Note

A Cautious Expansion of Direct and Public Incitement to Commit Genocide: Confusion Between Inchoate Offences and Modes of Liability

Eric Peffley*

If someone gets up on a stage and tells a large group of people to release *génocidaires* from prison into an ongoing genocide, that person is almost certainly guilty of a crime of incitement, even if no one actually acts according to his incitement. If instead someone uses power and authority to actually release those same *génocidaires*, that person is guilty of no crime, unless those prisoners go on to kill more people after their release. The former is an example of "direct and public incitement to commit genocide" (DPI), an inchoate offense, while the latter is an example of "instigating," which is a mode of liability for the crime of genocide. Such is the law as it stands in the United Nations (U.N.) International Criminal Tribunal for Rwanda (ICTR) and the U.N. International Criminal Tribunal for Yugoslavia (ICTY).

Tharcisse Muvunyi was convicted of DPI on the basis of a speech he gave to a crowd at Gikore Center. During his speech, he assured listeners they would not be punished if they killed Tutsi, and used language understood by members of the crowd as encouragement to kill.[1] In contrast, Callixte Nzabonimana used his authority to force the release of several prisoners who

* The author was an intern with the ICTR Office of the Prosecutor, Appeals and Legal Advisory Division, from June 2012 through August 2012. He would like to thank James Arguin, Chief of Appeals and Legal Advisory Division Office of the Prosecutor, ICTR, for his willingness to talk through ideas that were foundational to this Note and kindly provide invaluable feedback during the writing process. The author would additionally like to thank Richard Karegyesa, Chief of Prosecutions, Office of the Prosecutor, ICTR, and Antony Duff of the University of Minnesota Law School, for their willingness to discuss this topic and provide helpful resources and guidance.

1. Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Trial Judgement, (Feb. 11, 2010).

were arrested for acts of genocide.[2] The Trial Chamber of the ICTR found he had "encouraged the killing of Tutsis and caused [bourgmestre] Mporanzi to release killers in Rutobwe Commune."[3] Despite this finding, Nzabonimana was acquitted of genocide because the Prosecution was unable to show beyond a reasonable doubt that these specific prisoners killed more Tutsi after their release.[4] This failure called into question whether Nzabonimana's actions "substantially contributed" to any subsequent killings.[5]

The similarities between these two actions are striking.[6] Yet one is a crime regardless of any subsequent third party actions, while the other is a crime only if future crimes are carried out by independent actors.[7] It is not apparent that Muvunyi's action of speech is more harmful or more morally culpable than Nzabonimana's action of forcing the release of known killers. Comparing these two actions raises fundamental questions about why the international community criminalizes certain acts and not others. These questions cannot be answered without careful consideration of the purposes and philosophies behind the law as it stands.

This Note presents a critical comparison of the inchoate[8]

2. *See* Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Trial Judgement, ¶¶ 1042–43 (May 31, 2012).

3. *Id.* ¶ 1719.

4. *Id.* ¶ 1723.

5. *Id.* The Prosecution appealed this aspect of the Judgement, claiming that the Trial Chamber erred in this conclusion. Prosecutor v. Nzabonimana, Case No: ICTR-98-44D-A, Prosecution Appeal Brief, ¶¶ 58–68 (Sept. 12, 2012). The Prosecution appeal, however, claims that all the elements of aiding and abetting genocide were in fact met, and that the Trial Chamber erred in requiring more specific information regarding specific crimes committed by the released prisoners. *Id.* The focus of this Note differs from that of the appeal. The Prosecution does not argue that Nzabonimana's actions should be considered an inchoate offence. Such an argument would not be successful on appeal.

6. *Compare Muvunyi*, Case No. ICTR-00-55A-T, at ¶ 128 (finding Muvunyi's speech "intended to incite the audience to commit acts of genocide"), *with Nzabonimana*, Case No. ICTR-98-44D-T, at ¶ 1719 (finding that "Nzabonimana encouraged the killing of Tutsis and caused . . . [the] release [of] killers in Rutobwe . . . .").

7. *Compare Muvunyi*, Case No. ICTR-00-55A-T, at ¶ 23 (explaining that the crime of incitement requires a direct and public act of incitement coupled with the intent to incite), *with Nzabonimana*, Case No. ICTR-98-44D-T, at ¶ 1723 (detailing that proof of the crimes committed by third parties is necessary in finding a person guilty for the release of said third parties).

8. Inchoate is roughly defined as "just begun" or "underdeveloped," or understood as when not all instances of the action cause harm. *Infra* notes 34–

crime of DPI with the mode of liability of "instigation." The philosophical and legal policy justifications for inchoate offences generally, and DPI specifically, are discussed below, and I argue that those same justifications apply equally to other forms of direct instigation to commit genocide. I conclude that a cautious broadening of DPI to include all direct instigation of genocide is desirable. Justifications for inchoate offenses are accepted in respected legal theory and legal systems, and provide support for the cautious expansion of incitement law.[9] The ICTR cases of *Muvunyi* and *Nzabonimana*, however, demonstrate the arbitrary distinction drawn by the ICTR and ICTY (Tribunals) between which wrongful and culpable actions are punished and which are not – an arbitrariness that is problematic for the legitimacy of international criminal law.[10]

Section I will discuss the relevant background of the Tribunals, explanations of inchoate offences and modes of liability, and justifications for the current practice of treating DPI as an inchoate offence. Section II will highlight comparable circumstances where two nearly indistinguishable actions lead to divergent results in punishment, showing the need for clarification in the law. It will then analyze the specific distinction between DPI and "instigation," and give philosophical and policy justifications for extending inchoate liability to direct instigation to commit genocide. This Note concludes that the justifications and purposes for having DPI as an inchoate offence are valid, at least in limited circumstances, and that those purposes are undermined by arbitrarily limiting punishment to only those acts inciting genocide which are "direct" and "public," and current incitement law should be cautiously expanded to include all forms of direct instigation to commit genocide.[11]

39.

9. *See e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 373 (6th ed. 2012) (explaining that the law recognizes various inchoate offenses).

10. *See generally* Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Trial Judgement (Feb. 11, 2010) (finding Muvunyi guilty of "direct and public incitement" to commit genocide); Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Trial Judgement (May 31, 2012) (acquitting Nzabonimana of criminal liability for the release of *genocidaires* in Rutobwe Commune).

11. I somewhat take for granted the overwhelming support for the general U.N. ad hoc Tribunals' concern with preventing genocide through inchoate offences. There is some opposition to the general nature of inchoate crime. *See, e.g.*, Kent Greenawalt, *Speech and Crime*, AM. B. FOUND. RES. J. 645 (1980) (discussing the differences between inchoate crime and completed offences), as

I. BACKGROUND

A. OBJECT AND PURPOSE OF THE ICTR/ICTY: A FOCUS ON PREVENTION

Conflicts in the Former Yugoslavia and Rwanda shocked the international conscience in a manner not rivaled since the aftermath of World War II.[12] In Rwanda alone, approximately upwards of one million people were killed in a mere 100 days of genocide.[13] While the U.N. did little to actively stop atrocities in either conflict, it took relatively swift judicial action by setting up the respective criminal tribunals.[14]

The ICTR was founded through Security Resolution 955 almost immediately after the genocide in Rwanda ended in 1994.[15] Similar to the ICTY, it was intended

---

well as concern regarding the Tribunals' treatment of incitement as inchoate; Jens David Ohlin, *Incitement and Conspiracy to Commit Genocide*, *in* THE UN GENOCIDE CONVENTION: A COMMENTARY 207–27 (Paola Gaeta ed., 2009) (providing both the overview and history of incitement). The main focus on this point is that inchoate offences in general are common in international criminal law, and thus, as the laws stand, the Tribunals should pay more attention to administering them in a consistent manner.

While similarities between acts constituting DPI and acts constituting 'instigation' are highlighted, this Note does not rely fully on the comparisons holding true in all circumstances. Arguments can indefinitely be raised against certain specific analogies used, as is the case with all philosophical analogies. Examples given of certain national jurisdictions' acceptance of the justifications provided should help to compensate for any shortcomings in specific analogies used or for any concerns that the basis for this Note's proposal is based purely on my belief that the arguments and analogies are self-evident.

12. *See* World Without Genocide, RWANDAN GENOCIDE, http://worldwithoutgenocide.org/genocides-and-conflicts/rwandan-genocide (last visited October 17, 2013) (describing the devastation of the Rwandan genocide); *see also* About the ICTY, ICTY, http://www.icty.org/sections/AbouttheICTY (last visited Oct. 17, 2013) (providing an overview of the conflict in the Former Yugoslavia).

13. World Without Genocide, *supra* note 12; *see also* Peace Pledge Union Information, RWANDA 1994, http://www.ppu.org.uk/ genocide/g_rwanda1.html (last visited Oct. 14, 2013) (providing an overview of the Rwanda genocide).

14. *See* World Without Genocide, *supra* note 12 (stating that the ICTR began proceedings in 1996); *see also* ICTY, *supra* note 12 (citing the establishment of the ICTY in 1993). Although the concepts discussed in this Note apply to both the ICTR and ICTY, I primarily discuss the ICTR's background because the main cases relied upon come from the ICTR.

15. General Information, ICTR, http://unictr.org/AboutICTR/GeneralInformation/tabid/ 101/Default.aspx (last visited October 14, 2013) (explaining that the genocide ended in July 1994 and Resolution 955 was passed in November 1994); *see* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25,

to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 . . . .[16]

The Resolution was adopted nearly unanimously, with only one dissent (Rwanda), and one abstention (China).[17] The Statute of the ICTR is nearly identical to the Statute of the ICTY, differing only in its definition of crimes against humanity and in issues related to the internal nature of the conflict.[18]

The establishment of both Tribunals was multi-purpose.[19] For the purposes of this Note, the most relevant is the prevention of future crimes.[20] Not only were the ICTR and ICTY established to punish the actors responsible for past crimes, they were also meant to send a message of deterrence to the international community as a whole.[21] "NEVER AGAIN"

1993) for the comparable ICTY resolution.

