

Social Media and Accountability in the Cases Concerning Core Crimes

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Abstract: In these last years a dramatical increase in the use of cyber space has led to an important change also in criminal activities, emphasizing the weaknesses of actual legal frameworks in facing modern crime issues. Crime in the digital era can be more advanced due to technological instruments, moreover the modern world assists to the exponential growth of new types of crimes such as the evolving cybercriminality. With a particular regard to the Rome Statute and the International Criminal Court work, the issue which is discussed in this paper is whether the present legal structure is sufficiently efficient to deal with the problems pertaining to cyberspace, or whether new and updated laws and jurisprudence are needed. This research is supplemented by a case study examining the potential legal aspects of a situation where the ICC may have to deal with a case of multilayered crime. In the end, the public element of incitement is examined with reference to genocide, analyzing the effects of practical application of place factor and medium factors in the social media era.

Keywords: Cybercrime, Rome Statute, International criminal justice, Accountability, Social Media.

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1. Introduction

In these last years a dramatical increase in the use of cyber space has led to an important change also in criminal activities, emphasizing the weaknesses of actual legal frameworks in facing modern crime issues. Crime in the digital era can be more advanced due to technological instruments, moreover the modern world assists to the exponential growth of new types of crimes such as the evolving cybercriminality.

In its first part, this paper will try to explore the current status of cyber jurisprudence: this section will trace the development and conceptual evolution of the concept of jurisprudence. A further segment will analyze the need and prospects of a new cyber jurisprudence, which renders itself necessary because the legal principles formulated in centuries of jurisprudence might not be up to the challenges of crimes committed using the virtual world as a tool. This paper will demonstrate that the legal framework should adapt and modify the principles of law in accordance with time.

The second part of this research will question whether the provisions of Rome Statute are ready to tackle the disputes which may arise with regards to crimes committed through social media platforms. The jurisdictional challenge posed by the conducts which take place in cyberspace will be examined with particular regard to the difficulties in identifying the competent proceeding jurisdiction; this section will discuss the applicability of article 12 and 17 of the Rome Statute of the International Criminal Court. A further provision which will be analyzed is article 25 (3) (e), whose effectiveness in a situation where a multilayered crime is instigated on social media will be questioned. This is supplemented by a case study examining the potential legal aspects of a situation where the ICC may will have to deal with any such case in the near future.

In the end the research examines the public element of incitement to genocide: this segment will analyze the effects of practical application of *place factor* and *medium factors* in the social media era.

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2. Understanding Cyber Jurisprudence

With the increase in the variety of methodologies in committing crimes, the demand for a new jurisprudence for the cyber world has emerged. This section will try to analyze whether the accomplishment in tackling this demand of jurisprudential evolution may offer potential solutions to the regulatory gap in the legal framework. The evidence of cybercrimes strongly demands a need for cyber jurisprudence¹ and it is necessary to establish a definition of cyber jurisprudence.

2.1. Deriving the Definition of Cyber Jurisprudence

No discussion of Cyber Jurisprudence could begin helpfully without defining a baseline of terms; unfortunately, Cyber Jurisprudence does not have a universal definition. It is essential to analyze and separate the term around which the present research revolves. Black's Law Dictionary defines jurisprudence as a philosophy of law or a science, which treats principles of legal reaction and positive law². So, jurisprudence can be defined as the fundamental science which is capable to govern the legal structure.

Professor Gray stresses upon the nature of jurisprudence as being the systematic harmonization of the rules and procedure followed by the justice delivering institutions³. The above-mentioned principle also finds its evolution from the theory of jurisprudence propounded by Sir Thomas Holland⁴, which states that jurisprudence is a *formal* science which rather focuses on the basic principles than the concrete details. In the context of cyber jurisprudence, the definition by Holland is crucial. He compares the science of law (jurisprudence) with

1. See Peter Stephenson, *Digital Forensic Science: An Oxymoron?*, 6 LIJ 95, 108 (2018).

2. See Bryan A. Garner, Henry Campbell Black, *Black's Law Dictionary* (Thomson/West 8th ed. 2004).

3. See John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 Harv L Rev, 27 (1892-1893). See also N. V. Paranjape, Nomita Aggarwal, P.S.A. Pillai, V. D. Mahajan, *Jurisprudence is the systematic arrangement of the general principle of law*, LJ, available at <https://www.lawyersjurists.com/article/jurisprudence-study-systematic-arrangement-general-principle-law/> (last visited November 29, 2020).

4. See Thomas Erskine Holland, *Elements of Jurisprudence* (Oxford At the Clarendon Press 1924).

the Grammar and argues that the concept of laws of different states is very similar to comparing the growth of different languages by comparing the similarities and differences between them. Through comparative law, indeed, the similarities and differences are measured. The similarities arising out of these laws is what we call the abstract science of jurisprudence. However, this should not lead one into the belief the jurisprudence is essentially preceded by the study of comparative law only. Jurisprudence is a progressive science.

