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MUSIC AND GENOCIDE: HARMONIZING COHERENCE, FREEDOM AND NONVIOLENCE IN INCITEMENT LAW

Gregory S. Gordon*

Music can . . . / Engender fury . . . / . . .
When Orpheus strikes the trembling lyre
The streams stand still, the stones admire;
The listening savages advance . . . / . . .
And tigers mingle in the dance.

—Joseph Addison¹

[The] first principles of justice that ultimately define a system of law [are] the principles of uniform application of rules, of consistency, of evenhandedness, of fairness.

—United States Supreme Court Justice William Brennan²

I. INTRODUCTION

Can singing a song constitute incitement to genocide? A recent decision by the International Criminal Tribunal for Rwanda (ICTR) in the prosecution of Rwandan Hutu extremist pop singer Simon Bikindi said that it can.³ But it failed to say precisely why.⁴ This is problematic because a

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1. JOSEPH ADDISON, *A Song for St. Cecilia's Day*, in *THE POETIC WORKS OF JOSEPH ADDISON* 52–53 (Elibron Classics 2006) (1856).

2. *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan, J., dissenting).

3. *See Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶ 249 (Dec. 2, 2008) (finding that Bikindi's songs "advocated Hutu unity against a common foe and incited ethnic hatred" and that they were "deployed in a propaganda campaign in 1994 in Rwanda to incite people to attack and kill Tutsi . . .").

4. Instead, as discussed at Part III.D *infra*, the Tribunal did not engage in this analysis because it found Bikindi was not responsible for broadcasting the

string of prior Rwandan genocide judicial decisions,⁵ building upon relevant precedent from the Nuremberg jurisprudence,⁶ had developed a sound framework for incitement law that had begun to draw “a bright line between freedom of speech and incitement to genocide.”⁷ Although the ICTR acquitted Bikindi with respect to his pop songs, it convicted him of direct and public incitement to commit genocide for exhorting Hutu militia on a bullhorn to attack Tutsi civilians.⁸ In arriving at these decisions, the ICTR neglected systematically to apply, much less develop, that existing framework.⁹

Accordingly, incitement law has reached a crucial crossroads. There is a risk that the legal edifice constructed by previous decisions will be abandoned as a frame of reference. In the first place, the incitement law framework had not been systematically laid out in one single decision.¹⁰ Rather, it had been pieced together in a series of decisions that culminated in the ICTR’s “*Media Case*” trial judgment, where it found its most developed formulation.¹¹ That

songs and had not contemplated using them in connection with a genocide when he recorded them.

5. See, e.g., *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 550 (Sept. 2, 1998); *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998); *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 10 (June 1, 2000); *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003).

6. See, e.g., *Two Hundredth and Eighteenth Day; Tuesday, 1 October 1946*, reprinted in 22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 547–49 (1946) (discussing the judgment against Julius Streicher); *id.* at 582–85 (discussing the judgment against Hans Fritzsche). Streicher, Editor-in-Chief of the anti-Semitic newspaper *Der Stürmer*, was sentenced to death on charges of crimes against humanity because 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 as defined by the [IMT] Charter.” *Id.* at 549, 588. Fritzsche, the Nazi radio chief in Goebbels’s Propaganda Ministry, was acquitted of crimes against humanity charges ostensibly because of his relatively low position within the Nazi leadership hierarchy. *Id.* at 584–85.

7. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 409 (2006).

8. *Bikindi*, Case No. ICTR-01-72-T, ¶ 423.

9. *Id.*

10. See Gregory S. Gordon, *Defining Incitement to Genocide: A Response to Susan Benesch*, OPINIO JURIS, Apr. 17, 2008, <http://opiniojuris.org/2008/04/17/defining-incitement-to-genocide-a-response-to-susan-benesch-2/> (“[The] ICTR Media Case does not even explicitly set out a four-prong test . . . [and] the Mugesera Supreme Court decision was not sufficiently disciplined in its analysis to apply the test in a systematic, step-by-step way . . .”).

11. See generally Gregory S. Gordon, *From Incitement to Indictment?*

opinion suggested a base to which future decisions would return as a point of repair and build on as a platform for normative development.¹²

The *Bikindi* judgment failed to do either. As a result, jurisprudential consistency and coherence could be compromised to the point where future incitement defendants may not understand the grounds on which they are to be judged. Moreover, even if the framework in its current form were applied reliably and systematically, a failure to flesh it out could be fatal—its current supple contours, which provide necessary interpretational flexibility, could be exploited to justify suppression of legitimate expression.¹³ Thus, greater interpretational guidance is in order.

In response, certain commentators have called for the use of alternative tests. Professor Susan Benesch, a former journalist, believes the elements formulated by the ICTR should be rejected and international law should start from scratch.¹⁴ She has proposed the “reasonably probable consequences” test, which precludes an incitement finding unless a number of factors can be proved, such as prior “audience conditioning” and previous “similar messages.”¹⁵ Similarly, Dr. Carol Pauli, a professor of communications and law, has formulated the “communications research” test, which she advocates using for more effective incitement prevention.¹⁶ While these tests are helpful for contextualizing incitement analysis, they would be a poor substitute for the existing framework as they are either too inflexible, inconsistent with the basic requirements of

Prosecuting Iran’s President for Advocating Israel’s Destruction and Piecing Together Incitement Law’s Emerging Analytical Framework, 98 J. CRIM. L. & CRIMINOLOGY 853, 870–82 (2008) (analyzing each relevant decision and piecing together the framework).

12. See Gordon, *supra* note 10.

13. See Joel Simon, *Of Hate and Genocide: In Africa, Exploiting the Past*, COLUM. JOURNALISM REV., Jan.–Feb. 2006, at 9 (“[T]he misuse of hate-speech laws by repressive African governments may well be a greater threat right now than hate speech itself.”).

