



Contribution to OHCHR Initiative on Incitement to National, Racial, or Religious Hatred

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We congratulate the High Commissioner for Human Rights (HCHR) on this initiative and are glad to have an opportunity to contribute to it. We share the High Commissioner's keen interest in curbing incitement to national, racial and religious hatred while protecting freedom of expression. Indeed the mandates of the Special Advisor on the Prevention of Genocide (SAPG) and the HCHR converge in this area, since hatred is a prerequisite for genocide, and the suppression of free speech is often a harbinger of mass violence.

This paper offers the following contributions to the HCHR's effort. First, it analyzes incitement in international criminal law as well as in international human rights law, building an interpretive bridge between the two bodies of law. Second, it proposes a method for distinguishing incitement from other forms of hate speech, including offensive and insulting speech. Third, it summarizes the jurisprudence on incitement to genocide, which may be useful for interpreting Article 20 of the International Covenant on Civil and Political Rights (ICCPR). Finally, it describes a methodology for identifying speech that has a reasonable possibility of successfully inciting genocide, suggesting ways in which this framework may be adapted for distinguishing other forms of incitement.

1. Introduction

As Article 20 of the ICCPR recognizes by its terms, advocacy of national, racial or religious hatred may incite discrimination, hostility, and/or violence. In extreme form and in certain particularly dangerous contexts, advocacy of hatred may also incite an audience to mass violence, including genocide.

Incitement is of particular interest for genocide prevention since it is often a precursor to – if not also a prerequisite for – genocide and other forms of mass violence. The mechanisms by which speech influences audiences are complex, but inflammatory speech seems to be an ineluctable part of the social process that helps to bring about mass violence. Therefore such speech provides a special opportunity for violence prevention in two ways: 1) as an early warning indicator and 2) as a means directly to prevent or limit mass violence, by inhibiting the speech or its dissemination.

It can be difficult to identify incitement to genocide, however, and to distinguish it from other forms of inflammatory speech, including the forms of incitement codified by the ICCPR, and the even broader, variously-understood category of hate speech. Moreover, all forms of incitement can be confused with legitimate noncriminal speech, especially political speech, since the latter often features stereotyping and prejudice, falsehoods, generalization, and appeals to emotion and fear. In order to prevent violence and protect freedom of expression at the same time, international law on incitement and other forms of criminal speech should be interpreted and applied with particular care and consistency.

As part of the 18-month project “Dangerous Speech on the Road to Genocide,” being carried out with the Special Advisor and his staff, I am studying inflammatory speech closely in a variety of contexts, in order to 1) understand better which speech helps to catalyze mass violence, and why, 2) use this knowledge to clarify the law and to write guidelines for distinguishing forms of inflammatory speech, 3) identify the best policy responses for preventing violence by limiting incitement to genocide and other forms of inflammatory speech, without inhibiting freedom of expression.

We hope that the following theoretical and empirical ideas based on the Dangerous Speech project and other recent research on incitement and inflammatory speech will be useful for interpreting the forms of incitement codified in Article 20 of the ICCPR.

2. International human rights law and international criminal law must interpret all forms of incitement consistently

Article 20 of the ICCPR directs states parties to prohibit three distinct acts or forms¹ of incitement: incitement to discrimination, incitement to hostility, and incitement to violence. The Genocide Convention² (and the Statutes of the ad hoc international criminal tribunals and the International Criminal Court), provide jurisdiction for criminal prosecution of a fourth form of incitement – incitement to genocide. Since the first conviction for that crime in 1998, it has become the focus of a substantial new body of jurisprudence.

A fifth form of incitement – incitement to terrorism – is the subject of UN Security Council resolution 1624 (2005), which calls upon states to “prohibit by law incitement to commit a terrorist act or acts” and to prevent such conduct.³ This speech crime is also in need of further comment and clarification, not least because of “[t]he absence of an agreed definition of ‘terrorism’ in international law” which “leaves a broad margin of discretionary power to States,” as the Organization for Security and Cooperation in Europe (OSCE)

¹A ‘form’ of incitement is used as shorthand throughout this paper, for incitement intended to provoke a particular result, such as violence.

²UN Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (Dec. 9, 1948), Article III(c).

³ UNSC Resolution 1624 of 14 September 2005, operative para, available at <http://www.un.org/News/Press/docs/2005/sc8496.doc.htm>

pointed out in a background paper on the topic.⁴ In any case, incitement to terrorism lies outside the SAPG's mandate and the HCHR's initiative, and therefore outside the scope of this paper.

