Vile Crime or Inalienable Right: Defining Incitement to Genocide

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INTRODUCTION

On November 22, 1992 in Kabaya, Rwanda, a bespectacled politician named Léon Mugesera made a long, fiery speech to over 1,000 Hutus,[1] telling them that they were about to be exterminated by "inyenzi,"[2] or cockroaches. Seventeen months later, a "preventable genocide"[3] began

1. *See, e.g.*, ALISON DES FORGES, "LEAVE NONE TO TELL THE STORY": GENOCIDE IN RWANDA 83–86 (1999); ARTICLE 19, BROADCASTING GENOCIDE: CENSORSHIP, PROPAGANDA, & STATE-SPONSORED VIOLENCE IN RWANDA 1990-1994, at 38–40 (1996) [hereinafter ARTICLE 19], *also available at* http://www.article19.org/pdfs/publications/rwanda-broadcasting-genocide.pdf, at 18–20.

2. The term "inyenzi" was coined in the 1960s to refer to Tutsi rebel fighters who conducted nighttime attacks in Rwanda and then disappeared before daylight into neighboring countries. In the early 1990s the term referred to the Tutsi rebels of the Rwandan Patriotic Front (RPF), but it also came to mean perceived enemies of the Hutu government, and later any Tutsi person. "Inyenzi" was a leitmotif of Mugesera's speech. Since the meaning of the word changed dramatically over time, it cannot be understood without asking: what did it mean to a particular audience at a particular moment? For history of the term "inyenzi," see, for example, Jean-Marie Vianney Higiro, *Rwandan Private Print Media on the Eve of the Genocide*, *in* THE MEDIA AND THE RWANDA GENOCIDE 73, 84 (Allan Thompson ed., 2007); Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 44 (June 1, 2000) (Georges Ruggiu, a Belgian broadcaster who pled guilty to committing incitement to genocide in Rwanda, admitted that by 1994, *inyenzi* had come to signify "Tutsi" and "person to be killed").

3. The international panel of experts commissioned by the Organization of African Unity to

in Rwanda, but it was Hutus who massacred at least 500,000 Tutsis instead.[4]

By then, Mugesera had moved to Quebec, where other Rwandan expatriates later denounced him and asked that he be deported for having helped to cause the genocide with his 1992 speech.[5] 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]."[6] But in 2005, the Supreme Court of Canada found that Mugesera had indeed committed incitement to genocide,[7] a form of participation in genocide, arguably the worst crime ever codified.

What accounts for such dramatic disagreement between courts? The answer, in part, is that even as national and international tribunals have decided the world's first cases on incitement to genocide during the last decade, they have been finding defendants guilty of an ill-defined offense.

It is critical to define the crime properly. Incitement to genocide is not the same as hate speech,[8] and conflating these crimes[9] (as some of

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investigate the Rwandan genocide after the fact made this point the focus of their report, subtitling it "the preventable genocide." *See* REPORT OF THE INTERNATIONAL PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, RWANDA: THE PREVENTABLE GENOCIDE, *available at* http://www.africa-union.org/Official_documents/reports/Report_rowanda_genocide.pdf (last visited Nov. 18, 2007) [hereinafter PREVENTABLE GENOCIDE].

4. *See supra* note 1.

5. *See* William A. Schabas, *Denial of Residence Status to Alien on Grounds of Genocide-Application of Refugee Convention-Duty To Extradite Under Genocide Convention-Use of NGO Reports and Experts in Municipal Proceedings*, 93 AM. J. INT'L L. 529, 529–30 (1999); Les Perreaux, *Genocide Survivors: Time for Rwandan War Crimes Suspects to Go Home*, CNEWS!, July 31, 2007, http://cnews.canoe.ca/CNEWS/ Canada/2007/07/30/4380539-cp.html (last visited Nov. 18, 2007).

6. Mugesera v. Canada (Minister of Citizenship and Immigration), [2003] F.C.A. 325, ¶ 240.

7. Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] S.C.C. 40, ¶¶ 179–80.

8. I use "hate speech" to refer to language that encourages or incites racial hatred, discrimination, and/or violence. This is a broad definition, encompassing speech acts that have been variously codified in disparate bodies of domestic law, including incitement to racial hatred, incitement to discrimination, and incitement to violence.

9. Hate speech laws, too, have been criticized for vagueness and even a vigorous proponent of criminalizing hate speech writes that "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." *See* DAVID MATAS, BLOODY WORDS: HATE AND FREE SPEECH 55 (2000).

the recent decisions have done) or even confusing incitement to genocide with protected speech[10] can lead to both wrongful convictions and improper exonerations. It may also encourage the repression of legitimate speech—and already has, according to a journalists' organization.[11] On the other hand, it is equally important to prosecute true incitement to genocide vigorously, since that may be a method for preventing or at least limiting genocide.

The reason for this is that incitement is a step toward genocide. If incitement can be stopped, genocide itself may be prevented or at least lessened in scope, and crime prevention is the main (albeit Herculean) goal of international criminal law.

Moreover, criminal prosecutions are not the only relevant means of curtailing incitement to genocide. Other methods that have been collectively dubbed "information intervention" include jamming the signals of radio and television stations that broadcast incitement to genocide,[12] and broadcasting alternative views and information to people who are being subjected to unmitigated incitement.[13] A clear understanding of what

10. For commentary on and criticism of the decisions, see, for example, Jean-Marie Biju-Duval, *"Hate Media" – Crimes Against Humanity and Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda*, *in* THE MEDIA AND THE RWANDA GENOCIDE, *supra* note 2, at 343; Gabriele Della Morte, *De-Mediatizing the Media Case*, 3 J. INT'L CRIM. JUST. 1019, 1024–25 (2005); Gregory S. Gordon, *"A War of Media, Words, Newspapers, and Radio Stations": The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139 (2004); Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial:* Prosecutor v. Nahimana, 12 NEW ENG. J. INT'L & COMP. L. 17 (2005); Schabas, *supra* note 5; Wibke Kristin Timmermann, *The Relationship Between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?*, 18 LEIDEN J. INT'L L. 257 (2005); Alexander Zahar, *The ICTR's "Media" Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide*, 16 CRIM. L.F. 33 (2005).

11. *See, e.g.*, Joel Simon, *Of Hate and Genocide: in Africa, Exploiting the Past*, COLUM. JOURNALISM REV., Jan.–Feb. 2006, at 9, *available at* http://www.cpj.org/op_ed/comment_jsimon_13jkan06.html.

12. Long before the genocide in Rwanda began, UN officials, NGO activists, and U.S. State Department officials believed that Radio-Télévision Libre des Milles Collines (RTLM) was inciting the Rwandan population to mass violence, so the U.S. government considered jamming the station's signal, but never did so. S*ee* Jamie Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 629 (1997). For an account of the debate within the U.S. government over jamming RTLM, see SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 371 (2003). ("The United States could destroy the antenna. It could transmit 'counterbroadcasts' urging perpetrators to stop the genocide. Or it could jam the hate radio station's broadcasts."); *see also* DINA TEMPLE-RASTON, JUSTICE ON THE GRASS 63 (2005) (John Shattuck, then-U.S. Assistant Secretary of State for Human Rights, Democracy and Labor, notes that he was involved in "a very early effort" to investigate jamming RTLM).

13. For example, a Lausanne-based NGO called the Fondation Hirondelle: Media for Peace

constitutes incitement to genocide is thus useful not only to courts, but also for a range of genocide-prevention efforts.[14]

After the crime was codified in 1948, fifty years passed until the first case on incitement to genocide, but now it is the basis of a new and burgeoning jurisprudence. After handing down the world's first conviction for incitement to genocide in the case of a former Rwandan *bourgmestre*, or mayor, in 1998,[15] the International Criminal Tribunal for Rwanda (hereinafter ICTR) went on to convict other government officials (and to accept several guilty pleas) for the same crime.[16] The ICTR then broadened the meaning of incitement to genocide—but left some crucial findings unclear[17]—in its so-called "Media" decision, which convicted a newspaper editor and two broadcasting executives in 2003.[18] That verdict was appealed by all three defendants. The appeals panel handed down its decision in November 2007, reducing all of the defendants' prison terms and rebuking the trial court for not drawing a clear line between hate speech and incitement to genocide, and for failing to explain how it identified certain broadcasts as incitement.[19] The appeals panel reviewed a series of specific radio broadcasts that had been discussed in the trial court's opinion, and found that if there was more than one reasonable interpretation of the speech, it was not clear beyond a reasonable doubt that the speaker had committed incitement to genocide.[20]

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and Dignity helps set up outlets for responsible, rigorous journalism in crisis areas, including Kosovo, the Great Lakes region of Africa, the Democratic Republic of Congo, and Sudan. *See generally* Fondation Hirondelle: Media for Peace and Dignity Homepage, http://www.hirondelle.org (last visited Jan. 31, 2008).

14. *See, e.g.*, Metzl, *supra* note 12; Monroe E. Price, *Information Intervention: Bosnia, the Dayton Accords, and the Seizure of Broadcasting Transmitters*, 33 CORNELL INT'L L.J. 67 (2000); John Nguyet Erni, *War, Incendiary Media, and International Law (Part I)*, FLOWTV, Sept. 23, 2005, http://flowtv.org/?p=283 (last visited Nov. 18, 2007).

15. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

16. Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment (June 1, 2000); Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment (Sept. 4, 1998).

17. In his thoughtful 2004 article, Professor Gregory Gordon, a former ICTR prosecutor on the Media case, concluded that the decision did provide a four-part test: purpose, text, context, and the relationship between speaker and subject, although Gordon writes that "[t]he first two criteria, purpose and text, are lumped together by the Tribunal…." *See* Gordon, *supra* note 10, at 172. I find this test insufficient, as I explain in Part II.

18. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 5–7 (Dec. 3, 2003). For commentary on the decision, see generally *supra* note 10.

19. Nahimana c. Le Procureur, Affaire No. ICTR 99-52-A, Arrêt, ¶¶ 738–51 (Nov. 28, 2007). [At press time for this Article, this decision was not yet available in English. All citations are to the French version, and translations are the author's.]

20. *Id.* ¶¶ 738-51, 754.

In 2005, the Supreme Court of Canada decided the *Mugesera* case, reversing a lower court that, like the ICTR appeals panel, found no incitement to genocide where a speech could be interpreted in more than one way.[21]

The ICTR is now set to sail further into uncharted waters, since it is conducting the trial of a Hutu pop star, Simon Bikindi, whose elliptical lyrics and catchy tunes—officially banned in Rwanda since 1994—incited genocide, according to the ICTR prosecutors.[22] And in what could be the first incitement to genocide case before the International Criminal Court, its Prosecutor seeks to try a Sudanese official for, among other things, inciting the Janjawiid militias.[23]

Finally, perhaps the most famous person to be accused of incitement to genocide is Mahmoud Ahmadinejad, the President of the Islamic Republic of Iran. In December 2006, a group of notable figures including Harvard law professor Alan Dershowitz, former Canadian Minister of Justice Irwin Cotler, and Holocaust survivor Elie Wiesel collectively called for Ahmadinejad to be indicted for incitement to genocide[24] because of the Iranian President's public remarks against Israel, including his statement calling for that country to be "wiped off the map."[25] The group compared the situation to Europe in the 1930s, warning that Ahmadinejad might go on to commit genocide unless stopped.[26] On June 20, 2007, the U.S. House of Representatives passed a nonbinding resolution, 411-2,[27] urging the U.N. Security Council to charge Ahmadinejad with incitement to genocide. Ahmadinejad's speech was repre-

21. Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] S.C.C. 40.

22. Prosecutor v. Bikindi, Case No. ICTR 2001-72-I, Amended Indictment, ¶ 31 (June 15, 2005).

23. Prosecutor v. Harun, Case No. ICC 02/05-56, Prosecutor's Application, at 5 (Feb. 27, 2007).

24. Gabrielle Birkner, *Prominent Jews Urge Indictment of Iran President*, N.Y. SUN, Dec. 15, 2006, http://www.nysun.com/article/45229.

