



THE CHANGING FORMS OF INCITEMENT TO TERROR AND VIOLENCE: The Need for a New International Response



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INCITEMENT IN RWANDA: THE PATH TO GENOCIDE

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This article addresses the following questions: (1) What role did incitement play in the mass murder of some eight hundred thousand Tutsis in Rwanda over a three-month period in 1994? (2) What are the legal foundations for the International Criminal Tribunal for Rwanda's (ICTR) incitement-to-genocide jurisprudence? (3) What does that jurisprudence consist of? (4) How is the ICTR precedent relevant to contemporary cases of incitement?

HISTORICAL BACKGROUND

Rwanda was a Belgian colony, gaining independence in 1962. At the time of independence, there was large-scale violence perpetrated by Hutus against Tutsis, related to resentment Hutus felt regarding the manner in which Belgium governed the colony—generally favoring Tutsis and disenfranchising Hutus. Many Tutsis fled the country for refuge in neighboring lands and formed a diaspora in Central Africa's Great Lakes region. From the Tutsi refugee group in Uganda, the Rwandan Patriotic Front (RPF) was formed. In 1990, from Uganda's southern border, the RPF launched a military invasion into Rwanda. At that time, the Rwandan economy was quite weak and there was international pressure on Rwandan president Juvénal Habyarimana to make peace with the RPF.

In August 1993, the Hutu-dominated Rwandan government negotiated a settlement with the RPF known as the Arusha Peace Accords. These accords called for the establishment of a transitional government that included RPF participation in both the government and the military of Rwanda (a so-called Broad-Based Transitional Government that also included moderate Hutu parties). A UN peacekeeping mission, UNIMIR (UN Assistance Mission for Rwanda), was established to monitor the Arusha Accords transition.

Habyarimana had hard-line Hutus in his clique who did not want the president to bow to international pressure and share power with the Tutsis via the Arusha Accords. The accords aimed to establish the Broad-Based Transitional Government in anticipation of general elections. Habyarimana, then, was trying to temporize; to slow implementation of the accords and play the various factions off one another so as to stay in power. Hutu extremists, however, ultimately felt that he was selling them out and that the Arusha Accords could not be implemented under any circumstances. They began to use the media to attack the accords, the international community (especially the Belgians), and, most importantly, the Tutsis. And they began to formulate a plan for the genocide of the Tutsis.

As part of this, extremists set up a radio station, Radio Télévision Libre des Mille Collines (RTLM), otherwise known as Radio Machete. They also used the state-run radio station,

“Radio Rwanda,” to incite against the Tutsis. In their hate language disseminated over the airwaves, they attempted to dehumanize the Tutsis by, among other things, referring to them as “*inyenzi*” (cockroaches).

The Hutu extremist newspaper *Kangura* used both images and language to incite. For example, it published on one of its covers a photo of the first Rwandan president Grégoire Kayibanda, who led the country during the early post-independence period of mass violence against Tutsis. Next to the image of Kayibanda, a machete was depicted; and the text placed next to these images posed the question: “What shall we do to complete the social revolution of 1959?”—a reference to the Hutu revolt that overthrew the Tutsi monarchy and the accompanying mass violence. The apparent aim of the cover was to incite readers to massacre Tutsis with machetes.

The extremists also began to organize militias, including a group known as the *interahamwe* (meaning “those who work together” in Kinyarwanda), drawing from the ranks of disaffected youths. They purchased and stockpiled machetes and other weapons and used them to arm the militias, which, having been exposed to the incitement, began assaulting and murdering Tutsis. The head of the UNIMIR mission, General Roméo Dallaire, learned from an anonymous informant that extermination of the Tutsis had been planned. Unfortunately, his reports to UN headquarters were ignored, as were his requests to seize arms caches. And so the stage was set for genocide.

Before discussing the use of media *during* the genocide, it would be helpful to provide a few more examples of how the extremist Hutus used the media to foment violence in the period leading up to 1994. There had been, for example, a media-driven dress rehearsal for the genocide in Bugesera, near the Rwandan capital of Kigali. At the direction of Ferdinand Nahimana, then head of the government media agency ORINFOR (and later a principal founder of RTLM), Radio Rwanda broadcast a fabricated communiqué stating that the Tutsis had drawn up a hit list and that, based on this list, there would be Tutsi mass killings of Hutus. This message was broadcast as the militias were being trucked to Bugesera; thereafter, they murdered hundreds of innocent Tutsis. This orchestrated mix of incendiary language and militia movement followed by mass murder served as the template for the genocide during April to July 1994.

