One Spark Can Set a Fire: The Role of Intent in Incitement to Genocide

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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.”

Witness before the ICTR, testifying about the impact of incitement to genocide

I. INTRODUCTION

Raphael Lemkin understood the power of words. Lemkin dedicated his life to the study of mass atrocities, lobbying the League of Nations in 1933 to ban these acts of “barbarity” and “vandalism.” Meeting more opposition than he had anticipated, Lemkin took to heart the words of Winston Churchill in August 1941, who delivered a speech via radio broadcast urging action against the Nazis: “The whole of Europe has been wrecked and trampled down by the mechanical weapons and barbaric fury of the Nazis . . . We are in the presence of a crime without a name.” Lemkin sought to conceive of a term that would “connote not only full-scale extermination but also Hitler’s other means of destruction . . . ,” a term that described an assault on an entire population based solely on their nationality.

Lemkin wanted a word that not only embodied these crimes against humanity but that also carried with it a certain moral judgment. He ultimately settled on a hybrid of the Greek derivative geno, meaning “race” or “tribe,” paired with the Latin derivative “cide,” meaning “killing.” Upon introducing the term to the international community, Lemkin identified “genocide” as having two distinct phases: one, the destruction of the national pattern of the

3 *Id.* at 29 (emphasis added).
4 *Id.* at 40.
5 *Id.* at 42.
oppressed group, and two, the imposition of a national pattern of the oppressor. Again Lemkin experienced resistance from his peers. While his innovation was widely lauded, many simply believed that “a word is a word is a word”\(^7\) and that to deem a situation “genocide” would not carry any significant weight in the international community.

Since that time the term “genocide” has achieved exactly the type of notoriety Lemkin had hoped for. To this day, international political leaders tread carefully around their use of such a weighty term. The prohibition against genocide was codified in 1948 when the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide \[\text{Genocide Convention}\]\(^8\), which, among other things, explicitly defines the crime of genocide. To deem a situation genocide not only signifies that a gross violation of law has been committed but that the international community can no longer sit idly by. The word genocide compels action. Thus Lemkin was correct to place such faith in the power of a word.

The debate regarding the impact of words is again at the center of the global discussion on genocide as legal scholars attempt to interpret Article III(c) of the Genocide Convention, which expressly prohibits “direct and public incitement to commit genocide.”\(^9\) Some have argued that this prohibition includes the use of mere hate speech, while others assert a clear distinction between hate speech and incitement. Scholar Susan Benesch recently brought this issue to the forefront of the discussion on genocide, contending that in the framework of international law “incitement to genocide is not the same as hate speech . . . .”\(^10\) Making this distinction has been particularly problematic in recent years because while “national and

\(^6\) Id. at 43.
\(^7\) Id. at 44.
\(^9\) Id. art. III(c).
\(^10\) Benesch, supra note 1, at 487.
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.”

A closer examination of the rhetoric available suggests that the key difference between hate speech and incitement lies with the speaker’s intent. The delegates responsible for drafting the Genocide Convention expressly identified direct and public incitement as its own crime because of the level of intent involved: “In this regard, the delegate from USSR stated, ‘It was so impossible that hundreds of thousands of people should commit so many crimes unless they have been incited to do so and unless the crimes had been premeditated and carefully organized.’”

However, the definition of intent to incite genocide has yet to be truly developed by international tribunals. As a result, global courts have been left to redefine the element of intent every time the question of genocide is raised. This paper aims to clarify the difference between hate speech and incitement to genocide, placing particular emphasis on the issue of intent and exploring why this distinction is of legal significance. The final portion of this paper addresses the question of what constitutes intent to incite genocide, providing a set of guidelines for making this determination.

II. THE HISTORY OF HATE SPEECH IN INTERNATIONAL LAW

International legal standards addressing speech were initially quite convoluted. Earlier treaties made no distinction between hate speech and incitement to discrimination-based violence such as genocide, suggesting that legal standards for both types of speech were the same. However, the Nuremberg trials after World War II exposed the need for a more definitive set of

\[11 \text{Id.} \]
guidelines addressing the explicit protections and prohibitions for various fields of speech in the context of genocide. Examining these earlier treaties in the context of the Nuremberg decisions suggests that international law does in fact make the distinction between hate speech and incitement to genocide. This portion of the paper will examine the language of these treaties in light of the holdings of the Nuremberg trials to ultimately assert that mere hate speech is protected by international law.

A. Early International Covenants Addressing Freedom of Speech and Hate Speech

The three earliest international covenants addressing speech [namely the Declaration of Human Rights, ICCPR and Convention on Racial Discrimination] all clearly establish two distinct rights: the right to freedom of expression, and the right to be protected against discrimination-based violence. However, none of these covenants addresses how to remedy these sometimes-competing ideals; namely, at what point can speech be regulated because it constitutes discrimination? Instead, the concepts of hate speech and incitement are used interchangeably in these covenants, suggesting that the international community established a blanket prohibition on both types of speech.

The first international covenant to address speech was the Universal Declaration of Human Rights [Declaration of Human Rights]. Although the Declaration is not itself a treaty, it serves as the first global expression of the rights to which all human beings are entitled— including the right to freedom of expression. Adopted by the United Nations General Assembly in 1948, the Declaration attempts to balance the prohibition of discrimination with the protection of free speech.

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Article 7 of the Declaration states “[a]ll are entitled to equal protection against any discrimination . . . and against any incitement to such discrimination.”\textsuperscript{14} The language of this Article is crucial because it not only protects individuals from being discriminated against, but recognizes that incitement to violence can play a critical role in discrimination. In contrast, the Declaration later addresses freedom of expression in Article 19 which articulates that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”\textsuperscript{15} Thus the Declaration takes note of several important principles in international law: that people have the right to be free from discrimination, and that they also have the right to freely express themselves. However, at no point does the Declaration address how to balance these two principles in a way that fully embodies both rights.

In comparison to the Declaration, the International Covenant on Civil and Political Rights [ICCPR]\textsuperscript{16} is only slightly less vague. Article 20(2) of the ICCPR sets forth that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”\textsuperscript{17} Similar to the Declaration of Human Rights, the text of the ICCPR exclusively prohibits incitement but makes no reference to hate speech. Instead, we are left to interpret the protection against discrimination in light of Article 19(2), which maintains that “[e]veryone shall have the right to freedom of expression.”\textsuperscript{18}

\textsuperscript{14} Id. art. 7 (emphasis added).
\textsuperscript{15} Id. art. 19 (emphasis added).
\textsuperscript{17} Id. art. 20(2).
\textsuperscript{18} Id. art. 19(2).
However, the ICCPR does expressly identify some limitations on the right to freedom of expression. Indeed, Article 19(3) articulates that despite the ICCPR’s acknowledgement of freedom of expression, this right “carries with it special duties and responsibilities” and may be subject to restrictions “[f]or the protection of national security or of public order . . .”19 In the General Comment to Article 19 provided by the UN Human Rights Committee, it is noted that “[i]t is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.”20 However, at no point does the text build upon this principle or identify in what ways the restriction of speech can be justified.

The International Convention on the Elimination of All Forms of Racial Discrimination [Convention on Racial Discrimination]21 attempts to fill in these gaps by addressing what constitutes discrimination-based speech and when it can be prohibited. The Convention sets forth what appears to be a comprehensive set of restrictions for this type of speech. Article 4 articulates:

States Parties condemn all propaganda . . . based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and . . .

