

https://dspace.org/

Instigation to commit crimes against humanity under Article 6(1) of the Statute of the International Criminal Tribunal for Rwanda: a critique of the jurisprudence of the Trial and Appeal Chambers

Agbor, Avitas A

2013-04-04
http://hdl.handle.net/10539/12623

Downloaded from a DSpace repository. https://dspace.org/

ABSTRACT

In the decades after attaining independence from its colonial masters, Rwanda's two principal ethnic groups, the Hutus and the Tutsis, suffered worsening tensions which often resulted in the perpetration of atrocities. Peace agreements brokered by the international community did not ease these ethnic tensions. In April 1994, the ethnic crisis took a different dimension following the assassination of the Presidents of Rwanda and Burundi. A full-blown genocide was committed by the Hutus who targeted their Tutsi and Hutu-moderates victims because of their ethnic identity and tolerant political views respectively. In a hundred days, about a million Tutsis and Hutu-moderates were massacred. Gross violations of human rights had been committed. The planning, preparation and execution of these atrocities were done by almost everyone within the Hutu majority: the leadership (both civilian and military), business men, the clergy, artists, professors, journalists, militias, the commoners, and other civil society actors.

The Rwandan Patriotic Front (RPF) under the leadership of General Paul Kagame overthrew the Rwandan Armed Forces (RAF) and brought the genocide to an end. In an effort to build a government of national unity, the Government of Rwanda under the leadership of President Paul Kagame requested the United Nations Security Council to establish a tribunal for the trial of persons who bear responsibility for the atrocities committed in Rwanda. In response to this request, the United Nations Security Council passed Resolution 955 (8 November 1994) creating the second United Nations' *ad hoc* international criminal tribunal, the International Criminal Tribunal for Rwanda (ICTR). Annexed to Resolution 955 was the Statute of the ICTR.

The Statute gave the Tribunal jurisdiction over three crimes: genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Amongst other things, it also defined on which individuals it would impose criminal responsibility.

The definition of genocide and the punishable acts as contained in the Statute of the ICTR (Article 2) were simply imported from the United Nations' Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (Article III). One of these

punishable acts is direct and public incitement to commit genocide (Article 2(3)(c) of the Statute of the ICTR). As seen in Article 6(1) of the Statute of the ICTR, there are five different modes of participation that would lead to the imposition of criminal responsibility: planning, instigating, ordering, committing or otherwise aiding and abetting. Instigation is one of these modes of participation.

An examination of the jurisprudence of both the Trial and Appeal Chambers of the ICTR reveals that there is an overlap between direct and public incitement to commit genocide under Article 2(3)(c) and instigation as a mode of participation under Article 6(1).

The Trial and Appeal Chambers have contributed enormously to the development of the jurisprudence of direct and public incitement to commit genocide under Article 2(3)(c). Now settled as an inchoate crime in international criminal law, criminal responsibility is imposed irrespective of whether the direct and public incitement successfully results in the commission of genocide.

On the other hand, instigation is one of the modes of participation which would lead to the imposition of criminal responsibility. Participation under Article 6(1) is not limited to any particular crime, but extends to all the crimes over which the ICTR has jurisdiction – genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The jurisprudence of the Trial and Appeal Chambers on Article 6(1) states that criminal responsibility can only be imposed where it is proved that the accused's mode of participation substantially contributed to the commission of the crime. Therefore, instigation, which is one of the modes of participation, must be shown to have substantially contributed to the commission of the crime for criminal responsibility to be imposed.

In my opinion, this requirement of substantial contribution for the imposition of criminal responsibility is wrong. It emanates from a poor understanding of Article 6(1) and the construction of the words therein. It is a judicial invention which does not square with established principles of criminal responsibility in general and inchoate crimes in particular.