25. There has been heated debate over the correct translation of these remarks into English. *See, e.g.*, Ethan Bronner, *Just How Far Did They Go, Those Words Against Israel?*, N.Y. TIMES, June 11, 2006, § 6, *available at* http://www.nytimes.com/2006/06/11/weekinreview/11bronner.html; Jonathan Steele, Commentary, *Lost in Translation*, THE GUARDIAN, June 14, 2006, http://commentisfree.guardian.co.uk/jonathan_steele/2006/06/post_155.html.

26. Conference of Presidents of Major American Jewish Organizations, Symposium on Iranian President Ahmadinejad, http://www.conferenceofpresidents.org/meetings.asp?ArtCat=1&ArtID=24.

27. H.R. Con. Res. 21, 110th Congress (2007) (enacted); *see also* Press Release, Representative Steve Rothman, Rothman-Kirk Resolution Passes: House Calls on UN to Charge Iranian President with Violating the Genocide Convention and UN Charter (June 20, 2007), *available at* http://www.house.gov/rothman/news_releases/2007/june20.htm.

hensible and perhaps even dangerous, but did not constitute incitement to genocide, in my view.[28]

This Article proposes a new test to identify incitement to genocide, for use in prosecuting and adjudicating future cases, and in other genocide-prevention efforts. This test[29] will serve to distinguish incitement to genocide from hate speech, which is a key threshold, as Part I explains. Part II describes the role of incitement in bringing about genocide, arguing that incitement is at least a precursor, and perhaps a *sine qua non* for genocides with high levels of civilian participation, such as the Holocaust and the Rwanda genocide. Part II also describes telltale signs of incitement to genocide—techniques that were used in Germany, Rwanda, and in other cases. Part III outlines the existing law on incitement to genocide, with particular emphasis on the cases of the ICTR. Part IV proposes a six-prong approach for applying the test, to determine whether there was a reasonable possibility that a particular speech act could have led to genocide. Finally, Part V applies the test advanced in this Article to three cases.

I. DISTINGUISHING INCITEMENT TO GENOCIDE FROM HATE SPEECH

The confusion over what constitutes incitement to genocide is alarming for several reasons. First, courts may mistakenly convict mere hatemongers, lonely racists, or even "fervent supporter[s] of democracy" of one of the most serious crimes ever codified. Second, the confusion has given governments a new pretext for repressing their internal opposition or press. According to the director of the Committee to Protect Journalists, "[m]any governments [in Africa] have exploited the perception that the violence in Rwanda was fueled by the media to impose legal restrictions on the press in their own countries."[30] Finally, even where

28. In a forthcoming article, Professor Gregory Gordon makes the case that Ahmadinejad did commit incitement to genocide. *See* Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework*, 98 J. CRIM L. & CRIMINOLOGY (forthcoming June 2008).

29. The test is intended for international tribunals and national courts in countries that incorporate international crimes into domestic law. Canada's Criminal Code, for example, includes a provision that is similar, but not identical, to the international crime of incitement to genocide. It criminalizes "advocat[ing] or promot[ing] genocide." *See* R.S.C. 1985, c. C-46, s. 318(1).

30. Simon, *supra* note 11, at 5; *see also* Amicus Curiae Brief on Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Case No. ICTR 99-52-A, *available at* http://www.justiceinitiative.org/db/resource2/fs/?file_id=17874 (last visited Nov. 18, 2007). Since many of the restrictions cited by Simon and the Open Society Justice Initiative amicus brief were imposed *before* the Media judgment was handed down, the ICTR cannot be blamed for them. However, as the amicus brief argues, portions of the ICTR's reasoning "could all too easily

hate speech is banned in a good-faith effort to prevent genocide, this may backfire, since excessive restriction of speech can reinforce and promote hateful ideas, instead of weakening them, by exciting sympathy with their proponents.[31]

Incitement to genocide is codified as an international crime in treaty law, but hate speech is not criminalized in any international treaty,[32] and the extent to which hate speech is criminalized in domestic law varies greatly from one jurisdiction to another.[33] In the United States, for example, the right of free speech is so exalted that many forms of hate speech are protected under the U.S. Constitution.[34] This means that if incitement to genocide and hate speech are conflated, as in the *Media* decision,[35] a single act could be understood either as a heinous crime or

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encourage governments to suppress critical speech." *Id.* at 8.

31. *See, e.g.*, Sandra Coliver, *Hate Speech Laws: Do They Work?*, *in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 363, 374 (Sandra Coliver ed., 1992).

32. As discussed in Part III, incitement to genocide is criminalized in Article 3 of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. Convention on the Prevention and Punishment of the Crime of Genocide art. 2(c), Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. Moreover, there are international tribunals (including the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ICTR, and the International Criminal Court) with jurisdiction to try defendants for incitement to genocide. By contrast, international treaties call upon states to criminalize hate speech in their own municipal law, and it is not codified in the statutes of any of the international tribunals. Under Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR), "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." International Covenant on Civil and Political Rights art. 6, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171. Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) calls upon states to ban a much broader range of speech and action than the ICCPR:

> [State Parties] "[s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing therof."

International Convention on the Elimination of All Forms of Racial Discrimination art. 4, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). As Canadian human rights lawyer David Matas has pointed out, however, "current efforts to have states ban hate speech meets (sic) with a big fat 'no.'" MATAS, *supra* note 9, at 32.

33. Indeed the ICTY trial chamber has noted that hate speech is not a crime under customary international law since there is "a sharp split over treaty law" attempting to criminalize speech. *See* Prosecutor v. Kordic, Case No. IT-95-14/2, Judgment, ¶ 209 n.272 (Feb. 26, 2001).

34. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377 (1992) (overturning an ordinance that outlawed cross-burning); Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT'L L. & POLICY 253, 254 (2003).

35. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1020 (Dec. 3, 2003) (In discussing an RTLM broadcast of Dec. 12, 1993 for example, the Tribunal conflated

as the exercise of a cherished right under U.S. law. To put it another way, consider a spectrum with protected speech at one end, unprotected hate speech in the middle, and incitement to genocide at the other end. The courts that have considered incitement to genocide thus far have blurred or even collapsed this spectrum.

It is not surprising, though, that the ICTR felt compelled to borrow law for the first incitement to genocide cases: it found the larder quite bare. The codified law of incitement to genocide consists of only seven words in a single international treaty, the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[36] Article III of the Genocide Convention lists five punishable acts, including genocide itself, and "[d]irect and public incitement to commit genocide."[37] The convention defines genocide as any of a series of acts, including killing and causing serious bodily or mental harm, that are committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such. However, incitement to genocide is not defined any further by the Genocide Convention or any other treaty.[38]

So the treaty law instructs only that to commit incitement to genocide:

1. one must have specific intent[39] to cause genocide, and
2. the incitement must be direct and public.

The test that this Article proposes is derived from a key distinction between hate speech and incitement to genocide that seems to have escaped notice by the courts: hate speech can be made by anyone, but in-

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"the promotion of ethnic hatred" with incitement to genocide.).

36. Genocide Convention, *supra* note 32, art. 3.

37. The other three acts are conspiracy to commit genocide, attempt to commit genocide, and complicity in genocide. *Id.*

38. *Id.* Although the treaty itself is laconic, the Genocide Convention does have a drafting history, including compelling debates on incitement to genocide that are outside the scope of this Article. For an excellent brief summary, see generally Wibke Kristin Timmermann, *Incitement in International Criminal Law*, 88 INT'L REV. RED CROSS 823, 832 (2006); *see also* NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY (1960); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 51–101 (2000).

39. Although the Genocide Convention does not explicitly require specific intent for "punishable acts" other than genocide, including incitement, the ICTR interpreted the Convention that way: "the person who is inciting to commit genocide must have himself the specific intent to commit genocide." Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 560 (Sept. 2, 1998). The Canadian Supreme Court followed this view. *See* Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] S.C.C. 40, ¶¶ 85–89. Arguably, however, the inciter need not have specific intent to commit genocide himself, only to cause genocide by inspiring an audience to commit it.

citement to genocide can be committed only by certain people, in certain circumstances.

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.[40]

To commit incitement to genocide, a speaker must have authority or influence over the audience, and the audience must already be primed, or conditioned, to respond to the speaker's words. Incitement to genocide is an inchoate crime,[41] so it need not be successful to have been committed,[42] but it would be absurd to consider a speech incitement to genocide when there is *no* reasonable chance that it will succeed in actually inciting genocide. And to prosecute a case like this would be a needless (and possibly harmful) restriction of the right to free speech.

Yet the Times Square speaker might well have the specific intent to cause genocide, and the speech might be direct and public, so the Genocide Convention's requirements are insufficient to distinguish the crime from hate speech. A speech constitutes incitement to genocide not because of its content alone, and not even because of its content together with the intent of the speaker, but also because of the potential it has to influence a particular audience in a particular time and place. Therefore, incitement to genocide must be defined as speech that has a reasonable possibility of leading to genocide, when and where the speech is made. This is a "reasonably possible consequences" test.

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40. It is conceivable that a speaker in Times Square could incite a lesser form of violence, such as murder. Some would argue that this could be an act of genocide, since there is no minimum number of victims for genocide. It is outside the scope of this Article to draw the line between acts of genocide and genocide, however, and the focus here is on major genocides with high degrees of civilian participation.

41. SCHABAS, *supra* note 38, at 266.

42. Courts have repeatedly affirmed that there is no causation requirement for incitement to genocide. *See, e.g.*, Nahimana c. Le Procureur, Affaire No. ICTR 99-52-A, Arrêt, ¶ 678 (Nov. 28, 2007) ("[D]irect and public incitement to genocide is…punishable even if no act of genocide resulted from it. This is confirmed by the travaux preparatoires of the Genocide Convention, from which we can conclude that its drafters wished to punish direct and public incitement to genocide even if no genocide is committed, in order to prevent its occurrence."); *see also Mugesera*, [2005] S.C.C. 40, ¶ 85 ("Because of its inchoate nature, incitement is punishable by virtue of the criminal act alone irrespective of the result.").

U.S. incitement law also uses a consequences test to criminalize speech that is likely to lead to imminent lawless action.[43] For incitement to genocide, the traditional U.S. test is too narrow. Genocide can be "reasonably possible," not just likely, because genocide is such a terrible consequence. Even a small risk of genocide is too much, and thus the test must be cautiously broadened. It is still quite limited by the requirements that the speaker have the intent to bring about genocide, and that the audience have understood the speech to call for genocide, not merely discrimination, hatred, or even other forms of violence.

Lest free speech devotees still find this test unacceptable, it is important to note some further distinctions between hate speech and incitement to genocide that demonstrate why U.S. First Amendment law rationales for assiduously protecting hateful speech do not apply in situations where the speech might catalyze genocide.[44]

First, free speech doctrine seeks to protect individuals against state repression, but incitement to genocide is speech in the service of the state, since genocide is a major organizational feat that so far has generally been carried out by state employees, albeit often aided by civilians.[45] In Nazi Germany, for example, genocide was obviously a state project. Other atrocities that are considered genocides (if not unanimously, like the Nazi case) such as the Turkish slaughter and deportation of Armenians, beginning in 1915, and the wholesale massacre of Cambodians by the Pol Pot regime from 1976 to 1979, were also systematic government policy. In Rwanda, genocide was triggered by the assassination of the head of state, President Juvénal Habayarimana, but the genocide was still a government enterprise, since Hutu extremists from the president's party had "seized control of a highly-administered state and then launched an extermination campaign against the Tutsi

43. Brandenburg v. Ohio, 395 U.S. 444 (1969).

44. *See, e.g.*, Françoise J. Hampson, Incitement and the Media: Responsibility of and for the Media in the Conflicts in the Former Yugoslavia 7–12 (Human Rights Ctr., Univ. of Essex, Papers in the Theory and Practice of Human Rights No. 3, 1993) (discussing international conventions that allow for restricting speech to preserve *ordre public*, such as Article 20 of the International Covenant on Civil and Political Rights).

