Taking the Prevention of Genocide Seriously: Media Incitement to Genocide Viewed in the Light of the Responsibility to Protect

Okany, N.R.; Hoffmann, J.

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Edited by Julia Hoffmann
and André Nollkaemper

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Media Incitement to Genocide Viewed in the Light of the Responsibility to Protect

Julia Hoffmann and Amaka Okany

1 Introduction

Genocide does not happen spontaneously. Every incident of genocide is preceded by a similar series of processes, which are premeditated and organised. One of the common precursors of genocide seems to be the categorisation of people in groups, dehumanisation of a certain group and the subsequent propagation of what has been termed an 'extermination belief'.[1] Incitement, in particular through the media, can play a sinister role in amplifying those processes. From Nazi Germany to Rwanda, the deadly potential of propaganda has been amply illustrated.

In 2009, reflecting on the implementation of RtoP, UN Secretary-General Ban Ki-moon reminded us that we cannot afford to ignore the role that incitement – and the failure to act on it in time – has played in major atrocities in recent history:

> When a State manifestly fails to prevent such incitement, the international community should remind the authorities of this obligation and that such acts could be referred to the International Criminal Court, under the Rome Statute.
> ... in cases of imminent or unfolding violence of this magnitude against populations, this message may be more effectively and persuasively delivered in person than from afar. Until recently, however, the practice at the United Nations and in many capitals had too often been to ignore or minimize the signs of looming mass murder. The world body failed to take notice when the Khmer Rouge called for a socially and ethnically homogenous Cambodia with a 'clean social system' and its radio urged listeners to 'purify' the 'masses of the people' of Cambodia. Nor did it respond vigorously to ethnically inflammatory broadcasts and rhetoric in the Balkans in the early 1990s or in Rwanda in 1993 and 1994 in the months preceding the genocide.[2]

Incitement to genocide is not only a hallmark of genocide, but also possibly an indispensable prerequisite for genocide to occur.[3] The potential danger of words has been recognised in international criminal law, as is evidenced by the criminalisation of 'incitement to genocide' in the International Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (the Genocide Convention).[4]

The pressing question then becomes this: if we were able to detect (with the help of monitoring and content analyses of mass media content as has, for example, recently been piloted in the Kenyan context[5] with regard to the pre-election discourse, or is currently being developed for the online environment by Google[6], among others) the occurrence of incitement to genocide, which we know to be an element of the ideological preparation for genocide, would a serious commitment to preventing genocide not require intervention at those initial stages of incitement?

Proceeding from the view that effective genocide prevention mandates specific attention to the incitement stage of genocide, the present chapter addresses the question whether the Responsibility to Protect (RtoP), which advocates an obligation of the international community to prevent genocide and other gross violations of human rights, contemplates an obligation to intervene at the incitement stage of genocide. It also addresses the question of what incitement should actually be prevented, and how to draw the line between incitement to genocide, which ought to be prevented, and mere hate speech that may be protected by international legal rules on freedom of speech.

The chapter begins by discussing the root causes of genocidal conflicts and the role of the media in such conflicts (Section 2). Section 3 examines the extent to which RtoP establishes an obligation to prevent incitement. Section 4 addresses the question of how to conceptualise the crime of 'incitement to genocide'. In particular, it examines whether a standard can be derived from the definition established in international criminal law,[7] and how we can distinguish between speech that incites to genocide, which ought to be prevented, and merely controversial speech, which is protected by international human rights law. Section 5 discusses measures that can be taken by States to prevent incitement to genocide. The chapter ends with some concluding observations.

2 Genocidal Conflict Models and the Role of the Media

In furtherance of investigations into the causes of genocide, extensive datasets have been drawn up and a long list of variables tested for their usefulness as predictors of genocide. These scholarly investigations, exemplified by the works of scholars such as Staub, Harff, Krain and Rummel, identify a variety of factors that are usually present and contribute to the occurrence of mass killing or genocide.[8] Those factors include scarcity of resources and the exclusion of sections of a community from

political participation. Yet, the findings of social science research as to the causes of genocide underscore the reality that while economic and political inequality play a role in triggering intergroup conflicts that culminate in genocide, they do not necessarily lead to genocide occurring. Instead, genocide is invariably a product of a conscious decision by persons in positions of power or authority to use mass violence as a means of solving actual or perceived socio-economic or political problems.[9] Also, as the success of a genocidal plan is greatly dependent on the acquiescence or participation – active or passive – of ordinary citizens, mobilising public support is usually one of the first steps taken by architects of genocide.