Another example is worth noting. In November 1992, Léon Mugesera, a prominent member of Habyarimana’s MRND party, made an infamous speech calling for the extermination of the Tutsis. Among other techniques, he used metaphors. For example, he exhorted the audience to send the Tutsis “back to Ethiopia” via the Nyabarongo River, a nonnavigable body of water where Hutu bodies had been dumped after massacres in the early years after independence. And his language suggested that Tutsis were aliens, not true Rwandans but outsiders originating from the Ethiopian region. The Rwandan audience for this speech, as well as government authorities, easily grasped its import.

Mugesera was indicted for incitement by Rwandan authorities but fled to Canada, where an immigration case was filed against him. Early in 2012, after years of proceedings and appeals in Canada, he was deported to Rwanda to stand trial for his crimes.

CATEGORIES OF RTLM MESSAGES PRE-GENOCIDE

This radio station disseminated roughly four categories of messages before the genocide:

1. General efforts to create animosity toward Tutsis (for example, criticizing them for having too much wealth—a common anti-Semitic trope—or engaging in ethnic stereotyping regarding their physical characteristics)
2. Broadcasts that equated the terms *inyenzi* (cockroach) and *inkotanyi* (a Kinyarwanda word meaning a violent warrior/killer from feudal times) with Tutsis in general
3. Acknowledgments of RTLM's reputation as anti-Tutsi and inciting hatred toward Tutsis (for example, telling listeners that RTLM “sets people at odds with others,” “creates tension,” “heats up heads”)
4. Specific verbal attacks against particular Tutsis (for example, a broadcast on April 3, 1994, specifically denounced a doctor in Cyangugu—and three days later he was burned alive in front of his house)

Of course, all of this led to the actual genocide. On April 6, 1994, the airplane of President Habyarimana, returning from talks in Arusha on implementing the accords, was shot down over Kigali. Almost immediately, roadblocks were set up all over Kigali and death squads began killing prominent Tutsis and moderate Hutu politicians. A group of Belgian Blue Helmets were then murdered with the goal of impelling Belgian/UNAMIR withdrawal from Rwanda. Soon the killing spread across the country as RTLM continued to broadcast inflammatory messages. By the middle of July, approximately eight hundred thousand Tutsis and moderate Hutus had been slaughtered; an unimaginable number were hacked to death with machetes.

An illustration depicting a scene from the first night of the genocide shows two Rwandans listening to the radio at home, after Habyarimana's plane was shot down. The illustrator imagines that they hear the following message:

We ask all our valorous Hutu brothers not to allow this crime to go unpunished. Rise up, our brothers! Rise up and go to work! Sharpen your tools, raise your bludgeons! We must eradicate this breed of cockroaches! Look for them in all the holes. . . .

We do not know if this precise message was broadcast that evening. But it represents a reasonable composite or facsimile of the type of language that was disseminated by RTLM once the genocide began. “Go to work” was a euphemism understood by Rwandans to mean “kill Tutsis.” And Hutus were exhorted to kill them with primitive tools, such as machetes and bludgeons. Once again, the Tutsis were dehumanized by being referred to as cockroaches.

In addition to the type of messages it disseminated before the genocide, during the genocide RTLM broadcast messages that can be roughly divided into four new categories of incitement: (1) calls for the extermination of all Tutsis, including dehumanization of Tutsis and use of code words such as “go to work”; (2) reporting that extermination had taken place and praising it; (3) calls for attacks on UNAMIR—the skeletal force that Dallaire was leading that could do little more than serve as witnesses to the genocide; and (4) downplaying the extermination or urging the population to conceal traces of it so as to improve Rwanda's

international image.

A chilling example of Category 1 can be found in an RTLM broadcast by Kantano Habimana on June 4, 1994:

One hundred thousand young men must be recruited rapidly. They should all stand up so that we kill the *inkotanyi* and exterminate them. . .the reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it.

Another illustration comes from broadcaster Georges Ruggiu, the only white European convicted by the ICTR. He called on the population, particularly the military and the *interahamwe* militia, to finish off "the 1959 revolution." As noted, this was understood as an incitement to massacre the entire Tutsi population as Rwandans would roughly understand the exhortation to mean: "Many were killed in 1959 but not all. We now need to finish the job. We must now massacre the entire Tutsi population."