The other four forms of incitement in international law – incitement to hostility, discrimination, violence, and genocide – are distinct but also related in key ways, from both the empirical and jurisprudential points of view. As three Special Rapporteurs declared⁵ in a joint statement on freedom of expression and incitement during the April 2009 Durban Review Conference, “Let us never forget our duty to act swiftly when confronted with such cases and to heed early-warning signs. There is a lot we can learn from the relevant international criminal tribunals or courts which have addressed these difficult issues in a number of leading cases.”

In our view, it is critical to analyze and understand all four forms of incitement consistently and in light of one another. International human rights law and international criminal law are both young bodies of law undergoing relatively rapid development. For several reasons, law and practice in these related bodies of law should develop in harmony. First, they employ some of the same legal terms, such as ‘hate speech’ and ‘incitement’ itself, which should not acquire conflicting interpretations within distinct fields of international law. Second, some acts of speech constitute offenses within both bodies of law (for example incitement to genocide generally also constitutes incitement to violence), and may give rise to simultaneous enforcement efforts within both, which should be in conceptual sync with one another. Third, international criminal law has already drawn heavily on international human rights law on speech, notably in the ICTR's landmark “Media” case, but it has not yet explained how to distinguish between forms of incitement. Line-drawing must be consistent, in order for international law on incitement to be effective, predictable, and just.

Finally, all four forms of incitement are easily and frequently conflated with the term “hate speech,” which is in widespread use, but for which there is no single definition accepted by international consensus. In the next section, I propose a means of distinguishing incitement from hate speech. Each of the forms of incitement must also be defined and distinguished as clearly as possible to ensure that national and international efforts to limit the consequences of incitement (such as discrimination and violence) are in keeping with the requirements of Article 19 of the ICCPR, i.e. they do not curb freedom of expression any more than necessary.

⁴ Background Paper on Human Rights Considerations in Combating Incitement to Terrorism and Related Offenses, OSCE/CoE Expert Workshop *Preventing Terrorism: Fighting Incitement and Related Terrorist Activities* Vienna 19-20 October 2006 available at <www.osce.org/odihr/22052>

⁵ Freedom of Expression and Incitement to Racial or Religious Hatred,” Joint statement by Mr. Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Ms. Asma Jahangir, Special Rapporteur on freedom of religion or belief; and Mr. Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, April 22, 2009.

3. How to distinguish incitement from ‘hate speech’

Incitement in all of its forms is often confused with other types of inflammatory, hateful, or offensive speech. Incitement can be distinguished from these broader categories of speech, however, with reference to the intended or actual *effects* of speech. These effects are usefully described in the terminology of speech act theory (from the philosophy of language) as the “force” of speech.

First, it is important to define the term “hate speech,” as clearly as possible, although it is variously defined in law and popular discourse. To wit, hate speech can be understood as: speech that attacks or disparages a group or a person, for characteristics purportedly typical of the group.

Audiences experience the harmful effects of hate speech in two ways: directly and indirectly. On the one hand, a speaker may address a person or group that the speaker purports to describe (the victim group), in order to offend, frighten, or humiliate that audience directly. When the speech offends, humiliates, etc., it has what the philosopher of language J.L. Austin⁶ termed *illocutionary force*: the speech constitutes an action, such as the action of offending.

On the other hand, inflammatory speech may have indirect effects on the victim group. In that case the speech is intended primarily for another, different audience, with the goal of causing that audience to share the views expressed or implied in the speech, and to respond against the victim group e.g. with hostility, discrimination, or violence. If a speech act provokes responses from its audience, those are *perlocutionary acts*. When inflammatory speech inspires one audience to harm another person or group, that is an indirect effect - and successful incitement.

Most incitement also has direct effects, since speech intended to motivate a third party to harm a victim group is likely to harm the victim group directly as well, as long as the victim group is exposed to the speech. By contrast, many acts of hate speech that are aimed directly at the victim group do not have indirect effects and therefore do not constitute incitement.

In sum, Article 20 of the ICCPR and Article III(c) of the Genocide Convention proscribe incitement because of the damaging or disastrous *indirect* effects that it may have, and because there is international consensus that the law must suppress those effects.