16. ICTR Statute, ¶ 1.

17. WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 29 (2006). China had concerns about the precedent set by establishing an ad hoc tribunal to deal with an internal conflict, especially under stipulations that Rwanda refused to accept. *Id.* at 28–29.

18. *Id.* at 30. The ICTR Rules of Procedure and Evidence are also modeled after the Rules of the ICTY. *See* ICTR Statute, art. 14 (stating that the ICTR will adopt the procedures found within the ICTY). Importantly, a single Appeals Chamber handles appeals of cases from both Tribunals. *Id.* at art. 13(4). Due to the similarities in subject matter, statutes, rules of evidence and procedure, as well as having the same Appeals Chamber, each Tribunal relies heavily on the jurisprudence of the other, and, thus, both the ICTR and ICTY Tribunals will be drawn upon in this note. *See, e.g.*, Prosecutor v. Ntakirutimana & Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Appeal Judgement, ¶¶ 24-29 (Dec. 13, 2004) (comparing the appeal to prior appeals with the ICTY). Hence, I will refer to cases, rules, and articles from the statutes of both tribunals. As my primary focus is on the ICTR, I will refer to concurrent rules and articles between the two tribunals starting with the ICTR rule or statute followed by the ICTY rule or statute (e.g. Article 2(3)/4(3)).

19. *See, e.g.*, ICTR, *supra* note 15 (explaining that the goals of the ICTR are to "contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region."); ICTY, *supra* note 12 (describing the ICTY's goal "to deter future crimes and render justice . . . .").

20. *See* ICTY, *supra* note 12 (noting one of the goals of the ICTY as the deterrence of future crimes).

21. *Id.* ("The Tribunal has proved that efficient and transparent

is the first phrase on the ICTR's mission statement.[22] Further, the ICTR sent "a strong message to Africa's leaders and warlords," as this was the first time in Africa that such high-ranking officials were held accountable before an international court for their crimes.[23] In particular, the ICTR's enforcement of prison sentences was meant to provide a "greater deterrent effect in the continent."[24]

The Tribunals are not the international community's first attempt at preventing genocide. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), as the name suggests, binds the contracting parties not only to punish, but do what they can to prevent genocide from taking place.[25] The Genocide Convention also gives the contracting parties authority to act under the U.N. Charter as necessary for the prevention and suppression of genocide.[26] That command was realized after the Rwandan genocide, when the U.N. Security Council President stated that "persons who instigate or participate in such acts are individually responsible."[27] The broad conceptual framework for the overall goals and aims of prosecution within the Tribunals therefore demands individual responsibility for those who instigate genocide.[28] The Tribunal Statutes, by establishing

international justice is possible.").

22. ICTR, *supra* note 15.

23. *Id.*

24. *Id.* The ICTY has similar goals of sending a message "that an individual's senior position can no longer protect them from prosecution." ICTY, *supra* note 12. Additionally, Antonio Cassese, former ICTY President, said that justice in national reconciliation "is essential to the restoration of peaceful and normal relations between people who have to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus peace and justice go hand in hand." Press Release, Joint Statement by the President and the Prosecutor, The Hague, The Tribunal welcomes the parties' commitment to justice (Nov. 24, 1995), *available at* http://www.icty.org/sid/7220.

25. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. I [hereinafter Genocide Convention] (providing the first international attempt to punish genocide).

26. *Id.* at art. VIII. While there are concerns with the overall strength of argument that punishment after the fact is an effective tool of future prevention, this Note assumes that such deterrent purposes are clearly intended with the Genocide Convention and the ad hoc Tribunals. The framework of prevention exists and is generally accepted.

27. U.N. Sec. Council, Statement by the President of the Security Council, S/PRST/1994/21 (Apr. 30, 1994).

28. It is important to note that one of the purposes behind the entire formation of the Tribunals was prevention of future crimes, mainly through

such responsibility, implemented the aims of established international law into the fight to prevent genocide.[29]

1. The Statutes

a. Genocide and Its Inchoate Offences

The Statutes of both the ICTY and ICTR set forth how "persons responsible" for atrocities may be prosecuted.[30] Genocide, crimes against humanity, and war crimes are punishable under the Statutes.[31] The article on genocide reads as follows:

> Article 2: Genocide
>
> 1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.
> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>   (a) Killing members of the group;
>   (b) Causing serious bodily or mental harm to members of the group;
>   (c) Deliberately inflicting on the group conditions of life calculated to bring about it physical destruction in whole or in part;
>   (d) Imposing measures intended to prevent births within the group;
>   (e) Forcibly transferring children of the group to another group.
> 3. The following acts shall be punishable:

ending impunity. This should be kept in mind as this Note involves particular actions which relate in many ways to fostering environments of impunity. *See supra* note 15; *see also infra* notes 66, 130.

29. ICTR Statute, Preamble, ("Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and . . . other . . . violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.").

30. *Id.*; ICTY Statute, art. 1.

31. ICTR Statute, arts. 2-4; ICTY Statute, arts. 2–4 (laying out what constitutes genocide, crimes against humanity and war crimes).

(a) Genocide;
(b) Conspiracy to commit genocide;
(c)Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.[32]

Article 2(3)/4(3)[33] are considered inchoate offences. Inchoate is roughly defined as "just begun" or "underdeveloped."[34] One could also consider "an offence [as] inchoate when not all of its instances cause harm."[35] Inchoate offences have support from English common law, and are also known as "preliminary crimes,"[36] "offences of risk prevention,"[37] or "imperfect or incomplete."[38] "A principle feature of these crimes is that they are committed even though the substantive offence (i.e. the offence it was intended to bring about) is not completed and no harm results."[39] Ideally, therefore, if a person commits any of the acts set forth in article 2(3)/4(3), regardless of any further outcome, it is punishable under either statute.[40]

32. ICTR Statute, art. 2.

33. *Id.*; ICTY Statute, art. 4. Again, I will refer to concurrent Rules and Articles between the two Tribunals starting with the ICTR Rule or Statute followed by the ICTY Rule or Statute (e.g. Article 2(3)/4(3)).

34. BLACKS'S LAW DICTIONARY 830 (9th ed. 2009). While some valid and important disagreement exists on the purpose and/or validity of inchoate crimes, such debate is outside the scope of this Note. The Statutes clearly allow for the punishment of inchoate crimes, as do most, if not all, national jurisdictions. *See* ICTR Statute, art. 2(3) (stating that conspiracy, DPI, and attempt to commit genocide are punishable offenses); *see also* ICTY Statute , art. 4(3) (listing conspiracy, DPI, and attempt to commit genocide as punishable offenses). Hence this Note presumes the validity of such punishment, at least in some limited circumstances. Unless punishment for inchoate offences is abolished completely from international criminal law, positions posited here are still valid. It is highly unlikely that such a drastic step will be taken any time in the near future, if ever.

35. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 38 (2008).

36. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 444 (5th ed., 2006).

37. HUSAK, *supra* note 35, at 161.

38. DRESSLER, *supra* note 9, at 373.

39. *See id.* (explaining the six stages of crime as conceiving a criminal idea, determining whether it's a good idea or not, forming the intent, preparing, starting the act, and completing the crime with inchoate offenses falling somewhere short completion).

40. *See* ICTR Statute, art. 2(3) (listing the five offenses relating to genocide that are punishable); *see also* ICTY Statute, art. 4(3) (listing the five offenses relating to genocide that are punishable).

For example, if a person is proved beyond a reasonable doubt to have entered into a conspiracy to commit genocide, that person is convicted of the crime "conspiracy to commit genocide" even if no subsequent genocide takes place.[41] If a person gives a speech which is found beyond a reasonable doubt to constitute DPI, that person is convicted of the crime even if no subsequent acts of genocide take place.[42] "Complicity in genocide" is the one "non-inchoate" exception in article 2(3)/4(3), and as such adds to the ambiguity in making any viable distinction between articles 2(3)/4(3) inchoate responsibility and 6(1)/7(1) modes of liability.[43]

2. Justification for Inchoate Offences Is Well Established

The most common types of inchoate offences are attempt, solicitation, and conspiracy.[44] Justifications for such inchoate offences, while debated, are widely accepted inside and outside

41. *See, e.g.*, Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Trial Judgement, ¶¶ 1738–40 (May 31, 2012) (outlining the legal requirements for conspiracy to commit genocide).

42. *See, e.g.*, Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Trial Judgement, ¶ 133 (Feb. 11, 2010) (finding Muvunyi guilty of DPI).

43. Article 2(3)(e) "complicity in genocide" has more appropriately been described as "a hybrid of a substantive crime with a form of liability explicitly attached." Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations* Ad Hoc *Tribunals*, 21 HARV. HUM. RTS. J. 241, 278 (2008). The jurisprudence on "complicity in genocide" at the Tribunals "indicates seemingly transposable application of aiding and abetting genocide and complicity in genocide, which appear in the case law almost as reciprocal modes of liability, resulting in no more than a potential statutory redundancy." *Id.* For an appropriate example, see Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, ¶ 395 (May 15, 2003) ("[C]omplicity to commit genocide in Article 2(3)(e) refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide."). Notably, such holdings require the completion of a subsequent crime of genocide for liability to attach, raising questions as to the inchoate standing of "complicity in genocide." Because of this confusion and unsettled case law on complicity, this Note does not deal directly with the subject. If complicity in genocide was better established it could possibly solve some of the problems posed with the *Nzabonimana* case. Since it does not, I continue with the discussion related to incitement.