What role did incitement play in the genocide? ICTR judge Navanthen Pillay perhaps described it best and most evocatively in the Media Case Trial judgment:

The Chamber accepts that this moment in time [the downing of the airplane on April 6] served as a trigger for the events that followed. That is evident. But if the downing of the plane was the trigger, then RTLM and *Kangura* were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. The Chamber therefore considers the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM and *Kangura* before and after 6 April 1994.¹

DIRECT AND PUBLIC INCITEMENT TO GENOCIDE: THE LEGAL FOUNDATIONS

It is now appropriate to consider the foundations of incitement law. Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) defines genocide as a series of acts, including killing and causing serious bodily or mental harm, committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such. Article 3 then states that a number of related acts committed in furtherance of Article 2 will also be punishable, including Article 3(b), "[d]irect and public incitement to commit genocide."

Article 2(3)(c) of the ICTR Statute mirrors Article 3(b) of the Genocide Convention and several defendants have been prosecuted and convicted pursuant to this section of the ICTR statute:

1. Jean-Paul Akayesu, mayor of the Taba commune, incited the *interahamwe* militia in advance of massacres of Tutsis and was convicted in 1998.
2. Jean Kambanda, prime minister of the rump government during the genocide, metaphorically called for the elimination of Tutsis in speeches on the radio. He was also convicted in 1998.

3. RTLM announcer Georges Ruggiu also used metaphors to incite Hutus to kill Tutsis and was convicted in 2000.
4. In the 2003 Media Case judgment, RTLM founders Ferdinand Nahimana and Jean-Bosco Barayagwiza, as well as *Kangura* editor-in-chief Hassan Ngeze, were found liable for incitement.

In the most recent case, the International Criminal Tribunal pronounced judgment on Simon Bikindi, a famous Rwandan pop singer known for songs such as “Nanga Abahutu” (“I Hate These Hutus,” a song about contempt for Hutus who are tolerant toward Tutsis). His songs were played on the radio and by militias during the genocide. In late June 1994, as he traveled in a vehicle in an area where killing was taking place, he told militia members on a loudspeaker to rise up against the Tutsis and not spare anybody. On the way back, in the same vehicle, he asked the militia if they had killed the “snakes.” Bikindi’s incitement conviction was not based on his composing, singing, or playing recordings of his songs, because he played no role in their dissemination during the genocide, but on his genocidal exhortations on the car loudspeaker to the militia members.

These cases allowed the tribunal to elaborate the principles of incitement. In doing so, the tribunal grappled with the following inquiries:

1. Where was the utterance issued? (Is it sufficiently public?)
2. How was it interpreted by the audience? (Is it sufficiently direct?)
3. What was the state of mind of the person uttering the words? (Is there sufficient intent?)
4. What was the content of the statement? (Is it a permissible exercise of free speech or is it criminal advocacy?)
5. Must there be resulting violence? (I.e., is there a causation requirement?)

The “public” criterion is fairly straightforward. For incitement to be public, it needs to be a call for criminal action in a public place or by mass media.

Understanding whether or not the speech is “direct” requires considering it in light of its cultural and linguistic content. In other words, do the persons for whom the message was intended immediately grasp its meaning? So additional inquiries come to mind: (1) what language is being spoken? and (2) what are the sociolinguistic ramifications of the statement given the time and place of its utterance? For purposes of elucidating these issues, a sociolinguist can be employed as an expert witness. In the Media Case, for instance, the prosecution’s sociolinguist explained that the average Rwandan would understand *inyenzi* as meaning someone to kill, as it is an insect that one typically squashes under one’s foot.

The mental element is identical to that for the crime of genocide. In other words, the prosecution must prove the defendant had the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such.

It should also be noted that, in order to find liability for incitement, it is not necessary to prove resultant violence. The ICTR found that causation was not a requirement. It came to this conclusion because incitement is an “inchoate” crime. Inchoate crimes involve conduct that is designed to culminate in the commission of a substantive offense but has not yet achieved its culmination because there is something the actor or another still must do. Society feels justified in stepping in to assure that the target of the inchoate offense does

not occur. In the case of incitement, this means the law may intervene once the offensive words have been uttered and before genocide comes to fruition.

