Chapter 3

Propaganda as a crime under international humanitarian law: theories and strategies for prosecutors

*Dan Saxon**

In war, almost everything is a matter of representation.

J.J. Frésard[1]

Why prosecute propagandists?

During war, the lawful job of soldiers is to kill the enemy and destroy its ability to fight, often risking the soldier's life in the process. Propaganda can play an important role in instilling a belief system—be it complex, such as the ultimate triumph of Soviet communism over fascism and capitalism, or more simple, such as the "need" to exterminate Europe's Jews—that conditions soldiers to repeatedly risk their lives.[2] For many fighting men and women, the nuances of ideology are probably less important than a sense of purpose, because to die for nothing is unthinkable.[3]

Thus, it is not a crime for politicians and military commanders to encourage their fellow citizens to go to war or to kill enemy soldiers.[4] Killing the enemy, however, particularly at close range, requires soldiers to deny the humanity of their opponents.[5] That, for most people, is an abnormal act that requires "appropriate" psychological conditioning. Therefore, one may view speech intended to provide such encouragement and sense of purpose as a normal, even patriotic act, necessary to induce young men and women to enter the abnormally aggressive and hostile world of combat. Prosecutors who enforce international humanitarian law (IHL) must separate speech and other forms of expression intended to encourage the lawful killing of enemy soldiers from illegal communications promoting the unlawful killing and mistreatment of civilians and others *hors du combat*.

The International Committee of the Red Cross (ICRC) has identified four ideological premises commonly offered by belligerents to justify violations of the law of armed conflict:

* Dan Saxon, Visiting Professor, Cambridge University, Senior Prosecuting Trial Attorney, Office of the Prosecutor, United Nations International Criminal Tribunal for the Former Yugoslavia. The views expressed herein are those of the author(s) alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

1 The conviction that the group, ethnic community or nation is fighting for its very survival, and that consequently the humanitarian conventions no longer apply;
2 The conviction that the conflict is one between Good and Evil and that it is a matter of defending superior principles, such as the destruction of fascism or the preservation of "civilization;"
3 Hatred, accompanied by demonization, of the enemy, is often whipped up very effectively and cynically; this is much more often a political tool rather than the result of "ancestral animosities" or spontaneous human emotions;
4 The issue of reciprocity is omnipresent in the reasons put forward to justify violations of IHL; while this is probably a profoundly atavistic reaction (I hurt you because you hurt me), it is also frequently used by those in power, who accuse the adverse party – sometimes quite falsely – of committing the most heinous atrocities.[6]

When the expression of such ideas contributes to the commission of crimes, the speaker/writer may be held accountable for his or her individual criminal responsibility. In this chapter, the author describes the processes undertaken by international prosecutors to establish the individual criminal responsibility of persons who use propaganda to commit, instigate and/or aid and abet violations of the laws of armed conflict.

Challenges to the investigation of massive crimes

Any international prosecution of persons accused of violations of international humanitarian law is a complex affair. Tribunals such as the ICTY, the ICTR and the ICC are located thousands of kilometers from the crime scene(s). Crucial forensic evidence often lies buried in mass graves located in war zones. Eyewitnesses to crimes may be few and often scattered around the world as refugees. Documentary evidence may be non-existent or hidden away in archives which governments shield from view. Once sufficient evidence is gathered to support indictments, accused may remain fugitives for years. Individuals such as Joseph Kony, leader of the Lords Resistance Army in Uganda, and Omar Hassan Ahmad Al Bashir, President of Sudan, indicted by the ICC in 2005 and 2009 respectively and Ratko Mladić, indicted by the ICTY for his role in the events at Srebrenica in Bosnia and Herzegovina in 1995, fall into this category. After arrests occur, the logistics and costs required to conduct a trial may be staggering.

International tribunals established to redress violations of international humanitarian law lack the resources to investigate all crimes and every potential accused. Thus, prosecutors must make difficult choices to select a limited number of events to investigate and a limited number of accused to prosecute. At the ICTY, guidelines for the commencement of investigations emphasize a number of factors for consideration including:

1 The seriousness of the crimes, the numbers of victims, the duration of the offenses and the scope of destruction;

2 The role of the person under investigation, especially his or her position in the political or military hierarchy, the extent of his or her authority, and his or her alleged participation in the crimes under investigation;
3 Whether the persons and the crimes to be investigated were exceptionally notorious, even though the persons did not hold a formal hierarchical position.[7]

Massive crimes, such as the mass murders and the expulsions of entire communities from their homes common to contemporary armed conflicts, require the assistance of large numbers of persons who believe—often passionately—that the atrocities they commit are justified, necessary and even legal. The process of instilling such poisonous beliefs—often performed by leaders trying to fulfill political, military and/or economic agendas—may be crucial to the ultimate commission of such crimes. Prosecutions of serious violations of international humanitarian law based on the use of propaganda bring additional challenges to international prosecutors, who often do not speak, read or understand the language that forms the core of alleged criminal responsibility. The social, cultural, political and historic nuances of language and its forms of expression may be foreign to the prosecutor, whose task is to prove that the use of particular language and expression was a crime. Years of careful (and costly) translation, study and multidisciplinary analysis often underlie criminal charges for the use of speech.

Given these complexities, even prior to the search for evidence, international prosecutors should draft a comprehensive investigation plan designed to locate all forms of incriminating and exculpatory evidence in an efficient manner. The purpose of the investigation plan is to clarify the investigative objectives and evidence collection methods. Any such plan should discuss the following issues:

1. A summary of the proposed investigation which identifies the parameters and subject matter.[8]
2. Fundamental questions: every investigation poses fundamental questions that the investigation will attempt to answer through the collection of credible and reliable evidence. For example, "during the armed conflict in country A, did the public speeches of government members encourage Christian soldiers and Christian civilians to murder Muslim civilians?" Clear questions ensure that the investigation will maintain the focus necessary to effectively identify and collect the most relevant evidence.[9]
3. Legal framework of the Investigation Plan: any investigation must identify the specific legal elements of the crimes alleged (for example, to prove the occurrence of a crime against humanity, prosecutors must demonstrate a widespread or systematic attack against a civilian population) and the legal theories of individual criminal responsibility that will underlie any prosecution (for example, accused "X," a government Minister, committed, instigated and/or aided and abetted the murder of Muslims). Prosecutors must provide investigative staff with clear definitions of the legal elements and theories of criminal liability, as well as examples of the types of evidence likely to be relevant to establish each element and theory.[10]
4. Investigative avenues: large investigations often include several primary investigative avenues. For example, to evaluate whether a political figure illegally used speech to commit, instigate and/or aid and abet crimes, prosecutors and investigators will review the politician's televised speeches, radio broadcasts and interviews and published writings. In addition, investigative staff will interview the persons who saw, heard and/or read those expressions in order to adduce the effect of that speech on the targeted audience, which may be the general public, an army brigade, or a platoon of insurgents. "Each of these discreet 'sub-investigations' should be the subject of a separate section of the investigation plan, with clearly articulated goals and methods."[11]
5. Summary of what is presently known: large amounts of information about armed conflicts, and even particular crimes, are often accessible to international prosecutors prior to the commencement of a formal criminal investigation. The UN and other inter-governmental institutions, NGOs such as Human Rights Watch and Amnesty International, universities and independent research institutions often produce detailed reports about past or ongoing armed conflicts. Media reports, if reliable, may be another important source of information. Review of such information permits prosecutors to design their investigations in a more knowledgeable way.[12]
6. Potential witnesses to be interviewed: a list of potential witnesses should describe the identities of the individuals when known and the categories of persons when specific identities are unknown. The list should also explain the kinds of information that might be in the possession of such persons and the relevance of that evidence to the fundamental questions and the legal framework of the investigation.[13] Furthermore, in cases involving the use of propaganda in various forms and contexts, investigators must identify those witnesses who can discuss the evidence and explain its significance to the judges.
7. Documentary Evidence: any investigation addressing the use of propaganda requires the location and review of the writings, speeches, interviews and any other forms of public expression by the persons involved. The purpose of this section of the investigation plan is to describe all of the possible sources of such documentation and identify any obstacles to obtaining access to them. It is not uncommon, particularly while armed conflicts are ongoing or in the immediate post-war period, for hostile governments and belligerent parties to block access to archives that are important sources for documentation. Any international prosecutor must be acutely aware of these political and strategic concerns while planning and conducting an investigation. Efforts to overcome these obstacles may involve complex and time-consuming litigation involving the prosecution, the recalcitrant state and the international tribunal.[14]
8. Investigative Tasks: the prosecutor leading the investigation should develop a list of tasks to be allocated to members of the investigation team. Each task

should include specific requirements, a schedule for completion and the expected work product.[15] The last criteria is the most important as the prosecutor must project far into the future to the day he or she is presenting this evidence in the courtroom during the trial. What form will the evidence take? Oral? Written? Photographic? Will it be simple or complex? Will the evidence require translation into other languages and if so, do the resources exist to produce those translations? Especially when a case involves the allegedly criminal use of speech or other forms of expression, the prosecutor must plan carefully that all relevant texts of written works and/or recorded speeches and other documents will be accurately translated from the original text to the official languages of the international tribunal. Prosecutors must design mechanisms for revision and "quality control" to ensure that all charges are based on accurate translations and interpretations of the accused's use of language or other forms of expression. The prosecutor must consider these questions from the commencement of the investigation to ensure that all important evidence may be used effectively during trial.

9. Periodic Review: the progress of any international criminal investigation should be assessed periodically to determine whether the objectives of the original plan remain feasible. Alterations to the plan may be appropriate as the production of new evidence provides additional insights to the alleged criminal events and the persons responsible for them.[16] At all stages of an investigation, prosecutors should maintain an open mind about the responsibility of individuals. In order to ensure that all proceedings are fair, they should be prepared to consider conflicting evidence including evidence that might exonerate an accused.[17] When exculpatory evidence makes charges impossible to prove, prosecutors must be prepared to stop an investigation and/or dismiss the charges.

The education of international prosecutors on the significance of propaganda

During the development of the investigation plan and thereafter, the international prosecutor must undergo his or her own process of study; not only of the language of the accused and/or suspects, but also of the context in which the accused made his or her speech. Ideas do not take hold in social and political vacuums.[18] What may sound like benign political or social language may take on entirely different meanings if expressed during a time of war or rising political, ethnic or nationalist tensions. For example, a TC at the ICTR held that one could not properly interpret accused Simon Bikindi's songs "without considering the cultural, historical and political context in which they were composed and disseminated."[19]

International human rights treaties reflect the tensions that may exist between the right to freedom of expression and other fundamental human rights.[20] For example, according to Article 18 of the UDHR, "everyone has the right to freedom of thought, conscience and religion."[21] Importantly for the use of propaganda, Article 19 provides:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas *through any media and regardless of frontiers*.[22]

Preceding provisions of the UDHR, however, would seem to limit the potential for expression under Articles 18 and 19. For example, Article 1 provides: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[23]

According to Article 2:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[24]

The judgments from the European Court of Human Rights (ECHR) provide some guidance as to when so-called "fighting words;" the expression of tough, even violent communications in a democratic marketplace of ideas, cross the frontier between lawful and illegal speech. In *Sürek and Özdemir v. Turkey*, a Judgment issued on 8 July 1999, the ECHR held that the determining factor when evaluating whether political speech can be legitimately restricted is: "Does the speech or communication constitute incitement to violence, or is it capable of inciting violence?"[25]

In a concurring opinion to the Judgment in the same case, five judges of the ECHR suggested that less attention should be given to the form of words used and more attention directed to the *general context* in which the words were used and their *likely impact*:

> Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? . . . Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?[26]

Furthermore, one measure of the effectiveness of a defendant's use of propaganda will be evidence that the accused's forms of speech shaped the language of the time. After the commencement of the propaganda campaign, did the accused's vocabulary and forms of expression become part of the general public's universe?[27] In the former Yugoslavia, words like "Ustasha" and "Balija," derogatory terms for Croats and Muslims respectively, became common in the documents of Serbian armed forces and Serbian government bodies, as did the use of words

Second World War, the IMT found that Julius Streicher's incitement to murder and exterminate Jews at the time when Jews in Eastern Europe were massacred constituted persecution as a crime against humanity.[35]

More recently, at ad-hoc Tribunals such as the ICTY and the ICTR, the basis of individual criminal responsibility within the mode of "commission" frequently lies in the accused's participation in a criminal scheme referred to as a JCE. A conviction based on a JCE requires proof of the existence of a group of persons who share a common purpose that involves the commission of a crime.[36] In addition, it must be established that the accused participated in and shared the common purpose.[37] Crucially, for cases involving purveyors of propaganda, this participation need not involve the commission of a specific crime under a Tribunal's statutory provisions (for example, murder, deportation, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common criminal design.[38]

A participant in a JCE need not be physically present when and where the crime occurs nor have an agreement with the principal perpetrator who actually carries out the crime.[39] Indeed, the principal perpetrator need not share the common criminal purpose. But what is essential to impute criminal liability to a member of a JCE for a crime committed by another person is that the crime in question forms part of the common purpose.[40]

Accordingly, the doctrine of JCE provides a legal framework for holding accountable those members of leadership groups who personally perpetrate no crimes, such as, for example, Julius Streicher, but whose acts and omissions, such as the production and dissemination of propaganda, promote armed conflict for criminal ends. Evidence of broad criminal policies and objectives—such as the expulsion of members of religious, national or ethnic groups from a territory—can serve as the strategic and operational framework in which individual political and military leaders disseminated particular kinds of speech. Therefore, prosecutors who investigate the possible criminal use of speech during armed conflict also should establish whether the accused acted to further broader criminal objectives, or, as one court described it, a "genocidal enterprise,"[41] and whether the accused's use of speech furthered those illegal goals.