Now, there are two opinions discussing relevance of cyber jurisprudence. For the first, jurisprudence is static and so the existing substantive laws can be either applied as they are or with some modifications, but no separate legislation is required. This view might be disregarded by several States that are introducing separate legislation for dealing with the cyberspace world. The second doctrine suggests that cyberspace is a *novel legal space* and hence the traditional principle of jurisprudence cannot be upright for governance of these rules⁵. Furthermore, the introduction of a separate legislation does not ensure that a separate jurisprudence is necessary, given that, following the basic principles such as the concept of rights and duties, the basic jurisprudence is most likely to remain unchanged⁶. If the States opt to create a separate jurisprudence for cybercrime or cyber-enabled crime⁷, then the creation of a separate jurisprudence might be an unnecessary effort. This could lead to a bad application of the law, since the development of good jurisprudence takes years to get polished⁸.

5. See Svetlana L. Paramonova, *Boundlessness of Cyberspace Vs. Limited Application of The National Criminal Law (On Example Of Russian, Us-America And German Legal Systems)*. International Cybercrime Court, MIP for Foreign and International Criminal Law, Freiburg, Germany, available at http://old.gruni.edu.ge/uploads/content_file_1_1851.pdf (last visited November 29, 2020). See also Grigol Robakidze University, *2 Academic Digest Law 38, 40-43* (2013), available at http://dSPACE.nplg.gov.ge/bitstream/1234/149825/3/Akademiuri_Macne_2013_N2.pdf (last visited November 29, 2020).

6. See *id.*

7. Author suggests including cyber-enabled crimes in the category of cybercrimes due to the involvement of computer networks in combination with usage of the internet, dealing cyber-enabled crimes in the umbrella of cybercrime may provide a technologically and legally deeper view.

8. See Neil Duxbury, *Patterns of American Jurisprudence* at 61 (Clarendon Press 1st ed. 1997).

Here, it will be relevant to visit Holland's view of jurisprudence⁹. Accordingly, cyber jurisprudence should be allowed to strengthen and evolve itself while getting authority from basic principles of international law and principles of natural justice. Basically, cyber jurisprudence legislation can be framed as a delegated legislation which will derive its authority from fundamental documents and principles of international law.

3. *Framework of International Criminal Justice System and its Efficiency in the Context of Technological Development*

The jurisprudence of international criminal tribunals might evolve and progress by taking into consideration the actual situation and new social challenges. These laws and their application could prove to be so obsolete and unfit for the present situation that makes it almost impossible to find an interpretation suitable for a different context from the original one. As times change, the assumptions on which the laws were based may not stand true now¹⁰. This is particularly true with regards the legal environment surrounding technology, which will inevitably need to be considered an area in tumultuous development. In the present scenario, technological advancements raise the level of complexity while exacerbating past problems with traditional legal issues.

Since the foundation of the International Criminal Court (ICC) in 1998, a steep upward curve is marked in the technical advancements. For instance, use of computers has risen from 42% in 1998 to 89% in 2016, use of the internet raised from 25% in 1998 to 88% in 2016. Use of Social media has dramatically increased from just 5% in 2005 to

9. See Sir Thomas Erskine Holland, *Elements of Jurisprudence*, 2 The Journal of Social Forces, 790 (1924)

10. See Lindsay Freeman, *Law in Conflict: The Technological Transformation of War and Its Consequences for the International Criminal Court*, 51 NYU J Intl L & Polit, 808-845 (2018), see also Stein Schjolberg, *Recommendations for potential new global legal mechanisms against global cyberattacks and other global cybercrimes*, EastWest Institute (EWI) Cybercrime Legal Working Group (2012).

79% in 2019¹¹. The data clearly reflects a rapid increase in use of cyberspace and technology, leading to deeper implications in a number of contexts. This leads to the fact that the assumption that social media and the internet would not play a substantial role, made in 1998, is no longer valid in 2020.

Taking into consideration these data and the impact of Information and Communications Technology in a wide range of fields, an area particularly influenced is the one involving contrast and aggression between nations. Here a possible implication could be a shift from the traditional military aggression to a more sophisticated and underhand informatic attack. In such case a partial transfer of the focus of prescriptions punishing international criminal responsibility from military commanders to e.g. computer programmers, engineers, security hacker etc. in the relevant matters¹² would seem inevitable; a refocusing of the punishment paradigm would also be beneficial. Given the above-mentioned statistics and development trends, the responsibility should be attached in proportion with the power and control which an individual has over facts established in court. Furthermore, the advancement of technology is of such potential that it can be instrumental in documenting and reconstructing the harming acts. The propaganda and intent in cases of incitement through social media might for example be rightly established through the documented encouragement and other relevant materials, but the courts tend to acquit defendants found responsible of mere political propaganda because the use of such compromising elements is insufficient to prove the intent to encourage the commission of the criminal acts¹³.