The question of “content” is the most difficult. In my scholarship, I point out that the ICTR has divided the analysis of “content” into four main elements: *purpose* (on one end of the spectrum “legitimate”—such as news and historical research, and on the other end “illegitimate”—i.e., explicitly seeking violence); *text* (considering the words themselves); *context* (internal—speaker’s history and tone, and external—extraneous circumstances surrounding the speech, such as recent violence); and *relationship between speaker and subject* (government/majority speaker versus dissenting/minority speaker—the former is given much less deference in terms of free-expression considerations). “Text” and “relationship between speaker and subject” have not been explicitly identified as evaluative factors by the ICTR but reference to and reliance on them can be discerned from the Media Case judgment.

Regarding the “purpose” element, the difficulty lies in parsing speech that is in the “twilight zone” of not *explicitly* calling for violence. On one side of the divide, there are instances of speakers legitimately attempting to raise ethnic awareness. A good example is provided in the Media Case judgment where Jean-Bosco Barayagwiza talks about his childhood and how difficult it was to grow up as a Hutu under the perceived oppression of Tutsis. Perhaps less clearly legitimate, but still not necessarily incitement, is the use of metaphors. For example, an issue of *Kangura* explaining that a cockroach (i.e., a Tutsi) could not give birth to a butterfly may not rise to the level of incitement (though it could support a persecution charge). On the other hand, code words, such as “go to work,” even if not on their face explicit calls for violence, can be deciphered as incitement (the intended listeners understood them as a call to violence). Similarly, predictions of genocide might also be viewed as incitement. The speech at issue must always be considered on a case-by-case basis.

In this regard, “context” is quite helpful in discerning purpose. My research leads me to conclude that there are certain “external context” evaluative factors that should be looked at in determining whether there is incitement: (1) media environment; (2) political context; and (3) the existence or imminent outbreak of war.

Concerning the first “external-context” evaluative factor, incitement is more likely in a coercive media environment with an absence of competing messages and frequent message repetition. American jurisprudence on free speech regularly alludes to the metaphor of the marketplace of ideas. If the marketplace of ideas is functioning properly, then, in theory, good speech should be able to counter bad speech and ultimately marginalize it. If the marketplace is not functioning properly, however, an external context prevails where we are more likely to find that pernicious advocacy constitutes incitement.

Regarding the second factor, a finding of incitement should be more likely when there is political instability or when absolutism heightens audience dependence on the communication media and thereby strengthens the influence of the hate message on audience members.

As for the third external-context evaluative factor—the existence or imminent outbreak of war—genocide scholars have pointed to the empirical connection between genocide and armed conflict between the perpetrating government and another sovereign, or between the perpetrating government and an internal armed rebel group. Such a state of affairs would tend to tilt the analysis more in favor of finding incitement.

I have also advocated including these additional three criteria in the analysis of whether disseminated speech may be considered a legitimate exercise of free speech or an exercise in criminal advocacy:

Temporality: This requires that the speech be contemporaneous with its dissemination.

Instrumentality: This requires that the speech be disseminated by the speaker himself—always a potential issue when recordings are used.

Channel of communication: This requires considering whether speech is disseminated via a written versus a broadcast medium. Written material should be seen as less likely to entail incitement than broadcast material. However, with the recent explosion of social media, perhaps instant messaging tilts the scales in favor of an incitement finding even more than broadcast material. This is a phenomenon that needs to be monitored and explored in greater detail.

CONTEMPORARY APPLICATION

What about the application of incitement law today? Will it be of service in the near future? Or will it need to be clarified and refined even more going forward? Experts and courts will likely be grappling with this emerging body of jurisprudence in the coming year. Three cases in particular should be monitored: (1) the Rwandan prosecution of the infamous “Nyabarongo River-inciter,” Léon Mugesera; (2) the International Criminal Court case against Kenyan radio announcer Joshua arap Sang; and (3) potential liability of Iranian leaders such as Supreme Leader Ayatollah Ali Khamenei and President Mahmoud Ahmadinejad.

LÉON MUGESERA

As mentioned previously, earlier this year, after a decade-and-a-half of immigration-related proceedings, Canada finally deported Léon Mugesera to his native Rwanda to be criminally prosecuted in connection with his infamous 1992 speech. Among other offenses, the Rwandans have charged him with direct and public incitement to commit genocide. His trial, scheduled for later this year, will likely result in an interesting application and test of the ICTR jurisprudence.