(a) Shall 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 thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all

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19 Id. art. 19(3).
other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.\(^\text{22}\)

In his memorandum prepared for the UN Special Advisor on the Prevention of Genocide in 2006, Toby Mendel attempts to interpret the full reach of this Article. He identifies six categories of activity prohibited by subsection (a):

1. Dissemination of ideas based on racial superiority;
2. Dissemination of ideas based on racial hatred;
3. Incitement to racial discrimination;
4. Acts of racially motivated violence;
5. Incitement to acts of racially motivated violence; and
6. The provision of assistance, including of a financial nature, to racist activities.\(^\text{23}\)

Although Mendel asserts that many of these prohibitions (specifically numbers one, two, three and five) are hate speech-specific\(^\text{24}\), neither he nor the Convention provides a legal definition for hate speech. Instead, both use the concepts of hate speech and incitement interchangeably, suggesting that both types of speech are subject to the same restrictions.

Thus, the texts of these covenants are regrettably vague. All provide protection against discrimination, but also assert a general right to freedom of speech. However, a closer look at the literature interpreting these covenants suggests that the right to free speech is often limited in the wake of speech that discriminates. In the wake of the tragedies committed by the Nazis during World War II and Hitler’s successful use of hate speech to rally public support for his acts, the Nuremberg Tribunal that would first draw the distinction between hate speech and

\(^{22}\) \textit{Id.} art. 4.


\(^{24}\) \textit{Id.}
incitement, interpreting these covenants to protect mere hate speech while prohibiting speech
that incites violence.

B. The Nuremberg Trials

The International Military Tribunal [IMT] at Nuremberg was established after World
War II to preside over the trials of Nazi war criminals. Among these defendants were Julius
Streicher, publisher of the anti-Semitic newspaper Der Stürmer, and Hans Fritzsche, head of the
Radio Section of the Nazi Propaganda Ministry.\footnote{Gordon, supra note 12, at 143.} Because international law had not yet
established the crime of incitement to genocide, the defendants were instead charged with crimes
against humanity. As acknowledged by Professor Gregory S. Gordon, Director of the UND
Center for Human Rights and Genocide Studies, “[t]he Streicher and Fritzsche cases are the most
significant pre-ICTR\footnote{International Criminal Tribunal for Rwanda.} international precedents regarding media use of hate speech in connection
with massive violations of international humanitarian law.”\footnote{Id.} The Nuremberg Tribunal was the
first to identify the separate categories of hate speech and incitement to genocide and to assert
that hate speech was protected under international laws.

1. The Streicher Case

The Streicher case has been characterized as the “most famous conviction for incitement
[to genocide].”\footnote{Id., citing Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR Case No. 96-4-T ¶ 550 (Sept. 2,
1998), aff’d, Case No. ICTR 96-4-A, Judgment (Appeals Chamber June 1, 2001) [hereinafter Akayesu Judgment].} The Nuremberg Tribunal charged Julius Streicher for his pivotal role in
utilizing the media to rally support for Hitler’s “final solution.” At the time of Streicher’s trial,
the crime of incitement to genocide had not yet been articulated by international law. Instead,
the IMT found that “Streicher’s incitement to murder and extermination at the time when Jews in
the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes,” and charged him with committing crimes against humanity.

During his 25 years writing for and publishing Der Stürmer, Streicher earned himself the reputation of “Jew-Baiter Number One.” The Tribunal found that through his articles and speeches, which reached an estimated 600,000 people a week, Streicher had “infected the German mind with the virus of anti-Semitism.” The Tribunal noted no less than 23 articles appearing in Der Stürmer between 1938 and 1941 that explicitly called for the extermination of Jewish people. For example, Streicher wrote in 1939 that “[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.”

The IMT also found that as Germany gained ground in the war, Streicher demanded “annihilation and extermination in unequivocal terms.” Although Streicher denied any knowledge of mass executions of the Jewish population, the IMT determined he had full knowledge of the atrocities being committed but persisted with his advocacy of persecution and death anyways. Indeed Streicher often wrote of Hitler’s prophecy being fulfilled as “that world

29 Gordon, supra note 12, at 145.
31 Id.
32 Id. at 118.
33 Id.
34 Id.
Jewry [is] being extirpated, and that it [is] wonderful to know that Hitler was freeing the world of its Jewish tormentors.”

Ultimately the Tribunal sentenced Streicher to death for his crimes against humanity, noting that his “incitement to murder and extermination at the time when Jews in the east were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes . . . .” Christopher Scott Maravilla notes the importance of this case for providing “an illustration of what constitutes hate speech and [for creating] a criminal nexus between the speech and the resulting genocide.” The Streicher case was in fact the first example of international litigation where a war criminal was held responsible for his acts inciting genocide, providing the legal community with a strong foundation to prosecute similar crimes. This would be of particular importance on light of the upcoming Fritzsche trial, in which the Tribunal drew a distinct line between mere hate speech and incitement to genocide.

2. The Fritzsche Case

Hans Fritzsche was head of the Home Press Division and later of the Radio Division of the Nazi’s Propaganda Ministry, which oversaw an estimated 230 German newspapers. The IMT charged Fritzsche with crimes against humanity, accusing him of “deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities” and of “us[ing] his official and nonofficial influence to ‘disseminate and exploit the

35 Id.
36 Id. at 119.
37 Id.
38 Id.
39 Id.
principal doctrines of the Nazi conspirators. Unlike Streicher, the Tribunal ultimately determined that although Fritzsche’s broadcasts were intensely anti-Semitic, they did not urge persecution or extermination of the Jewish population. Thus the fine line between hate speech and incitement to genocide was born.

The Tribunal noted that the key difference between hate speech and incitement to genocide lay with the speaker’s intent. Upon examination of Fritzsche’s interactions with the media, the IMT ruefully noted that his intent to incite genocide was not clear enough to convict him of war crimes: “his language was not ‘direct’ enough—he did not clearly call for killing.” Instead the Tribunal found that Fritzsche had phrased his speech carefully, often in the form of publicly replying to statements made by Hitler: “As Fuehrer predicted it will occur in the event of war in Europe, the fare if the European Jewry turned out to be quite sad . . . .” Although Fritzsche’s speeches were clearly anti-Semitic, the Tribunal refused to convict him on the basis of that alone. Instead, the IMT established crucial precedent regarding the protection of mere hate speech and the necessary element of intent to incite genocide when convicting war criminals.

Fritzsche also provided compelling evidence regarding his intent at trial. He argued that he had refused persistent orders from Nazi Propaganda Minister Joseph Goebbels to incite antagonism or arouse hatred, and that he had never vocally supported the theory of “the master race.” Instead, Fritzsche claimed that he had banned that phrase from use by the media he controlled and that he had twice tried to shut down Streicher’s Der Stürmer over concerns

40 Id.
41 Id.
42 Benesch, supra note 1, at 510.
43 Maravilla, supra note 29, at 119.
44 Gordon, supra note 12, at 144.
regarding the paper’s content.\textsuperscript{45} The IMT also found no evidence that Fritzsche had falsified news in an attempt to incite the commission of war crimes or that he ever possessed enough power to directly influence Hitler’s policymaking.\textsuperscript{46} As a result, the Tribunal deemed Fritzsche’s publications mere hate speech and thus did not convict him of committing war crimes.\textsuperscript{47}

In considering the Fritzsche case it is important to note that one year after his acquittal by the IMT, a German court convicted Fritzsche for “anti-Semitic propaganda per se, without additional calls for acts of violence.”\textsuperscript{48} German domestic laws placed more stringent restrictions on speech and thus individuals such as Fritzsche could be held liable for the lesser crime of mere hate speech. Although the German court noted some similarities between Fritzsche’s hate speech and incitement to crime\textsuperscript{49}, it was never found that he committed a crime as grave as inciting genocide. Once again, international law had protected the distinction between hate speech and incitement to genocide, separated almost exclusively by the speaker’s intent.