11. See Diego Comin, Bart Hobijin, *Cross-country technology adoption: making the theories face the facts*, 51 *Journal of Monetary Economics* 39-83 (2004)

12. See Peter Warren Singer, Allan Friedman, *Cybersecurity and Cyberwar: What Everyone Needs to Know* (Oxford University Press 1st. ed. 2014). An example can be seen in the evolution of the Revolutionary Armed Forces of Colombia (FARC), whose fifty-four-year war against the Colombian government ended with a fragile 2016 peace. As FARC transitions to domestic politics, its struggle has shifted from the physical to the digital front. At its camps, former guerrilla fighters now trade in their rifles for smartphones. These are the "weapons" of a new kind of war, a retired FARC explosives instructor explained. "Just like we used to provide all our fighters with fatigues and boots, we're seeing the need to start providing them with data plans".

13. See *Pierre v. Attorney General of US*, 528 F.3d 180, 192 (3rd Cir., Jun 09, 2008). In this case the Court held that specific intent requires the purpose of accomplishing

With regards to the caution court rulings show in matters of communication technology and its use as a tool for criminal activities, noteworthy is the *Bemba et al.* case¹⁴. Here the Appeals Chamber of the International Criminal Court (ICC) decided, in a majority decision, to acquit Mr. Jean-Pierre Bemba Gombo of charges of war crimes and crimes against humanity in the Central African Republic. The court held that the commander lacked responsibility, basing the judgement on the fact that Mr. Bemba was not physically present and indeed was at a far distance, which made him unable to instruct the subordinates to commit the crimes he was accused of. However, the Court failed to note that communication was possible through a Thuraya Satellite Phone, which made instructing the subordinates possible. The Court also failed to note that, at present, technology has enabled military commanders to control subordinates' actions in an array of different ways even if miles away from the place where conduct in question took place.

It is necessary to examine if and how traditional jurisprudential guidelines keep the pace with current day challenges. A strict application of outdated jurisprudence to cases where advanced technologies are used as means of criminal action might also bring to an excessive expansion in applying the underlying "no witness–no case" principle in criminal investigation¹⁵.

3.1. *The International Criminal Laws and the Jurisdictional Challenge*

Due to the absence of any specific convention or provisions which deals with cyberspace, the Rome Statute acts as an important source for justice in cases of cybercrime, even if it does not contain provisions regarding intentional cybercrime. The Preamble of Rome Statute sets the foundation for a broad approach to the scope and objective of the Court. It states that most serious crimes to international concern must

a specific result which is prohibited by the law i.e. establishing the presence of general intent will not suffice the requirement.

14. See ICC-01/05-01/13, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (2018).

15. See Dermot Groome, *No witness, no case: an assessment of the conduct and quality of ICC investigations*, 3 Penn St JL & Int'l Aff. 1, (2014).

not go unpunished. This section will focus on the problems with narrower jurisdiction of ICC. Furthermore, as the Rome Statute has one hundred and twenty State parties on which the Court has jurisdiction, a section will also examine if all the states with conduct in question can claim jurisdiction of the ICC¹⁶.

With the increasing role of the internet as an instrument of foreign aggression, non-state actors are acquiring a substantial role to play. Using these subjects as scapegoats, States who directly promoted the international action can avoid direct responsibility in the international community. Moreover, the jurisdiction over such individuals will be often difficult to exercise due to the fact that at certain times it is difficult even for the service provider to track the location of data. The nature of the crimes may pose multijurisdictional complexity in particular cases, for example when criminal actions have been committed within the boundaries of one State, but the effects of such activities have an impact on other States. Under these circumstances, a State has the option to invoke the effects doctrine, which could be described as a recent variant of territorial jurisdiction. This principle provides that if a conduct started in a State, but its effects were deployed in a different one, then the second State has jurisdiction over the case¹⁷. Many States have recognized the principle of effects doctrine in national law¹⁸. The High Court in Zimbabwe for example stated that the traditional territorial law is being decreasingly appropriate for the principles of justice due to increased internationalization and globalization of contemporary society¹⁹. The effects doctrine could be a good response to jurisdictional complexity, nevertheless it is still criticized by a number of Rome Statute signatory States because of the restriction to State sovereignty it poses²⁰. These considerations lead to deem

16. See Stéphane Bourgon, *Jurisdiction Ratione Loci*, s.3 §14 in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. I*, (Oxford University Press 2002).

17. See Michail Vagias, *The territorial jurisdiction of the International Criminal Court*, §6 162–208 (Cambridge University Press 2014).

18. For example, the United States adopted it from the case *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945). India has adopted this in S. 3 of Indian Penal Code, 1860.

19. See HMA 26-17 HC/CA 9/17, *S v. Mharapara*, ZWMSVHC 26 (2017).

20. See Nico Krisch, *The decay of consent: international law in an age of global public goods*, 108 no. 1 Am J Intl L 1, 40 (2018). NZSC 38 SC 32/2009, *Andrew Robert Poynter v. Commerce Commission* (2010).

the effects doctrine not well established in international law and uncertain in nature²¹. Given the troubles in determining a jurisdiction rule between states, article 12 of the Rome Statute is central, being the settled provision of law regarding jurisdiction.