Notably, neither the ICCPR nor the Genocide Convention seeks to suppress hatred itself, nor even the expression of hatred. Both treaties seek to proscribe only certain effects or consequences of the expression of hatred. As Prof. Robert Post has pointed out, writing on hate speech, hatred is not unlawful in and of itself. “When the law seeks to suppress hate –

⁶ J.L. Austin, *How to Do Things With Words*, 2nd ed. (1975).

and hence hate speech – it is not because hate *as such* ought to be proscribed. It is instead because the law is intolerant of hatred when it is expressed in particular circumstances.”⁷

These distinctions are useful for interpreting Article 20 of the ICCPR, in which advocacy of hatred – even national, racial, or religious hatred – is not an offense on its own. Such advocacy becomes an offense only when it also constitutes incitement to discrimination, hostility, or violence, in other words when the speaker seeks to provoke reactions (perlocutionary acts) on the part of the audience.

It is logical and proper that international law prohibits certain speech acts for their consequences and not for their content as such. It would be impossible to reach international consensus on intolerable content, since community norms – not to mention national norms – vary greatly. What is deeply offensive in one community may not be so in another. Robert Post uses the example of Chicago to argue that even in one ethnically diverse city, one cannot find normative consensus on the constitutive harms of speech.

In the international community, it would be even more difficult or impossible to find consensus on which speech acts are constitutively so offensive that the law must suppress them. Indeed, national bodies of law proscribe certain speech acts – such as denying that the Holocaust occurred – that are entirely legal in other countries. The main reason for this is that norms of *constitutive* harm vary widely.

For instance, the prohibition on Holocaust denial in Germany is surely not intended to prevent contingent harms alone. Germany prohibits such speech not (or not only) because of the possible reactions of the audience, but because of social consensus that such speech is constitutively intolerable – in Germany. In other countries, national law prohibits certain speech acts because they are considered intolerably insulting to a monarch, for example, to a head of state, or to a religion. There is no international norm against insulting or offensive speech, however, nor is there international consensus on which speech would be considered insulting.

By contrast, Article 20 of the ICCPR and Article III(c) of the Genocide Convention seek to suppress speech for certain contingent harms, or consequences. There is a robust international consensus against the contingent harm of genocide, of course. There is also general consensus against the contingent harms of violence, discrimination and hostility, although the consensus is less concrete, as those harms themselves are somewhat less clearly defined.

⁷ Robert Post, “Hate Speech,” *EXTREME SPEECH AND DEMOCRACY*, Ivan Hare and James Weinstein, eds. (2009), p.124.

4. Incitement to genocide in international criminal law and jurisprudence

This section reviews international law on incitement to genocide, for its utility in interpreting Article 20 of the ICCPR – and interpreting and acting upon early-warning signs, as the Special Rapporteurs recommended in 2009.⁸ In that light, it should be noted that it is very different to apply law in criminal prosecutions, which call for exacting standards of evidence and proof, than to use the law for policymaking with respect to early warning and genocide prevention. In the latter case, the standard of proof need not be as rigorous.

A. Treaty law

1). *Genocide Convention*

As noted above, incitement to genocide was first codified as one of five punishable acts under Article III of the Genocide Convention: “Direct and public incitement to commit genocide.”⁹ Criminal incitement to genocide must be direct and public, then, and must also be committed with intent to bring about genocide, as Article II of the Genocide Convention specifies. These are three defining requirements of the crime: it must be direct, public, and committed with specific intent.

Causation is not a requirement, on the other hand. Speech may constitute incitement to genocide whether or not it is actually followed by genocide. Before the final version of the Convention was negotiated, the UN Secretariat’s draft convention on genocide included a provision that would have criminalized all forms of public propaganda tending to provoke genocide, not only direct incitement.¹⁰ The Ad Hoc Committee rejected that definition, and suggested prohibiting direct incitement, whether public or private, and “whether such incitement be successful or not.”¹¹ Yet another proposal, from the Soviet Union, would have provided for the disbanding of organizations that allegedly aspired to “inciting racial, national or religious hatred, or the commission of Genocide.”¹²

In the end, the drafters resolved to omit the phrase “whether such incitement be successful or not” but did not insert any language limiting the crime to successful incitement. This has been interpreted to mean that incitement can be committed even if no genocide follows it.¹³ In its first decision on incitement to genocide, the Rwanda war crimes tribunal (ICTR) agreed. Even unsuccessful incitement must be punished, because of the terrible danger it poses: “In the opinion of the chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure.”¹⁴ In other words,

⁸ See note 3, *supra*.

⁹ Convention on the Prevention and Punishment of the Crime of Genocide, Article III(c).

