


The ICC and Hate Speech

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By: Dr. Joseph Rikhof

On July 16, 2019, an ICC Trial Chamber issued the written reasons for its oral decision of January 15, 2019 (see here) in the case of Laurent Gbagbo and Charles Blé Goudé pertaining to the situation in the Republic of Côte D'Ivoire acquitting them of all charges and ordering their immediate release. The decision was split, with Judges Tarfusser and Henderson in the majority (with their reasons filed as a separate opinion by Judge Henderson, which has been removed from the ICC website but can be found here) and a strong dissent by Judge Herrera Cabuccia (which has also been removed from the ICC website but can be found here). The Prosecutor has appealed the decision (see here).

There have been a number of comments with respect to these reasons (see here, here, here and here) with some incisive discussions of the issues. But one aspect, which has been missing or was barely touched upon in the commentaries is the fact that both the majority and the dissent for the first time in ICC history examined the issue of hate speech with widely different approaches and conclusions.

International criminal law and hate speech

International criminal tribunals have looked at the phenomenon of hate speech on a number of occasions. Since hate speech has not been criminalized as such, these tribunals have attempted to define and set out the parameters of hate speech through a variety of legal vehicles, namely as crime against humanity, specifically with the underlying crime of persecution; as part of the inchoate crime of incitement to commit genocide; and within the mode of liability of instigation (for a very good academic treatment of this issue, see here).

Persecution

There was an apparent discrepancy between older ICTY (International Criminal Tribunal for the former Yugolavia) and ICTR (International Criminal Tribunal for Rwanda) caselaw regarding the application of the crime of persecution to hate crimes in that the ICTY courts originally rejected this concept (see Kordi? and ?erkez, TC, para 209) while it had been readily accepted by the ICTR (see Media case, AC, paras 986-988; Bikindi, TC, paras 379-389). The difference lies in the fact that the ICTR does not consider all hate speech to fall within the crime of persecution but only speech with a cumulative effect of inciting violence while stipulating that this violence has to result from the speech.

This was decided by the Appeals Chamber in the Media case, which used a narrower approach than the Trial Chamber in the same case in that the trial chamber did not require a causal connection between the speech and subsequent violence while the level of hate speech was ‘a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive them as less than human’ (see Media case, TC, para 1072). More recently the Appeals Chamber followed the same approach in an ICTY case (see Seselj, AC, para 159).

Incitement to commit genocide with hate speech

The jurisprudence regarding incitement has been exclusively developed by the ICTR, which sets out a number of requirements. A person may be found guilty of direct and public incitement to commit genocide if he or she directly and publicly incited the commission of genocide (the *actus reus*) and had the intent to directly and publicly incite others to commit genocide (the *mens rea*). In order to be direct, the incitement must be a specific appeal to commit a genocidal act and must be more than a vague or indirect suggestion. As an inchoate crime, direct and public incitement to commit genocide is punishable even if no act of genocide has resulted from the incitement or if the effects of the incitement are extended in time (see Media, AC, paras 678, 692 and 720; Butare case, AC, paras 2335, 2676 - 2677, 2781, 3338, 3345). When assessing the public element of the incitement, factors such as the place where the incitement occurred and whether the attendance was selected or limited can be taken into account, however the number of persons present is not an essential factor in this assessment (see Nzabonimana, AC, para 231; Ngirabatware, AC, para 52).

The crime is completed as soon as the discourse in question is uttered or published, even though the effects of the incitement may extend over time (see Media Case, AC, para 723; Ngirabatware, AC, para 52). However, language in which the incitement is implicit may still be held to be direct because incitement does not have to involve an explicit appeal to commit genocide. In order to determine whether speech is direct incitement, it should be viewed in light of its cultural and linguistic context, its audience, how the speech was understood by its intended audience, and the political and community affiliations of the inciter (see Kajelijeli, TC, para 856; Media case, pars 698-701; Bikindi, TC, paras 387-389; Butare case, AC, para 2678). The *mens rea* required for the crime of direct and public incitement to commit genocide presupposes a genocidal intent in that the person who is inciting to commit genocide must have him or herself the specific intent to commit genocide (see Rutaganda, AC , para 524; Butare case, para 3338).

Instigation

As the Trial Chamber in the Gbagbo and Blé Goudé judgment used instigation to violence against citizens supporting Ouattara, the opposition leader (para. 1075) to explore its connection to hate speech, it is useful to set out in both the general jurisprudence of the ICTY and ICTR related to this form of participation as well the caselaw with respect to this particular form of odious language.

