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The New Law of Incitement to Genocide: A Critique and a Proposal

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First, I wish to thank the U.S. Holocaust Memorial Museum and the Sudikoff Foundation for this thought-provoking symposium.

I. Introduction

Law has just begun to tug at the link between speech and atrocity, by punishing for incitement to genocide. Courts and tribunals have tried several important cases in the past two decades, but have not yet defined the crime clearly. To err in either direction is dangerous: an overly broad definition would restrain free speech, and an overly narrow one could contribute nothing to genocide prevention. At the symposium I offered a framework for identifying incitement to genocide, for use by courts and for early-warning efforts. I will outline the framework in this essay as well.

It is a daunting task to define the crime precisely. Speech is part of intricate social processes that lead to genocide, and which are not clearly understood. Also, speech is a right as well as a crime. More than it is punished, speech is protected by law – for good reasons and nowhere more assiduously than in the United States. Yet it can be hard to distinguish expressions of ethnic pride or ardent political speech, on the one hand, from hate speech and incitement to violence on the other – especially where violence and group hatred are already commonplace. In other words, a crime and a cherished right are so closely related that it can be difficult to draw a line between them.

After World War II, the Nuremberg tribunal tried two cases on speech, against Julius Streicher, a newspaper editor, and Hans Fritzsche, a radio broadcasting official.¹ Then came a gap of more than 50 years, until the International Criminal Tribunal for Rwanda, or ICTR, handed down the world's first conviction for incitement to genocide in 1998. The ICTR has gone on to produce most of the existing international law on the subject, with numerous indictments and prosecutions. (The International Criminal Tribunal for the Former Yugoslavia (ICTY), notably, has produced almost no law on speech.) Speech has become a key feature of the ICTR's jurisprudence.

Narrating and synthesizing the history of mass atrocity is one of the chief *raison d'être* of international tribunals like the ICTR, the ICTY, and the International Criminal Court (ICC), which cannot bring more than a tiny fraction of all potential defendants to justice. By choosing (as they must) certain crimes and certain defendants, the tribunals identify them as especially harmful, important, or catalytic for other crimes. Incitement to genocide is a signature crime in the ICTR's jurisprudence, which repeatedly describes hate-filled speech as a catalyst for genocide. In addition, the ICTR has focused

¹ I do not describe these cases here, as Gregory Gordon covered them in his own presentation.

particularly on large-scale, strategic incitement: speech that was delivered over a loudspeaker or through the media, to a large, self-selected, often unknown audience.

Not surprisingly, the ICTR's focus has influenced other courts. The Canadian Supreme Court found a Rwandan former official guilty of incitement to genocide in 2005, because of a speech he gave to a large crowd. And in January 2009, when a Rwandan court convicted former justice minister Agnes Ntamabyariro, the most senior official to be tried in Rwanda for crimes related to the genocide, she was sentenced to life in prison for incitement, among other crimes.

In identifying speech as a key factor in genocide, the ICTR was guided by the most outstanding sources – numerous witnesses and survivors, the work of Alison DesForges herself and other scholars, and, notably, even defendants, several of whom eventually pled guilty to the crime of incitement to genocide. Des Forges described Radio Télévision Libre des Mille Collines (RTLM) as “the voice of the genocide”² and Gen. Roméo Dallaire, chief of the UN peacekeeping force in Rwanda in 1993 and 1994, called RTLM “a direct instrument in promoting genocide.”³ Also Gregory Gordon, who worked as a prosecutor at the ICTR and did crucial early work in preparing its landmark case against two RTLM radio executives and the editor of a virulently anti-Tutsi newspaper, has suggested that if not for RTLM the genocide might not have happened or, at least, fewer people would have been killed.

This is an important reason why speech has been such an important issue in the aftermath of the genocide, in public discourse as much as in jurisprudence, and why we focus on it in this symposium. However there are two relevant paradoxes to consider.

First, there is recent research, including the thoughtful work of Scott Straus, calling into question whether speech caused genocidaires to “catch the fever” to massacre fellow Rwandans in such appalling numbers, so quickly, and so suddenly.

Straus cites interviews with 210 Rwandan convicted or confessed genocidaires in 2002. Asked “did the radio lead you to take part in the attacks?” about 85% of the genocidaires answered “no.” Straus suggests that “received wisdom” (that radio played a dominant role) has stood in the way of a nuanced and more accurate understanding of “complex mobilization dynamics” during the genocide. He proposes that hate radio did have an impact but that it was “indirect,” empowering hardliners, setting a tone of war, and narrowing the choices that Rwandans believed they had.