Research has made clear that propaganda, through media, has been a major factor in achieving such mobilisation. Thus in places ranging from Germany in the 1930s to Rwanda in the 1990s, the masterminds of various genocidal campaigns have resorted to propaganda as a means to create amongst the population the particular mindset that is necessary for their participation in or acquiescence to genocide.[10] Usually, in such propaganda, some kind of utopia is projected that would be achieved by the elimination of members of the target or victim group. The propagandists often seek to convince their audience of the need to 'purify' the community or 'defend' themselves against the 'bloodthirsty' enemy.[11] An enemy is created who is portrayed as inhuman and evil and thus excluded from the moral universe. Fear is instilled in the target audience, as well as the idea that 'preventive' action by the target audience – the enemy's alleged future victims – or its representatives is necessary for reasons of 'self-defence'. Thus, before genocide becomes conceivable, what Hamelink terms an 'extermination belief' must have been infused in the collective mind.[12]

Before and during the Balkan war of the 1990s, a war most remembered for the genocidal killing of 8,000 males in Srebrenica, political elites made use of party-controlled media to stir ethnic tensions, revive old fears and grievances and project forgotten historic conflicts onto political debates of the day. Also during and prior to the 1994 genocide in Rwanda, Rwandan radio stations and newspapers played a prominent role in creating the climate of fear and hate that made the genocide possible.[13] The process that took place in Rwanda mirrors events in Nazi Germany, where propaganda had been brought directly into the living rooms of the population by specially manufactured affordable radio sets, the *Volksempfänger*.

In view of such events, the media have to be considered an amplifying force in some incidences of mass violence.[14] They have been identified as an active player within the 'eight stages of genocide' famously identified by Gregory Stanton, in particular, the 'dehumanisation stage', which he described as follows:

> Denial of the humanity of others is the step that permits killing with impunity. The universal human abhorrence of murder of members of one's own group is overcome by treating the victims as less than human. In incitements to genocide the target groups are called disgusting animal names – Nazi propaganda called Jews 'rats' or 'vermin'; Rwandan Hutu hate radio referred to Tutsis as 'cockroach-

es'. The targeted group is often likened to a 'disease', 'microbes', 'infections' or a 'cancer' in the body politic.[15]

In view of the role played by ordinary citizens in the execution of genocide, it is of pivotal importance to prevent such incitement, especially via the mass media. In the next section we examine whether – and to what extent – such an obligation is recognised at the international level, in particular under the principle of RtoP.

3 The Obligation to Prevent Incitement to Genocide

The central theme of RtoP is that States have a responsibility to protect their own citizens from avoidable catastrophe, such as mass murder and rape, and that when they are unwilling or unable to do so, that responsibility must be borne by the broader international community.[16]

The basic tenets of RtoP do not in themselves represent anything new.[17] After all, the idea that sovereignty implies a duty to safeguard human rights lies at the very heart of pre-existing international human rights law. This much is clear from the reference in human rights treaties and jurisprudence predating RtoP to the responsibility of States to protect the human rights of persons 'within their jurisdiction' and subject to their 'sovereign authority'.[18] Also, importantly, the 1948 Genocide Convention recognises the duty of States parties to the Convention to prevent genocide.

This obligation does extend to incitement of genocide. The International Court of Justice (ICJ) elaborated on the content of the obligation under the Genocide Convention to prevent genocide in the case of *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*. At the height of the war, the State of Bosnia and Herzegovina had filed an application before the ICJ, asking it to declare that Yugoslavia (Serbia and Montenegro) [hereinafter Serbia] had violated and continued to violate its obligations under the Genocide Convention. Among the provisions of the Convention it considered Serbia and Montenegro to have violated and continue to violate was Article III (c) of the Convention, which declares 'direct and public incitement to commit genocide' to be a crime.

In relation to what it considered a continuation of those violations by Serbia and Montenegro, Bosnia had further requested from the Court, pending its final judgement on its main application, an order asking Serbia and Montenegro to cease and refrain from those violations. The Court, in granting the order, stated that Serbia and Montenegro was under a clear obligation to prevent the commission of genocide and,

> … in particular ensure that … any organisations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, *of direct and public incitement to commit genocide*.[19]

The principle of RtoP reaffirms the obligations of States to prevent genocide. Even if one may argue that the central ideas of the RtoP doctrine constitute nothing new, the doctrine is fulfilling the crucial role of reviving a view of international relations that had lost prominence.

One implication of the reference under the principle of RtoP to a responsibility of both individual States and the international community is that the norm serves as a means for gaining acceptance by States not party to the Genocide Convention of a responsibility to prevent genocide.[20]

Another crucial contribution of RtoP is that it goes beyond a barefaced advocacy of a duty to respond to gross human rights violations, to set out concrete modalities for carrying out such a duty. In this connection, the ICISS had identified three specific responsibilities it embraces – the so-called three pillars of RtoP.[21] Given that incitement usually precedes violence, but also persists and may amplify it in the escalation stage, acting in situations of incitement could be placed under its prevention as well as its response pillar.

The ICISS did not explicitly address the issue of incitement. It did not list it among the 'root causes and direct causes of internal conflict and other man-made crises'[22] forming the focus of its prevention pillar. UN bodies, on the other hand, in adopting RtoP, devote attention to the issue of incitement to genocide. For example, the UN General Assembly resolution, in which governments adopted the outcome of the 2005 World Summit (the WSO Document), stated that every Member State accepts 'the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity', and that '[t]his responsibility entails the prevention of such crimes, *including their incitement*, through appropriate and necessary means'.[23] Likewise, UN Secretary General Ban Ki-moon, in his 2009 report 'Implementing the Responsibility to Protect', reiterated this obligation to prevent incitement and criticised the past failure of the international community to take note of and deal decisively with incitement.[24]

4 Defining Incitement to Genocide: An International Standard

While there is thus support, both under the Genocide Convention and under the RtoP principle, that incitement to genocide should be prevented, it is less clear how such incitement should be defined and identified. For instance, can a distinction be drawn between, on the one hand, the incitement or creation of the particular state of mind that makes resort to genocide possible, and on the other hand, actually inciting or urging another to commit genocide? Or is this distinction artificial, and

should an incitement of racial hatred that culminates in genocide be considered as tantamount to an incitement to genocide?