Instigating entails prompting another to commit an offence (see Media case, AC, para 440; Ngirabatware, AC, para 162; Seselj, AC, para 124) with the intent that a crime be committed or with the awareness of the substantial likelihood that a crime would be committed in the realization of that act or omission (see Kordi? and ?erkez, AC, paras 27, 30; Gacumbitsi, AC, para 107; Ngirabatware, AC, para 166).

A causal relationship between the instigation and the physical perpetration of the crime is required in the sense that the instigation contributed substantially to the conduct of the person committing the crime (see Media case, AC, para 678). However, it will not be necessary to prove that the crime would not have been perpetrated without the instigation (see Kordi? and ?erkez, AC, para 27; Butare case, AC, para 3327). Both express and implied conduct may constitute instigation (see Boškoski and Tar? ulovski, AC, para 157). Presence at the scene of the crime is not required for this type of criminal responsibility (see Boškoski and Tar?ulovski, AC, para 125; Butare case, AC, para 3327) nor is it necessary to prove the instigator had any authority over the person committing the crime (see Staniši ? and Župljanin, TC, para 96). Omission can also be a form of instigation if and when the instigator had a duty to prevent the crime from occurring (see Limaj, TC, para 514).

The Gbagbo and Blé Goudé judgment

The facts

While both Gbagbo and Blé Goudé gave a number of speeches and statements during the post-election violence in Côte D'Ivoire in late 2010 and early 2011 (see Majority decision, paragraphs 963-1038), three given by Blé Goudé were singled out by the prosecutor as falling within the parameters of

instigation of crimes against humanity, namely when he addressed a crowd on December 15; during a rally at the Palais de la Culture in Abidjan on February 25; and on April 5, 2011 during a television broadcast on RTI (Radiodiffusion-Télévision ivoirienne).

During the December 15 speech he said among other things that the UN and France were preparing a genocide in Côte d'Ivoire and he accused the UN of helping opposition supported, which he called therebels by establishing a radio station, providing transport and vehicles and giving the rebels blue helmet uniforms to transport arms to the Golf Hotel. He also said that he had no weapons but that he could still dislodge Mr. Ouattara from the Golf Hotel with his bare hands. He ended his speech by calling on the crowd to stick together and claimed that they were prepared to die to see their country develop. (Majority , para 971) The February 25 speech had two themes, the first one being that the audience should prevent the UN from going into their neighbourhoods while the second one was to be aware of and verify the comings and goings in their neighbourhoods of strangers and to denounce them. (Majority decision, para 1988). With respect to the April 5 broadcast, he requested the people in the audience to reinforce the roadblocks and to record suspicious movement in their neighbourhoods and send them to Ivorian television. (Majority decision, para 1037)

The majority decision

The majority starts out by providing the elements of two aspects of article 25(3)(b) of the Rome Statute (see here), namely solicitation and inducement, without any reference to pre-existing jurisprudence as follows (which appears to be at odds with the above cited caselaw by requiring a direct effect on the subsequent criminal conduct):

i. the accused intentionally solicited or induced the physical perpetrator (either expressly or by necessary implication) to engage in criminal conduct,
ii. this solicitation or inducement had a direct effect on the physical perpetrator's decision to engage in criminal conduct,
iii. the accused was aware that his or her acts of solicitation or inducement would have a direct effect on the conduct of the physical perpetrator. (para 1967)

The majority decision concentrates on the last two events with the first instance quickly dismissed as follows:

Based on the available evidence, a reasonable trial chamber could find that Mr Blé Goudé agreed to mobilising the youth to assist in preventing the demonstrators from reaching the RTI building. However, the evidence is not capable of supporting a finding that Mr Blé Goudé appealed to the youth to engage in violence or otherwise induced the killing, raping, and injuring of Ouattara supporters during the RTI march. (para 1985)

With respect to the second speech, the majority conceded that while it does not contain a direct call to violence, the language used is also not neutral and could be perceived as carrying the risk that some people might take the matter in their own hand and go beyond wat was asked of them. (paras 1988).

However, such a risk should not be assumed and should be established through evidence. (para 1994) The weakness in the evidence was that there were no examples that persons who attended the rally committed any of the subsequent evidence, a conclusion strengthened by the fact that the violence took place over a kilometer from the location of the speech and by the fact there might have been other circumstances leading to this violence. (paras 1995-2000 and 2008). In addition, the meaning of the speech should also be assessed in view of subsequent actions by Blé Goudé as witnessed in a number of broadcasts in late February and early March. While these speeches indicate that he was aware of the manner his instructions for vigilance had been implemented and was aware of the violence committed after the speech, the fact remained that violence had subsided considerably between his early March interview and March 14 and that is effort to calm the situation had succeeded. (paras 2001-2007).

