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THE INHERENT DANGER OF HATE SPEECH LEGISLATION

*A Case Study from Rwanda and Kenya on the Failure of a
Preventative Measure*

By Andrea Scheffler

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**The Inherent Danger
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A Case Study from Rwanda and Kenya
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Based on Master's Thesis in Peace and Conflict Studies by
Andrea Scheffler

Edited by
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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
BBC	British Broadcasting Corporation
BTI	Bertelsmann Transformation Index
CCK	Communications Commission of Kenya
CERD	Committee on the Elimination of Racial Discrimination
CIPEV	Commission of Inquiry on Post Election Violence
CPJ	Committee to Protect Journalists
ECHR	European Convention on Human Rights
FOE	Freedom of Expression
FOI	Freedom of Information
HIHK	Heidelberg Institute for International Conflict Research
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICG	International Crisis Group
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally displaced persons
IRIN	Integrated Regional Information Networks
KANU	Kenya African National Union
KNCHR	Kenya National Commission on Human Rights
MCK	Member of Parliament
MRND	National Alliance of Rainbow Coalition
NCIA	National Cohesion and Integration Act
NCIC	National Cohesion and Integration Commission
NGO	Non-governmental organisation
OAS	Organization of American States
ODM	Orange Democratic Movement
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PEV	Post-election violence
PNU	Party of National Unity
RPF	Rwandan Patriotic Front
RSF	Reporters sans frontières
RTL	Radio-Télévision Libre des Milles Collines
RWF	Rwandan Franc
SMS	Short Message Service
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
USHMM	United States Holocaust Memorial Museum
WPI	World Policy Institute

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*“We must recognize the
limits of legislation to combat hate speech
and incitement.”*

Adama Dieng, United Nations Special Adviser
on the Prevention of Genocide ¹

¹ Adama Dieng uttered this phrase on the ‘Hate Speech and Incitement to Genocide Panel Discussion’ organised by the *United States Holocaust Memorial Museum* in 2013 (USHMM 2013: 17:03 – 17:12).

1. Introduction

The recognition that genocide “is a man-made, not a natural, disaster” (Fein 2000: 42 cited by Kentish 2011: 16) calls for rallying all forces in order to prevent such disastrous events. At least since the Rwandan genocide in 1994, the threat of incitement has been generally acknowledged. The claim to fiercely combat inflammatory speech is confirmed by more recent episodes such as the Kenyan post-election violence (PEV) in 2007/2008, which was accompanied by widespread hate speech.

Hate speech legislation is seen as an efficient and appropriate means to prevent harm emanating from speech. International Conventions, most notably the Genocide Convention and the *International Covenant on Civil and Political Rights* (ICCPR) put an obligation on their state parties to prohibit different forms of incitement. Some state - such as Rwanda - have reacted by adopting legislation against various forms of hate speech. In Kenya, the popular term is even couched in the new Constitution.

Surely, there cannot be anything wrong about prosecuting perpetrators, whose aim it is to incite people to displace, rape and kill their fellow countrymen. Some even argue inciters would in fact be more culpable than the ‘principal offender’ who carries out the killing (Benesch 2008: 507). Yet, in Rwanda hate speech legislation provides a tool for the government to suppress the opposition, media representatives, civil society actors, and the general public for legitimate speech and dissent. And in Kenya, high-level hate-mongers escape with impunity. Clearly, something has gone wrong in both cases.

This motivates a scrutiny of whether hate speech legislation is indeed an appropriate means to prevent renewed violence emanating from speech in Rwanda and Kenya prospectively. A closer look at the circumstances that have led to the Rwandan genocide and Kenyan PEV as well as an examination of the international and national legislative background will help to assess why a measure that was initially adopted with good intentions, might in the worst case rather add fuel to the fire. In practice, the visible costs of restricting freedom of expression (FOE) and media freedom will be weighed against the putative preventative potential of hate speech legislation. Finally, alternative

approaches that do not jeopardise FOE and media freedom but are often far more likely to have a preventative effect will be presented.

1.1 Arguments For and Against Hate Speech Regulation

FOE is one of the most fundamental human rights. Nevertheless, a fierce debate exists on the necessity to restrict some types of speech. The next paragraphs will go over the main arguments raised in the current debate on hate speech regulation.

Three rationales are commonly provided for protecting free speech (Mendel 2006: 29-30). To begin with, advocates argue that it is an underpinning of *democracy* given that effective democratic participation of citizens depends on their access to information about the actions of the government (ibid.: 29; Malik 2012)². Cass R. Sunstein (2003: 96, 98, 104) campaigns for political dissent as a means to counteract conformity and false conventional wisdom, which takes us to the second rationale for protecting free speech: Free speech is considered as the most reliable means of *discovering the 'truth'* (Mendel 2006: 30). This idea was upheld by John Stuart Mill in his famous essay 'On Liberty', where he provided a classic defense of free speech arguing that true views may be suppressed due to unpopularity or the political vagaries of the government in the absence of protection for free speech (ibid.; Haupt 2005: 314). Free speech has thus a larger benefit for society; its restriction is judged as a real social loss (Sunstein 2003: 110). The third rationale goes beyond this and holds that free speech is inherent to *human dignity*: "[...] to deprive human beings of the right to express themselves, to assert their ideas and to engage freely in communication with others, is to diminish their dignity" (Mendel 2006: 29).

To the contrary, a number of arguments are brought forward in favour of restricting free speech, concerning hate speech. It is argued that prosecuting hate speech sends a "message about the kind of society we wish to promote" (Malik 2012). Hate speech is believed to serve no purpose in society (ibid.: blog discussion). Advocates of free speech interject by arguing that it is not known which types of speech become eventually beneficial for humankind and restrictions should not take place on the basis of purely speculative

2 Kenyan Malik is a writer, lecturer and BBC presenter with a focus on multiculturalism and the protection of equal rights and FOE.

assessments (Mchangama 2012)³. The primary concern, however, is the *harm* in hate speech. The goal of today's international criminal law on incitement is to prevent real threats emanating from speech: "Prosecution for incitement to genocide might prevent genocide in two ways: by stopping incitement before it can lead to genocide, or, after genocide has already occurred, by deterring others from inciting genocide in future situations" (Benesch 2008: 497). In addition to these arguments, Jeremy Waldron, a New York University Professor and influential theorist, brings forward that hate speech can undermine a person's dignity (Leiter 2012 and Mchangama 2012 with reference to Waldron 2012). Hate speech prohibitions are believed to be able to protect particularly minority groups and thus also protect the inclusive character of a society (Stevens 2012 with reference to Waldron 2012). Advocates of stronger restrictions frequently get personal in their argumentation by holding that the tolerance of ugly speech is easier for liberal bystanders who do not adequately consider the experiences of the targets of racist speech (Haupt 2005: 308; Stevens 2012 with reference to Waldron 2012). Free speech advocates retort that their primary concern is actually dedicated to vulnerable minorities, who might be silenced through hate speech laws: History has taught that "the very groups that were intended to be the beneficiaries of the protective measures [...] would be the ones hardest hit"⁴ (Haupt 2005: 310; see also OHCHR 2012: 5). A rejection of hate speech regulation is thus largely based on a fear of government abuse of hate speech laws since its competence and trustworthiness has so far proven to be limited (Leiter 2012)⁵.

1.2 Normative Framework

Though the current debate on restricting free speech delves into the overarching theoretical argument over the appropriate degree of state power and the confrontation between liberal advocates of individual freedom

3 Jacob Mchangama is the Director of Legal Affairs at the Danish think tank CEPOS and Managing Director of Freedom Rights Project'.

4 Mchangama (2012) further explains "when minority groups are weak, despised, or feared by the majority, they are unlikely to obtain protection through hate speech laws. Such protection will only become a realistic prospect when the relevant minority group is sufficiently accepted by mainstream society".

5 The lawyer and philosopher Ronald A. Lindsay (2009, blog-discussion) reviews: "Think of all the claims throughout history that government or government-supported institutions have tried to suppress, such as the Copernican understanding of the universe, the theory of evolution, the 'absurd' notion that women should be granted the same social and political rights as men, the claim that the native populations of various regions did not require the oversight of 'advanced' European countries, and so forth. The list is endless. It is frankly surprising to me that given this history, some still advocate government supervision of speech."

from state restrictions and exponents who argue for more state intervention (Fontana 2013), the debate clearly remains on the liberal side: FOE is generally upheld as a fundamental human right; and restrictions are only advocated under very limited circumstances and must follow the rule of law in a democracy (see e.g. Mendel 2006; Benesch 2008).

Given that the Herculean goal of restrictions on free speech is to prevent violence partly so gruesome as genocide (Benesch 2008: 488), those threats could potentially be misused to legitimise more severe restrictions on free speech under the pretence of protecting society from massive violence. Harshly authoritarian states certainly have exceptional power to prevent the articulation of conflict-causing differences of position through overwhelming repression (Wolff 2009: 214) and have thus also the power to immediately silence inciters, if they want to⁶. Nevertheless, the current debate takes a clear liberal stance and this paper also sticks to the liberal approach for two major reasons: First, top-down repression is not viewed as morally defensible: “While totalitarian states may achieve a domestic peace of sorts, which may be characterized as the peace of a zoo, a democratic civil peace is likely not only to be more just but also more durable” (Hegre/Ellingen/Gates/Gleditsch 2001: 44). From a more pragmatic perspective, democracies also tend to be more stabilising and at least in the long run less vulnerable to massive violence (Wolff 2009: 211; Hegre et al. 2001: 33, 44). Finally, and based on free speech reasoning: The openness of the democratic system, which allows articulating dissatisfaction and provides mechanisms that allow taking up the articulated issues, should ideally lead to the processing and reduction of pressing problems and thereby diminish the need for extra-institutional conflict resolution (Wolff 2009: 211-2). Hegre (et al. 2001: 34) confirms that open democratic institutions promote a peaceful resolution of domestic conflict. Whereas repression only impedes the escalation of unmitigated conflicts, democracies allow dealing

6 Quantitative research evidences that stark autocracies are equally unlikely to experience civil war as institutionally consistent democracies (Hegre et al. 2001: 38, 42) because they have a strong capacity to effectively repress their potential challengers through “self-enforcing rules and institutions that prevent protest and other activities aimed against the state” (ibid.: 33-4; see also Wolff 2009: 213). The finding becomes more evident when comparing the likelihood of civil war between consolidated autocracies and liberalising autocracies: Political transformation in the form of democratisation is a destabilising process with an inherent risk of civil war because the interim period between the collapse of an authoritarian regime and an established democracy is a period of relative anarchy and ripe for ethno-national or ideological leaders, who want to organise rebellion (Hegre et al. 2001: 34). (This is equally true for a political change in the form of autocratization; ibid.). Thus, it is remarkable that the protection of free speech is generally favoured (with only a few exceptions concerning hate speech) within the current debate on hate speech regulation, regardless of the underlying political situation.

with conflicts constructively and peacefully and therefore contribute to an 'inner peace' (Wolff 2009: 211-2, 214). Thus, under the normative framework of this thesis, the "most reliable path to stable domestic peace in the long run is to democratize as much as possible" (Hegre et al. 2001: 44) and to protect free speech as much as possible.

1.3 Research Question

A central provision of the ICCPR indirectly demands that restrictions to FOE must be proportionate, in the sense that their benefit outweighs their harm to FOE (The OHCHR 2012: 4 and Mendel 2006: 22 with reference to ICCPR 1966: Article 19(3)). However, the proposed benefit of hate speech legislation to prevent disastrous consequences emanating from speech such as violence or genocide is a pure assumption, neither tested nor proven. Surprisingly, the preventative capability of hate speech legislation - though being the core function of the tool - is hardly ever surveyed. Legal scholars are dedicated to the theoretical interpretation of hate speech legislation on the international level, but do not examine its actual impact on national levels. The standardised tool is simply supposed to be able to prevent such complex processes as genocide or violence⁷. Since "modern hate speech laws are not the consequence of 'thousands of years of actions and introspection'" (Malik 2012: blog discussion), it is time to verify whether the theoretical expectations stand the test of reality.

This paper therefore examines, whether *hate speech legislation is an appropriate response to the Rwandan genocide in 1994 and the Kenyan PEV in 2007/2008, considering its objective to prevent harm emanating from speech. In this context, the following questions will be examined:*

1. *What role did hate speech play during the Rwandan genocide and the Kenyan PEV and who bears the greatest responsibility for hate speech?*
2. *What are the shortcomings of legislative measures targeting hate speech, what are the costs particularly concerning FOE, and what are the benefits with regard to conflict prevention?*
3. *Are there alternatives available to curb hate speech without jeopardising FOE?*

7 The challenge is that hate speech legislation is believed to be able to prevent impacts of speech, yet, very little is known about the link between 'speech' (attitude change) and 'action' (e.g. violence) and even less about the impact of speech on such complex phenomena as mass violence or genocide. Hate speech laws are based on a highly abstract and theoretical harm principle, without demonstrating the reality of the supposed danger, according to Mchangama (2012).

In Chapter II, this paper reviews the Rwandan genocide and the Kenyan PEV with special attention to the occurrence of hate speech. This investigation will include an assessment of the role of different key actors concerning the dissemination of hate speech, as well as an assessment of the supposed impact of hate speech on the episodes of violence. Those insights will provide information about contextual factors and the utilisation of hate speech. Both will serve as a basis for further considerations throughout this work.

Chapter III analyses and reflects on the current state of debate on hate speech legislation from a theoretical perspective. It examines its shortcomings both on the international and national level, in an attempt to provide a first potential explanation for the outcome of hate speech legislation in practice.

Chapter IV and V provide a cost-benefit assessment of hate speech legislation. Chapter IV provides empirical evidence for the actual costs of the tool in practice, namely the restriction of FOE and media freedom. Chapter V evaluates the preventative potential of hate speech legislation that is assumed and upheld in theory. While having in mind that a preventative effect is limited to harm emanating from speech and while acknowledging that it is difficult to prove or disprove such an effect in practice, the analysis will combine cognitions about the utilisation of hate speech in Rwanda and Kenya (Chap. II) with assessed shortcomings of the tool (Chap. III) to put forward certain conclusions on its preventative capability.

This cost-benefit confrontation eventually serves as a basis for drawing conclusions on whether hate speech legislation is an appropriate means to prevent negative consequences of speech in Rwanda and Kenya prospectively, or if the actual costs may discredit the tool. But beforehand, the penultimate Chapter presents alternative approaches to curb hate speech with a clear focus on those that do not jeopardise FOE.

2. Flashback

The Rwandan genocide in 1994 followed the downing of an aeroplane carrying the Rwandan President, Juvénal Habyarimana and the President of Burundi, Cyprien Ntaryamira. This event of 6th April 1994 took place in an already heated atmosphere, the Rwandan civil war between the Tutsi-led *Rwandan Patriotic Front* (RPF) and the Hutu government (Surminski/Schreiber 2007). Soon after the aeroplane was shot down, the extermination machinery was launched and eventually resulted in the killing of 800,000 lives within a few weeks (Mehler 2006: 249, 256). Ethnic violence was directed at Tutsi and moderate Hutus. The military victory of the RPF stopped the genocide in July 1994 (Surminski/Schreiber 2007). By September 1994, about 2.1 million Rwandans had left the country and a further 1.8 million people were considered *internally displaced persons* (IDPs) (Mehler 2006: 249).

The general elections in Kenya at the end of December 2007 resulted in local and regional violence (HIIK 2008: 36). It started when Mwai Kibaki (*Party of National Unity*, PNU) was announced as President and supporters of his opponent - Raila Odinga (*Orange Democratic Movement*, ODM) - protested against obvious irregularities and electoral fraud (ibid.). In fact, the majority of independent observers assumed afterwards that Odinga had been robbed of his victory even though both parties presumably committed electoral fraud (Harneit-Sievers 2008: 3)⁸. Protests and riots resulted in 1,000 to 1,500 dead and between 300,000 and 600,000 IDPs (see e.g. HIIK 2008: 36; KNCHR 2008: 3; BTI 2010: 4; Abdi/Deane 2008: 2). A massive international mediation led by Kofi Annan eventually stopped the crisis and introduced a power sharing agreement between Mwai Kibaki (President) and Raila Odinga (Prime Minister) at the end of February 2008 (HIIK 2008: 36).

This review pays special attention to the occurrence and impact of hate speech during the episodes of violence in these two case studies. The first sub-section reconsiders the responsibility for hate speech by comparing the role of the media with the role of political actors. The second sub-section sheds light on the impact of hate speech, which is central since its assumed impact on violence is the main argument in favour of hate speech legislation.

8 In some constituencies, the official turnout exceeded one hundred per cent (Taibl 2009: 145-6).

2.1 Hate Speech Surrounding the Rwandan Genocide and Kenyan PEV

The media sector is usually the first to be blamed when hate speech spreads. The media's responsibility should not be denied. If a medium releases hate speech this may not only lead to a broad dissemination of such utterances, but may also be accompanied with an increased influence since a medium conveys a degree of legitimacy, and can confer authority and strengthen trustworthiness (Benesch 2008: 521, 525; IRIN 2008). Certainly, journalists bear a high degree of responsibility, but so do politicians, who due to their leadership positions often embody authority and are therefore able to incite violence (Mendel 2006:66; see also USHMM 2013: 18:52 – 19:12: Adama Dieng). It is because of the potential influence of both groups that this Chapter aims to compare their responsibility for hate speech during the violent episodes.

2.1.1 Role of the Media

For Rwanda, there are abundant examples of hate speech promulgated by the media. In Rwanda, the newspaper *Kangura* had already started an anti-Tutsi and anti-RPF campaign in October 1990 and published the infamous "Ten Commandments", which specified amongst other things that Hutus who married Tutsi or engaged in business with Tutsi would be traitors, and that all posts in politics or administration should be reserved for Hutus exclusively (Des Forges 1999: 58, 67). *Kangura* further claimed "neo-Nazi Tutsi, nostalgic for power" had planned a 're-colonization' and would oppress all Hutus (ibid.: 66-7). On March 3, the *Radio Rwanda* broadcasted five times "that a 'human rights group' in Nairobi had issued a press release warning that Tutsi were going to kill Hutu" (ibid.: 71). "[...] in 1991 the Rwandan publication *Echo des 1000 collines* published a cartoon showing a Tutsi massacring Hutus with the caption, 'Flee! A Tutsi will exterminate the Hutus'" (Benesch 2008: 504). The station *Radio-Télévision Libre des Mille Collines* (RTLM) underlined differences between Hutus and Tutsi, the disproportionate share of Tutsi wealth and power and recalled the horrors of past Tutsi rule (Des Forges 2007: 45). It warned to prepare to defend against supposed attacks, encouraged listeners to fight, and even broadcasted names of individuals and places that were to be targeted (Des Forges 2007: 45; Straus 2007: 612). The station declared that RPF combatants dressed in civilian clothes were mingling among IDPs, which left the impression that the enemy was everywhere (Des Forges 2007: 48): "Fight them with the weapons that you have at hand, you have arrows, you

have spears [...] go after those inkotanyi⁹, blood flows in their veins as it does in yours [...]” (Des Forges 1999: 191: Announcer of *RTL*). The role of *RTL* in communicating and clarifying what Hutu moderates had to expect, must not be underestimated:

“The radio castigated those who failed to participate enthusiastically in the hunt. One listener remembers *RTL* saying: ‘All who try to protect themselves by sympathizing with both sides, they are traitors. It is they who tell a lot to the *Inyenzi*¹⁰-Inkotanyi. It is they whom we call accomplices [ibyitso]. They will pay for what they have done.’ Disseminating the message that ‘there is no place for moderates,’ *RTL* heaped scorn on those who refused to participate [...]” (Des Forges 1999: 191-92)

The term ‘*Inyenzi*’ (cockroach), a form of dehumanisation, gained sad notoriety during the Rwandan genocide. Moreover, numerous statements were aimed to close ranks within the Hutu community whilst strengthening their in-group identity and out-group suspicion by using a technique known as ‘accusation in the mirror’¹¹. This technique was often accompanied by calls for pre-emptive violence necessary for ‘self-defense’ (Yanagizawa-Drott 2012: 8). Furthermore, a lot of statements referred to past or present injustices. It is important to keep in mind the three key culprits, *RTL*, *Radio Rwanda* and *Kangura*.

In contrast, the role of the Kenyan media is controversial: The popular claim that the media sector fuelled violence is increasingly questioned from voices that argue it was the key actor in lessening tensions (CIPEV 2008: 297). Those inconsistencies largely arise from the fact that performances varied markedly between different media types. The role of the *local language media* was frequently recalled with “horror, fear, and disgust” (ibid.:295). Five local language radio stations are listed in the ‘Schedule of Alleged Perpetrators’ of the *Kenya National Commission on Human Rights* (KNCHR 2008: 195). Local language stations routinely called for the eviction of other ethnic groups (CIPEV 2008: 298-9). Especially the Kalenjin-language radio station KASS FM called for the expulsion of the Kikuyu and is often accused of “having contributed to a climate

9 The term ‘inkotanyi’ refers to the RPF army wing, but “had a number of extended meanings, including RPF sympathizer or supporter, and, in some instances, it even seemed to make reference to Tutsi as an ethnic group” (ICTR/ Akayesu Trial 1998: 147).

10 ‘*Inyenzi*’ is the term for cockroach in Kinyarwanda, one of the official languages in Rwanda.

11 The technique of ‘accusation in the mirror’ portrays attacks as legitimate self-defense. The out-group is, for example, accused of planning attacks to help justify similar plans of the own group.

of hate, negative ethnicity, and having incited violence in the Rift Valley” (ibid.: 295, 298-9). The *International Criminal Court* (ICC 2013) charged KASS FM’s presenter Joshua Arap Sang for committing crimes against humanity. Other radio stations, like *Inooro FM*, were to blame for their carelessness in offering airtime to highly emotional and distraught victims of violence, which created negative emotions with the audience (CIPEV 2008: 217; KNCHR 2008: 195).

Yet, the BBC report indicates that the majority of the Kenyan media played an important role in calming tension and promoting dialogue (Abdi/Deane 2008: 2, 6, 8) and Macharia Gaitho, Chairman of the Kenya Editors’ Guild, claims that the positive role of the media is simply not acknowledged (CIPEV 2008: 298). Alarming utterances of a few local language media stations unfortunately overshadowed that many stations did “to promote reconciliation and defuse tension particularly after the initial wave of violence” (Abdi/Deane 2008: 5). The BBC report further acknowledges that the *mainstream* media used their language in a very careful way (ibid.: 8). At the peak of the conflict, they even took coordinated action in splashing the same headline across their front pages: ‘Save Our Beloved Country’ (ibid.: on January 3, 2008). They were further “praised for the accuracy and fairness with which they reported the negotiations chaired by Kofi Annan to achieve settlement after the disputed election” (ibid.). This is very important since the negotiation phase saw several drawbacks, which could have led to renewed violence (HIIK 2008: 36). The BBC report also highlighted *community media* as a “model for the future” because they played an especially courageous role to calm the conflict (Abdi/Deane 2008: 2)¹².

2.1.2 Role of Political Actors

In Rwanda, inciters of violence ranged from supposedly legitimate authorities and administrative officials on the local level, to top-level politicians (see e.g. Des Forges 1999: 12, 14, 47, 71, 101, 176, 178-9, 358). In November 1992, the Rwandan politician Léon Mugesera made one of the most illustrative examples of ‘dangerous speech’ in front of a crowd of militants, wherein he used two characteristics of incitement to genocide, ‘dehumanisation’ and ‘accusation in the mirror’¹³ (Benesch 2008: 486, 517):

“These people called Inyenzis are now on their way to attack us [...] I am telling you, and I am not lying, it is [...] they only want to exterminate us.

12 The radio station Pamoja FM organised events to bring people from different communities together in order to stop fighting between youth, which make up its main audience. The station is located in a Nairobi slum, which was one of the main centres of the PEV. (Abdi/Deane 2008: 6-7)

13 For an explanation of the characteristics of incitement to genocide see Chap. 3.1.3.2.2

They only want to exterminate us: they have no other aim.” (Benesch 2008: 505) “[K]now that anyone whose neck you do not cut is the one who will cut your neck” (ibid.: 518).

In May 1994 Eliézer Niyitegeka, former Minister for Information, ordered an attack on Tutsi inside a church and afterwards thanked a crowd of some 5,000 people for “good work” (euphemism, see Chap. 3.1.3.2.2) (ibid.: 513-4). Jean Kambanda, prime minister during the genocide, uttered the following phrase: “you refuse to give your blood to your country and the dogs drink it for nothing”¹⁴ (Prosecutor v. Kambanda 1998: 39 cited by Benesch 2008: 514). In April 1994 after the genocide had already begun elsewhere in Rwanda, Jean-Paul Akayesu, the former mayor of Taba commune, made a speech in front of over 100 Hutus, calling them to unite in order to eliminate the ‘sole enemy’, while standing near the corpse of a young Hutu (Leondis/Lai 2008: 6; Benesch 2008: 512). He also read out names of supposed RPF accomplices (Leondis/Lai 2008: 6) and in fact, in the days after his speech, hundreds of Tutsi were killed in the township (Benesch 2008: 512). Thus, the responsibility of Rwandan politicians for incitement is as clear as the fact that the Rwandan government orchestrated the genocide (see Chap. 2.2.3).

In Kenya, it often appears to be very difficult to rate the danger of specific utterances – let alone to decide if they still fall within the scope of FOE, or already represent an illegal form of hate speech. For example, the former Minister of Information, Mutahi Kagwe, is cited to have said at a rally in October: “We are told that people will not be paying rent [if ODM win the election]. Even your milk which is now selling at 17 shillings will be declared free” (IRIN 2008). A former parliamentary aspirant told Kalenjins to stop selling land to the Kikuyus and Kisii (KNCHR 2008: 216). Often, coded language was used: William Ruto, Deputy President in 2014, is alleged to have said during an opening ceremony in reference to outsider communities, “they would uproot the ‘sangari’¹⁵, ‘shake off the soil’, ‘gather it together’ and ‘burn it’” (ibid.: 181). Very common during the campaign period was also the mutual denigration of political opponents, often by using ethnic stereotypes: The PNU argued a Kihii (‘uncircumcised boy’) would not be able to lead the country, a statement that was obviously directed at Odinga and his ethnic and cultural background (ICG 2008: 5; KNCHR 2008: 128). Stereotypes were often used negatively against other ethnic groups such as “Luos fish, Kikuyus run businesses, Kalenjins

14 Despite his guilty plea for incitement to genocide at the ICTR, the phrase was not an explicit call for killing, says Benesch (2008: 514).