¹⁰ Nehemiah Robinson, *THE GENOCIDE CONVENTION; A Commentary*, p. 66.

¹¹ *Id.* p.67.

¹² *Id.* p. 68.

¹³ *Id.* p. 67. See also William Schabas, *GENOCIDE IN INTERNATIONAL LAW* (2d ed.) p. 319.

¹⁴ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998), para 562.

incitement to genocide can be punished even if unsuccessful, because of the robust international norm against the disastrous contingent harm of genocide.

2) *Statutes of International Criminal Tribunals*

The Statutes of the ICTY and ICTR replicate the Genocide Convention's provision on incitement to genocide in Article 4(3)(c)¹⁵ and Article 2(3)(c),¹⁶ respectively. The Statute of the International Criminal Court (ICC) lists incitement to genocide in Article 25(3)(e), under individual criminal responsibility.¹⁷ It has been argued that this “reduces the status of incitement from a crime in its own right to a mode of participation in genocide.”¹⁸ That debate is outside the scope of this paper. At the ICC drafting conferences, efforts were made to expand the crime of incitement to cover other core crimes, but they failed.¹⁹

B. Case Law

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 codified as such, they were both charged with crimes against humanity.

a. *Streicher*

Julius Streicher²⁰ was the editor of *Der Stürmer*, a violently anti-Semitic German weekly newspaper published from 1923 to 1945. “In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution,”²¹ the IMT found. In a lead article in Sept. 1938 – using dehumanizing language typical of incitement to genocide – Streicher “termed the Jew a germ and a pest, not a human being, but ‘a parasite, an enemy, an evildoer, a disseminator of diseases who must be destroyed in the interest of mankind.’”²²

In May 1939 he 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.”²³ Like Joseph Goebbels, Streicher accused the Jews

¹⁵ Statute of the International Criminal Tribunal for the Former Yugoslavia.

¹⁶ Statute of the International Criminal Tribunal for Rwanda.

¹⁷ Rome Statute for the International Criminal Court, UN Doc. A/CONF.183/9.

¹⁸ Thomas E. Davies, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*,

22 *Harvard Human Rights Journal* 245, 252 (2009).

¹⁹ Schabas, p. 272.

²⁰ *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 21, Aug. 9 1946 to Aug. 21 1946. Volume 22, p. 501.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

of wanting to murder Germans. This is a typical technique or hallmark of incitement to genocide, in which the speaker accuses the victim group of planning atrocities against the dominant group (the audience). An apt term for it was coined in Rwanda: “accusation in a mirror.”²⁴

To refute Streicher’s claim that he had been calling not for the literal extermination of Jews, but only for their classification as aliens, the Nuremberg prosecutors showed that he continued to write such articles after he knew that hundreds of thousands of Eastern European Jews had been massacred. Streicher was convicted and hanged.

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” and notably, with “having used his official and nonofficial influence to ‘disseminate and exploit the principal doctrines of the Nazi conspirators.’”²⁵ Fritzsche was acquitted. 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 had.²⁶ Fritzsche’s intent was not clear, and his incitement was not “direct” enough – he did not clearly call for killing. In addition, the tribunal found that Fritzsche had not been influential enough among the Nazi leaders to have had much control over policymaking. In a strong dissent, the Soviet judge argued that Fritzsche had been a powerful, well-informed propagandist.

The following year a German court conducting de-Nazification trials prosecuted Fritzsche again, placed him in the category of the most culpable Nazi war criminals, and sentenced him to nine years’ hard labor.²⁷ When Fritzsche appealed, the court upheld his conviction, stressing four points in particular:

1. He had had extraordinary influence over the German public;
2. He knew that the public had already been “systematically incited against the Jews;”²⁸
3. He knew that Jews were already being sent to concentration camps;
4. He continually accused the Jews of “domination” and of making the war, to destroy the German people.²⁹

²⁴For further description and analysis of incitement to genocide, including the term “accusation in a mirror,” see Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 Virginia Journal of International Law 485 (2008), p. 504.

²⁵B.S. Murty, *Propaganda and World Public Order: The Legal Regulation of the Ideological Instrument of Coercion* 144 (1968).

²⁶Id, p. 549.

²⁷Wibke Kristin Timmerman, *Incitement in International Criminal Law*, 88 International Review of the Red Cross 864 (Dec. 2006) at 830, citing Hans Fritzsche Appeals Judgment, Ber.-Reg.-Nr. BKI/695, Berufungskammer I, Nürnberg-Fürth, Sept. 30 1947, Staatsarchiv München, SpKa Karton 475, p. 1.