\textit{C. Impact of the Nuremberg Decisions}

The early body of international law addressing hate speech is quite ambiguous. Covenants such as the Declaration of Human Rights and the ICCPR assert two contrasting rights: the right to freedom of expression, and the right to be protected from discrimination. It wasn’t until the Nuremberg trials that these rights were placed in the context of genocide and certain legal distinctions were formed. As it stands, hate speech receives protection under the penumbra of freedom of speech while incitement to genocide enjoys no legal protection whatsoever. The subsequent section of this paper will address the body of law that followed the Nuremberg trials,

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Maravilla, \textit{supra} note 29, at 119.
\textsuperscript{48} Benesch, \textit{supra} note 1, at 511.
\textsuperscript{49} “He had strong influence over his audience, the audience had already been subjected to hate speech . . . .’’ \textit{Id.}
which further distinguished hate speech from incitement to genocide and placed particular importance on the element of intent.

III. INCITEMENT TO GENOCIDE IN INTERNATIONAL LAW

In her commentary on the IMT trial of Hans Fritzsche, Benesch identifies the key to his acquittal: “If he did not call for violence, he did not commit incitement to genocide as it is now understood.” Therein lies the distinguishing element between hate speech and incitement to genocide: the speaker’s intent. While hate speech is discriminatory and often offensive, the speaker intends only to place his beliefs in the marketplace of ideas. A person who incites genocide, however, intends not only to share his discriminatory opinions with others but also to compel violence based on those beliefs: “[S]ystematic and massive violence is anything but the expression of spontaneous bloodlust or irreversible primordial hatreds. Rather, it is the consequences of a deliberate resort to incitement of ethnic hatred and violence as an expedient instrument by which elites arrogate power to themselves.”

The body of international law following the Nuremberg trials sought to build upon this distinction and to criminalize the specific act of incitement to genocide. Both the Genocide Convention and the Rome Statute expressly forbid incitement to genocide, and regional tribunals such as the International Criminal Tribunal for the former Yugoslavia [ICTY] and ICTR adopted the Convention’s exact language for their statutes. These tribunals would later turn to this language for guidance as they presided over the world’s first incitement cases, but would struggle to vocalize which circumstances suggested intent to incite genocide. The international

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50 Id.
legal community has yet to truly identify those acts that unquestionably attest to a perpetrator’s intent to incite.

A. *International Covenants Prohibiting Incitement to Genocide*

The actual body of law codifying the prohibition against incitement is quite sparse—in fact, it can be boiled down to just one oft-repeated phrase. The 1948 Genocide Convention was the first treaty to criminalize the act of incitement. The Convention defines genocide as a series of acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . . .”

Article III(c) goes on to prohibit “direct and public incitement to commit genocide.” In examining the provisions of the Convention, Benesch contends that incitement to genocide can thus be broken down into two distinct elements: “(1) one must have specific intent to commit genocide, and (2) the incitement must be direct and public.” However, at no point does the text of the Convention address that which constitutes intent.

It took forty years after the adoption of the Genocide Convention for a second covenant to explicitly criminalize the act of incitement. The Rome Statute of the International Criminal Court [Rome Statute] entered into force in 2002, and established the International Criminal Court’s [ICC] criminal jurisdiction over any perpetrator of incitement to genocide. However, the Rome Statute similarly fails to address the role of intent in the crime of incitement. Instead, the text of the Statute almost directly mirrors the language of the Genocide Convention; Article III states only that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . directly and publicly incites others to

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52 Genocide Convention, *supra* note 8, at art. III(c).
53 *Id.* art. II.
54 Benesch, *supra* note 1, at 493.
commit genocide . . .”

To date, the Genocide Convention and the Rome Statute are the only two international treaties that explicitly criminalize the act of inciting genocide. While these covenants are of great importance to the field of international law, their deficiencies cannot be ignored. Although the link between a perpetrator’s intent and the crime of incitement is touched upon in the Genocide Convention, neither treaty identifies those acts that might signal an individual’s intent to incite genocide. Instead, international tribunals responsible for prosecuting perpetrators of this crime have been left to create their own guidelines.

This has posed a particular challenge in recent years with the establishment of such tribunals as the ICTY and the ICTR. Both systems were created by the United Nations in the early 1990s to prosecute perpetrators of war crimes committed in the separate regions, including crimes of genocide. The UN Security Council drafted and later adopted a statute specific to each tribunal, governing the status and jurisdiction of these courts.

Although both statutes prohibit incitement to genocide, their language simply repeats the text of the Genocide Convention verbatim. Both Article 4(3)(c) of the ICTY Statute and Article 2(3)(c) of the ICTR Statute contain the same language forbidding “direct and public incitement to commit genocide.” It should be noted that these tribunals take additional steps to ensure individual liability for any person who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . ,” including incitement to genocide. However, no other language in these statutes speaks to the elements of

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56 Id. art. III.
58 ICTY Statute art. 7(1); ICTR Statute art. 6(1).
general or individual incitement to genocide.

The provisions of the Genocide Convention and the Rome Statute speak to the evolution of international law since the crime of genocide was first codified. These treaties demonstrate the legal community’s commitment to prosecute not only perpetrators of genocide but of speech that incited acts of genocide. The Genocide Convention is of particular importance because it notes the link between a speaker’s intent and the crime of incitement. However, neither these covenants nor the statutes of the ICTY or ICTR build upon this concept. It was not until the ICTR presided over the now-infamous series of incitement cases that any international standards addressing intent were formed.

B. The ICTR Incitement Cases

Just as the legal community relied on the Nuremberg Tribunal to assert the link between intent and incitement, it relied on the ICTR to identify the factors suggesting such an intent. Rwandan President Juvénal Habyarimana first came into power in 1973. During his reign, Habyarimana and his subordinates instituted a series of policies that blatantly discriminated against the Tutsi population. Despite international attempts to intervene, the situation deteriorated as Tutsi exiles organized their own political party with a military wing attached. After two decades of domestic turmoil, Habyarimana’s plane was shot down as he returned from a meeting on peacekeeping methods. The Rwandan genocide began within a matter of hours.

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59 Maravilla, supra note 29, at 126.
60 Id.
61 Id.
62 Id.
63 Id.
The UN formed the ICTR to prosecute perpetrators of war crimes committed in Rwanda during this time.\textsuperscript{64} After seeing Hitler’s success with manipulating the media, the UN was ready to acknowledge the impact of speech in inciting genocide. Accordingly, the drafters of the ICTR Statute included a provision prohibiting incitement to genocide. However, the ICTR was left to interpret this provision in the context of individual cases. The Tribunal did not shy away from this task and in a series of trials established groundbreaking precedent regarding the element of intent in incitement to genocide.

1. The Akayesu Case

The first person to be prosecuted by the ICTR for the crime of incitement to genocide was Jean-Paul Akayesu.\textsuperscript{65} Akayesu acted as \textit{bourgestre}\textsuperscript{66} for the village of Taba, and was thus responsible for administering and enforcing local laws as decided by a community panel.\textsuperscript{67} The position of \textit{bourgestre} was one of great power and reverence, and these individuals were commonly seen as the “parent” of the community: "‘[P]eople would normally follow [his] orders . . . even if those orders were illegal or wrongful.’ Citizens would never think to disobey the commands of the \textit{bourgemestre}.’"\textsuperscript{68}

The ICTR found that Akayesu enjoyed significant influence over his peers thanks to his role within the community.\textsuperscript{69} This was of particular importance on April 19, 1994, when Akayesu came upon a group of more than 100 people surrounding the corpse of a young Hutu