In regards to the April 5 broadcast, the majority again stressed that there was no direct call to violence by Blé Goudé (para 2011) nor was there evidence that the perpetrators of the violence heard this message or how they interpreted it. (para 2015).

The dissent

Unlike the majority, the dissent is strongly based on legal precedents, not only from the international criminal tribunals but also the European Court of Human Rights as well as the *International Convention on the Elimination of All Forms of Racial Discrimination*. (paras 565-569) In addition to setting out the law of hate speech in general terms, the decision is also replete with legal references when discussing the facts. When doing so, the law stated is in accordance with the precedents stated above with the following examples (while of interest is that there is frequent reliance on the *Mugesera* judgment by the Supreme Court of Canada, here, namely in footnotes 1158, 1202, 1226, 1231, 1264 and 1279):

-hate speech promotes discrimination and violence, ultimately denying victims of the crimes committed of their fundamental rights to life, liberty, security, physical integrity and human dignity; (paras 566-659 and 642)
-although participation as an instigator under article 25(3)(b) of the Statute may involve a position of authority, this is not required, and the contribution may consist solely of prompting or encouraging a decision to act; liability for inducing or soliciting can arise even if the power to decide on the execution of the crime remains the preserve of the direct perpetrators; (para 576)
-individual responsibility for hate speech needs to be examined in the historical context it was uttered; (para 570)
-it is important to take into account the specific context in which the message was displayed; it does not matter that the message might have been ambiguous to another audience in another context; (para 593)
-the instructions in the message must be considered objectively, but with regard being had to the circumstances in which they were given, the manner and tone used and the persons to whom the message was addressed; (para 593)

-it is unnecessary to determine whether a number of other persons would necessarily have to be involved before the crime was actually committed; what must be shown is the causal link between the acts of instigation and the commission of the crimes, even where the former were public utterances; (para 577)
-it is relevant to consider whether any omissions may have constituted possible forms of instigation when a government official may have had a duty to prevent the crimes; (paras 578 and 636)
-personal responsibility can occur even if the relationship between the speaker and the perpetrators is temporary or informal; (para 581)
-is it not necessary that the instructions be directly conveyed to the perpetrators; (paras 581, 591)
-while the presence of the person giving the speech is not a requisite element of instigation, it is a factor to consider when determining *mens rea* as well as indicative of support for subsequent events; (para 613)
-whether speeches had a substantial impact on the commission of crimes will also depend on the degree of general influence the speaker had on the perpetrators; (para 619)
-the influence of the speaker on the perpetrator of the commission of crimes can demonstrated by circumstantial evidence; (para 636)
-the knowledge of a person that in vilifying certain groups and encouraging acts of violence against those target groups would have the effect of furthering the commission of crimes is connected to that person's education, political status and prominence on the local scene and the national level; (para 632)

Based on this extensive examination of the jurisprudence, the dissenting judge found that Blé Goudé was responsible "for inducing and soliciting the commission of the following crimes against humanity, as described in article 7 of the Statute, carried out in general during the post-election violence at roadblocks by the Jeunes Patriotes, and in particular during the March on RTI of 16 December 2010 and attacks in Yopougon commune, Abidjan, between 25 and 28 February 2011 and on 12 April 2011: (a) murder; (b) rape; (c) other inhumane acts; (d) attempted murder; and (e) persecution of unarmed civilians." (para 646)

She came to that conclusion first by starting to explain the general role and character of Blé Goudé, which was described as follows:

Mr Blé Goudé gave his speeches and organised events in the context of the post-election violence. Evidence shows that he was aware that he was acting in the context of an internal political and ethnic conflict, which he categorised as a "revolution" and a "difficult birth" Evidence also shows that Mr Blé Goudé was a well-educated and well-connected person who had studied abroad, and that he was part of Mr Gbagbo's government but had also been a charismatic youth leader for over a decade. (para 572)

He also had a great deal of influence over the group, the *Jeunes Patriotes*, which had been responsible for the violence subsequent to the three speeches in question. (paras 577-583)