15 In this context, the term ‘sangari’ was a circumscription to refer to weeds.

are pastoralists, Somalis trade and Luhyas are farmers” (Umati 2013: 14). Yet, stereotyping and insulting utterances are in themselves not an illegal form of speech (see Chap. 3.1.2). A bit clearer is the statement of above-mentioned Kagwe, who compared Odinga in one of his speeches to Idi Amin and Hitler and warned his audience Odinga would start “suppressing us” like those dictators did, if he wins (IRIN 2008). The aim was obviously to spread fear. As in Rwanda, the dangerous rhetorical technique of ‘accusation in the mirror’ was used: Both candidates, Kibaki and Odinga, or members of their parties, accused each other of ethnic cleansing and equipping militias (HIIK 2008: 36; ND 2008b). Like in Rwanda, direct calls to physical violence were made: Local ODM politicians argued prior to the elections in 2007 that, a victory of the opponent, Kibaki, would be impossible, but if that happens “it must mean the polls had been rigged and the reaction should be ‘war’ against local Kikuyu residents” (HRW 2008b: 4). It is striking that in Kenya, most of these direct calls to violence openly revealed the initial aim of the ethnic violence: the election victory¹⁶ (see Chap. 2.2.3).

2.1.3 Rethinking Responsibility

Whereas journalists seem to be very self-critical of their role in retrospect¹⁷, politicians rather deny any responsibility: The Kenyan government shifted the main guilt for the violence on local language media (Abdi/Deane 2008: 4-5) and the RPF still employs *RTL* as a cautionary tale about the dangers of private media (Waldorf 2007: 404). The latter implication should be carefully examined, since “[m]any governments there [in Africa] have exploited the perception that the violence in Rwanda was fuelled by the media to impose legal restrictions on the press in their own countries”, according to the executive director of CPJ (CPJ/Simon 2006).

There is no doubt that Rwandan media released inciting utterances. However, the media sector was largely manipulated by the government: Prior to the genocide, the government had created “media that looked independent to outsiders, but which was under its full control behind the scenes”, says the prominent Rwandan academic Kamatali (2002: 67 cited by Waldorf 2007: 413). *Kangura*, for example, was financed by Félicien Kabuga (Kentish 2011:

16 The *Member of Parliament* (MP) William Ole Ntimama is alleged to have told the Maasais to evict Kikuyu and Kisii communities if they did not vote for him (KNCHR 2008: 183). The MP William Ruto is alleged to have said at a meeting at his home that Kikuyu should be attacked if they dared to campaign in the area (ibid.: 182).

17 After the PEV in Kenya, media professionals assessed their performance as “a collective failure to defend the public interest” (Abdi/Deane 2008: 8).

15)¹⁸, a wealthy businessman who was one of the financial advisors of the governing Habyarimana regime and whose daughter was married to a son of the President, who in turn was secretary-general of the Interahamwe¹⁹ (ibid.; Des Forges 1999:59,97). *Kangura* therefore strove to publish the government's propaganda (Waldorf 2007: 413). Kabuga was also one of the chief financiers and president of *RTLM*, which was founded, among others, by the minister of planning and the minister of telecommunications²⁰ (Des Forges 1999:59;ICTR/Media Trial 2003: 569). *RTLM*'s co-founder and director Ferdinand Nahimana "was also the director of the Rwanda Bureau of Information and Broadcasting (ORINFOR), the agency responsible for regulating mass media" (Yanagizawa-Drott 2012: 8; ICTR/Media Trial 2003: 567-568). Evidentially, *RTLM* was owned and controlled by Hutu hard-liners within the ruling regime²¹ (Straus 2007: 612; Des Forges 1999: 59; Yanagizawa-Drott 2012: 4; Waldorf 2007: 413). The state-owned *Radio Rwanda* experienced a significant change when its director, a member of the political opposition, fled (Des Forges 2007:48): One *RTLM* announcer celebrated the transformation of *Radio Rwanda* from 'rival' to 'sister' (Des Forges 1999:60). Both radio stations conveyed orders from the authorities and were used to spur and direct killings (Des Forges 2007: 47). While *Radio Rwanda* spoke in the ponderous tones of state officials, *RTLM* was meant to reach ordinary citizen through its lively style (ibid.: 44; Des Forges 1999:191). Good performance can make a message more compelling, Benesch explains (2008:525):"RTLM made sure its broadcasts were entertaining, using catchy music [...], off-color jokes, and an informal style. These [...] helped to create a false impression of trustworthiness, and to drive the message into listeners' minds."

The liberalisation of the print media and the airwaves after Rwanda's independence in the 1980s had not brought with it diversity and pluralism (Article 19/Maina 2011: 16). By 1992, a Hutu Journalist states that the 'marketplace of ideas' was badly damaged, if not dead (Benesch 2008:525). The dominant media outlets performed the role of political propaganda organs, and though alternative media existed in the form of print media, they hardly had any relevance due to their limited circulation and high illiteracy rates (Yanagizawa-Drott 2012: 8-9). Waldorf concludes in reality, *RTLM* and *Kangura*

18 Kabuga also was among the importers of large amounts of machetes (Des Forges 1999:97; see also footnote Chap. 2.2.3).

19 The Interahamwe militia was severely involved in massacres during the genocide (Des Forges 1999).

20 For further connections between the MRND and *RTLM* see Des Forges 1999:59.

21 The ICTR Media trial (2003: 566) concluded that "RTLM was owned largely by members of the MRND [National Republican Movement for Democracy and Development] party, with Juvenal Habyarimana, President of the Republic, as the largest share-holder".

would testify to the dangers of government control and manipulation of the media (Waldorf 2007: 404). After all, the genocide was perpetrated in an environment that was characterised not by too much but by too little press freedom (Article 19/Maina 2011: 16).

Kenyan politicians showed a wider margin of different and sometimes indirect approaches to influence the media. *Government media* had been a “government mouthpiece” anyway (Abdi/Deane 2008: 12). An attempted transformation in 2002 failed because “government became increasingly irritated by the tone of some of its coverage” (ibid.). During the PEV, no independent public service broadcaster existed in Kenya (ibid.: 3). But the great amount of political interference in all kinds of media outlets was just recently documented by an astonishing analysis of Internews (Nyanjom 2012). Even though the study reflects on the ownership structures for 2012, it makes it possible to draw conclusions about media ownership during the Kenyan PEV in 2007/2008 as single connections were supposed or even known before and have haunted the media so that the Internews study only provides the final comprehensive evidence for the government’s and politician’s influence over the media. During the media liberalisation period²² leading politicians and politically connected individuals used the absence of a regulatory framework to acquire a substantive slice of the media industry politics (Nyanjom 2012: 22-23, 41). Kenyan politicians seem to have realised that media ownership brings with it the distinct advantage of spending less while influencing more within campaign periods (Abdi/Deane 2008: 5-6). The Internews analysis reveals that then President Kibaki and Prime Minister Odinga have either known or probable links to media outlets (Nyanjom 2012: vii, 45-6). The government’s media presence is described as “pervasive” due to cross media ownership structures (ibid.: 45)²³. Also, various former or present parliamentarians are linked to FM stations (ibid.: 46-7)²⁴. They partly use very inventive methods to conceal their media ownership²⁵. The main focus of political influence lies on local language stations (Nyanjom 2012: Foreword; ICG 2013: 38; Abdi/Deane 2008: 5-6). *KASS FM*, for example, which gained by far the most criticism for hate

22 The print media market already liberalised in the 1990s, the airwaves towards end of 1990s until early 2000s.

23 For a detailed table of cross media ownership in Kenya see Nyanjom 2012: 48-9.

24 For detailed information about known and likely links between Kenyan politicians and media outlets see Nyanjom 2012: 46-7.

25 Factual ownership is for example achieved through dominant shareholding of media groups, which are on the domestic stock exchange, but various politicians also own FM stations either through direct or remote proxies or even themselves and “employ subterfuge to cover their tracks, such as using their long-discarded first/ Christian names to register their media outlet” (Nyanjom 2012: vii, 44-7).

speech during the PEV, was controlled by politician William Ruto (Plaut 2012; ICC 2013). The Internews report highlights the vulnerability of smaller media houses to political interference, since politicians assure their financing (rent, wages, etc.) (Nyanjom 2012: 44, 52). Not surprisingly, such structures put staff under immense pressure and reduce editorial independence considerably (ibid.: Foreword; ICG 2013: 38; MCK 2011: 2; Abdi/Deane 2008: 5). The BBC reports that during live talk shows, politicians suddenly came “out of nowhere,” literally calling on the youth to rise up and fight (Abdi/Deane 2008: 5). Besides such problems due to media ownership, larger media houses are also open to influence due to their dependence on advertising, especially during election periods, which are always “a particular money spinner” (Nyanjom 2012: 51; Abdi/Deane 2008: 9): The PNU spent about four million Euro and the ODM about two million Euro on advertising during the 2007 elections (Nyanjom 2012: 50).

All in all, the BBC report concludes (similar to Rwanda): “The problem facing Kenya’s media is not an excess of media freedom. It is a lack of it” (Abdi/Deane 2008: 2). The Chairman of the Kenya Editors’ Guild, Macharia Gaiho, argues: “We are seeing a situation where politicians create a problem, politicians promote violence, politicians incite the people and then when things do not go their way they start to blame the media” (CIPEV 2008: 298). It speaks volumes that local language stations, which are the prime target for political interference, were also the main disseminators of hate speech (see Chap. 2.1.1). It can be concluded that in both the Rwandan and Kenyan cases, the media sector acted as an intermediary of hate speech by disseminating top-down incitement due to a lack of media freedom.

2.2 The Impact of Hate Speech

Hate speech is commonly described as ‘poisonous’ (Benesch 2008: 523; ICTR/ Media Trial 2003: e.g. 243,1101), ‘toxic’ (Richter 2010: 20) and ‘the match that lights up the fire’ (Mbaaro 2010: 33). Very popular are comparisons between ‘words’ and ‘weapons’: “In Rwanda, the machetes were the hardware, but the words were the software of this campaign” (Richter 2010: 13). The judges of the *International Criminal Tribunal for Rwanda* (ICTR) sentenced Ferdinand Nahimana by saying: “Without a firearm, machete or any physical weapon, he caused the deaths of thousands of innocent civilians” (ICTR/Media Trial 2003: 1099) and concluded with regard to the media outlets: “But if the downing of the plane was the trigger, then RTLM, Kangura [...] were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded” (ibid.:

953). *RTLM*, which is often referred to as 'Radio Machete' or 'Radio Murder', has become the textbook case of 'broadcasting genocide' (Straus 2007: 612-3). The Pulitzer Prize winner Samantha Power (2001) said, killers in Rwanda often have "carried a machete in one hand and a transistor radio in the other". And Roméo Dallaire, the former UN force commander, argued: "In Rwanda the radio was akin to the voice of God, and if the radio called for violence, many Rwandans would respond, believing they were being sanctioned to commit these actions" (Roméo Dallaire 2003: 272 cited by Straus 2007: 612).

The abovementioned examples reveal an astonishing lack of careful and thoughtful consideration by courts or even those who have experienced the genocide in terms of their wording selected - considering that they are talking about an issue where the wrong selection of words is seen as dangerous. The above comments and expressions all suggest a direct link between hate speech and violence; they reflect the conventional wisdom whereupon media has large-scale and direct effects on behaviour (Straus 2007: 612). Inherent to this implication is the idea that 'ordinary citizens' respond to incitement like marionettes and incitement is the cause for violence:

"Wars are not fought for territory, but for words. Man's deadliest weapon is language. He is susceptible to being *hypnotized by slogans as he is to infectious diseases*. And where there is an epidemic, the group mind takes over." (Arthur Koestler 1978 cited by Richter 2010: 1)

"The Rwandan public is often characterized as hearing a drumbeat of racist messages and directly internalizing them or as hearing orders to kill and heeding the command. Those views are consistent with stereotypes about Rwandans, namely that they obey orders blindly, that they are poorly educated and thus easily manipulated, and that they are immersed in a culture of prejudice." (Straus 2007: 615)

Kenan Malik (2012) criticises that it has become very unfashionable to insist on the distinction between 'speech' and 'action' in:

"In blurring the distinction between speech and action, what is really being blurred is the idea of human agency and of moral responsibility. Because lurking underneath the argument is the idea that people respond like automata to words or images. But people are not like robots. They think and reason and act on their thoughts and reasoning. Words certainly have an impact on the real world, but that impact is mediated through human agency." (Malik 2012)

The impact of speech is a delicate issue. Models of propaganda stimulus and behavioural responses are at odds with decades of empirical research, argues Scott Straus (2007: 614-5), a professor of political science and international studies at UW-Madison with focus on, inter alia, the study of genocide. Jacob Mchangama (2012), the director of legal affairs at the Danish think tank CEPOS and managing director of the Freedom Rights Project, confirms “numerous surveys on race relations suggest that the putative dangers of tolerating extreme speech have little factual basis”. Certainly, the distinct paucity of confirming studies is due to the difficulty of proving and measuring such an impact, and to the issue delving into the complex question of what affects or motivates people to act as they do (Benesch 2011c: 257).

This part of the paper will try to shed light on the impact of hate speech on the Kenyan PEV and confront the conventional wisdom on large-scale and direct media effects with closer inspection of the degree of correlation during the Rwandan genocide. At the end of this process the influence of hate speech within the broader context of conflict dynamics is assessed. This is meant to offer a counterweight to the numerous papers that focus exclusively on the element of ‘speech’ and attribute little or no agency to the actors (Straus 2007: 611, 615).

2.2.1 The Impact of Hate Speech on the Kenyan PEV

In contrast to Rwanda, it is obvious that both the spread of violence and the level of participation in the violence were much lower in Kenya. Although the KNCHR report suggests that different people with different backgrounds and professions supported the violence²⁶, the majority of Kenyans reacted in a passive way to the PEV and tried to stay away from the struggle. Due to security reasons some would no longer leave their homes or bring their families to the countryside (Harneit-Sievers 2008: 6; Bengelstorff 2008b). A caller to a Luo station said: “I urge people to promote peace so that things can come back to normal and for politicians to abstain from inciting people and speak the truth [...]” (Abdi/Deane 2008: 5). Civil society was “very visible in their demands to an immediate end of the bloodshed” (BTI 2010: 23): NGOs, churches, businesses

26 The ‘Schedule of Alleged Perpetrators’ of KNCHR includes a number of MPs, councillors, teachers, headmasters, butchery proprietors, timber and livestock dealers as well as members of illegal groups. Butchery or hotel owners provided, for example, food or shelter to youth (partially for groups of up to 300 armed youth), former army officers or teachers engaged in recruiting, training and mobilising efforts, some simply financed and purchased petrol for arson, provided storage for guns and other logistics or a grinder to sharpen pangas for the attacks. (KNCHR 2008: 177-84, 203, 207, 209-11, 215, 218-9, 220-2, 224, 277, 235-6)

and media called for peace and understanding and warned Kenyan politicians not to jeopardise the internal stability and future of their country in favour of their power interests (Harneit-Sievers 2008: 7). Likewise trade unions and employers placed a full-page advertisement in the Kenyan newspaper *The Standard*, demanding a stop to the violence and declaring further ethnic divisions as well as the support of armed militias as unacceptable (ND 2008c). The announcement of the power sharing agreement, which eventually ended the violence, was followed by nationwide joyful celebrations (ibid.). Although many Kenyans saw the election as a chance to end their marginalisation and make up for past injustices (Bengelstorff 2008a; KNCHR 2008: 88), most of them did not derive from that the legitimacy for physical violence. Kenyan society seems to be characterised by a certain degree of resilience to hate speech (Mbaaro 2010: 28). It should not be underestimated that an audience might value physical violence as illegitimate, despite being bombarded with hate speech, and prefer other peaceful ways of solving outstanding issues, injustices and grievances such as the engagement in political parties, interest groups, self-help organisations, or even peaceful social protest movements (Krennerich 2002: 255-7). Such peaceful alternatives, which are a characteristic of democracies, were available in Kenya, and Kenyans have a record of actively shaping their recent political history²⁷. Already in 2007, first protests against the “ethnicisation” of politics by politicians²⁸ were visible (Taibl 2009: 160), which peaked in an “aggressive campaign calling on Kenyans to rise above the politics of ethnicity” during the elections in 2013 (BBC 2013f). It may therefore be suggested that at least some Kenyans got tired of the ‘divide and rule’ strategy of their political leaders, which they had witnessed for decades, and therefore developed a critical attitude towards hate speech utterances of officials. The 2013 election impressively proved the commitment of the general civil society towards peace: Calls for peace ran through the entire news coverage, crowds shouted ‘Peace, peace’ at a truck of paramilitary police and walls and roads carried the message “Peace wanted alive” (BBC 2013h). While observers often focus on the negative sides of speech solely, the above-

27 Freedom House (2008) highlights the energetic and robust civil society as one of the core strengths of Kenya’s political culture; whereas the Bertelsmann Foundation (2010: 23) states civil society plays a key role in determining political outcomes: “This was the case during the country’s struggle for multiparty competition in the early 1990s, in anticipation of the first transfer of power from KANU [Kenya African National Union] to NARC [National Alliance of Rainbow Coalition] in 2002; in the three constitutional conferences in 2003 and 2004, which saw significant and highly professional input from civil society; and finally, in the run-up to the constitutional referendum in 2005. In all cases, civil society successfully opposed the government of the day. Civil society advocates further reforms quite vocally and consistently criticises corruption and human rights abuses” (BTI 2010: 23).

28 The phenomenon of identity/tribal politics is described for Kenya in Chap. 2.2.3.

mentioned calls for peace could have contributed to the relative preservation of peace. It is often put aside that considering the structural background for conflict in Kenya, large-scale violence such as a civil war would have been thinkable (see Chap. 2.2.3). Luckily, the ethnic tensions “only” concentrated on the Central, Rift Valley, and Western Provinces (HIIK 2008: 36), which brings us to the main perpetrators of violence.

A report from the Waki Commission reveals that the 2007/2008 PEV was overwhelmingly carried out by reactivated armed youth militias²⁹. Some of them already consisted of several thousand youth³⁰. The KNCHR report lists a few incidents where speeches/meetings were indeed followed by ethnic violence: After *Member of Parliament* (MP) William Ole Ntimama told Kalenjin and Maasai youths that Kikuyu women in the Narok market had insulted him, the market was burned down (KNCHR 2008: 183). The MP Franklin Bett and the late MP Lorna Laboso said at a meeting which was attended by about 500 to 700 youth: “[W]e will fight the government until given haki yetu (our right). Immediately after they left, the youth began to attack the Kisii community and burn down their houses” (ibid.: 58). On the surface, those incidents suggest that speech motivated the violence. But upon closer examination, other motivations emerge: The Waki Commission states that these groups have operated on a “willing buyer willing seller basis” (CIPEV 2008: 33). This is confirmed by the reports of the KNCHR and *Human Rights Watch* (HRW), which both give clear examples of direct payments to youth for committing violence: “Young men interviewed by Human Rights Watch claimed that they were offered 7.000 shillings (\$100) for taking part and 10-15.000 (\$200) for each Luo man beheaded. Luo victims and local human rights activists also mention similar figures” (HRW 2008b: 48). The large amount of further examples suggests that payment for violence was by no means an exception³¹.

29 With regard to the main perpetrators, the Commission concluded the violence had been “more than a mere juxtaposition of citizens-to-citizens opportunistic assaults”; rather attacks had been “systematic” and attackers “assembled considerable logistical means and travelled long distances to burn houses, maim, kill and sexually assault their occupants because these were of particular ethnic groups and political persuasion” (CIPEV 2008: viii).

30 Numbers between 2,000 and 7,000 members are mentioned (CIPEV 2008: 68; KNCHR 2008: 55, 58). The Waki Commission clearly emphasises the great risks of ever-growing and increasingly powerful militias. They have a long tradition, which means, they are experienced and already equipped. In many areas, they have become shadow governments. Police and government seem to be ineffective in dealing with them. (CIPEV 2008: viii, 33-5, 68)

31 A lot more examples can be found. Eye witnesses reported that MP Franklin Bett gave unspecified amount of money to Kalenjin and Luo men who immediately after the payment started stoning and burning kiosks perceived to be owned by Kikuyus (KNCHR 2008: 179-80). MP Najib Balala is mentioned as having paid youth Ksh. 500 to cause violence (ibid.: 185). A businessman “was heard saying that whoever killed a Kalenjin would be paid Ksh. 25,000 and

Apart from such direct rewards, different sources suggest lootings could have been an incentive as well and youth may have been motivated to commit ethnic crimes by being promised land (CIPEV 2008: 32; De Smedt 2009: 596). Furthermore, persistent rumours indicate that Raila Odinga “paid rent for many of his supporters, and monthly allowances to his main mobilizers” for many years (De Smedt 2009: 595). This evidence challenges the assumption that the groups acted on incitement and consequently that incitement had caused the PEV. Perpetrators operating on a “willing buyer willing seller basis” often settle for violence by rationally considering alternative income opportunities (Collier 2000: 94). Unfortunately, the severe youth unemployment in Kenya provides strong incentives to join violent groups (CIPEV 2008: 33). Nevertheless, more comprehensive surveys would be necessary to examine whether hate speech may have had conditioning effects. Moreover, all incidents listed within the ‘Schedule of Alleged Perpetrators’ of the KNCHR where hate speech was followed by violence occurred during face-to-face meetings and were communicated orally, without any media involvement.

Apart from the youth militias, the Kenyan police itself contributed to at least one third of the total dead: “The Commission found that there was a heavy-handed Police response whereby large numbers of citizens were shot – 405 *fatally* [...]” (CIPEV 2008: 417)³². Even though it cannot be ruled out that some police officers may have acted themselves in response to incitement, there is evidence for coordinated action which implies that officers were following orders³³: According to the *International Crisis Group* (ICG), brutal police violence comprised many regions³⁴. A UN investigation report accused the police of having “*systematically*” murdered (Engelhardt 2010). This, too, at least questions the incitement theory for Kenya.

2.2.2 The Media’s Impact on the Rwandan Genocide

Conventional wisdom clearly suggests that the media, above all *RTLM*, caused the genocide through incitement that had large-scale and direct effects on

a Luo Ksh. 18,000” (ibid.: 227). Others are accused of collecting money or managing funds that were used to pay the attackers (ibid.: 206, 208, 210, 215, 233). Further examples: HRW 2008b: 46, 51, 53; KNCHR 2008: 121, 185; ICG 2008: 11

32 The Waki Commission declares that many citizens were unlawfully killed by police officers because there were “too many instances of citizens being shot from behind”, including children (CIPEV 2008: 417-8).

33 Whole police stations are for example accused of excessive use of force, threatening members of other ethnic groups, shooting and killing peaceful demonstrators (not in self-defense), arson, looting etc. (KNCHR 2008: 186, 188, 190, 192, 194; CIPEV 2008: 416-429).

34 The ICG (2008: ii) recommended to the Kenyan Government the immediate suspension of all police officers in a number of regions where there is crucial evidence of extra-judicial killings

behaviour (Straus 2007: 612). However, little social scientific analysis confirms such an impact (ibid.: 609; Benesch 2012a: 1).

Two studies shed light on the impact of hate speech. On the one hand, Scott Straus (2007) opposes the conventional view of *RTL*M broadcasts during the Rwandan genocide. On the other hand, a study by Professor David Yanagizawa-Drott (2012; initial version 2009), an assistant professor of public policy at the Harvard Kennedy School, is considered to be the first quantitative evidence for the impact of media activity on violence (Benesch 2011c: 259). What seems contradictory at first are probably two sides of the same coin. Both scholars use *RTL*M as their case study, which is only reasonable since the radio station has become exemplary for the direct and massive influence of the media. The studies are partly complementary and together they provide a detailed and comprehensive picture of the media's impact on the genocide. Whereas Straus (2007: 609, 630) uses an analysis of exposure, timing, content and interviews with 210 perpetrators to explore the correlation, Yanagizawa-Drott uses a complex calculation and statistical methods of econometrics (Benesch 2011c: 259).

First of all, Straus found evidence that *RTL*M was not able to reach large parts of Rwanda's rural population (90 to 95 per cent in the early 1990s) since the station only had two transmitters and the topography of Rwanda - the "land of a thousand hills" - implies comparatively limited exposure to radio broadcasts (Straus 2007: 617). Still, the genocide occurred nationwide and therefore the country generally is a poor model for *mass effects* from FM broadcasts (ibid.). However, Straus' conclusion does not deny *any* impact. This is where Yanagizawa-Drott's study comes into play. What he did was – simplified – to compare the access to broadcasts (independent variable) with the participation in the violence (dependent variable)³⁵ (Yanagizawa-Drott

35 While recognising the same problem as Straus, namely that the reception of *RTL*M was limited, Yanagizawa-Drott used information on the *RTL*M transmitter locations, technical specifications, engineer-developed digital topographic maps and radio propagation software "to estimate what portion of a given village (administrative sector) had sufficient reception to listen to the radio during the genocide" (ibid.: 17-8, 4). For his dependent variable, the author had to rely on the village level prosecution data provided from Gacaca courts as a proxy for the participation in the violence, which is certainly contestable (ibid.: 16-7). Yanagizawa-Drott himself points to a number of issues considering the data of both his variables. According to him, measurement errors are likely for the dependent variable as "prosecution and participation are not identical" (Yanagizawa-Drott 2012: 17). I would add that Gacaca courts might not be a very reliable source for the actual participation rates since serious doubts exist regarding their fairness (BTI 2012b: 10). Regarding the independent variable, there exist three major concerns: 1) The measurement relies on predicted radio coverage instead of actual radio coverage; 2) Since no available data on listening rates exist,

2012: 16-8). The results provide evidence that *RTL*M broadcasts increased participation in violence (ibid.: 24); “full radio coverage increased the number of persons prosecuted [...] by approximately 62-69 percent [...], compared to persons in areas with no radio coverage” (ibid.). Further calculations suggest that 10 per cent of the total participation in violence – approximately 51,000 persons – was provoked by the propaganda (ibid.: 29). This is noteworthy in two respects: Firstly, incitement disseminated via media can have an impact on conflict (ibid.: 30); secondly, the figure equally suggests that the majority of violence may not be directly related to incitement disseminated via media channels³⁶. This figure also corresponds with the inter-views of Straus, in which 85 per cent of the interviewed perpetrators answered negatively when asked whether radio contributed to their decision to join the killing (Straus 2007: 626)³⁷. All in all, Straus’ empirical study consistently contradicts the conventional view (ibid.: 630). He states: “I conclude that radio alone cannot account for either the onset of most genocidal violence or the participation of most perpetrators” (ibid.: 611).