44. HUSAK, *supra* note 35, at 161; *see also* DRESSLER, *supra* note 9, at 373 (focusing on the "most notable" inchoate offences recognized in the Anglo-American law). Solicitation is sometimes replaced with incitement as the third general inchoate offence; *see, e.g.*, ASHWORTH, *supra* note 36, at 444.

the context of the Tribunals.[45] It is worth expanding on several of these justifications, so as to set the context for later analysis on why "instigation" should be included in an expanded definition of inchoate offenses.

The critical question with inchoate offenses is why the criminal law gets involved when the harm with which the law seems to be primarily concerned has not resulted. Consequentialist and retributivist perspectives are helpful in answering this question.[46] Under a consequentialist perspective, the criminal law is concerned "not merely with the occurrence of harm but also with its prevention."[47] Once it is decided that an act should be criminalized, "the law should not only provide for the punishment of those who have culpably caused such harms but also penalize those who are trying to cause the harms."[48] Genocide, for example, is clearly an appropriate object of the criminal law given its horrific nature.[49] Hence, keeping in line with the object and purpose of the Genocide Convention, laws against genocide should also capture those attempting genocide.[50] Such criminalization "reduces harm by authorizing law enforcement officers and the courts to step in before any harm has been done, so long as the danger of the harm being caused is clear."[51] Similarly, "we must surely agree that if it is wrong to cause a harm intentionally or recklessly, it is also (and not much less) wrong to attempt to cause such harm . . . ."[52] The consequentialist perspective thus provides support for punishing inchoate offences rather than waiting for the ultimate harm to take place.[53]

45. *See, e.g.*, DRESSLER, *supra* note 9, at 373 ("Anglo-American law recognizes various inchoate offenses . . . .").

46. ASHWORTH, *supra* note 36, at 445 (providing an introduction to both consequentialist and retributivist theories).

47. *Id.* Recall the importance of prevention in the Genocide Convention and the aims of the Tribunals. *See supra* notes 25–28 and accompanying text.

48. ASHWORTH, *supra* note 36, at 445.

49. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Judgement, ¶ 36 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 18, 2004) (singling out genocide for "special condemnation and opprobrium.").

50. *See supra* notes 12–29.

51. ASHWORTH, *supra* note 36, at 445 (emphasis in original). Consider also the United States' approach of allowing punishment in certain circumstances, even when only speech is involved, so long as the advocacy in question is express, calls for immediate or "imminent lawless action and is likely to incit[e] or produc[e] such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

52. R.A DUFF, CRIMINAL ATTEMPTS 134 (1996).

53. ASHWORTH, *supra* note 36, at 445 ("The law should not only provide

A retributivist perspective also supports punishment for inchoate offenses.[54] Carrying out a particular action with the intent to cause a serious harm is wrongful whether or not the intended result was successful.[55] Under the retributivist perspective, the justification for criminalization rests on moral culpability, so that the person who tries to cause a particular harm is "not materially different from the person who tries and succeeds: the difference in outcome is determined by chance rather than by choice, and a censuring institution such as the criminal law should not subordinate itself to the vagaries of fortune by focusing on results rather than on culpability."[56] Indeed, with the paramount importance on intent in the case of genocide[57] one could powerfully argue that inciting others to commit genocide is not easily distinguished from wielding the machete oneself.[58]

All jurisdictions have inchoate offences, and most legal philosophers accept that the criminal law should be used as a harm prevention tool.[59] After all, "[a]ny plausible account of the proper purposes of the criminal law . . . will justify the creation of inchoate, as well as substantive, offences."[60] Concern arises, however, when deciding the scope of the laws and thus of how far to expand international or state authority,[61] and it is admittedly "less clear . . . what the scope and structure of such inchoate offences should be."[62] Such concerns are legitimate and must be kept in mind in any discussion regarding an expansion

for the punishment of those who have culpably caused harms but also penalize those who are trying to cause harms.").

54. *See id.* (explaining that there is no difference in moral culpability between a person who completes a crime and a person who falls short of completion).

55. *Id. See also* DRESSLER, *supra* note 9, at 374

56. ASHWORTH, *supra* note 36, at 445.

57. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Judgement, ¶ 37 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (stressing the high intent requirement for genocide).

58. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgement, ¶ 191 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999) ("The moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.").

59. *See* HUSAK, *supra* note 35, at 161(supporting the existence of inchoate crimes).

60. DUFF, *supra* note 52, at 133.

61. HUSAK, *supra* note 35, at 161 (introducing the potential risks associated with inchoate offenses).

62. DUFF, *supra* note 52, at 134.

in the coverage of inchoate offences.[63]

B. INDIVIDUAL RESPONSIBILITY AND MODES OF LIABILITY – THE NEED FOR SUBSEQUENT ACTS

Article 2(3)/4(3) inchoate liability is distinguished from Article 6(1)/7(1), which lays out modes of liability leading to individual responsibility for a crime. Article 6(1) of the ICTR Statute reads:

> Article 6: Individual Criminal Responsibility:
> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.[64] These Articles translate into six separate "modes," or "forms," of liability for a particular crime, recognized under international customary law:
> (1) Planning;
> (2) Instigating;
> (3) Ordering;
> (4) Committing (direct perpetration);
> (5) Aiding and abetting in the planning, preparation or execution of the crime;
> (6) Joint criminal enterprise.65

A seventh form of individual responsibility is created under Article 6(3)/7(3) known as "superior responsibility," whereby a superior, civilian or military, can be held personally responsible for his or her subordinates so long as certain conditions are

63. *See infra* notes 160–183 and accompanying text (discussing ways of limiting over-breadth).

64. ICTR Statute, art. 6(1). Article 7(1) of the ICTY Statute reads the same, save its applicability to Articles 2–5 of the ICTY Statute. ICTY Statute, art. 7(1).

65. INT'L CRIMINAL LAW & PRACTICE TRAINING MATERIALS, *MODES OF LIABILITY: COMMISSION AND PARTICIPATION* § 9.2.2.1 [hereinafter ICLS]. Joint criminal enterprise is considered a portion of commission within the Statute; s*ee Tadiv*, Case No: IT-94-1-A, ¶¶ 188–192; Prosecutor v. Milutinovic et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 20 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003), *available at* http://203.176.141.125/sites/default/files/documents/courtdoc/00207160-00207178.pdf.

met.[66]

For conviction under any one of the modes of liability a double showing of *mens rea* and *actus reus* is necessary. That is, the Prosecution must provide sufficient evidence to satisfy the mens rea requirement for both the mode and the substantive crime, as well as the *actus reus* for both the mode and the actual crime.[67] The Statutes themselves provide little guidance, however, on how these concepts should be applied.[68] The Appeals Chamber has clarified, in broad terms, that modes of liability can be proven "by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused."[69]

1. Justification for Modes of Liability – Punishing Secondary Actors

Modes of liability are a necessary part of the Tribunals' Statutes. The Tribunals are designed to catch the leaders and architects of crimes, rather than only principal perpetrators of crimes. This necessitates the creation of secondary liability, most often accomplished through the modes of liability. A great many of the leaders and architects of the genocide in Rwanda did not physically participate in the slaughter they staged and fueled. Yet strong philosophical and jurisprudential support exists for why such persons should still be punished for acts of

66. Article 6(3)/7(3) states:

> The fact that any of the acts referred to in Articles 2 to [4/5] of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

ICTR Statute, art. 6(3)/7(3). The language in the latter part of Article 6(3)/7(3), mentioning prevention, is especially relevant because it facially connects the purposes of prevention, prevalent in the foundations of the Tribunals, to the modes of liability. This proves important in showing how similar actions consisting of modes of liability can be to inchoate offences. In the least, it supports the perhaps self-evident notion that the international community has an interest in preventing actions deemed to be modes of liability as well.

67. ICLS, *supra* note 65.

68. SCHABAS, *supra* note 17, at 292; *see also id.* at 292–96 (discussing further the *mens rea* and *actus reus* in the ICTR and ICTY context).

69. Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Appeal Judgement, ¶¶ 177–78 (Int'l. Crim Trib. for the Former Yugoslavia Nov. 30, 2006).

genocide, even though they did not "get their hands dirty." For instance, the Appeals Chamber in *Prosecutor v. Duško Tadic*, stated that Article 7(1) established that

> [R]esponsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the actus reus of the enumerated crimes but appears to extend also to other offenders . . . Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice . . . .[70]

Following such a rationale, supported by both the "object and purpose of the Statute" as well as "the very nature of many international crimes which are committed most commonly in wartime situations," the Appeals Chamber concluded that "the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question."[71] Further support is drawn from the Secretary General's Report, which expresses "that *all* persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations."[72] Modes of liability are therefore well established within the Tribunals as a necessary element to pursue justice and prevent future atrocities.

2. Description of the Relevant Inchoate Offence and Mode of Liability

Having established the philosophical underpinnings of inchoate offenses and modes of liability generally, I will now

70. *Tadić*, Case No: IT-94-1-A, ¶¶ 189–90. This case also established joint criminal enterprise, further expanding the scope of secondary liability. *Id.*

71. *Id.* ¶ 190.

72. *Tadić*, Case No: IT-94-1-A, Appeal Judgement, 15 July 1999, ¶ 190 (quoting U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993*), ¶ 53, U.N. Doc S/25704 (May 3, 1993)) (emphasis added by Appeals Chamber). Note the similarities between the above justifications of having modes of liability and those of inchoate offences. *Compare id.*, *with supra* notes 44–63.

address the offense of DPI and the mode of "instigation" specifically.

a. Direct and Public Incitement to Commit Genocide

A person can be punished for DPI if they (1) directly and publicly (2) incite a group (3) to commit acts of genocide, and (4) have the requisite genocidal intent,[73] which is presupposed by a finding of intent to incite.[74] The Tribunals understand DPI as

> [D]irectly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication."[75]

While no such requirement exists in the Statutes, all of the convictions to date involve either speeches made to large audiences, public broadcasts or mass media dissemination.[76]

While no exact definition is given for "direct" in the Statutes, cases have clarified the term somewhat. For the "direct" element to be satisfied, "the incitement must be a specific appeal to commit an act referred to in Article 2(2) of the Statute and must be more than a vague or indirect suggestion."[77] Implicit language, however, can still be considered direct.[78] The "principle consideration" is the

73. Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Appeal Judgement, ¶155 (Oct. 20, 2010); Nahimana et al. v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgement, ¶ 677 (Nov. 28, 2007).