4.1 Freedom of Expression and its Limits

In considering what acts qualify as incitement and should be prevented, we should take into account that preventing speech stands in opposition to the right to freedom of expression, which constitutes a bedrock of democratic society and is firmly protected in many national constitutions and by international human rights law. And while it is accepted that the freedom of expression, like many other freedoms, has its limits, it is at the same time an established principle of national and international law that restrictions on individual rights are to be convincingly established and narrowly interpreted.[25] The importance accorded to this right is evidenced by judgements of the European Court of Human Rights, which emphasise that the right to freedom of expression is not only intended to protect inoffensive speech, but also covers ideas which are prone to 'offend, shock or disturb'.[26]

Nonetheless, the freedom of speech is not unlimited. Limitations must be placed on human rights when necessary for ensuring that individuals do not exercise their freedoms in a way that infringes on the freedom of others.[27] One rationale recognised in human rights law for imposing limitations on the right to free speech is the protection of others against hostility or even violent attacks resulting from what is generally referred to as 'hate speech'. Such speech is addressed in many international instruments[28] that oblige States to prohibit or criminalise racist and xenophobic communications, speech that incites discrimination, hostility or violence and certain other specific forms of offensive speech within their respective jurisdictions.[29]

'Incitement to genocide' would clearly fall within the category of 'hate speech' within the meaning of international human rights law and qualify as incitement of violence which States are required under human rights law to prohibit or criminalise. In line with the aforementioned purpose of limitations placed on human rights, its prohibition or prevention would constitute a means of striking a balance between the right of an individual to freedom of expression and the human rights of persons forming the target of such incitement, such as their right to life and their right not to be subjected to violent attacks.

It is, however, evident that it is not *every* incitement of hatred or of violence that would qualify as an incitement to genocide – as an incitement of acts aimed at destroying a specific national, ethnical, racial or religious group as such.

The pertinent question therefore is when can an incitement to hate or violence be said to constitute incitement to genocide, and in particular, for the specific purposes of international efforts aimed at preventing genocide. In the next section, we examine whether reliance should for this purpose be placed on the definition of incitement to genocide in international criminal law.

4.2 Developments in International Criminal Law: from Nuremberg to Arusha

A possible basis for defining incitement (that should be prevented under the RtoP doctrine) is its definition in international criminal law. The Genocide Convention and the respective statutes setting up the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) all refer to incitement to genocide punishable under those treaties as 'direct and public incitement'.[30] The reference to the 'public' requirement is apparently aimed at focusing on the type of incitement that has historically played a role in genocides: that made through public speeches and other ways of reaching out to the public – the type of incitement that is distributed via the media. The 'direct' requirement, on the other hand, specifies the link that must exist between a given communication and genocide for the communication to qualify as incitement to genocide punishable in international criminal law.

When examining international jurisprudence on this issue, two broad conditions for considering a given media or other public communication as a 'direct' incitement to genocide emerge: first, the speech must explicitly or implicitly urge or call for the extermination of a national, ethnic, racial or religious group, not simply make a vague or indirect suggestion that genocide be committed; and second, the linguistic, cultural, social, historical and political contexts of a communication are relevant for establishing whether it constitutes an implicit yet direct call for genocide.

The requirement that incitement to genocide be 'direct' is inspired by the trials of two World War II criminals, Julius Streicher and Hans Fritzsche, before the International Military Tribunal (IMT) at Nuremberg.[31] The difference in the conclusions drawn by the IMT in those two cases has long served as the framework for pinpointing the fine line that separates inflammatory, racist speech from direct incitement to genocide.

In the *Streicher* case, the Tribunal did not seem to have trouble convicting the accused on the basis that the relevant contents of *Der Stürmer,* the magazine publication of which he was editor, constituted a 'direct' call for the extermination of the Jewish people. The magazine had described Jews as swarms of locusts which must be exterminated completely.[32] In the *Fritzsche* case, on the other hand, the IMT reached a different conclusion. A senior official in Goebbels' Ministry of Popular Enlightenment and Propaganda and head of its Radio Division, Fritzsche had been accused of having 'incited and encouraged the commission of War Crimes by deliberately falsifying news to arouse in the German People those passions which led them to the commission of atrocities'. The Tribunal nonetheless acquitted him, one basis for his acquittal being that the speeches 'did not urge persecution or extermination of Jews'.[33] *Streicher* and *Fritzsche* thus set a strict standard of directness or unambiguousness of a speech in its call for genocide as a criterion to fall into the category of international crime.

This strict standard would seem to have been followed in the judgements of the ICTR. In the first case before it, *Akayesu*[34], the tribunal stated that the 'direct' element of incitement implies that the perpetrator specifically and intentionally provoke or urge another to commit genocide; that more than mere vague or indirect suggestion is required for conduct to constitute direct incitement.[35] It also identified as a state of mind required for considering a speech to qualify as direct incitement, the intent of its maker to directly prompt or provoke another to commit genocide.