A second crucial point is that like in Kenya, *meetings* and direct mobilisation seem to have played a major role in Rwanda (Straus 2007: 629). Most respondents of Straus’ interviews said, “face-to-face mobilization and fear, not radio, led them to join attacks” (ibid.: 630). The recruitment was organised locally - usually by an authority or elite figure - and was conducted from house-to-house, at markets or rural commercial centres, at rural bars, or at village meetings (ibid.: 626). This result corresponds with other studies, where face-to-face mobilisation and social ties are consistently found to be the primary vectors (ibid.; Des Forges 1999: 182). There is further evidence that national government officials travelled to communities and met with local officials, who in turn instructed the population (Straus 2007: 628-9)³⁸. A delicate issue appears already here: What is the difference between incitement and direct mobilisation/recruitment, and where does one draw the line? Was the function of the meetings to incite or mobilise? Probably both! Benesch (2008:

the paper only estimates the reduced form effect; 3) The transmitters could possibly have been placed in areas more prone to conflict, which would then violate the assumption about the correlation between radio coverage and participation (Yanagizawa-Drott 2012: 18-9). Last but not least, the village dataset is imperfect due to data problems so that “the final dataset contains 1065 villages out of the total 1513 in the country” (ibid.: 18).

36 Other media outlets conveyed inciting messages, too, yet probably less than *RTL*M (see Chap. 2.2./2.2.2).

37 Beyond doubt, such interviews and this question in particular must be treated with caution regarding the truth of the statements.

38 Des Forges (1999: 182-3) emphasises that “it was burgomasters and their subordinates who really mobilized the people”.

501) suggests that already during the early 1990s “dress rehearsals” for the “final solution” were preceded by political “consciousness-raising” meetings in which local leaders described Tutsis as devils and gave the order to kill them.

A third important point is that both scholars do NOT deny any impact of speech. Their studies even reveal indirectly under which circumstances or by what means incitement can be successful/dangerous. Straus (2007: 623-4) in his quantitative content analysis of available *RFLM* transcripts examined whether specific forms of incitement he considered to be as most inflammatory, correspond with higher and lower genocide periods, e.g. calls to be vigilant, calls to fight, kill or defend the nation or themselves, or the mentioning of the words ‘exterminate’ and ‘inyenzi’. Straus (2007: 630) concludes that “the bulk of violence appears to have occurred before the most inflammatory broadcasts aired”. This might indicate that successful incitement does not necessarily consist of direct and apparent calls to violence and – which is even more important – that incitement might not immediately provoke a certain effect: In Rwanda, four years of psychological preparation were necessary, according to Benesch (2008: 499-500). Successful and dangerous incitement might rather consist of slowly but radically changing norms of thought and behaviour; the audience must be re-categorised in order to commit ethnic violence or at least accept it (ibid.). For hate speech to be effective it might be counterproductive to be too explicit: “Inciters do not always say ‘go and kill’ [...] – especially when they are laying the crucial groundwork for genocide” (ibid.: 520). Most of the time incitement is delivered in coded language – “to largely the same effect as clear calls to commit [e.g.] genocide” (Mendel 2006: 8). In fact, coded language often entails a special loaded meaning, which bonds the speaker and the audience more tightly together (Benesch 2012a: 5). Benesch argues, “incitement is at least a precursor, and perhaps a sine qua non for genocides with high levels of civilian participation” (Benesch 2008: 491). She highlights the necessity of social conditioning when victims live among the majority group, since “most people have a moral aversion to killing other human beings” (ibid.: 499-500). The creeping type of incitement seems more appropriate for explaining the “highly centralized and labour-intensive nature” of the genocide, which required the efforts of hundreds of thousands of ‘ordinary citizens’ (ibid.: 499)³⁹ than the automata approach. Straus also supposes that radio broadcasts had conditional effects: They may have framed the political crisis and public choice in the sense that radio communicated how to think about the crisis and set a tone of war (Straus 2007: 611, 629-32), “but the issues

39 It is suggested that “[t]he dead of Rwanda accumulated at nearly three times the rate of Jewish during the Holocaust” (Gourevitch 2000: 3 cited by Kentish 2011: 15).

took on significance in the context of what individuals knew was happening around them in their communities” (ibid.: 630).

Finally, Yanagizawa-Drott (2012: 15) suggests that the explicit information that the “*elite in power* supported the persecution of Tutsis” would have affected the choice whether to participate in the violence or not, since the government’s de facto policy on punishment (or reward) for such violence is uncertain prior to any such information (ibid.: 3). Straus (2007: 630) equally suggests, based on his interviews, that the media effect primarily consisted of disseminating the authorities’ intent: “Radio communicated who had power, what ‘authorities’ supposedly wanted [...]” (ibid.). Straus (2007: 629, 931) assumes the media functioned as an elite coordination device. This assumption is supported by the ICTR: “The Interahamwe and other militia listened to RTLM and acted on the information that was broadcast by RTLM” (ICTR/Media Trial 2003: 488). Yanagizawa-Drott attributes even greater importance to this assumption. He opines that in addition to the information effect, mass media increases participation in violence through an indirect coordination effect (Yanagizawa-Drott 2012: 3). His counterfactual assessment concludes that the broadcasts had far more influence on collective violence (almost one-third was caused by the station) than on individual violence (only 6.5 %) (ibid.: 29-30). This may be due to the fact that collective violence requires more coordination and broadcasts were used to coordinate attacks (ibid.: 1)⁴⁰. Thus, to make incitement successful and bring about violence, the support of the political elite is required.

40 This assumption seems to be supported by two very interesting findings for the participation in collective violence. First, Yan-agizawa-Drott discovered increasing scale effects for collective violence within villages: Low levels of radio coverage did not increase the participation in collective violence, “but once a critical level is reached, there is a sharp increase”, which changed the composition of violence to a larger share of collective violence (Yanagizawa-Drott 2012: 5, 24-5). Second, the author discovered significant cross-village spillover effects for collective violence, which show that “prosecutions are significantly higher when a larger share of the population in neighbouring villages has radio coverage” and again, the effect altered the composition of the violence to a larger share of collective violence (ibid.: 5-6). The examination further indicates that the spillover effects caused 22.3 per cent of the collective violence while only 7.7 per cent can be attributed to direct effects (ibid.: 29). Hence, “a majority of the effects of the station on collective forms of violence were thus due to social interactions, or coordination effects, rather than the persuasive power of the content or inflammatory messages contained in the broadcasts” (ibid.: 6). Yet the individual violence was neither affected by scale effects nor cross-village spillover effects (ibid.: 5, 25). From this, Yanagizawa-Drott interprets coordination effects due to media broadcasts. He assumes that the broadcasts increased the expectation of potential militia members that others (either in the same or another village) would join the attacks, which in turn increased their willingness to participate in the violence (ibid.: 26).

2.2.3 Rival Explanations

It is beyond the scope of this paper to provide in-depth conflict analyses for the Rwandan genocide and Kenyan PEV. Instead this Chapter will point at the inherent complexity of conflict scenarios, present a number of rival explanations including root causes and other trigger mechanisms and thereby demonstrate that hate speech legislation only addresses a fragment of the circumstances that have brought forth the violence.

According to Straus, the recent focus on incitement is undoubtedly an improvement to the untenable claims that ‘ancient tribal hatred’ drove the violence in Rwanda (Straus 2007: 611)⁴¹, yet it is another simplistic model (Straus 2007: 611). Ethnic conflict and genocide in particular are such complex phenomena that scholars still try to reveal their inherent dynamics. Previously, it was widely assumed that diverse societies are more likely to experience conflict than homogenous ones, but in recent years experts have become increasingly convinced that it is not a difference in identity per se that increases the risk of conflict, but the (political) exclusion of ethnic groups (Wimmer/Clederman/Min 2009: 40-1⁴²; Bowen 1996). Genocide is preceded by a long-term process⁴³, wherein incitement is just one variable among others. Hence, when trying to identify the root causes of genocide or ethnic conflict in general, a whole range of factors need to be taken into account.

The Rwandan genocide was preceded by longstanding ethnic competition and tensions between Hutus and Tutsi (Mehler 2006: 252)⁴⁴. Yet, the ‘ancient tribal hatred’ approach proved to be both historically and empirically untenable, since marriages between Hutus and Tutsi were common and the way of life was widely shared (language, religion, dressing etc.) (ibid.; Polley/Körner 2002; Straus 2007: 611). Experts agree that the German and Belgian colonial rule contributed to an aggravation of the conflict, since the Tutsi monarchy was, to

41 Within the media, ethnic conflict is often portrayed as a ‘generic massacre story’, thus endemically and inevitable: “[T]hose people had been killing each other for thousands of years, and will always do so” (Benesch 2008: 501).

42 Wimmer/Clederman/Min (2009: 53, 59-63) provide significant evidence for their exclusion theory by using a new dataset (Ethnic Power Relations – EPR), which encompasses all politically relevant ethnic categories worldwide and provides information about their access to power. Collier (2008: 43) confirms that there is rarely any statistical correlation between ethnic diversity and the risk of civil war, yet, societies with one dominant ethnic group and other numerical strong groups at the same time are more prone to a risk of conflict.

43 The president of Genocide Watch, Gregory H. Stanton (1998), gives an impression of the complexity within “The 8 Stages of Genocide” that contain classification, symbolisation, dehumanisation, organisation, polarisation, preparation, extermination and denial.

44 Des Forges (1999: 31-5) describes the historical roots of the division in more detail.

a large extent, privileged (Mehler 2006: 253)⁴⁵. The crucial point was finally the unequal social hierarchy (Polley/Körner 2002). Importantly, it is often forgotten that the genocide occurred within an already on-going civil war, starting with the armed return of Tutsi-refugees (RPF) in 1990 (Mehler 2006: 250; Surminski/Schreiber 2007; Des Forges 1999: 36). Without going into detail of the long lasting power struggle, it should be noted that tens of thousands Tutsi fled to neighbouring countries after the 'Hutu Revolution' had successfully ended the Tutsi Monarchy in 1961 (Polley/Körner 2002). In the early 90s, it is estimated that 600,000 to 700,000 Tutsi-refugees – almost ten per cent of the Rwandan population – were living in neighbouring countries (Mehler 2006: 255). The invasion of Tutsi-refugees can thus be rated as one of the main conflict factors, particularly in the light of extreme land scarcity and population pressure: Between independence and the genocide the population more than doubled from six to fourteen million (*ibid.*: 250, 257). Still, Tutsi-refugees never gave up their dream to return (*ibid.*: 255). Some historians and experts see the conflict in the light of a "struggle for survival" with a latent rationality in eliminating competing candidates with regard to scarce resources (*ibid.*: 257). The high arms circulation, partly supported by new imports of machetes, must be rated as an aggravating factor⁴⁶. The responsibility of international actors,

45 Belgians imposed a Tutsi monopoly of power in the belief that Tutsi were more capable and superior to the Hutus (Des Forges 1999: 34). Hutus were excluded from higher education and thus careers in the administration, which affected next generations as well (*ibid.*). Experts often point to the Belgian introduction of identity cards indicating ethnic origin in the 1930s, which were meant to help identify who exactly was Tutsi and enhanced the importance of ethnic affiliation (*ibid.*: 35). However, differences in status already emerged prior to the colonisation: Within a pre-colonial monarchical political system, controlled by Tutsi (Kentish 2011: 14), the "word 'Tutsi,' which apparently first described the status of an individual – a person rich in cattle – became the term that referred to the elite group as a whole and the word 'Hutu' – meaning originally a subordinate or follower of a more powerful person – came to refer to the mass of the ordinary people" (Des Forges 2009: 32). A partially exploitative pre-colonial 'feudal system' to the detriment of the Hutus may already have contributed to the development of an inferiority complex, which may have gained momentum during colonial times (Mehler 2006: 252-3; Des Forges 1999: 35).

46 This point is crucial in several respects. First of all, arms imports could have been a warning signal. Already in 1990 Boutros-Ghali, then Minister of Foreign Affairs in Egypt, facilitated an arms deal of \$26 million with Rwanda (Guardian 2000). Secondly, the imports seem to have played a significant role for equipment efforts: Although it is often upheld that machetes, as a traditional farming tool, were available to many Rwandans anyway and military and militia were often equipped with firearms instead (Des Forges 1999: 9, 25), Colonel Théoneste Bagosora, an organiser of the genocide, calculated "being able to provide firearms for only one third of the recruits" since they were too costly (*ibid.*: 9, 97). Alternatively, key actors advocated arming, for example, participants in the 'civilian self-defense' program with traditional weapons such as machetes (*ibid.*: 9) and hence imported a quantity equalling some "581,000 machetes or one for every third adult Hutu male in Rwanda" from January 1993 through March 1994 (*ibid.*: 97). It is only possible to assume the effect of such imports on the genocide. It might not be reasonable to suggest that without the imports the genocide would have been avoidable. However, an arms embargo, which was implemented only in

particularly France, which openly provided military assistance to the Hutu-Regime, must be taken into account in this context (ibid.: 261-2)⁴⁷.

Above all, it is well known that the government orchestrated the genocide (Mehler 2006: 258, 262; Yanagizawa-Drott 2012: 4) and the motivation of the political elite is obvious: The government found itself in the midst of a civil war against the Tutsi-led RPF, with a real chance of losing it (Straus 2007: 609-10; Mehler 2006: 262). The extermination campaign was meant to secure power, albeit unsuccessfully since the RPF defeated the regular army within a few months (Mehler 2006: 256, 259, 262). Some sources indicate the 'extermination project' had been openly discussed in cabinet meetings (BBC/Doyle 2004). The so-called 'réseau zéro'⁴⁸ was responsible for the preparation and supervision of atrocities (Mehler 2006: 261); and militias such as the *Interahamwe* operated with unofficial government authorisation (Des Forges 1999: 82-3, 178-81). Their role in spreading fear and terror is often overlooked by advocates of the incitement theory, who emphasise 'ordinary citizens' must have been persuaded to kill by the media⁴⁹. The media certainly communicated what moderates had to expect (see Chap. 2.1.1), yet, what sympathisers with Tutsi victims really had to fear was the punishment by the estimated 30,000 militia members (Kentish 2011: 15). Benesch (2008: 495) says that so far, genocide has been "carried out by state employees, albeit often aided by civilians":

In Kenya, too, the complexity of violent outbursts is often simplified. Violence is regularly characterised by three main components: Elections, ethnic belonging⁵⁰ and incitement. This often and mistakenly leads to the assumption that any of these variables 'causes' violence. However, ethnic diversity itself does not cause violence; elections function only as a trigger; and incitement is nothing more than a tool. The root cause of violence is far more complex; and

May 1994 by the Security Council, would at least have been "another effective, cost-free way of indicating international condemnation of the interim government" (ibid.: 25-6).

47 In 1993 France provided up to 1,000 soldiers, arms delivery and training to the regime in order to preserve its sphere of influence in Africa through preventing a victory of the RPF. It still continued to deliver weapons after the start of the genocide. (Mehler 2006: 261-2)

48 The 'réseau zéro' was a network charged with the preparation and execution of the genocide (Mehler 2006: 261). The death squad was linked to the highest circles of power in Kigali (Des Forges 1999: 48).

49 The militias have exerted pressure on 'ordinary citizens' that has nothing to do with persuasion. It is well known that Hutu collaborators and traitors were killed just as were Tutsi. This is not to neglect that members of those militias could have been influenced by incitement to join the above mentioned groups.

50 The PEV had a strong ethnic connotation: In the slums of Nairobi whole districts were redistributed following ethnic criteria (Harneit-Sievers 2008: 7; Bengelstorff 2008b) and most of the victims were attacked from members of other ethnic groups (Taibl 2009: 146).

in the case of Kenya it is 'identity politics'⁵¹. Ethnicity based politics has been an integral part of Kenya since the establishment of a political system after independence in 1963 (Harneit-Sievers 2008:6-7).

To reveal the inherent conflict dynamics, it is crucial to distinguish between two groups of actors: Politicians and, in this case, their electorate. Politicians present themselves as the 'big men' of their communities instead of relying on coherent party manifestos and competing based on content and ideas (BBC/Juma 2012; BTI 2008: 2). The weak party system is characterised by party hopping of politicians who strive for convenient ethnic alliances (KNCHR 2013a: 1; BTI 2008: 2; BBC/Juma 2012): William Ruto, who is the 'big man' of the Kalenjin community backed Raila Odinga (Luo community) in 2007, but switched sides in 2013 when he took the position of running mate to Uhuru Kenyatta (Kikuyu community) (BBC 2012c; BBC 2013g; BBC/Okwembah 2013b). The underlying aim of self-preservation of the political elite has never been more obvious than during the 2013 election (BBC/Juma 2012): "Despite [...] major changes in governance, any Kenyan who went to sleep soon after independence 50 years ago, and woke up last weekend will be forgiven for quickly telling themselves: 'I haven't missed much - Kenyatta is still fighting Odinga!'" (BBC 2013)⁵². President Uhuru Kenyatta, who was elected in 2013, and his Deputy President William Ruto represented "that section of the Kenyan society that had monopolized political and economic power since 1963" in order to concentrate the massive wealth in the hands of the economic oligarchy (Campbell 2013)⁵³.

Large parts of the electorate, on the other side, willingly participate in the game of identity politics. They vote "not for 'policies that speak to me' but for 'personalities that speak like me'" (BBC 2013)⁵⁴, because history has taught Kenyans that economic prosperity comes with political power. During Kenya's

51 According to an international development professor at Harvard University, the challenge in many African countries is neither the prevalence of ethnic identity nor the stranglehold of autocrats (anymore), it is the use of identity politics, it is tribalism (BBC/Juma 2012).

52 In the early 1960s Jomo Kenyatta's main rival was Oginga Odinga (BBC 2013).

53 Kenyatta has vast commercial interests in the country's banking, tourism, construction, insurance, agriculture, media, and dairy sectors (BBC/Mugera 2013; Campbell 2013). Whereas the Kenyatta-family owns huge parcels of land in different regions of Kenya, the majority of Kenyans suffer from landlessness (BBC/Mugera 2013; BBC 2013). According to Forbes magazine, Kenyatta is "[h]eir to one of the largest fortunes in Kenya" and ranked as the "23rd richest person in Africa with an estimated fortune of £330m (\$500m)" (BBC/Mugera 2013). To give another example, Odinga has interests in liquid gas cylinder manufacturing, ethanol production and the importation and distribution of petroleum (BBC/Okwembah 2013b).

54 According to research, more than 50 per cent of Kenyan respondents did not know that their parties even had manifestos (BBC/Juma 2012).

political history, one of the ethnic groups was alternately in power, leaving the other(s) excluded from the political sphere and economically marginalised (BTI 2010: 3-4; Harneit-Sievers 2008: 5)⁵⁵. In Kenya, the privilege of one often seems to be to the detriment of the other. Land distribution is the ultimate showcase for this. During colonisation the Kikuyu lost large tracts of their land. However, reallocation schemes after independence mainly benefited those with capital - and thus the new Kenyan Kikuyu business elite was able to purchase large tracts of British settlement territory⁵⁶ (Harneit-Sievers 2008: 5; Huggins/Nyukuri/Wakhungu 2008: 11-3). Until today, the allocation of land itself is one of the most emotional and conflictive topics because every ethnic group has experienced land losses during Kenya's history (Harneit-Sievers 2010; KNCHR 2008: 17; Huggins et al. 2008: 11; BBC/Gatehouse 2013a)⁵⁷. Many Kenyans internalised the underlying logic of identity politics (Harneit-Sievers 2008: 4), whereby the satisfaction of the own ethnic group gains priority for politicians (BTI 2008: 2). Votes are exchanged for "little favours," starting with voter bribery during door-to-door campaigns and ranging up to patronage⁵⁸ (KNCHR 2013a: 3; BBC/Juma 2012). Meanwhile, many Kenyans are hardly capable of cutting themselves off from this logic (BTI 2010: 19) and believe that (...)

"[...] a person from their own tribe must be in power, both to secure for them benefits and as a defensive strategy to keep other ethnic groups, should these take over power, from taking jobs, land and entitlements. All of this has led to acquisition of presidential power being seen both by politicians and the public as a zero sum game, in which losing is seen as hugely costly and is not accepted." (CIPEV 2008: 29; see also KNCHR 2008:18)

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- 55 The Kikuyu developed a privileged position because Jomo Kenyatta, the first President after independence, belonged to this group (Harneit-Sievers 2008: 5). Since then they were "politically and economically positioned to raise capital" (Huggins et al. 2008: 13). In turn, they were marginalised under the authoritarian regime of Daniel arap Moi (1978 - 2002), who represented the Kalenjin community (BTI 2010: 2-3).
- 56 Apart from their strong economic position, which allowed Kikuyus to invest in land-buying companies, Kikuyus certainly profited from ethnic favouritism and political patronage during the land reallocation time (Huggins et al. 2008: 13).
- 57 To understand deeply felt land-related grievances one has to take into account, that land ownership is linked to feelings of identity and belonging and land tenure has a great significance in agrarian states where livestock production is the main economic activity. Kenya also faces an increasing structural land scarcity. The Kenyan history and impact of land allocation is illustrated in Huggins et al. 2008
- 58 The plunder of government resources is directly related to patronage (see e.g. BBC/Juma 2012; BBC 2013d; BBC/Shikwati 2012). "Scandals [...] followed each other with such regularity that the poor of Kenya were becoming immune to stories of theft of state property and misappropriation of funds" (Campbell 2013).

This conflict background is explosive. Nevertheless, a majority of the Kenyan electorate seemed to adhere to peaceful means to defend their interests during the election in 2007/2008 by casting their vote (see Chap. 2.2.1). The case is different concerning the political elite: What appeared to be an 'ethnic conflict' on the surface was in fact a fight for national power (HIIK 2008:26)⁵⁹. The instruments employed by the political elite were hate speech⁶⁰ and violence: Whereas orderly elections may entail the risk of losing, inflammatory speech and violence aims to achieve certainty of the outcome (Benesch 2011b: 1).

During the 2007 election Mwai Kibaki, representing the Kikuyu elite, faced Raila Odinga, who stood up for progressive political and radical social change, thereby gathering the Luo community behind him (KNCHR 2008:23; Ling 2008; Bengelstorff 2008a). As usual, both political camps bolstered support within their respective communities in order to generate votes, often by highlighting ethnic differences and exploiting deeply-felt grievances of the electorate, such as unfair land tenure (Harneit-Sievers 2008: 4; BTI 2008: 2). The employment of incitement was successful inasmuch as the contest "was perceived in large parts of the country as an ethnic struggle for the presidency between Kibaki's Kikuyu and Raila's Luo" (BTI 2010: 6). Both candidates received over 90 per cent of the votes in some ethnic homogenous provinces (Engelhardt 2010).

At the same time, political actors of both the PNU and the ODM financed and organised youth militias to secure their Presidency and thus power (KNCHR 2008: 3, 177-185; HRW 2008b: 4, 45, 46, 53; ICG 2008: 11; Harneit-Sievers 2008: 2, 7; De Smedt 2009: 595-6). There is nothing new about such connections⁶¹. The Waki Commission speaks of a general "trend of institutionalization of violence" (CIPEV 2008: viii) and HRW already warned in 2002: "Violence has

59 Often an 'ethnic conflict' covers the original aim and motivation, which in Kenya was the calculus of power (Taibl 2009: 154). It is also important to note that even though attacks were overwhelmingly targeted at other ethnic groups, this should not belie the fact that political interests finally dominated over ethnic belonging (ibid.: 146, 159; Huggins et al. 2008: 15): For example, attacks during the 2013 elections that were targeted at polling stations only shortly before their opening imply a political motivation as they are meant to scare off voters (BBC 2013h). So do displacements, which hinder people to take part in the voting process within their district of registration (KNCHR 2013b: 2). In fact, some examples show that kinsmen attacked members of their own ethnic group, because they did not want to join attacks or were perceived to be sympathetic to the other party (CIPEV 2008: 93).

60 A former prosecutor of the *International Criminal Tribunal for the Former Yugoslavia* (ICTY) argued incitement was "an expedient *instrument* by which élites arrogate power to themselves" (Benesch 2008: 501).

61 Politicians have already used violent gangs for the ethnic clashes in the 1990s (CIPEV 2008: 34; HRW 2008b: 2) and earlier: "Already in the 1960s KANU used its Youth Wings to intimidate political opponents, while in the 1980s it became commonplace for politicians to have their own (violent) gangs of supporters" (De Smedt 2009: 595).

been used so often for political ends and without accountability that it is at risk of being seen as a legitimate means of political discourse” (HRW 2002: 70). At the time Kibaki was declared as the winner, Odinga used the PEV to provoke international attention for a fraudulent election:

“[...] the violence was more or less controlled by Raila Odinga’s Orange Democratic Movement as a way to contest what was widely presumed to be a stolen presidential election [...]. Where the courts are slow and lack autonomy, such violence represents a logical – if unfortunate – means of protest and political influence [...]. In this case, the objective was control over the central state. When this was at least partially achieved, the violence all but stopped.” (Landau/Misago 2009: 100)

The ICC (2013) undertook investigations and upheld charges on ‘crimes against humanity’ against three of six suspects; Uhuru Kenyatta and William Ruto - who run the country as President and Deputy President since the 2013 elections - as well as Joshua Sang (Head of Radio Station KASS FM) (ICC 2013). Kenyatta and Ruto were accused of organising attacks on members of other ethnic groups during the 2007 elections (BBC 2013j). The ICC dropped Kenyatta’s charges for ethnic violence in December 2014 (BBC 2014).

These remarks about the conflict context in Kenya demonstrate the need to carefully distinguish between root cause and trigger mechanism: Identity politics, not incitement, is the reason why “[e]very election since the establishment of a multi-party system in 1991 witnessed widespread violence” (HRW 2008b: 11).