45. *See e.g.*, SCHABAS, *supra* note 38, at 1 ("[G]enocide was generally, although perhaps not exclusively, committed under the direction or, at the very least, with the benign complicity of the State where it took place."). There is continuing debate, however, over genocide or "acts of genocide" committed by non-state actors. See, for example, the International Court of Justice's decision in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 169 (Feb. 26).

minority."[46] Philip Gourevitch put it with biting clarity: "Genocide, after all, is an exercise in community building" on behalf of the state.[47]

As in the Rwanda case, inciters to genocide typically have overwhelming, state-sponsored access to the means of broadcasting or other media distribution.[48] This sort of access would be impossible for an individual with a soapbox or even a website.[49] So curbing incitement to genocide would tend to check the power of the state, not expand it.

The second reason why U.S. free-speech doctrine is not relevant to incitement to genocide is that the "marketplace of ideas" theory fails in this context. U.S. law protects odious and even violent speech in the belief that "bad" speech will eventually be neutralized by "good" speech. But by the time incitement to genocide is possible, there is such a disproportion in access to the means of disseminating information that protests by the targeted group, or even by sympathizers among the audience, would be extremely unlikely to stop incitement from taking effect. Indeed, pre-genocidal governments typically shut down independent media, destroying the marketplace of ideas. The Nazi government was able to mold public opinion in part because it destroyed the opposition press,[50] and in Rwanda, a group of Hutu ideologues founded the Radio Télévision Libre des Mille Collines (RTLM) radio station as a first major step toward seizing power and bringing about genocide.[51]

Finally, as noted above, the harm that can be caused by incitement to genocide is so great that the balancing of interests must be different. Even where there is no apparent danger of violence, hate speech may be curbed, under international law and under the law of many countries including the United States, because of the *psychological* harm it may

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46. *See* Lars Waldorf, Book Review, 50 AFR. STUD. REV. 145, 146 (2007) (reviewing LINDA MELVERN, CONSPIRACY TO MURDER (2006)).

47. PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 95 (1998).

48. Hampson, *supra* note 44, at 2 ("This paper is not concerned with the issue of freedom of speech as such, but rather with an abuse of the freedom which is likely to promote violence."); *see also id.* at 3 (describing the Serbian takeover of broadcasting in 1990 and 1991 "to enable the Serbian government to achieve full state control over broadcasting").

49. It is worth noting, however, both that a website could turn into a powerful platform since information can spread "virally" on the Internet, and that some private actors, such as celebrities and owners of media outlets, have disproportional access to the news media.

50. JEFFREY HERF, THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST 18 (2006). Herf describes the weeks and months immediately following Hitler's election in January 1933, when 2,000 German journalists were fired, arrested, or driven into exile and more than 200 non-Nazi newspapers were closed.

51. For descriptions of other incitement campaigns via state-controlled media, see Metzl, *supra* note 12.

cause.[52] In comparison there is less to lose by restricting incitement to genocide and much more to lose by not restricting it.

The "possible consequences"[53] test solves several problems that courts have faced in incitement to genocide cases so far.

First, even though there is no formal causation requirement for incitement to genocide,[54] it may seem illogical or unjust to convict someone for a speech made a long time before the crime that it ostensibly helped to bring about. Even if seventeen months may be an acceptable lag, as in the case of Mugesera, surely some length of time would be so long that the speaker could not reasonably be held responsible for the eventual result. The possible consequences test solves this problem since a speaker such as Mugesera commits incitement if there was a reasonable possibility that his speech could have caused genocide *when he made it*—not seventeen months later.

Second, courts have indirectly relied on causation, in the absence of such a test, even when such reliance may have stretched the evidence thin. For example the ICTR declared that Hassan Ngeze, the defendant in the *Media* case who published a newspaper with a circulation of just 1,500 to 3,000 in a country with a population of eight million[55] and a low literacy rate, "poisoned the minds of his readers, and by words and deeds caused the death of thousands of innocent civilians."[56]

Third, since the test does not depend on evidence of genocide, it allows for incitement prosecutions or other intervention, such as radio jamming, before genocide has ensued.[57] Otherwise, any hope that tribu-

52. See, for example, State v. Wyant, 624 N.E.2d 722 (Ohio 1994), in which an Ohio man was convicted for shouting racist slurs at two people in a neighboring campsite. In other cases, governments have systematically restricted the speech rights of individuals whose speech was causing psychological harm to unspecified members of racial groups, even though there was no apparent danger of violence. In 1979, for example, a Canadian Human Rights Tribunal ordered a Canadian citizen to stop using the telephone to impart anti-Semitic messages because they were "likely to expose a person or persons to hatred and contempt." The man petitioned the UN Human Rights Committee, arguing that his right to freedom of expression had been violated, but the Committee found that the Canadian government had properly stifled his advocacy of racial hatred. *See* J.R.T. and the W.G. Party v. Canada, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 at 25 (1984).

53. Note that the "reasonable possibility" standard is not inconsistent with criminal law, since it is not to be used as a standard of proof, but rather as an aid in defining or recognizing a crime.

54. *See supra* note 42.

55. Zahar, *supra* note 10, at 37.

56. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1101 (Dec. 3, 2003).

57. 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.

nals have of preventing genocide rests on deterrence after the fact, which is a remote possibility since tribunals can prosecute only a tiny fraction of offenders.

To gauge when there is a possibility that a speech will lead (or could have led) to genocide, one must understand the nature of incitement to genocide. To that end, this Article will draw on the large historical and analytical scholarship on genocide, as well as accounts from witnesses and perpetrators, to describe the psychosocial process that leads to genocide, and some specific techniques used in incitement to genocide.

The following six-prong inquiry will aid in identifying the crime and distinguishing it from hate speech:

1. Was the speech understood by the audience as a call to genocide? Did it use language, explicit or coded, to justify and promote violence?
2. Did the speaker have authority or influence over the audience and did the audience have the capacity to commit genocide?
3. Had the victims-to-be already suffered an outbreak of recent violence?
4. Were contrasting views still available at the time of the speech? Was it still safe to express them publicly?
5. Did the speaker describe the victims-to-be as subhuman, or accuse them of plotting genocide? Had the audience been conditioned by the use of these techniques in other, previous speech?
6. Had the audience received similar messages before the speech?

II. THE ROLE OF INCITEMENT IN GENOCIDE

A. Incitement Is a Catalyst and Perhaps a Sine Qua Non

Incitement has been a precursor to, and a catalyst for, modern genocides. It may even be a *sine qua non*, according to witnesses and the abundant historical and sociological literature on the topic.[58] It seems

58. *See, e.g.*, FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE 28 (1990) ("[I]n order to commit a genocide the perpetrator has always had to first organize a campaign that redefined the victim group as worthless, outside the web of mutual obligations, a threat to the people, immoral sinners, and/or subhuman."); *see also* HELEN FEIN, ACCOUNTING FOR GENOCIDE: NATIONAL RESPONSES AND JEWISH VICTIMIZATION DURING THE HOLOCAUST (1979); LEO KUPER, GENOCIDE: ITS POLITICAL USES IN THE TWENTIETH CENTURY (1981); ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP

that without incitement, genocides like the Holocaust and especially the Rwandan one might not have happened.

The evidence is strongest with respect to the Nazi and Rwandan cases, which saw the highest levels of civilian participation in killing.[59] These are also the cases on which there is the greatest scholarly consensus that they were in fact genocides.[60] Incitement seems to play a critical role when intended victims live among the majority group, so that mass killings cannot take place without the participation or at least the tacit acceptance of many members of the majority group. In Nazi Germany and in Rwanda there were well-documented incitement campaigns.[61] In Turkey, there were plans to "Excite Moslem opinion by suitable and special means" before the Armenian genocide.[62] By contrast, in Darfur, ethnic cleansing and killings have been carried out by paramilitaries (Janjawiid) mainly in villages inhabited solely by their victims. When the civilian bystanders are far away, there is less need to incite them.[63]

In any case, genocide is never a happenstance or a spontaneous uprising. Rather, it is a massive, planned undertaking that requires a large number of active participants and the tacit approval of thousands more who must be conditioned to play their roles. In 1948, one of the drafters of the Genocide Convention remarked about the Holocaust, "It was impossible that hundreds of thousands of people should commit so many

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VIOLENCE (1989); Helen Fein, *Genocide: A Sociological Perspective*, CURRENT SOCIOLOGY, Spring 1990, at 1.

59. Rwanda stands out especially, in this respect. "Commentators have frequently remarked upon the highly centralized and labor-intensive nature of the killing campaign, involving the direct or indirect efforts of hundreds of thousands of ordinary citizens working under the direction of a strong state utilizing dense networks of local administration and parastatal entities." Darryl Li, *Echoes of Violence: Considerations on Radio and Genocide in Rwanda*, 6 J. GENOCIDE RES. 9, 10 (2004).

60. Scott Straus, *Second-Generation Comparative Research on Genocide*, 59 WORLD POL. 476, 497 (2007).

61. See generally HERF, *supra* note 50, for details on incitement in Nazi Germany. For details on incitement in Rwanda, see generally ARTICLE 19, *supra* note 1, and JEAN-PIERRE CHRETIEN, RWANDA: LES MÉDIAS DU GÉNOCIDE (1995).

62. Vahakn N. Dadrian, *The Secret Young-Turk Ittihadist Conference and the Decision for the World War I Genocide of the Armenians*, 7 J. HOLOCAUST & GENOCIDE STUD. 173, 174 (1993); *see also* Memorandum by the Committee of Union and Progress Outlining the Strategy for Implementing the Armenian Genocide, 1914-1915, *available at* http://www.armenian-genocide.org/br-cup-memo-text.html (last visited Nov. 19, 2007).

63. There is also debate, outside the scope of this Article, as to whether the Darfur case constitutes genocide. *See, e.g.*, Scott Straus, *Darfur and the Genocide Debate*, FOREIGN AFF., Jan.–Feb. 2005, at 123, *available at* http://www.foreignaffairs.org/20050101faessay84111/scott-straus/darfur-and-the-genocide-debate.html.

crimes unless they had been incited to do so...."[64] Similarly, the Rwandan theologian Tharcisse Gatwa commented that genocide would have been inconceivable in Rwanda before the 1990s, and that four years of psychological preparation made it possible.[65]

Scholarly experts on genocide have generally concurred. Frank Chalk and Kurt Jonassohn concluded, for example, that "in order to perform a genocide the perpetrator has always had to first organize a campaign that redefined the victim group as worthless, outside the web of mutual obligations, a threat to the people, immoral sinners, and/or subhuman."[66] Such a campaign is a process of social conditioning which gradually, but radically, changes norms of thought and behavior.[67]

Since most people have a moral aversion to killing other human beings (indeed, societies depend on this aversion for the maintenance of social order), an audience can apparently only be incited to genocide if it is persuaded that mass killing is justified, or necessary, or both. As one commentator noted, "Had the majority of Germans regarded Jews as enemies, the Nazis would have had limited need for their endless anti-Semitic propaganda. That the entire period 1933-1945 is steeped with Nazi harangues against Jews indicates that they were attempting to instill hatred of Jews among the German people…they were trying to *create* an enemy."[68] And in Rwanda, "genocidal leaders had to transform the normative environment such that actions that were once considered verboten (such as killing thy neighbor) could be viewed as not only legitimate but imperative," according to a political scientist who studied the process.[69]

The genocide scholar Helen Fein has explained the psychological basis of this effort: people can learn to commit atrocities against other people by re-categorizing them as "outside the universe of moral obligation." "[T]he collective or common conscience," Fein observed, "is de-

64. U.N. GAOR 6th Comm., 3d Sess., 84th mtg. at 219, U.N. Doc. A/C.6/SR.84 (Oct. 20, 1948).

65. Christine L. Kellow & H. Leslie Steeves, *The Role of Radio in the Rwandan Genocide*, J. COMM., Summer 1998, at 107, 123 (citing Tharcisse Gatwa, *Ethnic Conflict and the Media: The Case of Rwanda*, 42 MEDIA DEV. 3, at 18–20 (1995)).