Accordingly, individual expressions of propaganda cannot be considered in isolation. International prosecutors should develop evidence demonstrating that propagandists participated in local, regional and or national programs of persecution that may involve large numbers of persons. The most powerful evidence will be proof that the accused identified with such a program and devoted himself or herself to its accomplishment, thereby placing his or her expressions in the "proper" criminal context.[42] For example, after the Second World War, the judges trying the major war criminals at Nuremburg found that when Julius Streicher published his weekly *Der Stürmer* newspaper with its virulently anti-Semitic articles, letters and drawings, he did so as part of a broader Nazi campaign designed to free "the world of its Jewish tormentors."[43]

More recently, during the ICTY trial of Bosnian Serb leader Radoslav Brđanin, the prosecution presented evidence about the six strategic goals of the Serbian

People of Bosnia and Herzegovina. One of these strategic goals was the permanent and illegal removal of a significant part of the non-Serb population from the territory of the planned Bosnian Serb state. The evidence demonstrated that these goals constituted a "Strategic Plan."[44] In its judgment, the TC found that Brđanin:

> made one of his most substantial contributions to the implementation of the Strategic Plan by way of a propaganda campaign against Bosnian Muslims and Bosnian Croats, which he conducted before, during and after holding the positions of President of the ARK Crisis Staff, and which merits separate examination. The Trial Chamber is satisfied that the Accused intentionally and systematically made inflammatory statements on the radio, television and print, using the media as a tool to further the implementation of the Strategic Plan.[45]

The TC, for technical reasons, declined to find Brđanin criminally responsible as a participant in a JCE. However, these reasons were subsequently overturned on appeal.[46] The TC's finding above demonstrates the value for prosecutors, when possible, to place an accused's use of propaganda within the broader context of a common criminal plan.

Participation in a criminal scheme through the use of propaganda also may involve speech that misleads or threatens personnel who try to assist victims of violations of international humanitarian law. For example, over the course of several days in July 1995, Bosnian Serb forces executed several thousand Bosnian Muslim men and boys from in and around the so-called "safe area" of Srebrenica. These executions took place according to a "pre-conceived, coordinated plan to murder" the able-bodied Bosnian Muslim males from Srebrenica and the murders were organized as part of a massive, "wide scale, premeditated killing operation."[47] A TC at the ICTY recently found that the large number of persons who assisted in the implementation of this plan participated in the common criminal purpose and shared the intent to murder.[48]

Almost in parallel, the Bosnian Serb forces at Srebrenica also implemented a second JCE, a plan to forcibly remove the Bosnian Muslim population from the safe area. This plan commenced with the issuance of a directive by the main staff of the VRS to the commands of VRS corps in March 1995. The directive instructed the Drina Corps, responsible for the area that included Srebrenica, to "create an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of Srebrenica."[49] The Drina Corps pursued this plan by restricting the amounts of humanitarian aid to the enclave and with military attacks including the indiscriminate shelling of civilians, and culminated in the terrorizing of the residents of the town.[50] The Bosnian Serbs finally achieved this second common criminal purpose through the busing of Bosnian Muslim women, children and elderly men out of the enclave.

One of the participants in the common purpose to expel Bosnian Muslims from Srebrenica was VRS General Milan Gvero, who was responsible for Morale, Legal

and Religious Affairs for the VRS Main Staff. One of his tasks was the dissemination of information and propaganda for the troops before and during combat operations. On 10 July 1995, as the VRS advanced on Srebrenica, a UN official notified the VRS that, as a response to the VRS attack, NATO air strikes had been approved. On the same day, General Gvero issued a statement to the media in which he explained that the Bosnian Serb army's combat activities were directed only towards neutralizing Muslim terrorists and was not directed against civilians or members of the UN:

> Our combat activities at the moment are directed towards simply neutralizing the Muslim terrorists, and are in no way directed against civilians or members of (the United Nations) . . . The civilians from Srebrenica who wish to do so can in an organized and safe manner leave the settlement. All in all, there is no reason for the media and foreigners to get involved in the Muslim war propaganda.[51]

The ICTY TC held that the purpose of General Gvero's press release was to mislead the international authorities concerned with protecting the Srebrenica safe area in order to delay any action on their part that could obstruct the efforts of the Bosnian Serb army.

Furthermore, General Gvero effectively threatened a high-ranking UN official that, unless NATO air strikes on Bosnian Serb positions near Srebrenica ceased, there might be serious consequences for the UN personnel and Muslim civilians still in the Srebrenica area.[52] The Tribunal observed that at the time of General Gvero's threat, NATO air strikes were the only means to stop the capture of the Srebrenica enclave. Thus, from the Bosnian Serbs' perspective, the NATO air strikes were the last significant obstacle to their plan to occupy Srebrenica and expel its inhabitants. The importance of General Gvero's threat was reflected in a conversation that he had with Bosnian Serb President Radovan Karadžić shortly after General Gvero's discussion with the UN official. General Gvero described his discussion with the UN official and told Karadžić: "[e]verything is going according to plan. Don't worry."[53] Indeed, the Prosecution's evidence demonstrated that the plan included the use of "aggressive propaganda."