2.3 Conclusion: Check Responsibilities for Hate Speech and Rival Explanations for Violence

Several conclusions can be drawn from this Chapter. First of all, incitement is *neither the – nor a – root cause* for violence. If people act on incitement they have far “better” and more complex reasons to do so, such as political and economic exclusion, resource scarcity or, as was particular in the Rwandan case, fear for their life. Mehler (2006: 258) confirms that hate radio only exacerbated the conflict instead of being a direct cause for the Rwandan genocide. And the BBC report concludes that the Kenyan PEV is rooted in long standing grievances so that the role of the media is just one among many other factors (Abdi/Deane 2008: 2). Concentrating solely on incitement not only trivialises the problems in the two countries, but also leaves the core issues unresolved

and hinders the development of alternative strategies: Tackling root causes such as political exclusion and linked marginalisation would decrease the effect of incitement, which exploits related ethnic division and existing grievances. For Kenya, it is unlikely that legislation on incitement will prevent further election violence since it neither diminishes the incentives of those in power to support youth militias (the main perpetrators), nor changes or even addresses the perspectives of the youth.

Thus, the *impact of hate speech* is often exaggerated for Kenya, where a closer look at the main perpetrators during the PEV 2007/2008 questions the incitement theory. Regarding the role of the media, inciting statements were spread via local language stations, yet, the positive impact of other media outlets is hardly ever mentioned and probably underestimated. This stands in direct contrast to Rwanda. All three mentioned media outlets - with special attention on *RTL*M - used disgusting and clearly inciting statements. Here, it is without doubt that the media had an impact on the violence, as Yanagizawa-Drott's study proves. Even though the impact might not be as large as the conventional wisdom indicates and local meetings seem to have played a crucial role for mobilisation efforts, conditional and creeping media effects have probably played a role that cannot be neglected considering the tragedy of the Rwandan genocide.

This takes us to the first sub-section of this Chapter. The three media outlets in Rwanda were under full control of the regime. In Kenya, too, politicians owned certain local language stations and the government's media presence was described as "pervasive". In both countries incitement was what Benesch (2008: 495) calls "speech in the service of the state", and media outlets became an intermediary by disseminating top-down incitement, which was only possible due to a lack of media freedom.

Most observers concur that the near absence of press freedom is characteristic before genocide (Article 19/Maina 2011: 11). In Nazi Germany, the opposition press was destroyed and non-Nazi journalists were fired, arrested or driven into exile in order to mould public opinion (Benesch 2008: 523). According to Benesch (2009: 9), alternative sources of information tend to disappear before genocides, since pre-genocidal governments typically shut down opposing media "and make it dangerous for anyone to speak up against the campaign of incitement" (Benesch 2008: 523). Public discourse is heavily manipulated in order to establish a monopoly on opinion and to avoid non-poisonous speech, which could counter or challenge the incitement (ibid.). If no alternative views

are provided, inflammatory speech becomes much more liable (Benesch 2009: 10), and "is much more powerful, more likely to overwhelm the listeners' own moral compasses" (Benesch 2008: 523) because it narrows the choices individuals believe they have (Straus 2007: 632).

3. Shortcomings of Hate Speech Legislation

The purpose of this study is to assess the implementation of hate speech legislation in Rwanda and Kenya. However, to concentrate on domestic legislation entirely has been rejected as insufficient for two reasons: First of all, the shortcomings on the national level can only be examined sufficiently if the standards on the international level are provided beforehand. Secondly, a comparison is important to eventually conclude whether domestic shortcomings are entirely home-made or have their roots in shortcomings on the international level. Examinations that focus on domestic legislation often leave the impression that states adopt hate speech legislation with the intent to extensively restrict FOE (see e.g. Amnesty International 2010/2011; HRW 2008a; Article 19 2009b/2010a). This must be checked. If Conventions on the international level are vague or even conflicting, these shortcomings are bound to be carried forward to the national level since the contracting state parties of the relevant Conventions are obliged to implement them.

3.1 International Level

The legal framework for crimes of incitement is sparse. This reflects a core problem of international legislation, i.e. settling for the lowest common denominator: Nations fundamentally disagree on the question regarding the extent to which FOE should be restricted⁶². The difficulty to reach a basic agreement on the international level was already visible during the drafting process of the Genocide Convention, wherein incitement to genocide is stipulated⁶³. The national approval of hate speech legislation is often connected

62 The United States and Germany are often used as counter examples (Haupt 2005). Basic differences can already be deduced from the Constitutions of both states: In the United States, FOE takes a prominent position under the first amendment so that free speech is allowed almost absolutely (Benesch 2008: 492, 507), whereas in Germany "all rights must be weighed against human dignity, which takes precedence over all other values" (Haupt 2005: 314) according to Article 1 of the German Basic Law. Hence, consensus is difficult to achieve: German hate speech laws with particular attention on Holocaust denial (see Chap. 3.2.1) would be unconstitutional under the first amendment of the United States (ibid.: 303).

63 The United States took 40 years to ratify the Genocide Convention and then only with a reservation (Benesch 2008: 507). While the Soviet Union proposed to expand the restriction on FOE, the United States tried to further limit the scope of restrictions (Mendel 2006: 6). The final version must therefore be seen as careful compromise (ibid.: 9). And still, the reservation of the United States declares: "[N]othing in the Convention requires or authorizes legislation

to historical experiences. Some states that followed the trend on hate speech legislation, such as Germany, South Africa, Rwanda, and more recently Kenya, responded to disastrous events in their history, which appeared to make restrictions on FOE indispensable. The acceptance of hate speech legislation is obviously greater in countries whose challenge is to rebuild national unity and achieve racial harmony and reconciliation (Mbaaro 2010: 38). Thus, international conventions must balance various interests (Mendel 2006: 7).

3.1.1 Legislative Background on FOE and Incitement

Regarding the right of and restriction to FOE, three different instruments are relevant on the international level: the ICCPR, the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) (Article 19 2012: 9-13) and the *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention 1948), which addresses the specific type of incitement to genocide⁶⁴.

FOE is a fundamental human right, primarily guaranteed by Article 19 of the *Universal Declaration of Human Rights* (UDHR 1948) as well as Article 19 of the ICCPR (1966). Yet, the right to FOE is not absolute as can be deduced from Article 19(3) of the ICCPR:

“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are *provided by law* and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.”

Thereby the ICCPR opens the door for legislation on hate speech – but only if those restrictions satisfy the required ‘three-part test’ of **legality, legitimate aim and necessity/proportionality** (in part following Article 19 2012: 26 and Mendel 2006: 22). First, limitations to FOE must be provided for by law. According to the European Court of Human Rights, any restriction to FOE must be “formulated with sufficient precision to enable the citizen to regulate

or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States” (Benesch 2008: 507-8).

64 Besides these international human rights instruments, three regional human rights instruments exist: The *European Convention on Human Rights* (ECHR), the *American Convention on Human Rights* (ACHR) and the *African Charter on Human and Peoples’ Rights* (ACHPR or The ‘African Charter’) (Article 19 2012: 14-7). These instruments will not be further considered, since the focus lies on the ICCPR and Genocide Convention.

his conduct” (European Court/Sunday Times Case 1979: 49). Second, any interference with FOE must pursue at least one of the legitimate aims listed in the ICCPR, which are exclusive (other aims are illegitimate) (Mendel 2006: 22). And third, “the restriction must be necessary to protect those aims. ‘Necessary’ implies that there is a ‘pressing social need’ for the restriction, that the reasons given by the state to justify the restriction are ‘relevant and sufficient’ and that the restriction is proportionate in the sense that the benefits outweigh the harm.” (ibid.) To conclude, Article 19(3) of the ICCPR explicitly permits restrictions on the right to FOE and sets the international standard for the scope of such restrictions⁶⁵.

The first provision explicitly dealing with incitement can be found in Article 20(2) of the ICCPR (1966): “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” However, Article 19(1) and 19(2), which guarantee FOE, and Article 20(2), which poses an obligation to restrict speech, are “clearly in potential tension and even conflict with each other” and thus present a discrepancy in international law (Mendel 2006: 31). The second provision dealing with incitement is Article 3(c) of the Genocide Convention (1948), which declares “[d]irect and public incitement to commit genocide” as a punishable act. Consequently, the UN restricts four forms of incitement: incitement to discrimination, hostility, violence and genocide (Benesch 2011a: 2)⁶⁶. Thirdly, Article 4(a) of the ICERD (1965) offers the most far-reaching hate speech provision on the international level (Mendel 2006: 11). It requires contracting state parties, inter alia, to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred.” Thus, it calls for the banning of the mere dissemination of ideas, regardless of any impact (ibid.: 35)⁶⁷. Mendel (2010: 6) argues that the provision is in “clear and problematical

65 The dedication to FOE as well as the clarity in providing restrictions to this right is quite different in all the aforementioned international and regional instruments: Based on its specific focus on racial discrimination, the *ICERD* explicitly requires its state parties to declare, inter alia, “incitement to racial discrimination” and “incitement to acts of racially motivated violence” as offences punishable by law, however, provides for the right to FOE in less dedicated terms (ibid.: 11-2). Regarding the regional instruments, the *ACHR* surprisingly “specifically provides for the banning of hate speech” (ibid.: 13), whereas the *ECHR* is interpreted by the European Court of Human Rights as “justifying hate speech laws but not necessarily as requiring them” (ibid.) and the *ACHPR* includes “requirements that rights should be exercised with due regard for the rights of others (Article 27), and to respect others and to maintain relations aimed at promoting respect and tolerance (Article 28)”, which “could be relied upon to justify hate speech laws”, according to Mendel (2006: 13).

66 The fifth form ‘incitement to terrorism’ (Benesch 2011a: 2-3) lies outside the scope of this study.

67 Extensive concern on Article 4 of the ICERD already appeared during debates at the UN General Assembly, but the controversy was not pursued for systemic reasons (Mendel 2006:

conflict with the right to freedom of expression” and “it is hard to see how consistency could be achieved between Article 19(3) of the ICCPR and Article 4(a) of [I]CERD” (ibid.: 34)⁶⁸. The restrictions of the ICERD are very controversial among experts and less acknowledged than the ICCPR.

3.1.2 Terminology

The OHCHR (2012: 4) stresses that restrictions to FOE must be “clearly and narrowly defined” and not be “overly broad”. Considering that hate speech laws are aimed to curtail one of the most fundamental human rights, one might expect to find distinct concepts of various types of incitement as well as clear and consistent definitions for the key terms couched in the legislative texts. Instead and disappointingly, there are very few consistent and widely accepted definitions⁶⁹.

Hate Speech

Though the term is not employed in international provisions, its general usage should be clarified for the sake of completeness. Without doubt, ‘hate speech’ is the most popular and, at the same time, the most imprecise and holistic concept within this topic. No single definition is accepted by international consensus, but the term is generally understood to mean “speech that attacks or disparages a group or a person, for characteristics purportedly typical of the group” (Benesch 2011a: 3-4). In practice, the phrase is used as an umbrella term, which covers a great range of other concepts including the ‘incitement-family’ (see next paragraphs). Malik (2012) raises doubts about the usefulness of a concept that lumps “it all together in a single category”. The uncertainties within the debate make it necessary to be able to refer to a concept that is acknowledged for its far-reaching vagueness. However, it must be clear that the term does not qualify for any legal utilisation, since it virtually invites subjective analysis (Amnesty International 2012: 7). It is therefore surprising that the term ‘hate speech’ made its way into the Kenyan Constitution of 2010 (see Chap. 3.2.2).

‘Incitement’

Both the ICCPR and the Genocide Convention utilise the term incitement. Many experts emphasise that the concept of incitement is “extremely complex

34; Mendel 2010: 6).

68 Article 19 (2012: 24) agrees, “Article 4(a) of ICERD should be interpreted in compliance with Article 20(2) of the ICCPR”.

69 Definitions in this section do not include the requiring elements of the legal crimes, which will be examined in the next chapter.

and controversial” (Mendel 2010: 6)⁷⁰. There is no easy answer to the question of what constitutes incitement. Mendel, for example, devotes a whole Chapter to clarifying the term (Mendel 2006: 44-61). In order to avoid getting lost in the details, the general meaning of the term has to suffice at this point: The Oxford Dictionary (2013a) defines ‘to incite’ as to “encourage or stir up (violent or unlawful behaviour)” or to “urge or persuade (someone) to act in a violent or unlawful way”. Benesch (2012a: 2) proposes that in law, “speech intended to provoke another to commit a crime is incitement”.

‘Incitement to Genocide’

The provision of incitement to genocide in the Genocide Convention consists of seven words only with no further definition or explanation (Benesch 2008: 493). As a consequence, “hundreds of courtroom hours have been spent – and dozens of pages of judgments written – discussing particular examples of speech without clear conclusions on whether or why they constituted incitement to genocide” (Benesch 2011c: 260). A clear advantage of the concept is that the Genocide Convention at least includes a definition of the single term ‘genocide’⁷¹. It is clear that incitement to genocide is a specific type of incitement to violence (Benesch 2011a: 3) and in direct comparison represents a higher degree of danger regarding the result for which its inciter strives.

‘Incitement to Violence’ and ‘Incitement to Discrimination’

Just as the Genocide Convention, the ICCPR does not provide any definition for either incitement concepts. Contrary to the Genocide Convention, the ICCPR does not even define the single terms ‘violence’ and ‘discrimination’⁷². It should

70 Frank LaRue, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, rates incitement as “[t]he most difficult word in Article 20” (USHMM 2013: 1:38:00 – 1:38:42) and the UN High Commissioner for Human Rights “expressed concern at the fact that this term lacks clear definition in international law” (Mendel 2010: 6).

71 Definition of the term ‘genocide’ according to Article II of the Genocide Convention: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group” (Genocide Convention 1948).

72 Definitions from other documents must suffice: Article 19 defines violence by adapting a definition of the World Health Organisation as “the intentional use of physical force or power against another person, or against a group or community that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation” (Article 19 2012: 19) and *discrimination* by adapting a definition of the ICERD and *Convention*

be noted that international legislation generally understands the results of both types of incitement, namely violence and discrimination, as “(normally) illegal acts” or crimes - equally to genocide (Mendel 2010: 9).

... and ‘Advocacy of Hatred’ and ‘Incitement to Hostility’ ?

Both concepts are employed within the ICCPR, yet again, are not defined. They pose the greatest challenges to scholars and courts because of the terms ‘hatred’ and ‘hostility’. Mendel (2010: 9) speaks of a “distinct paucity of material in official documents and court decisions on what constitutes ‘hatred’”. Both terms are often used and defined as equivalents (ibid.; Article 19 2009c: 10), but the inevitable question then becomes whether there actually is any difference. Courts and committees either tend to completely avoid their usage or, despite their application, do not define them (Mendel 2006: 10, 25⁷³). If they do, they define them “in an entirely circular fashion” (ibid.: 24). Contrary to genocide, violence or discrimination, the proscribed result of hatred or hostility is difficult to grasp (ibid.: 10). The question arising is whether they refer to an illegal act at all or purely to a state of mind.

“Hatred and hostility would appear to refer to very similar notions. Significantly, both the HRC [Human Rights Committee] and the Committee on the Elimination of all Forms of Racial Discrimination (CERD Committee) have understood their respective terms to include a passive state of mind rather than a specific act. In other words, the proscribed result is simply a state of mind in which hostility towards a target group is harboured, even though this is not accompanied by any urge to take action to manifest itself.” (ibid.: 15)

This finding leads invariably to a contradiction within international law: “hatred, as such, is simply an opinion and is thus absolutely protected under international law” (Mendel 2010: 9).

Offensive and Insulting Speech

According to the Oxford Dictionary (2013b/c), ‘offensive’ means “causing someone to feel resentful, upset, or annoyed” and ‘insulting’ means

on the Elimination of All Forms of Discrimination against Women as “any distinction, exclusion, restriction or preference based on race, gender, ethnicity, religion or belief, disability, age, sexual orientation, language political or other opinion, national or social origin, nationality, property, birth or other status, colour which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” (ibid.).

73 e.g. the European Court of Human Rights and the UN Human Rights Committee

“disrespectful or scornfully abusive”. To distinguish incitement from offensive or insulting speech, it is useful to consider direct and indirect effects of speech. Benesch distinguishes between speech that specifically or directly addresses a person or group with the aim to offend or denigrate them (Benesch 2012a: 1, 4), and a more dangerous type of speech that is rather directed at the speakers own group (instead of the group it purported to describe) “with the goal of causing that audience to share the views expressed or implied in the speech, and to respond against the victim group e.g. with hostility, discrimination, or violence” (Benesch 2011a: 4, 15). Those considerations can be helpful for a cursory glance; however, “[i]dentifying the true target of statements, [...] is a subjective and often controversial exercise” (Mendel 2006: 44). Nevertheless, the one consensus that does exist among experts is that offensive and insulting speech are undoubtedly protected (ibid.: 25). Frank LaRue, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, elucidates:

“The State has an obligation to prevent people from harm. Not necessarily from offence. People can feel offended [...] by cartoons or by many other means. And that still falls in the category of freedom of expression. But harm is not possible. Harm meaning discrimination or harm meaning physical harm.” (USHMM 2013: 32:10 – 32:32)

To recapitulate, it might be possible to define single terms within the legislative framework on hate speech but the overarching concepts lack definition and clarity. Nevertheless, incitement to genocide seems to be relatively distinct, whereas ‘hatred’ and ‘hostility’ are more vague (Mendel 2006: 10). Clarity increasingly diminishes the ‘lesser’ the level of incitement or its proscribed result. From a legal point of view, some of the aforementioned concepts are hardly ‘accessible’ and lack the sufficient precision to enable citizens to regulate their conduct, which violates the demand for ‘legality’ under the three-part-test of the ICCPR (see Chap. 3.1.1). In practice, the problem can have a great impact, which Benesch (2009: 1) elucidates for incitement to genocide: “To err in either direction is dangerous: an overly broad definition would restrain free speech, and an overly narrow one could contribute nothing to genocide prevention.” The inability to clearly define the concepts has the consequence that court decisions have conflated incitement to genocide with hate speech, though these are certainly not identical (Benesch 2008: 487, 492-3). The decision of the ICTR Media Trial was later rebuked by the appeals panel “for not drawing a clear line between hate speech and incitement to genocide” so that all prison terms were eventually reduced (ibid.: 489). This exemplifies the legal dangers and practical consequences of unclear definitions and vague terminologies.

3.1.3 Requirements of Incitement Crimes and their Application Challenges

This section examines the requirements for a crime to qualify as incitement within the Genocide Convention and the ICCPR. Clear requirements are a necessary basis for all international and national courts that are enabled to try defendants on incitement crimes. State parties that signed and ratified the ICCPR and Genocide Convention are not only allowed, but also obliged to implement the international criteria agreed by the UN in their national legislation (Genocide Convention 1948: Article 5; ICERD 1965: Article 4⁷⁴). The same applies to courts on the international level. Here, the UN Ad Hoc Tribunals – the ICTR and the ICTY – as well as the ICC are allowed to prosecute the specific crime of incitement to genocide (Benesch 2008: 509).

It is necessary to emphasise one important thing: If international legislative texts are sparse and definitions are unclear, it is even more important that international courts provide clarity on necessary requirements for crimes in their case law decisions. However, the ICC has not litigated incitement cases so far (Davies 2009: 248) and only a dozen defendants have been convicted for incitement to genocide by international courts. The ICTR conducted the majority of these cases (Benesch 2011a: 9; Benesch 2012b). Besides, the ICCPR-incitement crimes are not codified in the statutes of any of the international tribunals (Benesch 2008: 492; Biju-Duval 2007: 348), which means that those tribunals are only enabled to try the specific crime of incitement to genocide. Consequently, international case law on incitement to genocide is limited and international case law on incitement to violence, discrimination and hostility is only provided from regional Human Rights Courts and Committees⁷⁵. This can affect national courts as well, as the following example illustrates: In 1992, the Rwandan politician Léon Mugesera held a speech, which can hardly be surpassed in its unambiguousness and emanating danger (see Chap. 2.1.2). Since Mugesera had fled to Canada in time, national courts began deportation hearings for the crime of incitement to genocide in 1995:

74 The UN Human Rights Committee underlines the duty of its state parties to adopt the necessary legislative measures (OHCHR 1983: General Comment No. 11).

75 The European Court of Human Rights has contributed important case law concerning the balancing of the right to FOE and for example the rights of others or public safety (Mendel 2006: e.g. 25, 48, 58). Furthermore, the UN Human Rights Committee, which monitors the implementation of the ICCPR by its contracting parties, provides necessary interpretations of the legislative framework and due to its complaint mechanisms also is involved in helping to balance the partly conflicting rights. Yet, it should be carefully noted that the UN Human Rights Committee is “not convicting the accused but merely assessing the application by national courts of a restriction on freedom of expression” (ibid.: 55) so that the focus is on “breaches by States of their international human rights obligations” (ibid.: 27).

“The case slowly made its way through the Canadian courts, and in 2003 a Canadian federal appeals court ruled for Mugesera: ‘This speaker was a fervent supporter of democracy.... The themes of his speeches were elections, courage and love.... Even though it is true that some of his statements were misplaced or unfortunate, there is nothing in the evidence to indicate that Mr. Mugesera [was guilty].’ But in 2005, the Supreme Court of Canada found that Mugesera had indeed committed incitement to genocide, a form of participation in genocide, arguably the worst crime ever codified.” (Benesch 2008: 487 in part quoting *Mugesera v. Canada* 2003: 240)

The Mugesera case stands symbolically for a dramatic disagreement between courts (Benesch 2008:487). This raises the question of whether a consistent set of requirements exists to assess the liability of a person for incitement crimes. This Chapter will demonstrate that only few requirements can be readily derived from the scarce international legislative texts. Others have been deduced from the texts and widely agreed on and still others are controversial and challenging in their application.

3.1.3.1 Actus Reus and Mens Rea

The ‘Public’ Element

The Genocide Convention literally refers to “public incitement to commit genocide”⁷⁶. The ICTR Akayesu trial (1998: 556) specified “public incitement is characterized by a call for criminal action *to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television*”. The case is less clear for the ICCPR, which does not explicitly mention the element. Mendel (2006: 19) says it is unclear how significant the difference is, but the missing indication could mean that the provision includes statements made in private meetings.

Unfortunately, the number of experts who have dealt with the topic is limited and references to the public ‘element’ stay vague⁷⁷ so that the issue remains unclear concerning the ICCPR.

76 During the drafting process the Soviets proposed to prohibit private incitement as well, which has been ruled out because “such incitement was not serious enough to be included in the convention” (Nehemiah Robinson 1960:67 cited by Benesch 2011c:256).

77 For example, the OHCHR (2012: 4-5) refers to the Camden Principles of Article 19 and employs the same formulation, which states that ‘incitement to hatred’ requires an intention “to promote hatred publicly” (Article 19 2009c: 10). The focus here is certainly of the ‘intent requirement’. Following Article 19, again, it is recommended that courts should consider the public nature of speech (OHCHR 2012: 6), but there is no clear demand whereupon only those speech can be prosecuted that meets the ‘public’ requirement.

The 'Direct' Element

The requirement that incitement to genocide must be 'direct' can be clearly extracted from the Genocide Convention. Less clear is the meaning of 'direct'. The requirement is controversial "in part because it goes to the heart of what constitutes incitement" (Mendel 2006: 8). The Rwandan pop star Simon Bikindi provides a clear example of a speech that "was direct, public and could hardly have been more explicit in content" (Benesch 2011c: 259). When the Rwandan genocide was almost finished, while driving down a road he allegedly said over a loudspeaker (ibid.): "The majority population, it's you, the Hutu I am talking to. You know the minority population is the Tutsi. Exterminate quickly the remaining ones" (ICTR/Bikindi Trial 2008: 266). Incitement is rarely that direct and explicit. Most of the time, incitement is delivered in coded language (see Chap. 2.2.2/ 2.1.2). In Rwanda, the expression 'cut down the tall trees' became famous - instructing Hutus to start killing the Tutsi minority. In Kenya, terms like 'kuondoa madoadoa' (remove the spot) or "references to the need for 'people of the milk' to 'cut grass' and complaints that the mongoose has come and 'stolen our chicken'" were common (KNCHR 2008: 52, 149; IRIN 2008). The reason for employing implicit language is obviously to conceal the purpose of the speech. From a legislative point of view, it is indeed difficult to capture such subtle and obscure utterances. At the same time it is clear that the exclusive prosecution of explicit statements would only contribute very little to prevention efforts. Therefore, the ICTR Akayesu trial (1998: 557) has made it clear that the term 'direct' does not cover explicit statements solely, since "incitement may be direct, and nonetheless implicit". Still, the trial declares that more than a "mere vague or indirect suggestion" is required and that direct incitement implies to "specifically provoke another to engage in a criminal act" (ibid.). Thus, a statement must still "be quite explicit about the specific criminal act towards which it is directed" (Leondis/Lai 2008: 7). Nevertheless, those remarks vividly demonstrate that courts balance on a thin line when prosecuting incitement to genocide.

What is clear is that both the Genocide Convention and the ICCPR cover veiled language and that the application of both will inevitably involve a great deal of interpretation before court. Case law might not be very helpful, because "what might, in one context or cultural setting, qualify as direct incitement would not do so in another context" (Mendel 2006: 8; see also ICTR/Akayesu Trial 1998: 557 and USHMM 2012).

The Requirement of 'Intention'

Even though none of the conventions or the ICCPR literally require evidence

of intent for incitement crimes, experts and courts on the international level have fully agreed on this point⁷⁸. Although the majority of states worldwide recognise intention as one of the defining and necessary elements of incitement, a minority still accepts lower thresholds of criminal culpability (such as recklessness or negligence⁷⁹), which is not sufficient under the ICCPR (Article 19 2012: 22), but which suffices under the ICERD, which lacks any requirement for intention (Mendel 2010: 6). Again, this is a problematic case of inconsistency in intentional law, because 'intention' is an absolutely fundamental requirement to prosecute incitement⁸⁰.