74. Bikindi v. Prosecutor, Case No. ICTR-01-72-A, Appeal Judgement, ¶ 135 (Mar. 18, 2010); *Nahimana*, Case No. ICTR-99-52-A, ¶ 677.

75. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 559 (Sept. 2, 1998).

76. *Kalimanzira*, Case No. ICTR-05-88-A, ¶¶155–56.

77. Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgement, ¶ 24 (Feb. 11, 2010) (citing Nahimana et al. v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgement, ¶ 677 (Nov. 28, 2007).

78. *Id.* ¶ 25. For example, acts of genocide were often referred to as "work," which would count as coded language falling under the purview of this crime. *See, e.g.*, Prosecutor v. Bikindi, ICTR-01-72- T, Judgement, ¶ 177 (Dec. 2, 2008); Prosecutor v. Kajelijeli, ICTR- 98-44A-T, Judgement, ¶ 856 (Dec. 1, 2003).

"meaning of the words used in the specific context" as would be understood by the audience.[79] The context must be considered both linguistically and culturally.[80] The incitement should be further considered in light of the "political and community affiliations of the inciter."[81] The *Akayesu* Trial Chamber found that "[t]he 'direct' element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act . . . ."[82] An example in the negative is seen in *Bagosora*, where a showing that the accused "told a municipal leader during an assembly at Umuganda stadium in Gisenyi that he should reinforce roadblocks and 'to warn his Muslim friends not to continue hiding Tutsi in their houses'" was insufficiently "direct" for a conviction.[83]

No minimum number has been set for what constitutes "public"; although speeches or instructions at roadblocks are considered insufficient to meet the burden.[84] The *Muvunyi* Trial Chamber explained that the "public element of incitement to commit genocide may be appreciated by looking at the circumstances of the incitement, such as the place where the incitement occurred and whether or not the audience was selective or limited."[85] As with the "direct" element, whether an act of incitement can be considered sufficiently "public" therefore depends on much on the context.

DPI has its roots in Article III of the Genocide Convention.[86] The drafters of the Genocide Convention decided to make this a punishable offence "[i]n order to focus on the preventive dimension of the prohibition of genocide."[87] The

79. *Muvunyi*, Case No. ICTR-00-55A-T, ¶ 25.

80. *Id.* Muvunyi was convicted in part for using a proverb about killing a snake, which was understood in that culture to refer to killing the Tutsi. *Id.* ¶ 63.

81. *Id.* ¶ 25.

82. *Akayesu*, Case No. ICTR-96-4-T, ¶ 557; *see also* Prosecutor v. Niyitegeka, ICTR-96-14-T, Judgement, ¶ 431 (May 16, 2003); Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgement, ¶ 978 (Dec. 3, 2003).

83. SCHABAS, *supra* note 17, at 182 (quoting Prosecutor v. Bagosora et al., ICTR-98-41-T, Decision on Motions for Judgement of Acquittal, ¶ 23 (Feb. 2, 2004)).

84. Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Appeal Judgement, ¶155 (Oct. 20, 2010); Nahimana et al. v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgement, ¶ 677 (Nov. 28, 2007).

85. Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgment, ¶ 27 (Feb. 11, 2010).

86. Genocide Convention, *supra* note 25, at art. III; *see also* SCHABAS, *supra* note 17, at 181.

87. SCHABAS, *supra* note 17, at 181.

Appeals Chamber in *Nahimana* explains:

> [T]he crime of direct and public incitement is an inchoate offence, punishable even if no act of genocide has resulted therefrom. This is confirmed by the *travaux préparatoires* to the Genocide Convention, from which it can be concluded that the drafters of the Convention intended to punish direct and public incitement, even if no act of genocide was committed, the aim being to forestall the occurrence of such acts.[88]

The Appeals Chamber further noted that "the Statute of the International Criminal Court also appears to provide that an accused incurs criminal responsibility for direct and public incitement to commite genocide, even if this is not followed by acts of genocide."[89] While speech can be used to incite other forms of violence, the Statutes, modeled after the Genocide Convention, intend that only direct incitement to commit genocide will be punishable.[90] DPI, therefore, is well established in international criminal law, despite ambiguities regarding what actions the crime should cover.

b. Instigation

Instigation essentially means "prompting another to commit an offence."[91] The *Kvocka et al*. Trial Chamber explains

88. *Nahimana et al.*, ICTR-99-52-A, ¶ 678 (internal citation omitted).

89. *Id.* "Article 25(3)(b) of the Statute of International Criminal court provides that any person who 'orders, solicits or induces' the commission of a crime falling under the jurisdiction of the Court shall be individually responsible for such a crime 'which in fact occurs or is attempted.' However, Article 25(3)(e) of the Statute of the International Criminal Court provides that a person may incur criminal responsibility for direct and public incitement and it does not require the 'commission or attempted commission of such a crime.'" *Id.* at 216 n.1615.

90. Prosecutor v. Bikindi, ICTR-01-72- T, Judgement, ¶ 388 (Dec. 2, 2008) (citing *Travaux préparatoires* of the Genocide Convention, U.N. ORGA, 6th Comm., 3d Sess., 86th mtg., U.N. Doc. A/C.6/3/CR. 86 at 244–48 (Oct. 28, 1948); *Travaux préparatoires* of the Genocide Convention, U.N. ORGA, 6th Comm., 3d Sess., 87th mtg., U.N. Doc. A/C.6/3/CR. 87, at 248–54 (Oct. 29, 1948)).

91. SCHABAS, *supra* note 17, at 299 (quoting Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶ 601 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001)); *see also* Prosecutor v. Blaškić, Case No IT-95-14-T, Judgement, ¶ 280 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

the *actus reus* of "prompting," saying that "[t]his element is satisfied if it is shown that the conduct of the accused was a clear contributing factor to the conduct of the other person(s). It is not necessary to demonstrate that the crime would not have occurred without the accused's involvement."[92] Case law at the ICTY has established that "proof of a 'causal relationship between the instigation and the crime itself'" is necessary, and "the contribution of the accused must in fact have had an effect on the commission of the crime."[93] The Prosecution must show, in other words, only that the actions of the instigator was a "factor substantially contributing" to the principal's act.[94] Instigation can be viewed as "bringing in a proxy to do your dirty work."[95]

The *mens rea* required "is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts."[96] There is no ability to prosecute if someone was not actually instigated to commit the crime in question.[97] This element is what makes instigation a mode of liability rather than an inchoate offence. As such, and in contrast to DPI, "instigation" as a mode of liability is not limited soley to genocide, but can attach to any crime under the statute.[98]

92. Prosecutor v. Kvoćka et al., Case No. IT-98-30/1-T, Trial Judgement, ¶ 252 (Int'l. Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (internal citations omitted).

93. SCHABAS, *supra* note 17, at 300 (quoting Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-T, Judgement, ¶ 387 (Int'l. Crim. Trib. for the Former Yugoslavia Feb. 26, 2001)); *see also Blaškic*, Case No. IT-95-14-T, ¶¶ 278, 280.

94. Kordić & Cerkez, Case No. IT-95-14/2-A, Appeal Judgement, ¶ 27 (Int'l. Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

95. Interview with James Arguin, Chief of the Appeals and Legal Advisory Division, Office of the Prosecutor in the U.N. ICTR, (Aug. 29, 2012) [hereinafter Arguin Interview].

96. Kvocka et al., Case No. IT-98-30/1-T, ¶ 252 (Int'l. Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (internal citations omitted).

97. SCHABAS, *supra* note 17, at 299–300.

98. *Id.* at 300. Aiding and abetting as a mode of liability also "has considerable overlaps with other concepts of participation spelled out in the statutes, namely 'inciting' and 'ordering,' as well as 'direct and public incitement.'" *Id.* at 302. There have been additional discussions involving aiding and abetting and its overlap with other modes. *See, e.g.*, *id.* at 302; ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW, 67 (4th ed. 2010) [hereinafter BANTEKAS]; Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgement, ¶ 271 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004); Prosecutor v. Blaškic, Case No. IT-95-14-A, Appeal Judgement, ¶¶ 1, 45, 48

3. Despite the Stated Differences between DPI and Instigation, Issues of Overlap Create Confusion on the Relevant Distinction Between the Two

The original French version of ICTR Article 6(1) read "incitation," rather than "instigation" as it reads in the English version.[99] Furthermore, the *Akayesu* Trial Chamber elaborates that "[i]n English, it seems the words incitement and instigation are synonymous."[100] The *Akayesu* Appeals Chamber also understands the terms to be synonymous, and notes that the only difference between DPI and "instigation" is that while "instigation" could at times be "direct and public," it does not have to be "direct and public."[101] That is, the Appeals Chamber attempts to distinguish "instigation" from DPI not on the basis of any difference between the word "instigate" and "incite," but rather upon the "direct and public" requirement.[102]

Within the language of the Tribunals, significant overlap exists between the rationale underpinning both Article 2(3)/4(3) inchoate liability and Article 6(1)/7(1) modes of liability. The *Kajelijeli* Trial Chamber found that "the Accused is criminally responsible, pursuant to Article 6(1) of the Statute, for inciting directly and in public the *Interahamwe* and the crowd to commit genocide by killing or causing serious bodily or mental harm to members of the Tutsi population in Rwankeri, Mukingo Commune."[103] He was convicted under Article 2(3) as charged in the Indictment,[104] yet the Chamber includes that he was criminally liable for DPI under Article 6(1). The Appeals

(Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgement, ¶¶ 954, 975 (Dec. 3, 2003); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement, ¶ 890–91(Jan. 27, 2000).

99. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 481 (Sept. 2, 1998).

100. *Id.*

101. *Id.* ¶ 478.

102. *See, e.g.*, Nahimana et al. v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgement, ¶ 678 (Nov. 28, 2007).

103. Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgement, ¶ 860 (Dec. 1, 2003) (emphasis added).

104. *Id.* ¶ 861 (referring to Count 4 in the indictment which charges liability under Article 2(3)); *see Kajelijeli* Indictment, Count 4 (Jan. 25, 2001), http://www.unictr.org/Portals/0/Case/English/Kajelijeli/indictment/250101.pdf ("Direct and public incitement to genocide, pursuant to Article 2(3)(c) of the Statute").

Chamber in *Prosecutor v. Tadic* similarly connects the two Articles when justifying the extension of liability to "other offenders," referring in particular to both "Article 2, which refers to committing or *ordering* . . . and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy, incitement, attempt, and complicity*."[105]

The purpose of both inchoate responsibility and modes of liability is arguably rooted in the notion that punishing this type of behavior will aid in the prevention of future harm.[106] This unity of purpose is the source of much of the confusion and overlap between the two. The Trial Chamber in *Krstic* for example, provides some explanation:

> Article 4(3) provides for a broad range of heads of criminal responsibility, including heads which are not included in Article 7(1), such as "conspiracy to commit genocide" and "attempt to commit genocide". By incorporating Article 4(3) in the Statute, the drafters of the Statute ensured that the Tribunal has jurisdiction over all forms of participation in genocide prohibited under customary international law. The consequence of this approach, however, is that certain heads of individual criminal responsibility in Article 4(3) overlap with those in Article 7(1).[107]

This admitted overlap is the context within which the Tribunal's artificial separation of DPI from other forms of direct instigation to commit genocide must be understood. The strong emphasis on prevention, and capturing "all forms of participation in genocide"[108] through both inchoate offences and modes of liability in the Statutes, is a unifying purpose which

105. *Tadic*, Case No: IT-94-1-A, ¶ 189.

106. *See Nahimana et al.*, ICTR-99-52-A, ¶ 678, supra note 87 (noting the preventative purpose of DPI set forth in the *Travaux préparatoires* of the Genocide Convention); *Tadić*, Case No. IT-94-1-A, Appeal Judgement, ¶ 189 (noting that the object and purpose of the Statute similarly applies to Articles of the Statute dealing with inchoate liability and modes of liability.). For justification outside the Tribunals, see ASHWORTH, *supra* note 36, at 445 ("[Criminalizing attempts] reduces harm by authorizing law enforcement officers and the courts to step in *before* any harm has been done, so long as the danger of the harm being caused is clear.").

107. Prosecutor v. Krstic, Case No: IT-98-33-T, Trial Judgment, ¶ 640 (Int'l Crim. Trib. for the Former Yugoslavia, Aug. 2, 2001).

108. *Id.*

makes the inconsistency in the application of law appear contradictory .

B. MODES OF LIABILITY AND INCHOATE OFFENCES IN CONTEXT

Before entering analysis, it is helpful to refocus on the two main example cases: *Muvunyi* and *Nzabonimana*. These cases provide a lens through which the current inconsistency caused by the overlap between inchoate offences and modes of liability and the artificial divide created by the Statutes is made clear.

Muvunyi was convicted of DPI and sentenced to 15 years in prison.[109] He was found to have "told the crowd to begin killing on the following day without fear that anything would happen to them."[110] More than one witness attested to Muvunyi's "assurance to the crowd that they would not be punished for any killings."[111] The Chamber found that "the evidence strongly suggests that the only reasonable conclusion is that the crowd at the Gikore Centre understood that Muvunyi told them to seek out Tutsis in hiding and kill them. This finding is supported by the evidence . . . that Tutsis in hiding . . . were sought out and killed the morning following the meeting."[112] The Chamber thus found that there was "no reasonable doubt that Muvunyi intended to incite the audience to commit acts of genocide."[113] The Chamber further found that the Prosecution proved "beyond all reasonable doubt that Muvunyi possessed the requisite intent to destroy the Tutsi group as such."[114] In part because of the broader context, "namely, that large-scale massacres of Tutsi had already occurred in area, which must have been known to Muvunyi,"[115] Muvunyi was found guilty of

109. Prosecutor v. Muvunyi, Case No. ICTR-00-55A-A, Appeal Judgement, Disposition (Apr. 1, 2011).

110. Prosecutor v. Muvunyi, Case No. ICTR-00-55-A-T, Retrial Judgement, ¶ 95 (Feb. 11, 2009).

111. *Id.* ¶ 97.

112. *Id.* ¶ 127. Although in this case evidence connecting Muvunyi's speech with subsequent killings was available, it was not necessary for his conviction. The evidence was used instead to show that his coded language, including a proverb commonly understood as encouragement to kill Tutsi, was in fact understood by the audience as a charge to kill.

113. *Id.* ¶ 128.

114. *Id.*

115. *Id.* ¶ 131.

DPI at the Gikore Centre.[116]

Nzabonimana, on the other hand, was acquitted of aiding and abetting or instigating genocide, although the Trial Chamber found beyond a reasonable doubt that he released prisoners, through his power and use of threats, who had been imprisoned for committing acts of genocide, and did so with genocidal intent, knowing of the prisoners' genocidal intent.[117] The Trial Chamber explained that adequate evidence was not given to prove that these particular prisoners went on to commit genocidal crimes,[118] or that his actions constituted a "substantial contribution" to the genocidal killings.[119] Nzabonimana's threat, the cause of the release, happened at a private meeting and thus was not the appropriate setting for a DPI charge.

What distinguishes Muvunyi's actions from Nzabonimana's should not be enough to warrant the former's conviction and the latter's acquittal. Nzabonimana directly communicated through action what Muvunyi simply said on a stage: go kill, and you will not be punished. Further highlighting this communicative comparison, a chief witness testified that he was informed that Nzabonimana told those released to "do what he was doing"; namely perpetrating genocide.[120] The actions are not distinct enough in kind, in gravity, or in potential effect to be treated so differently, absent some compelling justification not yet provided. The law should be cautiously expanded to include the abhorrent conduct of direct incitement to genocide (whether or not the incitement is also public), staying true to its goals of prevention, without posing an unreasonable danger of over-inclusion.

II. ANALYSIS

A. THE RATIONALE BEHIND PUNISHING DPI COVERS MORE THAN THAT WHICH IS DIRECT AND PUBLIC – DIRECT INSTIGATION SHOULD BE INCORPORATED

116. *Id.* ¶ 132.

117. Prosecutor v. Nzabonimana, Case No. ICTR-98-44-T, Trial Judgement, ¶¶ 1719–20 (May 31, 2012).

118. *Id.* ¶ 1723.

119. *Id.*

120. *Id.* ¶ 1047.

Having already shown how both DPI and "instigation" are intended to help prevent future genocides, the analysis will now focus on the specific examples of DPI and "instigation" from the *Muvunyi* and *Nzabonimana* cases to seek answers on what truly distinguishes the two. Specific examples from *Muvunyi* and *Nzabonimana* will be presented to establish the invalidity of the current distinction. Philosophy of criminal law arguments are infused throughout to support a reasoned analysis. The doctrine of incitement in domestic English law is also provided to ground the argument in reality. Lastly, further minimalist philosophical justification is given for extending inchoate liability to acts of instigation related to genocide, mitigating concerns about such liability growing too wide.

1. As Applied, the Distinction Between DPI and Instigation Is not Valid

Much of the overlap and confusion within the Statutes can be attributed to the complexity of the overall attempt to render appropriate justice in large scale atrocities.[121] In such circumstances, "[s]ome persons will have planned and set in motion the genocide, others will have been aware of the genocidal plan and will have played a part in its execution and yet others will have carried out particular functions without knowledge of the overall plan."[122] Which persons are more responsible? The Tribunals have expended enormous effort to properly deal with the difficulties of this dilemma, and have, despite criticism, been largely successful.[123] But further clarification is still needed when certain conduct appears, at least facially, to meet many of the indicia of guilt adequate to secure liability and yet remains unpunished.[124] Nzabonimana's

121. *Cf.* Mark Berger, *The Right to Silence in the Hague International Criminal Courts*, 47 U.S.F.L. REV. 1, 15 (2012) ("The drafters of the statute governing the ICTY . . . were faced with the enormously complex task of constructing a legal system to identify, investigate, and try suspects accused of human rights atrocities.").

122. BANTEKAS, *supra* note 98, at 52.

123. *See, e.g.*, Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and Its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. INT'L & COMP. L. ANN. 239 (2008). While this Note critiques certain inconsistencies between modes of liability and inchoate offences as applied, it fully recognizes the groundbreaking work accomplished by the Tribunals despite the incredible difficulty of their missions.

124. In fact, because the Tribunals have been so groundbreaking they will indefinitely be, and already are, used as invaluable precedent in the

unpunished use of power and authority to release killers into an ongoing genocide provides an example of an existing gap in need of remedy.

The ICTR has attempted to clarify the difference between DPI and "instigation." The Nahimana Appeals Chamber explained that while instigation is narrower than incitement in requiring a connection with a subsequent crime in order to be punishable, it is also broader than incitement in the sense that it does not need to be "direct" or "public."[125]

This distinction appears insufficient to draw such a stark line, with such stark consequences, between general instigation and DPI. The insufficiency is especially apparent considering the vague standards set on what constitutes "public" and the lack of explanation by the Tribunals on why that element is so crucial.[126] In addition to the general overlap between Article 2(3)/4(3) and Article 6(1)/7(1), the applicability of the "direct provocation" element[127] – this includes implicit language and threats – to non-public instigation likewise cuts against any clear distinction. Since a primary purpose of punishing both DPI and "instigation of genocide" is the prevention of genocide,[128] focusing on this rationale provides insight on why the current distinction, in the context of genocide, is not valid.