3.2. *Jurisdiction and Article 12 of the Rome Statute*

A cornerstone of Rome Statute is article 12, which contains the precondition regarding position of jurisdiction. The theme of jurisdiction revolves around article 12 and may be seen as a compromise between state sovereignty and the concept of international justice. The structure of article 12 is designed to govern the territorial jurisdiction²²: a different interpretative focus may lead to misreading the scope and meaning of the article, consequently damaging the quality and principles of international criminal law it sets. The power of judicial interpretation is also curtailed by drafting the *elements of crime*²³. While article 12 provides clarity in law, it also narrows the applicability of the provisions of the Rome Statute. The Court can exercise its jurisdiction under its *ratione materiae* competence, and by applying this competence it could prevent judicial over interpretation in standard matters²⁴. There still is an undiscovered area of ICC and that is when jurisdiction on conduct occurring in cyberspace might be found. At this point could be asked how the Court can exercise its jurisdiction without overstepping the judicial boundaries.

There is no clear guidance regarding the jurisdiction of the Court in cases where crimes have been committed through cyberspace and the Court itself has never dealt with the subject directly. The prosecutor recently acknowledged the need to match up with the expansive advancement of technology²⁵. Apart from this when authors and law-

21. See ICTFY-04/81/A, *Prosecutor v. Momčilo Perišić* (2013).

22. See Mark Klamberg (ed.), *Commentary on the law of the International Criminal Court at 170-171* (Torkel Opsahl Academic EPublisher Vol. 29 2017)

23. See Jost Delbrück, Rüdiger Wolfrum, *Völkerrecht, begründet von Georg Dahm* at 1145 (De Gruyter 2nd ed. 2002).

24. See Gerhard W. Wittkämper, Britta Obszerninks, *Völkerrecht/Internationales Recht* in Wichard Woyke (ed.), *Handwörterbuch Internationale Politi* at 473 (Bundeszentral fuer politische Bildung 7th ed. 2016).

25. See Michail Vagias, *The Territorial Jurisdiction of the ICC for Core Crimes Committed through the Internet*, 21 J Conflict & Sec L 523, 524 (2016).

yers have commented upon the restrictive nature of article 12, due to ignorance while dealing with crimes committed through cyberspace, no clear position has been presented.

Since the position remains unclear, article 21 becomes relevant: in the exercise of jurisdiction «the Court shall apply in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence». The jurisdictional issue at hand should be resolved through application of interpretative principles stated at article 31 and article 32 of the Vienna Convention on the Law of Treaties. In the condition of lacuna in the ordinary sources of the International Criminal Court as mentioned in paragraph 1 (b), «applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict» should be applied. But firstly, neither the elements of crime nor the rules and procedure entail clarification for the jurisdictional challenge emerged due to cyberspace. Secondly, the Convention on Cybercrime (i.e. the Budapest Convention) remains the only legislation dealing with crimes relating to cyberspace and no other international treaty on the subject exists. The only relevant document was presented at the United Nation: a resolution titled *Countering the use of information and communications technologies for criminal purposes* passed by the Third Committee of the General Assembly in 2019²⁶. Considering the lack of other sources, the only viable tools to fill the lacuna on jurisdiction of the ICC on cybercrimes, are customary international law and the general principles of international law but given the novelty of the discussed field, an entirely new legal studies sector would be necessary to fill the void

3.3. *Application Problems of the Article 17 of the Rome Statute*

The article 17 of the Rome Statute discusses the issues of admissibility, so it is a crucial provision to allow the investigation about the accountability of individuals who become part of a crime through social media, but it must be taken into consideration that several nations do not have appropriate laws for dealing with such factual scenarios. This may lead to cases of unfair acquittal of responsible individuals,

26. See United Nations, *Countering the use of information and communications technologies for criminal purposes*, General Assembly A/RES/73/187 (2019).

even after a genuine effort by the States to prosecute in an unbiased manner.

According to the first clause, in particular to sub clauses (a), (b) and (c) of article 17, if a State which has the jurisdiction over the case is investigating or prosecuting, or it investigated and decided not to prosecute, or it had tried the accused, then the case shall not be admissible in the Court. In fact, the incorporated principle in article 17 is the *Complementarity Principle*²⁷.

The only acknowledged exception is the case in which the State with jurisdiction is unwilling or unable to investigate or prosecute. But the relevance of this disposition is decreased. This is due to the fact that States have not incorporated substantive criminal laws in order to deal with the issue of core crimes committed through cyberspace. Therefore, this situation could give to potential offenders an undue advantage in evading proceedings. Moreover, even if the State prosecutes the accused, there is an high probability of getting an acquittal because of non-availability of relevant laws, and, once there is an acquittal, the criminal justice system does not allow to prosecute again for the same offence on the basis of the *ne bis in idem* principle.

It must be also noted that institutions such as European Union and other States Parties were quick to comply with adjustments. Nevertheless, it was mostly because of non-comprehensive legislation due to unwillingness of a collective step forward by the international community. This resulted in laws which do not take into account the current technological advancements. Consequently, the laws may not be clear in the modern factual scenarios, which could lead to the acquittal of the cybercriminals. The same is valid for the present provisions, that are not designed for cases dealing with cyberspace. In fact, various stretched interpretations may lead to ambiguity, which could result more convenient for persons investigated for cyber-crimes in application of article 22(2) of the Statute, stating the *nullum crimen sine lege* principle.