The TC found that the evidence that Gvero disseminated false information and issued a serious threat demonstrated that Gvero had a limited but important role in supporting the Bosnian Serb objective to expel the Bosnian Muslim population of Srebrenica:

> As a senior assistant commander, cloaked with authority from the highest echelons, Gvero took steps to block protective action in favor of the enclave by international authorities, notably UNPROFOR and NATO. The Trial Chamber is satisfied that by disseminating false information and issuing a serious threat, whether effective or not in the end, Gvero made a contribution to the JCE which by its nature cannot be classified as other than significant.[54]

The TC also found that the forceful manner in which General Gvero carried out his actions, coupled with his own words to Radovan Karadžić: "everything is going according to plan" illustrated Gvero's shared criminal intent.[55] For his significant contribution to the JCE, the TC found General Gvero guilty of the crimes against humanity of inhumane acts (forcible transfer) and persecution of the Bosnian Muslim population of Srebrenica.[56]

The conviction of General Gvero for his participation in the JCE is important for three reasons. First, it is the first conviction of a participant in the tragic events at Srebrenica for the use of propaganda.[57] Second, the conviction demonstrates that, in particular circumstances, individuals may incur criminal responsibility under international law for their obstruction of organizations dedicating to assisting populations in distress.[58] Lastly, and crucially, it confirms that proof of the effectiveness of propaganda is *not* a determinative factor to prove liability, at least under the JCE mode of criminal responsibility.

This last finding suggests a relatively low evidentiary threshold for culpable participation in a JCE, provided that the accused shares the requisite intent to further the criminal purpose. At first blush, it appears contradictory to suggest that an individual can make a significant contribution to a JCE via an ineffective act or omission. Nevertheless, these situations may arise, such as when one participant in a common criminal scheme to attack civilians joins other participants in firing weapons at the intended victims, but, through poor aim or other reasons, fails to actually shoot any victims. The shooter who missed would still contribute to the JCE.[59] Furthermore, the legal standard for a determination of prohibited speech, set by the *Sürek and Özdemir* jurisprudence from the ECHR, mentioned above, does not require that speech actually incited violence but rather that it was capable of doing so. Thus, the TC's findings that General Gvero incurred criminal responsibility for his use of propaganda "whether effective or not" is consistent with the standards set by the jurisprudence of the ECHR.

It is important to note that the ICC does not subscribe to the JCE theory of individual criminal responsibility. Instead, the ICC applies the concept of liability known as co-perpetration through joint control over the crime.[60] This theory is similar to JCE in that it also includes the existence of a common criminal plan, the utilization of the principal perpetrators by the members of the plan, etc.[61] However, the ICC has also raised the bar for proving this form of criminal responsibility. For example, ICC prosecutors must demonstrate that the contribution of a co-perpetrator to the execution of the criminal task was "essential" rather than the "significant" standard applied to cases of JCE.[62]

Instigation

Instigation "means prompting another to commit an offence."[63] To prove a defendant's criminal responsibility as an instigator, prosecutors must demonstrate that the instigation was a factor clearly contributing to the conduct of other persons

committing the crime. Thus, unlike the relatively low threshold to establish that propaganda was a significant contribution to a JCE, a determination that speech instigated others to commit a crime would require a finding that the speech was effective. Furthermore, the prosecutor must demonstrate that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his or her acts or omissions.[64]

An ICTY TC found that the public speeches of Bosnian Serb leader Radoslav Brđanin instigated the commission of crimes committed against non-Serbs in the ARK:

> [i]t has been abundantly proved that the Accused made several inflammatory and discriminatory statements, . . . advocating the dismissal of non-Serbs from employment, and stating that only a few non-Serbs would be permitted to stay in the territory of the ARK. In light of the various positions of authority held by the accused throughout the relevant time, these statements could only be understood by the physical perpetrators as a direct invitation and a prompting to commit to crimes. Against this background, the Trial Chamber is satisfied that the Accused instigated the commission of some crimes charged in the indictment.[65]

Moreover, on 11 July 1995, after Bosnian Serb forces captured the town of Srebrenica, a television crew in Srebrenica filmed General Ratko Mladić, then the commander of the VRS, as he savored the VRS's victory. "[T]he time has come," said General Mladić, "to take revenge on the Turks in this region."[66] The mass expulsions of Bosnian Muslim women, children and elderly began the next day and the mass executions of Bosnian Muslim men and boys by VRS forces began two days after General Mladić's statement.[67] The video of General Mladić's call for revenge, even standing alone, would be powerful evidence that General Mladić prompted his soldiers to commit crimes. In addition, testimony of individual soldiers and officers (if available) that they heard General Mladić's speech and acted upon his call to take revenge, would further establish that General Mladić's speech was a factor clearly contributing to their decision to commit the crimes at Srebrenica.

Furthermore, additional contextual evidence might underline the likely impact of General Mladić's call for revenge on the actual perpetrators. On the evening of 11 July 1995, after General Mladić made his public call for revenge against the "Turks," General Mladić, in the presence of several other VRS officers, told a representative of the Bosnian Muslim community in Srebrenica: "I need to have a clear position of the representatives of your people whether you want to survive . . . stay or vanish."[68]

At a similar meeting held the following morning, General Mladić told other representatives of the Bosnian Muslim population:

> There is no need for your people to get killed, your husband, your brothers or your neighbors. All you have to do is say what you want. As I told this gentleman last night, you can either survive or disappear.[69]

This kind of contextual material provides circumstantial evidence that General Mladić, and, by inference, his VRS subordinates, intended to commit crimes against the Bosnian Muslim residents of Srebrenica, or, at a minimum, were considering this course of action. When viewed in this broader context, General Mladić's public call for revenge carries an even more ominous tone. The totality of this evidence would make it more difficult for General Mladić to advance an argument that his speech was not a clear contributing factor to the mass executions and expulsions at Srebrenica. Similarly, when viewed together, this material is powerful evidence of General Mladić's intent to instigate his subordinates to commit these crimes.[70]

The challenge for prosecutors to demonstrate a criminal state of mind will always be to prove that particular expressions were meant to inflame passions rather than to appeal to lawful and rational instincts. Some evidence may yield patterns of repeated expressions which, when viewed together, reveal an intent to instigate others to commit criminal acts. The creation of a chronology of the expression of such speech, the forums used, the audiences targeted and the past and subsequent commission of crimes often serves as a practical tool to demonstrate criminal intent. Chronologies also serve as dramatic visual aids to rebut suggestions that speech or other forms of expression had a more benign purpose.