\textsuperscript{64} \textit{Id.}
\textsuperscript{65} Benesch, \textit{supra} note 1, at 512.
\textsuperscript{66} Also commonly spelled \textit{bourgemestre}, this person acts as mayor of their township.
\textsuperscript{67} Maravilla, \textit{supra} note 29, at 127.
\textsuperscript{68} \textit{Id.} at 127-28.
militiaman.\textsuperscript{70} Akayesu used this encounter to advocate the killing of the Inkotanyi, a derogatory term used to describe the accomplices of Tutsi rebels.\textsuperscript{71} In his speech, Akayesu compelled the crowd to unite against what he referred to as the “sole enemy.”\textsuperscript{72} In the days that followed, the ICTR found evidence of the widespread massacre of Tutsi in Taba.\textsuperscript{73} Akayesu was ultimately convicted on several counts of genocide and war crimes, including incitement to genocide.\textsuperscript{74}

By the time Akayesu was tried by the ICTR, the international community had widely accepted that intent to incite genocide was a necessary element for a finding of actual incitement. However, the Akayesu trial was a pivotal moment in legal history because for the first time, an international tribunal articulated a few of the relevant factors indicating a person’s intent to incite genocide. First among these factors was the perpetrator’s role within the community. Akayesu’s position as \textit{bourgestre} bestowed upon him a considerable amount of power over his peers. The ICTR found that Akayesu had used “his respected and powerful position in the community to commit direct and public incitement to genocide . . . .”\textsuperscript{75} The Tribunal noted that not only was Akayesu aware of his capacity to influence the members of his village but that he knew this speech “would be construed as a call to kill the Tutsi in general,”\textsuperscript{76} particularly given that acts of genocide had already occurred elsewhere in Rwanda and that genocidal militias were beginning to form in Taba.\textsuperscript{77}

The Tribunal also established critical precedent regarding the nexus between incitement to genocide and actual acts of genocide. Although the ICTR acknowledged that Akayesu’s

\begin{footnotesize}
\begin{enumerate}
\item Benesch, \textit{supra} note 1, at 512.
\item \textit{Id.}
\item \textit{Id.}
\item Davies, \textit{supra} note 68, at 253.
\item \textit{Id.}
\item \textit{Id.} at 252.
\item Akayesu Judgment ¶673(iv).
\item Benesch, \textit{supra} note 1, at 512.
\end{enumerate}
\end{footnotesize}
speech was likely a factor in the persecution of Tutsis in Taba, the court ultimately held that a
definitive causal link between speech and acts of genocide was not necessary to hold an
individual accountable for mere incitement.\textsuperscript{78} Instead, the trial chamber held that “direct and
public incitement to commit [genocide] must be punished as such, even where such incitement
failed to produce the result expected by the perpetrator.”\textsuperscript{79}

The Tribunal’s decision that incitement was an inchoate crime was a significant moment
in legal history, particularly for the field of genocide prevention. It was no longer necessary to
establish that genocidal acts occurred as a direct result of a particular communication. Instead,
the ICTR felt it was more relevant to consider a suspect’s state of mind by asking both (1) how
did the speaker intend for his message to be understood, and (2) how was the message most
likely to be understood? Akayesu’s speech was delivered to a crowd of over 100 people. He
used a young militiaman’s death to prey on the emotions of his audience, and he consistently
used terminology that dehumanized the Tutsis. The ICTR ultimately convicted Akayesu after
determining that he clearly “had the intent to directly create a particular state of mind in his
audience necessary to lead to the destruction of the Tutsi group.”\textsuperscript{80}

2. The “Media Case”

As the ICTR was presiding over the Akayesu trial, it also charged Hassan Ngeze,
Ferdinand Nahimana, and Jean-Bosco Barayagwiza with incitement to genocide in what would
come be known simply as the “Media Case.” However, the Media Case possessed one crucial
distinction from the Akayesu trial, as the three defendants were charged with committing

\textsuperscript{78} “The Tribunal opined that establishing a ‘possible coincidence’ between Akayesu’s speech and
the massacres would not be sufficient. Instead, ‘there must be proof of a possible causal link.’”
Gordon, \textit{supra} note 12, at 150.
\textsuperscript{79} Akayesu Judgment ¶ 562.
\textsuperscript{80} Maravilla, \textit{supra} note 29, at 129.
incitement both before and after the Rwandan genocide had “officially” begun. The Tribunal again asserted that there did not need to be a direct causal link between speech and genocidal acts for the speaker to be convicted of incitement. Instead, the Tribunal found that the impact of the defendants’ incitement was clear enough:

The Chamber accepts that this moment in time [the downing of the airplane] served as a trigger for the events that followed . . . But if the downing of the plane was a trigger, then RTLM, Kangura, and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded.\(^81\)

Relying on this principle, the ICTR found that all three defendants were guilty of incitement. The Tribunal also used this case as a further opportunity to identify reliable indicators of a perpetrator’s intent.

i. Hassan Ngeze

Hassan Ngeze was both the owner and Editor-in-Chief of Kangura, the most widely read newspaper in the country.\(^82\) Just months after its first publication, Kangura ran its infamous “Appeal to the Conscience of the Hutu.”\(^83\) The article referenced the country’s violent 1990 invasion of RPF\(^84\) forces and stated: “The enemy is still there, among us, and is biding his time to try again . . . to decimate us. Therefore, Hutu, wherever you may be, wake up! Be firm and vigilant. Take all necessary measures to deter the enemy from launching a fresh attack.”\(^85\) The article also issued the so-called “Hutu Ten Commandments,” which set forth a series of directives that would prevent the Tutsis from using the Hutus’ “money, women and dishonesty to

\(^{81}\) Gordon, supra note 12, at 169, citing Akayesu Judgment ¶ 953.
\(^{82}\) Id. at 157.
\(^{83}\) Id.
\(^{84}\) RPF stands for “Rwandan Patriotic Front,” a group of primarily Ugandan Tutsi exiles who formed their own political party with a functional military unit attached.
gain control over the country.” The Commandments further demanded that the “1959 social revolution,” during which thousands of Tutsis were massacred, be taught to Hutus “at all levels.”

_Kangura_ published articles of this nature for the three years preceding the Rwandan genocide. Earlier pieces attacked the Tutsis for being violent and depraved, and played upon the Hutus’ fear of losing political power. These articles warned Hutus against becoming too complicit and even suggested “re-launching the 1959 Bahutu revolution.” Later pieces went even farther, comparing the Tutsi population to animals and labeling them _inyenzi_, or cockroaches. In a notorious 1993 article entitled “A Cockroach Cannot Give Birth to a Butterfly,” Tutsis were described as biologically distinct from Hutus and inherently marked with wickedness and malice:

> We are not mistaken in stating that a cockroach can only give birth to another cockroach. Who can establish the difference between the _Inyenzi_ who attacked in October 1990 and those of the 1960s? They are all the same . . . Their wickedness is the same . . . The abominable crimes committed by the present _Inyenzi_ against the citizens are a reminder of those committed by their peers: killing, looting, raping young girls and women . . .