²⁸Id, citing appeals judgment at 15.

The German court convicted Fritzsche “for anti-Semitic propaganda per se, without additional calls for acts of violence.” If he did not call for violence, he did not commit incitement to genocide. However, his speech bore some of the hallmarks of that crime.

2.) *International Criminal Tribunal for the former Yugoslavia (ICTY)*

The ICTY has not seen a case on incitement to genocide, but it is now prosecuting Vojislav Seselj, who stands accused of instigation, and hate speech as persecution, among other charges. The Seselj trial may well be the ICTY’s landmark case on speech, as the first few sentences of the prosecution’s opening statement indicate:

“This trial, perhaps more than any other case before this Tribunal, is about the use of words, language and expression. This trial is about the use of political speech to poison the minds of men and women in order to further criminal goals. This case is about the ability of this accused, Vojislav Seselj, to use propaganda to condition Serbs to fear, hate, and commit violence against members of the non-Serb communities in the former Yugoslavia, in particular Croats and Muslims.”³⁰

The prosecution charged Seselj with several types of speech crimes – direct and indirect, illocutionary and perlocutionary. In Nov. 1991, for example, he gave several speeches in Vukovar, for which he was charged with persecuting non-Serbs, and with instigating the killing of non-Serbs by his own followers. The prosecution also argues that a speech Seselj gave on May 6, 1992, in the town of Hrtkovci, constituted ethnic cleansing in and of itself, since it so terrified local Croats that many quickly fled. Under this novel theory, the illocutionary act was itself a separate crime.

In addition, like Julius Streicher, Seselj is accused of poisoning minds.

Since the trial is still underway, however, it has produced no jurisprudence as yet. It is the Rwanda war crimes tribunal that has conducted the great majority of the world’s international trials for incitement, to date.

3.) *International Criminal Tribunal for Rwanda (ICTR)*

The ICTR has tried many cases and accepted several guilty pleas for incitement to genocide. Several of the most notable cases are discussed below.

²⁹ Id, citing appeals judgment at 10.

³⁰Prosecutor v Seselj, Case No. ICTY IT-03-67, Prosecution’s opening statement, on file with author.

a. *Akayesu*

Jean-Paul Akayesu, the *bourgmestre* or mayor of the Rwandan township of Taba, was the first person convicted by the ICTR for incitement to genocide, as well as for genocide. Early in the morning on April 19, 1994, Akayesu came upon a crowd of more than 100 people standing near the body of a young Hutu militiaman who had been killed. 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. A three-judge ICTR panel found that Akayesu’s audience had understood his speech as a call to exterminate the Tutsi people.

The judges were convinced that Akayesu knew that his speech would be understood that way, since genocide had already begun elsewhere in Rwanda, and 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 genocide.”

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 written material or printed matter in public places or at public gatherings, or through the public display or placards or posters, or through any other means of audiovisual communication.”³¹

Akayesu’s speech was the easiest form of incitement to genocide to identify. 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 they are already primed to commit genocide. 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’ illustration³² except that in Akayesu’s case, the ICTR found, it was incitement to commit genocide – not incitement to hostility or violence.

However, the Akayesu type of incitement is not the crime that seems truly to catalyze genocide. Akayesu’s speech instigated³³ killings in Taba, but could not have helped to

³¹ Prosecutor v. Akayesu, para 559.

³² “[E]ven opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor, 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* (1859).

unleash the genocide in general, since he spoke after it had already started. Preventing this type of speech alone, then, seems to be insufficient for preventing genocide.

b. *Guilty Pleas: Kambanda and Ruggiu*

It is often overlooked that the RTLM has received several guilty pleas for incitement to genocide, indicating that the inciters themselves – who were in a good position to gauge the impact of their own speech – concluded that the speech was criminal.

Jean Kambanda was Rwanda's prime minister during the 100 days of the genocide. Speaking over the notorious radio station Radio Télévision Libre des Milles Collines (RTLM), he said that the station was “an indispensable weapon in the fight against the enemy”. In his guilty plea before the ICTR, to incitement to genocide among other crimes, Kambanda conceded that he had given speeches inciting the population to commit violence against Tutsi and moderate Hutu, and he 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.”