27. ICTR-98/44D/A, *Callixte Nzabonimana v. The Prosecutor*, Judgement (2014). See also Max Plank, *The complementarity regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the fight against impunity*, 7 Max Planck Yearbook of United Nations Law 591-632 (2003).

3.4. *The Regulatory Gap in Article 25*

The article 25 of the Rome Statute determines the individual criminal responsibility, so it seems legit to wonder if this provision could serve the purpose of establishing responsibility of individuals engaged in criminal acts through social media or, broadly, through cyberspace.

The Court interpretation about this disposition has led to the introduction of the concept of *indirect perpetration*, through which the difference between principal liability and accessorial liability has been set. Applying this concept to a case of crime co-perpetration, the Court went beyond the literal meaning of *control over the crime*, extending it to *control over the organization*²⁸, this in order to establish the liability on multi-level crime with an organized apparatus and structure. However, the statement of article 25 (1) by which «the Court shall have jurisdiction over natural persons pursuant to this Statute» does not explicitly cover also the liability of corporate bodies which might be involved in commission of crimes.

The debate for the inclusion of *juristic persons* within the Statute was taken up by the French delegation, but it has seen the objection of some Romano-Germanic States, claiming that many of the signatory States did not contain any provision relating to legal entities; for this reason it wouldn't have been appropriate to include such element in the provision. So, the French demand could not have been embodied due to non-consensus²⁹, and this not only reduced the jurisdictional scope of the Court, but also left a regulatory gap about corporate bodies liability. And this gap reverberates on the application of the whole Statute.

Nevertheless, in article 25 (3) (c) the responsibility for the *purpose* of: i) *aiding*, ii) *abetting*, or iii) *otherwise assisting* the facilitation of a crime seems to fall within the jurisdiction of the Court, but the meaning of these mentioned conducts still has to be defined. Since the Court has not yet specifically ruled about the elements of *aiding*

28. ICC-01/04-01/07, *Germain Katanga v. The Prosecutor*, *Judgement* at para 500 (2018).

29. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the establishment of an International Criminal Court*, A/CONF.183/2/Add.1 (1998).

and *abetting*, the interpretation of this Article is basically led by other tribunals' ruling.

Firstly, we can notice that the word *purpose* inside the disposition has the function of emphasizing the role of a strengthened *mens rea*³⁰. This goes along with the *obiter dictum* set out in *Lubanga case*³¹, which states that if the liability establishment of a perpetrator requires substantial effect, then the acts of co-perpetrator must amount to something more than a substantial effect.

Secondly, it is fundamental to specify the meaning of *actus reus*, in order to understand its role in cases of *aiding* and *abetting*. One of the essential requirements of *actus reus* is that a conduct should have had a substantial effect on the facilitation of a crime. Moreover, the *Tadic appeal judgement*³² added also the element of *specific direction*, which requires that the act must be specifically directed to assist, encourage, or lend moral support in perpetrating a crime. This element has been later upheld also in the *Perisic Case*³³.

Then, since the terms *otherwise assist* work as an umbrella to encompass any other form of assistance to crime³⁴, other than the already mentioned forms, the case of providing any kind of platform through which crime could be somehow facilitated³⁵ might fall within this disposition. Nevertheless, since the ambiguity of the terms and the various rulings about them, it is a difficult challenge to effectively prove conducts of aiding or abetting. And this challenge becomes even harder when it comes about setting the liability in cases where such conducts took place in a complex context like cyberspace.

Finally, the plain reading of article 25 (3) (d) suggests that the key focus must be on the knowledge, the intention and the sharing of a common intent. If critically analyzed, this provision does not seem

30. ICC-01/04-01/10-465-Red, *The Prosecutor v. Callixte Mbarushimana*, Judgment (2011).

31. ICC-01/04-01/06-2842, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment (2012).

32. See ICTFY-94/1/AR72, *The Prosecutor v. Duško Tadic*, International Criminal Tribunal for the Former Yugoslavia (1996).

33. See ICTFY-04/81/A (cited in note 21).

34. See M. Klamberg, *Commentary on the Law of the International Criminal Court* (cited at note 22).

35. The author intends to point out the liability of administrators and supervisors on groups created on social media.

to be suitable for matters involving cyberspace, because individuals using social media may easily have different intentions from the actual crime perpetrator. However, the element of knowledge could be sufficient to establish responsibility for a kind of indulgence in core criminal activities. So, setting up this kind of liability on the basis of knowledge, giving less emphasis to common intention, might be helpful for the prevention of core crimes.

4. *Introduction to Genocide and to Genocide Incitement*

The term *Genocide* was first coined by Raphael Lemkin, after World War II, as the "massive destruction of a nation or an ethnic group"³⁶. The legislative definition of the term is currently given by article 6 of the Rome Statute, which states as it follows:

For the purpose of this Statute, "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: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group.