Quite another issue is the complexity of proving intention, since most defendants will deny their intention (Mendel 2006: 48; Article 29 2012: 31; Kentish 2011: 3). Various approaches to prove intention exist. The first one is to look at the choice of language and/or tone of speech (Article 19 2012: 32): Some statements might directly refer to war or even provide suggestions about the use of particular weapons (Mendel 2006: 48-9). If the statement in question lacks specificity, governmental documents or policies might indirectly reveal the intent of official figures (Kentish 2011: 3). Another indication for intent can be a massive manipulation of the truth or the deliberate dissemination of falsehoods (Lwanga 2012; Mendel 2006: 60). Such reasoning is implicit

78 The Genocide Convention (1948) only requires intent for the crime of genocide itself (not for incitement), but scholars and various courts affirm that the inciter needs to have the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group"; meaning in detail "to cause genocide by inspiring an audience to commit it" (Benesch 2008: 493). For the ICCPR, the term advocacy anchors the requirements of the intent to promote hatred towards a target group (Mendel 2006: 14; Article 19 2009a: 6, 10; see also Chap. 3.1.2). In its case law, the European Court paid specific attention to the question "whether it was intended to spread racist or intolerant ideas through the use of hate speech or whether there was an attempt to inform the public about an issue of general interest" (Article 19/Maina 2011: 19). Finally, a Joint Statement of the *UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression* referred to intention as one of the minimum requirements: "no one should be penalized for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence" (UN/OSCE/OAS 2001).

79 In Norway for example, the offence of incitement to hatred can be committed through gross negligence (Article 19/Maina 2011: 20).

80 This can best be illustrated by the Jersild case: In Denmark a journalist was convicted for a television programme, which included hate speech statements by members of a racist group (Mendel 2006: 35, 48). But the European Court of Human Rights "held that the conviction by the Danish courts was a breach of Jersild's right to freedom of expression" since the purpose was to expose and analyse a problem and generate public debate instead of promoting racism (Mendel 2010: 5; Mendel 2006: 35, 48). Mendel (2006: 48) concludes the lack of racist intent finally has played a key role in the Court's finding on the Jersild case. But he strongly suspects that the journalist could have been held accountable under the ICERD (ibid.: 36).

in Holocaust denial cases⁸¹ (Mendel 2006: 60; more in Chap. 3.2.1). But the dissemination of false information does not necessarily imply the intention of a speaker to bring about genocide:

“The Nuremberg Tribunal seems to have placed some weight on the question of truth in the Fritzsche decision. The Tribunal noted that Fritzsche did sometimes spread falsehoods, but that he did not know they were false. Indeed, this suggests that even false statements may be protected, as long as they were not disseminated with knowledge of falsity.” (Mendel 2006: 60)

Very common in case law is the approach to deduce the intention of a speaker from the surrounding context: A speaker who makes an inciting statement in the midst of an ongoing genocide (or other violent outbursts) or who even repeats language that has previously sparked violence, must be aware of the inherent danger of the statement and hence, must have the intention to bring about any of the proscribed results (Benesch 2008:494, 524; Mendel 2006:48-9; Article 19 2012: 33). This line of reasoning, however, is only possible to employ if violence already occurred and cannot be used in cases when its occurrence is to be prevented beforehand. Finally, it will be the very combination of factors that eventually provides evidence of intention.

In spite of the number of potential indicators for intention, the challenges should not be underestimated: It was for example not possible to hold the pop star Simon Bikindi responsible for songs, which extolled Hutu solidarity through manipulating Rwandan history (ICTR/Bikindi Trial 2008: 254), simply because “it was not clear that Bikindi had intentionally wielded the ‘weapon’: there was not enough evidence that he had composed the songs with intent to incite attacks and killings, even if they were eventually used for that purpose, especially by broadcasters over RTLM’s airwaves” (Benesch 2011c: 261). To substantiate that an inciter indeed strove for the specific result of genocide (and not any other violent act) might be challenging as well. Additionally, judicial authorities will always have to scrutinise: “Could he/she have intended something other than to incite hatred?” (Article 19 2012: 32; see Jersild case). Special attention must always be paid to the following legitimate objectives: Academic discourse and research, dissemination of news and information,

81 In one case, the UN Human Rights Committee found that the accused had “singled out Jewish historians as having perpetrated the myth of the holocaust, although many French historians have written on this issue. This historical dishonesty coupled with a clear racist bias suggested that the real intent was to promote anti-Semitism rather than to engage in historical debate” (Mendel 2006:49).

public accountability of government authorities, artistic expression⁸², religious expression, and statements of facts and value judgements⁸³. Judicial authorities will always have to assess if a statement was primarily made for one of the abovementioned purposes or on the other hand employed to bring about genocide, violence, or discrimination (or hostility).

To sum up, the requirements for a crime to qualify as incitement are not always clear, especially in the case of the ICCPR, and proving them can be difficult. In addition, prosecuting incitement involves a great deal of interpretation.

This section has so far presented three requirements for the specific crime of incitement to genocide: public, direct, and intention. Benesch illustrates that these requirements are not sufficient for prosecution:

“Suppose that someone stands up today in Times Square and shouts out the most inflammatory lines from Léon Mugesera’s 1992 speech, or any of the most explicit rants that were broadcast over Rwandan radio before and during the 1994 genocide, for which some officials pled guilty to incitement to genocide and others were convicted. No genocide would ensue. No matter how much the speaker longed to persuade New Yorkers to commit genocide, the effort would certainly fail.” (Benesch 2008: 494)

The final, most important and complex requirement is the link between a statement and its proscribed result.

3.1.3.2 Proving a Nexus between the Statement and its Proscribed Result

Restrictions to FOE are allowed for one single reason, which is to prevent harm: *Both* the Genocide Convention and the ICCPR only “seek to suppress speech for certain contingent harms, or consequences”; neither of them “*seeks to suppress hatred itself, nor even the expression of hatred*” (Benesch 2011a: 4-5). To be more concrete: Legislation only prohibits cases, where a speaker aims to inspire his own group to harm another group (ibid.: 4-5, 15). Article 19(3) only permits effect-based regulation as opposed to viewpoint-based regulation⁸⁴:

82 Artistic expression is protected because it often features criticism on political and social issues in a society (Article 19 2012: 35).

83 The list has been adopted from Gordon 2008 and Article 19 2012: 35-6.

84 Scholars often distinguish between effects-based regulation and content-based/ viewpoint-based regulation (Malik 2012; Haupt 2005: 333). The latter is objectionable for several reasons: For a start, no consensus can be achieved on intolerable content or views on the international level, since norms vary greatly (Benesch 2011a: 5; see Chap. 3.1). Secondly, banning specific contents even on the national level may reduce the usage of specific words or contents, but

"[...] restrictions on freedom of expression which are not effective in promoting the legitimate aim they purport to serve cannot be justified. If certain statements are not likely to cause a proscribed result - whether it be genocide, other forms of violence, discrimination or hatred - penalising them will not help avoid that result and hence cannot be said to be effective. If, on the other hand, a sufficient degree of causal link or risk of the result occurring can be established between the statements and the proscribed result, penalising them may be justifiable." (Mendel 2006: 50)

Above all, legislation strives for pre-atrocity punishment. Academic literature clearly acknowledges that *all crimes of incitement are inchoate crimes* (Mendel 2006: 8; Article 19 2012: 39; for incitement to genocide in specific see Benesch 2008:494 and ICTR/Akayesu Trial 1998:562), meaning that incitement is desired to be prosecuted before it is able to provoke a result whenever possible⁸⁵. The confirming case law is provided by the ICTR's first incitement judgment, whereupon the judges argued that acts of the crime must be punished "even if they fail to produce results" because "of the high risk they carry for society" (ICTR/Akayesu Trial 1998: 562). But up to now, incitement to genocide has never been prosecuted at the international level without a subsequent genocide occurring (Gordon 2008; see also Mendel 2006: 52). The failure of legislation to comply with its own objective is remarkable.

if the aim is indeed incitement, then there exists a virtually inexhaustible wealth of potential instigating expressions and the ingenuity of perpetrators should not be underestimated (cf. coded language: Chap. 3.1.3.1/ 3.1.3.2.2/ 6.4). Restricted terms or contents will soon be replaced and legislation is not known as a tool that keeps up with quick changes. Third, the question arises, which contents are to be restricted and who is allowed to take this decision? (see Chap. 1.1) For a detailed distinction see Sunstein 2003:99-102.

85 In other words: "speech may constitute incitement to genocide whether or not it is actually followed by genocide" (Benesch 2011a: 6). According to Benesch (2008: 494) the travaux préparatoires of the Genocide Convention confirm, that its drafters "wished to punish direct and public incitement to genocide even if no genocide is committed". Scholars and courts deduce the possibility of pre-atrocity prevention either indirectly from Article 19(3) of the ICCPR or from the drafting process of the *Genocide Convention*. An earlier draft of the Convention included the phrase "whether the incitement be successful or not" (Nehemiah Robinson 1960: 67 cited by Benesch 2011c: 256). Mendel (2006: 6) explains that the phrase was simply erased on the recognition that it is superfluous since successful incitement is already covered by the crime of complicity (see Chap. 3.1.2). The fact that no reference was inserted to limit the crime to successful incitement "has been consistently interpreted by scholars and judges to mean that it is possible to have committed incitement even if no genocide ensues" (Benesch 2011c: 256): "The Genocide Convention's drafters focused on inchoate crimes in order to fulfil the Convention's first purpose – to prevent genocide – not only to prosecute after the disaster has already occurred" (ibid.).

To conclude, judicial authorities must prove a link between a speech act and its proscribed result, which is the greatest challenge of all. Different approaches exist. While it is useful to distinguish between the proof of causation and the likelihood/ imminent danger approach⁸⁶, the next two sub-sections will demonstrate that the boundaries are blurred.

3.1.3.2.1 The Causation Approach and its Limits

The Causation approach demands of judicial authorities to prove that speech has actually 'caused'⁸⁷ a proscribed result, which is a difficult endeavour. In a hypothetical scenario Davis (2009: 248-255) describes the obstacles that would have to be overcome by the ICTR, if causation had to be proven:

"So the prosecutor [of the Media trial] would need to first convince the court that a particular statement did constitute incitement [Davis adds that the vast majority of statements on RTLM expressed hatred towards Tutsis but did not amount to direct incitement to genocide], and then find a way to establish that the perpetrator had actually been listening to the radio at the moment when the statement was made [...]. But how would this be done? How many people can remember with certainty that another person was listening to the radio at a particular hour on a particular date, several years ago?" (ibid.: 249)

In a second step, the prosecutor would have to evidence that the perpetrator did not only commit any violent act, but instead committed an act of genocide with the mens rea (intention) 'to destroy, in whole or in part, a national, ethnical, racial or religious group', which is not self-evident since perpetrators may have many individual motivations to commit an act of physical violence during a genocide (ibid.: 250). To give another example, the case of the pop star Bikindi is very illustrative as well (see Chap. 3.1.3.1):

"Prosecutors would have had to prove, first, that a particular genocidaire had been standing by the road when Bikindi's vehicle drove past; second, that Bikindi had said something amounting to incitement at a moment when he was in earshot of that particular audience member; and third, that that individual had subsequently committed an act amounting to genocide with the requisite mens rea" (ibid.: 254).

86 Mendel (2006: 55-6) distinguishes between proving 'causation' and showing causality through demonstrating the 'likelihood'.

87 'Causation' is a problematical term in this respect (see Chap. 2.3). Yet, the term is established within this topic and will thus be used.

From this, Davis (2009: 249, 270) reasonably concludes that it might have been impossible to prosecute some of the ICTR defendants under the requirement to prove causation.

Most scholars regard the temporal-link (often referred to 'immediacy') as the greatest challenge of proving causation. In the rarest of cases speech is immediately followed by violent acts. In Rwanda, Mugesera gave his very inflammatory speech seventeen months before the genocide occurred (Benesch 2009: 5-6; see Chap. 2.1.2). Under the requirement to prove causation, judicial authorities would have to evidence that his speech caused acts of genocide a considerable time later. Still, Chapter 2.2.2 has shown that "slowly changing a population's view of what is necessary and what is acceptable" (ibid.: 4) is presumably necessary to bring about genocide with a high level of civilian participation. A witness of the Rwandan ICTR Media trial (2003: 1078) said RTLM "spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country".

Notwithstanding these difficulties, the concept of causation is not entirely superseded if it is understood in a slightly different way. Mendel (2006: 49, 55) argues that causation is an appropriate concept if analysing whether a statement has caused the creation of a "*requisite state of mind*" of the target audience to commit a specific act. This appears possible in cases where genocide has already taken place, which itself demonstrates "that the requisite state of mind had been created and so it only remains to show that it was the statements in contention that created it" (ibid.: 52). However, the evidentiary challenge is great for pre-atrocity prosecution, and it is not possible to predict how courts would respond to this challenge since international jurisprudence has dealt exclusively with cases of genocide that have already taken place (ibid.: 26, 52-3). Mendel (2006: 53) indicates that in cases of pre-atrocity prosecution "the focus may be more on the likelihood of the proscribed result occurring than on the psychological state of those engaged". The same applies to the specific crime of incitement to hostility, where the proscribed result is itself a passive state of mind (see Chap. 3.1.2): "the evidentiary challenges of proving causation, namely that certain statements did create a (passive) attitude of hatred in others, are almost insurmountable" (ibid.: 54).

In the light of all these challenges, scholars and courts have consistently agreed that the proof of causation is not required to prosecute incitement⁸⁸.

88 In fact "[n]o prosecution for incitement to genocide to date has led evidence that speech caused thousands of deaths: only evidence that the speech was made juxtaposed with

Nevertheless, the judgement in the ICTR Akayesu trial perfectly demonstrates the remaining uncertainty in this matter:

“[T]he Trial Chamber declared that evidence of causation was required, only to concede the contrary a few pages later. The judges asserted that there ‘must be proof’ of a possible causal link (and twice claimed to have found it), yet also asserted the opposite, which is correct: incitement may be punished without proof that it caused genocide.” (Benesch 2011c: 254-5 in part quoting ICTR/Akayesu Trial 1998: 348)

Even though a proof of strict causation is not required, some kind of nexus must be identified to justify restrictions on FOE.

To conclude, the causation-related approach has its limits. Proving that a statement has caused a specific act appears to be impossible. Proving the creation of a specific state of mind is an alternative, but seems to be difficult as well, and virtually impossible in cases of pre-atrocity prosecution and for incitement to hostility. Above all, many uncertainties remain concerning the required degree of link between a speech act and its result.

3.1.3.2 Operationalisation of the Imminent Danger Approach

The likelihood/imminent danger approach is sometimes preferred over the causation approach. The approach is newer and no specific term has yet become widely established⁸⁹. It assesses the degree of risk or potential of a proscribed result occurring instead of causality per se, and it is therefore far less challenging in its application (Mendel 2006: 53, 56)⁹⁰. The essential question is how judicial authorities can reasonably evidence the likelihood of risk originating from a statement. Benesch (2011c: 254) takes the view that “causation still haunts this young body of case-law” because it “stands in for a tool that courts are lacking: a systematic method for identifying incitement to genocide” (ibid.: 257). From studying different genocide cases, Benesch (2008) uncovered six substantial variables that should help to gauge the “reasonable possibility that a particular speech will lead to genocide” (ibid.: 519):

separate evidence of mass violence afterward [...]” (Benesch 2011c: 254).

- 89 Prominent designations are: Imminent Danger, Imminent Risk, Actual Risk, Reasonably Possible Consequences (Benesch), Likelihood of the Proscribed Result (Mendel), Foreseeable Consequence, etc.
- 90 The concept has its origin in United States’ case law. In 1919 the Supreme Court of the United States found in *Schenck v. United States* that the First Amendment can be limited in the presence of a ‘*clear and present danger*’. In 1969 the test resulting thereof was replaced by *Brandenburg v. Ohio* who proposed a new standard test, which allows restrictions to FOE in cases where speech provokes ‘*imminent lawless action*’, which additionally must be likely to occur. (Mchagama 2012; Haupt 2005: 317; Mbaaro 2010: 36)

1) *Was the Speech Understood by Its Audience as a Call To Commit Genocide?* Benesch (2008: 520) places little value on the plain meaning of the speech, which makes it possible to consider coded and concealed language. The focus on the audience instead of on the statement allows drawing more attention to contextual factors⁹¹. Benesch (2008: 521) admits that it is still difficult “to gauge the meaning and effect of speech [...]”. Courts must rely on detailed factual investigation to determine how a speech was actually understood”.

2) *Was the Speaker Able To Influence the Audience, and Was the Audience Able To Commit Genocide?* Benesch (2012a: 3) assumes that only “a powerful speaker with a high degree of influence over the audience” is able to commit incitement to genocide. A good example for a very influential person in the Kenyan context is Raila Odinga - nicknamed ‘Agwambo’ (Act of God) by his supporters (BBC/Okwembah 2013b). Yet, a powerful person must not necessarily be a politician, religious leader or cultural icon (Benesch 2008: 521). Popular or charismatic entertainers, such as radio moderators, can have even more influence over their audience (Benesch 2012a: 3; see Chap. 2.1.1). The second part of the question is very important as well: “If either the speaker or the audience is disempowered, then genocide cannot ensue and incitement to genocide cannot occur” (Benesch 2008: 521). It must always be differentiated between the pure motivation and the real possibility to bring about genocide, which involves a great degree of central organisation and planning (see Chap. 2.2.3).

3) *Had the Targeted Group Suffered Recent Violence?* Benesch (2008: 522) argues an audience will more likely understand any call to action after earlier outbreaks of violence. In Rwanda massacres of Tutsi were already visible in 1990 (ibid.).

4) *Was the “Marketplace of Ideas” Still Functioning?* Chapter II has already demonstrated that the absence of alternative speech is dangerous.

5) *Did the Speaker Dehumanise the Target Group,[to justify] Killing?* Benesch highlights two rhetorical devices, which are commonly used before and during genocides: ‘dehumanisation’ and ‘accusation in the mirror’. Chapter II has already indicated their widespread use not only in Rwanda, but also in Kenya. The first technique describes victims-to-be as vermin, pests,

91 For example in the Jersild case, the European Court “placed some reliance on the fact that the programme was a serious one, ‘intended for a well-informed audience’” (Mendel 2006: 57 in part a quotation of the European Court/Jersild Case 1994: 9, 34).

insects or animals to degrade them and make them subhuman (Benesch 2012a: 4-5). The second technique claims, "(falsely) that the victims-to-be are planning to commit atrocities against the genocidaires-to-be" (Benesch 2008: 504): "*Dehumanization, the first technique, makes genocide seem acceptable. 'Accusation in a mirror' goes further by making it seem necessary*" (ibid.: 506). The rationale for 'dehumanisation' is simple: Since it is not acceptable to kill other people, victims-to-be are described as creatures which are eligible for killing, a famous example being the degradation of Tutsi to 'cockroaches' before and during the Rwandan genocide (ibid.: 503). The technique of 'accusation in the mirror' portrays attacks as legitimate self-defense: "Just as self-defense is an ironclad defense to murder, collective self-defense gives a psychological justification for group violence [...]" (Benesch 2012a: 5). The fear connected to this technique narrows perceived choices (Benesch 2009: 4). Another common technique to justify killing in speech is 'perverse euphemisms' such as 'go to work', which meant 'commit genocide' in the Rwandan case (Benesch 2008: 506). Finally, members of the dominant group who sympathise with the intended victims are defined as members of the same group (ibid.: 524; see Chap. 2.1.1).

6) *Had the Audience Already Received Similar Messages?* Repetition is of paramount importance for conditioning and persuasion (ibid.: 524) as the following statement of a Rwandan farmer shows: "I did not believe the Tutsi were coming to kill us, but when the government radio [Radio Rwanda] continued to broadcast that they were coming to take our land, were coming to kill the Hutus [...] I began to feel some kind of fear" (ibid.: 502). Mendel (2006: 67) confirms: "Indeed, humankind's ability to resist the constant repetition of messages from apparently authoritative sources has frequently proven to be weak".

The strength of Benesch's test is the focus on pre-atrocity punishment. The six questions assess whether there is a reasonable possibility that a speech act can cause genocide at the time when it is delivered (Benesch 2008: 494). The test includes many specific risk criteria, which can be exceptionally helpful for courts to substantiate their decision. Nevertheless, the test leaves room for interpretation in many respects. In addition, Benesch's test does not amount to identify the risk of the other three forms of incitement (violence, discrimination and hostility), since the expert has specifically selected criteria that appear to be typical before and within genocidal scenarios.

In summary, the likelihood approach is a reasonable alternative to the causation approach and there is a workable threshold-test assessing the risk origination from speech for incitement to genocide. However, the question remains as to whether it is possible to establish a threshold-test, which assesses the risk of the three vaguer incitement concepts (violence, discrimination, hostility), especially prior to the occurrence of any result. This is especially true for incitement to hostility (Mendel 2006: 39). Even the Likelihood approach is stretched to its limits in this case

“[U]nlike incitement to an act, it is **almost impossible** to prove whether hatred per se is or is not *likely* to result from the dissemination of certain statements. Regular evidentiary techniques may be employed to assess the risk of a particular illegal act occurring but these do not work well in assessing the risk of a purely psychological outcome.” (ibid.)

3.2 Arbitrary Transformation into National Law

The considerable uncertainties on the international level described in the above Chapter 3.1 naturally affect national hate speech legislation, where the problems eventually become more obvious. Often, it is difficult to judge whether national laws violate international legislation, firstly because they employ a differing terminology and secondly because international legislation itself sets conflicting standards, particularly regarding the ICCPR and the ICERD (e.g. banning of the mere dissemination of ideas, regardless of any impact as provided in the ICERD; see again Chap. 3.1). Nevertheless, the ICCPR is commonly used as the underlying standard. The following two Chapters reflect the main criticism of the most important Rwandan and Kenyan legislation on hate speech by regional and international organisations⁹².

3.2.1 Rwanda: Sectarianism, Divisionism and Genocide Ideology

Rwanda signed and ratified the ICCPR, the Genocide Convention and the ICERD and is thus obliged to implement the international criteria prescribed by those conventions. The Rwandan government introduced a series of laws

92 Due to space constraints it is not possible to include the original text of the hate speech laws in this thesis, but references to Internet sources are provided for each law. Besides the hate speech laws, there are additional laws that affect the media sector as a whole (e.g. Kenya Communications, Amendment Act, 2009), singular parts of the sector (e.g. Kenyan Broadcasting Regulations 2009) or influence the sector partially to a high and inadequate degree (e.g. Rwandan national security laws) (Article 19 2010a: 4). These laws fall out of the scope of this paper and are not considered.

of which 'Discrimination and Sectarianism'⁹³ (2001) and 'Genocide Ideology' (2008) earned most criticism.

The crime of Sectarianism is heavily criticised for its self-contradiction. The English version differs for example from the French one in terms of whether a speech act must be likely to spark conflicts or must cause conflicts (Amnesty International 2010: 16). Terms used such as 'conflicts' (English) and 'querelles' (French) leave much room for interpretation and there also is no equivalent for 'querelles' in the English version, which instead utilises 'uprising' and 'strife' (ibid.). Amnesty International (2010: 15) describes the law as vague and ambiguous.

Furthermore, people have been convicted for 'Divisionism', a crime that is non-existent in Rwandan law (Amnesty International 2011: 4-5). The Rwandan Ministry of Justice admitted in a report to the ACHPR that there is no law defining Divisionism (Amnesty International 2010: 15). This clearly violates international standards whereupon restrictions to FOE must be provided by law (see Chap. 3.1.1).

Besides, Genocide Ideology prosecutions were underway even before the vague law was promulgated (ibid.: 17-9): "The concept itself, not one known as such in the past, was referred to by the relatively new term, 'Ibengabyitekerezo bya jenocide', meaning literally the ideas that lead to genocide" (HRW 2008a: 35). This is contradictory to the Genocide Convention's aim to restrict incitement to genocide rather than some kind of ideology that is the basis of genocide (Article 19 2009b: 7). Even a report of the Rwandan Senate admitted that it had not been easy to provide a systematic definition of the crime, which however did not discourage prosecution on it (Amnesty International 2010: 13, 17). Article 3, which seeks to specify the characteristics of the crime, is especially criticised for its vague and broad wording including terms such as: propounding wickedness, marginalising, laughing at one's misfortune, mocking, boasting, despising, stirring up ill feelings, etc. (ibid.: 14; Genocide Ideology 2008). This clearly violates international standards in multiple ways. Amnesty International (2010: 14) criticises that the wording undermines any level of certainty. HRW (2008a: 41-2) considers Article 3 to aggravate the already existing imprecision and confusion. The FOE organisation Article 19 (2009b: 9) also criticises that Article 3 does not spell out the requirement for an imminent risk. Easily adoptable requirements of the Genocide Convention (public, direct, intention) were completely ignored (ibid.: 7-8). This has led to situations where

93 Hereinafter referred to as *Sectarianism*

private comments, misheard from passers-by, led to convictions (Amnesty International 2010: 20). Article 19 (2009b: 9-10) concludes that Genocide Ideology violates the Genocide Convention and the ICCPR in multiple ways. Another delicate issue concerning the Genocide Ideology law is that convictions are carried out on 'Genocide revisionism', 'Genocide denial' or 'Gross minimization of genocide' without defining the terms (HRW 2008: 35).

The penalties of the Rwandan hate speech laws are quite harsh: Sectarianism is punished with a custodial sentence varying between two and five years and/or a fine up to 5.000.000 *Rwandan Francs* (RWF) (about 6,000 Euro). Additionally, any person guilty of the crime is denied his/her civil rights⁹⁴. Genocide Ideology is punished with ten to 25 years of imprisonment and a fine of up to 1.000.000 RWF (about 1,200 Euro) for first-time offenders, with penalties to be doubled for recidivists⁹⁵. Serious criticism occurred for the severe penalties awaiting children. Children between 12 and 18 years are sentenced to half the adult penalty, which means up to 12.5 years of imprisonment or being committed to a rehabilitation centre (Amnesty International 2010: 15⁹⁶).

3.2.2 Kenya: Numerous Provisions

With regard to international commitments, Kenya signed and ratified the ICCPR, acceded and thus ratified the ICERD, but neither ratified nor signed the Genocide Convention.