14. See Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485, 491 (2008).

15. *Id.* at 519–20.

16. See Carol Pauli, *Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention*, 61 ALA. L. REV. (forthcoming 2010) (manuscript at 10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457016).

incitement law, or procedurally incompatible.¹⁷ Nevertheless, they help reveal incitement law's recent problems and suggest solutions.

This article will propose a more acceptable "middle-ground" solution and explain how incitement law can regain its footing. Part II will examine the ICTR's incitement precedents and the framework they constructed. As this part will demonstrate, the framework has sufficient range and depth to permit principled discernment between permissible hate speech and criminal incitement. But, it has always contemplated further judicial sculpting and refinement. Part III will look at the most recent decisions, whose results have been doctrinally consistent with the framework, but whose methods of analysis have been opaque and anemic. Part IV will examine the alternate frameworks proposed by the aforementioned commentators. Part V will reject these new tests as wholesale substitutes for the existing framework, but will suggest how they may be useful in putting incitement law back on the right path. That path will entail systematizing, fleshing out, refining, and expanding the existing framework.

In the end, the article will conclude that the necessary upgrades can best be accomplished by folding certain of the proposed alternative test elements into the existing incitement framework.¹⁸ Such an integration will help ensure greater consistency and guidance in applying ICTR precedent. At the same time, it will enhance protection of free expression while keeping incitement law focused on its primary objective—genocide prevention. Finally, consistent with this, the article will advocate the establishment of a systematic typology of incitement techniques that will permit a superior understanding of the crime's scope and bolster preventive approaches to enforcing it.¹⁹

17. As will be explained in Parts IV.B.2 and IV.C.3 *infra*, Benesch's proposed test is too inflexible and Pauli's requirement of an "overt act" and removal of the crime's intent requirement are fundamentally at odds with the basic framework of incitement law. Moreover, the Pauli test is procedurally inappropriate as it is concerned with the issue of prior restraint, not criminal adjudication.

18. See *infra* Part V.B.

19. See *infra* Part V.D.

II. THE INCITEMENT LAW FRAMEWORK PRE-BIKINDI

A. *Prosecutor v. Akayesu*

The incitement law framework, as I have noted elsewhere,²⁰ was cobbled together in a string of decisions stretching back to *Prosecutor v. Akayesu*.²¹ In *Akeyesu*, the Tribunal found a Rwandan mayor guilty of, *inter alia*, inciting Hutu militia to slaughter his town's Tutsi population.²² In the words of the Tribunal, Akeyesu then "clearly urged the population to unite in order to eliminate what he termed the sole enemy: the accomplices of the Inkotanyi."²³ Expert and lay testimony established that this was understood by the audience as an exhortation to murder Tutsis,²⁴ and the town's Tutsis were, in fact, murdered shortly thereafter.²⁵

The seminal *Akayesu* judgment, the first ever genocide adjudication pursuant to a trial,²⁶ set out the lion's share of the elements for incitement to genocide: (1) its mens rea element (consisting of the dual intent to provoke another to commit genocide and to commit the underlying genocide itself);²⁷ (2) its "direct" element (viewing the speech "in the light of its cultural and linguistic content" to determine if the persons for whom the message was intended immediately grasped the implication thereof);²⁸ and (3) its "public" element ("a call for criminal action to a number of individuals in a public place," or to "members of the general public at large by such means as the mass media, for example, radio or television").²⁹

20. See Gordon, *supra* note 11, at 870; Gregory S. Gordon, "A War of Media, Words, Newspapers and Radio Stations": *The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 149-54 (2004).

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

22. *Id.* ¶ 674.

23. *Id.* ¶ 673(iii).

24. *Id.* ¶ 673(iv).

25. *Id.* ¶ 673(vii). But the Tribunal indicated that causation was not a required element in determining whether incitement had occurred. *Id.* ¶ 553 (noting that liability may be established "even where such incitement fails to produce results").

26. See Gordon, *supra* note 11, at 871.

27. *Akayesu*, Case No. ICTR 96-4-T, ¶ 560.

28. *Id.* ¶¶ 557-58.

29. *Id.* ¶ 556.

B. Kambanda, Ruggiu, and Niyitegeka

Three subsequent decisions further refined the “direct” element analysis by considering the use of veiled exhortations, euphemisms, and post-violence condoning in incitement. In *Prosecutor v. Kambanda*,³⁰ an incitement charge against the Prime Minister of the rump genocide regime was based in part on his congratulating génocidaires who had already killed (a form of incitement patently less direct than requests or commands),³¹ and on his repeatedly telling audiences: “[Y]ou refuse to give your blood to your country and the dogs drink it for nothing.”³² Similarly, in *Prosecutor v. Ruggiu*,³³ radio announcer Georges Ruggiu’s incitement conviction was based on his broadcast of incendiary euphemisms such as urging the population to deal with the “*Inyenzi*,”³⁴ to “go to work,”³⁵ and to “finish off the 1959 revolution.”³⁶ These were code words calling for massacre of the Tutsi population.³⁷

*Prosecutor v. Niyitegeka*³⁸ provided further insight regarding the directness calculus. As the Rwandan Minister of Information during the genocide, Eliézer Niyitegeka took part in various massacres against Tutsis.³⁹ After one massacre, he used a loudspeaker to thank the perpetrators for their “good work.”⁴⁰ The ICTR found this referred to the “killing of Tutsi civilians,” and this formed, in part, the basis of an incitement conviction.⁴¹

30. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

31. *Id.* ¶ 39(viii).

32. *Id.* ¶ 39(x).

33. *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence (June 1, 2000).