Although these articles condemned the Tutsis for committing countless murders and rapes, several articles in _Kangura_ suggested that the same methods be used against the Tutsis. Many editorials even isolated certain groups within the Tutsi population, identifying them as being particularly wicked. _Kangura_’s articles often portrayed Tutsi women as promiscuous and dangerous, thus articulating “a framework that made the sexual attack of Tutsi women a

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87 _Id._
88 _Id._
89 _Id._
90 Nahimana Judgment ¶ 179.
foreseeable consequences of the role attributed to them.”\(^{91}\) The paper even went so far as to publish lists of people’s names, ambiguously charging them as “suspects” and advocating preemptive strikes.\(^{92}\)

In March 1994, *Kangura* partnered with Radio Télévision Libre des Mille Collines [RTLM] to host a competition that required participants to answer eleven questions.\(^{93}\) Each question could be answered by reading previous issues of the paper, and was designed to familiarize readers with the general teachings of *Kangura*.\(^{94}\) It was this competition that signaled to the ICTR that *Kangura* and RTLM had joined forces on at least one occasion.\(^{95}\) This would later become relevant when both Ngeze and two managers of RTLM were charged with incitement to genocide and tried at the same time.

ii. Ferdinand Nahimana and Jean-Bosco Barayagwiza

The interaction between these three defendants actually extended far beyond the joint competition in 1994. Ferdinand Nahimana and Jean-Bosco Barayagwiza exercised significant control over the RTLM radio station. Nahimana began his career with the Rwandan government, but was later let go when he was found to be fabricating stories of Tutsi violence.\(^{96}\) Within months of his dismissal, Nahimana decided to establish his own private radio station to “better reflect the voice of [President Habyarimana’s] party.”\(^{97}\) Nahimana played a central role in both the establishment and day-to-day management of RTLM, hiring its entire staff and serving on the
Board of Directors. Although Nahimana would later downplay his role at the radio station, several witnesses at his trial testified to “dealing with and perceiving Nahimana in the period before the genocide as the ‘main brain’ behind RTLM or its ‘leader.’”

One of these witnesses would also testify that if Nahimana was “the top man” at RTLM, Barayagwiza was his “number two.” Barayagwiza, a well-known jurist in Rwanda, was also a founding member of an extremist Hutu party. He was brought on to the RTLM Board of Directors by Nahimana, and would come to participate “in RTLM management largely to the same extent as Nahimana.” Indeed, both men were given the authority to represent RTLM in an official capacity, and both were largely known throughout Rwanda to be representatives of the radio station.

Despite the ICTR’s assertion that the three defendants often worked together, it was Barayagwiza who served as the “lynchpin” between Ngeze and Nahimana. While the three men had all previously worked together in various capacities, it was known that Ngeze and Nahimana did not share an amicable relationship. Instead, it was often Barayagwiza and Ngeze that would discuss the roles of Kangura and RTLM in the context of the Hutu “struggle against the Tutsi.” However, this provided the ICTR with enough of a link to try all three men at the same time.

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98 Id.
99 Id.
100 Id. at 165.
101 Id.
102 Id.
103 Id.
104 Id. at 166.
105 Id.
106 Id.
Perhaps because the three defendants work together, the messages propagated by Kangura and RTLM often shared similar themes. The ICTR analyzed four key facets of the RTLM’s pre-genocidal programming: “(1) general efforts to create animosity towards Tutsis; (2) broadcasts that equated the terms Inyenzi and Inkotanyi with Tutsis in general; (3) acknowledgements of RTLM’s reputation as anti-Tutsi and inciting hatred toward Tutsis; and (4) specific examples of verbal attacks on Tutsis.”

The Tribunal found that RTLM’s commitment to propagating these themes only intensified once the genocide began, at which point new categories of broadcasts also began to emerge, including:

1. those calling for a blanket extermination of all Tutsis;
2. those reporting that extermination has taken place and praising it;
3. those attacking UNAMIR; and
4. those downplaying the extermination or urging the population to hide traces of it to improve Rwanda’s image among the international community.

RTLM employed similar methods to those of Kangura to achieve these goals. The radio station began to broadcast the names and locations of Tutsis targeted for violence, and commonly characterized the Tutsis as inyenzi.

Despite Nahimana’s and Barayagwiza’s attempts to distance themselves from RTLM’s content at trial, it was found that both men had served as broadcasters prior to the genocide. Nahimana used stories of Rwanda’s past to help shape the nation’s future, compelling his peers to take a stand against the disproportionate treatment of Hutus by Tutsis: “Not long [ago], . . . those [Tutsi] refugees tried to replace the new Republic by the former monarchy. They launched attacks that killed people . . . you understand that the RPF that attacked us is made of those

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107 Id. at 161.
109 Id. at 162.
110 Id. at 161.
people, has its origin in those Tutsis . . . who attacked us . . . .” Barayagwiza used stories from his own childhood to suggest that Tutsis had long considered themselves superior to Hutus. Although the men removed themselves from the air after the genocide began, both Nahimana and Barayagwiza continued to exert considerable influence over the broadcasts’ content; Kantano Habimana, one of RTLM’s principal broadcasters, would later testify that there were times in which he simply read dialogue straight from a telegram drafted by his supervisor, Nahimana.

iii. The ICTR’s verdict

All three men—Ngeze, Nahimana, and Barayagwiza—were charged with incitement to genocide. Before the Tribunal began its analysis of the case, it noted the challenge in balancing hate speech with incitement to genocide. Again the ICTR asserted that the element separating hate speech from incitement was intent: “Freedom of information, a fundamental human right, ‘requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to see the facts without prejudice and to spread knowledge without malicious intent.” After a thorough consideration of each defendant’s intent, the ICTR convicted all three men of incitement to genocide. The Media Case proved to be a massive undertaking, with the court producing a 351-paged judgment to be followed by a 528-paged decision by the appeals chamber. A close reading of these judgments reveals that the ICTR had once again identified several clear indicators of intent to incite genocide.

111 Nahimana Judgment ¶ 357.
112 Gordon, supra note 12, at 165.
113 Id. at 160-61.
114 Id. at 168, citing Nahimana Judgment ¶ 944.
115 Benesch, supra note 1, at 515-16.
In his article analyzing the Media Case, Gregory S. Gordon synthesized the Tribunal’s judgment to identify four key elements signaling intent: (1) purpose; (2) text; (3) context; and (4) the relationship between speaker and subject.\footnote{116} Under these criteria, a tribunal must first consider the object of a communication and ask what compelled the perpetrator to speak. If the tribunal can identify a legitimate objective for the speech other than to incite genocide, it is likely to be protected. The ICTR provided several examples of what it deemed “legitimate objectives[,] [such as] historical research, the dissemination of news and information, and the public accountability of government authorities.”\footnote{117} In applying this rationale to the instant case, the Tribunal found examples of both legitimate and illegitimate objectives. For example, the ICTR found that Barayagwiza’s broadcast in which he spoke of his childhood was merely meant to convey historical inequalities and to promote ethnic consciousness, which was not prohibited by law.\footnote{118} However, the Tribunal also condemned multiple broadcasts in which the purpose appeared to be the promotion of “harmful ethnic stereotyping.”\footnote{119} The ICTR maintained that to adequately analyze a perpetrator’s intent, a court must consider not only the explicit language used but also the context in which the speech was disseminated. While the relevant body of law prohibiting incitement to genocide specifically criminalizes “direct and public” incitement, the ICTR noted that speech must not always be “direct” to be explicit. Instead, “calls for genocide can be couched in euphemisms and yet be

\footnote{116} Gordon, supra note 12, at 172.  
\footnote{117} Id. at 172-73.  
\footnote{118} Nahimana Judgement ¶ 1019.  
\footnote{119} Id. ¶ 1020.
fully understandable by their audiences.”120 Indeed, the ICTR found that RTLM often used code words such as “enemy” or “cockroach” to refer to the Tutsis.121

Given this philosophy, the ICTR studied not only the exact language used by the defendants but also the tone of their speech and the circumstances in which it was shared. The Tribunal took particular note of the fact that much of the speech in question had been disseminated after the genocide began. It argued that in “‘a genocidal environment,’ an ‘ethnic generalization provoking resentment’ would be more likely to lead to violence and would also be an ‘indicator that incitement to violence was the intent.’”122 Accordingly, the Tribunal appeared to frame the context question as, how was the audience most likely to interpret the speech given the context in which it was delivered? The appeals court for the Media Case later limited this analysis by holding that if a communication had more than one reasonable interpretation given the context in which it was delivered, it is not clear beyond a reasonable doubt that the speaker intended to incite genocide.123

The final factor of intent as articulated by the ICTR examined the relationship between the speaker and the subject. As evidenced by the Akayesu case, a speaker’s authority or influence over his audience directly impacts their capacity to receive his message.124 To build upon this thought, Benesch poses the well-known “Times Square” hypothetical: “Suppose that someone stands up today in Times Square and shouts out the most . . . explicit rants that were broadcast over Rwandan radio before and during the 1994 genocide . . . No genocide would

120 Davies, supra note 68, at 258-59.
122 Mendel, supra note 23, at 56, citing Nahimana Judgment ¶ 1022.
123 Translation provided by Benesch, supra note 1, at 489.
124 Id. at 494.
ensue . . .”\textsuperscript{125} But the more power a speaker exerts over his audience, the more primed they will be to receive his message.

