THE PROSECUTION OF INCITEMENT TO GENOCIDE IN SOUTH AFRICA

HJ van der Merwe*

SUMMARY

The inchoate crime of direct and public incitement to commit genocide was first recognised under the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948). The creation of the crime was a direct result of the horrific effects of acts of incitement before and during the Second World War. Today the crime is firmly established under international law and is also criminalised in many domestic legal systems.

History shows that incitement to crime and violence against a specific group is a precursor to and catalyst for acts of genocide. Consequently, the goal of prevention lies at the core of the prohibition of direct and public incitement to genocide. However, it may be said that this preventative objective has thus far been undermined by a general lack of prosecutions of the crime, especially at the domestic level. This prosecutorial void is rather conspicuous in the light of the new vision of international criminal justice under which domestic legal systems (including that of South Africa) bear the primary responsibility for the enforcement of the law of the *Rome Statute of the International Criminal Court* (*Rome Statute*), which in Article 25(3)(e) includes the crime of direct and public incitement to commit genocide.

This article provides a brief historical and teleological overview of the crime of direct and public incitement to commit genocide under international law, as well as the definitional elements thereof as interpreted and applied by the International Criminal Tribunal for Rwanda (ICTR). Thereafter it examines the criminalisation of incitement to genocide in contemporary South African law in order to assess South Africa's

* Hermanus J van der Merwe. BAcc, LLB, LLM, LLD (Stellenbosch University). Lecturer, Faculty of Law, University of the Western Cape (UWC). Email: hvandermerwe@uwc.ac.za. The author is grateful to Prof Israel "Solly" Leeman for his comments and editorial assistance.

capacity to prosecute incitement to genocide at the domestic level. In this regard there are, in theory, various 'legal avenues' for the prosecution of incitement to commit genocide in South Africa, namely: as a crime under the *Riotous Assemblies Act* 17 of 1956; as a crime under the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 (the ICC Act); or as a crime under customary international law pursuant to section 232 of the *Constitution of the Republic of South Africa*, 1996. The article reflects critically on the viability of prosecuting incitement to genocide in terms of each of these alternatives.

The article highlights a number of practical and legal problems as regards the prosecution of incitement to commit genocide under the *Riotous Assemblies Act* as well as under customary international law. It is argued that the prosecution of incitement to genocide in terms of the ICC Act is preferable, as this would respond directly to an international consensus as regards the unique and egregious nature of genocide by providing for a limited form of extraterritorial criminal jurisdiction. Prosecution under the ICC Act would also reflect the objectives of the *Rome Statute* pursuant to which South Africa has certain international legal obligations.

However, it is submitted that legislative amendment of the ICC Act is needed, since the crime is not explicitly provided for thereby at present. It is submitted that the legislative amendment must provide for the distinct crime of direct and public incitement to genocide in terms of South African criminal law. Such an amendment will remove the existing legal obstacles to the domestic prosecution of incitement to genocide and enable effective prosecution thereof at the domestic level. The proposed amendment will have the effect of strengthening the alignment between South African law and the objectives of the *Rome Statute* and may have preventative benefits in the long run.

KEYWORDS: Incitement; Genocide; South Africa; *Genocide Convention*; ICTR; *Rome Statute*; Domestic implementation; Prosecution; Prevention.