34. *Id.* ¶ 44(iii). *Inyenzi*, a term used by some of Rwanda’s governing Hutus to refer to rebel Tutsi fighters, eventually became a slur applied to any Tutsi.

Id.

35. *Id.* ¶ 44(iv).

36. *Id.* ¶¶ 44(iii), 50.

37. *Id.*

38. *Prosecutor v. Niyitegeka*, Case No. ICTR 96-14-T, Judgment and Sentence (May 16, 2003).

39. *Id.* ¶¶ 68, 83, 115–16, 130, 178, 205, 215.

40. *Id.* ¶ 257.

41. *Id.* ¶ 433.

C. *The Media Case*

1. *Trial Chamber Decision*

The Tribunal's decision in *Prosecutor v. Nahimana, Barayagwiza & Ngeze*,⁴² commonly referred to as the "Media Case," filled in the final pieces of the puzzle. The defendants were Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders and directors of Radio Télévision Libre des Mille Collines (RTLM), an extremist Hutu radio station that broadcast Tutsi hate rhetoric and calls for violence during the genocide,⁴³ and Hassan Ngeze, Editor-in-Chief of the Hutu hate newspaper *Kangura*.⁴⁴ The Tribunal assessed, among other things, whether the RTLM broadcasts and *Kangura* writings constituted direct and public incitement to commit genocide.⁴⁵

Causation and content were the two key incitement elements addressed in the decision.⁴⁶ With respect to the former, the Trial Chamber erased any lingering doubts as to whether the crime of direct and public incitement to commit genocide requires a showing of violence occasioned by the incitement. It found it does not.⁴⁷

Regarding content, the Trial Chamber explicitly focused on two criteria through which speech regarding race or ethnicity could be classified as either legitimate expression or criminal advocacy: (1) its purpose,⁴⁸ ranging from, on one end of the spectrum, clearly legitimate purposes such as historical research and dissemination of news, to patently criminal purposes such as explicit calls for violence;⁴⁹ and (2) its context, i.e., the circumstances surrounding the speaker's text—such as contemporaneous large-scale interethnic

42. *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003).

43. *Id.* ¶¶ 490, 491, 494.

44. *Id.* ¶¶ 123–24, 139.

45. See Gordon, *supra* note 20, at 170.

46. See Gordon, *supra* note 11, at 874.

47. *Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, ¶ 1015.

48. *Id.* ¶¶ 1000–06.

49. *Id.* ¶¶ 1004–06. Of course, the area between these extremes is fertile ground for contextual analysis. Incitement law decisions have referred to contextual evaluative factors such as surrounding violence and previous rhetoric. See, e.g., *id.* ¶ 1004 (speaking of massacres taking place surrounding the speaker's utterance); *id.* ¶ 1005 (focusing on previous conduct to reveal purpose of text).

violence, as well as the speaker's tone of voice.⁵⁰

When examining this decision in prior articles, I have pointed out that the Trial Chamber included two additional criteria (even though not directly classified as such) in its analysis: text and the relationship between speaker and subject.⁵¹ Concerning "text," the Trial Chamber discussed it under the "purpose" subheading (as it would help further reveal the purpose of the speech), noting that this portion of the analysis involved a parsing and exegetical interpretation of the key words in the speech.⁵²

With respect to the relationship between the speaker and the subject, the Trial Chamber indicated that the analysis should be more speech-protective when the speaker is part of a minority criticizing either the government or the country's majority population.⁵³ Thus, while the decision implicitly taught that content could be analyzed according to purpose, text, context, and the relationship between speaker and subject, the Trial Chamber did not lay out these elements in an explicit, systematic manner.⁵⁴

2. Appeals Chamber Decision

On November 28, 2007, the ICTR Appeals Chamber issued its decision in the *Media Case*, and left undisturbed those portions of the judgment analyzing the elements of direct and public incitement to commit genocide.⁵⁵ In the most relevant portion of the decision, the judges generally validated the approach taken by the ICTR Trial Chamber in its incitement jurisprudence:

The Appeals Chamber considers that the Trial Chamber did not alter the constituent elements of the crime of direct and public incitement to commit genocide in the media context (which would have constituted an error) Furthermore, the Appeals Chamber notes that several extracts from the [Trial Chamber] Judgment demonstrate that the Trial Chamber did a good job of distinguishing between hate speech and direct and public

50. *Id.* ¶ 1022.

51. See Gordon, *supra* note 20, at 172; Gordon, *supra* note 10.

52. *Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, ¶ 1001.

53. *Id.* ¶ 1006.

54. See Gordon, *supra* note 10.

55. See Prosecutor v. *Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-A, Judgment, ¶ 695-97 (Nov. 28, 2007).

incitement to commit genocide

The Appeals Chamber will now turn to the Appellants' submissions that the Trial Chamber erred (1) in considering that a speech in ambiguous terms, open to a variety of interpretations, can constitute direct incitement to commit genocide, and (2) in relying on the presumed intent of the author of the speech, on its potential dangers, and on the author's political and community affiliation, in order to determine whether it was of a criminal nature. The Appellants' position is in effect that incitement to commit genocide is direct only when it is explicit and that under no circumstances can the Chamber consider contextual elements in determining whether a speech constitutes direct incitement to commit genocide. For the reasons given below, the Appeals Chamber considers this approach overly restrictive.⁵⁶

It should be noted that the Appeals Chamber found, based on the evidence, that certain pre-genocide speech could not be considered incitement beyond a reasonable doubt.⁵⁷ It also concluded that the pre-1994 conduct of the defendants, which the Trial Chamber considered part of the incitement crimes at issue, was outside the ICTR's temporal jurisdiction—and this resulted in a reduction of the defendants' respective sentences.⁵⁸

In this regard, it is significant that the prosecution had tried to place Hassan Ngeze's 1990–1993 *Kangura* articles within the Tribunal's 1994 temporal jurisdiction by linking them to a 1994 RTLM radio contest that asked members of the public to find information from back issues of *Kangura*.⁵⁹ Rejecting incitement charges based on such back issues, the Appeals Chamber implicitly suggested two new potential elements for the incitement framework: temporality (the allegedly inciting articles were not written contemporaneous with their re-publication), and instrumentality (it was RTLM, not Ngeze, who was responsible for or instrumental in their

56. *Id.* ¶¶ 695–97. Susan Benesch states that the Appeals Chamber “rebuked” the Trial Chamber for “not drawing a clear line between hate speech and incitement to genocide.” Benesch, *supra* note 14, at 489. As indicated clearly by ¶¶ 696–97, however, her statement is simply not supported by the actual text of the decision.