The Tribunal also noted the relevance of whether a speaker attempts to distance himself from his message: “In cases where the media disseminates views that constitute ethnic hatred and calls to violence . . . a clear distancing from these is necessary to avoid conveying an endorsement of the message . . .”\textsuperscript{126} In applying this standard to the Media Case, the ICTR found that neither Nahimana nor Barayagwiza made any effort to distance themselves from RTLM’s message of ethnic hatred.\textsuperscript{127} Instead the two men were known as representatives of both the station and the station’s philosophies.

\textit{C. Impact of the ICTR Incitement Cases}

The ICTR incitement cases provided the legal community with invaluable insight into the role of intent in the crime of incitement to genocide. The Tribunal was meticulous in its comparison of hate speech to incitement to genocide and in its recognition of intent as the differentiating factor. With each case the ICTR identified new elements that speak reliably to a perpetrator’s intent. However, the legal community has yet to synthesize the ICTR’s judgments and establish a set of guidelines relating to the indicators of intent. International courts presiding over incitement cases must instead refer to the ICTR judgments for any guidance in addressing this issue.

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{125}] \textit{Id.}
\item[\textsuperscript{126}] Nahimana Judgment ¶ 1024.
\item[\textsuperscript{127}] \textit{Id.}
\end{enumerate}
\end{footnotesize}
IV. GUIDELINES TO DEFINING INTENT TO INCITE GENOCIDE

It has been said that “to ignore or deny the relationship between hate speech and . . . incitement to violence is to not know history.”128 While there is undeniably a connection between hate speech and incitement to genocide, international law only prohibits the latter. As intent has been identified as the distinguishing factor between hate speech and incitement, it is imperative that a legal framework be established to help identify the presence of intent to incite genocide. Section IV combines recent legal rhetoric with past court judgments to briefly identify the five key elements of intent to incite genocide (language, context, relationship, theme, and purpose) and the potential questions that fall under each category. It should be noted that this is not meant to serve as an exhaustive list, but merely as a starting point for the creation of legal standards addressing this issue.

A. Language

Incitement to genocide can be communicated in a variety of ways: speeches, newspaper articles and comics, radio and television broadcasting, and even music. International courts often begin their analysis by looking to the actual language the perpetrator used for evidence of intent. Given the exact language used, courts have drawn a distinction between explicit and direct calls to genocide. However, both types of communication indicate the intent to incite.

1. How explicit was the language used?

Tribunals traditionally begin their analysis by examining the explicit language used by a perpetrator to communicate his message. Given the wealth of evidence available in the Media Case, the ICTR found the requisite intent to incite based primarily on the explicitness of the statements made by the accused: “The statements in question were often very direct, calling

explicitly for the extermination of the Tutsis, referring to a war between ethnic groups, providing suggestions about the weapons to be used and even describing the media as the complement to bullets in the ‘war’. A suspect’s explicit call for the use of violence against or the extermination of any national, ethnical, racial or religious group clearly signals their intent to incite genocide.

2. Was the language direct without being explicit?

However, language can convey a direct call to genocide without so explicitly stating this intent. The ICTR has particularly noted a perpetrator’s use of euphemisms to conduct a direct call for genocide, as seen in the case of Georges Ruggiu. Ruggiu often used his broadcasts for RTLM to rally his listeners against the “enemy,” and often compelled them to “go to work.” The Tribunal found that “With the passage of time, [this] expression came to mean, ‘go kill the Tutsis and Hutu political opponents of the interim government’.” The Tribunal also studied Ruggiu’s use of inyenzi. During the genocide, this term first became synonymous with “Tutsi” and eventually designated “persons to be killed.” The ICTR found that Ruggiu’s repeated use of these euphemisms served as direct incitement to kill and cause serious harm to the Tutsis.

B. Context

While the language of a communication certainly speaks to a perpetrator’s intent, a tribunal should also examine the circumstances surrounding the speech. Context plays a significant factor in the potential for speech to incite genocide. For example, Mendel noted the ICTR’s assertion that “in ‘a genocidal environment,’ an ‘ethnic generalization provoking resentment’ would be more likely to lead to violence and would also be an ‘indicator that

129 Mendel, supra note 23, at 48-49.
130 Prosecutor v. Ruggiu, Case No. ICTR 97-31-1, Judgment and Sentence, ¶ 44 (June 1, 2000).
131 Id.
132 Id.
incitement to violence was the intent’.“ However, Mendel also noted the lack of case law speaking to those contexts that are likeliest to incite genocide. In the absence of any definitive conclusions on the matter, the following questions simply serve as a sample of contextual factors that a tribunal might consider.

1. What were the circumstances surrounding the speech?

Tribunals should consider not only the circumstances directly surrounding the speech, but a state’s social climate at the time the speech was disseminated. Tribunals should first consider the context immediately surrounding the speech, including such factors as when and where the speech was made, to whom the perpetrator was speaking, etc. The ICTR marked the significance of the circumstances surrounding Akayesu’s oration, which took place before the body of a murdered man. Akayesu used the victim to manipulate his audience’s emotions and to heighten their already existing sense of fear, danger, and urgency. This greatly increased the probability that Akayesu’s audience would feel compelled to take action.

Tribunals have also marked the importance of a state’s social and political climate at the time speech is made, placing particular emphasis on whether the genocide had already begun at that time. A witness during the Media Case conveyed the critical role that early incitement has in triggering a genocide: “What the 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’.” It takes even less effort for a perpetrator to move his audience to action if a genocide is already taking place. Speech in that context would simply exacerbate a highly volatile situation and lend credence to the acts of violence already being committed.

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133 Mendel, supra note 23, at 56, citing Nahimana Judgment ¶ 1022.
134 Id.
135 Benesch, supra note 1, at 516, citing Nahimana Judgment ¶ 436.
2. How often was the speech communicated?

The more often an audience is exposed to a message, the more likely they are to believe in it. It is highly improbable that an audience could be moved to action after being exposed to a message only once or twice. However, if they are repeatedly subjected to the same message, they will become conditioned to accept that message as true. Alfred Kiruhara testified to this effect after he was charged for his roles in the Rwandan genocide: “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 later coming to kill the Hutus—when this was repeated over and over—I began to feel some kind of fear.”  

Benesch contends that most inciters know they must repeat their message to truly affect their audience. Thus the more a perpetrator seeks to repeat his message, the likelier it is that he aims to incite genocide.

3. Were opposing views available at the time the speech occurred?

Regardless of how often a message is repeated, its impact will be weakened in the presence of opposing ideas: “[For] when alternative news is no longer disseminated in the media, the marketplace of ideas withers, and the remaining media becomes unchallenged.” As a result, perpetrators who wish to incite genocide will often remove alternative messages from the marketplace of ideas. It was only a matter of days after Hitler came into power that he seized control of every major media outlet, and shortly thereafter he banned all anti-Nazi news publications. Those journalists who continued to propagate anti-Nazi stories were inevitably silenced, and Hitler quickly gained control over the mainstream media.