The ICTR made the important clarification that the cultural and linguistic background of a speech is relevant for determining whether or not it constitutes 'direct' incitement to genocide. In other words, a specific call to commit genocide may be made in words – including coded speech, slang and so forth – which while they may be vague or indirect in their meaning to others of a certain background, would be direct in their meaning to persons of a given national, cultural or linguistic background.[36]

However, while maintaining that the relevant speech, even in coded form, must specifically call for genocide, the tribunal had also seemed to admit the possibility that speech that does not specifically call for genocide, but creates an atmosphere in which it could occur, could well fall within its definition of direct incitement to genocide.[37]

In the next case in which the tribunal dealt with a charge of incitement to genocide – the so called *Media* case – the tribunal clarified the extent to which what would ordinarily be classified as hate speech could qualify as incitement to genocide. The defendants in this case were found guilty of direct and public incitement to genocide. The publications and broadcasts which the trial chamber treated in that case as constituting non-explicit but direct calls for genocide included publications and broadcasts which warned readers that the government was not effectively protecting them from certain people, and that they needed to be 'vigilant' and organise their own self-defence to prevent their own extermination. As the trial chamber pointed out, the incessant calls on the listeners to 'be vigilant' had become a coded term for aggression in the guise of self-defence.

As in *Akayesu,* the tribunal seemed to suggest that speech which does not implicitly or explicitly call for genocide might still, based on the context in which it is made, be regarded as incitement to genocide:

> A statement of ethnic generalisation provoking resentment against members of that ethnicity would have a heightened impact in the context of a *genocidal environment*. It would be more likely to lead to violence. At the same time *the environment would be an indicator that incitement to violence was the intent of the statement*.[38]

The decision of the trial chamber in the *Media* case has been criticised as failing to distinguish hate speech from incitement to genocide. The defendants also appealed

against the decision. In that appeal, the Appeals Chamber of the tribunal took care to point out that there existed a distinction between hate speech and direct incitement to genocide.[39] Yet, it was also of the view that the Trial Chamber had not confused mere hate speech with direct incitement to commit genocide, that it was correct in considering the context of a speech as relevant for deciding whether discourse constitutes direct incitement to commit genocide,[40] and that the fact that the Trial Chamber had referred to the possible impact of certain speech in its analysis did not mean that it considered any potentially dangerous hate speech to constitute direct incitement to commit genocide.[41]

The *Bikindi* case,[42] concerning a famous Rwandan pop singer, constituted yet another opportunity for the ICTR to clarify the issue. However, the tribunal's judgment in that case raises more questions than answers in that respect. While the trial chamber noted that the historical and political context in which Bikindi's songs were composed and disseminated was relevant for 'properly interpret[ing]' those songs[43] as well as 'how the songs inspired action',[44] it concluded that none of his songs constituted direct and public incitement to commit genocide *per se,* as there was insufficient evidence to conclude beyond reasonable doubt that Bikindi had composed them with the specific intention to incite killings. The tribunal had, thus, found the existing atmosphere of political and ethnic tension in Rwanda to be insufficient to demonstrate that Bikindi's hate speech was accompanied by an intent to incite genocide.

Thus, it seems that beyond the two conditions mentioned above, the case law is unclear as to whether, and if so when, hate speech that does not call for genocide but can lead to it could be an indicator that the speech was made with the intent to incite genocide and as such qualifies as an incitement to genocide.

4.3 Defining Media Incitement to Genocide for the Purposes of RtoP

There is much reason to link the trigger for preventative action required under the RtoP principle to the international criminal law definition of incitement as discussed above. After all, RtoP is conceptualised around four core crimes and has as such an in-built criminal law dimension. At the same time, it should also be recognised that the definition in international criminal law is specifically designed to serve as a basis for individual criminal responsibility, and it is not immediately obvious why States should only act to prevent when an act rises to the level of individual criminal responsibility.[45] It seems very likely that acts that do not qualify as incitement in criminal law terms may still have a causal effect on genocidal processes, which ought to be prevented under RtoP.

Whereas international criminal law on incitement to genocide, as interpreted by tribunals such as the ICTR, has so far always been applied *ex post facto* – meaning after a genocide has already occurred – prevention efforts would naturally have to rather focus on the likelihood of genocide occurring as the basis for defining incitement for their purposes.

Therefore, it is contended here that for the purposes of RtoP, incitement to genocide may be defined more broadly, considering hate speech which does not explicitly or implicitly call for genocide as tantamount to an incitement to genocide based on the criterion identified in the *Media* trial: where the climate is so volatile that hate speech carries the risk of triggering genocidal violence.[46] This would mean that besides explicit or implicit calls for genocide, hate speech that is likely to lead to genocidal violence can be considered as incitement to genocide.