In understanding the justification for inchoate offences, it

international criminal law field. *See, e.g.*, Kingsley Chiedu Moghalu, *International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda*, 14 PACE INT'L L. REV. 273, 281 (2002) ("The judgment of Trial Chamber I of the ICTR in *Akayesu* . . . has provided a universal precedent to other jurisdictions such as the ICTY and the International Criminal Court."); Kendra McGraw, Note, *Universally Liable? Corporate-Complicity Liability under the Principle of Universal Jurisdiction*, 18 MINN. J. INT'L L. 458, 463 n.33 (2009) ("The ICTR was groundbreaking for holding a radio station liable for inciting genocide . . . and for extending the notion of command responsibility to a civilian corporate director."). It is, therefore, even more critical to critique any shortcomings so that they may be addressed in future application.

125. Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Appeal Judgement, ¶¶ 678–79 (Nov. 28, 2007). This is the only distinction given by the ad hoc Tribunals.

126. *See supra* notes 84–85 and accompanying text; *see, e.g.*, Prosecutor v. Muvunyi, Case No. ICTR-00-55-A-T, Retrial Judgment, ¶ 27 (Feb. 11, 2009) (The "public element of incitement to commit genocide may be appreciated by *looking at the circumstances* of the incitement, such as the place where the incitement occurred and whether or not the audience was selective or limited.") (emphasis added).

127. Prosecutor v. Muvunyi, Case No. ICTR-00-55A-A, Appeal Judgment, ¶ 25 (Apr. 1, 2011).

128. *See supra* notes 86–90, 106 and accompanying text.

is important to understand the wrong the law is attempting to prevent.[129] With DPI the ultimate wrong to be prevented is clearly genocide. Giving an inflammatory speech, however, does not always lead to genocide. There must also be an intermediate wrong worth preventing. Understanding this concept of intermediate wrongs is necessary to make inchoate liability more consistent. One apparent purpose of making DPI an inchoate crime is to prevent any person from the committing the intermediate wrong of *encouraging or spurring others* on to commit genocide. Arguably, the deterrent aspects of criminalizing certain behaviors apply not only to deterring the dangerous end result (e.g. acts of genocide), but also to initial behaviors that increase the likelihood of that dangerous end result (e.g. the incitement of acts of genocide). If the international community is attempting to prevent or deter genocide by punishing DPI, and believes – with good reason – that DPI will increase the risk of genocide, it should logically wish to deter the act of DPI as well, as a wrong in and of itself. While genocide itself is the ultimate wrong to be prevented, there exists a more immediate wrong of urging or prompting others to commit genocide which itself should be prevented. It is hardly difficult to accept that this wrong – increasing the likelihood of genocide – is one of the undesirable states of affairs the crime of DPI is aimed at preventing.

Indeed, by punishing someone for simply giving a genocidal speech or radio broadcast intended to incite genocide, the Tribunals are staying true to their promise of "sending a message" that others will not be able to act with impunity, in furtherance of the U.N.'s desired "greater deterrent effect."[130] Yet other actions (e.g. releasing prisoners with the intention that they continue to commit genocide) taken to *encourage or spur others* to commit genocide seem equally within the purview of the law, especially if those actions or words yield a high likelihood of success. When prevention is accepted as the

129. A "wrong" is widely considered at least one major factor that must be shown in order to justifiably criminalize any action. *See, e.g.*, HUSAK, *supra* note 35, at 73–77; DUFF, *supra* note 52, at 134 (using "wrong" as language to justify punishment of inchoate offences); Michael Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27, 29 (2009) ("[A] state should criminalize only what it is willing to punish, and it should be willing to punish only those who have done morally wrong actions."); A.P. Simester & Andrew von Hirsch, *Remote Harms and Non-Consecutive Crimes*, 28 CRIM. JUST. ETHICS 89, 90 (2009) ("One cannot be appropriately be blamed except for doing something wrong.").

130. ICTR, *supra* note 15.

aim of the law, then the law has a strong interest in preventing anyone, in any circumstance, from encouraging or spurring others on to commit acts of genocide. The law should be consistent with its supposed purposes.[131] Hence, if giving a speech encouraging others to go and kill Tutsi is an act that should be prevented, so too should direct words and actions taken to encourage others, or allow others to commit those same crimes.

Looking at the *Muvunyi* and *Nzabonimana* cases, the arbitrary inconsistency of the law is clear. Both Muvunyi and Nzabonimana were found beyond a reasonable doubt to have had genocidal intent with regard to their respective actions. Yet Nzabonimana's action does not constitute a crime unless those criminals released by his hand committed further crimes, despite the fact that with near 100% certainty that they would indeed go and commit further acts of genocide, considering the circumstances in Rwanda at the time.[132] It is difficult to claim with any certainty that Muvunyi's actions are worse in terms of moral culpability or possible harmful effects. Muvunyi's words may have been heard by a wider range of persons at the outset, but Nzabonimana's words and actions appear more direct and more likely to cause immediate harm.[133] In fact, the killings intensified in Rutobwe Commune soon after the release of these known killers.[134] It is inconsistent at best to punish the speech and not the action itself, for "[i]t cannot be worse to risk bringing about an undesirable state of affairs than to engage in conduct that deliberately and directly brings about that same

131. This rationale is consistent with the general justifications for inchoate offences. DUFF, *supra* note 52, at 132 ("Any plausible account of the proper purposes of the criminal law . . . will justify the creation of inchoate, as well as substantive, offences."); *see also* HUSAK, *supra* note 35, at 161.

132. The totality of the circumstances, often considered in ICTR and ICTY cases, leads comfortably to this conclusion. *See, e.g.*, Prosecutor v. Muvunyi, Case No. ICTR-00-55-A-T, Retrial Judgement, ¶ 131 (Feb. 11, 2010), *supra* note 115. This inference is supported by the Trial Chamber's finding that Nzabonimana had knowledge of the killers' genocidal intent and ultimately that he himself had genocidal intent. *See Nzabonimana*, Case No. ICTR-98-44-T, ¶¶, 1720, 1724.

133. *Compare Muvunyi*, Case No. ICTR-00-55-A-T, ¶ 25 ("Implicit language may be 'direct' because incitement does not have to involve an explicit appeal to commit genocide"), *with Nzabonimana*, Case No. ICTR-98-44-T, ¶ 1047 ("Nzabonimana had forcibly released the perpetrators and that Nzabonimana had told those released that they could 'do what he was doing.' Witness CNAA testified that it was as if Nzabonimana had launched the genocide.").

134. *Nzabonimana*, Case No. ICTR-98-44-T, ¶ 1719.

state of affairs."[135] The better approach is to say that Muvunyi and Nzabonimana each did something equally wrongful and potentially harmful, and thus should be punished equally.

A slight alteration of the facts further demonstrates the arbitrary nature of the law as it stands. Nzabonimana would almost certainly be convicted of a crime, even if no one in the crowd went out and actually released those prisoners, if he had gotten up on a stage and said (quite similarly to Muvunyi), "If you go and release those imprisoned for killing Tutsi you will not be punished! Release them so they can kill more Tutsi!" His crime would have been DPI.[136] But instead Nzabonimana himself forced the release of those prisoners through abuse of his power as a minister at a private leadership meeting. His position as a prominent leader very likely had a psychological impact beyond those present at the meeting and those specific prisoners released.[137] The effect of his action, at least, was quite public: the news and effects of the prisoner release spread around an entire prefecture.[138] Yet still there is no crime. We are left with a paradoxical situation where he would be guilty of a crime if he gave a speech encouraging others to release *génocidaires*, but is not guilty of a crime if he does that very action himself.

Developed within a recent minimalist theory on criminal law, the "consummate harm" requirement establishes that a state should not "proscribe conduct to reduce the risk of a given harm unless that state proscribe[s] conduct that intentionally and directly causes that same harm."[139] That is, an act that *might* lead to an ultimate harm should not be criminalized, unless an act that *directly* leads to an ultimate harm is also

135. HUSAK, *supra* note 35, at 166.

136. This is so because the language used is to be interpreted by the court as persons in the audience would understand at the time, and in that language. *See Muvunyi*, Case No. ICTR-00-55-A-T, ¶ 25; *supra* notes 78–81 and accompanying text. A counter-argument could be made that DPI must be a direct call for the people themselves to kill. Still, Nzabonimana's words in this hypothetical speech would likely be found to have sent the same message as Muvunyi's—that you will not be punished for killing Tutsi. Also, a leader giving a speech such as this would likely be taken by most, again considering the totality of the circumstances, as incitement for a free pass for all to kill.

137. *See, e.g.*, *Nzabonimana*, Case No. ICTR-98-44-T, ¶¶ 1047–49 (documenting Witness CNAA claims that this event, in conjunction with threats made by Nzabonimana, scared those present at the meeting, and that most people in Gitarama knew of the incident).

138. *Id.* ¶ 1049

139. HUSAK, *supra* note 35, at 165–66.

criminalized. In the context of genocide, giving a speech instructing others to release killers and perpetuate genocide is arguably less direct than forcing the release oneself (that is, one step further removed from the ultimate harm of genocide). Hence, it would appear that in order to satisfy the consummate harm requirement, the more direct action would need to be punishable if the less direct speech is. The Tribunals are clearly willing to punish the latter, and there is seemingly little philosophical justification for why they would then not be willing to punish the former.

It is arguable that Nzabonimana is merely inciting people to *instigate*, or aid and abet genocide, rather than actually inciting them to *commit* genocide themselves. However, the previous comparison of Nzabonimana's actions with Muvunyi's speech still serves to highlight inconsistencies in the law.[140] If the international community can justifiably punish someone for assuring citizens from a podium that they will not be held liable for committing acts of genocide, they should be required to punish a leader who actually forces the release of killers from prison. In fact, as was argued in the intermediate harm context,[141] Muvunyi's promise of impunity is a step removed in many ways from Nzabonimana's actual grant of impunity for genocidal killers. Yet the former is punishable, and the latter is not, save evidence supporting that subsequent crimes took place.