66. CHALK & JONASSOHN, *supra* note 58, at 28.

67. *See id.*; *see also* Michael Blain, *Group Defamation and the Holocaust*, *in* GROUP DEFAMATION AND FREEDOM OF SPEECH 45 (Monroe H. Freedman & Eric M. Freedman eds., 1995); Laraine Fergenson, *Group Defamation: From Language to Thought to Action*, *in* GROUP DEFAMATION AND FREEDOM OF SPEECH 71 (Monroe H. Freedman & Eric M. Freedman eds., 1995).

68. SARAH ANN GORDON, HITLER, GERMANS AND THE JEWISH QUESTION 152 (1984).

69. Lee Ann Fujii, *Transforming the Moral Landscape: The Diffusion of a Genocidal Norm in Rwanda*, 6 J. GENOCIDE RES. 99, 99–100 (2004).

fined by the boundaries of the universe of obligation—that circle of persons toward whom obligations are owed, to whom the rules apply, and whose injuries call for expiation by the community."[70]

B. Primordialist Theory Refuted

In Nazi Germany and Rwanda, a small number of civilian political leaders directed systematic campaigns of hate speech and incitement over the course of several years.[71] Payam Akhavan, a genocide scholar and former prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY) commented, "[S]ystematic and massive violence is anything but the expression of spontaneous bloodlust or irreversible primordial hatreds. Rather, it is the consequence of a deliberate resort to incitement of ethnic hatred and violence as an expedient instrument by which élites arrogate power to themselves."[72]

Yet this essential factor is missing from many political figures' and journalists' portrayals of both genocides. Instead "those people" had been killing each other for thousands of years, and will always do so. "The generic massacre story," as Philip Gourevitch has pointed out, "speaks of 'endemic' or 'epidemic' violence…."[73]

This theory is popular because, in addition to producing dramatic historical summaries and vivid metaphors, it excuses the international community from doing much to prevent the next massacre or genocide. If "those people" kill each other endemically, then nothing can be done to stop them, so it is a waste of time and effort to try. Paradoxically, such an account of the causes of genocide is comforting.

Gourevitch has described the massacres of Tutsis during the early 1990s as "dress rehearsals" for the "final solution" of 1994, writing:

> To soothe foreign nerves, the government portrayed the killings as "spontaneous" and 'popular' acts of "anger" or "self-protection." The villagers knew better: massacres were invariably preceded by political "consciousness-raising" meetings at which local leaders, usually with a higher officer of the provincial or national government at their side, described Tutsis as devils—horns, hoofs, tails and all—and gave the order to kill them,

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70. HELEN FEIN, ACCOUNTING FOR GENOCIDE: NATIONAL RESPONSES AND JEWISH VICTIMIZATION DURING THE HOLOCAUST 33 (1984).

71. *See, e.g.*, DES FORGES, *supra* note 1.

72. Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 741 (1998).

73. GOUREVITCH, *supra* note 47, at 186.

> according to the old revolutionary lingo, as a "work" assignment.[74]

Civilian perpetrators also report being driven by incitement (although their post-genocide accounts can be questioned because such perpetrators may have been seeking to exculpate themselves).[75] Borislav Herak, a Bosnian Serb who confessed to participating in the killing of Muslims, "spoke warmly of his own experience of Muslims but he got a different view" from Serbian radio and television and at gatherings with other Serb fighters.[76] Eventually he became convinced that he must kill Muslims. "We were told that we would have to cleanse our whole population of Muslims," he said. "That's what we have been told. That's why it has been necessary to do all this."[77]

Similarly, Alfred Kiruhara, a farmer awaiting trial in Rwanda after the 1994 genocide, told an interviewer, "I did not believe the Tutsi were coming to kill us, but when the government radio continued to broadcast that they were coming to take our land, were coming to kill the Hutus—when this was repeated over and over—I began to feel some kind of fear."[78] Another Rwandan man who was a teenager when he killed, by his own admission, fifteen people in his native village, explained his actions by saying: "[T]he government told us that the RPF is Tutsi and if it wins the war all the Hutus will be killed."[79] As Françoise Hampson concluded in a study of incitement in the former Yugoslavia: "People who have lived alongside one another relatively peacefully for forty years do not suddenly, collectively and without prompting start hating one another to the point of killing their neighbor."[80]

Of course, people do hate one another without incitement. Even when hate speech successfully incites, it typically affects someone who is already racist and filled with hate. Similarly, the argument for the importance of incitement to genocide diminishes neither the role played by longstanding prejudice nor the responsibility of individuals who commit crimes after incitement. To believe that incitement is critical for geno-

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74. *Id.* at 94.

75. It should be noted that in the Rwandan case, at least one scholar has taken issue with the consensus that radio broadcasts were a critical catalyst of genocide. He suggests that genocide might have succeeded even without radio. *See* Scott Strauss, *What Is the Relationship Between Hate Radio and Violence? Rethinking Rwanda's "Radio Machete,"* 35 POL. & SOC'Y 609 (2007).

76. Hampson, *supra* note 44, at 11 (citing John F. Burns, *A Killer's Tale – A Special Report: A Serbian Fighter's Path of Brutality*, N.Y. TIMES, Nov. 27, 1992, at A1).

77. *Id.*

78. Kellow & Steeves, *supra* note 65, at 123.

79. *Id.*

80. Hampson, *supra* note 44, at 25.

cide, one need not believe that people are pure of heart and mind without incitement, only that people do not spontaneously rise up as one to commit genocide without it.

C. Techniques Used in Incitement to Genocide

Inciters have used strikingly similar techniques before genocide, even in times and places as different as Nazi Germany in the 1930s and Rwanda in the 1990s. Because these techniques are hallmarks of incitement to genocide, they are elements of the six-prong inquiry described in Part IV.

1. Describing Victims as Vermin

The first technique is to describe the victim group as subhuman (usually as insects). As Chalk and Jonassohn put it, "How is it possible for people to kill other people on such a massive scale? The answer seems to be that it is not possible, at least not as long as the potential victims are perceived as people…. The victims must not only not be equals, but also clearly defined as something less than fully human."[81] Those who incite genocide frequently describe their targets as insects or other vermin—creatures that it is always acceptable to kill with impunity and relief.

For example, Hutu leaders, editors, and broadcasters famously described Tutsi people as *inyenzi*, or cockroaches.[82] Slobodan Milosevic referred to Bosnian Muslims as "black crows" in speeches.[83] Nazi propaganda referred to the Jews as germs, pests, and parasites,[84] and Josef Goebbels, the propaganda minister, described them as "the lice of civilized humanity."[85] Legal scholars were not to be left out of the effort. In 1938, Walter Buch, the Supreme Judge of the Nazi Party, wrote in a contribution to the prestigious legal journal Deutsche Justiz: "the

81. CHALK & JONASSOHN, *supra* note 58, at 27–28.

82. *See, e.g.*, ROMEO DALLAIRE, SHAKE HANDS WITH THE DEVIL 142 (2005).

83. Jennifer Antieno Fisher, *Nonviolent Action in Prevention of Genocide: Bosnia in Focus*, ONLINE J. PEACE & CONFLICT RESOL. 1.1, March 1998, at 2, http://www.trinstitute.org/ojpcr/1_1fish.htm (citing NORMAN CIGAR, GENOCIDE IN BOSNIA: THE POLICY OF ETHNIC CLEANSING 34 (1995)).

84. THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY, Part 22, at 501 (1946) [hereinafter PROCEEDINGS: TRIAL OF GERMAN MAJOR WAR CRIMINALS].

85. HERF, *supra* note 50, at 121.

National Socialist has recognized…[that] the Jew is not a human being…"[86] Noticing such writing in 1937, Aldous Huxley noted:

> We know that the harming or killing of men and women is wrong, and we are reluctant consciously to do what we know to be wrong. But when particular men and women [and we must add, sadly, children] are thought of merely as representatives of a class, which has previously been defined as evil and personified in the shape of a devil, then the reluctance to hurt or murder disappears.[87]

2. Accusation in a Mirror

A second method of incitement genocide is to claim (falsely) that the victims-to-be are planning to commit atrocities against the genocidaires-to-be. In a mimeographed document entitled "Note Rélative à la Propagande d'Expansion et de Récrutement," a kind of instruction manual for incitement, a Rwandan propaganda theorist called this technique "accusation in a mirror" and instructed his colleagues to "impute to enemies exactly what they and their own party are planning to do."[88] "[T]he party which is using terror will accuse the enemy of using terror," he wrote, which will "persuade listeners and 'honest people' that they are being attacked and are justified in taking whatever measures are necessary 'for legitimate [self-]defense.'"[89] The propagandist understood that accusation in a mirror achieves an important psychological prerequisite for genocide: it provides a collective justification for mass atrocities, just as self-defense provides an ironclad excuse for the crime of homicide.

Alison Des Forges, an expert on the Rwandan genocide, cites many examples of how this technique was used in Rwanda during the three years before the genocide. For instance, 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."[90] Another Rwandan publication "stated that the Tutsi wanted to 'clean up Rwanda...by throwing Hutu in the Nyabarongo [River]', a phrase that would become notorious" when Léon Mugesera spoke a

86. MAX WEINREICH, HITLER'S PROFESSORS 89 n.204 (Yale Univ. Press 1999) (1946).

87. Fergenson, *supra* note 67, at 73 (quoting Aldous Huxley, *Words and Behaviour*, *in* ABOUT LANGUAGE 444, 453 (Marden J. Clark et al. eds., 1975)).

88. DES FORGES, *supra* note 1, at 66.

89. *Id.*

90. *Id.* at 72.

year later of putting *Tutsi* into the Nyabarongo River.[91] In 1994, thousands of Tutsi corpses were indeed thrown into the river. In the same speech, Mugesera repeatedly claimed that the "inyenzi" planned to commit genocide against the Hutu: "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. They only want to exterminate us: they have no other aim."[92] "Are we really waiting till they come to exterminate us?" Mugesera demanded.[93]

"Who should die, the Germans or the Jews?" wrote the Nazi propaganda minister, Josef Goebbels, in a 1941 pamphlet. "You know what your eternal enemy and opponent intends for you. There is only one instrument against his plans for annihilation."[94] Nazi propagandists worked to persuade the public that the Jews were planning to wipe out the German people. Goebbels seized on a screed called "Germany Must Perish," which was self-published in 1941 by an obscure American Jew named Theodore Kaufman. Goebbels immediately placed articles in Germany's major newspapers referring to Kaufman's book as "Jewish plans for extermination of the Germans" and claiming, fictitiously, that Kaufman was closely associated with an advisor to President Roosevelt.[95] Goebbels placed special emphasis on Kaufman's suggestion that Germans be sterilized—an accusation that was "in a mirror" in Germany since the Nazi regime was already performing thousands of sterilizations on Jewish victims.[96]

As the Nazi genocidal project expanded from sterilization to mass murder, so did the "accusation in a mirror." For example, in 1943, Heinrich Himmler, chief of the German SS, said to his Gruppenführers (group leaders): "we had the moral right vis-à-vis *our* people to annihilate [*umzubringen*] this people which wanted to annihilate us."[97]

The ICTY also noted the use of "accusation in a mirror" in the former Yugoslavia during the early 1990s. "[I]n articles, announcements, television programmes and public proclamations, Serbs were told that they needed to protect themselves from a fundamentalist Muslim threat and

91. *Id.* at 79.

92. *See* Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] S.C.C. 40, ¶ 69, app. III ¶ 18.

93. *Id.* ¶ 49.

94. HERF, *supra* note 50, at 114.

95. *Id.* at 112, 110.

96. *Id.* at 113.

97. 3 RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 1081 (Yale Univ. Press 3d ed. 2003) (1961) (quoting Heinrich Himmler, Commandant, Schutzstaffel (SS), Address to Gruppenführer (Oct. 4, 1943)).

must arm themselves and that the Croats and Muslims were preparing a plan of genocide against them."[98]

Dehumanization, the first technique, makes genocide seem acceptable. "Accusation in a mirror" goes further by making it seem necessary. The fact that this succeeded—that populations came to believe that unarmed or grossly outnumbered Jews, Muslims, or Tutsi might actually annihilate the Germans, the Serbs, or the Hutu—demonstrates the power of incitement.