Focusing on the possibility as opposed to the certainty of genocide occurring as a result of a speech would furthermore be in accordance with the precautionary principle, a principle that is frequently applied to human rights debates, especially when it comes to environmental and health issues[47] and that has been applied for example by the European Court of Justice (ECJ) to uphold a ban on UK beef exports.[48] That focus would also resonate with the statement of the ICJ that the obligation of State parties to the Genocide Convention to act to prevent genocide is triggered the instant a State learns of, or should normally have learned of, the existence of a *serious risk* (as opposed to certainty) that genocide will be committed.[49] Thus, just as the ICJ considered that a risk of genocide occurring should trigger preventive action, it may be argued that a serious risk of genocide occurring could be a factor in determining whether a given hate speech constitutes incitement to genocide for preventive purposes – in other words, was made with the intent to trigger a genocide.

The idea that hate speech can be dangerous and must be prevented, even if it would not qualify as incitement to genocide, has international support. For example, Former UN Secretary General Annan, in discussing a five-point action plan he had established for preventing genocide, had cited as 'a precipitating factor to look for' alongside situations matching the legal definitions in the developing international case law on genocide, 'the prevalence of expressions of hate speech targeting populations at risk, *especially if they are uttered in the context of an actual or potential outbreak of violence*'.[50]

The conclusion is thus that a serious commitment to preventing genocide would require prevention of incitement to genocide as well as hate speech, which, because it is made in a volatile context, carries the risk of precipitating genocide. Making this clear distinction or operationalising these concepts for the purpose of media monitoring is likely to be very difficult. Yet, a number of suggestions have been made on how to address these problems.[51] For example, Benesch has proposed to operationalise the criterion of incitement to genocide – as opposed to 'merely' hate speech – as 'speech that has a reasonable possibility of leading to genocide' by taking into account the concurrent presence of a number of factors:

- As understood by its audience, the speech calls for genocide.
- The speaker has influence or authority over the audience.
- The audience has the capacity to commit genocide against the would-be victims.
- Previous incidents of violence against the target group have taken place.

- Sources of news and information are severely limited.
- Speech bears the linguistic hallmarks of incitement to genocide.
- The audience has already been exposed to similar calls.[52]

5 Measures for Preventing Media Incitement to Genocide and Hate Speech that Could Lead to Genocide

Having concluded that a broad reading of the RtoP principle requires that incitement to genocide as well as hate speech which could lead to a genocide must be prevented, we need to ask how States and the international community would become aware of the need to take preventative measures, and what measures they could use to achieve prevention.

Essential to the first question is the establishment of an institutional framework for monitoring media content, comparable to an independent UN unit, as had for example been advocated by Metzl in response to the inaction during the Rwandan genocide.[53] This step would be necessary for detecting media publications which pose a threat and would necessitate preventive action. Such an institution could constitute part of a national or international early warning system.

Paragraph 138 of the Summit Outcome envisaged the establishment of a UN early warning capability. In response, the UN has created the office of the Special Adviser to the Secretary General on the Prevention of Genocide, whose tasks include collecting existing information, in particular from within the UN system, and acting as a mechanism of early warning to the Secretary-General, and through him to the Security Council.[54] Also, in the light of the complementarity of the responsibilities of the Special Adviser to the Secretary General on the Prevention of Genocide and the Special Adviser on the Responsibility to Protect, the UN Secretary-General had proposed the establishment of a joint office for collaborating their efforts, whose tasks would include enhancing the operation of the early warning mechanism that will be created out of pre-existing UN arrangements.[55]

The Secretary-General's 2009 report on implementing the responsibility to protect further elaborated that an early warning framework would require:

> (i) the timely flow to United Nations decision makers of accurate, authoritative, reliable and relevant information about the *incitement*, preparation or perpetration of the four specified crimes and violations; (ii) the capacity for the United Nations Secretariat to assess that information and to understand the patterns of events properly within the context of local conditions; and (iii) ready access to the office of the Secretary-General.[56]

While the obligation of States under RtoP to prevent genocide includes an obligation to prevent genocide abroad, there are obviously limits to what a State can do to

prevent incitement to genocide in areas outside its territory. However, as recognised by the ICJ in the *Bosnia Genocide* case, a State can use its influence on foreign governments or entities as a result of political, economic, military or other ties it has with them as a means of persuading it to act in accordance with the obligation not to commit genocide or its incitement.[57]

One measure a State can take to prevent incitement to genocide occurring outside its territory is the jamming of broadcast signals of a radio station that is broadcasting incendiary messages. This idea was considered but ultimately not implemented by the United States during the Rwandan genocide. However, it was supported by UN Security Council Resolution 1161 (1998) on Rwanda, in which the Council had urged States to cooperate in countering radio broadcasts and publications that incited acts of genocide, hatred and violence in the region.[58]

A question that arises is whether a measure such as jamming radio broadcasts is a coercive measure of intervention which would require UN Security Council approval. This is far from clear. Though statements in UN documents suggest such jamming is actually required of States as a means of fulfilling their obligations to prevent genocide, there does not appear to have been any discussion as to whether it is a use of coercive power that would require UN Security Council approval.[59]

6 Concluding Observations

In this chapter, we set out to make the case that a serious international commitment to fulfilling the responsibility to protect populations from genocide requires attention to preventing incitement of genocide, especially by the media. We also proposed an international standard for defining incitement to genocide which must be prevented, while at the same time advocating the prevention of hate speech which, because of the particular circumstances in which it is made, is capable of triggering genocide. We further identified measures that should be taken by States in fulfilment of an RtoP obligation to prevent incitement to genocide.