It is not necessary for this destruction to take place in a single moment, since it can also be committed in different stages, with the same purpose of annihilating the oppressed people³⁷.

After the Nuremberg trial, when the term was used for the first time in a Court, every international criminal court statute contains nowadays provisions to prevent genocide.

36. Raphael Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government. Proposals for Redress* at 79 (Carnegie Endowment for International Peace 1944).

37. See *ibid.* at 80.

It is necessary to cite art. 25 (3) (e) of the Statute, which condemns as criminally responsible and liable for punishment a person that "in respect of the crime of genocide, directly and publicly incites others to commit genocide". By the joint reading of these articles, it appears how the two crimes are intimately connected to each other despite it is not necessary for the crime of incitement to be committed that the genocide occurs. In fact, some scholars assume that it is unlikely to expect a civilian population to turn violent and to keep such behaviours on its own. Instead, it is often the result of a process of manipulation that exploits hatred and superiority complexes³⁸.

In the 21st century this manipulation process is facilitated by social media, which provide a wide reach for the multitude of costumers using them. Unfortunately, this also helps the targeting of oppressed groups, whose information can be easily tracked down even by the exposition of a single member account.

4.1 *Incitement to Genocide*

Incitement to commit genocide is arguably an inchoate crime, that in common law systems can be defined as "crimes [] that do not require the completion of a harmful act in order for criminal liability to be assigned"³⁹.

In other words, it means that whilst for the crime of genocide to be committed it is necessary that one of the material conducts described in article 6 of the Rome Statute are realized, for the purpose of art. 25(3), (e) genocide does not have to occur for a defendant to be convicted for incitement but must be met the specific requirement of the incitement conduct. Brendan Saslow wrote that "[t]o make a conviction, a criminal chamber must find the accused intended to perpetrate direct and public incitement to commit genocide, and perpetrated action that constitutes direct and public incitement to commit genocide"⁴⁰. The court in the Akayesu reminded that "[i]ncitement

38. See David A. Hamburg, *Preventing Genocide: Practical Steps Towards Early Detection and Effective Action* (Boudler Paradigm Publishers 2008).

39. Larry May, *Genocide: A Normative Account* at 189 (Cambridge University Press 2010).

40. Brendan Saslow, *Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide*, 48 J Int'l L 417, 420-421 (2016).

is defined in Common law systems as encouraging or persuading another to commit an offence⁴¹. But as mentioned above, the crime of genocide is so serious that the "incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator"⁴².

Art. 25(3) (e) also requires the incitement to be direct and public. These being the core features of the crime, they will be analysed in the next paragraphs.

4.1.1. *Direct Incitement*

Unlike generic instigation, which may be "expressed or implied"⁴³, it seems that incitement can only be appreciated as an active and direct behaviour. This can be argued by analysing some of the most important cases decided by international criminal courts, such as the Nuremberg trials and the Akayesu case.

In the former, the judges found Hans Fritzsche, Reich Ministry of Public Enlightenment and Propaganda, not guilty of incitement to genocide because "his speeches did not urge persecution or extermination of Jews"⁴⁴, although they were extremely racists. In the latter, the Trial Chamber explicitly addressed that "the direct element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement"⁴⁵.

The Akayesu case is also relevant because it underlines the distinction between a mere instigation and incitement. As the court clearly states "the form of participation through instigation stipulated in Article 6 (1) of the Statute, involves prompting another to commit an offence; but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator"⁴⁶.

41. ICTR-96/4/T, Trial Chamber, *Prosecutor v. Jean Paul Akayesu* at para 555.

42. *Id.* at para 562.

43. ICTY-IT/95/14/T, Trial Chamber, *Prosecutor v. Thimohir Blaškić* at para 270.

44. International Military Tribunal, *United States and Others v. Göring and Others*, in *Trial of Major War Criminals* at 584.

45. ICTR-96/4/T *Prosecutor v. Jean Paul Akayesu* at para 557 (cited in note 45).

46. *Id.* at para 482.

As interpreted by the Courts then, it seems that the incitement is direct when it explicitly encourages other people to commit the crime of genocide, not being sufficient an indirect incentive. It needs to be stressed though, that it is not necessary for the crime of incitement to be committed that the genocide occurs.

However, in present days, it would be relevant to consider this requirement in the light of modern technologies, thus potentially considering also indirect elements in the interpretation of incitement. As a matter of facts, the ways to communicate indirect messages through social media are increasing, and given that the directness of the incitement cannot be lacked for the perpetration of the crime, the new challenge for present day jurisprudence is to define to what extent a behaviour on social media must be active for the commission of incitement. The impact of social media in today society cannot be concealed, and these new aspects must be taken into consideration for a proper fight against genocide.