3. Other Techniques

Three additional techniques of incitement to genocide should be mentioned since they may also serve as hallmarks of it. The first is to use jargon, especially perverse euphemisms. In Rwanda, for example, the phrase "Go to work" came to mean "commit genocide" and the term *inyenzi*, coined to refer to guerrillas, eventually covered all Tutsis.[99]

A second technique is to refer to atrocities that are already underway, correctly identifying the victims but describing the atrocities in ways that make them sound morally justified. "In many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense," as W. Michael Reisman has observed.[100] Nazi leaders, for example, continually emphasized the "humaneness" of the massacres, torture, death marches, slavery, and other atrocities they ordered.[101]

Finally, inciters intentionally conflate victims-to-be and members of the dominant group who sympathize with them, preparing the audience for the killing of both. For example in Nazi Germany, non-Jews who sheltered or helped Jews were the targets of vicious attacks and were often sent to concentration camps and killed solely because of their sympathy for Jews.[102] Similarly, in Rwanda, Hutus who were deemed sympathetic to Tutsis were called "traitors," conflated with Tutsis or "the enemy," and killed as if they had been Tutsi themselves.[103]

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98. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 91 (May 7, 1997).

99. *See supra* note 2 for description of how the meaning of "inyenzi" evolved.

100. W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75, 77 (1996).

101. *See* 3 HILBERG, *supra* note 97, at 1010.

102. *See, e.g.*, KENNETH S. BORDENS & IRWIN A. HOROWITZ, SOCIAL PSYCHOLOGY 430 (2d ed. 2002) ("Those caught helping Jews, even in the smallest way, were subjected to punishment, death in an extermination camp, or summary execution.").

103. *See, e.g.*, Thomas Kamilindi, *Journalism in a Time of Hate Media*, *in* THE MEDIA AND

III. EXISTING LAW ON INCITEMENT TO GENOCIDE

Arguably, no one is more morally responsible for genocide than its inciters. Surely they should also be legally culpable, and some argue that those who are complicit in genocide, like inciters, may in fact be *more* culpable than the "principal offender" who carries out the killing.[104] Not surprisingly, the Genocide Convention delegate who believed that the Holocaust would not have happened without incitement also wondered "how in those circumstances, the inciters and organizers of the crime should be allowed to escape punishment, when they were the ones really responsible for the atrocities committed"?[105]

Yet some of the other drafters of the Convention hesitated even to criminalize incitement to genocide. The U.S. delegate to the Genocide Convention, for example, sought to have the incitement provision altered,[106] and after that effort failed, twice voted against the Convention entirely.[107] Because it is a form of speech, which is protected in some measure by the domestic laws of most countries (none more zealously than those of the United States), incitement to genocide is still one of the most controversial crimes in international criminal law.

After Harry Truman made the United States the first country to sign the Genocide Convention in December 1948, the U.S. Senate refused to give advice and consent to ratification for nearly 40 years, in part because of American concern that criminalizing incitement to genocide would conflict with the First Amendment.[108] Although the Senate finally permitted ratification of the Convention in 1986, it did so with a reservation, aimed at the incitement provision, which states the Senate's understanding "[t]hat nothing in the Convention requires or authorizes

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THE RWANDA GENOCIDE, *supra* note 2, at 136, 138–39 (a Hutu journalist describes how he became "one of the targets of the Hutu militia" because he was perceived as sympathetic to Tutsis).

104. *See, e.g.*, SCHABAS, *supra* note 38, at 257.

105. U.N. GAOR, 6th Comm., 3d Sess., 84th mtg. at 219, U.N. Doc. A/C.6/SR.84 (Oct. 20, 1948).

106. U.N. Econ. & Soc. Council [ECOSOC], *Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat*, U.N. Doc. E/623 at 14 (Jan. 30, 1948).

107. U.N. Econ. & Soc. Council [ECOSOC], *Ad Hoc Committee on Genocide: Summary Record of the Twenty-Fourth Meeting*, U.N. Doc. E/AC.25/SR.24 at 7 (May 12, 1948).

108. Lawrence LeBlanc writes:

> There was extensive debate…over the issue of the "direct and public incitement to commit genocide" clause of Article III. The issue had been a serious one during the drafting stage as well, with a U.S. representative asserting that the incitement clause could create problems for the United States under the First Amendment constitutional guarantees to free speech and expression.

LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 147 (1991).

legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."[109]

A. Treaty Law

1. Genocide Convention

As mentioned above, incitement to genocide is listed as one of five punishable acts under Article III of the Genocide Convention, which calls it "[d]irect and public incitement to commit genocide."[110] After intense debate, the Ad Hoc Committee rejected proposals that would have criminalized hate speech and propaganda, and defined incitement broadly. The U.N. Secretariat's draft convention, for example, included a provision that would have criminalized all forms of public propaganda tending to provoke genocide, not only direct incitement.[111] The Ad Hoc Committee for the Convention rejected that definition, and instead suggested prohibiting direct incitement, whether public or private, and "whether such incitement be successful or not."[112] Yet another proposal, advanced by the Soviet Union, could have allowed broad repression in the name of preventing incitement to genocide. Specifically, this proposal would have provided for the disbanding of organizations that allegedly aspired to "inciting racial, national or religious hatred, or the commission of Genocide."[113]

The drafters of the Convention dismissed the Soviet proposal and further narrowed their definition to "direct" action—that is, incitement that "calls for" genocide.[114] Finally, the drafters omitted the phrase "whether such incitement be successful or not" but did not insert any language limiting the crime to successful incitement.[115] This has been interpreted to mean that incitement can be committed even if no genocide ensues.[116]

109. 132 CONG. REC. S1355-01 (daily ed. Feb. 19, 1986).
110. Genocide Convention, *supra* note 32, art. 3(c).
111. ROBINSON, *supra* note 38, at 66.
112. *Id.* at 66–67.
113. *Id.* at 68.
114. *Id.* at 67.
115. *Id*.
116. *See supra* note 42.

2. Statutes of International Criminal Tribunals

The Statutes of the ICTY and ICTR each replicate the Genocide Convention's provision on incitement to genocide in Article 4(3)(c)[117] and Article 2(3)(c),[118] respectively. The Statute of the International Criminal Court (ICC) also includes direct and public incitement to commit genocide, based on the Genocide Convention except that incitement to genocide appears separate from the article on genocide.[119] At the ICC drafting conference, efforts were made to expand the crime of incitement to cover other core crimes, but these efforts ultimately failed.[120]

B. Caselaw

1. Nuremberg Tribunal

The International Military Tribunal (IMT) at Nuremberg tried two defendants for acts tantamount to incitement to genocide. Since the crime was not yet known as incitement to genocide, both defendants were charged instead with crimes against humanity.

a. Streicher

Julius Streicher was the editor of *Der Stürmer*, a violently anti-Semitic German weekly newspaper published from 1923 to 1945.[121] The IMT found that Streicher "infected the German mind with the virus of anti-Semitism and incited the German people to active persecution" in "speeches and articles, week after week, month after month."[122] In a lead article in September 1938, Streicher—using the technique of describing future genocide victims as vermin, discussed above in Part II—"termed the Jew a germ and a pest, not a human being, but 'a parasite,

117. *Compare* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 4(3)(c), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (May 25, 1993), *with* Genocide Convention, *supra* note 32, art. 3(c).

118. *Compare* Statute of the International Criminal Tribunal for Rwanda art. 2(3)(c), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994), *with* Genocide Convention, *supra* note 32, art. 3(c).

119. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 25(3)(e), 2187 U.N.T.S. 90 (entered into force July 1, 2002).

120. William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141, 156 (2000).

121. PROCEEDINGS: TRIAL OF GERMAN MAJOR WAR CRIMINALS, *supra* note 84, at 501.

122. *Id.*

an enemy, an evildoer, a disseminator of diseases who must be destroyed in the interest of mankind.'"[123]

In May of 1939 Streicher wrote: "A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch."[124] Like Goebbels, Streicher accused the Jews of wanting to murder Germans, using the technique of "accusation in a mirror" described above in Part II. Streicher claimed that he had been calling not for the literal extermination of Jews, but only for their classification as aliens. But the Nuremberg prosecutors showed that he continued to write inciting articles after he knew that hundreds of thousands of Eastern European Jews had been massacred.[125] Streicher was ultimately convicted of committing a crime against humanity and hanged.[126]

b. Fritzsche

Hans Fritzsche, head of the Radio Division of the German Propaganda Ministry, was accused of "deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities"[127] and, notably, with "having used his official and nonofficial influence to 'disseminate and exploit the principal doctrines of the Nazi conspirators.'"[128] Unlike Streicher, Fritzsche was acquitted by the IMT. Although he had made intensely anti-Semitic broadcasts and blamed the Jews for the war, the Tribunal found that his speeches "did not urge persecution or extermination of Jews" as Streicher's writings had.[129] Fritzsche's specific intent was not clear, and his language was not "direct" enough—he did not clearly call for killing.[130] In addition, the Tribunal found that Fritzsche had not been influential enough among

123. *Id.*

124. *Id.*

125. *Id.* at 502. The Tribunal carefully noted the sources of Streicher's knowledge, including his own press photographer who traveled to Eastern European Jewish ghettos in 1943, and a Jewish newspaper, *Israelitisches Wochenblatt*, to which Streicher subscribed. The *Wochenblatt* published tallies of Jewish dead—125,000 in Romania, 85,000 in Yugoslavia, 700,000 in Poland—which Streicher quoted in his own newspaper, commenting, "This is not a Jewish lie." *Id*.

126. MARTIN GILBERT, THE SECOND WORLD WAR: A COMPLETE HISTORY 731 (2004).

127. PROCEEDINGS: TRIAL OF GERMAN MAJOR WAR CRIMINALS, *supra* note 84, at 526.

128. B.S. MURTY, PROPAGANDA AND WORLD PUBLIC ORDER: THE LEGAL REGULATION OF THE IDEOLOGICAL INSTRUMENT OF COERCION 144 (1968).

129. PROCEEDINGS: TRIAL OF GERMAN MAJOR WAR CRIMINALS, *supra* note 84, at 526.

130. *Id*.

the Nazi leaders because he had little control over policymaking. In a strong dissent, however, the Soviet judge argued that Fritzsche had been a powerful, well-informed propagandist.[131]

The following year, a German court conducting de-Nazification trials prosecuted Fritzsche again, placing him in the category of the most-culpable Nazi war criminals and sentencing him to nine years of hard labor.[132] When Fritzsche appealed this judgement and sentence, he lost. The court made it clear that Fritzsche had been convicted "for anti-Semitic propaganda per se, without additional calls for acts of violence."[133] If he did not call for violence, he did not commit incitement to genocide as it is now understood. However, as the court noted, his speech bore some of the hallmarks of that crime: he had strong influence over his audience, the audience had already been subjected to hate speech, and he practiced "accusation in a mirror."

2. United Nations Ad Hoc Tribunals

The ICTY has not seen a case or even an indictment for incitement to genocide, though the Tribunal has long noted that inflammatory speech played a key role in the Bosnian conflict. At the ICTY's first trial, witness Edward Vulliamy described it as "sort of a hammer bashing on people's heads."[134]

At this writing, the ICTY is beginning a trial that will focus on dangerous speech, which the Tribunal's prosecutors have described as a form of persecution. Vojislav Seselj, a Serbian politician who turned himself in to the Tribunal five years ago, was indicted for crimes against humanity and war crimes, including "war propaganda and incitement of hatred towards non-Serb people."[135] According to his indictment, "[i]n public speeches [he] called for the expulsion of Croat civilians from parts of the Vojvodina region in Serbia...and thus instigated his followers and the local authorities to engage in a persecution campaign against

131. Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet member), Nuremberg 30th September and 1st October 1946, Cmd. 6964, Misc. No. 12, at 132 (London: H.M.S.O. 1946), *reprinted at* http://www.yale.edu/lawweb/avalon/imt/proc/juddiss.htm#fritzsche.