A potential problem that arises in the context of a genocide prevention mechanism focused on incitement of genocide is the effect that incitement prevention efforts may have on freedom of speech. Fears have been expressed that the establishment of a duty to prevent incitement could provide governments with a new tool for muzzling the opposition. In response to this, it is worth pointing out that a government that does not respect the rule of law would usually not need the excuse of preventing incitement for making unjustified limitations on free speech. On the other hand, in a country where justice is rendered on the basis of the rule of law, any clearly unjustified restriction of speech would be successfully challenged in the Courts.[60]

At this point, one might expect the conditions needed to address the role of incitement in order to help make prevention more effective to be in place. A standard to define what sort of speech ought to be considered as incitement that must be

addressed under RtoP has been proposed, some preventive measures can be specified that would be acceptable under current international law, and initial efforts have been undertaken by NGOs,[61] as well as the UN, to institute effective monitoring and information-sharing to facilitate early warning. The major difficulty, as in all other areas of effective genocide prevention, remains, as recent history demonstrates, in the area of actual genocide prevention. The greatest challenge may not be designing measures for preventing genocide but getting States to act. This may prove to be especially difficult if genocide is about to take place in an area which is not – as the US ambassador to Somalia tellingly put it – 'a critical piece of real estate for anybody in the post-Cold War world'.[62] Intervention 'only' for the sake of potentially saving lives does not seem to have been prevalent in recent history, moreso as the geopolitical relevance of wide swathes of the developing world has declined even further since the fall of the Berlin Wall.

Regardless of an international obligation to prevent incitement to genocide and to create early warning systems to detect risky situations requiring intervention, the reality of international politics will remain a factor to contend with.

Notes

1 CJ Hamelink, 'Media between Warmongers and Peacemakers' (2008) 1(1) Media, War & Conflict, 77.

2 Report of the Secretary-General, 'Implementing the Responsibility to Protect' (2009) UN Doc A/63/677.

3 S Benesch, 'Inciting Genocide, Pleading Free Speech' (2004) XXI(2) World Policy Journal, 62; AJ Vetlesen, 'Genocide: A Case for the Responsibility of the Bystander' (2000) 37(4) Journal of Peace Research, 519; See also the finding of the Appeals Chamber in *The Prosecutor v. Nahimana, Barayagwiza and Ngeze*. While it held that there was insufficient evidence to establish a causal link between RTML broadcasts prior to 6 April 1994 and the occurrence of genocide, it did recognise that its broadcasts after that date substantially contributed to the genocide that ensued.

4 Convention on the Prevention and Punishment of Genocide, status as of 11 November 2010, United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=en> accessed 11 November 2010.

5 See S Benesch's reporting at <http://voicesthatpoison.wordpress.com/2010/08/03/kenya-hate-speech-laboratory/>.

6 For more information on this project see eg <http://www.insightonconflict.org/pax-a-reuters-for-the-people/>.

7 For a critical discussion on the issue of relying on criminal law as standard to trigger RtoP see the contribution of Kleffner in this volume.

8 E Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press, New York 1989); B Harff, 'No Lessons Learned from the Holocaust? Assessing Risk of Genocide and Political Mass Murder since 1955' (2003) 97(1) American Political Science Review, 57; M Krain, 'State-Sponsored Mass Murder: The Onset and Severity of Genocides and Politicides' (1997) 41(3) Journal of Conflict Resolution, 331;

RJ Rummel, 'Democracy, power, genocide, mass murder' (1995) 39(1) Journal of Conflict Resolution, 3.

9 M Shaw, *War and Genocide* (Polity Press, Cambridge 2003). See also Goldhagen's contribution in this volume.

10 See eg G Caplan, 'Rwanda (and other Genocides) in Perspective'(2007) 2(3) Genocide Studies and Prevention, 275; A Des Forges, 'Leave None to tell the Story: Genocide in Rwanda' (1999) Human Rights Watch & FIDH.

11 See eg R De la Brosse, 'Political Propaganda and the Plan to Create a "State for all Serbs". Consequences for using the media for Ultra-Nationalist Ends' (2003) Report compiled at the request of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia. Available at <http://hague.bard.edu/reports/de_la_brosse_pt1.pdf> accessed 13 July 2008; S Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48(3) Virginia Journal of International Law, 485; J Belman, '"A Cockroach Cannot Give Birth to a Butterfly" and Other Messages of Hate Propaganda' (2004) <http://www.gse.harvard.edu/~t656_web/peace/Articles_Spring_2004/Belman_Jonathan_hate_propaganda.htm> accessed 7 July 2011.

12 Hamelink, 'Media between Warmongers and Peacemakers'.

13 K Kurspahic, 'Bosnia: Words Translated Into Genocide. Speech, Power, Violence: Balkans experiences of 1990s <http://www.hrw.org/legacy/reports/1999/rwanda/rwanda0399.htm> accessed 7 July 2011; A Oberschall, 'The Manipulation of Ethnicity: From Ethnic Cooperation to Violence and War in Yugoslavia' 23 Ethnic and Racial Studies, 982; De la Brosse, 'Political Propaganda'.