The ICTR does not seem to have entertained doubts. In its landmark decision on the effect of speech in print and over the airwaves, specifically the airwaves of RTLM, the ICTR refers in no uncertain terms to “the genocidal harm that was caused by RTLM programming.”⁴ The tribunal drew the same conclusion with regard to individual

² Alison Des Forges, Human Rights Watch, *Leave None to Tell the Story* (1999), glossary.

³ Roméo Dallaire, *Shake Hands with the Devil* (2005) p. 375.

⁴ *Prosecutor v Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence, para 972 (Dec. 3, 2003).

defendants, for instance declaring of Ferdinand Nahimana, who was a professor of history at the National University of Rwanda and one of the founders of RTLM,

“[W]ithout a firearm, machete or any physical weapon, he caused the deaths of thousands of innocent civilians.”⁵

The ICTR also quoted Nahimana himself as saying, in a broadcast on Radio Rwanda on 25 April 1994, "I am very happy because I have understood that RTLM is instrumental in awakening the majority people."⁶

Even the small Rwandan newspaper Kangura played an important role, according to the ICTR, although its circulation was limited and only about 30 percent of the adult population of Rwanda was literate.

“The ethnic hatred that permeates Kangura had the effect of poison...Its message of prejudice and fear paved the way for massacres of the Tutsi population.”⁷

The second paradox is that, from the legal point of view, the ICTR did not need to conclude that any speech caused genocide. Causation is not a legal requirement to prove the crime of incitement to genocide since the crime is inchoate – it is a crime that promotes the commission of another one but it is, itself, a separate crime. To prove that someone has committed incitement to genocide, there is no need to show that the speech caused anyone to commit genocide.⁸

So how does the law define the crime instead? The ICTR borrowed from the law of hate speech, and sometimes conflated incitement to genocide with hate speech. Incitement to genocide is a crime in international law, but hate speech is not. Hate speech is criminalized in domestic law, in very different ways and to different extents around the world. “Messages of prejudice and fear,” for example, would likely be protected by the Constitution in the United States, but criminalized in some other countries.

Since the genocide, the Rwandan government has also used a broad brush to classify speech – and to ban it.

For 10 years after 1994, the Rwandan government permitted no private Kinyarwanda-language radio stations, and it has accused many journalists and critics of the crime of “ethnic divisionism,” which is also broadly defined and applied. Even foreign broadcasts have been banned. Just this month, in April 2009, the Rwandan government suspended the Kinyarwanda service of the BBC, for a broadcast that the

⁵ Id, para 1099.

⁶ Id, para 539.

⁷ Id. para 243.

⁸ The principal reason for this is that the twin goals of international law on genocide are to punish it and to prevent it. If speech can only be punished after it has helped to bring about a genocide, i.e. after the fact, the law cannot prevent that crime. Another reason is that it is unusually difficult to prove beyond a doubt that speech by one person, especially in the context of hatred and violence, caused another person to kill.

Rwandan minister of information, Louise Mushikiwabo, deemed “unacceptable.” (A Rwandan Hutu had said over the air that he would not apologize for the genocide.)

II. Existing law on incitement to genocide

The crime of incitement to genocide was first codified in 1948, in the United Nations’ Convention on the Prevention and Punishment of the Crime of Genocide, as “direct and public incitement to commit genocide.”

The Convention lists five acts that are punishable, including genocide itself, and incitement. (The others are conspiracy, attempt and complicity). For all five acts, specific intent is required; in other words a speaker must specifically intend to cause an audience to commit genocide. For any further guidance, the courts were left on their own.

The ICTR handed down the world’s first conviction for incitement to genocide in 1998, in the same case that was also the first conviction for genocide, of Jean-Paul Akayesu, a local official in the Rwandan township of Taba. Akayesu gave a speech directly to a crowd of people and soon afterward, killing began in Taba. Since Akayesu spoke to a group of people who had been primed by other speech they had been hearing over recent months and years, his exhortations functioned like a command.

That sort of incitement is also known in the law as instigation, i.e. a specific speech act made directly to a person or to a group, in which the speaker tries to goad the listeners into immediate action. John Stuart Mill gave a famous hypothetical example in his book On Liberty: an instigator speaks to a crowd of hungry, angry people in front of the storehouse of a corn-dealer, encouraging them to help themselves.