Mendel developed this idea further and identified a non-exhaustive list of circumstances that signal the stifling of the marketplace of ideas:

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136 Id. at 502.
137 Id. at 523.
The existence of barriers, particularly those subject to political manipulation, to establishing print media outlets, and the use of these barriers to systematically limit the access of certain groups to the print media sector;

- a licensing system for broadcasters which is subject to political control and which works to undermine diversity, and the use of licensing to systematically limit the access of certain groups to the print media sector;

- the absence of media diversity—in both the print and broadcast sectors—and, in particular, an absence of minority (or majority) media;

- broad and unclear restrictions on the content of what may be published or broadcast, including hate speech laws, along with evidence of racial or group bias in the application of these restrictions;

- the absence of criticism of government or wide-ranging policy debates in the media and other forms of communication;

- as a particular form of the previous point, the absence of broad social condemnation of racism and racist statements, when they are disseminated.\textsuperscript{138}

However, inciters can suppress opposing speech in any number of ways, particularly if they are in any position of power.

4. Had the targeted group already suffered violence?

As noted earlier, the use of violence against the eventual victims of genocide plays a significant role in how speech is received. In that context, a call to action is perceived in a more dangerous light. As Benesch asserts, “[i]f a speaker calls, even ambiguously, for genocide after an already-established pattern of violence, it is much more likely that an audience will react.”\textsuperscript{139}

Indeed, a speaker can rely more heavily on veiled threats and euphemisms in this context, because his audience is more primed to receive a call to action. The fact that acts of aggression have already occurred would simply serve as justification for the continued use of violence.

5. What was the scope of the speech’s impact (i.e., was the message systematic and widespread?)

\begin{footnotes}
\item \textsuperscript{138} Mendel, \textit{supra} note 23, at 63-64.
\item \textsuperscript{139} Benesch, \textit{supra} note 1, at 522.
\end{footnotes}
When incitement reaches a certain level of intensity, there becomes a real risk that genocide will occur. Mendel warns that particularly where speech promoting genocide or violence is widespread, the risk that it provokes acts of genocide significantly increases.  

Literature from the Committee on the Elimination of Racial Discrimination [CERD] supports this contention, cautioning that the

- (1) Systematic and widespread
- (2) use and acceptance of
- (3) speech or propaganda
- (4) which promotes hatred and/or incites violence against minority groups
- (5) particularly through use of the media,

poses a serious risk of inciting genocide. Mendel identified the rationale behind this assertion, stating that “the constant repetition of these messages makes them less extreme and eventually normal, even to members of society who might initially be surprised and shocked by them.”

International tribunals have long acknowledged this connection, as seen by the ICTR’s repeated reference to the impact of the “drumbeat” of RTLM or the “litany” of discriminatory speech in Kangura.

6. In what manner was the speech communicated?

More traditional modes of incitement include articles, political cartoons, radio and television broadcasts, and public speeches. However, international courts have emphasized that perpetrators can also use less traditional methods of communication to dispel their messages.

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140 Mendel, supra note 23, at 66.
141 Id., citing Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, 14 October 2005, CERD/C/76/1, Indicator 8.
142 Mendel, supra note 23, at 67.
143 Id.
This issue was examined in the case of Simon Bikindi, a popular Hutu musician in Rwanda.\textsuperscript{144} The ICTR issued an indictment against Bikindi that charged him with incitement to genocide, stating:

\begin{quote}
During the period [of] 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.\textsuperscript{145}
\end{quote}

Although the ICTR found that Bikindi composed his songs with the “specific intention to disseminate pro-Hutu ideology and anti-Tutsi propaganda, and thus to encourage ethnic hatred,”\textsuperscript{146} it also held that the lyrics never specifically advocated for genocide.\textsuperscript{147} However, the Tribunal did not assert that music could not serve as a form of incitement. Thus, the inquiry into mode of communication should not simply ask how a message was communicated. Instead, it should ask how the speech was likeliest to be received given the method in which it was communicated. For where some might interpret a song as artistic expression, others might interpret it as a call to action.

\textit{C. Relationship}

It has been argued that international courts cannot convict someone of incitement to genocide unless it finds that (1) the speaker had authority or influence over his audience, and

\begin{footnotes}
\item[145] \textit{Id.}, Indictment at ¶ 28 (June 27, 2001).
\item[146] \textit{Id.}, Judgment at ¶ 16.
\item[147] It should be noted that Bikindi was ultimately found responsible for incitement to genocide. However, his conviction was based on actions unrelated to his music. For example, on one occasion Bikindi was known to have driven along a road with a convoy of militia while using a loudspeaker to compel the crowds of people to kill Tutsis.
\end{footnotes}
(2) that audience was primed to receive the speaker’s message. However, a court’s consideration of a speaker’s relationship to his audience need not extend this far in its analysis of intent to incite. Here the question is not whether the perpetrator could reasonably have incited genocide, but simply whether the perpetrator sought to use his position of authority to compel his audience to commit acts of genocide.

1. Did the perpetrator seek to use his position of authority to compel others to act?

People in positions of authority are generally aware of their capacity to influence others. As a result, their speech is carefully constructed to induce a certain response. The ICTR found that this was the case with Akayesu, who was aware that his position as bourgestre was viewed with great reverence and that he was often seen as the embodiment of “the communal authority.” Thus when he urged the crowd to eliminate the enemy, it was found that “Akayesu himself was fully aware of the impact of his speech on the crowd . . .” and fully intended to utilize his ability to influence to “create [the] particular state of mind in his audience necessary to” compel them to commit acts of genocide. Accordingly, a perpetrator’s use of his position of authority to induce action serves as an indicator of his intent to incite genocide.

2. Was the speech state-sponsored?

Historically, incitement to genocide has been a largely state-sponsored activity. Although genocide has occurred in countries that are markedly different from one another, the methods of state-sponsored incitement are usually quite similar. State officials will often seize control of all major media outlets, including print and broadcast. Journalists are forced to perpetuate a state’s key messages, and those who refuse are silenced (often they are killed or

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148 Benesch, supra note 1, at 494.
149 Maravilla, supra note 29, at 127.
150 Akayesu Judgment ¶ 673.
151 Id. ¶ 674.
extradited to another country). Independent media outlets are similarly repressed. In the Media Case, the Tribunal noted that both the overwhelming presence of state-controlled media and the apparent restriction of free thought serve as indicators of the state’s intent to incite genocide. As a result, the Tribunal held that “speech ‘align[ed] . . . with state power rather than in opposition to it’ deserves less protection, ‘to ensure that minorities without equal means of defence are not endangered’.” Thus state-controlled media that circulates discriminatory speech and compels public action not only serves as an indicator of the state’s intent to incite, but receives less legal protection than incitement that is based on minority opinions.

**D. Theme**

The presence of an overarching theme in a perpetrator’s speech also serves as a reliable indicator of his intent. If a perpetrator consistently disparages or discriminates against a group of people, it is likely that his goal is simply to persuade others that his beliefs are correct. But if the perpetrator consistently compels or justifies action based on discriminatory beliefs, he likely possessed the requisite intent to incite genocide. In making this distinction, courts should consider not only the perpetrator’s use of a consistent theme but also how audiences received and responded to that message.

1. Was the speech understood by its audience as a call to commit violence or acts of genocide?

Past incitement cases have shown that a perpetrator can convey a direct call for genocide without explicitly stating this intent: “Inciters do not always say ‘go and kill’ in so many blunt words—especially when they are laying the crucial groundwork for genocide.” As a result,

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153 *Benesch, supra* note 1, at 520.
courts should consider not only the language used by a perpetrator but also the underlying message of his speech. One method for determining the underlying message of speech is to look to the audience’s response. If the speech was understood as a call to commit violence or acts of genocide, it is highly likely that the perpetrator intended to convey that message. The ICTR used this method to find that Akayesu intended to incite after “several prosecution witnesses . . . [testified] that when Akayesu urged the audience to kill the ‘Inkotanyi,’ his listeners understood that as a call to kill Tutsis.”