Georges Ruggiu, a Belgian national who worked as a broadcaster for RTLM from January 6, 1994 to July 14, 1994, pled not guilty to incitement to genocide at first, and then changed his mind. Asked to explain why, he said, “I realized 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.”³⁴

c. *The Media Case*

Even while the ICTR was trying Akayesu in its first case for genocide and incitement to genocide, it had embarked on more complex cases, indicting three other men for, *inter alia*, incitement to genocide committed before the genocide began. Ferdinand Nahimana was a professor of history and founder of RTLM, 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, a lawyer, was an RTLM executive. Hassan Ngeze, the third defendant, had been the founder, editor, and publisher of a Rwandan tabloid called Kangura that, beginning in 1990, printed reams of anti-Tutsi vitriol, but no explicit order to kill.

The tribunal joined the three cases into what came to be known as simply the “Media” trial. For three years, the trial chamber received testimony from more than 100 witnesses. At last, in December 2003, it convicted all three defendants of incitement to

³³ As Mordecai Kremnitzer and Khaled Ghayanim have pointed out, in many legal systems 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 definition, Akayesu may have committed mere instigation. See Mordechai Kremnitzer and Khaled Ghanayim, *Incitement, Not Sedition, in Freedom of Speech and Incitement Against Democracy* 147, 162-63 (David Kretzmer and Francine Kershman Hazan eds., 2000).

³⁴ Prosecutor v. Georges Ruggiu, Judgment, Case No. ICTR-97-32-I (June 1, 2000)

genocide among other crimes, telling Nahimana for example, “without a firearm, machete or any physical weapon, you caused the deaths of thousands of innocent civilians.”³⁵

Usefully, the Media judgment discusses incitement that takes place well before genocide, and one witness captured eloquently why early incitement is important and dangerous. The defendants’ crime, the witness said, was to “spread petrol throughout the country little by little, so that one day [they] would be able to set fire to the whole country.”³⁶

The ICTR devoted most of its legal analysis of incitement to genocide to a review of the international human rights law restricting speech, based on the 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 – RTL M broadcasts, Kangura articles, and witnesses’ testimony – in terms of that law, opining for example that “speech constituting ethnic hatred results from the stereotyping of ethnicity combined with its denigration.”³⁷ The trial chamber made some effort to distinguish hate speech from protected speech, but did not clearly distinguish hate speech from incitement to genocide, or the latter from other forms of incitement.

The chamber identified three “central principles” that “emerge from the international jurisprudence on incitement to discrimination and violence that serve as a useful guide”³⁸ to defining incitement to genocide as applied to mass media (the context in which it most often occurs, and may be most dangerous).

The first principle identified by the trial chamber is ‘purpose’. This is equivalent to intent, which is already a clear requirement in the law. The tribunal also lists ‘causation’. It is equally clear that causation is not a requirement, as the judgment notes.³⁹ The last principle listed is ‘context’. The chamber recommends that context be taken into account “when considering the potential impact of expression.”⁴⁰ This is wise, but it begs the question: “what is meant by ‘context’?” since a nearly infinite constellation of contextual variables might affect the impact of speech. The fifth and final section of this paper offers a list of variables that matter most, in an analytical framework for analyzing the potential impact (perlocutionary force) of speech.

4). *The Supreme Court of Canada*

The Canadian Supreme Court has produced a major ruling on incitement to genocide in Rwanda that was an immigration case, not a criminal prosecution. On 22 November 1992,

³⁵ Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, para 1099 (Dec. 3, 2003).

³⁶ Id, para 436.

³⁷ Id, para 1021.

³⁸ Id, para 1000.

³⁹ Id, para 1007.

⁴⁰ Id, para 1004.

Leon Mugesera gave a rousing speech to a crowd of militants⁴¹ of the ruling MRND⁴² party in Kabaya, Gisenyi prefecture. The speech was tape-recorded and widely disseminated, and then widely criticized by Rwandan commentators. The Rwandan ministry of justice issued a warrant for Mugesera's arrest for incitement to violence.

Mugesera fled to Canada where other Rwandans denounced him to the government, and on 11 July 1996, a Canadian immigration adjudicator found that he had committed incitement to genocide and ordered him deported. Mugesera appealed, and in November 1998, an immigration appeals bench upheld the adjudicator's ruling⁴³ in an opinion analyzing the speech in detail.