With respect to the first instance of violence in December 2011, it was relevant that the *Jeunes Patriotes* had already been armed, mobilized and trained before the post-election violence and had already been involved in violence before the speech (paras 591-592) and that Blé Goudé had not condemned this earlier violence (paras 595-598). As a result, he was aware that this group would react to his call by committing acts of violence and this his words would be prompting them to commit further crimes. With respect to the Yopougan speech, the patter established in the previous instance was repeated in that violence had already occurred before February 25 while Blé Goudé had already mobilized the same group in prior speeches leading up to the one of February 25. (para 600-604) The fact that there already had been clashes between neighbourhoods in Yopougan involving use of roadblocks and that Blé Goudé did not issue unequivocal instructions to stop all violence but called again to set up such roadblocks and to stop suspicious outsiders, UN personnel and "rebels", was evidence that he incited the violence that followed, especially considering the influence he had on the *Jeunes Patriotes* (paras 616-619). With respect to the April 12 speech, it is important to examine Blé Goudé's actions between the attacks in Yopougan following his previous February speech and the April date. It becomes clear that as before, he does not explicitly condemn the earlier violence although he is aware that the situation is volatile and then used either similar language as before or more neutral language without specifically ruling out violence, thereby using his influence to cause more violence. (paras 621-639).

The above analysis prompted the dissenting judge to conclude:

It is true that hate speech per se is not always criminal or an incitement to violence. To be so considered, it must be demonstrated that these speeches, including those inciting violence, contributed to the commission of a widespread and systematic attack during the post-election violence and in particular during the relevant incidents. A reasonable Trial Chamber could find, from the evidence, that Mr Blé Goudé's speeches, "mots d'ordre" and calls during the post-election violence, considered as a whole, and in the light of the particular social and political context of that post-election violence, substantially contributed to the acts of violence committed by the Jeunes Patriotes. The evidence analysed above supports the existence of a direct link between Mr Blé Goudé's speeches and "mots d'ordre" to the Jeunes Patriotes and the attacks they committed against unarmed civilians who were perceived to be Ouattara supporters. … It would thus be reasonable to conclude that the Jeunes Patriotes were the instrument of Mr Blé Goudé's will to implement the State policy. Considering his rhetoric, which targeted outsiders, UNOCI and Mr Ouattara and … rebels, it would be reasonable to conclude that Mr Blé Goudé knew that the civilians targeted would be those considered to be supporters of Alassane Ouattara. A reasonable Trial Chamber could also conclude that Mr Blé Goudé used hate speech that promoted discrimination and violence, ultimately denying victims of the crimes committed by the Jeunes Patriotes of their fundamental rights to life, liberty, security, physical integrity and human dignity. (para 642)

Conclusion

This first foray by the ICC into the issue of hate speech and international criminal law is rather dissatisfying as the majority and minority judgment are diametrically opposed in the conclusions of law on essentially the same fact pattern. The difference of opinion appears to stem from two factors. The first one is the appreciation of previous jurisprudence from international tribunals in this area of law where the majority does not find it necessary to refer to any caselaw and when setting out the essence of the mode of liability sets a higher, quite possibly wrong, standard than what had been the norm so far. On the other hand, the legal treatment of the law of instigation in the dissent judgment is much more detailed and is also an accurate representation of that law as previously developed. This leads to the second observation, which might very well have been the result of the legal approach taken in the two judgments, namely that both judgments show that the judges were of the view that some of the language in the speeches might have been inflammatory. While the majority then emphasized the lack of evidence of the exact identity of the perpetrators of the subsequent violence, the minority paid more attention to the context of the speeches, the fact that violence occurred between the speeches and so that the pattern of violence should be attributed to Blé Goudé.

It is hoped that the Appeals Chamber will be able to provide not only a clear direction regarding the parameters of instigation for the ICC for the role of hate speech in the incitement to crimes but also will be able to overcome the different interpretation of the facts in this case. Incidentally, this case also discloses a more fundamental issue with the *Rome Statute*, namely that if it would have extended the inchoate crime of incitement beyond genocide, as it the case now in article 25(3)(e), to the other crimes, this difference in opinion between the majority and the dissent might not have occurred or at least would not have been so pronounced.

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About the author

*Joseph Rikhof**Globally recognized as an expert in cases of war crimes, Dr. Joseph Rikhof was with the Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice and teaches International Criminal Law in the Faculty of Law at University of Ottawa. Dr. Rikhof was a visiting professional with the International Criminal Court in 2005 and Special Counsel & Policy Advisor to the Modern War Crimes Section of Canada’s Department of Citizenship and Immigration between 1998 and 2002. Extensively published, Dr. Rikhof lectures around the world on organized crime, terrorism, genocide, war crimes, and crimes against humanity.*

Image: Mr Laurent Gbagbo and Mr Charles Blé Goudé in Courtroom I at the seat of the International Criminal Court in The Hague, Netherlands on 15 January 2019 ©ICC-CPI.