

## ELECTIONS AND ETHNIC VIOLENCE

This panel was convened at 10:45 a.m., Friday, March 25, by its moderator, Sarah Knuckey of the Center for Human Rights and Global Justice, New York University, who introduced the panelists: Peter Bartu of the University of California at Berkeley; Susan Benesch of the World Policy Institute; Jeff Fischer of Creative Associates; and Chidi Odinkalu of the Open Society Justice Initiative.\*

### ELECTION-RELATED VIOLENCE: THE ROLE OF DANGEROUS SPEECH

*By Susan Benesch<sup>†</sup>*

Even more than violence, inflammatory speech is a common feature of elections. In many cases, violence and fiery speech come hand in hand, by no coincidence. This juxtaposition gives rise to the case I wish to argue here: inflammatory speech provides opportunities for preventing violence in the context of elections, in which violence is very often related to ethnicity. However, it is critical to define such speech clearly, so that legitimate speech is not restricted. International law focuses on the link between speech and violence. Both human rights law and international criminal law single out forms of incitement for prohibition, but neither body of law defines these forms of incitement in enough detail to distinguish them reliably from other inflammatory speech.

To advance toward the twin goals of preventing election-related violence while protecting freedom of expression, I propose a more fine-grained category than treaty law provides: “dangerous speech,” or incitement that is likely to succeed in catalyzing violence. I have developed an analytical framework to identify this dangerous speech, and will conclude by describing it briefly.

Elections tend to foster inflammatory speech because they are tantamount to battles, sublimated to one extent or another. Political speakers exploit and inflame rancor between ethnicities or other groups, to bolster support within their own communities and attack their rivals, sometimes to the point of catalyzing mass violence. Often the goal is to sabotage an election, but violence may be used to influence the result of a vote as well.<sup>1</sup> As Chidi Odinkalu noted in his own remarks on this panel, where elections are peaceful and orderly, the rules are certain and the outcome is uncertain; by contrast, where electoral contestants resort to inflammatory speech and violence, they are often aiming for the reverse, namely, uncertain rules and a certain outcome.

Kenya has seen elections beset by inflammatory speech and violence all too often, most recently and catastrophically in 2007 and 2008. At the time of this Annual Meeting in March 2011, Cote d’Ivoire is, unfortunately, another example in the headlines, in the aftermath of two rounds of presidential elections in October and November 2010. More than 50 states have scheduled national elections for the remainder of this year and the next one, and ethnic

\* Peter Bartu, Jeff Fischer, and Chidi Odinkalu did not contribute remarks to the Proceedings.

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<sup>1</sup> Rep. of the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Election-Related Violence and Killing*, U.N. Doc. A/HRC/14/24/Add.7, at 5 (May 18, 2010) (by Phillip Alston) (“For the purposes of this report, election related killings may relate to election processes or outcomes. They include killings (i) designed to influence, or to prevent attempts to influence, an election outcome, (ii) that arise in the context of election processes, or (iii) that seek to promote or hinder election-related activity”), and at 8, citing Kimuli Kasara (“Kenyan politicians may use election ‘violence as a substitute for political inducements such as vote buying”).

or identity-based violence is a risk in many of them, including Kenya during its next presidential election planned for August 2012.

In such cases, political actors use inflammatory speech as a tool to foment violence, and/or to persuade audiences to condone violence carried out by members of their own group or ethnicity, ostensibly on their behalf. Dangerous inflammatory speech is characterized by certain hallmarks, from case to case, as briefly described below.<sup>2</sup> Since such speech precedes violence, it provides two distinct opportunities for violence prevention:

- (1) early warning
- (2) limiting violence by restricting the dangerousness of speech. It is important to note that this is not the same as limiting the speech itself. It is possible to limit the dissemination of speech (and therefore its impact), since there is no human right to broadcast or, for example, send a text message to 10,000 mobile phones. It may also be possible to limit the impact of inflammatory speech by supplying alternative sources of information.

Two key challenges present themselves:

- (1) to identify unlawful speech, and especially to distinguish it from political speech, which constitutes the exercise of a human right, and which is essential for democratic functioning at all times—never more than during an electoral process. Political campaign speech and inflammatory speech can be difficult to distinguish since, like inflammatory speech, campaign speech often exalts the speaker’s group while denigrating his or her opponent and, explicitly or implicitly, the opponent’s supporters.
- (2) to find best practices for limiting the dangerousness of such speech, without curbing the exercise of freedom of expression.