57. *See, e.g., Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-A, ¶¶ 740–51.

58. *See, e.g., id.* ¶ 314.

59. *Id.* ¶ 410.

publication).⁶⁰

The Appeals Chamber also noted that the “re-publication” affected the directness calculus: “Even if, in attempting to find the answers to the questions asked in the competition, the participants happened to re-read certain extracts from *Kangura* capable of inciting the commission of genocide, this could only constitute an indirect incitement to genocide.”⁶¹

Notwithstanding issues of temporality, the Appeals Chamber generally validated the approach taken by the ICTR Trial Chamber in its incitement jurisprudence to that point.⁶² But it could have provided more enlightening guidance. In particular, this was a perfect opportunity to review the elements of the incitement framework in a rigorous manner, and explain in greater detail how they should be applied. Instead, the Appeals Chamber simply gave its general stamp of approval and eschewed a more detailed examination.⁶³ The chance to enrich and regularize the incitement analysis was lost, and would inspire a similarly lax analytic approach the following year in the *Bikindi* decision.

D. *Mugesera v. Canada*

The next major incitement opinion related to the Rwandan genocide was handed down by the Supreme Court of Canada in *Mugesera v. Canada*.⁶⁴ Although Léon Mugesera’s case was decided in the immigration context⁶⁵—he had fled Rwanda and arrived in Canada after delivering an infamous speech calling for Tutsi extermination in veiled terms⁶⁶—it provided the Canadian high court with the opportunity to analyze the elements of direct and public incitement to commit genocide.⁶⁷ Mugesera’s hate-laced speech, the basis of the deportation action, was sufficiently oblique (for example, his famously suggesting that the Tutsis should return to Ethiopia via the non-navigable Nybarongo

60. *Id.*

61. *Id.*

62. *Id.* ¶ 314.

63. Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-A, Judgment, ¶ 316 (Nov. 28, 2007).

64. *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 2005 SCC 40 (Can.).

65. See Gordon, *supra* note 11, at 879.

66. *Id.*

67. *Id.*

River, a traditional dumping ground for massacre victims)⁶⁸ that the ICTR's guiding principles were helpful in focusing the court on the essential analytic criteria and permitting it to find that Mugesera had indeed committed the incitement crime.⁶⁹ But once again, the court failed to engage in a disciplined point-by-point analysis.⁷⁰

By then, a series of core incitement criteria had been enunciated and applied to reach well-reasoned and consistent results. But the criteria were being used in a desultory manner—not sufficiently rigorous or systematic in application. As the *Mugesera* decision was being published, another Rwandan incitement defendant was awaiting trial. Extremist pop singer Simon Bikindi's case would present the international community with an intriguing question: whether incitement to genocide could be accomplished through lyrics and a melody.⁷¹

III. THE SIMON BIKINDI CASE: MUSIC AND GENOCIDE

A. Background

On June 15, 2005, the ICTR indicted Simon Bikindi on six counts for crimes perpetrated in 1994, including one count of direct and public incitement to commit genocide pursuant to Articles 2(3)(c) and 6(1) of the ICTR Statute.⁷² The incitement charge stemmed from the playing and dissemination of Bikindi's extremist Hutu songs at political rallies, during radio broadcasts, and at pre-killing meetings, as well as from Bikindi's speeches exhorting extremist Hutu party activists and militia to exterminate the Tutsi population.⁷³

In the media buzz and academic discourse surrounding the case, much attention was focused on the songs.⁷⁴ Bikindi

68. *Mugesera v. Canada*, [2005] 2 S.C.R. 100 app. III, ¶¶ 15–29.

69. See Gordon, *supra* note 11, at 880.

70. See Gordon, *supra* note 10.

71. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment (Dec. 2, 2008).

72. *Id.* ¶ 5.

73. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Amended Indictment, ¶¶ 31–41 (June 15, 2005) [hereinafter Amended Indictment].

74. See, e.g., Benesch, *supra* note 14, at 490 (“The ICTR is now set to sail further into uncharted waters, since it is conducting the trial of a Hutu pop star, Simon Bikindi, whose elliptical lyrics and catchy tunes—officially banned in Rwanda since 1994—incited genocide, according to the ICTR prosecutors.”).

was a well-known composer of popular music and director of the *Irindiro Ballet*, a dance company that choreographed to traditional Rwandan rhythms.⁷⁵ He was also a Rwandan official who served in the Ministry of Youth and Sports, and a member of President Habyarimana's MRND political party.⁷⁶ But it was primarily as a tunesmith that Bikindi attained great fame in Rwanda before the genocide.⁷⁷ His songs were aired in bars, buses, salons, and even offices;⁷⁸ wealthy families hired his band for their children's wedding ceremonies.⁷⁹ During this period, Bikindi composed the now infamous *Njyewe nanga Abahutu (I Hate the Hutu)* as well as other songs, including *Bene Sebahinzi (Descendants of the Father of Farmers)* and *Twasezereye ingoma ya cyami (We Said Goodbye to the Monarchy)*.⁸⁰ These songs allegedly characterized Tutsis as "Hutu enslavers, enemies or enemy accomplices by blaming the enemy for the problems of Rwanda, by continuously making references to the 1959 Revolution and its gains by the *rubanda ngamwinshi* [Hutu] and by supporting the Bahutu Ten Commandments, and inciting ethnic hatred and people to attack and kill Tutsi."⁸¹