Furthermore, punishing Nzabonimana's acts of instigation

140. *See supra* notes 136-138 and accompanying text. To clarify that the above comparisons—between Muvunyi's promise not to punish and Nzabonimana's release of prisoners—are valid, more detail from the Muvunyi facts is helpful. In the original trial, Witness CCP and YAI testified that Muvunyi said in his speech that the Tutsi wives had to be sent away so they could be killed. *Muvunyi*, Case No. ICTR-00-55-A-T, ¶¶ 68–73. This is essentially the same as if Nzabonimana would have given a speech telling others to release the killers; that is, essentially inciting others to instigate or aid in genocide. This claim that the Tutsi wives should be "sent home" —interpreted as a death sentence —was, in fact, the only claim testified to by all of the Prosecution witnesses, *id.* ¶ 94, except the similarities in all four testifying that he used Kinyarwanda proverbs to encourage killing of Tutsi. *Id.* ¶¶ 121, 126. Based on these witness statements, the Chamber convicted him of DPI. *Id.* ¶¶ 127–28, 131–32. It is, therefore, not entirely clear that his conviction for DPI was only for a direct command for the people in the crowd to kill, as not all of the witnesses testified to that effect. *Id.* ¶¶ 71–73, 90 (documenting that witness YAI did not testify that Muvunyi said that the people themselves should kill; the Trial Chamber did not reject this testimony).

141. *Supra* notes 129–130 and accompanying text; *see also* DUFF, *supra* note 52, at 132; HUSAK, *supra* note 35, at 161.

falls well within the boundaries of the general justifications of inchoate offences.[142] Consider the persuasive position that "we must surely agree that if it is wrong to cause a harm intentionally or recklessly, it is also (and not much less) wrong to attempt to cause such harm . . . ."[143] This reality holds true whether an actor attempts to cause the harm himself or attempts to bring about the harm on a larger scale by inciting many others to act.

Given the particular gravity of the crime, there is a powerful argument that inciting others to commit genocide is not distinguishable (either from a retributivist or consequentialist perspective) from committing acts of genocide oneself.[144] So while it is possible to qualify general attempt as being "not much less" wrong than actual commission,[145] the question remains whether any such distinction in wrongfulness is necessary in the context of genocide. The damage one individual could do with a machete, gun, or bandoleer of grenades is clearly great,[146] but the damage one leader could do with the power and influence to instigate mass acts of genocide is also great. In fact, the damage inflicted by the leader could possibly be even greater, as he is encouraging and creating the environment conducive to mass murder on a scale hardly reached by the individual with the weapons in hand.

The intent to orchestrate genocide involves similar moral culpability as participating in genocide, satisfying retributivist concerns. The potential harm of instigating genocide satisfies consequentialist concerns. Furthermore, the preventative rationale is evident in the Tribunals' justifying DPI as an inchoate offence,[147] as well as in justifying secondary modes of liability.[148] No adequate justification is apparent for why the

142. *See supra* notes 44–63 and accompanying text; *see also* DUFF, *supra* note 52, at 132; HUSAK, *supra* note 35, at 161.

143. DUFF, *supra* note 52, at 134.

144. *Tadic*, Case No: IT-94-1-A, ¶ 191 ("The moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question."). *See supra* note 57 and accompanying text.

145. DUFF, *supra* note 52, at 134.

146. These were the most common weapons used in the Rwanda genocide.

147. Indeed, the U.N. requires punishment for DPI because it believes its punishment will act as a preventative measure. *See supra* notes 15–33, 86–90 and accompanying text.

148. *Travaux préparatoires* of the Genocide Convention, U.N. ORGA, 6th Comm., 3d Sess., 86th mtg., U.N. Doc. A/C.6/3/CR. 86 at 244–48 (Oct. 28, 1948).

same rationale does not apply to highly direct, but slightly less public, incitement; and we are left with no clear reasons why DPI is inchoate and direct instigation is not. The international community should reconsider the arbitrary distinction between the two, especially in light of changing national systems which have already begun to notice and address shortcomings of laws of incitement.[149]

2. The Proposed Change in the Law of the Tribunals Gains Support from the English Reform on the Crime of Instigation

A concrete example of my proposed change is found by looking at the recent reforms in English law.[150] In 2006, the English Law Commission recommended changes in their inchoate offence regime to close an obvious gap. The proposal was to make the following punishable offences:

(1) Encouraging or assisting the commission of an offence ("the principal offence") intending to encourage or assist its commission ("the clause 1 offence");
(2) Encouraging or assisting the commission of an offence ("the principal offence") believing that it will be committed ("the clause 2(1) offence").[151]

149. Additionally, the Statutes already recognize the need to punish leaders and superiors for acts of secondary liability. Article 6(3)/7(3) allows for punishment of superiors even for failing to stop or punish their troops for acts of genocide. For example, Stakić was held liable under Article 7(3) Superior Responsibility for running his prison camp in such a way to create an environment of immunity. *See* Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judement (Int'l Crim. Trib. for the Former Yugoslavia Jul. 31, 2003), http://www.icty.org/x/cases/stakic/tjug/ en/stak-tj030731e.pdf. While "failure to punish" is not inchoate in the way DPI is, its concept of punishing for a leader's setting bad precedent, which will likely lead to further crimes, is similar to such liability. The Tribunals wish to prevent all such behavior. Most, if not all, would agree that a leader is more culpable when *directly* involved in encouraging genocide than he is by failing to punish it. This difference in culpability could additionally account for Superior Responsibility remaining within Article 6/7 in my proposal while direct incitement is moved under Article 2(3)/4(3). Such a notion is clearly underdeveloped, but could serve as a starting point in differentiating general Superior Responsibility from direct instigation of genocide.

150. The English model, along with above mentioned support found in respected philosophy of the criminal law, helps provide a reasoned basis for accepting my proposal.

151. ENGLISH LAW COMMISSION, INCHOATE LIABILITY FOR ASSISTING AND

Clause 1 is particularly relevant.[152] The Law Commission points out that each of these offences "targets very culpable conduct."[153] Indeed, "[i]n order to be convicted of the clause 1 offence, the defendant (D) must not only deliberately seek to encourage or assist the principle (P) but also do so with the intention that P should commit the principal offence or be encouraged to commit it."[154] The Commission focuses on the moral culpability of the agent as the justification for criminalization,[155] using an example where "D encourages P to murder V," but "[t]he police arrest P in connection with another matter just as P is about to leave home to murder V."[156] The encouraged crime is not committed, so in one sense no harm has been done. However, the Commission convincingly points out:

> [T]he moral quality of D's conduct is unaffected by the fact that P has not murdered or attempted to murder V. It was D's intention that actual harm should occur. Should D be exonerated, it might be thought that the law was "speaking with a strange moral voice."[157]

Parliament was apparently convinced by the Commission's reasoning because the proposal was passed into law, with only minor adjustments, in §44 of the Serious Crime Act of 2007. It reads as follows:

> ENCOURAGING OR ASSISTING CRIME
> Inchoate offences
> 44 Intentionally encouraging or assisting an offence
> (1) A person commits an offence if–
> (a) he does an act capable of encouraging or assisting the commission of an offence; and
> (b) he intends to encourage or assist its commission.

ENCOURAGING CRIME, 2006, Law Comm'n No. 300, at 8 [hereinafter LAW COMMISSION].

152. Clause 2 is included simply to highlight the national jurisdiction proposing an even lower threshold than is proposed in this Note (that is, "believed", in addition to "intended").

153. LAW COMMISSION, *supra* note 151, at 8.

154. *Id.*

155. Reflecting a retributivist perspective.

156. LAW COMMISSION, *supra* note 151, at 8.

157. *Id.* (quoting R.A. DUFF, CRIMINAL ATTEMPTS 134 (1996)).

> (2) But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act.[158]

Such an influential critique of incitement on a practical level is important to ground this Note's proposal in reality. That English law can successfully implement an expansion of instigation, not limited by the constraint that it be "public," makes it more feasible for international bodies, such as the ICTR and ICTY, to follow suit.[159] The Commission's rationale easily applies to the grave consequences and harm that comes from inciting genocide. If this reasoning is appropriate in cases of encouraged murder, it is surely appropriate for encouraged mass murder.

3. Mitigating the Dangers of Making Instigation too Broad

Part of the justification for defining non-direct and non-public incitement as a mode of liability rather than an inchoate offence is preventing "instigation" from becoming too broad or too sweeping.[160] The concern here is obvious: in any criminal system, spreading the net so wide so as to catch innocent persons as well as the guilty is undesirable.[161] Prevention,

158. Serious Crime Act, 2007, c. 27, §44 (Eng.).

159. Other national jurisdictions similarly allow at least some punishment for attempted instigation. Israel, for example, has a separate offence of "attempt to instigate" where the perpetrator can be punished, albeit less harshly than in cases of successful instigation, for the failed instigation. Itzhak Kugler, *Israel*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 371 (Kevin Jon Heller & Markus D. Dubber eds., 2011). Similarly, in Indian law, abetment by instigation and abetment by conspiracy are offences, regardless of whether the principal committed the substantive offence. Stanley Yeo, *India*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 296 (Kevin Jon Heller & Markus D. Dubber eds., 2011).