Inflammatory speech has become a focus of attention and lawmaking in many countries and regions in recent years, especially in Europe and in Africa.<sup>3</sup> It is often colloquially described as “hate speech,” but hate speech is a very broad category including (1) speech that is intended to harm directly, by insulting or offending the person or people it purports to describe; and (2) speech intended to cause indirect harm, by inciting one person or group against another.

Nearly all provisions of international law that prohibit or criminalize speech describe forms of incitement, that is, speech intended to harm indirectly.<sup>4</sup> For example, international criminal law has codified incitement to genocide in the Genocide Convention. In international human rights law, Article 20 of the ICCPR lists circumstances in which the right of freedom of expression shall be limited. It directs states to prohibit “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.”

In other words, speech is most often prohibited under international law not because it is offensive, insulting, or otherwise constitutively harmful, but because of its possible consequences—because of its capacity to lead to an internationally unacceptable secondary effect, such as violence or genocide. This is not surprising since it would be impossible for the

<sup>2</sup> For detailed discussion of this and related points, see Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INTL L. 3 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1121926](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121926).

<sup>3</sup> The UN High Commissioner on Human Rights (OHCHR) is presently surveying national laws to prohibit incitement to national, racial, or religious hatred worldwide, in a series of expert workshops on the implementation of Article 20 of the ICCPR. Details on this initiative are available at [http://www2.ohchr.org/english/issues/opinion/articles1920\\_iccpr/](http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/).

<sup>4</sup> The exception is hate speech as a form of persecution, in the context of crimes against humanity.

international community to agree on which speech is offensive or insulting, whereas a consequentialist test, by contrast, could be applied internationally.

Indeed, a consequentialist test is the basis of my framework for distinguishing between “dangerous speech” on the one hand, and other forms of speech (including both the broad, variously defined category of hate speech, and political speech) on the other. The framework is not intended to supplant existing international law, but rather to aid in interpreting it, and to permit contextualized, evaluative monitoring of speech, especially during election campaigns.

The analysis proceeds in two steps: first, to identify speech that constitutes incitement, and second, to identify which incitement is likely to succeed, especially in helping to catalyze violence.<sup>5</sup> Where incitement to violence or genocide is successful on a large scale, it may give rise to an international responsibility to protect civilians.

The framework makes use of indicators grouped around five criteria that make a particular act of speech more or less dangerous in the context in which it was made or disseminated: the speaker, the audience, the content of the speech act itself, the social and historical context into which the speech is broadcast, like a seed into soil, and the means of dissemination. The last criterion is of keen interest at present, since SMS (text messaging) and websites are increasingly prominent means of disseminating inflammatory speech, alongside older methods such as speeches at political rallies and radio broadcasts. Monitoring should include these indicators since they permit monitors and policymakers to estimate the dangerousness of speech in its context.

Time and space limitations preclude a full description of the framework, which is available upon request from the author. The following are examples of indicators related to speaker, speech act, and audience:

- (1) a speaker is much more likely to commit successful incitement if s/he has some form of pre-existing influence or authority over an audience. Case studies suggest that this is a particularly powerful indicator. Authority need not derive from *de jure* political office; it may take any number of forms and may derive from different sources of status. A notable example is Simon Bikindi, the Rwandan pop music star whose prosecution was the last major incitement case at the International Criminal Tribunal for Rwanda (ICTR).<sup>6</sup>
- (2) incitement is characterized by certain rhetorical devices. One of these is to tell the audience that it is in danger of attack by the putative victims. This was given the apt label “accusation in a mirror” before the 1994 genocide in Rwanda.<sup>7</sup> The same technique was common in Cote d’Ivoire earlier this year and was notorious in Kenya in 2008, as well as in many other cases of incitement.
- (3) an audience that is fearful—for any number of reasons—is more vulnerable to incitement. This is only one example of many indicators of risk that, unsurprisingly, overlap with the risk factors listed in the contextual analysis offered by Jeff Fischer, another of the speakers on this panel.

Such indicators should be included in the work of election monitors wherever violence is a reasonable possibility, since dangerous speech is a harbinger (if not also a catalyst) of violence.

<sup>5</sup> Inflammatory speech is only one of a complex series of factors that contribute to increasing the likelihood of violence, in a process that is still poorly understood. However, quantitative evidence of a correlation between inflammatory speech and mass violence has recently emerged for the first time. See David Yanagizawa-Drott, *Propaganda and Conflict: Theory and Evidence from the Rwandan Genocide* (draft on file with author).

<sup>6</sup> Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment and Sentence (Int’l Crim. Trib. for Rwanda Dec. 2, 2008).

<sup>7</sup> ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 66 (1999).