Mugesera had implored his listeners not to leave themselves open to invasion, and said "These people called Inyenzi [cockroaches] have set out to attack us."⁴⁴ He also offered his audience a self-defense justification for killing, predicting that they would be the victims of genocide otherwise. "Know that the person whose throat you do not cut now will be the one who will cut yours," he declared. Mugesera's speech was indeed followed by a series of atrocities directed against Tutsi in the Gisenyi region of the country.⁴⁵

Mugesera appealed again and Canada's Federal Court of Appeal reversed the lower courts, finding that Mugesera had only been giving an impassioned political speech – and demonstrating excessive interpretive leeway in the law of incitement.⁴⁶ Finally the Canadian government appealed to the Supreme Court, where Mugesera lost. Since, as the Supreme Court noted, there is no causation requirement for incitement to genocide, it did not concern itself with the 17-month delay between Mugesera's speech and the outbreak of genocide. The Court deduced the requisite intent from the fact that Mugesera knew that massacres of Tutsis were already taking place when he spoke.

In sum, the pioneer caselaw has made considerable progress, but has not fully developed international criminal law on incitement.⁴⁷ At times the caselaw conflates incitement to genocide with hate speech, propaganda, and with other forms of incitement, such as incitement to murder or to racial hatred. Several scholars have criticized this trend.⁴⁸

⁴¹ *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.C. 40, para 179-80.

⁴² National Republican Movement for Development and Democracy, whose youth militia, the *Interhamwe*, committed a large proportion of the killings in the 1994 genocide.

⁴³ *Mugesera v. Minister of Citizenship and Immigration*. Nos. M96-10465, M96-19466. Immigration and Refugee Board (Appeal Division) of Canada, Nov. 6, 1998. See also William Schabas, *International Decision: Mugesera v. Minister of Citizenship and Immigration*, 93 AJIL 529 (1999).

⁴⁴ *Mugesera v. Canada*, at para 164.

⁴⁵ William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 McGill L.J. 141,144 (2000-2001).

⁴⁶ *Supra* note 43, para 169.

⁴⁷ William Schabas, *The Genocide Convention at Fifty*, Special Report No. 41, United States Institute of Peace, at 8 (Jan. 7, 1999) ("Thus, the application of this important obligation to prevent incitement to genocide remains muddled by divergent practice and confused jurisprudence.")

⁴⁸ See, e.g. Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 New Eng. J. Int'l. & Comp. L. 17; Alexander Zahar, *The ICTR's "Media" Judgment and the Reinvention of*

Some have suggested that the ICTR did well to define incitement to genocide broadly and that hate propaganda should be criminalized.⁴⁹

5. A framework for identifying incitement

As I have argued above and elsewhere,⁵⁰ international law criminalizes speech because of its capacity to produce a contingent harm, such as genocide, violence, discrimination, or hostility. This can be described as the ‘dangerousness’ of speech. A method for estimating this dangerousness would be useful – not only for consistent development of the law but also for carrying out critical UN mandates, such as the Responsibility to Protect and the Protection of Civilians. Moreover, it would be useful to develop a methodology to identify the forms of incitement codified in Article 20 of the ICCPR, and to distinguish them from one another, where possible. To that end, some preliminary ideas are offered below.

In 2008, I published a proposed six-factor analytical framework for evaluating whether there is a reasonable possibility that an act of speech will successfully incite genocide.⁵¹ In my current work, I have expanded the set of factors or indicators, and have begun to identify which ones weigh most heavily, or are most influential.

The indicators describe five key variables affecting the force of a speech act: the speaker, the audience, the content or meaning of the speech, the socio-historical context, and the mode of transmission. The most dangerous speech act is one for which all five variables are maximized: an especially powerful speaker, an audience that is highly vulnerable to incitement (because it is fearful, for example), a speech act with compelling content (and no competition from other sources of information), an effective and influential mode of transmission, and a dangerous, conflictive historical and social context.

A. Distinguishing incitement to violence from incitement to genocide

Among the list of indicators, some are common to two or more forms of incitement. Others can be used to distinguish among them.

For example, my (still incomplete) study of specific cases suggests that to have a reasonable possibility of inciting genocide, a speaker must have pre-existing influence or authority over the audience. It may be that this is not the case for incitement to violence, where the content of speech may be inflammatory enough to provoke a reaction. An example

Direct and Public Incitement to Genocide, Criminal Law Forum (2005); Gabriele Della Morte, De-Mediatizing the Media Case; Elements of a Critical Approach, Journal of Int’l Crim. Justice 3 (2005) at 1019.

⁴⁹ 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).