160. Arguin Interview, *supra* note 95.

161. Terrorism laws are a clear example of this problem. Take for instance England's "encouragement of terrorism" offence. Terrorism Act, 2006, c. 11 § 1 (Eng.). "If D publishes a statement which some members of the public are likely to see as direct or indirect encouragement of acts of terrorism and he knows that there is a risk of this occurring, he is guilty of the offence of encouraging terrorism." Victor Tadros, *Justice and Terrorism*, 10 NEW CRIM. L. REV. 658, 671 (2007). This is clearly too broad, and it is left up to not only discretion, but also one's perception or even personal bias. *See id.* (articulating more fully the concerns with this type of law); ASHWORTH, *supra* note 36, at 444 (expressing concern regarding terrorism offences). The proposal for this

indeed, can get out of hand, and it is important to be mindful of this ever-present trap within the criminal law. It is important with any proposed crime to keep in mind that under limited a criminal law, for criminal sanction to stay within the boundaries of attempted crimes, the criminalized behavior must consist of "more than merely preparatory" act[s]."[162] Several possible ways to prudently limit the expansion of DPI to avoid over-breadth are discussed below.[163]

First of all, an important limiting factor is the requirement of a relationship to genocide. "Direct and public incitement to commit genocide," as the name suggests, is only punishable when related to genocide. The proposed change would also be so limited as to only apply to direct incitement *of genocide*. This expansion does not apply to any other crime within the Tribunals' jurisdiction. There could never, for example, be a conviction for direct incitement to commit war crimes or crimes against humanity as an inchoate offence.[164]

Applying a minimalist four-prong test for risk prevention offences[165] should further ease concerns about over-breadth. The first restrictive principle is a "*substantial risk* requirement."[166] Essentially, the risk or harm sought to be prevented cannot be trivial.[167] This principle is met here, as evident from the similarities noted above between the actions of Muvunyi and Nzabonimana: if Muvunyi's speech creates a substantial risk that the acts encouraged will take place, then Nzabonimana's direct release of *génocidaires* equally presents a similar substantial risk of acts of genocide taking place.

The second principle is to have a "*prevention* requirement," which "entails that the proscription in question must actually decrease the likelihood that the ultimate harm will occur."[168]

Note is much narrower.

162. ASHWORTH, *supra* note 36, at 444.

163. The limiting factors are admittedly underdeveloped, as each would take much additional research and consideration. The factors listed are simply included to highlight the numerous potential ways that "direct instigation" can be treated as an inchoate offence without going too far.

164. I am not proposing that such a crime should never exist. This limitation is simply one possible way to ease concerns of making instigation law too broad. Also, while implicated, justifying the criminalization of direct instigation to commit other crimes is outside the scope of my argument.

165. This is the test developed by Husak. *See* HUSAK, *supra* note 35, at 161.

166. *Id.*

167. *Id.*

168. *Id.* at 162.

Applied particularly to "attempt," "[t]he particular crime attempted must be specified in the indictment and generally refers to the ultimate harm to be reduced by the inchoate offence."[169] The only argument necessary for our purposes is that if criminalizing DPI based on prevention is justified, so is criminalizing other forms of direct incitement to commit genocide.[170]

The third principle is the "*consummate harm* requirement," which requires that an act cannot be proscribed in order to reduce the risk of a particular harm, unless acts which "intentionally and directly" bring about that same harm are also proscribed.[171] As established above, this requirement would be satisfied because using authority to force the release of killers is arguably more direct than encouraging others to do so through a speech.[172] Other direct and intentional acts that bring about genocide, beyond DPI, should also be proscribed.

The final principle in the minimalist test is the "*culpability* constraint," which "rejects criminal laws that are more extensive than necessary to achieve their objectives"; that is, the law should not be overbroad.[173] The strong *mens rea* element of the crime of genocide satisfies this principle, since the proposed inchoate form of instigation would only capture those who truly desire to incite genocide.[174] Applying this restrictive test should ease concerns about making the law of incitement to genocide too broad or expansive.[175]

169. *Id.* at 163. This concept is helpful in and of itself in keeping the proposed expansion of DPI from expanding too far. *See infra* note 179.

170. Empirical data would be necessary to show that this requirement is met for either DPI or "direct incitement." While adequate research on this issue has not been conducted for this note, it is likely that any empirical evidence showing tangible success in preventing acts of genocide coming from the inchoate status of DPI would be quite similar to successful prevention stemming from an inchoate "direct incitement" status.

171. HUSAK, *supra* note 35, at 165–166. This principle is highly relevant, hence its inclusion above. *See supra* note 139 and accompanying text.

172. *Supra* note 139 and accompanying text.

173. HUSAK, *supra* note 35, at 168.

174. Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Appeal Judgement, ¶ 37. (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

175. The inchoate form of instigation related to genocide also likely passes Husak's proposed internal and external constraints. The four internal constraints on the criminal law are: "the *non-trivial harm or evil* constraint, the *wrongfulness* constraint, the *desert* constraint, and the *burden of proof* constraint." HUSAK, *supra* note 35, at 55. The three external constraints are to be applied with the equivalent of U.S. Supreme Court intermediate scrutiny, and each law must be shown to: (1) aim toward a substantial state interest;

The principle of causality could provide another potential limitation. Two important functions are served by causality: (1) "it guarantees that criminal liability will be personal rather than vicarious," and (2) "causation is a tool used to calibrate the appropriate level of a wrongdoer's punishment."[176] A causal link is required for a conviction of instigation under Article 6(1)/7(1).[177] While it is not possible to require causality for an inchoate offence, keeping the requirements for 6(1)/7(1) instigation in mind may help limit the more attenuated actions while still justifying attaching guilt in appropriate cases. For example, in Nzabonimana's case, the *génocidaires* would have remained in prison but for his actions. He caused their release.[178] The proposed standard for an inchoate offence of instigation could apply a similar rationale and include an element stating that the instigator must have put the principal in a position he or she would not otherwise have been in, or directly increased the risk of someone carrying out the desired result. Another possibility, taken from the minimalist theory of criminal law, would be to require that "the particular crime" intended by the instigator "be specified in the indictment and generally [refer] to the ultimate harm to be reduced by the inchoate offence."[179]

In addition to considerations of causality, specific intent requirements are necessary to protect against unwarranted convictions for incitement to commit genocide. This requirement is consistent with the understanding of solicitation in some national jurisdictions, including the United States. United States law states that "[a] person is not guilty of solicitation unless he intentionally commits the *actus reus* of the inchoate offence – he intentionally invites, requires, commands, hires, or encourages another to commit a crime – with the *specific intent* that the other person consummate the solicited crime."[180] In the context of the Tribunals, such intent,

(2) directly advance that interest; and (3) be no more extensive than necessary to achieve its objective. *Id.* at 132, 145, 153.

176. DRESSLER, *supra* note 9, at 468.

177. Prosecutor v. Dario Kordić & Mario Čerkez, Case No. IT-95-14/2-A, Trial Judgement, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 17, 2004); Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Appeal Judgement, ¶ 127 (Jul. 7, 2006).

178. It is important to note, however, that direct causation is not a standard for instigation under the Tribunals' jurisprudence. *See supra* note 96.

179. HUSAK, *supra* note 35, at 163.

180. DRESSLER, *supra* note 9, at 413 (emphasis added).

as well as the *actus reus*, must as always be proven beyond a reasonable doubt.[181] This requirement poses no problems for attaching liability to Nzabonimana, as the Trial Chamber found that he had genocidal intent in releasing these killers.[182]

Remaining concerns could be addressed by sentencing guidelines. For example, the inability to connect an act of instigation to an actual crime could result in a lesser sentence.[183] Or if some are still convinced that DPI is a worse offence, "direct incitement" could be given a lower sentence. It is preferable to have a scaled punishment for scaled culpability, rather than simply not punishing at all.

In sum, concerns of over-breadth are easily mitigated. Many philosophical and practical limitations can be used to ensure that liability is applied cautiously, rather than simply avoided all together.

CONCLUSION

The Tribunals are left with the reality that some culpable, incredibly dangerous and destructive behavior can fall through the cracks within the current system. Ultimately, expanding inchoate liability to include all direct instigation of genocide is necessary to avoid unwarranted gaps in the law. Some punishment should be available for a Trial Chamber to impose upon an offender who it finds beyond a reasonable doubt instigated others to commit acts of genocide; that is, if the Tribunals wish to be consistent with the purposes behind attaching inchoate liability to speeches of incitement. Additionally, a strong case can be made that, when dealing with genocide, the stakes are too high to acquit someone who has instigated others to commit genocide with genocidal intent.

181. *See, e.g.*, Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-T, Trial Judgement, ¶¶ 6, 29 (Feb. 11, 2010) (citing Nahimana et al, v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgement, ¶ 524 (Nov. 28, 2007)) (stating the rule that the standard of proof for either is "beyond a reasonable doubt," permitting circumstantial evidence "[i]n the absence of direct evidence" to infer genocidal intent "from relevant facts and circumstances that can lead beyond reasonable doubt to the existence of the intent, provided that it is the only reasonable inference that can be made from the totality of the evidence.").

182. Prosecutor v. Nzabonimana, Case No. ICTR-98-44D-T, Trial Judgement, ¶ 1724 (May. 31, 2012).

183. The Netherlands, for example, imposes a less severe punishment for those convicted of attempt where the criminal act did not come to fruition. *See* J.A.W. Lensing, *The Netherlands*, *in* INTERNATIONAL ENCYCLOPEDIA FOR CRIMINAL LAW 79, Part I, ¶ 154 (Frank Verbruggen ed., 1997).

Such offenders have greatly increased the risk of a non-trivial harm or evil. They have clearly committed an action customary international law should recognize as wrong, are deserving of some retributive desert, and the punishing body can clearly articulate the importance of punishing this type of behavior.[184]

Including direct instigation to commit genocide as an inchoate offense has strong backing in numerous philosophies of criminal law, as well as in national legal systems, and therefore should not be considered a grave expansion of international criminal law. The recent case of Nzabonimana highlights the inconsistency of the current law and the importance of finding a solution. Acquitting a perpetrator of direct instigation to commit genocide runs contrary to notions of justice, and mending such a gap in the existing law can be accomplished without casting the net too wide.

184. Again satisfying Husak's internal constraints. HUSAK, *supra* note 35.