132. Timmermann, *supra* note 38, at 829 (citing Hans Fritzsche Appeals Judgment, Ber.-Reg.-Nr. BKI/695, Berfungskammer I, Nürnberg-Fürth, Sept. 30 1947, Staatsarchiv München, SpKa Karton 475, p. 8).

133. *Id.* at 830.

134. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 96 (May 7, 1997).

135. Prosecutor v. Seselj, Case No. IT-03-67, Third Amended Indictment, ¶ 10(c) (Dec. 7, 2007).

the local Croat population."[136] This trial may break new ground for criminalizing propaganda in international law—or it may limit the crime to speech that instigates a specific audience to immediate action.

The ICTR has tried three cases on incitement to genocide and accepted two guilty pleas. And for its part, the ICC has already made one indictment for incitement to genocide.

a. Instigation Cases: *Akayesu* and *Niyitegeka*

Jean-Paul Akayesu, the *bourgmestre*, or mayor, of the Rwandan township of Taba,[137] was the first person prosecuted by the ICTR for incitement to genocide, and for genocide itself. Early in the morning on April 19, 1994, Akayesu had come upon a crowd of more than 100 people standing near the corpse of a young Hutu militiaman.[138] Akayesu gave a speech, exhorting the crowd to unite against the "sole enemy" which he described as the accomplices of the Inkotanyi, or Tutsi rebels who had been fighting to overthrow the Hutu-led government of Rwanda.[139]

A three-judge ICTR panel found that Akayesu's audience had understood his speech as a call to exterminate the Tutsi people.[140] The judges were also convinced that Akayesu knew his speech would be understood that way, since genocide had already begun elsewhere in Rwanda, and since genocidal militias had already formed in Taba. Hundreds of Tutsi were in fact killed in Taba in the days after Akayesu's speech. In September 1998 the Tribunal convicted Akayesu not only of genocide (making his case the first such conviction ever) but also of "direct and public incitement to commit genocide."[141]

Although Akayesu made his speech in person, the trial chamber made a point of interpreting "direct and public" to include many forms of communication, including broadcast:

> Direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of

136. *Id.* ¶ 10(d).
137. Prosecutor v. Akayesu, Case No. ICTR 96-5-T, Judgment, ¶ 54 (Sept. 2, 1998).
138. *Id.* ¶¶ 210–11.
139. *Id.* ¶ 334.
140. *Id.* ¶ 365.
141. *Id.* ¶ 674.

> written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.[142]

Akayesu's speech was the easiest form of incitement to identify. Also known as instigation,[143] it functions like a command: a speaker addresses a particular crowd, knowing that he or she has strong influence or authority over the minds of the listeners and that the listeners are already primed to commit violence. Immediately or soon afterward, the crowd acts in response to the speech.

This is the sort of incitement that John Stuart Mill proscribed with his famous "corn dealer" illustration,[144] except that in Akayesu's case, the ICTR found that his speech was incitement to commit genocide and not incitement to hatred or some other form of violence. If a similar speech were given in the United States—with an equal probability that the crowd would react violently—the speaker could be prosecuted under U.S. law without disturbing the First Amendment, since the speech was "directed to inciting or producing imminent lawless action" and, in addition, it was "likely to incite or produce such action."[145]

However, the type of incitement at issue in Akayesu's case is not the crime that catalyzes genocide, as described in Part II. Since he spoke after genocide had already started, Akayesu's speech may have influenced who killed whom in the Taba district, but even if he had not spoken, genocide would have taken place. Silencing speech such as Akayesu's would not prevent another genocide, in other words.

Eliézer Niyitegeka's was another instigation case.[146] As Rwandan Minister of Information during the genocide, Niyitegeka ordered an attack on Tutsis who had taken refuge inside a church[147] and personally

142. *Id.* ¶ 559.

143. As Mordecai Kremnitzer and Khaled Ghanayim have pointed out, in some legal traditions, such as Israeli and Continental law, public incitement is directed at a large group of persons, neither public nor defined, whereas instigation is directed at a specific, defined group or individual. According to this distinction, Akayesu committed mere instigation. *See* Mordechai Kremnitzer & Khaled Ghanayim, *Incitement, Not Sedition*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 147, 162–63 (David Kretzmer & Francine Kershman Hazan eds., 2000).

144. "An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but [not] when delivered orally to an excited mob assembled before the house of a corn dealer." JOHN STUART MILL, ON LIBERTY 121 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

145. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

146. Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment and Sentence (May 16, 2003).

147. *Id.* ¶¶ 69–71.

took part in other massacres. On the evening of May 13, 1994 he shouted through a loudspeaker to a crowd of some 5,000 people, thanking them for "good work," by which, the ICTR found, he meant killings that had taken place earlier that day.[148] In the same speech, Niyitegeka organized the next day's killings of Tutsi in Bisesero.[149] He was convicted of incitement to genocide, genocide, conspiracy to commit genocide, and murder, and was sentenced to life imprisonment in May 2003.[150]

b. Guilty Pleas: *Kambanda* and *Ruggiu*

Jean Kambanda was the Rwandan prime minister during the 100 days of the genocide. Speaking over RTLM, he said that the station was "an indispensable weapon in the fight against the enemy."[151] In his guilty plea before the ICTR, to incitement to genocide and other crimes, Kambanda conceded that he had given speeches inciting the population to commit violence against Tutsi and moderate Hutu, and Kambanda acknowledged uttering a phrase that was later repeatedly frequently: "you refuse to give your blood to your country and the dogs drink it for nothing."[152] Notably, this phrase was not an explicit call for killing. Kambanda was sentenced to life in prison.[153]

Georges Ruggiu, a Belgian national who worked as a broadcaster for RTLM from January 6, 1994 to July 14, 1994,[154] pled not guilty to incitement to genocide at first but later changed his mind.[155] Asked to explain why, he said:

> I realised that some persons in Rwanda had been killed during the events of 1994, and that I was responsible and guilty of those facts, that there was a direct link with what I had said and their deaths and under these circumstances I believed that I had no other choice than to plead guilty.[156]

148. *Id.* ¶ 142.
149. *Id.*
150. *Id.* ¶ 480.
151. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment, ¶ 39 (Sept. 4, 1998).
152. *Id.*
153. *Id.* at Verdict.
154. Prosecutor v. Ruggiu, Case No. ICTR 97-32-1, Judgment, ¶ 43 (June 1, 2000).
155. *Id.* ¶¶ 53–55 (describing Ruggiu's guilty plea).
156. *Id.* ¶ 45 .

c. The *Media* Case

Even while the ICTR was conducting the trial of Akayesu, the court's first case for genocide and incitement to genocide, it had embarked on more "difficult" cases, indicting three other men for, among other crimes, incitement to genocide that was, the prosecutor charged, committed before the genocide began. Ferdinand Nahimana was a professor of history and founder of RTLM,[157] the radio station that became famous for its anti-Tutsi broadcasts, starting in July 1993, nine months before the Rwandan genocide began. Jean-Bosco Barayagwiza, the second defendant, was a lawyer and an RTLM executive.[158] Hassan Ngeze, the third defendant, had been the owner and editor of a Rwandan tabloid[159] called *Kangura* that, beginning in 1990, printed reams of anti-Tutsi vitriol, but with no explicit exhortation to kill. The Tribunal joined the three cases into what came to be known as simply the "Media" trial. It lasted three years and included testimony from more than one hundred witnesses. Finally, in December 2003, a three-judge panel of the ICTR convicted all three defendants of incitement to genocide and other crimes. The Tribunal found that Nahimana, for example, "[w]ithout a firearm, machete or any physical weapon, [had] caused the deaths of thousands of innocent civilians."[160]

The court's 351-page judgment mixed legal standards and failed to explain clearly which acts constituted incitement to genocide and why. For instance, the decision notes that *Kangura* editorials described Hutu people as "generous and naïve, while the Tutsi were portrayed as devious and aggressive."[161] The court did not explain, however, if this constituted incitement to genocide, and if so, why. Instead, the ICTR devoted most of its legal analysis of incitement to genocide to a review of the international law on racial discrimination and hate speech, based on provisions in three treaties, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). The Tribunal discussed the evidence at hand—RTLM broadcasts, *Kangura* articles, and testimony from myriad wit-

157. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1099 (Dec. 3, 2003).
158. *Id.* ¶ 1100.
159. *Id.* ¶ 1101.
160. *Id.* ¶ 1099.
161. *Id.* ¶ 176.

nesses about what they had read and heard—in terms of that law, opining for example that "speech constituting ethnic hatred results from the stereotyping of ethnicity combined with its denigration."[162] Although the Tribunal made some effort to distinguish hate speech from protected speech,[163] it did not distinguish hate speech from incitement to genocide.

The court's decision did focus on incitement well before genocide, citing a witness who captured eloquently why early incitement is so important and so dangerous. What RTLM did, the witness said, was "almost to pour petrol – to spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country."[164] The *Media* decision cited the remark approvingly but failed to explain whether all of the drops of petrol constituted incitement to genocide, or only some of them, and if the latter, how to draw the line.

In the appeals chamber's 528-page decision, handed down at the end of 2007, it concluded that the ICTR had erred in not explaining which of the defendants' speech acts constituted incitement to genocide.[165] So the appeal panel took on the task itself, reviewing each RTLM broadcast mentioned in the tribal chamber's decision, one by one. (In dissent, Judge Theodore Meron pointed out that this sort of review is not the work of an appeals chamber, and argued that the case should have been remanded.)[166]

In a holding that seems to limit the ambit of incitement to genocide, the appeals panel found that none of the broadcasts *before* the genocide constituted incitement to genocide—only broadcasts after the genocide began. In example after example, the appeals panel wrote, "in the absence of other elements of proof in this regard, the appeals chamber cannot conclude beyond a reasonable doubt that the broadcast directly and publicly incited genocide."[167] Disappointingly, it seems that the appeals panel drew a critical line based on a lack of evidence, not a legal distinction.

The appeals panel affirmed the Tribunal's finding that the language of incitement to genocide need not be explicit, and that a court must

162. *Id.* ¶ 1021.

163. *Id.* ¶¶ 978–1010.

164. *Id.* ¶ 436.

165. The Appeals Chamber reduced the sentences of all three defendants because of errors by the Trial Chamber, although it concurred that all three defendants were guilty of incitement to genocide and other crimes.

166. Nahimana c. Le Procureur, Affaire No. ICTR 99-52-A, Arrêt, ¶¶ 1–2 (Nov. 28, 2007) (Meron, J., dissenting).

167. *Id.* ¶¶ 744, 745, 748 (majority opinion).

consider the cultural context of speech (what the speech's audience understood it to mean) to carry out the relevant inquiry.[168] But it erred, in my view, when it applied its own rule, by ruling out incitement to genocide where a speech could be subject to more than one interpretation.[169] The latter is the same standard implicitly used by the Canadian judge who believed Mugesera was a fervent supporter of democracy. The proper question is not how the speech could have been understood but, instead, what its audience actually understood.

Imposing another major limitation, the appeals panel held that the ICTR had no jurisdiction over incitement to genocide committed before 1994.[170] (The ICTR had overcome the jurisdictional problem by finding that incitement to genocide is a continuing crime that began before 1994 but was not completed until that year.[171]) Judge Mohammed Shahabudeen dissented from this portion of the decision eloquently, insisting that "the genocide did not spring from nowhere"[172] because "incitement operates by way of the exertion of 'influence,'" and "[i]nfluence is a function of the processes of time."[173]

3. The Supreme Court of Canada

Mugesera gave his notorious speech to a crowd of militants[174] of the ruling MRND[175] party in Kabaya, Gisenyi prefecture. The speech was tape-recorded and later published in a Rwandan newspaper (and therefore widely disseminated). The speech was then widely criticized by Rwandan commentators. For example, one commentator referred to it as a "bald summons to slaughter."[176] Professor Jean Rumiya, a former colleague of Mugesera's, wrote an open letter expressing outrage at what he called a "true call to murder," and noted that in the speech Mugesera had used some of the same language that had been heard at then-recent

168. *Id.* ¶ 739.