Aiding and abetting

Aiding and abetting means that an accused performed an act consisting of practical assistance, encouragement or moral support to the principal offender of the crime. The act of assistance must have had a substantial effect on the commission of the crime by the principal offender. The assistance may consist of an act or omission, and it may occur before, during or after the act of the principal offender.[71]

When the ICTY TC convicted Radoslav Brđanin for aiding and abetting the forcible transfer and/or deportation of non-Serbs from their homes in Bosnia and Herzegovina, one basis for the Chamber's finding of guilt was Brđanin's use of propaganda:

> [s]ome of the inflammatory and discriminatory statements made by the Accused, in light of the positions of authority that he held, amount to encouragement and moral support to the physical perpetrators of crimes. Moreover, the Accused made threatening public statements which had the effect of terrifying non-Serbs into wanting to leave the territory of the ARK, thus paving the way for their deportation and/or forcible transfer by others.[72]

The *mens rea* of aiding and abetting consists of awareness that the acts or omissions of the aider and abettor assist in the commission of a crime by the principal offender. The aider and abettor need not be aware of the precise crime that is intended or that was actually committed, as long as he or she is aware that one of a number of crimes would probably be committed, including the crime that occurred.[73] In the *Brđanin* judgment, the TC found that Radoslav Brđanin "intentionally made a substantial contribution towards creating a climate where people were prepared to tolerate the commission of crimes and to commit crimes, and where well-meaning Bosnian Serbs felt dissuaded from extending any kind of assistance to non-Serbs."[74]

The same TC convicted Brđanin for aiding and abetting the persecution of non-Serbs in Bosnia and Herzegovina, finding that Brđanin held the same criminal intent to discriminate against non-Serbs as did the individuals who actually committed abuses:

> [t]he essence of the utterances made by the Accused are, . . . instructive of his attitude towards Bosnian Muslims and Bosnian Croats. The Trial Chamber recalls that the Accused repeatedly used derogatory and abusive language when referring to Bosnian Muslims and Bosnian Croats in public. Moreover, he openly labeled these people "second rate" or "vermin" and stated that in a new Serbian state, the few Bosnian Muslims and Bosnian Croats allowed to stay would be used to perform menial work. The Trial Chamber is thus satisfied that not only the physical perpetrators, but also the Accused possessed the intent to discriminate against the Bosnian Muslim and Bosnian Croat victims.[75]

Helpful albeit circumstantial evidence

Circumstantial evidence that an accused used propaganda to prompt another to commit a crime, or contributed to the decision of another to commit a crime, includes evidence that the accused had the ability to do so. This capacity may arise from the accused's position of authority in the community, his or her communication skills, his or her ability to disseminate speech, or some combination of factors.

Thus, evidence that the accused was a respected intellectual, a political or military leader, or held another position of high status in society, indicates that the accused's speech carried a special authority for the listener, as would specific evidence of an accused's popularity. In the *Brđanin* judgment, for example, the TC held that due to Brđanin's authority, "his public statements were attributed more weight in the eyes of both the Serbs and the non-Serbs."[76] In the "Media Trial," judges at the ICTR found that accused Ferdinand Nahimana was a "renowned academic" who "used the radio—the medium of communication with the widest public reach—to disseminate hatred and violence"[77] during the Rwanda genocide. Furthermore, the Tribunal heard evidence that proved that Hassan

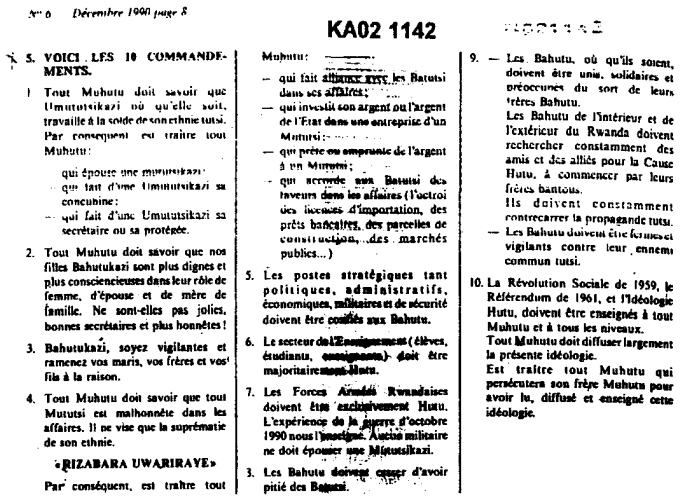
Ngeze, one of Nahimana's co-accused and the owner of the virulently anti-Tutsi newspaper *Kangura*, "as owner and editor of a well-known newspaper in Rwanda, was in a position to inform the public and shape public opinion," but chose to use the media "to attack and destroy human rights."[78] Evidence of status, communication skills and access to the media, therefore, provides important context to facts about specific speech, its dissemination, and its effect on the perpetrators of crimes.

Prosecutors may choose to use the assistance of expert witnesses to provide contextual evidence concerning the meaning and impact of certain kinds of speech used by those accused. For example, in times of war and social crisis, history may be presented in such a way as to inflame ethnic resentments.[79] Scholars of linguistics, history and/or politics may provide helpful evidence to assist judges in their understanding of certain forms of expression and its likely impact on an audience.

Malicious propaganda campaigns, the slow injection of poisonous beliefs into the minds of the populace, may pre-date the actual commission of crimes. The evidentiary value of such long-term campaigns, however, may be problematic. For example, prior to the 1994 Rwanda genocide, Hutu newspaper owner Hassan Ngeze, published "The Appeal to the Conscience of the Hutu" and "The Ten Commandments" (see Figure 3.1). These tracts urged Hutus to "cease feeling pity for the Tutsi!" and claimed that all Tutsi were dishonest in their business dealings and that Tutsi women "wherever they may be," were working in the pay of the Tutsi ethnic group.

Evidence presented at the "Media Trial" described the effectiveness of Ngeze's newspaper propaganda and how it helped to create a common belief system amongst Rwanda's Hutu population. As a result of the publication of the "Ten Commandments," Hutu began to perceive the Tutsi as enemies and the Tutsi also began to see the Hutu as a threat.[80] Rwanda's national radio broadcast the "Ten Commandments," the TC found, "to ensure that all the Hutus must become united," that "they should have a single fighting goal that they should aim for," and "that they should have no link or relationship between Hutus and Tutsis."[81] This propaganda campaign led to individual crimes as some men killed their Tutsi wives and children of mixed marriages killed their own Tutsi parents.[82]

On appeal of Ngeze's conviction for direct and public incitement to genocide, however, the Appeals Chamber held that the TC erred in basing some convictions of Ngeze for direct and public incitement to genocide on pre-1994 issues of *Kangura*. The Appeals Chamber found that the ICTR TC could not have jurisdiction over acts of incitement that occurred before 1994 based on the theory that this incitement continued in time until the genocide occurred. The Appeals Chamber held that direct and public incitement occurs as soon as the words are uttered or expressed. Thus, pre-1994 issues of *Kangura*, at most, could only constitute indirect incitement to genocide.[83] The older issues might serve as contextual material, however, to assist in understanding the criminal nature of *Kangura* issues published during the period of the Rwandan genocide.