Experts on incitement law eagerly anticipated the *Bikindi* Tribunal's judgment given the free-speech implications of criminalizing artistic expression in a genocidal context. John Floyd, Hassan Ngeze's *Media Case* attorney, expressed particular concern over Simon Bikindi's indictment for inciting genocide through his lyrics. Floyd compared prosecuting Bikindi to "putting Bob Dylan on trial for protest songs."⁸² Robert Snyder pointed out that Bikindi's indictment:

75. Amended Indictment, *supra* note 72, ¶¶ 3–13.

76. *Id.* "MRND" is an acronym for the National Republican Movement for Democracy and Development (French: *Mouvement républicain national pour la démocratie et le développement*).

77. See *Singer Bikindi: From Defence Witness to the Dock over "Genocide Music."* RWANDA NEWS AGENCY, Sept. 18, 2006, http://www.rwandagateway.org/article.php3?id_article=2947.

78. *Id.*

79. *Id.*

80. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶ 187 (Dec. 2, 2008).

81. *Id.*

82. Dina Temple-Raston, *Radio Hate*, LEGAL AFFAIRS, Sept.–Oct. 2002, http://www.legalaffairs.org/issues/September-October-2002/feature_raston_sepoct2002.html.

[C]ould lead to a backlash against musicians who arguably support one ethnic, political, or social group over another. Considering that Bikindi's songs are characterized by the prosecution as only songs of Hutu solidarity and not direct calls for the killing of Tutsis, a large range of potential music could be affected.⁸³

However, Snyder also noted the case's potential for strengthening freedom of expression:

By stressing the context in which Bikindi wrote and performed these songs and his position of influence with Rwandans, the Tribunal can limit the potential impact of any conviction. It was not the fact that Bikindi merely wrote and performed this music that made his actions potentially criminal. Rather, it was the message of the songs, combined with their presentation amidst calls for outright genocide on the airwaves of RTL and at gatherings of the Interahamwe that made Bikindi's music so deadly.⁸⁴

B. The Decision

In the end, for incitement experts, the *Bikindi* judgment was cause for neither despair nor rejoicing. In effect, the Tribunal punted. Although it ruled that Bikindi's songs "advocated Hutu unity against a common foe and incited ethnic hatred,"⁸⁵ and that they were "deployed in a propaganda campaign in 1994 in Rwanda to incite people to attack and kill Tutsi"⁸⁶ (in effect finding they could have constituted incitement to genocide), the Tribunal found insufficient evidence to conclude beyond a reasonable doubt "that Bikindi composed these songs with the specific intention to incite such attacks and killings, even if they were used to that effect in 1994."⁸⁷ Moreover, the Tribunal held that there was insufficient evidence to prove that Bikindi "played a role in the dissemination or deployment of his . . . songs in 1994."⁸⁸

83. Robert H. Snyder, "Disillusioned Words Like Bullets Bark": Incitement to Genocide, Music, and the Trial of Simon Bikindi, 35 GA. J. INT'L & COMP. L. 645, 673-74 (2007).

84. *Id.* at 674.

85. *Bikindi*, Case No. ICTR-01-72-T, ¶ 249.

86. *Id.* ¶ 255.

87. *Id.*

88. *Id.* ¶ 263.

In reaching this conclusion, the Tribunal did not include in its analysis an explicit consideration of purpose, text, context, and the relationship between speaker and subject. It paid minimal lip service to context, only holding that:

To determine whether a speech rises to the level of direct and public incitement to commit genocide, context is the principal consideration, specifically: the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience, i.e. whether the members of the audience to whom the message was directed understood its implication.⁸⁹

The Tribunal acknowledged that a “direct appeal to genocide may be implicit; it need not explicitly call for extermination, but could nonetheless constitute direct and public incitement to commit genocide in a particular context.”⁹⁰ It therefore found that “depending on the nature of the message conveyed and the circumstances,” it could not “exclude the possibility that songs may constitute direct and public incitement to commit genocide.”⁹¹

At the same time, the Tribunal attributed Bikindi’s liability for incitement uniquely to an incident that occurred in late June 1994 on a road between the Rwandan towns of Kivumu and Kayove, where Tutsi were being murdered. One witness testified that during his outbound travel to Kivumu, Bikindi, riding in a truck with a loudspeaker, addressed himself to the militias doing the killing.⁹²

Bikindi is reported to have said: “You sons of *Sebahinzi*, who are the majority, I am speaking to you, you know that the Tutsi are minority. Rise up and look everywhere possible and do not spare anybody.”⁹³ The witness interpreted this to mean that although some Tutsi had already been killed, others were hiding and Bikindi was calling on people to do all that was necessary to eliminate the Tutsi.⁹⁴ The witness also testified that on the way back from Kayove, “Bikindi stopped at a roadblock and met with leaders of the local *Interahamwe*

89. *Id.* ¶ 387.

90. *Id.*

91. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶ 389 (Dec. 2, 2008).

92. *Id.* ¶ 268.