169. *Id.* ¶ 746 (analyzing RTLM broadcast of March 16, 1994: "[T]he appeals chamber is not convinced that this is the only reasonable interpretation of this broadcast.").

170. *Id.* ¶¶ 314–17.

171. Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 104 (Dec. 3, 2003).

172. *Nahimana*, Affaire No. ICTR 99-52-A, Arrêt, ¶ 41 (Shahabudeen, J., dissenting).

173. *Id.* ¶ 25 (Shahabudeen, J., dissenting).

174. Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] S.C.C. 40, ¶ 24.

175. The "MRND" is the National Republican Movement for Development and Democracy, whose youth militia, the *Interhamwe*, committed a large proportion of the killings in the 1994 genocide.

176. DES FORGES, *supra* note 1, at 86.

massacres of Tutsis in northwestern Rwanda.[177] After Rumiya's letter, the Rwandan Minister of Justice issued a warrant to arrest Mugesera for incitement to violence, and Mugesera disappeared.[178]

In August 1993, Mugesera entered Canada and settled in Quebec with his wife and five children. The November speech caught up with him, however, after "a long campaign by members of Canada's Rwandan community."[179] A Canadian immigration adjudicator found on July 11, 1996 that Mugesera had committed direct and public incitement to genocide in violation of the Genocide Convention and should therefore be deported from Canada. Mugesera appealed, and in November 1998, a three-judge immigration appeals bench upheld the adjudicator's ruling in an opinion containing paragraph-by-paragraph analysis of a key Mugesera speech, making a searching effort to understand what he had said.[180] Mugesera implored his listeners not to leave themselves open to invasion, and said "These people called *Inyenzis* [cockroaches] are now on their way to attack us."[181] And in one of the speech's most memorable lines, he gave future genocidaires a self-defense justification for killing, predicting that they would be the victims of genocide if they did not kill: "know that anyone whose neck you do not cut is the one who will cut your neck."[182] Mugesera's speech indeed "sparked a series of atrocities directed against Tutsi in the Gisenyi region of the country."[183]

Mugesera again appealed the decision to deport him, and this time the Federal Court of Appeal reversed the lower courts, finding that Mugesera had given only an impassioned political speech. Commenting on a part of the speech in which Mugesera called for then-prime minister Dismas Nsengiyaremye to be sentenced to death, the appeals court wrote, "[w]ith respect to this paragraph, we should mention that Mr. Mugesera is entitled to hold political opinions that may not necessarily be shared by everyone."[184]

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177. *Id.* (citing Jean Rumiya, Lettre ouverte à M. Mugesera Léon, Butare, Dec. 9, 1992 (International Commission)).

178. *Id.*

179. Schabas, *supra* note 5, at 530.

180. Mugesera v. Canada, [1998] I.A.D.D. No. 1972 (QL); *see also* Schabas, *supra* note 5, at 532–33 (noting that Canada does not intend to try Mugesera in criminal court nor to extradite him to Rwanda to stand trial there).

181. Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] S.C.C. 40, app. III ¶ 13.

182. *Id.* ¶ 76.

183. Schabas, *supra* note 120, at 144.

184. *Mugesera*, [1998] I.A.D.D. No. 1972, ¶ 162.

Finally, the Canadian government appealed to the Canadian Supreme Court, where Mugesera lost. According to the civil standard of the balance of probabilities (since it was a deportation case and not a criminal trial), the Court found that Mugesera's speech was direct and public since it had been "delivered in a public place at a public meeting and would have been clearly understood by the audience."[185] Because, as it noted, there is no causation requirement for incitement to genocide, the Court did not concern itself with the delay between Mugesera's speech and the outbreak of genocide.[186] It deduced the requisite intent from the fact that Mugesera knew that massacres of Tutsis were already taking place.

Like the *Media* judgment, the Canadian Supreme Court's decision in this case was correct, but the court sidestepped vexing issues in the case. What if Mugesera had spoken a year earlier, or to a less inflamed crowd, or before massacres had taken place? Would the same speech still have constituted incitement to genocide? A year and a half after his famous speech, when Mugesera was far away in Quebec and the genocide began in Rwanda, "members of the interhamwe often recited favorite phrases [from the speech] as they went forth to kill."[187] For how long can a speaker be held responsible, when someone else is later motivated by his words? The jurisprudence leaves these questions unanswered.[188]

IV. USING THE REASONABLY POSSIBLE CONSEQUENCES TEST: A SIX-PRONG INQUIRY

To recommend a reasonably possible consequences test, especially if incitement to genocide can be committed even when the consequences do not actually ensue, is to beg the question: how can one gauge when there is (or was) a reasonable possibility that a particular speech will lead to genocide? Past campaigns of incitement to genocide suggest several factors, listed above in Part I and described in more detail below.

The reasonably possible consequences test does not displace the existing legal standard for incitement to genocide, which requires that incitement to genocide be "direct and public" and that the speaker commit

185. *Mugesera*, [2005] S.C.C. 40, ¶ 94.

186. *Id.* ¶ 102.

187. GOUREVITCH, *supra* note 47, at 96.

188. William Schabas, *The Genocide Convention at Fifty*, at 8 (U.S. Inst. of Peace, Special Report No. 41, Jan. 7, 1999) ("Thus, the application of this important obligation to prevent incitement to genocide remains muddied by divergent practice and confused jurisprudence.").

it with the specific intent to bring about genocide. The test is not a new element of the crime. It should, instead, be used to clarify the legal standard that already exists.

In my view, all six prongs must be satisfied for a court to find that incitement to genocide has been committed by a defendant. Several of the prongs characterize other crimes, including forms of hate speech. For instance, a call for violence might be incitement to murder, without the other characteristics of incitement to genocide that are embodied in the test. Similarly, hate speech often dehumanizes members of the group that it targets, for instance by comparing them to animals or insects. When all six prongs apply, however, the danger of genocide must be real and, significantly, a speaker with influence over an audience must be aware of the danger.

The inquiry is intended to aid in interpretation, to promote a coherent international jurisprudence in this area, and, especially, to give courts a framework for explaining how they draw the line between incitement to genocide and hate speech in each case. A court might find, for example, that only some of the prongs apply to a particular speech, and identify it as hate speech.

A. Was the Speech Understood by Its Audience as a Call To Commit Genocide?

The relevant question is not the plain meaning of a speech, but how it was understood by the audience. As the ICTR first pointed out in *Akayesu*, even "direct" language need not be explicit. Inciters do not always say "go and kill" in so many blunt words—especially when they are laying the crucial groundwork for genocide. The ICTR judges were "of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience."[189] The *Media* appeals panel made a point of agreeing with this view, reiterating that speech must be understood in the context in which it was delivered, and that the meaning of words such as *inyenzi* can evolve over time.[190] This standard recognizes that the meaning and the effect of speech can depend on the cultural agar into which it is thrown, as much as on the plain meaning of the words themselves.

189. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 557 (Sept. 2, 1998).
190. Nahimana c. Le Procureur, Affaire No. ICTR 99-52-A, Arrêt, ¶ 739 (Nov. 28, 2007).

It is difficult, of course, to gauge the meaning and effect of speech, especially years after the fact in a different country and in translation.[191] Courts must rely on detailed factual investigation to determine how a speech was actually understood.

B. Was the Speaker Able To Influence the Audience, and Was the Audience Able To Commit Genocide?

As illustrated in the Times Square hypothetical above, only some speakers *can* commit incitement to genocide—as much as others might wholeheartedly wish to do so—because only some have adequate influence or authority over the audience. In the same way, not all audiences are able to commit the genocide that a speaker seeks.

Influence can come from many sources, and the ICTR's prosecutors have correctly understood that inciters need not be government officials. They may be political leaders with de facto authority, or cultural icons like Simon Bikindi who put their fame into the service of a genocidal cause (and whose influence over an audience may be greater, in fact, than that of any political leader).

Even a little-known figure like the Belgian RTLM broadcaster Georges Ruggiu can exert power over an audience. His own influence derived from the immense popular appeal of the radio station that employed him. A medium can confer authority. "In Rwanda the radio was akin to the voice of God," wrote Romeo Dallaire, the Canadian general who directed the UN mission to Rwanda before and during the genocide, "and if the radio called for violence, many Rwandans would respond, believing they were being sanctioned to commit these actions."[192]

To apply this prong of the test, courts must examine the form and degree of influence that the speaker had over the audience, and the audience's capacity to commit genocide against the intended victims. If either the speaker or the audience is disempowered, then genocide cannot ensue and incitement to genocide cannot occur.

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191. *See, e.g.*, Zahar, *supra* note 10, at 41 (describing the ICTR's "unusually difficult task: to pass judgment, in English, on alleged incitement, in Kinyarwanda, before defendants who were following the proceedings in French translation, using texts which are (plainly) second-rate English translations of French translations of the original Kinyarwanda recordings").

192. DALLAIRE, *supra* note 82, at 272.

C. Had the Targeted Group Suffered Recent Violence?

Before the full-scale genocides began in Europe and in Rwanda, there were outbreaks of brutal violence against the eventual victims of genocide. These could be called acts of genocide, and it might then be argued that this test for incitement to genocide is circular, if incitement to genocide must be preceded by genocide. Not all acts of violence or even killings are acts of genocide, however.[193]

What is clear is that after an outbreak of violence against the targets of a poisonous speech, including but not limited to killings, both speaker and audience must understand any call to action, no matter how elliptically it is phrased, in a different and more dangerous light. If a speaker calls, even ambiguously, for genocide after an already-established pattern of violence, it is much more likely that an audience will react. For that reason, this prong helps to distinguish hate speech from incitement to genocide.

In Nazi Germany, acts of violence against Jews accelerated in the course of the 1930s, culminating in Kristallnacht, a pogrom during the night of November 9, 1938, in which civilians joined paramilitary troops of the SA and SS to raid and wreck more than 8,000 Jewish homes and businesses, and to kill more than 90 Jews.[194]

There was also a steady pattern of previous violence in Rwanda, often in response to incitement. The report entitled "The Preventable Genocide," written after the genocide by an international panel of experts for the Organization of African Unity, listed instances of this violence:

> Massacres of Tutsi were carried out in October 1990, January 1991, February 1991, March 1992, August 1992, January 1993, March 1993, and February 1994. On virtually each occasion, they were carefully organized. On each occasion, scores of Tutsi were slaughtered by mobs and militiamen associated with different political parties, sometimes with the involvement of the police and army, incited by the media, directed by local government officials, and encouraged by some national politicians.[195]

One especially notorious case, known as the Bugesera massacre, followed incitement of the "accusation in a mirror" variety. In March 1992, Ferdinand Nahimana, one of the defendants in the *Media* trial,

193. See *supra* note 37 for further discussion of acts of genocide.

194. *See, e.g.*, 1 SAUL FRIEDLANDER, NAZI GERMANY AND THE JEWS 269–76 (1998).

195. PREVENTABLE GENOCIDE, *supra* note 3, at Ch. 7.15.

gave Radio Rwanda journalists a falsified communiqué that purported to warn against imminent attacks by Tutsi in Bugesera, a town south of Kigali. The communiqué was broadcast repeatedly, Hutu leaders in Bugesera echoed it, and Hutu civilians and militiamen massacred some 200 Tutsis.[196] When Mugesera gave his famous speech eight months later, both he and his audience knew he was speaking in the aftermath of the Bugesera massacre.

D. Was the "Marketplace of Ideas" Still Functioning?

Poisonous speech is much more powerful, more likely to overwhelm the listeners' own moral compasses, in the absence of alternative speech that might "cure" it. Therefore inciters remove sources of non-poisonous speech from public discourse, and make it dangerous for anyone to speak up against the campaign of incitement. In societies with news media that broadcast a variety of opinions, inciters shut down alternative sources of information so their speech cannot be countered by other voices.