Kangura N° 6 *Décembre 1990 page 8*

KA02 1142

5. VOICI LES 10 COMMANDEMENTS.

1. Tout Muhutu doit savoir que Umututsikazi où qu'elle soit, travaille à la solde de son ethnie tutsi. Par conséquent est traître tout Muhutu:
   - qui épouse une Umututsikazi;
   - qui fait d'une Umututsikazi sa concubine;
   - qui fait d'une Umututsikazi sa secrétaire ou sa protégée.
2. Tout Muhutu doit savoir que nos filles Bahutukazi sont plus dignes et plus consciencieuses dans leur rôle de femme, d'épouse et de mère de famille. Ne sont-elles pas jolies, bonnes secrétaires et plus honnêtes!
3. Bahutukazi, soyez vigilantes et ramenez vos maris, vos frères et vos fils à la raison.
4. Tout Muhutu doit savoir que tout Mututsi est malhonnête dans les affaires. Il ne vise que la suprématie de son ethnie.

«RIZABARA UWARIRAYE»

Par conséquent, est traître tout Muhutu:
- qui fait alliance avec les Batutsi dans ses affaires;
- qui investit son argent ou l'argent de l'Etat dans une entreprise d'un Mututsi;
- qui prête ou emprunte de l'argent à un Mututsi;
- qui accorde aux Batutsi des faveurs dans les affaires (octroi des licences d'importation, des prêts bancaires, des parcelles de construction, des marchés publics...)

5. Les postes stratégiques tant politiques, administratifs, économiques, militaires et de sécurité doivent être confiés aux Bahutu.
6. Le secteur de l'Enseignement (élèves, étudiants, enseignants) doit être majoritairement Hutu.
7. Les Forces Armées Rwandaises doivent être exclusivement Hutu. L'expérience de la guerre d'octobre 1990 nous l'enseigne. Aucun militaire ne doit épouser une Mututsikazi.
8. Les Bahutu doivent cesser d'avoir pitié des Batutsi.
9. — Les Bahutu, où qu'ils soient, doivent être unis, solidaires et préoccupés du sort de leurs frères Bahutu.
   Les Bahutu de l'intérieur et de l'extérieur du Rwanda doivent rechercher constamment des amis et des alliés pour la Cause Hutu, à commencer par leurs frères bantous.
   Ils doivent constamment contrecarrer la propagande tutsi.
   — Les Bahutu doivent être fermes et vigilants contre leur ennemi commun tutsi.
10. La Révolution Sociale de 1959, le Référendum de 1961, et l'Idéologie Hutu, doivent être enseignés à tout Muhutu et à tous les niveaux.
    Tout Muhutu doit diffuser largement la présente idéologie.
    Est traître tout Muhutu qui persécutera son frère Muhutu pour avoir lu, diffusé et enseigné cette idéologie.

Figure 3.1 *Kangura*, No. 6, December 1990. "The Ten Commandments".

1 Every Hutu male should know that Tutsi woman, wherever they may be, are working in the pay of their Tutsi ethnic group. Consequently, shall be deemed a traitor:
   - Any Hutu male who marries a Tutsi woman;
   - Any Hutu male who keeps a Tutsi concubine;
   - Any Hutu male who makes a Tutsi woman his secretary or protégé.

Tellingly, in his pre-1994 issues of *Kangura*, Hassan Ngeze tried to make all Hutus propagandists by telling his readers that:

> Every Hutu must propagate the present ideology widely. Any Hutu who persecutes his brother for having read, disseminated and taught this ideology shall be deemed a traitor.[84]

Ngeze's early efforts to repress Hutus who disagreed with his values illustrate an important source of circumstantial evidence. Effective propagandists will often be skilled, not only in the dissemination of their ideas, but in the imposition of limits on the expression of counter-ideas as well. Thus, international prosecutors should seek evidence of resources or government apparatus devoted to control the expression of ideas and repression of dissent. By shutting down the marketplace of ideas, "good" propagandists ensure that soldiers and other members of the population only hear and assimilate their skewed view of reality. As Catherine Merridale explains, nothing holds a people together better than censorship and isolation:

Figure 3.1 Continued

2 Every Hutu male must know that our Hutu daughters are more dignified and conscientious in their role of woman, wife and mother. Are they not pretty, good secretaries and more honest!
3 Hutu woman, be vigilant and bring your husbands, brothers and sons back to their senses.
4 Every Hutu male must know that all Tutsis are dishonest in their business dealings. They are only seeking ethnic supremacy.

"RIZABARA UWARIRAYE" (Only he who spent a sleepless night can talk about the night)

Shall be consequently considered a traitor, any Hutu male:

- who enters into a business partnership with Tutsis;
- who invests his money or State money in a Tutsi company;
- who lends to, or borrows from, a Tutsi;
- who grants business favors to Tutsi [granting of import licenses, bank loans, building plots, public tenders . . .]

5 Strategic positions in the political, administrative, economic, military and security domain should, to a large extent, be entrusted to Hutus.
6 In the education sector, (pupils, students, teachers) must be in the majority Hutu.
7 The Rwandan Armed Forces should be exclusively Hutu. That is the lesson we learned from the October 1990 war. No soldier must marry a Tutsi woman.
8 Hutus must cease having any pity for the Tutsi.
9 – The Hutu male, wherever he may be, should be united, in solidarity and be concerned about the fate of their Hutu brothers.
   – The Hutus at home and abroad must constantly seek friends and allies for the Hutu Cause, beginning with their Bantu brothers.
   – They must constantly counteract Tutsi propaganda.
   – The Hutu must be firm and vigilant towards their common Tutsi enemy.
10 The 1959 social revolution, the 1961 referendum and the Hutu ideology must be taught to Hutus at all levels. Every Hutu must propagate the present ideology widely. Any Hutu who persecutes his brother for having read, disseminated and taught this ideology shall be deemed a traitor.

Courtesy of Montreal Institute for Genocide and Human Rights Studies at Concordia University. Online. Available HTTP: <http://migs.concordia.ca/links/kangura_files.htm> (accessed 8 February 2011).