'The Prohibition of Hate Speech Bill' (2007) marked the starting point for hate speech legislation in Kenya. Due to the widespread criticism⁹⁷, the bill

94 The punishment depends on the background of the person or body involved. Individuals in position of responsibility ('officials'), masterminds and persons who sow sectarianism through education have to expect higher penalties. The highest fine of 10.000.000 RWF (circa 12.100 Euro) is provided for associations, political parties and NGOs. A further reservation entitles the court to double the penalty or dissolve the body concerned. (Discrimination and Sectarianism 2001: 2-3)

95 Again, the penalty varies. Associations, political organisations and NGOs shall be subject to the punishment of dissolution and a fine of up to 10.000.000 RWF. Parents, guardians, teachers, and headmasters are also held accountable for "inoculating the genocide ideology". Article 8 is of relevance to media representatives: According to that any person "who disseminates genocide ideology in public through documents, speeches, pictures, media or any other means shall be sentenced to an imprisonment from twenty (20) years to twenty-five (25) years and a fine of two million (2.000.000) to five million (5.000.000) Rwandan francs". (Genocide Ideology 2008: 2-3)

96 Below the age of 12, they may be taken to a rehabilitation centre for up to one year (Amnesty International 2010: 15).

97 The law bill was prepared in 2007, thus before the PEV. The bill was heavily criticised by Article 19 for several shortcomings: First of all, despite its name, it did not include a definition on the concept of hate speech and referred to 'behaviour' – a term that should not appear in a law expressly meant to address speech, according to Article 19 (2009a: 11). Moreover,

was not passed into law and there are no efforts to do so (KNCHR 2011: 11). Nevertheless, it sent the message of hate speech regulation being needed.

Since the adoption of the 2010 Constitution of Kenya, hate speech legislation has an express constitutional endorsement: Article 33(2) (Constitution of Kenya 2010) literally restricts FOE with regard to propaganda for war, incitement to violence, hate speech and advocacy of hatred. Hate speech is not a legal term and the aforementioned terms certainly represent overlapping concepts (see Chap. 3.1.2; Article 19 2010a: 9). The Kenyan constitution neither defines these terms nor sets up any boundaries between them (ibid.). FOE is restricted, if speech “constitutes ethnic incitement, vilification of others or incitement to cause harm” (Constitution of Kenya 2010: Article 33(2)(d)(i)). The expression ‘vilification of others’ is certainly broad and open to interpretation (Article 19 2010a: 9).

The revised Penal Code (2009) includes two paragraphs, which are particularly relevant for the regulation of hate speech. Section 77 on Subversive Activities refers to, inter alia, incitement to violence as well as the promotion of feelings of hatred and provides a penalty of up to seven years (Penal Code 2009: 43-4). Section 96 on ‘Incitement to violence and disobedience of the law’ provides a punishment of up to five years (ibid.: 48-9). In both Sections any reference to the requirement of an imminent risk is missing (Article 19 2010a: 10). Section 96 requires nothing else than evidence of speech “indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated [...] to bring death or physical injury” (Penal Code 2009: 48). Additionally, Section 96 puts the evidentiary burden on the defendant, who is required to prove not having incited to violence (Article 19 2010a: 10), thereby violating a legal principle in criminal law.

Today, the *National Cohesion and Integration Act* (NCIA 2008: 15-6: Section 13) seems to be the most relevant law for the prosecution of hate speech in Kenya, even though its main purpose is ostensibly to foster national cohesion and integration. Again, its relevant Section 13 is heavily criticised for alternatively

intention and the imminent risk requirement were presented as alternative requirements instead of additional ones (ibid.). Furthermore, the accused had to prove a lack of awareness, if he had not intended to stir up hatred (ibid.: 12). The bill (2007: Section 8) provided an excessive maximum custodial sentence of ten years and/or a fine not exceeding one million Kenya Shillings. One might argue that consensus about definitions cannot be achieved on the international level, since hate speech depends on many cultural and historical factors and therefore each country is itself responsible for providing sufficient definitions in accordance to those factors. Such a stance might be legitimate, but nevertheless the difficult task of providing clear, narrow and workable definitions has only shifted to the national level.

requiring intention or the likelihood of ethnic hatred (Article 19 2010a: 17). It fails to employ the term incitement and instead refers to 'threatening, abusive or insulting words or behaviour' (NCIA 2008: Section 13), which falls under the scope of free speech (see Chap. 3.1.2). An offence is penalised with a prison term of up to three years and/or with a fine of up to one million shillings (about US\$ 11,600), which is excessive for a country with an estimated annual GDP per capita of about US\$ 1,250 (World Bank 2013; GDP per capita in current US\$).

In Kenya, the sheer number of different laws and regulations⁹⁸ is confusing and reflects the "governments' desire to over-regulate the media" (Nyanjom 2013: 73). Participants of a conference on hate speech in 2010 agreed that there is no need for additional legislation, but that it would be necessary to review, harmonise and test the effectiveness of current legislation and to ensure its conformity with international standards (Article 19 2009a: 16).

3.3 Preliminary Conclusion

On the one hand, shortcomings of hate speech legislation on the national level are only a logical consequence of shortcomings on the international level. The definition problem is exemplary: Due to the failure to define incitement concepts on the international level, those responsible on the national level seem to struggle to clearly and narrowly define those concepts, which they are obliged to implement as a result of their obligations under international law⁹⁹. Even Rwandan lawyers and judges, the professionals charged with applying the law, expressed confusion about what behaviour these laws criminalise (Amnesty International 2010: 17-8). HRW (2008a: 34) found that not one interviewed judge was able to define Divisionism, despite each having adjudicated and convicted defendants on Divisionism charges. Kenyan legislation fails to state that incitement is an intentional crime *and* must produce at least some kind of risk (e.g. NCIA, Penal Code). However, these aspects are not prescribed in the ICCPR and Genocide Convention by express terms but rather through the interpretations of courts and the opinions of

98 It should be noted that there exist more provisions directly concerning hate speech as well as related provisions, e.g. within the Media Act (2007 as amended in 2008), the Kenya Communications (Amendment Act 2009), the Broadcasting Regulations (2009) (Article 19 2010a: 4).

99 One might argue that consensus about definitions cannot be achieved on the international level, since hate speech depends on many cultural and historical factors and therefore each country is itself responsible for providing sufficient definitions in accordance to those factors. Such a stance might be legitimate, but nevertheless, the difficult task of providing clear, narrow and workable definitions has only shifted to the national level.

scholars dealing with case law decisions –an unfortunate characteristic of jurisdiction in general. Additionally, the ICERD, to which both countries are bound as well, sets considerably different standards.

On the other hand, the shortcomings of international hate speech and genocide legislation should not belie the fact that Kenyan and especially Rwandan laws clearly violate international standards, considering the current state of debate. A clear – and easily avoidable – violation is Rwanda’s prosecution of a crime where there is no law as is the case when prosecuting Divisionism. International wording and incitement concepts are replaced by overlapping concepts (hate speech and advocacy of hatred), vague, broad and open-ended terms (e.g. marginalising, stirring up ill feelings), or completely unknown conceptualisations (Genocide Ideology). The OHCHR (2012: 3) criticises that domestic legislation often includes terminology that is inconsistent with Article 20 of the ICCPR; and Article 19 criticises that the wording of Article 20 is rarely, if ever, enshrined in domestic legislation (Article 19/Maina 2011: 5): “The absence of reference to incitement in some domestic legislation suggests that states are either unwilling to take on the language of the ICCPR’s Article 20 or are simply ignorant of it” (ibid.: 6).

Unwillingness, ignorance and inability are different things. Even though Article 19 often recommends in its papers to use exactly the international terminology (see e.g. Article 19 2009a: 10; Article 19 2010a: 9, 18), its Executive Director, Dr. Agnes Callamard, emphasises that international law is a “blunt instrument, which must be implemented carefully and wisely” (Article 19 2010b). Firstly, it is striking that Rwanda and Kenya are among a whole range of countries that violate the ICCPR¹⁰⁰. Secondly, it is noticeable that criticism and recommendations from international and regional organisations often remain vaguer, than the national legislation itself: Amnesty International (2010: 7, 14-5) and HRW (2008a: 34) only criticise the imprecise, ill-defined, broad and vague nature of the laws and demand more ‘certainty’. HRW makes no recommendations at all and Amnesty International recommends to: “Significantly revise the ‘genocide ideology’ and ‘sectarianism’ laws and ensure that the laws are clearly and precisely drafted to prohibit only that

100 There is no uniform treatment of hate speech in the world (Haupt 2005: 304; Article 19 2012: 25): “Britain bans abusive, insulting, and threatening speech. Denmark and Canada ban speech that is insulting and degrading. India and Israel ban speech that hurts religious feelings and incites racial and religious hatred. In Holland, it is a criminal offense deliberately to insult a particular group. Australia prohibits speech that offends, insults, humiliates, or intimidates individuals or groups. Germany bans speech that violates the dignity of, or maliciously degrades or defames, a group. And so on. In each case, the law defines hate speech in a different way.” (Malik 2012)

expression prohibited in Article 20(2) of the ICCPR by means that are strictly necessary and proportionate to meet this aim“ (Amnesty International 2010: 35). Rwanda and Kenya are required to implement legislation to “the level of seriousness set out in article 20” (Article 19/Maina 2011: 10), with regard to the required “proportionality” (Amnesty International 2010: 13-4), or “with what is ‘necessary’ in a democracy” (HRW 2008a: 42). Such criticism, which refers to the ICCPR’s Article 19(3), is of course legitimate and justifiable. Simultaneously, it offers no solution but instead reveals the inability of NGOs to give clear recommendations.

The underlying problem is that international law allows restrictions on FOE for the protection of very abstract aims, namely for ‘respect of the rights or reputations of others’ and for ‘the protection of national security or of public order (order public), or of public health or morals’ (Mendel 2010: 7; see Chap. 3.1.1: Article 19(3)). Courts applying incitement laws must always consider whether a conviction is justified in accordance with those aims. However, even direct prosecutions under ‘national security laws’ are, in practice, often a ‘farce’; dissidents, and especially journalists, are jailed under the cover of security reasons¹⁰¹. Suddenly, covering sensitive social issues, land seizures, protests, ethnic unrest or specific minorities, opposition parties and marginalised groups becomes a matter of ‘national security’ (CPJ/Campbell 2012).

The ultimate problem of incitement laws is the adequate balancing of the right to FOE and the protection of the aims of these laws, which necessitates that specific proscribed results are prevented. Leaving aside the prevention effort, scholars and courts already struggle to determine the degree of required nexus between a speech act and its proscribed result in cases where it has already occurred. The likelihood approach, which was borne out of the difficulties to evidence a connection between ‘speech and act’, is easier to abuse on the national level due to its lesser evidentiary challenge. Benesch’s Reasonably Possible Consequences Test must be seen as an important step in overcoming the uncertainties (though only with regard to incitement to *genocide*). Nevertheless, judicial authorities still face many interpretation challenges when applying the test. It speaks for itself that courts have never tried incitement to genocide as a preventative measure on the international level, not even in the case of Rwanda. It may be suggested that judicial authorities simply did not dare or were not able to assess the hypothetical

101 For a collection of examples see CPJ/Campbell 2012. The journalist Monica Campbell describes how a number of governments exploit national security laws to punish critical journalists in her article ‘Jailing Under Cover of Security’.

risk of genocide due to incitement. This, however, entirely questions the existence of hate speech laws, considering that prevention is their main purpose. Incitement to genocide is still “one of the most controversial crimes in international criminal law” (Benesch 2008: 507), even though it is much clearer than incitement to violence, discrimination and hostility with regards to its requiring elements. Incitement to hostility offers the biggest potential for political abuse (Mendel 2006: 39) as it punishes the creation of a state of mind rather than causing an action.

Examining hate speech legislation thus leads to the conclusion that the potential for political abuse of the legislation on the national level is great¹⁰².

102 For this reason, experts warn that criminal sanctions “should be seen as last resort measures” (OHCHR 2012: 7; see also Mendel 2006: 1). Even vigorous proponents of criminalising hate speech warn “if anti-hate laws are vague, we should not have them. Vagueness would vitiate the laws, render them useless, and indeed threaten free speech unduly” (David Matas 2000: 55 cited by Benesch 2008: 487); “where there are fine lines to be drawn the law should generally stay on the liberal side” (Waldron 2012 cited by Stevens 2012).

4. Costs Associated with Hate Speech Prosecution

4.1 Targeting Dissidents

In Rwanda, hate speech legislation has become a tool of repression. Sectarianism/Divisionism and Genocide Ideology have been officially interpreted as including, for example, general opposition to government policies, the support of political candidates who are not part of the governing RPF, calls for prosecution of unpunished RPF war crimes, criticism of the lack of media freedom and comments on the deficiencies of the hate speech laws themselves (Amnesty International 2010:9, 11-2; HRW 2008a:38). In the context of these extensive interpretations of hate speech, it comes as no surprise that Rwandan courts dealt with 1,304 cases involving Genocide Ideology between 2007 and 2008 (HRW 2008a:40).

Shortly before the 2003 presidential elections, the Rwandan government orchestrated a crackdown on the political opposition (Amnesty International 2010: 11). Hate speech laws were used to effectively destroy the only political party strong enough to challenge the RPF: the Democratic Republican Movement (Amnesty International 2010: 11; HRW 2008a: 38; Waldorf 2007: 406). The leader of a second opposition party, the Ideal Social Party, Bernard Ntaganda, was arrested on the first day presidential candidates could register for the elections and sentenced to four years imprisonment for Divisionism and 'breaching state security' (Amnesty International 2011: 4) even though, as mentioned earlier, 'Divisionism' is not defined as a crime in Rwandan law. In response to his criticism of government policies, the prosecution explained that "'paint[ing] a negative image of state authority' could cause the population to rebel and create unrest" (ibid.). Another opposition politician and presidential aspirant, Victoire Ingabire, was among other things charged with Genocide Ideology, 'minimizing the genocide' and Divisionism for her decision to raise the issue of RPF war crimes (Amnesty International 2010: 21). Amnesty International (2010: 21-2) suggests a political motivation in both cases due to the timing and manner of the accusations.

Only days before his re-election in 2010, the Rwandan President Paul Kagame declared in front of a crowd of thousands in Kigali: "those who give

our country a bad image can take a rope and hang themselves" (CPJ 2010). It is easy to imagine that those words specifically targeted the media. The Freedom of the Press Organisation Reporters without Borders (RSF 2012c) has granted the Rwandan President a place on its 'Predators of Press Freedom' list for several years. Five months before the election, the Media High Council suspended the leading two independent weeklies *Umuseso* and *Umuvugizi* for six months (RSF 2010a). The newspapers were well known for their anti-government stance because they broke stories and reported on issues such as government corruption (RSF 2012c; Waldorf 2007: 409-10)¹⁰³. Only one week before the election, the Media High Council - with close links to the government - suspended some 30 news media, and they were immediately closed by the security forces (RSF 2010b)¹⁰⁴. As a consequence of those actions, only a handful of independent papers were able to cover the election (CPJ 2010).

Special media attention was given to the case of two female journalists of the private bi-monthly newspaper *Umurabyo*: Agnes Nkusi Uwimana and Saidati Mukakibibi were sentenced to 17 and seven years of detention respectively in 2011¹⁰⁵ (RSF 2011a; Amnesty International 2011:5). The journalists had covered sensitive policy issues in several opinion pieces from mid-2010 onward¹⁰⁶. A mix of incitement to violence, promoting ethnic division, Genocide denial, and defamation made up the charges (CPJ 2012b)¹⁰⁷. Other journalists have chosen exile to escape punishment¹⁰⁸. In 2012, Rwanda was ranked at position

103 Already in 2003, *Umuseso's* journalists were charged with 'disseminating genocidal ideology', which seemed "grotesque" according to Waldorf (2007: 409-10), since almost half of the journalists had been Tutsi.

104 The government had suddenly enforced the provisions of a 2009 media law, which demanded for all media outlets a registration with the government and some of them failed to provide the required documents in time (RSF 2010b; CPJ 2010).

105 Prosecutors previously requested a 33-year and 12-year sentence (RSF 2011a). In 2012 the Supreme Court reduced the sentences to four and three years respectively (RSF 2012a).

106 Those issues included agricultural policy, the previous murder of a journalist, allegations of corruption and of lavish government spending on luxury jets made against senior government officials including Kagame, descriptions of the falling-out between Kagame and two military leaders exiled in South Africa and demands for justice for Hutus killed during the genocide (CPJ 2010; CPJ 2012c).

107 Other more recent cases against journalists include for example a reporter, who was sentenced to one year in jail for Divisionism because he had suggested men might regret marrying Tutsi women solely for their beauty (CPJ 2012a). In 2012, a radio presenter was accused of Genocide Ideology and minimising the genocide and had to stay in pre-trial detention for three months because he had accidentally mixed up the terms 'victims' and 'survivors' while reading an announcement (RSF 2012b). Even though he was eventually acquitted, he lost his employment (RSF 2012b).

108 Prominent and recent examples are the founder of the newspaper *Umusingi*, Nelson Gatsimbazi, who faced arrest on the charge of Divisionism and the journalist, Jean Bosco

14 among the top countries that journalists flee into exile¹⁰⁹ (CPJ 2012e). International media outlets were targeted as well, especially the BBC and Voice of America¹¹⁰ (Amnesty International 2010: 28-9). Amnesty International (2010: 28) was called a ‘human rights terrorist’ for its criticism of the Genocide Ideology law from the government-aligned New Times.

Although “only” one journalist was imprisoned in Rwanda in 2014 (RSF 2012c), her and former cases contribute to a wider chilling effect: National and international journalists and human rights workers chose to self-censor politically sensitive areas of work to avoid falling foul of a law that fails to clearly define the conduct and behaviour that is still acceptable (Amnesty International 2010: 17-8, 27). A Rwandan human rights activist declared, “Genocide ideology is a form of intimidation. If you dare to criticize what is not going well, it’s genocide ideology” (ibid.: 27). A development partner, who supports the Rwandan justice sector, subsumes: “Anything goes into genocide ideology, if you want it to” (ibid.: 33).

Therefore, prosecution has become a matter of interpretation: Rwandan officials have for example argued the charges against opposition politician Victoire Ingabire would not stem from her words per se, but from the underlying philosophy (Amnesty International 2010: 21-2). The suspended BBC Kinyarwanda service was accused by then Information Minister, Louise Mushikiwabo, of containing “coded messages” (ibid.: 28). She admitted that the speakers didn’t deny the genocide outright, but sent hidden messages (ibid.). This is an interesting point because the recent debate on international

Gasasira, who fled into exile, because he was censored, threatened, beaten up and hunted inside the country. Both continued to publish online versions of their newspapers in exile, which have been temporarily blocked, hacked and even furnished with a bogus version in order to allow the government to post false news and to see who reads the paper online. (RSF 2011b; CPJ 2012a)

109 Further repressive measures play a role as well, such as intimidations, physical attacks, disappearances, and assassinations of media representatives in apparent retaliation to their work (Waldorf 2007: 407-9; RSF 2011b).

110 In 2006, the Minister of Information criticised two of the VOA correspondents for biased reporting because of references to critical Amnesty International and HRW reports (Waldorf 2007: 412). In 2009, the Rwandan government suspended the BBC Kinyarwanda service for a month for inciting Divisionism and Genocide denial (CPJ 2011; Amnesty International 2010: 28). A trailer contained a statement of a man who asked “why the government had not allowed relatives of those killed by the RPF to grieve” and a statement of a former presidential candidate who opposed “to have all Hutus apologise for the genocide as not all had participated in it” (ibid.). In October 2014 the BBC Kinyarwanda service in Rwanda was suspended to protest the production of a BBC television documentary *The Untold Story* which the Rwandan authorities accuse of incitement, hatred, divisionism, genocide denial and revision (The Guardian 2014).

legislation clearly permits and favours interpretation efforts as opposed to the direct meaning of statements. The abuse potential of those approaches becomes visible in practice.

The 'culture of fear' is boosted due to the extreme penalties and the threat of wrongful accusation. Charges without thorough investigations and based on flimsy evidence lead to a great number of acquittals (Article 19/ Maina 2011: 11; Amnesty International 2010: 8): In 2009, 260 of 749 cases of genocide revisionism and other related crimes resulted in acquittals (Amnesty International 2010: 19). At the same time, charges often include long pre-trial detention (ibid.: 8) and several arrested journalists and opposition politicians were never brought to trial¹¹¹. In the end, the government has successfully eliminated criticism and thus the ability of journalists to inform Rwandans about public matters (ibid.: 28).

Comparing Rwanda and Kenya is very interesting, because the exploitation of hate speech legislation takes a different direction in Kenya. The Kenyan state's interference with press freedom is much less frequent and, above all, less conspicuous. On a positive note, no journalists are currently imprisoned and the country is rated as the second most common destination in the world for exiled journalists (RSF 2013; CPJ 2012d). Kenya's status as a role model for democratisation in Africa has, however, been challenged since the PEV in 2008 (ND 2008a; BTI 2008: 1). A remarkable interference with press freedom occurred on the day Kibaki was announced as winner and sworn in as President, despite substantial doubts about his victory. On December 30, 2007 the Ministry of Information and Communications and the Ministry of Internal Security brought forward an unconstitutional¹¹² ban on live radio and TV news reports (CIPEV 2008: 296). The Ministry of Information justified the step by saying it found itself constrained to control media contents, since reputable media outlets around the world had used headlines like 'Hate radio spreads new wave of violence in Kenya' (ibid.: 297). The ministry itself believed its actions were in "good faith" and with the "overriding national interest in mind" (ibid.). However, the ban "contributed much more to raising tension

111 A former *Radio Rwanda* journalist was released after three and a half years in pre-trial detention, a former TV Rwanda journalist after six years and a former editor of the government-owned *Imvaho* died in detention (Waldorf 2007: 408). Two opposition politicians of the Democratic Republican Movement spent 18 months and three years in pre-trial detention (HRW 2008a: 53). Accusations included discrimination, incitement to sectarianism/divisionism, and threatening state security (ibid.).

112 Kenya's Attorney General and the Chairman of the Editors' Guild considered the ban as unconstitutional (CIPEV 2008: 296, 298).

than continuing those broadcasts, because then people started wondering what is happening" (ibid.: 298). The BBC report by Abdi & Deane explains that Kenyans have become increasingly reliant on the media (Abdi/Deane 2008: 3): "When the media was prevented from doing its job, the public clearly missed it and the country almost certainly suffered as a result" (ibid.: 8). *Short Message Service* (SMS) took over live journalistic reporting (ibid.). The ban, designed to diffuse public anger, arguably did the opposite: It fuelled credibility in rumours (ibid.: 8, 11).

More recently, the government increased its efforts to combat hate speech within the new media sector. Already during the PEV, the government pressured the leading mobile network operator, Safaricom, to close down its SMS system around December 31. They correctly resisted because they felt that panic might ensue (Abdi/Deane 2008: 11). In response, the government took a desperate step by issuing a nationwide SMS on January 3 saying, "the sending of hate messages inciting violence is an offence that could result in prosecution" (IRIN 2008). Very recent attempts to control the new media sector have become much more serious: The *Communications Commission of Kenya* (CCK) "drafted guidelines that put the responsibility of filtering out inflammatory text messages on mobile phone service providers," which prospectively will be held accountable for hate messages (IRIN 2012; Wafula 2013). In this context, it should be mentioned that the Kenyan government held a majority stake in Kenya's largest phone provider Safaricom until the initial public offering in 2008 and in 2013 its stake was still 35 per cent (CPJ/O'Brien 2013). In 2013 too, the government officially admitted that mobile operators may filter some key words and that it was already working with Interpol to fight hate SMS (Wafula 2013).

In 2012, the CCK further announced plans to install Network Monitoring Software for Internet traffic (Mutung'u 2012). By 2013 the government had implemented an "observation regime" with about 100 monitors hired to watch social media content (Hopkins 2013). The rapid set-up of those surveillance mechanisms should especially raise concern: To what extent should the state be allowed to invade personal privacy – particularly in Kenya, which has no data protection law (Mutung'u 2012)? The Kenyan Ministry of Information and Communication already interjected that monitoring SMS and the Internet could violate the right to privacy (Mbote 2012b). A Nairobi lawyer warned that "continued blanket surveillance on citizens by the government could pose legal challenges with regard to technology and privacy in the age of information" (Mbote 2012a). To date, the legal justification is derived from the constitutional

clause containing overlapping hate speech concepts (e.g. hate speech and advocacy of hatred; see again Chap. 3.2.2; Mbote 2012b). The Kenyan Ministry of Information and Communication nonetheless officially admitted that “the current law does not provide for monitoring of ‘new media’ such as Internet and SMS” (ibid.). International legislation is quite clear regarding such (state) activities: “No one shall be subjected to arbitrary or unlawful interference with his privacy, [...] or correspondence [...]” (ICCPR 1966: Article 17)¹¹³.

Thus, the Kenyan case demonstrates that the damage caused by hate speech legislation does include more than just wrongful convictions. Hate speech legislation can also be misused to legitimise state surveillance activities.

4.2 Denunciation

Dialogue is an important component of conflict transformation; issues that are intentionally veiled cannot be solved. The previous Chapter indirectly demonstrated that hate speech legislation hinders constructive dialogue in Rwanda, since the articulation of sensitive issues may end in jail. Especially Genocide Ideology accusations are used to settle personal discords on a local level (Amnesty International 2011: 24). Amnesty International (2011: 24) documented cases where such accusations have been fabricated by students to discredit their teachers. “In one such case, a fight with a male genocide survivor appears to have been caused by an argument over a woman” (Amnesty International 2010: 24-5). According to a Rwandan scholar, denunciation became part of everyday life (ibid.: 12). Many false accusations take place during the genocide commemoration period when tensions are particularly acute (ibid.: 20). Despite the stated aim to foster unity, the laws are more likely to lead to an even deeper split in an already traumatised society. They have themselves become a tool that fuels further conflict instead of preventing it.

Rwandans are only copying on a local level what the government exemplifies on the national level. Within a broad campaign against dissidents, the government demonstrated the force of denunciation against political opponents by insinuating guilt of Genocide Ideology and Divisionism even before the accused are brought to trial (Amnesty International 2010: 26). It denounced hundreds of individuals and dozens of Rwandan and international

113 Regarding the Internet, it would be interesting to know if Kenya keeps the complete Internet traffic under surveillance or “only” those communications in public forums. The surveillance of SMS is not legitimate under international law in any case.

organisations by publishing their names in parliamentary reports, on the radio, and at public meetings with little or no verification and no judicial process (HRW 2008a: 39). Since the denunciations were rarely followed by judicial proceedings, many accused did not have any opportunity to clear their names, some suffered loss of employment, expulsion from school, and social isolation (ibid.; Amnesty International 2010: 11). Amnesty International (2010: 8) concludes that the laws have a “corrosive effect on mutual trust in a society already fragile after the 1994 genocide”.