The second kind of incitement to genocide, in which speech can take place long before the possible result, is harder to identify. In particular, it is difficult to distinguish from discriminatory speech or hate speech, all of which can prepare the way for genocide by slowly changing a population’s view of what is necessary and what is acceptable, until many of them can condone genocide, and some participate in it. That is not altogether different, notably, from the “indirect” effects that Straus suggested in the case of RTLM, such as setting a new tone for public discourse, and narrowing perceived choices.

In Germany before genocide, as the USHMM’s propaganda exhibit reminded us, the majority population was bombarded for years with hate-filled speech, and the same was true in Rwanda. This does not mean that the speech was a necessary condition for genocide, but it does indicate that the perpetrators thought it was important. In Rwanda at least some of them seem to have believed it was criminally harmful, as indicated by the guilty pleas that the ICTR has received for incitement to genocide.

Indirect, incremental effects played a large role in the ICTR’s next major case on incitement to genocide, the “Media” trial on RTLM and *Kangura*. One of the witnesses at that trial described it eloquently, saying that RTLM’s broadcasts “spread petrol

throughout the country little by little, so that one day it would be able to set fire to the whole country".⁹

One would expect this process to be especially important for genocides with high levels of civilian participation, such as the Holocaust and Rwandan genocide. Where the victims live among the majority population, as in Nazi Germany or Rwanda, the majority must at least condone genocide, if not actively participate.¹⁰ As the international criminal law scholar Mark Drumbl put it, "support and acquiescence of the masses is the single prerequisite for atrocity truly to become epidemic."¹¹

In its judgment in the Media case, as noted above, the ICTR described a direct causal relationship between broadcasts over the airwaves of a radio station, and genocide. It gave some chilling and straightforward examples, of Tutsis whose names and even license plate numbers were read out over the air once the genocide was underway, and who were killed soon afterward.

The tribunal also found that other, less specific speech catalyzed genocide, and that is where the controversy started.

For instance, the decision notes that editorials in the newspaper *Kangura* described Hutu people as "generous and naïve, while the Tutsi were portrayed as devious and aggressive." The court did not explain, however, if this constituted incitement to genocide, or why.

Ferdinand Nahimana and his two co-defendants appealed, and the higher court found that the ICTR had erred by not specifying which RTLM broadcasts from early 1994 constituted incitement to genocide. The appeals court found that none of the pre-genocide broadcasts rose to the level of incitement to genocide, and reduced all of the defendants' sentences. (Nahimana's sentence dropped from life in prison to 30 years.) Even though the "Media" decision ran to 361 pages, in my view it also failed to clarify *why* certain speeches, articles, and broadcasts constituted incitement to genocide.

The ICTR is not alone. Other courts have considered cases of incitement to genocide, only to contradict each other, in some cases dramatically.

Consider the case of Léon Mugesera. Seventeen months before the genocide broke out in April 1994, a Rwandan government minister and politician gave a speech in a large field, to a crowd of about 500 of his political followers. Mugesera made remarks that seemed to inflame the audience, such as "we should act so as to protect ourselves against traitors and those who would like to harm us." He repeatedly used the word "Inyenzi" which means "cockroaches" in Kinyarwanda, and said "These people called Inyenzi are now on their way to attack us." Much of the speech was in dramatic but

⁹ Prosecutor v Nahimana, *supra*.

¹⁰ This is not the case in Darfur, for instance, where most victims live in homogeneous settlements far away from the majority population of Sudan.

¹¹ Mark Drumbl, *Atrocity, Punishment, and International Law* (2007), p. 172.

elliptical language, for instance, “I will tell you that the Gospel has changed in our movement. If someone strikes you on one cheek, you hit them twice on one cheek and they collapse on the ground and will never be able to recover!”¹²

The Rwandan minister of justice, Stanislas Mbonampeka, immediately issued an arrest warrant for Mugesera for inciting hatred, but Mugesera fled Rwanda for Canada. There, other Rwandan expatriates denounced him, and asked the Canadian government to deport him for the crime of his notorious speech. He was ordered deported but he appealed, and his case made its way slowly up through the Canadian courts.

One Canadian federal appeals judge decided, “the 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...guilt.”¹³ This time the government appealed, and eventually the Supreme Court of Canada ruled that Mugesera had committed incitement to genocide, and ordered him deported.

The Mugesera case presented several particular challenges. First, none of the Canadian judges who reviewed it could read it in the original Kinyarwanda. (Nor does any of the judges at the ICTR speak or read Kinyarwanda.) They relied on translators, who disagreed on the proper rendering into English or French, and disagreed on the meaning of ambiguous words, even in the original. Second, the speech was given 17 months before the genocide, begging the question: how much time can elapse between incitement to genocide and its intended effect?