93. *Id.*

94. *Id.*

where he insisted, ‘you see, when you hide a snake in your house, you can expect to face the consequences.’”⁹⁵ After Bikindi left the roadblock, members of the surrounding population and the *Interahamwe* intensified their search for Tutsi, using the assistance of dogs and going into homes to flush out those still hiding.⁹⁶ The witness stated that a number of people were subsequently killed.⁹⁷

Another witness testified that, on Bikindi’s return trip from Kayove, he heard Bikindi ask members of the militia over a truck loudspeaker whether they had “killed the Tutsis” there, and whether they had killed the “snakes.”⁹⁸ The witness also heard Bikindi’s songs being played as the vehicles moved on.⁹⁹

Based on these statements the Tribunal found Bikindi had made a direct call to eliminate the Tutsis, thus his statements constituted direct and public incitement to commit genocide:

Bikindi’s call on “the majority” to “rise up and look everywhere possible” and not to “spare anybody” immediately referring to the Tutsi as the minority unequivocally constitutes a direct call to destroy the Tutsi ethnic group. Similarly, the Chamber considers that Bikindi’s address to the population on his way back from Kayove, asking “Have you killed the Tutsis here?” and whether they had killed the “snakes” is a direct call to kill Tutsi, pejoratively referred to as snakes. In the Chamber’s view, it is inconceivable that, in the context of widespread killings of the Tutsi population that prevailed in June 1994 in Rwanda, the audience to whom the message was directed, namely those standing on the road, could not have immediately understood its meaning and implication. The Chamber therefore finds that Bikindi’s statements through loudspeakers on the main road between Kivumu and Kayove constitute direct and public incitement to commit genocide.¹⁰⁰

95. *Id.*

96. *Id.*

97. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶ 268 (Dec. 2, 2008).

98. *Id.* ¶ 269.

99. *Id.*

100. *Id.* ¶ 423.

C. *Significance of the Decision*

What can be concluded from this decision? First of all, like the Canadian Supreme Court in *Mugesera*, the Tribunal squandered a golden opportunity both to solidify and flesh out the new analytic incitement law structure set forth in previous Rwandan decisions.¹⁰¹ The Tribunal's failure explicitly to ground itself and build on existing precedent could ultimately jeopardize the jurisprudential gains in incitement law, and leave the latter vulnerable to accusations that it is capricious and inimical to healthy free expression. Bikindi's lyrics should have been systematically filtered through the purpose, text, context, and speaker-subject crucible. That exercise would have bestowed the test with superior interpretive power and greater normative coherence. And the Tribunal's conclusions might therefore have been perceived as resting on less slender of a reed.

But it is important to note that the result would not likely have changed because, in another sense, the Tribunal got it right. And while the journey may in some respects be more important than the destination, the Tribunal's doctrinal instincts were no doubt tempered by strains of *stare decisis* emanating from *Akayesu* and its progeny. Detailed consideration of Bikindi's lyrical objectives and the words he used to attain them, in light of their context and notwithstanding their being voiced by a member of the majority attacking the minority, in all likelihood would have exonerated the tunesmith.¹⁰² So the Tribunal's jurisprudential incitement compass appears well aligned even if its precise reading remains obscure.

D. *Two New Analytic Criteria: Temporality and Instrumentality*

The Tribunal also seemed to build on the logic of the Appeals Chamber decision in the *Media Case* by reprising the two new analytic criteria, temporality and instrumentality, to determine whether a speaker has engaged in genocidal incitement.¹⁰³ These criteria are relevant in cases where

101. See *supra* Parts II.A–D.

102. See *supra* Part II.C.1.

103. This is consistent with the *Media Case* Appeals Chamber analysis regarding Ngeze's pre-1994 *Kangura* writings. See *Prosecutor v. Nahimana*,

speech is re-published by a third party after initially being uttered by the original speaker.¹⁰⁴

First, the Tribunal noted that, in light of its finding that Bikindi wrote the songs long before they were disseminated during the genocide, he could not have had the requisite genocidal intent.¹⁰⁵ In effect, the Tribunal impliedly incorporated a “temporality” criterion—the offensive words must have been uttered at or near the time of the contextual violence that renders them genocidal.¹⁰⁶ Here, Bikindi composed his songs long before the 1994 mass murders.¹⁰⁷

Similarly, the Tribunal appeared to find significance in the manner of the songs’ dissemination in relation to the violence. While recordings of the songs might have been played as a prelude to and in chorus with the massacres, those electronic reproductions were not within Bikindi’s control.¹⁰⁸ Thus, an implied “instrumentality” criterion can be gleaned from the judgment as well. In other words, when recordings are involved, the recorded would-be inciter must be responsible for actual contemporaneous dissemination of the criminal speech (i.e., the playing of the recording) that is charged.¹⁰⁹

E. Reaffirming the Jurisprudence on Indirect Incitement Techniques

Even absent these implied doctrinal advances, the judgment does help affirm important ancillary points that were made in previous cases. In referring to Bikindi’s use of

Barayagwiza & Ngeze, Case No. ICTR 99-52-A, Judgment, ¶ 410 (Nov. 28, 2007) (considering Ngeze’s “re-published” 1990–1993 articles).

104. *Id.*

105. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶ 421 (Dec. 2, 2008).

106. The analogy with re-publication of Ngeze’s pre-1994 articles is apt except that music is routinely re-broadcast, whereas written text is more likely to be published on one occasion.

107. *Bikindi*, Case No. ICTR-01-72-T, ¶ 255.

108. *Id.* ¶ 263.

109. As pointed out in the *Media Case* Appeals Chamber decision with respect to Ngeze’s re-published 1990–1993 articles, the re-publication in *Bikindi* (i.e., the re-playing of the songs) would likely also entail a finding that the alleged incitement was not sufficiently direct. See Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-A, Judgment, ¶ 410 (Nov. 28, 2007). Unfortunately, once again, the *Bikindi* Trial Chamber is guilty of merely skimming the surface of the analysis and missing the opportunity to delve into this important issue.

code words, such as “snakes” and “work” as part of the incitement,¹¹⁰ the Tribunal reaffirmed the central role played by euphemisms and metaphors. Moreover, given that the Tribunal characterized Bikindi’s roadside inquiry as to whether Tutsi had been killed as incitement, it is now quite clear that questions can be a form of incitement.