In Kenya the situation is less critical: some misinformed citizens incorrectly accused each other of committing hate speech acts (Umati 2013: 9). A NCIC commissioner rated the tendency to politicise hate speech prosecution as a real threat (IRIN 2012), but the judicial proceeding still prevents illegal prosecutions.

4.3 A Toothless Tool against Impunity

The Rwandan case demonstrates that hate speech legislation can be abused to silence dissidents. Vague legislation can, however, also lead to exactly the opposite, as in the case of Kenya. Even though high-ranking politicians made numerous inciting statements prior and during the PEV - including direct calls to violence or displacement (see Chap. 2.1.2) - no high-level convictions have taken place so far (see e.g. Wesangula 2013; KNCHR 2011: 11; Nderitu 2012; K24 TV 2014) and are even more unlikely since the ICC dropped its case against the Kenyan President Uhuru Kenyatta in December 2014 (BBC 2014). The ICG’s Horn of Africa analyst, Abdullah Boru Halakhe, argues that the broad definition of the NCIA may make it difficult to provide evidence that passes the prosecutorial threshold (IRIN 2012). The *National Cohesion and Integration Commission* (NCIC), which is the institution most engaged in prosecuting hate speech, is already called a “toothless bulldog” (Wesangula 2013; Olang 2010). It initiated, for example, hate speech charges against two MPs and one political activist during the 2010 referendum on the new Constitution, but later requested their withdrawal, because it favoured non-prosecutorial alternatives to seek reconciliation (Thuku 2011a/b¹¹⁴). The withdrawal was seen as “an anticlimax for the first prosecution over alleged hate speech in Kenya” (Thuku 2011b). Since its establishment in 2008, the NCIC investigated

114 MP Fred Kapondi was accused of uttering words meaning that some communities would be forced out if the Constitution would be passed (Thuku 2011b). The political activist, Christine Nyaguthia Miller, is said to have uttered the following words: “The ‘Yes’ group has not come to Central because they know in Githunguri, we shall stone them and let them know that we support ‘No’” (ibid.).

more than 100 hate speech cases, but only ten of the cases went to court and none was found guilty (Wesangula 2013). MP Ferdinand Waititu was recorded on video saying “We don’t want to see any Maasai here in Kayole” and people who employed Maasai should sack them with immediate effect (BBC 2012a). Soon thereafter, several people were killed during occurring riots (Warner 2013). Even though he was suspended from his government post (BBC 2012b), he was leading the race to become governor of Nairobi province just a few months later (Warner 2013). There are, of course, more cases of impunity¹¹⁵. A civil rights activist called the Commission “a waste of taxpayers’ money” (Wesangula 2013), though the Commission explains its conduct by pointing out that its mandate also covers the unification of previous rivals (ibid.).

From a legislative stance, impunity questions the existence of hate speech legislation: “Restrictions on free speech which are not effective cannot be justified; they cannot be necessary to protect a legitimate aim since, by definition, they are not protecting it” (Mendel 2006: 39-40). A KNCHR commissioner points out that even a potential deterrence effect disappears: “You can only talk about deterrence when you have had successful prosecutions, but we have no track record at all in punishing high-level crime” (IRIN 2012).

If comparing Rwanda and Kenya, one might argue that Kenyan impunity is not much of a problem since it only preserves the status quo and, at least, does not worsen the problem. A few negative side effects should nevertheless be stressed. The very existence of available legislation can give rise to hopes and expectations in terms of holding perpetrators accountable. In Kenya the withdrawal of charges fuelled the perception that particular people will never be held responsible (Nyanjom 2012: 69). Impunity may therefore lead to frustration and raise doubts about the judicial or even the political system. Moreover, impunity appears to validate the impugned speech, according to Mendel (2006: 71). This can send a dangerous signal to the audience. Last but not least, the Kenyan government uses the constitutional clause to legitimise the recent introduction of SMS and Internet surveillance: “This introduces the question: Is there any tangible point to monitoring hate speech if the government has limited will to do anything tangible with the information?” (Hopkins 2013).

115 Kenya’s Assistant Livestock Minister was accused of inciting violence that claimed more than 100 lives in Tana River (BBC 2012a/d)

To put it briefly, the situation in both countries is unacceptable: Whereas dissidents are intentionally suppressed in Rwanda through legislative means, high-level perpetrators escape punishment in Kenya. The following statement of the OHCHR (2012: 2) suggests that Rwanda and Kenya are not isolated incidents: “This dichotomy of (1) no prosecution of ‘real’ incitement cases and (2) persecution of minorities under the guise of domestic incitement laws seems to be pervasive”

4.4 State Interference with Judicial Independence

The above discussions have shown that the abuse potential of hate speech legislation is great (see Chap. 3.3). In spite of this, the majority of studies about hate speech legislation mention the absolute basic condition of judicial independence only in passing. However, the practical outcomes of the tool in Rwanda and Kenya demands dedicating a few lines to the issue.

In Rwanda, the judiciary is subordinated to the will of the executive (BTI 2012b: 9; HRW 2008a: 44-69). The authoritarian regime uses its tight control over the judiciary to control the political space, media and civil society because of its “understandable fear of democracy in a country where Hutu comprise an overwhelming majority” (Waldorf 2007: 405). Even before the genocide, “opposition journalists were selectively targeted with legal cases, even for infractions that had no basis in law, while the writings of racist extremists were justified as legitimate on the basis of respect for freedom of expression” (Mendel 2006: 63). Rwanda testifies today what is visible throughout history: “Without a principled defense of freedom of expression no group is more than a political majority [or minority in power] away from being the target rather than the beneficiary of hate speech laws” (Mchangama 2012; see Chap. 1.1).

Even though the 2010 Constitution has strengthened the independence of the judiciary in Kenya, the executive still attempts to interfere with its independence (BTI 2012a: 12). The commission most responsible for prosecuting hate speech offences, the NCIC, is a government agency. Since the agency is only equipped with the power to summon persons, it must recommend the prosecution of suspects to the police and the Attorney General (NCIA 2008: 23-8; Olang 2010; Nderitu 2012), which in turn are considered to be particularly corrupt¹¹⁶ (Freedom House 2008; BTI 2010: 8).

116 Provincial administrators did not pursue hate speech cases, because they were in fear of the population and political leadership and the police seemed to be either unwilling or incapable to carry out investigations (CIPEV 2008: 63, 420, 457).

Under these conditions, high-level prosecutions on hate speech are unlikely, especially in a country where impunity of high-level offenders is systematic¹¹⁷. In September 2013, Kenyan MPs even approved a motion to leave the ICC, probably in response to the indictment of the President and Deputy President (BBC 2013m)¹¹⁸. This step indicates that changes regarding impunity of high-level perpetrators should not to be expected in the near future.

Considering the costs of silencing dissidents and of impunity (see e.g. Chap. 1.1 and 4.3), the obvious and final conclusion would be to generally question the application of hate speech legislation in countries where the judiciary is not able to work independently. A dilemma results, which Mendel and Benesch perfectly describe:

“Unfortunately, it is precisely where there is a real risk of genocide that administration of justice authorities tend to lack independence” (Mendel 2006: 71).

“ [...] in countries where the rule of law is healthy and the government is not supporting inflammatory speech for the most part there is not an acute risk of mass violence. So almost by definition we are talking about countries where you cannot rely on calm, normal traditional procedures and other ways of curbing dangerous speech.” (USHMM 2013:55:20 – 55:50)

117 Chapter 2.2.3 has documented that political actors have financed and organised youth militias for quite some time already. This is no news but earlier findings of related investigations (above all the Akiwumi report) were completely ignored and high-ranking politicians including Mwai Kibaki as former Minister for Internal Security continued to operate with impunity (HRW 2008b: 2, 18).

118 Already during the elections, clever political manoeuvring of Kenyatta’s circle re-branded the indictment and turned the presidential elections “into a referendum on the ICC and in turn the West ‘meddling’ in Kenyan affairs” (BBC 2013k). It is assumed that the ICC label has even helped to galvanise support for Kenyatta, instead of destroying his bid for the presidency (ibid; BBC/Mugera 2013).

5. Can Hate Speech Legislation prevent violence?

The visible effects of hate speech legislation in Rwanda and Kenya today are a strong argument against that type of legislation. In Kenya, a preventative effect appears to be very unlikely, given that no prosecution takes place. Rwanda is a different case: Prosecution might have prevented violence by stopping incitement before it was able to produce a result (Benesch 2008:497) and in view of the large number of prosecutions, a deterrence effect cannot be ruled out either. The following statement shows that visible harm of the tool may not end the debate: "In short, a false positive -e.g. wrongly silencing an inciter, - is much less of a problem than a false negative, e.g. letting an inciter commit his vile crime - which would be catastrophic" (Richter 2008). Thus, the potential of hate speech legislation to prevent disastrous consequences emanating from speech is frequently seen to outweigh the harm (see e.g. Leiter 2012 and Mchangama 2012 with reference to Waldron 2012). It must again be emphasised that this study cannot empirically prove or disprove a preventative effect in practice. But the findings gained in Chapter II and III allow certain conclusions on the more general preventative capability of the tool to be put forward. What should be kept mind is that a preventative effect of hate speech legislation that is based on breaches of international standards is not legally justifiable.

5.1 Hate Speech Dissemination - Dodging Prosecution

Successful prosecution is dependent on sources of verifiable information. Ironically, it appears to be a stroke of luck from a legal point of view if hate speech is disseminated via mainstream media because publications or recordings at least provide "technical" evidence. By contrast, prosecutors face serious difficulties if hate speech is spread in meetings or face-to-face. First of all, legislative texts reduce the applicability regarding the 'public' requirement (see Chap. 3.1.3.1). Secondly, it is rather unlikely that anyone who is part of those 'inner circles' will notify cases of incitement, and if they do, then one testimony may stand against another and the matter of trustfulness comes into play. The crucial point is that public and private meetings have played an enormous role during the Rwandan genocide and Kenyan PEV (see Chap. 2.2/ 2.3) and hate speech legislation is again limited in tackling the situation.

Another huge topic opens up regarding the new media sector and Internet. Their role can perhaps be neglected in the case of Rwanda, but cannot be omitted for Kenya. The rapidly growing new media sector,¹¹⁹ with its lively blog culture and rapid rise of the popularity of Facebook¹²⁰ and Twitter, provides alternative means of dissemination for dodgy speech. During the 2007 election, mobile phones were the primary medium to spread hate speech and SMSs were even used for direct attacks (BBC 2013c; Some 2009). The dynamic of malicious mass SMSs caused paramount concern (Abdi/Deane 2008: 10; CIPEV 2008: 216):

“There were SMSs landing in my cellphone’s inbox literally every 15 minutes in the last two weeks of the campaign, emanating from all sorts of support groups for the candidates... after the dispute over the outcome, the texts were arriving every five minutes, and they were meaner, nastier and more propaganda-filled” (Abdi/Deane 2008: 10-1: statement from Charles Onyango-Obbo, Nation Media Group).¹²¹

Around 600 blogs were operated during the Kenyan 2007 election with “some of them spewing shocking tribal vitriol” (Abdi/Deane 2008: 11)¹²². Recent monitoring of online hate speech reveals an enormous spread within Facebook, Twitter and the comments sections of online newspapers (Umati 2012a: 3; KNCHR 2013a: 3). Calls to kill and discriminate stand out prominently among other calls to loot, riot, beat and forcefully evict (Umati 2013: 16-7, 22)¹²³.

119 The technology boom in Kenya, which positions itself as an African tech hub, has surely contributed to an inconsiderate use of hate speech from the bottom (BBC/Gatehouse 2013b). Mobile phone subscribers rose from 9.3 million in 2006/2007 to 25 million in 2012 and internet users went up to 14 million (Nyanjom 2012: 33) – which means that circa a third of Kenya’s population is online.

120 On the verge of the elections in 2013, Facebook was the most preferred Internet platform: Almost 80 per cent of dangerous speech was found on public Facebook groups and pages (Umati 2012b: 13).

121 An example is the following SMS sent before an ODM demonstration on January 16, 2008: “We say no more innocent kikuyu blood will be shed. We will slaughter them right here in the capital city. For justice, compile a list of all luos and kaleos [slang for the Kalenjin ethnic group] you know at work, your estate, anywhere in Nairobi, plus where and how their children go to school. We will give you number to text this info.” (IRIN 2008)

122 One of these blogs, Mashada.com, decided to suspend its forum because it received 5,000 comments a day and was unable to supervise the increasing number of ethnically insulting comments. Mashada.com assumes that politicians are responsible for the bombarding of their blog in order to enrage the debates, since there was some level of organisation in it. (Abdi/Deane 2008: 11)

123 The civil society monitoring project ‘Umati’ (see Chap. 6.4) lists numerous examples. The techniques of ‘dehumanisation’ and ‘accusation in the mirror’ are prominent as well: “If anything the [race] who live among us are Worms in our stomachs, Jiggers in our toes and we should not reward them for promoting theft of public resources in the name of fake

Kenyan politicians also keep up with the times. The mobile telephony has become “one of the most effective methods of political communication, including the spread of hate messages” (Some 2009; see also Rubadiri 2012, Sudi 2012). An ODM Cabinet Minister is linked to hate SMS, which instructed youths “to do all possible to root out the ‘enemy’” (Some 2009). The utilisation of such means comes with distinct advantages for those seeking to distribute these messages: Politicians do not depend anymore on face-to-face meetings and are able to reach large audiences while simply bypassing the monitored traditional media sector.

This is again a situation, where the application of hate speech legislation could be useful, because content is more likely to radicalise within new media channels¹²⁴. Yet, attempts to regulate political hate speech via SMS can so far only be described as a ‘nice try’¹²⁵. Loopholes of SMS evidence may even hinder indictments, if hate messages are sent from a registered phone, since it must be incontrovertibly proven that the SMS was actually sent by the suspect (Some 2009). Above all, SMS can be sent from bulk messaging services such as Google, which in turn have limited capacity to block inciting messages or even trace them back to the originator (Wafula 2013): “Multiple sources across the mobile industry said their responsibility is limited only as far as the message is emanating from their network or is being redistributed on their networks by licensed bulk SMS providers” (ibid.). It might be reasonably assumed that responsibility vanishes further under the mantle of anonymity¹²⁶. Politicians who were accused of sending hate SMS argued that they could not be blamed for the chaos, since they were not physically present to co-ordinate attacks (Some 2009). Prosecution of online hate speech is similarly hopeless: No arrests have been made and suspects have been acquitted because monitoring bodies failed to provide compelling evidence (BBC 2013c). To conclude, the

businesses in the last 50 years” (Umati 2013: 7). “[tribe2] will ‘take care’ of both [tribe5] and [tribe4] in Nairobi, ...together we will cleanse this country of parasites and traitors” (ibid.: 8). “it will be either you kil or get killed” (ibid.: 14). “Killing all [political party] leaders is the only way to prevent further loss of innocent lives!!!” (ibid.). See Umati 2012a/b, 2013 for further examples.

- 124 Benesch (2012a:5) explains that new media platforms can be *compelling in and of themselves insofar as they make members feel being part of a select/privileged group. Kenyan blogs developed a virulent nature* regarding inciting comments (Abdi/Deane 2008: 11).
- 125 The CCK has drafted guidelines specifically aimed to bar politicians from sending bulk messages (Sudi 2012). They demand that every message must have the names of the political party, must be authorised by the party and must be reviewed for 48 hours before the message is sent (ibid.; Rubadiri 2012). However, it is doubtful that any politician aiming to incite violence will follow the official path.
- 126 Whereas publications within the traditional media sector usually disclose names of journalists as well as politicians, mass SMS can be sent in an anonymous way and social media users can use nicknames.

judiciary is unable to hold to account offenders who use the new media sector and Internet, while the prosecution of hate speech done face-to-face or at closed meetings is exceedingly difficult.

5.2 'Truth' cannot be Prosecuted

A Joint Statement of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression states, "*no one should be penalized for statements which are true*" (UN/OSCE/OAS 2001). Any other conclusion would be untenable.

This considerably limits the employment of hate speech legislation for preventative efforts. Chapter II has provided evidence that Rwandan politicians referred to past injustices and Kenyan politicians constantly exploit long held land-related grievances¹²⁷. These are just some examples among many more. Little is known about the functioning of incitement, but it is suggested that the constant repetition of falsehoods might eventually convince perpetrators-to-be (see Chapter 3.1.3.2.2). Nevertheless, it would be absurd to suggest that incitement can only be dangerous if it contains falsehoods. Direct calls to violence do not seem to be very successful either, especially if the target audience consists of civilians, who must be radically re-categorised to accept killings or even engage in violence themselves (see Chapter 2.2.2). It might be reasonably suggested that an emphasis on 'truth' has an exceptional power to bring about violence and that a speaker who highlights real historical injustices such as displacements or actual grievances such as unemployment and inequality will probably be more influential and successful to reach 'ordinary' citizens than if he calls aggressively for violence and makes up stories. In Kenya, parties ran campaigns that were heavily loaded with grievance/victimhood nuances (KNCHR 2008: 23), simply because it is assumed that the power of persuasion is stronger if reference is made to painful life experiences. George Weiss, the founder of a Dutch NGO

127 The issue of land grievances is visible throughout the whole KNCHR report, including clear references to exploitations of land grievances (KNCHR 2008: 52, 118, 178, 182). Another case from Kenya is quite illustrative. The Kenyan Environment Minister, Chirau Ali Mwakwere was accused of hate speech by the NCIC because he stated during a by-election campaign that indigenous coastal people had been oppressed by Arabs (Lucheli 2012). Later he vehemently denied the allegation: "Angry, yes, hate speech, no!" (Olang 2010). He defended himself by saying that "he was airing his views on the historical injustices suffered by his people, which is a constitutional right guaranteed to him under Article 27 of the Constitution" (Lucheli 2012). Eventually, the politician was discharged (Agoya 2012).

dealing with hate speech from a psychological perspective (see Chap. 6.3), argues inciters don't need study in any strategic workshop on how to incite people to violence, simply because their audiences are all ready to be incited because of certain circumstances and therefore it is enough to push them by pressing certain buttons relating to *unhealed dramata of their past* (USHMM 2013: 39:53 – 40:26). The ICTR holds that a dissemination of 'truth' can indeed be dangerous, but argues for non-prosecution in those cases because "if a true statement generated 'resentment', this would be a result of the underlying factual situation, rather than the articulation of the statement as such, and the speech would be protected" (Mendel 2006: 49¹²⁸). To put it rather crudely: If 'truth' leads to violence, then the offender must not be called to account since violence would have happened anyway. Obviously, the ICTR is forced to reach this conclusion as it is scarcely conceivable where society ends up if the prosecution of 'truth' is legalised. The ICTR statement confirms that the judiciary is unable to deal with speech that portrays historical injustices etc. This inevitably points at the limitation of hate speech legislation to prevent violence in many circumstances when hate speech is employed.

5.3 Prosecution Won't Persuade, Thus Cannot Prevent

If prosecution actually takes place, this is no guarantee that a preventative effect will result (Mendel 2006: 70-1). The reason for this is that jurisdiction focuses on the offender solely. Even if the judiciary decides that a statement is illegal, the speaker's utterances may already be deep-seated in people's minds. Legislation only bans and condemns instead of debating questionable views. It is often argued that not all arguments qualify for debate because they are contemptible and should not be allowed to receive a platform. The paradox is that the whole process of a charge attracts more public attention to a statement than it might otherwise have received, especially if prominent figures are involved (Amnesty International 2012: 8). Kenan Malik (2012) further warns that much hate speech consists of loathsome claims, but to dismiss them "as beyond the bounds of reasonable debate is to refuse to confront the actual arguments" and to engage with an idea that could have considerable purchase:

128 Mendel interpreted the following finding of the ICTR/Media Trial (2003: 1015): "The Accused have maintained in their defence that certain communications made by them about the Tutsi population were simply true, for example the broadcast stating that 70% of the taxis in Rwanda were owned by people of Tutsi ethnicity. [...] Its impact, if true, might well be to generate resentment over the inequitable distribution of wealth in Rwanda. However, this impact, in the Chamber's view, would be a result of the inequitable distribution of wealth in Rwanda, the information conveyed by the statement rather than the statement itself."

“Hate speech is but a symptom, the external manifestation of something much more profound which is intolerance and bigotry. Therefore, legal responses, such as restrictions on freedom of expression alone, are far from sufficient to bring about real changes in mindsets, perceptions and discourse. To tackle the root causes of intolerance, a much broader set of policy measures are necessary, for example in the areas of intercultural dialogue or education for tolerance and diversity. In addition, this set of policy measures should include strengthening freedom of expression.” (OHCHR 2011: 12)

Openly challenging hateful and inciting views instead of banning them is particularly important if there is the fear that an idea may strike a chord (Malik 2012, blog-discussion). Especially if a statement confirms an audience in their opinion, branding it as hate speech will not disenfranchise all those others holding such a view, says Malik (2012). In practice, prosecutions often generate sympathy with the wrongdoer and create martyrs rather than criminals (Benesch 2012b; Mendel 2006: 39, 71). Kenyans, for example, tend to condone and cheer politicians who use inflammatory language and those accused become their communities’ heroes (KNCHR 2013b: 1, Nderitu 2012). The Kenyan NCIC faces complaints against their charges, which argue those politicians only said what was in their hearts (Nderitu 2012). In Rwanda, the persuasive effect of hate speech legislation must be generally doubted since the abuse of the tool is well known (see Chap. 4.1/4.2).

5.4 Time Factor

Chapter 2.2.1 highlighted some incidents where oral incitement was immediately followed by violence. Jurisdiction will, however, not be able to prevent immediate violence since it is not a tool known for its rapid responsiveness. The second time-related challenge appears for pre-atrocity punishment because “illegal action called for at some indefinite future time should fall short of any criminal law sanctions” (Article 19 2012: 40).

The time factor will always considerably limit effective prevention: The temporal range wherein incitement prosecution can be employed and wherein it has a *potential chance* to prevent a proscribed result is limited when reactions to a statement are either immediate or when reactions only appear quite some time after the statement has been made.

5.5 Conclusion: Legislation Fails in the Most Dangerous Situations

If international standards are considered as a basis, the ability of hate speech legislation to prevent violence is highly limited. Those limitations are of a legal or more technical nature. Kenya provides an illustrative example for many limitations and shows that perpetrators have enough possibilities to bypass prosecution if, for example, reconsidering their location of use (e.g. meetings) and/or means of dissemination. The inability of legislation to handle incitement that is built upon “true” historical injustices or grievances is a more general but extensive limitation. Also, if prosecution actually takes place, it does not guarantee a change of mind on behalf of the audience, but rather leads to the opposite. Still, if prosecution takes place and the audience eventually follows the view of the court, it may come too late (time factor). All these limitations together question the upheld preventative strengths of the tool. Even worse, hate speech legislation is not able to influence situations that contain a particular danger: when hate speech is rife, widely spread through SMS or new media channels, when it exploits ‘truth’, when an audience already holds contemptible views, and when violence is an immediate result.

The fact that Kenya is more prominent in this Chapter should not blind us to the fact that all limitations of prosecuting hate speech would equally apply to the Rwandan case if judicial proceedings there complied with international standards. Provided that there is a preventative effect in Rwanda, which might be a deterrence effect due to the high number of cases and convictions, it is likely that the effect was achieved through illegal means. Rwandan hate speech laws themselves, as well as judicial proceedings in cases of public and well-known personalities, call into question the proper investigation of cases. If an actual perpetrator is convicted without getting a fair trial, the resulting preventative effect can no longer be attributed to hate speech legislation based on international law. Above all, a preventative effect that is due to judicial arbitrariness and state repression is not a legitimate objective (see Chapter 1.2).

6. Alternative Approaches to Curb Hate Speech

The following paragraphs introduce a few alternative methods to hate speech legislation. Compared to legislation, they are far more promising in preventing harm emanating from speech. At the same time, they do not jeopardise FOE and media freedom. The following approaches and ideas have the potential to tackle the complex problem on two different levels, either by preventing hate speech or by countering it (Mendel 2006: 1). The approaches are structured according to the actors who would have to implement them.

6.1 Government and State Officials

Start tackling the root causes of violence while listening carefully to hate speech: Hate speech legislation only combats a symptom. The most effective way to prevent violence emanating from speech is to tackle the underlying root causes. The case of Kenya testifies, however, that there is not a great deal to be expected from the state in situations where the system of 'identity politics' is of use to the powerful. Nevertheless, it would be advisable for governments to tackle at least singular causes of violence such as unfair land ownership in the Kenyan context¹²⁹, since those causes can also become detrimental to political actors, especially bearing in mind future elections. Beyond this, the effective mitigation of socio-political conflicts, which requires at least a partial reduction of root causes of conflict, is at the core to enduring stability (Wolff 2009: 212; see also Chap. 1.1). Regardless of the fact that hate speech is not desirable, it often points at unresolved and persisting issues. It would be advisable for governments to listen carefully to hateful and inciting public commentary in order to learn more about the issues its societies are grappling with. Such efforts are of course long-term orientated and need time to have a positive impact.

Promote a constructive conflict culture to deal with unresolved problems: The state obviously has a responsibility to strengthen a constructive conflict culture (Senghaas 1995: 202-3)¹³⁰. Many post-conflict states tend to be very

129 In fact, the new Kenyan Constitution contains an entire section devoted to land ownership (Harneit-Sievers 2010).

130 This includes educational measures and is a long time process.

cautious about raising sensitive issues of conflict episodes because they fear that renewed debate may itself carry conflict potential. They simply do “not trust [their] citizens to make wise decisions” (Geoffrey Stone cited by Leiter 2012). That fear is understandable. The Rwandan government has chosen to suppress the open airing of sensitive issues such as RPF war crimes¹³¹ or the provocative emphasis on ethnicity, a crime that is stipulated in the Penal Code and carries prison terms (CPJ 2012a). But the suppression of sensitive topics is in itself dangerous. The denial of the existence of a conflict already hampered any constructive conflict management prior to the genocide (Mehler 2006: 257). Such provisions today lead to a situation where problems between different groups are neither raised nor solved (see Chap. 1.1): “What Rwanda requires is not the suppression of the deep-seated animosities but the ability of people openly to debate their differences”, says Malik (2012). This is of course equally true for the prohibition of other sensitive contents (see Chap. 4.1). “Censorship is the tool of those who have the need to hide actualities from themselves and others. Their fear is only their inability to face what is real [...]”, says the German-American poet Charles Bukowski (cited by Goodreads 2013b). The crucial point is that people will find a way to deal with outstanding issues anyway. But if dialogue and debate, one of the most important components of conflict transformation, are blocked, alternative ways to settle old scores or newer disputes may well take a negative direction. The abuse of hate speech laws in Rwanda clearly shows that (see Chap. 4.2). In terms of conflict transformation, the suppression of speech leads nowhere.