> The birth of the glorious wartime myth was managed all the way along. The censors ensured that words like "retreat" and "surrender" would never feature in the annals of Red Army operations, but more cruelly they also suppressed evidence of the war's true human cost. . . . On average, Soviet losses outnumbered those of the enemy by at least three to one, but every pressure worked to hide this statistic. . . . Emotions, too, were censored. Grief was allowed – as long as it stirred soldiers to revenge – but other reactions to danger and pain remained unspoken. The Sovinformburo made sure that nothing that was published referred to men's fear or doubt.[85]

Finally, it is axiomatic that it is much easier to start a war than to stop one. Similarly, it is far simpler to inject hate and fear into a society than it is to remove them. Once criminal objectives are obtained, when the ethnic cleansing is over and territory secured, political and military objectives may change to reflect new realities and the consolidation of power, position and new strategic alliances. Extremist ideologies may become inconvenient and counter-productive. Thus, evidence that a government or military leader used propaganda to instill hatred and

instigate violence, and then, after objectives were secured, succeeded to remove or diminish his poison's effectiveness, would be the mark of a most effective propagandist.

Defenses

Any competent prosecutor must consider the likely defenses to criminal charges of serious violations of international humanitarian law. It may be dangerous to rely too heavily on theories such as JCE when, so often in war, crimes occur more as a result of chaotic chains of events than elaborate criminal plans.[86] For example, the mass exodus of a civilian population may be the result of fear of lawful combat or a legitimate evacuation by military forces for the protection of civilians.[87] Furthermore, while an accused's use of speech and propaganda may appear onerous in a particular context, the principal perpetrators of crimes may have been pre-disposed, for a myriad of reasons, to criminal conduct prior to hearing the speech. Proving that the accused's speech contributed to the commission of crimes in this context may become difficult or impossible. During the investigation phase, prosecutors would do well to explore these issues during witness interviews and their review of documents to ensure that events were actually criminal and, if so, that the evidence truly demonstrates the individual criminal responsibility of all accused.

Final thoughts

The investigation and prosecution of persons who use forms of expression to commit or contribute to serious violations of international humanitarian law are challenging and complex tasks. Nevertheless, prosecutions based on propaganda activities have made important contributions to the development of international criminal law as well as the enforcement of international humanitarian law. To reduce the suffering caused by war, international tribunals should continue to apply these areas of law to persons who use speech for criminal ends.

Notes

1 J.J. Frésard, *The Roots of Behaviour in War: A Survey of the Literature*, Geneva: International Committee of the Red Cross, October 2004, p. 29. *Publishing on the Internet*. Online. Available HTTP: <http://www.icrc.org/eng/assets/files/other/icrc_002_0854.pdf> (accessed 30 January 2011).
2 For a recent example, see Ernesto Londoño, 'U.S. Struggles to Counter Taliban Propaganda', *Washington Post*, 1 October 2010.
3 C. Merridale, *Ivan's War: The Red Army 1939–45*, London: Faber and Faber, 2005, p. 331.
4 For example, British military doctrine emphasizes the importance of the moral component of operational effectiveness, or "fighting power," i.e. the ability to get people to fight. R. Dannatt, *Values and Standards of the British Army*, British Army, January 2008, p. 6.

5 D. Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Boston, MA: Little Brown and Co., 1995, p. 199.
6 Frésard, *The Roots of Behaviour in War*, p. 30.
7 ICTY and UNICRI authors, *ICTY Manual on Developed Practices*, Turin: United Nations Interregional Crime and Justice Research Institute (UNICRI), 2009, pp. 14–15.
8 *ICTY Manual on Developed Practices*, p. 30.
9 *ICTY Manual on Developed Practices*, p. 30.
10 *ICTY Manual on Developed Practices*, pp. 30–31.
11 *ICTY Manual on Developed Practices*, p. 31.
12 *ICTY Manual on Developed Practices*.
13 *ICTY Manual on Developed Practices*, p. 31.
14 *ICTY Manual on Developed Practices*, p. 32; See Rule 54 bis of the ICTY Rules of Procedure and Evidence and Article 92 of the Rome Statute of the Permanent International Criminal Court (ICC) (Rome Statute) and Rule 115 of the ICC's Rules of Procedure and Evidence.
15 *ICTY Manual on Developed Practices*, p. 32.
16 *ICTY Manual on Developed Practices*, p. 32.
17 *ICTY Manual on Developed Practices*, p. 15.
18 Grossman, *On Killing*, p. 199.
19 *The Prosecutor v. Simon Bikindi*, Judgment, Case No. ICTR-01-72-T, 2 December 2008, para. 247.
20 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgment, Case No. ICTR-99-52-A, Partly Dissenting Opinion of Judge Meron, paras 5 and 10, "profound disagreement exists in the international community as whether mere hate speech is or should be prohibited . . . overly permissive interpretations of incitement can and do lead to the criminalization of political dissent".
21 UNGA Res. 217 A (II), UN Doc. A/810, p. 71 (1948).
22 UNGA Res. 217 A (II), UN Doc. A/810, p. 71 (1948), emphasis added.
23 UNGA Res. 217 A (II), UN Doc. A/810, p. 71 (1948), emphasis added.
24 UNGA Res. 217 A (II), UN Doc. A/810, p. 71 (1948), emphasis added.
25 *Sürek and Özdemir v. Turkey*, ECHR Judgment, 8 July 1999, pp. 27–28.
26 Ibid., p. 40.
27 Merridale, *Ivan's War*, p. 330.
28 For the purpose of this chapter, the term "suspect" refers to a person who is the subject of a criminal investigation, but not yet formally indicted for any crime. The term "accused," which will be used throughout, refers to a person who is the subject of a criminal indictment.
29 *Publishing on the Internet*. Online. Available HTTP: <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (accessed 2 August 2010).
30 *The Prosecutor v. Simon Bikindi*, Judgment, Case No. ICTR-01-72-T, 2 December 2008, para. 391.
31 *The Prosecutor v. Simon Bikindi*, Judgment, Case No. ICTR-01-72-T, 2 December 2008, paras 392 and 395.
32 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, [illegible]eptember 2004, nte. 62, Witness BT-104.
33 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, [illegible]eptember 2004, nte. 62, Amir Džonlić.
34 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, [illegible]eptember 2004, nte. 62, Witness BT-11.
35 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 1947, pp. 303–304.
36 *Prosecutor v. Milomir Stakić*, Judgment, Case No. IT-97-24-A, paras 64 and 69.