This represents a salutary expansion of what may be considered potential indirect incitement techniques. Further, the decision can be lauded for reaffirming the irrelevance of causation in incitement law: “As an inchoate crime, public and direct incitement to commit genocide is punishable even if no act of genocide has resulted therefrom.”¹¹¹

IV. ALTERNATIVE INCITEMENT TEST PROPOSALS

A. Background

Perhaps in part because the ICTR incitement framework has not been applied consistently or systematically in the written decisions, it has been subject to attack from various quarters. Professor Diane Orentlicher has expressed concern that the Trial Chamber’s “somewhat ambiguous” analysis in the *Media Case* can be interpreted as criminalizing mere hate speech, as opposed to direct calls for incitement to genocide.¹¹² Joel Simon, Deputy Director of the Committee to Protect Journalists (“CPJ”), has warned that “[s]ome repressive countries could be emboldened by the language of the tribunal’s decision.”¹¹³

In fact, according to Simon, “[m]any governments [in Africa] have exploited the perception that the violence in Rwanda was fueled by the media to impose legal restrictions on the press in their own countries.”¹¹⁴ Simon concludes:

110. *Bikindi*, Case No. ICTR-01-72-T, ¶ 269.

111. *Id.* ¶ 419.

112. See Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 AM. U. INT’L L. REV. 557, 562 (2006) (“Although its analysis in *Nahimana* is somewhat ambiguous, Trial Chamber I apparently treated the hate-speech law associated with these treaties as the most pertinent guide to its interpretation of the Genocide Convention’s provision on direct and public incitement to commit genocide.”).

113. Joel Simon, *Murder by Media: Why the Rwandan Genocide Tribunal Went Too Far*, SLATE, Dec. 11, 2003, <http://www.slate.com/id/2092372>.

114. Simon, *supra* note 13, at 9. Simon has not explicitly tied any repressive government actions directly to any deficits in the ICTR incitement law framework.

“Since 2002, the Committee to Protect Journalists has documented nearly fifty such cases in at least a half-dozen countries . . . [including Rwanda] . . . where the current government has increasingly used allegations of ethnic ‘divisionism’ to silence critics, including those in the press.”¹¹⁵

Alternative incitement tests have been proposed in response to such criticisms. In particular, two have made valuable contributions to the development of incitement law: Susan Benesch’s “Reasonably Probable Consequences Test,”¹¹⁶ and Carol Pauli’s “Communications Research Framework.”¹¹⁷ Each shall be considered in turn.

B. The “Reasonably Probable Consequences” Test

1. Formulation of the Test

In her thoughtful 2008 article, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, Susan Benesch offered the “reasonably possible consequences” test to determine whether hate speech rises to the level of incitement to genocide.¹¹⁸ Her six-prong inquiry breaks down as follows:¹¹⁹

1. [Nature of Message and Audience Understanding:]

Was the speech understood by the audience as a call to genocide? Did it use language, explicit or coded, to justify and promote violence?

2. [Speaker Authority and Audience Capacity:]

Did the speaker have authority or influence over the audience and did the audience have the capacity to commit genocide?

115. *Id.*; see also Judith Miller, *Killing Again*, N.Y. POST, Jan. 29, 2007, available at <http://www.nysun.com/opinion/killing-again/47538/> (“[Simon] has documented nearly [fifty] such cases in Burundi, the Central African Republic, Togo, Gabon, Zimbabwe, and sadly, Rwanda . . .”).

116. Benesch, *supra* note 14, at 491.

117. Pauli, *supra* note 16, at 10.

118. Benesch, *supra* note 14, at 498.

119. As the reader can see, the six-prong inquiry consists of nine questions.

3. [Recent Violence:]

Had the victims-to-be already suffered an outbreak of recent violence?

4. [Survival of Marketplace of Ideas:]

Were contrasting views still available at the time of the speech? Was it still safe to express them publicly?

5. [Dehumanization and Audience Conditioning:]

Did the speaker describe the victims-to-be as subhuman, or accuse them of plotting genocide? Had the audience been conditioned by the use of these techniques in other, previous speech?

6. [Prior Similar Messages:]

Had the audience received similar messages before the speech?¹²⁰

2. Problems with the Test

While the Benesch test makes an extremely valuable contribution to the incitement literature, it is problematic in three important respects: (1) it is too rigid in its proposed application; (2) parts of it are ambiguous; and (3) it appears too fixed in scope. Each of these issues shall be considered in turn.

a. Rigidity

Unfortunately, Benesch's proposed test is absolute. As she states: "In my view, all six prongs must be satisfied for a court to find that incitement to genocide has been committed by a defendant."¹²¹ While Benesch's criteria are helpful in analyzing whether lawful hate speech has become illicit incitement, her approach is too lock-step and rigid, and

120. *Id.* at 498.

121. *Id.* at 520.

completely does away with the flexible four-part test developed by the ICTR. But how can this rigidity potentially cause problems?

Imagine, for example, that in the context of massive inter-ethnic violence, which has been raging in a country for several days, a high-ranking government official belonging to the country's ethnic majority makes a speech on the radio euphemistically calling for destruction of the country's ethnic minority by telling the ethnic majority it needs to "go to work" on the minority. The speech, using coded language to justify and promote violence, is understood by the audience as a call to genocide. The speech targets have been the subject of ethnic violence for nearly a week, and the government retains a complete monopoly on access to media outlets.