Secure access to information and develop/protect the ‘Marketplace of Ideas’: A monopoly on opinion favours unchallenged incitement and thus makes it far more dangerous. States must therefore ensure that citizens have access to alternative information; they must develop or protect a ‘Marketplace of Ideas’. Rwanda certainly has a long way to go. Within the last years, the government aggressively attained a ‘monopoly on knowledge construction’ that left a subdued and largely state-dominated press landscape (Waldorf 2007: 405; CPJ 2011; RSF 2012c)¹³².

131 The way in which issues are selectively prohibited implies that the fear of renewed conflict is only one side of the coin. The other side of the coin is the government desire to secure its power, which results in specifically targeting competing opposition politicians (see Chap. 4.1/4.4).

132 In 2002 the government adopted a press law that forms the basis for restrictions of media freedom: It created a media council that operates under the supervision of the Office of the President; accredits journalists and advises the government on censorship (Waldorf 2007: 407; Amnesty International 2010: 12). Such an institution must always be clearly separated from the state: “No government in any country at any time has proven able to directly regulate media without inhibiting media freedom [...]” (Abdi/Deane 2008: 10). Furthermore,

On a positive note however, Rwanda passed a new Access to Information law as well as a new Media Law in 2013¹³³.

Ensure ownership transparency: In Kenya, the most urgent topic is the transparency of media ownership. President Kenyatta, who was indicted by the ICC until December 2014, and Deputy President, Ruto, who is still indicted by the ICC, are both major media investors (Nyanjom 2012: vii, 45-6). Kenyatta is a media mogul: His family owns a TV channel, a newspaper and a number of radio stations (BBC/Mugera 2013). Several local language stations were created by politicians vying for parliamentary or county seats during the last two years (Nyanjom 2012: Foreword; ICG 2013: 38; Abdi/Deane 2008: 5-6). Considering the role of some politically owned local language stations during the PEV (see Chap. 2.1.1/2.1.3), political media ownership is without doubt a delicate issue. Still, it is impossible to ban it because in a democracy, politicians have the same rights to private ownership as other citizens. To face the problem, sufficient and public information about direct or indirect media ownership from politicians is crucial – including ownership by relatives, factual ownership through stock exchange investments, cross media ownership structures, etc. Such information must be brought to the attention of the audience.

Counter hate speech employed by colleagues: It should be an imperative for those charged with governance to refrain from employing hate speech, and to understand their responsibility of firmly and promptly countering hate speech employed by colleagues and other public figures (see e.g. OHCHR 2012: 7; USHMM 2013: 19:20 – 19:33; Adama Dieng). Speech employed by influential personalities needs a vigorous countering from other influential personalities (USHMM 2013: 59:46 – 1:01:20; Susan Benesch). A failure to condemn hate speech by colleagues, however, must be interpreted as a warning sign of official promotion of hatred or worse (Mendel 2006: 65).

the minister of information declared that: "The public radio and television are there for relaying the action of the government. The private media, rather, should be interested in other things, like music and entertainment" (Fontemaggi cited by Waldorf 2007: 411). In 2009 the information minister proposed exorbitant minimum start-up capital to launch new news media (e.g. 41,000 dollars for a newspaper, 81,000 dollars for a radio station and 187,500 dollars for a TV station) (RSF 2009), further threatening media pluralism.

133 Article 19 (2013a) welcomed the new access to information law. The new Media Law instructed to establish the new „Rwanda Media Commission“, a seven-member self-regulatory body (IPI 2014). Still, Article 19 (2013b) criticises that the new Media Law does not go far enough and „contains too many provisions which pose a threat to journalists and the independence of the media“.

6.2 The Public

“The only valid censorship of ideas is the right of people not to listen,” says Tommy Smothers, an American comedian and musician (cited by Goodreads 2013a). During the PEV in 2007/2008 many Kenyans chose to ignore inciting statements (see Chap. 2.2.1). Some degree of immunity towards hate speech conduct is certainly not the worst (Umati 2013: 26), but taking an active stand against it would be more beneficial. Since the PEV in 2007 hate speech has become a big topic in public discourse and is fiercely disputed by the media. Many Kenyans - especially the young - are more alert and think that addressing hate speech is a priority for Kenya (Nderitu 2012): “[...] long before law enforcement officers move towards investigation, they will usually raise the alarm to the NCIC [which] receives an average of twenty complaints per week” (ibid.). The public can help to rein in hate speech by exposing offenders (the actor), discrediting lies and rumours (the message) and reporting incidents of dangerous calls to action (the proscribed action). With regard to the first example, using his mobile phone, a rally witness recorded MP Ferdinand Waititu while he was urging a crowd in Nairobi to chase Massai from their homes (Warner 2013; Hopkins 2013; BBC 2012a/b). The recording was posted on YouTube, which led to Waititu’s identification and suspension (ibid.). In another case, a popular rumour was disseminated via Twitter in 2012, which propagated that Muslims had set one of Mom-basa’s Christian churches on fire (Hopkins 2013). A citizen photographed and tweeted the unharmed church that was supposedly burning with the text “stop spreading lies” (ibid.; Ushahidi 2013). Simply pointing out the truth can discredit falsehoods (Umati 2013: 26) and a SMS or tweet is much faster than any attempt at prosecution.

6.3 Media

The classical preventative strengths of the traditional media sector: The positive influence of the media on society is often taken for granted – at least until the system is disturbed and then the focus tends to be entirely on its negative manifestations (see Chap. 2.1.1). Many problems would not have appeared if the media had just been able to do its job without interference (see Chap. 2.1.3). The job of the media is to provide a variety of ideally unbiased information, and that alone may counter hate speech. Beyond this, it is of course desirable if the media explain puzzling events and analyse them within their context. The 2007 campaign period in Kenya demonstrates that politicians simplified complicated topics in order to use other ethnic groups

as scapegoats for existing grievances¹³⁴. A representative of the Media Council of Kenya (MCK) admitted in respect of the PEV that the sector failed to analyse the source of the problem from a historical perspective (Abdi/Deane 2008: 9). Another journalist confirmed that the media did not look for reasons behind events: “For example, a month before the election we saw reports of landlords evicting tenants [in Kibera] – the media was just covering that and not trying to find out the root cause” (ibid.). More context and less event-driven reporting (ibid.: 10) can not only challenge falsehoods and negative simplifications, but can also promote a constructive dialogue about historical injustices and grievances, and thereby may be able to shape conversations elsewhere, e.g. on social media, on the Internet or even at private meetings, where they are outside the range of jurisprudence (Umati 2013: 18). The objective is not to overload the sector with expectations it cannot meet¹³⁵, but to simply build on the classical strengths of the media. The Kenyan media have perfectly proven their constructive role during the Constitutional Referendum in 2010 by deciphering the proposed legislation so that Kenyans were able to cast their vote from an informed position (Olang 2010). Leading pollsters even valued the media as the most reliable and trusted sources of information (ibid.).

A constructive dialogue means not sinking into a peace coma: During the Kenyan election in 2013, a media blitz of tolerance was flooding the airwaves in an attempt to counteract hatred (BBC 2013c/l). Radio stations organised peace road shows, played songs calling on Kenyans to “love your neighbours” and “if they wrong you, forgive them” (BBC 2013c). “One can hardly take a walk, turn on a TV, or even visit YouTube in Nairobi now without being bombarded by peace propaganda,” says Benesch (2013) in her article ‘Peace-Propaganda is not enough to save Kenya from violence’. A focus on peace speech results in a denial of sensitive issues similar to Rwanda. Fear of renewed conflict drove the Rwandan government and, at least temporarily, the Kenyan media. The focus on peace speech must certainly be seen in the light of the strong criticism the Kenyan media received in the aftermath of the 2007 election. Nevertheless, it is a situation that means stagnation: “While the mantra across Kenya is ‘amani’ (peace), some campaigners are warning against a ‘peace coma’ - a failure to

134 Corruption was, for example, reduced to a ‘Kikuyu problem’ and inequality explained in terms of ‘Kikuyu dominance’ (KNCHR 2008: 24).

135 Over-enthusiastic approaches frequently appear. The concept of ‘Peace Journalism’ promoted by the peace researcher Johann Galtung (1998) is very ambitious. The former BBC-TV Journalist McGoldrick (2000: 21) says: “[...] creating peace is not a reporter’s job; the job is to tell the truth and report the facts.” Bettina Gaus (2000: 59), a former Africa correspondent, states that the role of journalists should not be redefined and overloaded with too high expectations. The perception that journalists should be automatically qualified as mediators in conflict scenarios is a significant self-overestimation (ibid.: 57).

address past injustices which would prevent Kenya from moving on" (BBC 2013i). It is the balance that is important. Conflict can be constructive if the form of settling it is a healthy dialogue.

Phone-in programmes and talk shows – Transforming risks into chances: The popularity of such programmes demonstrates the demand for debate in Kenya. There is a risk in banning such outlets that may in fact have worked for many citizens as a tool for outbursts, an alternative to physical violence:

"Suddenly, and largely accidentally, these talk shows had become an outlet for a public debate and an expression of voice which had been suppressed for decades. Many of these voices were angry, disaffected and determined on change. Such outlets were arguably much needed if tensions were to be defused through public debate rather than violence." (Abdi/Deane 2008: 4)

"To limit speech may also increase the likelihood of mass violence. Because it is to shut down the opportunity to debate, to air grievances, legitimate or not legitimate. So in other words you would want people to have a peaceful way of airing grievances and resolving disputes and if you shut that down, that may in fact increase the likelihood of mass violence itself." (USHMM 2013: 1:16:48 – 1:17:14: Susan Benesch)

In Kenya, it is highly probable that the debate will shift into the new media sector with a good chance of further radicalisation (see Chap. 5.2): "However, the challenge here is that like an amoeba, once one part is cut, another quickly grows. Dangerous speech may move from the monitored media to others like WhatsApp groups, private Facebook pages and face-to-face meetings" (Umati 2013:25)¹³⁶. Public content driven programmes could in fact be used to facilitate the discussion of grievances, albeit in a factual manner, if only a few rules are followed. The main problem during the Kenyan PEV was the reckless attitude of entertainers (rather than moderators), who were apparently not sufficiently trained to handle particularly sensitive issues: "The unfortunate thing is that we let these callers speak bile and laughed about it," said a journalist (Abdi/Deane 2008: 4). Reporting requirements obviously and naturally increase in

136 Another alternative method are leaflets, which have also become a common means of issuing threats against various target groups and often preceded violence (Mbaaro 2010:44). During the elections in 2013 hate leaflets continued to spread "fear and panic" by instructing ethnic groups to chase away their opponents (BBC 2013b). They were used during the PEV to slander political actors: Odinga was accused of "being a terrorist, devil worshipper, communist, expert in overthrowing governments" etc. (CIPEV 2008: 216).

cases of complex circumstances. Since caller's statements or their underlying intention cannot be sufficiently checked before going on-air, it is important that moderators are trained in conflict-sensitive reporting. The NCIC already conducted sensitisation sessions to journalists on their obligations regarding advocacy of hatred during live programmes (Article 19/Maina 2011: 17)¹³⁷.

Hate speech: To report or not to report?

This is where opinions differ markedly. The Kenyan Code of Conduct takes a very clear stance:

“Quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms.” (MCK 2007: 22: Section 25)

Nevertheless, the question whether media should or should not publish extremist views and inflammatory statements is fiercely disputed, as it may in fact be a form of self-censorship:

“To report or not? That's the dilemma facing Kenya's media today. [...] That there are fewer inflammatory statements in the media today is not because our politicians all got 'saved' overnight. Their penchant for verbal warfare is as potent as ever [...]. Credit largely belongs to the media for astute exercise of their professional discretion. [...] But is this the rightful role of the media? Should the media be protecting their audiences from the true character of their own leadership?” (Makali 2012)

It is not the rightful role of the media: FOE means that the media has the right of imparting such information and that the reader has the right to receive them. The Chairman of the Kenya Editors' Guild, Macharia Gaitho, elucidates “it might have been better if the media had aired more rather than fewer inflammatory statements by politicians who then would have been exposed to the public

137 The MCK's (2012) development of “Guidelines for Election Coverage” is also a step in the right direction. The guidelines are very comprehensive, make specific reference to hate speech (including a definition, case examples of the ICTR and characteristics of hate speech) and include advices for the handling of social media platforms, phone-ins and talk shows: “The presenter or editor must be alert and prepared to challenge or cut off a caller who breaches the guidelines or the law, especially on hate speech” (MCK 2012: 21).

for who they were” (CIPEV 2008: 297-8). The media needs to disseminate hate speech utterances, confirmed the ICTR, to keep the electorate informed (Mendel 2006: 23, 29, 59; Article 19 2012: 38). This also enhances the chance that more Kenyans will rise above the system of ‘identity politics’ (see Chap. 2.2.1). That, however, does not relieve the media of responsible reporting. In such instances, journalists need to clearly distance themselves from the utterances, according to the ICTR Media trial (2003: 1024) and at best should counterbalance the statement, as indicated by the European Court (1994: 28-29 cited by Mendel 2006: 59).

‘Naming and Shaming’ is a technique the leading television station Kenya Television Network has experimented with (Benesch 2012b). Questionable statements by politicians, who directly address their own ethnic groups in vernacular language, are broadcasted on national television with Swahili or English subtitles (ibid.). The ‘audience-diversification’ strategy is meant to expose inciters nationwide (ibid.). This can be a promising model for the future, because the use of tribal language indicates that speakers will hesitate to employ hate speech if they know that it is not only limited to their own constituency. Moreover, it does not infringe upon press freedom, but rather raises awareness and strengthens critical discussion instead of keeping citizens uninformed and ignorant.

Media Intervention: This approach is not initiated by the media itself but must be applied with their support. Chapter 5.4 has concluded that condemning is not sufficient for preventative efforts, since in most cases it will not convince those audiences holding contemptible views. The Dutch NGO La Benevolencija uses edu-tainment and psycho-education to combat hate speech¹³⁸. Here, the focus is on the audience, not the offender. The founder of the project, George Weiss, takes the view that journalism sometimes lacks the ability to attract its audiences, who want simple stories (USHMM 2013: 1:09:47 – 1:10:26)¹³⁹. Weiss continues criticising that outsiders often promote democratic values and thereby forget that perpetrators are not necessarily interested in such values, especially in a situation of a breakdown of structures and fear (ibid: 43:12 – 43:27, 1:35:06 – 1:35:34). In Rwanda, the project initiated the telenovela

138 La Benevolencija (2013) explains their technique as follows: “To get the message across, La Benevolencija employs an Education and Entertainment strategy that is based on general behaviour change theory, widely employed in education & entertainment (edutainment) attitude-change projects: a KAP approach. It stands for changing behaviour by first changing Knowledge, then Attitude, and as a last step implementing the insights gained in Practice.”

139 This is a problem media face all over the world: The provision of information and its complex analysis is not always ‘sexy’ enough.

'Musekeweya Radiosoap', which used a Romeo and Juliette love story as a dramatic measure to attract the audience and provided role models such as heroes that were able to overcome difficulties and solve problems without resorting to violence (ibid.: 42:13 – 42:43, 43:37 – 44:04). The program has been on the air since 2003 and, according to Weiss, became the most popular one in the country (ibid.: 42:25 – 42:30)¹⁴⁰. Already after one year, University teams in Yale, Princeton and NYU evaluated the surprising impact, which resulted in people changing some of their norms (ibid.: 44:04 – 44:20). An obvious advantage is that media intervention is a way to attack the problem without infringing upon FOE and even better, a tool that uses the power of the media (ibid.: 39:35 – 39:52, 1:10:30 – 1:10:50). The approach goes far beyond the ability of jurisprudence to prevent violence.

6.4 Monitoring Institutions

Media monitoring activities are not a task of the state (see Kenya, Chap. 4.1). But independent, traditional media monitoring by non-state actors is a very effective means in terms of early warning efforts¹⁴¹. However, "sufficient warning has scarcely been a problem in regards to genocide; it is when the warnings are ignored that creates the problem" (Kentish 2011: 19-20). But above that, the tool can have a deterrence effect, because at least Kenyan offenders seemed to refrain from hate speech on realisations that they are being watched: During the 2007 election period, incitement was mainly spread from local language stations that were not being monitored in Nairobi (Abdi/Deane 2008: 2, 4) and politicians increased their use of coded messages and heavy vernacular dialect on realisations that they were being monitored (Mbote 2012b). In 2013 before that year's elections, Kenya's Media Council intensified its efforts and monitored "80 radio stations, TV channels and newspapers round the clock" (BBC 2013c).

140 "Recently it was discovered that the soap is also highly popular among FDLR rebels in neighbouring DRC, providing an excellent opportunity to use the soap for broadcasts to sensitize this elusive, rarely reached rebel grouping, responsible for some of the worst acts of atrocities, especially atrocities involving sexual violence, on the other side of the Rwandan border, in the restive Kivu region of the DRC" states La Benevolencija (2014)

141 Rwanda clearly testifies that hate speech can serve as an 'early warning': The 1994 genocide is often called a preventable genocide, because utterances on RTLM and other media outlets made the genocide foreseeable (Mehler 2006: 258).

6.5 International Community

The international community, without doubt, has a great range of measures available to react to on-going violence¹⁴², but this study concentrates on speech-related measures, and the jamming of electronic media is one. During the Rwandan genocide, the possibility of radio jamming was rejected, which is often interpreted as a clear failure of the international community (Cotton 2007; Richter 2010: 20). Different considerations have played a role¹⁴³, but two reasons stand out: Firstly, radio jamming violates state sovereignty, and secondly, it restricts free speech (Cotton 2007; Power 2001). In view of the first, it was suggested “that after 6 April 1994 foreign governments not only had the right to intervene to jam RTLM broadcasts, they had an obligation to do so if they were able, under the Genocide Convention” (Carver 2000: 191 cited by Cotton 2007). In view of the free speech topic, radio jamming is a particularly severe restriction since it stops the dissemination of a statement entirely instead of sanctioning the offender afterwards. However, in the Rwandan case, media freedom would not have been violated since the jamming would have been directed at a state propaganda organ rather than a free media outlet. The benefit of the tool is controversial: On the one hand, a temporary silencing of *RTLM* caused by the destruction of its transmitters by the RPF had failed to inhibit the genocide (Cotton 2007). On the other hand, this is not surprising because indoctrination had already been completed (setting a tone of war; framing the crisis, see Chap. 2.2.2) and a temporary withdrawal of the offending broadcasts would not have led to an immediate change in attitude. But, it might have made a difference in the long run, also because a supposedly very important coordination tool would have been removed (see Chap. 2.2.2). On the basis of such considerations, the tool must be advocated in retrospect on the international level. A future application can only be decided on a case-by-

142 e.g. diplomatic pressure, deployment of a peacekeeping force, economic sanctions, military intervention, humanitarian intervention, etc. (Kentish 2011: 16-22). Those means vary greatly in respect of their ability to prevent violence (most will come too late) and without doubt many of them are highly questionable.

143 In respect of the mere technical component, it must be emphasised that during the Rwandan genocide, the United States were the country best equipped in this regard (Cotton 2007; Power 2001). Thus, the application of the measure depended on the willingness of one particular state. The application of the tool would have required flight clearance from neighbouring countries because a “plane would have been forced to wait in Rwandan airspace until broadcasts began, leaving the aircraft (and thus, US servicemen) highly vulnerable to attack” (Cotton 2007; Power 2001). Unfortunately it seems that cost calculations were relevant for the United States (Power 2001), which is both morally questionable and absurd: Even tough estimations suggest cost of \$8,500 per flight hour (ibid; Cotton 2007), the operation would have been relatively inexpensive in comparison to other intervention activities (Kentish 2011: 16).

case basis¹⁴⁴, whereby it must be based on sufficient information to weigh the benefit against the costs, which, however, are most likely to be missing in the chaos of mass violence. It should always be kept in mind that the complete withdrawal of information can have an additional destabilising effect, as the media ban in Kenya during the 2007 election clearly demonstrates (see Chap. 4.1).

144 In order to determine basic conditions for future use an additional study would be necessary, which would have to take into account the problems of a consent-seeking process on the international level.

7. Conclusion

Based on the analyses of Rwandan and Kenyan cases, hate speech legislation is not an appropriate tool to prevent harm emanating from hate speech. The empirically verifiable costs of the tool by far outweigh its putative benefits.

In Rwanda, opposition politicians are convicted for criticising government policies, and journalists sentenced to decades of imprisonment for covering sensitive issues, held in pre-trial detention for years to be finally acquitted, driven into exile and forced to practise self-censorship. Whole news media are suspended or completely closed for providing platforms for anti-government stances. The persecution of individual politicians and journalists has a great negative impact on society. Access to unbiased information is impeded and the 'Marketplace of Ideas' destroyed. Instead of supporting a process of reconciliation, the laws are used to suppress a necessary, healthy and constructive debate on sensitive topics of the past. As a result, citizens strive to switch to other forms of conflict resolution, which 'ironically' means that hate speech legislation itself is misused to settle personal disputes. Rwandan hate speech legislation has itself become a tool that fuels further conflict. While the Rwandan government abuses hate speech legislation to silence its critics in order to secure its power position, the Kenyan government employs hate speech provisions to justify its surveillance of Kenyan citizens. At the same time, politicians who publicly call for displacements and violence are allowed to escape punishment in the name of cohesion. Impunity, despite the availability of hate speech legislation, not only leads to frustration of those who oppose the inflammatory utterances in question, but also validates the impugned speech for those who hold the same contemptible views as the speaker, which was the evil which was sought to be avoided.

In Rwanda and Kenya, the costs of the hate speech legislation disqualify the tool. Above that, the putative benefit of the tool to prevent harm emanating from speech is uncertain in the Rwandan context, and is equal to zero in Kenya since virtually no prosecution takes place. A closer inspection of the preventative potential of hate speech legislation allows for the conclusion that preventative effects are limited because of the difficult handling of the tool regarding the in-built conflict between the right to FOE on the one side and the request to restrict it concerning incitement on the other side.

The situation in Kenya clearly shows that hate speech legislation is not able to face situations that contain a particular danger, if the tool is employed in accordance to international standards. If there follows any preventative effect from the severe restriction of speech in Rwanda, this is arguably a result of overwhelming state repression, but is neither an effect that can be attributed to the tool nor an outcome that is acceptable under the normative framework of this thesis.

The actual outcome of hate speech legislation in Rwanda and Kenya can be traced back to immature legislation at the international level. Uncertainties start with the problem to properly define the four crimes of incitement to genocide, violence, discrimination and hostility. The requiring elements of the crimes are partly unclear - with special attention on the three ICCPR incitement forms - and the proof of those requirements is challenging. The greatest trouble involves precisely the requirement that is most important for the legitimacy of restrictions to FOE: the nexus between a statement and its proscribed result. Prosecuting incitement is a matter of interpretation. The current debate on hate speech legislation is a work in progress, and the research process is at a stage where certainty is only being gained about the uncertainties that remain. In the meantime, some national governments - including those of Rwanda and Kenya - hurry to adopt hate speech laws and provisions, which in part clearly violate international standards, but more often must be rated as a reflection of international obscurities. The vague and contradictory criticism of international and regional NGOs on domestic hate speech legislation misses the core of the problem. The remaining uncertainties on the international level create potential for abuse of hate speech legislation, which eventually becomes visible during application of the tool on the national level.

While research on the Rwandan genocide provides quantitative evidence that incitement can have an impact on violence under certain circumstances and while a closer inspection on the Kenyan PEV 2007/2008 leads to suppose that widespread incitement can remain ineffective, measures that are meant to influence such complex processes must be chosen carefully. The biggest mistake that could be made is to advocate the implementation of a standardised tool to prevent very complex, partly undefined and country-dependent phenomena - namely genocide, violence, discrimination and hostility - without even evaluating whether the theoretical objectives of the tool are able to meet the actual outcome in practice. Scholars have concentrated on the proper elimination of various forms of incitement in theory, but have failed take into account the actual context in which the tool is inserted. The impact of contextual factors like the judicial independence and the role and

interest of national key actors was neglected, notwithstanding the knowledge that hate speech legislation is highly vulnerable to abuse. The international community places an obligation on all their contracting state parties to combat incitement, thereby missing that incitement is all too often speech in the service of the state. The outcomes in Rwanda and Kenya should have been foreseeable if the dynamics of past events had been reviewed in more detail. In both countries, there is overwhelming evidence that either the government itself or individual state representatives were at the forefront of employing incitement. The widespread dissemination of hate speech via media channels was only possible because the Rwandan government entirely controlled the media sector, while Kenyan politicians had acquired a substantial slice of the media industry prior to the PEV. The lack of media freedom and media pluralism was the structural component that eventually favoured the wide dissemination of incitement. The logical consequence is that any approach to limit hate speech must limit the state's control of the media sector: Curbing hate speech requires checking the power of the state, not expanding it (following Benesch 2008: 496). Currently, hate speech legislation tends to do the opposite. In Rwanda, the laws have helped the government to recreate a situation that comes dangerously close to the pre-genocidal environment, despite being aimed at preventing harm emanating from speech.

An advocacy of hate speech legislation is most incomprehensible in the light of available alternatives. A number of traditional as well as more innovative concepts are far more promising to effectively prevent harm emanating from speech without jeopardising FOE and media freedom. Responsibility is returned to the wider public while the state's possibilities to manipulate public discourse are reduced. The enforcement of those alternative approaches would prospectively be the first step towards the prevention of harm as a result of speech.

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