14 See eg A Thompson (ed) *The Media and the Rwanda Genocide* (London, Pluto Press 2007); M-S Frère, '*The Media and Conflicts in Central Africa*' (Lynne Rienner Publishers, London 2007).

15 See http://www.genocidewatch.org/images/8StagesBriefingpaper.pdf for the various stages. They are: (a) classification (the creation or identification of separate classes of persons, with a certain class seen as constituting the enemy, the 'them' in the 'us vs them' distinction); (b) symbolisation (the use of names such as 'Tutsi', 'Hutu', 'Jew', physical characteristics such as skin color or nose shape and other symbols to signify the recognised classifications); (c) dehumanisation (for example, calling the target groups animal names such as 'rats' or 'vermin' as in the case of Nazi propaganda against Jews, or cockroaches' as was the case with Rwandan Hutu hate radio – the conception of the victim group as less than human); (d) organisation (planning, including the determination of the method for carrying out the genocide); (e) polarisation (provocative actions aimed at exacerbating tensions or differences between opposing groups until peaceful settlement of a dispute becomes an impossibility); (e) preparation (drawing up of death lists, imposition of identify cards that would subsequently be used for getting victims, concentration or herding of victims to specific locations such as a ghetto or stadium and other acts which set the stage for the actual perpetration of the genocide); (f) extermination (killings, mutilations and related acts – the implementation of the genocide); (f) denial (denial of the occurrence of the genocide, occasionally done through subtle means such as claiming the deaths were the result of a civil war or disputing whether the killing fits the legal definition of genocide).

16 See International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (Report) (December 2001) <http://www.iciss.ca/report-en.asp> accessed 28 April 2011 (ICISS Report), VIII.

17 See contributions in the present volume, such as eg by Brollowski.

18 Also, the ICISS itself has acknowledged this fact, as it has described as being among the foundations of the RtoP doctrine: 'the obligations inherent in the concept of sovereignty [and] … specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law'. ICISS Report, XI.

19 International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, p. 3 at p. 24, para 52 A(2).

20 It is worth drawing attention in this respect to the fact that the number of States that have endorsed the responsibility to protect and pledged to act in accordance with it (191 States) is greater than the number of States that as of November 2010 had ratified the Genocide Convention (141 States). See Convention on the Prevention and Punishment of Genocide, status as of 11 November 2010, United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&lang=en> accessed 11 November 2010.

21 For a more detailed elaboration of the separate pillars, see the introduction and the contribution of Edward Luck, Special Advisor to the UN Secretary General on the Responsibility to Protect, elsewhere in this volume.

22 ICISS Report, XI.

23 UNGA, '2005 World Summit Outcome' (2005) UN Doc A/60/L 1 (WSO Document), 31

24 Report of the Secretary-General, 'Implementing the Responsibility to Protect'.

25 In a General Comment on Article 19 of the European Convention which guarantees the right to freedom of expression, the Office of the United Nations High Commissioner for Human Rights states that, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The necessity for any restrictions must be convincingly established and narrowly interpreted.

26 *Handyside v. the United Kingdom* (5493/72) [1976] ECHR 5 (7 December 1976), para 49.

27 Along these lines, Art 17 of the European Convention on Human Rights (ECHR) prohibits any State, person or group from abusing its rights by engaging in acts aimed at destroying any of the rights recognised in the ECHR or limiting those rights in a manner not permitted by the ECHR.

28 Universal Declaration of Human Rights (UDHR) (adopted 10 December 1948) UNGA Res 217; International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Convention on the Elimination of All Forms of Racial Discrimination (CERD) (adopted 21 December 1965, entered into force 4 January 1969) UNGA Res 2106; Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (adopted 28 January 2003) ETC 189. Also, with Art 10(2), the European Convention on Human Rights (ECHR) also contains a provision which is relevant to hate speech. For a recent overview of relevant case law, see D Voorhoof and H Cannie, 'Freedom of Expression and Information in a Democratic Society: The Added but Fragile Value of the European Convention on Human Rights' (2010) 72 International Communication Gazette, 407. Furthermore, the UN Human Rights Committee has commented on the 'special duties and responsibilities' that come with the exercise of the right of freedom of expression, specifically when it comes to racist speech. See eg Tarlach McGonagle, 'Freedom of Expression and Limits on Racist Speech: A Difficult Symbiosis' (2001) 13 Interights Bulletin – A Review of the International Centre for the Legal Protection of Human Rights, 135.