The Canadian Supreme Court did not answer that question. It simply found that Léon Mugesera’s speech had been direct (the ICTR had ruled that language need not be explicit to be considered “direct”) and public, and that it had been understood by the audience as a call to commit genocide.

Some of Simon Bikindi’s speech was even more ambiguous than Mugesera’s. Bikindi was a very popular Rwandan singer and musician in the years leading up to the genocide. In the first attempt to criminalize music using international law, the ICTR indicted him for incitement to genocide, among other charges. The indictment focused on three songs¹⁴ that Bikindi composed, sang, and recorded, and that were played in Rwanda frequently before and during the genocide. The songs were widely broadcast and played

¹²Mugesera v Canada (Minister of Citizenship and Immigration) [2005] 2 S.C.R. 100, 2005 SCC 40, Appendix III.

¹³Mugesera v Canada (Minister of Citizenship and Immigration) [2003] F.C.A. 325, para 240.

¹⁴ Nanga Aba Hutu or Twa Naga abahutu (I hate Hutus), written in 1992, is the most explicit of the three songs for which Bikindi was indicted. Yet he never mentions Tutsis by name in the song. Instead he attacks Hutus who break ranks with other Hutus. In spoken-word delivery, the song lists the types of Hutus Bikindi hates: "I hate these Hutus, these de-Hutuized Hutus, who have renounced their identity, dear comrades. I hate these Hutus, these Hutus who march blindly, like imbeciles. This species of naïve Hutus who join a war without knowing its cause. I hate these Hutus who can be brought to kill and who, I swear to you, kill Hutus, dear comrades. And if I hate them, so much the better."

at political rallies and were allegedly sung by Rwandan genocidaires while they were killing. Since the genocide, Bikindi's songs have been banned in Rwanda.

The tribunal also found beyond a reasonable doubt that Bikindi addressed the audience at a rally at a soccer field in the neighborhood of Kivumu, in his home province of Gisenyi, in 1993, that he told the audience that they must kill the Tutsi, whom he described as 'serpents,' and that his music was played at the rally on cassette. The speech seems analogous to that of Mugesera, but the tribunal does not distinguish this case from that one, nor even mention the Canadian Supreme Court decision. Without explanation, the ICTR did not convict Bikindi for speaking at the rally.

After an exhaustive review of testimony on how the songs were understood, in its factual findings the tribunal concluded that "in 1994 in Rwanda, Bikindi's three songs were indisputably used to fan the flames of ethnic hatred, resentment and fear of the Tutsi. Given Rwanda's oral tradition and the popularity of RTLM at the time, the Chamber finds that these broadcasts of Bikindi's songs had an amplifying effect on the genocide."¹⁵

Yet the ICTR concluded that none of them constitutes direct and public incitement to genocide per se.

Instead, the tribunal convicted Bikindi on one charge only: for driving along a road in Gisenyi near the end of June 1994, saying over a public address system attached to the car he was riding in, "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."¹⁶

This was a conservative decision on the "easy case." By late June 1994, most of the genocide had already taken place. Hundreds of thousands of people had been killed. This is not to say that this crime was not important or worthy of prosecution; only that it cannot be a catalyst for genocide, writ large.

In summary, the tribunal has opined repeatedly that speech that came well before genocide helped to cause it – without a theory of how this happened, or how to distinguish incitement to genocide from speech that is "merely" hateful.

III. A proposal to define incitement to genocide

I have designed a model to help make this distinction. Not by coincidence, the model suggests answers to several of the questions that the USHMM posed for this symposium: Does it matter who speaks? How do individual speech events fit into the larger social context, especially in places with a history of intergroup tensions? What are

¹⁵ The Prosecutor v. Simon Bikindi, Case No. ICTR-01-72-T, para 264 (Dec. 2, 2008).

¹⁶ The Prosecutor v. Simon Bikindi, Case No. ICTR-01-72-T, para 266 (Dec. 2, 2008).

the key identifiers that hate speech will result in genocide? What structural or institutional conditions within a society set up a permissive environment for violence and how does speech fit into that? Finally, has the current conflict evoked others?

In lieu of a causation requirement, I suggest that incitement to genocide is speech that has a reasonable possibility of leading to genocide. This makes several contributions.