This thesis critiques the jurisprudence of the ICTR on instigation as a mode of participation under Article 6(1). Instigation is a recognised mode of participation in

international crimes. Under the common law system, it is also an inchoate crime. International instruments and the jurisprudence of the Trial and Appeal Chambers have recognised the inchoate nature of incitement. However, in the construction of Article 6(1) wherein instigation features as a mode of participation, the Trial and Appeal Chambers erred. I illustrate in this thesis that a correct construction and understanding of Article 6(1) shows its inchoate and bifurcated character: first, any of the modes of participation must lead to any of the stages of any of the crimes (planning, preparation or execution). These modes of participation are not limited to any particular crime. Therefore, if instigation leads to the planning or preparation of any of the crimes, that renders it inchoate (which is understood to mean a criminal activity that is incomplete, still at its initial stage). Second, the imposition of criminal responsibility is bifurcated. In other words, it must go through two stages: first, there must be a mode of participation, and second, it must lead to any of the stages of the crimes. Third, the substantial contribution requirement does not square with a strict construction of Article 6(1). In articulating the different stages that a mode of participation must lead to, it states 'planning, preparation or execution' of any of the crimes. The use of a disjunctive word 'or' rather than a conjunctive word 'and' suggests that any of the modes of participation that leads to any of these stages (planning, preparation or execution) of any of these crimes (genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II) would suffice. Therefore, to require that there must be a substantial contribution to commission of a crime before criminal responsibility can be imposed under Article 6(1) is a clear limitation to the last stage of the crime, which is execution (or commission).

As evidenced by the cases tried at the Tribunal, Article 2(3)(c) which addresses the inchoate crime of direct and public incitement to commit genocide and Article 6(1) which deals with the imposition of criminal responsibility, do overlap. In other words, incitement that qualifies as direct and public incitement to commit genocide under Article 2(3)(c) may as well qualify as instigation to any of the crimes over which the ICTR has jurisdiction under Article 6(1). From the delivery of its first judgment in the case of *The Prosecutor v Jean-Paul Akayesu*,[1] the Trial Chambers did not recognise the confluence

[1] Judgment, Case No. ICTR-96-4. T. Ch. I, 2 September 1998.

between these two Articles. However, in the case of *The Prosecutor v Callixte Kalimanzira*,[2] the Trial Chambers made this observation, and outlined a set of guidelines on how to resolve cases of overlap. Though a colossal step in fixing this problem, the guidelines are faulted because they repeat the same mistakes made by previous Trial Chambers: first, they limit instigation only to genocide even under Article 6(1); second, they still hold that criminal responsibility can be imposed under Article 6(1) only when it is proved that the mode of participation substantially contributed to the commission of the crime.

While it resonates with conventional wisdom today that incitement, synonymous with instigation, is limited to the crime of genocide, this thesis critiques the jurisprudence of both the Trial and Appeal Chambers of the ICTR and argues that instigation is a mode of participation in crimes against humanity following a strict construction of Article 6(1). Furthermore, incitement that qualifies as 'direct and public incitement' to commit genocide under Article 2(3)(c) may also qualify as instigation to commit genocide, crimes against humanity, or both under Article 6(1). Third, 'direct and public incitement' to commit genocide under Article 2(3)(c) is limited to the crime of genocide, and must fulfil the caveats of 'direct' and 'public'. Meanwhile, instigation under Article 6(1) does not need to meet any requirement as long as it leads to the 'planning, preparation or execution' of any of the crimes over which the ICTR has jurisdiction.

The poor construction of Article 6(1) has resulted in huge controversies about instigation as a mode of participation in crimes over which the ICTR has jurisdiction under Article 6(1). More specifically, instigation, which is one of the modes, overlaps with the wording of Article 2(3)(c) which deals with the inchoate crime of direct and public incitement to commit genocide. The substantial contribution requirement is a judicial invention which does not align squarely with established principles of criminal responsibility for inchoate crimes. It is the unfortunate outcome of a poor construction of Article 6(1) and has orchestrated a confused understanding of instigation as a mode of participation. It has blurred and obfuscated instigation as a mode of participation in crimes against humanity; stagnated the evolution of the jurisprudence on instigation to

[2] Judgment, Case No. ICTR-05-88-T, T. Ch. III, 22 June 2009.

commit crimes against humanity; and above all, propelled international criminal law on an ambitious and controversial mission from which it must retreat.