4.1.2. *Public Incitement*

Beyond the element of direct incitement, the crime under article 25 (3) (e) could be committed only if the requirement of public incitement is satisfied, too⁴⁷. The definition of this element has not been yet definitely clarified despite it has been matter of concern in important

47. See William Schabas, *Genocide In International Law: The Crime Of Crimes* at 396 (Cambridge University Press 2nd ed. 2009); ICTR 05/88/A, *Prosecutor v. Callixte Kalimanzira*.

judgments as *Akayesu*⁴⁸, *Niyitegeka*⁴⁹, *Muvunyi*⁵⁰, *Nahimana*⁵¹ cases. On the bases of these decisions, in 1996 the International Law Commission in its Yearbook wrote that:

[t]he indispensable element of public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a public place or by technological means of mass communication, such as by radio or television⁵².

So, it seems that incitement is supposed to be public when it is made in person to a number of individuals in a public place or through mass media⁵³ without any other specific requirement in terms of qual-

48. See Amann D. Marie, *Prosecutor v. Akayesu Case ICTR-96-4-T*, 93 (1) Am J Intl L 195 (1999) (the first case under an international tribunal to ever convict someone of genocide as defined under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and moreover, the first case to hold that rape and sexual assault may constitute acts of genocide, concerned Jean-Paul Akayesu, the former Bourgmestre (mayor) of Taba Commune, who stood trial for allowing, promoting, and ordering the killing and rape of individuals seeking refuge at Taba Commune offices. The prosecution charged Akayesu with direct and superior responsibility for genocide; incitement to genocide; crimes against humanity for acts of extermination, murder, torture, rape, and other inhumane acts; and war crimes for acts of violence to life and outrages upon dignity. In 1998, an ICTR Trial Chamber found Akayesu guilty of genocide; incitement to commit genocide; and crimes against humanity for acts of extermination, murder, torture, rape, and other inhumane acts; but the Trial Chamber found Akayesu not guilty of complicity in genocide and war crimes. The Trial Court sentenced Akayesu to life imprisonment. In 2001, the ICTR Appeals Chamber rejected Akayesu's appeal).

49. See-ICTR 96/14/T, Trial Chamber, *Prosecutor v. Eliézer Niyitegeka* at para 431.

50. See-ICTR 2000/55A/T, Trial Chamber, *Prosecutor v. Tharcisse Muvunyi, Judgment* at para 501.

51. See-ICTR 99/52/A, Appeals Chamber, *Prosecutor v. Ferdinand Nahimana, et al., Judgment*.

52. International Law Commission, Yearbook of The International Law Commission at 22 (United Nations Publication 1996). available at https://legal.un.org/ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf (last visited 29 November, 2020).

53. See-ICTR 96/4/T, *Prosecutor v. Jean-Paul Akayesu* at para 556 and n 126. See Brendan Saslow, *Public Enemy: The Public Element of Direct and Public Incitement to*

ity and quantity of the audience. In *Muvunyi* case the first Chamber of International Criminal Tribunal for Rwanda affirmed that:

[t]here is no requirement that the incitement message be addressed to a certain number of people or that it should be carried through a specific medium such as radio, television, or a loudspeaker. However, both the number and the medium may provide evidence in support of a finding that the incitement was public⁵⁴.

Accordingly to these statements, it is already clear that the criteria to determine the publicity of the incitement are highly uncertain and questionable. This flexible approach allows the courts to appreciate the peculiarities of the case but on the other hand does not ensure consistency and predictability which are fundamental principles in criminal matters. Moreover, considering that the crimes under art. 25 (3) (e) is a inchoate crime, it does not matter if the incitement conducts to the perpetration of the crime of genocide. So, despite in same situations it was considered as a presumptive element⁵⁵, should not be considered decisive⁵⁶ (or strictly, should not be considered at all) if the conduct of incitement reached its aim or not⁵⁷. So, it would be an error to assume the element of publicity on the basis of the concrete commission of the crime, because the effectiveness of the conduct is not a required criterion.

In order to better evaluate the elements of publicity, in the Akayesu case was considered if the audience was selective or not. On these basis Akayesu was judged liable because of the place and the number of persons reached through his messages and the media used⁵⁸. On

Commit Genocide, 48 J Int'l L 417 (2016).

54. See-ICTR 2000/55A/T, *Prosecutor v. Tharcisse Muvunyi* at para 862 (cited in note 51).

55. See-ICTR 99/52/A, Trial Chamber, *Prosecutor v. Ferdinand Nahimana, et al.*, at para 1029.

56. See-ICTR 99/52/A, Appeals Chamber, *Prosecutor v. Ferdinand Nahimana, et al.*, at para 709.

57. See Saslow, *Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide* (cited in note 54).

58. See MICT 12/29/A, Appeals Chamber, *Prosecutor v. Jean-Paul Akayesu* at para 52. See ICTR 96/4/T, *Prosecutor v. Jean-Paul Akayesu* at para 556 and n 126

the other hand, on the basis of the same elements *Nahimana*, in the so called "Media Case", was considered not accountable for incitement in places where just selective group of people were present⁵⁹ but being judged liable for other conducts.