1. First, speech is understood in context, as Sheldon Himelfarb, Scott Straus and others also recommended. This model takes into account the relationship between speech and other pre-genocidal dynamics, such as the typical lack of alternative media outlets. It recognizes that speech is dangerous because of where and when it is made – it is like a seed that will sprout only in the right soil. Therefore the model must describe the soil.
2. The model supplies a new and important distinction between hate speech and incitement to genocide: hate speech can be made by anyone, but incitement to genocide can be committed only by certain speakers. If I stand in Times Square and say exactly the words for which Akayesu, Mugesera, or Bikindi were convicted, nothing will happen. The speech might well be direct and public, and I might specifically intend with all my heart to bring about genocide. Since there's no causation requirement for incitement to genocide, this speech could be considered incitement to genocide under current law. Clearly, that doesn't make sense.
3. Due importance and responsibility are assigned to the speaker, who – for the same reason that his speech is dangerous – is aware of its dangerousness. A charismatic leader has special (and especially dangerous) influence and authority over certain audiences. The same knowledge that allowed him to gain that authority also gives him a special understanding of the meaning and power of his particular speech over his particular audience. By contrast, as mentioned above in the Times Square example, a speaker without influence over the audience cannot commit incitement.
4. This model solves an important, although rarely acknowledged, problem in the jurisprudence – the temporal problem. According to this model, Mugesera's speech would constitute incitement to genocide because of the danger it posed when he gave the speech – not because of what happened more than a year later. Using this theory, speech made in advance of genocide can be criminalized without having to fix a time limit that, otherwise, would have to be arbitrary.

This proposal does beg the question: how can one determine when there is, or was, a reasonable possibility of genocide in response to a speech?

As noted above, a process of social conditioning must take place before people will rise up en masse and massacre their neighbors. This is not yet fully understood, of course, but it can be described. In particular, there are certain “hallmarks” of pre-

genocidal speech. I propose that the following factors be taken into account in evaluating whether a particular speech act produced a reasonable possibility of genocide. Some of the factors also characterize hate speech, discriminatory speech, and propaganda. Where they are all present, however, there is a greater likelihood that genocide will result, so the speech is more likely to function as incitement to genocide.

1. As understood by its audience, the speech called for genocide

Incitement is usually delivered in coded language, like Léon Mugesera's. Therefore the relevant question is not, as the ICTR suggested in its Media decision, whether the speech could have been understood in more than one way. The correct inquiry is whether the speech was in fact understood by its audience as a call to commit genocide.

2. The speaker had influence or authority over the audience

Only some speakers *can* commit incitement to genocide, as discussed above, much as others might wholeheartedly wish to do so, because only some speakers have some form of influence or authority over a certain receptive, conditioned audience. Authority and influence are not derived only from *de jure* authority, as Bikindi's case illustrates. A singer may have more influence over an audience than a politician, in fact.

3. The audience had the capacity to commit genocide against the would-be victims

Just as some speakers are unable to commit incitement to genocide, some audiences do not have the means to carry out genocide. In such cases, there cannot be a reasonable possibility of genocide in response to a speech.

4. Previous incidents of violence

As a historical matter, genocide is usually preceded by eruptions of violence. This was true in the Nazi and Rwandan cases. If a speaker uses the language of incitement in the wake of massacres, the danger of genocide is greater. Typically, both speaker and audience are aware of this increased danger.

5. Severely limited sources of news and information

In the period leading up to genocide, alternative sources of information tend to disappear. As the USHMM's new propaganda exhibit describes, for example, Joseph Goebbels moved quickly to fire journalists and to shut down anti-Nazi newspapers. When there is little or no speech to counter

poisonous messages, they become more effective, and therefore more liable to function successfully as incitement to genocide.

6. Linguistic hallmarks of incitement to genocide

As other symposium participants mentioned, inciters use characteristic rhetorical techniques, such as

- a. describing the victims-to-be as subhuman, especially as vermin, insects, or animals
- b. “warning” the dominant group that the victims-to-be are planning to annihilate them

Such a “warning” provides a collective, false analogue of the only ironclad defense to murder, which is self-defense.

These six factors are intended to serve as a guide for evaluating when there is, or was, a reasonable possibility of genocide in response to a particular speech act.

In conclusion, it is not my intention to critique the verdicts reached in the incitement to genocide jurisprudence of the ICTR, and national courts such as those of Canada and Rwanda. Instead I suggest a more systematic and robust method for reaching future verdicts and, hopefully, for preventing genocide by more clearly identifying a crime that precedes it.