For example, critics of the judicial opinions from Canada’s immigration proceedings have emphasized that seventeen months elapsed between Mugesera’s November 1992 speech and the start of the Rwandan genocide in April 1994. Therefore, from an external-context point of view, at least on the surface, it may seem that the speech was not delivered in a genocidal environment. Looking beyond the surface, though, one finds that in late 1992 widespread violence, which would eventually culminate in the genocide, was already being perpetrated against Tutsis. If Mugesera is found guilty, one would expect that an in-depth, credible judgment would explain the relationship between such contemporaneous violence and the speech—not merely refer to the speech and point out that genocide eventually occurred seventeen months later. Similarly, in addition to parsing the code words used by Mugesera and the nature of the political rally at which they were uttered, one would hope that the court would provide analysis regarding, among other things, the media environment at the time of the speech and whether Mugesera previously gave comparable speeches.

JOSHUA ARAP SANG

The International Criminal Court has indicted Kenyan radio announcer Joshua Arap Sang on charges of crimes against humanity arising, in part, from his broadcasting messages during violence against certain Kenyan ethnic groups, following the controversial 2007 presidential election in Kenya. Arap Sang's broadcasts are not, in and of themselves, the subject of any criminal charges against him but support non-speech-related charges: persecution in the form of murder and forcible transfer of population as part of a joint criminal enterprise. Press accounts, however, have erroneously indicated that Arap Sang is being prosecuted on incitement charges, and they have shown hostility toward the notion of applying incitement law to this case (especially since there is no causation requirement).

It is, then, important to be careful about how incitement is characterized. The media believes its own rights might be infringed with an expansive application of incitement law. The potential chilling effects of criminal speech cases should not be ignored. But for purposes of educating the public and deterring future would-be perpetrators, we need an accurate understanding of this rapidly evolving area of law.

IRAN

Iranian leaders, notably Supreme Leader Ayatollah Ali Khamenei and President Mahmoud Ahmadinejad, have called for the destruction of Israel, both directly and indirectly. This has included extremely explicit statements, for example, Ahmadinejad's call for Israel to be wiped off the map—language that, in many ways, is even more direct than much of the language from the Rwandan cases. The Iranian leaders have also used less direct means, such as resort to dehumanizing metaphors. They have, for example, referred to Israel as a “tumor” that must be removed, and analogized Israeli Jews to animals or bacteria. Even less directly, they have predicted Israel's destruction or denied the existence of the Holocaust. Such indirect calls, when anchored to more direct incitement rhetoric, may constitute incitement as well.

The context is Iran's development of nuclear weapons and its support for terrorist groups bent on Israel's destruction. Certainly, there are potential proof issues that might arise in a prosecution of these leaders. There would likely be a battle of the experts regarding the translation of their words calling for destruction. For example, some have claimed that Ahmadinejad did not in fact say that Israel should be wiped off the map but that the Israeli government should “vanish from the page of time.” But there is much evidence indicating the translation is accurate. Most persuasive, perhaps, is the fact that all official translations of Ahmadinejad's statement, including a description of it on his website, refer to “wiping Israel away.”

Nevertheless, the Iranian leaders would likely argue that they were advocating the destruction of the Israeli government, not its people. Still, experts note that hate rhetoric aimed at “Zionism” or the Israeli government is readily perceived as an attack on Judaism or the Jewish people themselves.

Another potential issue may be the target audience of these speeches. Is it an international audience, or an exclusively Iranian one? Assuming the target audience is Iranian, one may ask what exactly the incitement is asking the population to do. If the Iranian leaders themselves control the launch of the nuclear weapons that could destroy Israel, why must

Iranian civilians be persuaded to attack? The answer may lie in the leaders' efforts to create consensus for an Iranian policy that would result in mass murder and could trigger a war that Iranian citizens would have to fight.

Of course, no trial is without issues. That does not mean a case should not be brought. A credible case can be presented and, given the nuclear threat, a strong sense of urgency is in order. We need to recall that the Genocide Convention's full name is the Convention on the *Prevention* and Punishment of the Crime of Genocide. Prevention is first; that should be our focus. And as Iran gets ever closer to realizing its nuclear ambitions, attempts at prevention, such as through legal action, must come sooner rather than later.

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ENDNOTES

- 1 Available at <http://www.unictr.org>.