29 See Art 20(2) ICCPR, Art 4(a) CERD and Arts 3-6 of the Additional Protocol to the Council of Europe's Cybercrime Convention,
30 Art 3(c) Genocide Convention, Art 2(3)(c) ICTR Statute, Art 4(3)(c) ICTY Statute and Art 25(3)(e) of the ICC Statute.
31 As the crime of 'incitement to genocide' did not exist in international law at that time, both had been charged with incitement to murder and extermination Both are crimes which fall under the category of crimes against humanity in international law, and can today be distinguished from the crime of genocide by the specific intent required for an act to constitute genocide – the intent to destroy a group as such.
32 HM Attorney-General, 'The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremburg, Germany' (Her Majesty's Stationery Office, London 1950) 501; WK Timmermann, 'Incitement in International Criminal Law' (2006) 88 International Review of the Red Cross, 823, 827.
33 Timmermann, 'Incitement in International Criminal Law', 828.
34 International Criminal Tribunal for Rwanda, *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T, T Ch I (30 May 1996) (*Akayesu* I).
35 See *Akayesu* I, para 557 and accompanying footnote citing the following statement of the ILC: 'The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion'. See also para 560, where it states that 'The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide'.
36 *Akayesu* I, paras 557-55
37 *Akayesu* I, para 557 includes the following consideration: 'The Chamber further recalls that incitement may be direct, and nonetheless implicit. Thus, at the time the Convention on Genocide was being drafted, the Polish delegate observed that it was sufficient to play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime'.
38 *Nahimana* I, para 1022. The *Nahimana* trial chamber had not stated what it meant by a 'genocidal environment'. It seems from the facts of the case that by this it meant a volatile or threatening atmosphere in which genocide has become or been entertained as a possibility.
39 That distinction being that the latter involves a 'direct appeal to commit an act'. It also pointed out that while in most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, only direct and public incitement to commit genocide is prohibited by the ICTR Statute. International Criminal Tribunal for Rwanda, *Prosecutor v. Nahimana et al.* (Judgement) ICTR 99-52-A (28 Nov 2007) (J Meron, dissenting) (*Nahimana II*), para 692.
40 *Nahimana II*, para 715.
41 *Nahimana* II, para 711.
42 International Criminal Tribunal for Rwanda, *Prosecutor v. Bikindi* (Judgement) ICTR-01-72-4-T, T Ch III (2 December 2008) (*Bikindi* Case).
Bikindi Case, paras 247-248
Bikindi Case, paras 254-255.
43 *Bikindi* Case, paras 247-248.
44 *Bikindi* Case, para 253.
45 See also chapter by Kleffner elsewhere in this volume.
46 *Nahimana* I, para 1022.

47 See eg C Raffensperger and J Tickner, *Protecting Public Health and the Environment: Implementing the Precautionary Principle* (Island Press, Conneticut 1999); J Cameron and J Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment', (1991) 14 B.C. Int'l & Comp. L. Rev.

48 See Bovine spongiform encephalopathy ('BSE') or 'mad cow disease' case (United Kingdom v. Commission), European Court of Justice Case No. C-180/96, [1998] ECR I-2265, para 99 where the ECJ stated that 'when there is uncertainty as to the existence or extent of risks to human health, Community institutions may take protective measures without having to wait until the reality and seriousness of those risks becomes fully apparent'.

49 International Court of Justice, Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Judgement), 26 February 2007 (Bosnia and Serbia Judgement), para 431.

50 UN Commission on Human Rights, Report of the Secretary-General on the Implementation of the Five Point Action Plan and the Activities of the Special Adviser on the Prevention of Genocide, U.N.Doc E/CN.4/2006/84, 9 March 2006, para 26. It is also worth noting in this connection that after the acquittal of Joseph Fritzsche at the Nuremberg tribunal on the basis that his publications 'did not urge persecution or extermination of Jews', he was subsequently sentenced to nine years of forced labour by the German Courts (*Spruchkammer* I and the *Berufungskammer* I) in the context of the de-Nazification trials that were conducted in post World War II Germany, the basis for this conviction being the role his progaganda played in achieving public support for the Nazi ideology. The role of hate speech in creating a climate of fear and hatred in which incitement to genocide would be effective was also acknowledged.

51 See eg GS Gordon, 'From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework' (2008) 98 J. Crim. L. & Criminology 853, 895; J 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' (2010) 43 Interdisciplinary Journal of Human Rights Law.

52 S Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48(3) Virginia Journal of International Law, 485.

53 JP Metzl, 'Information Intervention: When Switching Channels Isnt't Enough' (1997) 76 Foreign Affairs, 15.

54 For more detail please refer to Francis Deng's contribution in this volume.

55 Report of the Secretary-General, 'Implementing the Responsibility to Protect'.

56 Para 10 (d), available online at <http://www.unhcr.org/refworld/pdfid/4989924d2.pdf>. accessed July 2011.

57 Bosnia and Serbia Judgement.

58 United Nations Security Council, Resolution 1161 of 9 April 1998, S/RES/1161, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/099/83/PDF/N9809983.pdf?OpenElement > accessed 3 June 2008.

59 For a discussion of so-called information interventions under international law, see E Blinderman, 'International Law on Information Intervention', in M Price & M Thompson (eds), *Forging Peace. Intervention, Human Rights and the Management of Media Space* (Edinburgh University Press, Edinburgh 2002).

60 For example, charges of 'incitement to violence' once made against the Zimbabwean opposition leader Morgan Tsvangirai were thrown out by the Kenyan Supreme Court.

61 For recent efforts of a number of NGOs to monitor the 2010 pre-election phase in Burundi and to react to potentially dangerous hate speech by concerted media campaigns, see Synergy project (eg at <http://www.sfcg.org/programmes/burundi/burundi_update.html>).

62 S Totten, 'The Intervention and Prevention of Genocide: Sisyphean or Doable?' 2004 6(2) Journal of Genocide Research, 229, 237.