All these applicative uncertainties could be particularly problematic regarding the application to a future "online social media case". Platforms like Facebook have private groups or chats features that can accommodate up to 250 members at once⁶⁰, while Telegram has bumped up the member limit to 200,000. It would be interesting to suppose if these platforms were considered public place *in re ipsa* on the basis of the intrinsic aim of the social network to share contents and ideas and if the *selectivity* of online groups were considered relevant.

4.2. Genocide Incitement and Social Media Challenges

As clarified in the previous paragraphs the crime under art. 25 (3) (e) must meet the requirements of active, direct and public incitement. The international courts have already faced the issue of considering the commission of this crime through media (as television and radio) recognizing the amplifying force and effectiveness of these instruments. Today courts do not have already behind them cases with involvement of social media as the most common online platforms; but it is easy to think that in the next future these cases will be considered by the courts and that they will arise several questions and doubts in terms of application of the existing legal framework.

First, supposed that a passive behavior is not sufficient, it would be necessary to think if the evaluation of the incitement directness were stressed in cases involving new social media. Some questions would arise as if the mere but voluntary presence of a person in a social group inciting to genocide is sufficient to meet criminal accountability and if passive adherence is considerable enough. Moreover, shall be thought how to determine the threshold of an active behavior in the social media era and if a like or a shared post could be a decisive

59. See-ICTR 99/52/A Appeals Chamber, *Prosecutor v. Ferdinand Nahimana, et al.* at para 862.

60. See Geoff Desreumaux, *Facebook Brings Chats To Groups For Up To 250 Members At A Time*, available at <https://wersm.com/facebook-chats-groups-up-to-250-members/> (last visited 29 November, 2020).

element to configure an active conduct. In this regard, must always be considered the difference between instigation and incitement where the latter requests an explicit and direct behavior and incentive to commit genocide crime, a real *call for action*.

Second, the digital era deeply changed sociality and society through social media. New virtual public places have been opened to people all over the world. Just one person can reach with its idea thousands of million persons with one simple post. In this regard, the requirement of public incitement has new ways to express itself. A particular question would arise as if the social media can be considered public places *in re ipsa* quoting their uncountable potential to reach people or if, in same cases, *selective criteria* should be applied⁶¹. It is not unthinkable that a closed group on a social media could be more "opened" and public as a city square. Moreover, a common affiliation and criminal purpose within a private group does not sterilize the criminal relevance of incitement conducts. In fact, it must be underlined that the effectiveness of the message and the commission of the genocide are not requested for the perpetration of the incitement.

So, there are still several "open points" in determining which conditions and behaviors could be considered as relevant in the light of the essential requirement of activeness, directness and publicness of incitement in the new technological and social era.

5. Conclusion

Cyberspace is in the developing stage right now, proving to be a vital and tumultuous development area.

As it was discussed in the first part of this article, the view on the nature of jurisprudence presented by Holland might prove helpful to draft some universal legislation for cyber-related matters: laws and customs governing the cyber environment could find a base and supporting structure as refined legislative instrument, deriving their "moral" and driving force from universally recognized principles rooted in documents such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or even

61. See ICTR 98/44D/A, *Prosecutor v. Callixte Nzabonimana* at 380.

common international law principles.. Until that time, periodical revision of jurisprudence will help in creating updated legislation. The analysis of legal documents and provisions makes it clear that those drafted in the pre-internet era cannot be always suitable to adequately help in solving cybercrimes. Furthermore, current provisions of Rome Statue pose challenges to admissibility of a judgment of crimes which are commenced or instigated on the social media platform and relying on the effect doctrine will not be a practical idea, given its uncertainty in international criminal law.

An analysis of the present legal framework suggests that the laws are not fit for the future challenges, and that there is a need for modification in the structure upholding the rule of law and justice, may bring as practical consequence the punishment of internationally relevant cybercrimes. Due to absence of a universal cyber code of conduct, we have seen that article 17 on the issues of admissibility of a case in front of the ICC might be used inappropriately. While testing the effectiveness of article 25, it was indicated that the concept of public incitement lies in a grey area in cases where social media is actively involved. Some high barriers are set for satisfying the mental element (*mens rea*), which would be difficult to prove in the Court if a case concerning liability for crime instigated at social media is analyzed. For example, as said, questions regarding a clear determination of the publicity features are still not addressed by the Court.

Creating a new sphere of jurisprudence and case law governing cyberspace will undoubtedly require time, practical application and scholars' contribution. Customary international law acts as the last resort in the order of applicable tools listed at article 21 of the Rome Statute of the International Criminal Court. So, customary law can only set up the basis for deciding any such matter and might not be helpful to rely on, to its full extent, to reach full justice. This is especially true in the criminal field where, due to the *nullum crimen sine lege* principle, change and evolution of jurisprudence recognizing the adaptation to new fields of law is arduous.

In conclusion, the first steps to ensure more effective legal rules in the cyberspace could be the action of individual nations – perhaps guided and coordinated by the deliberations of international and supernational regional bodies (e.g. the European Union) – that could

arrange laws and principles of great help in leading the way on the path to the framing of a uniform legislation to fight cybercrime.