37 *Prosecutor v. Milomir Stakić*, Judgment, Case No. IT-97-24-A, para. 64; *Prosecutor v. Miroslav Kvočka, et al.*, Judgment, Case No. IT-98-30/1-A, 28 February 2005, paras 89–90, 97.
38 *Prosecutor v. Milomir Stakić*, Judgment, Case No. IT-97-24-A, para. 64.
39 *Prosecutor v. Miroslav Kvočka, et al.*, Judgment, Case No. IT-98-30/1-A, 28 February 2005, para. 112; *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-A, para. 404.
40 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-A, para. 418.
41 *Prosecutor v. Radislav Krstić*, Judgment, Case No. IT-98-33-A, 19 April 2004 , paras 134, 143–4.
42 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-A, para. 398, citing Separate Opinion of Judge Iain Bonomy, Milutinović et al. Decision on Ojdanić's Motion Challenging Jurisdiction, in particular paras 18–22.
43 Trial of the Major War Criminals Before the International Military Tribunal, Judgment, 1947, pp. 301–304
44 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, paras 75–77.
45 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 323.
46 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, paras 414, 419 and 424.
47 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, paras 1050–1051, 1067 and 1072.
48 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, para. 1072.
49 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, para. 1086, Ex. P00005.
50 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, para. 1085–1086.
51 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, para. 1768.
52 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, para. 1816.
53 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, para. 1819.
54 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, para. 1820.
55 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, para. 1822.
56 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, paras 1826 and 1836.
57 N. Ahmetašević, 'Hague Recognises Propaganda's Role in Srebrenica Genocide', *Balkan Insight*, 7 July 2010. *Publishing on the Internet*. Online. Available HTTP: <http://www.balkaninsight.com/en/article/hague-recognises-propaganda-s-role-in-srebrenica-genocide> (accessed 17 January 2011).
58 In *Prosecutor v. Mile Mrkšić, et al.*, when evaluating aggravating the circumstances that could impact the sentence imposed on Veselin Šljivančanin, the TC observed that Šljivančanin had been deceitful in ensuring that international representatives were not given access to the Vukovar Hospital, from which Croat prisoners were removed and subsequently killed in November 1991. Judgment, Case No. IT-95-13/1-T, 27 September 2007, para. 704. However, "aggravating factors" should be directly related to the commission of the offense and it remains unclear whether this factor actually

effected the TC's sentencing decision. *Prosecutor v. Mile Mrkšić, et al.*, Judgment, Case No. IT-95-13/1-A, para. 387.
59 I am grateful to Peter McCloskey for this insight.
60 *Prosecutor v. Germain Katanga and Mathieu Ngudjol Chui*, ICC-01/04-01/07-717, Confirmation of Charges, 30 September 2008, paras 480–534.
61 *Prosecutor v. Germain Katanga and Mathieu Ngudjol Chui*, ICC-01/04-01/07-717, Confirmation of Charges, 30 September 2008, paras 522–523.
62 *Prosecutor v. Germain Katanga and Mathieu Ngudjol Chui*, ICC-01/04-01/07-717, Confirmation of Charges, 30 September 2008, paras 521, 524–526.
63 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 269.
64 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 269.
65 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 360.
66 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, nte. 3503, Ex. P0247 and Ex. P02048, p.11.
67 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, paras 915–925 and 1050.
68 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, nte. 3503, Ex. P0247 and Ex. P02048, pp.47–8.
69 *Prosecutor v. Vujadin Popović, et al.*, Judgment, Case No. IT-05-88-T, 10 June 2010, nte. 3503, Ex. P0247 and Ex. P02048, p.51.
70 At the time of writing, General Mladić remained a fugitive.
71 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 271.
72 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 368.
73 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 272.
74 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 330.
75 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 1053.
76 *Prosecutor v. Radoslav Brđanin*, Judgment, Case No. IT-99-36-T, 1 September 2004, para. 324.
77 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgment and Sentence, Case No. ICTR-99-52-T, para. 1099.
78 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgment and Sentence, Case No. ICTR-99-52-T, para. 1101.
79 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgment and Sentence, Case No. ICTR-99-52-T, para. 184.
80 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgment and Sentence, Case No. ICTR-99-52-T, para. 141.
81 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgment and Sentence, Case No. ICTR-99-52-T, para. 140.
82 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgment and Sentence, Case No. ICTR-99-52-T, para. 140. *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor*, Judgment, Case No. ICTR-99-52-A, 28 November 2007, paras 408–410.
83 *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor*, Judgment, Case No. ICTR-99-52-A, 28 November 2007, paras 408–410.

84 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Judgment and Sentence, Case No. ICTR-99-52-T, 3 December 2003, para. 139.
85 Merridale, *Ivan's War*, pp. 27 and 164.
86 X. Agirre, 'Conspiracy v. Chaos: Scenarios for the Analysis and Litigation of Leadership War Crimes', unpublished paper, p. 8. Quoted with the permission of the author.
87 Ibid., p. 16.

Bibliography

Agirre, X., 'Conspiracy v. Chaos: Scenarios for the Analysis and Litigation of Leadership War Crimes', unpublished paper.

Ahmetašević, N., 'Hague Recognises Propaganda's Role in Srebrenica Genocide', *Balkan Insight*, 7 July 2010. *Publishing on the Internet*. Online. Available HTTP: <http://www.balkaninsight.com/en/article/hague-recognises-propaganda-s-role-in-srebrenica-genocide> (accessed 17 January 2011).

Dannatt, R., *Values and Standards of the British Army*, British Army, January 2008.

Frésard, J.J., *The Roots of Behaviour in War: A Survey of the Literature*, Geneva: International Committee of the Red Cross, October 2004. *Publishing on the Internet*. Online. Available HTTP: <http://www.icrc.org/eng/assets/files/other/icrc_002_0854.pdf> (accessed 30 January 2011).

Grossman, D., *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Boston, MA: Little Brown and Co., 1995.

ICTY and UNICRI authors, *ICTY Manual on Developed Practices*, Turin: United Nations Interregional Crime and Justice Research Institute (UNICRI), 2009.

Merridale, C., *Ivan's War: The Red Army 1939–45*, London: Faber and Faber, 2005. *Publishing on the Internet*. Online. Available HTTP: <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>.

UNGA Res. 217 A (II), UN Doc. A/810.

Table of cases

IMT

Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 1947.

ICTY

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T.
Prosecutor v. Radislav Krstić, Case No. IT-98-33-A.
Prosecutor v. Miroslav Kvočka, et al., Case No. IT-98-30/1-A.
Prosecutor v. Mile Mrkšić, et al., Case No. IT-95-13/1-A.
Prosecutor v. Vujadin Popović, et al., Case No. IT-05-88-T.
Prosecutor v. Milomir Stakić, Case No. IT-97-24-A.

ICTR

The Prosecutor v. Simon Bikindi, Case No. ICTR-01-72-T.
The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Case No. ICTR-99-52-A.

ICC

Prosecutor v. Germain Katanga and Mathieu Ngudjol Chui, ICC-01/04-01/07-717.

European Court of Human Rights

Sürek and Özdemir v. Turkey, European Court of Human Rights.