⁵⁰ Supra at note 24. See also Susan Benesch, The New Law of Incitement to Genocide: A Critique and a Proposal (April 2009), available at <http://www.ushmm.org/genocide/spv/pdf/benesch_susan.pdf>

⁵¹ Id.

of this may be Terry Jones, the Gainesville, Florida pastor who threatened to burn the Koran on September 11, 2010. Jones was unknown outside his tiny community until his speech was broadcast worldwide. Violence broke out due to the *content* of the speech, not Jones' identity or his relationship with any of the incited audiences. It would be useful to study specific cases of violence in response to Jones' speech, to learn whether they were provoked in part by other leaders who decried Jones' threat to audiences over which they did have influence.

B. Analytical framework for identifying incitement to genocide

What follows is a list of key indicators for incitement to genocide, framed as questions. Although it may be evident, I wish to emphasize that this framework is intended for use in preventing violence, as least as much as for prosecuting after the fact.

1. The speaker.

- a. Did the speaker have authority over the audience?
- b. Did the speaker have influence over the audience? If so, what kind? (Influence need not derive from a formal political post; cultural and religious figures and entertainers often have even more influence over an audience than political figures have.)

2. The audience.

(The audience may be large or somewhat indeterminate. This would not invalidate the analysis, which should focus on the audience that is most likely to react to the speech.)

- a. Who was the principal audience for the speech, or the audience most likely to react to it?
- b. Was the speech directed primarily at members of the group it purported to describe, i.e. victims, or at members of the speaker's own group, or both? (If the former, the speech would cause direct harm. If the latter, the speech might bring about indirect harm by inciting the audience, i.e. it constitutes incitement.)
- c. Did the audience have the means or capacity to commit violence against the group targeted in the speech? (If an audience is unable to commit mass violence, incitement cannot succeed.)

- d. Was the audience fearful? (This is a particularly important factor, for predicting an audience's vulnerability to incitement.)
 - e. Was the audience exposed to, or did it have access to, alternate views or sources of information? (It is common for governments supporting incitement to shut down alternative sources of information, since this gives great force to the incitement.)
3. Content of the speech act.
- a. Was the speech understood by the audience as a call to violence? (Possible alternative interpretations are not relevant, since the analysis is designed to gauge the speech's effect on its audience.)
 - b. Did the speech describe the victims-to-be as other than human, e.g. as vermin, pests, insects or animals? (This is a rhetorical hallmark of incitement to genocide, and to violence, since it dehumanizes the victim or victims to be.)
 - c. Did the speech assert that the audience faced serious danger from the victim group? (Another hallmark of incitement, this technique is known as "accusation in a mirror." Just as self-defense is an ironclad defense to murder, collective self-defense gives a psychological justification for group violence, even if the claim of self-defense is spurious.)
 - d. Did the speech contain phrases, words, or coded language that has taken on a special loaded meaning, in the understanding of the speaker and audience? Examples of this are "go to work" or "inyenzi" (the Kinyarwanda word for cockroach) in the context of the Rwandan genocide.
 - e. Did the speech echo previous, similar messages? (Repetition increases the force of a propagandistic or inflammatory message.)
4. Socio-historical context
- a. Were there underlying conflicts between the putative victim group and the principal audience for incitement?
 - b. Were there recent outbreaks of violence following other examples of hate speech? (This would have put speaker and audience on notice that such speech can indeed lead to violence.)

- c. Was the audience suffering economic insecurity, e.g. lacking in food, shelter, employment, especially in comparison with its recent past?

5. Mode of transmission.

- a. Was the speech transmitted in a way that would increase its force, e.g. via a media outlet with particular influence, or set to compelling music?

6. Conclusion

In this contribution, I hope to have made the case for a holistic and consistent understanding of incitement in international speech law, whether it is codified within international human rights law or international criminal law. Just as international tribunals handing down the first judgments for incitement to genocide relied on the existing Article 20 jurisprudence, international criminal jurisprudence is now a fruitful source for the deepening interpretation of Article 20.

I have also argued for the importance of distinguishing clearly between forms of offensive speech in domestic law, and the international law norms against incitement, and have proposed a basis for making that distinction systematically.

Finally, I have offered the outlines for a methodology for identifying speech that has a reasonable possibility of successfully inciting genocide, and have suggested ways in which this framework may be adapted for distinguishing other forms of incitement.

I look forward to discussing these guidelines and ideas at the OHCHR's workshop in Vienna on February 8 and 9. I also hope to devise a plan to develop them further, collaboratively, and to apply them in order to limit dangerous incitement without limiting freedom of expression, in fulfillment of the Responsibility to Protect and other mandates of the OHCHR and the OSAPG.