Perpetrators are often sensitive to their audience and aware of the best way to communicate with them. Thus, if an audience has interpreted speech as a call for action, it is highly likely that the perpetrator intended for that message to be conveyed.

2. Did the perpetrator knowingly convey information that was misleading or incorrect?

Although truthfulness does not serve as a defense to incitement, “the deliberate dissemination [of] falsehoods may speak to intention.” International courts have repeatedly held that perpetrators who intentionally circulate stories they know to be untrue are likely using these falsehoods to incite acts of genocide. This issue was at the heart of the Holocaust denial cases, in which the courts found that (1) the Holocaust was a clearly established historical fact, (2) the defendants’ statements denying the Holocaust were necessarily false, and (3) the defendants’ intention in disseminating these falsehoods was to incite hatred.

Central to this consideration is whether the perpetrator knew that he was spreading falsehoods. Courts will likely refuse to convict a perpetrator of incitement if he believed the information to be true: “With regard to the charge that he had incited the commission of war crimes by deliberately falsifying news to arouse passions in the German people, the IMT found

154 Gordon, supra note 12, at 152.
155 Mendel, supra note 23, at 60.
156 Id.
no evidence Fritzsche knew any such information was false."\textsuperscript{157} Courts have similarly protected the dissemination of true statements, because any resentment generated by those statements would simply “be a result of the underlying factual situation, rather than the articulation of the statement as such . . .”\textsuperscript{158} However, if a perpetrator knowingly conveys information that is misleading or false, it is likely that he intended to use those falsehoods to incite genocide.

3. Did the speech dehumanize the targeted group and justify their killing?

Genocide is not a commonly accepted practice. However, perpetrators of incitement are adept at using speech to “lay the psychological groundwork for genocide.”\textsuperscript{159} By creating and perpetuating key messages, inciters can alter their audience’s perception of genocide. This is most often accomplished in one of two ways. First, the inciter dehumanizes the target group. By depicting the targets as “non-humans . . . it will seem acceptable to kill them.”\textsuperscript{160} Second, inciters suggest that genocide is not only acceptable, but it is necessary. It is argued that the target group poses a serious threat and that the use of violence against them would merely serve as a justifiable form of self-defense. This is commonly known as the “accusation in a mirror” approach, where inciters “claim (falsely) that the victims-to-be are planning to commit atrocities against the genocidaires-to-be.”\textsuperscript{161} Both of these methods were commonplace in Rwanda. The Tutsis were regularly called “cockroaches” or “animals”; once the group had been stripped of its human identity, Hutus were told that the Tutsis were also committing mass atrocities. These methods combined allowed for even the most average Hutu person to become a murderer.

\textsuperscript{157} Gordon, supra note 12, at 144.
\textsuperscript{158} Mendel, supra note 23, at 60.
\textsuperscript{159} Benesch, supra note 1, at 523.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 504.
E. Purpose

Finally, courts should consider a perpetrator’s secondary motivations. International law clearly distinguishes between speech that aims to educate persuasively and that which is intended to promote an offense.\(^{162}\) People who aim only to educate cannot be convicted of incitement (regardless of how discriminatory the speech might be); for as offensive as hate speech might be, it is accorded a significant amount of protection under international law. But once a speaker seeks to influence his audience’s actions, even in a minor way, he has likely crossed the line from hate speech to incitement. Accordingly, courts should consider whether a perpetrator was motivated by a desire to affect the actions of others.

1. Did the speaker merely seek to advocate his beliefs, or did he seek to compel others to take violent action based on those beliefs?

International law permits a broad range of speech. Regardless of how disparaging or offensive the speech might be, hate speech is accorded significant protection under international law. Courts have consistently found hate speech to be a legitimate form of expression, used by speakers who were motivated to convey historical inequities, provide political analysis, or advocate for greater ethnic consciousness. Thus if a speaker’s motivation was simply to advocate for his personal beliefs, he did not possess the requisite intent to incite genocide. However, if a speaker was motivated by his desire to compel even small-scale discriminatory action, it can be held he intended to incite genocide. The ICTR made this distinction during the Media Case, when it analyzed one of Barayagwiza’s radio broadcasts. During the broadcast, Barayagwiza shared stories from his childhood meant to illustrate the social inequities between Hutus and Tutsis at that time. Although the tone of the speech was undoubtedly discriminatory,

\(^{162}\) UN Tribunal’s Judgment Review, supra note 153, at 2772.
the Tribunal found that Barayagwiza’s broadcast was permissible as “a moving personal account of his experience of discrimination as a Hutu.”

2. Did the speaker attempt to change social norms or promote social conditioning?

It can be difficult to differentiate hate speech from incitement, and often courts have based the distinction on whether the speaker wanted to induce his audience to take violent action. However, the intent to incite might also be present when the speaker exhibits only a desire to alter social norms. Legal scholars have argued that for a perpetrator to incite genocide, he must first engage in a campaign of “social conditioning which gradually, but radically, changes norms of thought and behavior.” Thus if a speaker voices a desire to alter the social climate, that may speak to his eventual intent to incite genocide. For example, Hitler’s media blitz first focused on rallying support for the Nazi party and on convincing non-Jews that they were superior and deserved to be treated as such. Once the social climate in Germany fell into line with Hitler’s views, the tone of his speech began to more explicitly call for acts of violence.

V. CONCLUSION

The UN’s adoption of the Genocide Convention ushered in a new era of international law. Not only did the Convention provide a legal foundation for prosecuting perpetrators of genocide, but it also sparked an international dialogue regarding the definition of this crime. One of the more significant topics in this discussion was that of incitement to genocide. After World War II, the world could no longer ignore the massive impact of speech in inciting genocide. However, the legal community struggled to distinguish mere hate speech from actual incitement. For although the Convention criminalized the act of incitement, it failed to define

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163 Nahimana Judgment ¶ 1019.
the elements of the crime. Instead, international tribunals were left to interpret what acts constituted incitement.

These tribunals have identified one key element separating hate speech from incitement to genocide: the speaker’s intent. Although such tribunals as the ICTY and the ICTR have widely acknowledged the role of intent in prosecuting perpetrators of incitement, they have yet to definitively identify those acts which signal the intent to incite. However, establishing a set of guidelines to which each tribunal may refer is of paramount importance. While incitement cases should be considered on an individualized basis, these principles would serve as a baseline for legal standards addressing incitement. Thus the legal community could more easily distinguish hate speech from incitement, and the threat of unlawfully infringing upon the right to free speech would be minimized. International tribunals might then be more willing to prosecute perpetrators of incitement, and prosecutors would have an easier time proving the element of intent.

Perhaps most important is the impact this could have on the field of genocide prevention. These guidelines would make it possible “to try to prevent genocide when it has not yet occurred by indicting and prosecuting individuals who incite genocide before the incitement comes to fruition.”165 Rather than waiting for actual genocide to occur, prevention advocates would have a basis for intervening in countries where incitement is being committed. For although the debate regarding standards of intent is critical to the prosecution of perpetrators, the primary goal is to compel action by the international community when there is a risk that genocide might occur. As stated by Dr. Charles Murigande in his 2005 Statement to the United Nations, it is “action, not words, [which will] be the measure of our success or failure. Will there be lengthy

165 Davies, supra note 68, at 246.
academic or legal debates on what constitutes genocide . . . while people die?  Adoption of these guidelines would end the legal debate on the elements of intent and thus compel intervention in states where these elements are present. This would be a significant step towards achieving Raphael Lemkin’s ultimate goal of preventing the loss of innocent lives lost to the needless crime of genocide.