In Nazi Germany, for example, within a few days of Hitler's rise to power in 1933, his chief of propaganda, Goebbels, exulted that "[r]adio and press are at our disposal" and began banning anti-Nazi newspapers.[197] Goebbels also personally silenced non-Nazi journalists, by firing them from their jobs, arresting them, or driving them into exile.[198] In Rwanda, RTLM steadily displaced Radio Rwanda, the official government station, as the primary source of news, and it quickly became dangerous to criticize RTLM.[199] When alternative news is no longer disseminated in the media, the marketplace of ideas withers, and the remaining media become unchallenged.

E. Did the Speaker Dehumanize the Target Group, and Justify Killing?

As described in Part II, inciters to genocide practice characteristic techniques that lay the psychological groundwork for genocide. The first of these, it will be recalled, is to describe a group of people as non-humans, so that it will seem acceptable to kill them.

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196. For accounts of the Bugesera massacre and others in the same period, see DES FORGES, *supra* note 1, at 89; TEMPLE-RASTON, *supra* note 12, at 27.

197. *See* WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 189 (1960).

198. *See* HERF, *supra* note 50.

199. *See generally* Li, *supra* note 59.

The second technique goes further, making genocide seem not only acceptable but necessary. The inciter accuses the future victims of plotting the same crimes that are soon to be perpetrated against them, and represents the victims as such a severe threat that genocide would be nothing more than self-defense.

Mugesera's speech, for example, contained instances of both of these techniques. He referred to the Tutsi as cockroaches (this was by then common parlance among Hutu leaders) and he used the technique of "accusation in a mirror" extensively. His speech was, according to Alison Des Forges, the Human Rights Watch expert on Rwanda, "the best-known expression" before the genocide of the idea that the Hutu people themselves faced genocide, or as Des Forges put it, an "overwhelming threat" to their existence.[200]

The last three techniques discussed in Part II are: first, to use perverse euphemisms, second, to describe atrocities as humane or morally justified, and last, to characterize members of the dominant group who sympathize with the intended victims, as if they were members of that same group.

F. Had the Audience Already Received Similar Messages?

Repetition is a critical reason why people become convinced of false messages, and they cannot be persuaded to commit genocide overnight, so incitement to genocide follows repeated hate speech. As Edward Vulliamy, a witness at the ICTY's first trial, said,

> It was a message of urgency, a threat to your people, to your nation, a call to arms, and, yes, a sort of an instruction to go to war for your people.... It pushed and pushed. It was rather like a sort of hammer bashing on peoples' heads I suppose.[201]

Similarly, a witness at the *Media* trial spoke of "spreading petrol little by little" so that eventually the country could burst into genocide.[202]

Inciters know that the message must be repeated over and over, and when they repeat language that they know has previously sparked violence, they betray their own intent to cause such violence. For example in Jean Rumiya's open letter in response to Mugesera's November 1992 speech, he pointed out that Mugesera had used some of the same

200. *See* DES FORGES, *supra* note 1, at 83.

201. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 96 (May 7, 1997).

202. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1099 (Dec. 3, 2003).

phrases that had been heard at then-recent massacres of Tutsis in northwestern Rwanda.[203]

Like repetition, the techniques of good performance also make a message more compelling, although they are not required for incitement to genocide. For example, RTLM made sure its broadcasts were entertaining, using catchy music (including Simon Bikindi's songs), off-color jokes, and an informal style.[204] These, together with the station's endlessly repeated propaganda itself, helped to create a false impression of trustworthiness, and to drive the message into listeners' minds.

V. APPLYING THE TEST

To demonstrate the test, this section applies it to the facts of the Mugesera, Bikindi, and Ahmadinejad cases.

In the Mugesera case, much of the disagreement among Canadian judges centered on the test's first prong: the meaning of the speech when and where it was given. After reviewing the voluminous record, the Canadian Supreme Court became convinced that Mugesera's audience understood his coded language as a call to commit genocide against the Tutsi. Despite Mugesera's facially ambiguous language, the court found that the genocidal message "would have been clearly understood by the audience."[205]

As for other prongs of the test, Mugesera, a well-known political leader and government official, clearly had influence over his audience of MRND political party members, and the Tutsi had indeed suffered recent massacres after Hutu political leaders incited Hutu civilians and militiamen to attack Tutsi civilians.

The marketplace of ideas was badly damaged, if not dead, in 1992, according to observers like Thomas Kamilindi, a Hutu journalist then working at Radio Rwanda who attempted to lead a protest movement against severe censorship by the Hutu government. The protest "resulted in many threats against me," wrote Kamilindi, who then left Radio Rwanda because "it seemed impossible for me to bring about any change."[206] Finally, as discussed above, Mugesera did dehumanize the

203. *See* DES FORGES, *supra* note 1, at 86.

204. *See Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 440; Li, *supra* note 59, at 16. Li provides a detailed and thoughtful analysis of the "performative aspects" of RTLM.

205. *See* Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] S.C.C. 40, ¶ 94; *see also id.* ¶ 87 ("*Depending on the audience*, a particular speech may be perceived as direct in one country, and not so in another.") (emphasis in original).

206. Kamilindi, *supra* note 103, at 138.

target group and justify killing, and his audience had heard similar messages before. Based on these factors, which demonstrate a reasonable possibility that Mugesera's speech could have led to genocide, I concur with the Canadian Supreme Court that Mugesera committed incitement to genocide.

The second case is that of Simon Bikindi, the Rwandan pop star, whose trial is still underway at the ICTR in Arusha, Tanzania, at this writing. Bikindi's case is an unusual opportunity for the ICTR. First, if he is convicted of incitement to genocide, the verdict will draw more widespread attention than the ICTR usually commands because Bikindi is best-known as a popular singer and some observers will likely find it anathema to criminalize music. Second, the case against Bikindi contains an interesting mixture of allegations, some of which would constitute an instigation case like Akayesu's, and others that are more ambiguous. Since he played many roles before and during the genocide, Bikindi's case would allow the Tribunal to draw the line between hate speech and incitement to genocide – among the acts of one man.

According to the indictment, two months after the genocide began, in late June 1994 in Gisenyi prefecture, Bikindi operated a vehicle outfitted with a public address system and led a caravan of *Interahamwe* [paramilitary killers] on the main road between Kivumu and Kayove communes and announced: "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."[207]

If the evidence proves that allegation to their satisfaction, the ICTR judges could limit their ruling on incitement to genocide to that incident alone—there would be little confusion as to whether such conduct constitutes incitement. (All six prongs of the test above would be satisfied, but they would not be needed.) Alternatively, the Tribunal could focus on Bikindi's more ambiguous conduct, and explain when there was a reasonable possibility of genocide in response to it.[208]

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207. Prosecutor v. Bikindi, Case No. ICTR 2001-72-I, Amended Indictment Pursuant to Decisions of 11 May 2005 and 10 June 2005, ¶ 39 (June 15, 2005).

208. This is very unlikely, however, since the ICTR's jurisdiction is limited to crimes committed in 1994. In the *Media* decision, the ICTR reached speech uttered before 1994 by holding that incitement is a continuing crime, since it may continue to have effects long after the speech is uttered. But the appeals panel in the *Media* case disagreed. If incitement to genocide can be committed without an ensuing genocide, the panel reasoned, the crime must be completed as soon as the speech is made. The *Bikindi* Tribunal can be expected to follow this ruling, but it could still clarify the line between hate speech and incitement to genocide in dicta.

Bikindi composed Hutu solidarity songs as early as the 1980s, and that was surely not incitement to genocide. Somewhere in between his compositions of the 1980s and his public speech during the genocide, Bikindi began to incite, according to the ICTR prosecutors, playing a catalytic role by singing and speaking over RTLM radio, and even by working up crowds at political rallies as early as 1992. Those sessions were "often a prelude or a motivating factor in anti-Tutsi violence against individuals and property in the vicinity of those public gatherings,"[209] and his indictment alleges:

> During the period 1990 to 1994, Simon Bikindi composed, performed, recorded or disseminated musical compositions extolling Hutu solidarity and characterizing Tutsi as enslavers of the Hutu. These compositions were subsequently deployed in a propaganda campaign to target Tutsi as the *enemy*, or as *enemy accomplices*, and to instigate, incite, and encourage the Hutu population to separate themselves from the Tutsi and to kill them.[210]

If the Tribunal shows, rigorously and with clear explanations of its reasoning, which of these performances constituted incitement to genocide, it will have made an important contribution to the jurisprudence.

The Ahmadinejad "indictment" (actually a report recommending indictment, by the Jerusalem Center for Public Affairs)[211] is highly unlikely to give rise to a case at either the International Criminal Court or the International Court of Justice, the two Tribunals mentioned by the group calling for Ahmadinejad's indictment. But analysis of Ahmadinejad's remarks is nonetheless instructive.[212] To apply the test proposed above, one must ask whether Ahmadinejad's remarks could have incited an audience to participate in genocide.

First, were his remarks understood as a call to genocide? As noted above, there has been debate over the translation of Ahmadinejad's comments into English.[213] It is also unclear who the audience was. If it was the Iranian people, and if they understood the speech as a call to genocide, one must ask how much influence Ahmadinejad has over them, and whether that audience has the capacity to commit the feared

209. *Bikindi*, Case No. ICTR 2001-72-I, Amended Indictment, ¶ 33.

210. *Id.* ¶ 31.

211. JUSTUS REID WEINER, JERUSALEM CTR. FOR PUB. AFFAIRS, REFERRAL OF IRANIAN PRESIDENT AHMADINEJAD ON THE CHARGE OF INCITEMENT TO COMMIT GENOCIDE (2006), *available at* http://www.jcpa.org/text/ahmadinejad-incitement.pdf.

212. As mentioned above, *supra* note 28, Gregory Gordon discusses this case at length in a forthcoming article.

213. *See supra* note 25.

genocide. It seems unlikely that Iranian civilians can rise up to commit genocide against Israelis—more likely, the Iranian government might try to destroy Israel militarily, perhaps with the tacit support, but not the participation, of civilians. If the intended victims are the small Jewish population in Iran, the Iranian public would be entirely capable of genocide, but there do not seem to have been incidents of violence in response to inflammatory speech like Ahmadinejad's.[214]

One must also ask whether there are still alternative sources of information and opinion available to counter Ahmadinejad's speech. This depends, again, on who the audience is. Finally, did Ahmadinejad dehumanize the target population, and justify killing, and was he repeating a message that had been delivered before? If his statements refer to the state of Israel or the Israeli population rather than to another group of Jews, and if they were directed at the Iranian public, it seems that he did not commit incitement to genocide, since one cannot commit genocide against a state, and since his civilian audience does not have the capacity to commit genocide against the population of Israel. Although Ahmadinejad's speech is despicable, at this point there does not seem to be a reasonable possibility that it will cause genocide.

CONCLUSION

The confused state of the law on incitement to genocide, described above in order to clarify it, also illustrates a broader point about international criminal law. This relatively new, rapidly growing body of law can go astray easily when courts interpret it by grafting other law onto it,[215] or by trying to understand international crimes simply as large-scale versions of domestic offenses. For example, as argued above, incitement to genocide is not simply international hate speech. Now that the world has created its first permanent international criminal court, it is to be hoped that international criminal law will put down its own deeper roots as well.

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214. *See, e.g.*, Scott Peterson, *In Ahmadinejad's Iran, Jews Still Find a Space*, CHRISTIAN SCI. MONITOR, Apr. 27, 2007, at 1, *available at* http://www.csmonitor.com/2007/0427/p01s03-wome.html.

215. Another example that William A. Schabas has noted is the term "dolus specialis," which the ICTR and ICTY have used interchangeably with "specific intent" and "special intent," although "dolus specialis" is a concept used in a few civil law systems and does not have the same meaning as the other terms. William A. Schabas, *The* Jelisic *Case and the* Mens Rea *of the Crime of Genocide*, 14 LEIDEN J. INT'L L. 125, 129 (2001).