Under Benesch's proposed test, this would not qualify as incitement to genocide simply because: (1) the speaker did not describe the victims-to-be as specifically subhuman or accuse them of plotting genocide (and the audience had not been "conditioned" by the use of these techniques in other, previous speech);¹²² and (2) the audience had not received similar messages before the speech.¹²³ Given the context of mass ethnic violence, however, as well as the target audience's understanding and willingness to act on the message, this seems like the wrong result and appears inconsistent with the ICTR test.¹²⁴ This is especially true since, as I have written elsewhere,¹²⁵ the incitement crime should be geared toward prospective genocide *prevention*, not merely retrospective punishment.¹²⁶ Benesch's proposed hair-splitting risks chilling preventive enforcement.¹²⁷

b. Ambiguity

Moreover, given the absolute nature of the test, it is problematic that portions of its terminology are ambiguous. For example, what constitutes "an outbreak of recent

122. *See id.* at 498.

123. *Id.*

124. *Cf.* Gordon, *supra* note 11, at 893–907 (applying the ICTR incitement framework to the case of Iranian President Mahmoud Ahmadinejad).

125. *See id.* at 857, 918 ("Ahmadinejad's incendiary speeches present the world with a golden opportunity to use the incitement charge for its intended purpose: to prevent genocide, not merely to punish it *ex post facto*.").

126. *Id.*

127. *See* Gordon, *supra* note 10.

violence”? How “recent” does it have to be?¹²⁸ Does it have to be violence on a certain scale—as measured in numbers of dead or wounded—or can it be extreme, brutal violence visited on a smaller number of victims? How is one to determine whether the audience had been previously “conditioned” by the use of similar speech techniques?¹²⁹ What qualifies as “conditioning”? How is it to be measured? How can it be determined whether the “conditioning” is causally related to those techniques? Given the precision demanded by the test, it is troubling that answers to these questions, among others, do not suggest themselves.

c. Finality

Benesch apparently means for the “reasonably possible consequences” test to be a self-contained universe. I do not doubt the thoroughness of Professor Benesch’s research, but her personal gleaning of six prongs merely represents her observations about speech and violence from existing fact patterns. It is quite possible that other indicators could be discerned.¹³⁰

For example, it might be useful to inquire whether the particular speaker has a history of successfully inciting violence. It might also be critical to know whether the channels of communication employed (for example, radio or television, as opposed to newspapers or pamphlets) have a greater propensity for inciting imminent violence.¹³¹

As well, genocide scholars have pointed to the empirical connection between genocide and war.¹³² Perhaps Benesch

128. See Benesch, *supra* note 14, at 522.

129. *Id.* at 524.

130. See, e.g., Pauli, *supra* note 16, at 4–5 (observing that the Benesch test omits some factors “that may prove decisive in determining prospectively when a broadcast or other mediated speech is dangerous enough to justify intervention”).

131. In fact, this element is so independently important that it should be added as a separate criterion to the existing incitement framework. See *infra* Part V.C.1.

132. See MARTIN SHAW, WHAT IS GENOCIDE? 28 (2007) (“[The] major, commonly recognized instances of genocide—not only the Holocaust, but also Armenia and Rwanda—have been clearly connected with war contexts, and this is an overwhelming empirical trend.”); Paul Bartrop, *The Relationship Between War and Genocide in the Twentieth Century: A Consideration*, 4 J. GENOCIDE RES. 519, 524 (2002) (“[For] regimes committing [genocide] the presence of war can play a vital role in masking genocidal activities.”).

should have included as an element of her test the existence or imminent outbreak of war between the perpetrating government and another sovereign (or between the perpetrating government and an internal armed rebel group). It is problematic that such an absolute test does not include these potentially relevant indicators of “reasonably possible consequences.”

C. *The “Communications Research Framework”*

1. *Formulation of the Test*

Professor Carol Pauli has recently proposed another test, which seeks to use a “communications research” framework for determining when incitement to genocide warrants prior restraint through such means as jamming broadcast signals.¹³³ In other words, she examines communications research postulates such as the “ritual model,”¹³⁴ “the spiral of silence,”¹³⁵ and “dependence theory.”¹³⁶ According to Pauli, the analytic structure culled from such work should comprise the following factors:

1. Media Environment:

Finding incitement more likely in a coercive media environment with an absence of competing messages and frequent message repetition;

2. Political Context:

Postulating that incitement is more likely when political instability heightens audience dependence on the communication media and thereby strengthens the influence of the hate messages on audience members;

133. Pauli, *supra* note 16, at 5 (“[This paper] proposes a framework, based on research in the field of communication, to determine when a message constitutes incitement to genocide so as to justify international prior restraint through measures such as jamming of broadcast signals.”).

134. *Id.* at 8 n.51.

135. *Id.*

136. *See id.* at 11.

3. Audience Characteristics:

Finding the impact of a message may be stronger where the audience is young or unsophisticated, already inclined toward prejudiced views or highly networked along such lines as tribal membership and religion;

4. Authority of Message Source:

Concluding that speech will more likely be restricted as dangerous where the source of an incendiary statement is a person of authority in the eyes of the audience;

5. Content of Message:

Focusing on text appealing to base emotions and communicating recourse to violence as indicative of incitement;

6. Channel of Communication:

Positing that written text is less likely than broadcast media to lead to violence—distinguishing a “book from a bullhorn,” as it were; and

7. Overt Acts:

Opining that overt acts, such as stockpiling weapons, help gauge the immediacy and degree of physical danger posed by the inflammatory speech.¹³⁷

2. *Relationship to the Benesch Test*

In relation to Benesch, Pauli approaches incitement from the opposite end of the spectrum. While the former is troubled by the retrospective prospect of hate speech being

137. *See id.* at 14–21.

liberally characterized as incitement,¹³⁸ the latter is more concerned about prospectively nipping hate speech in the bud before genocide can occur.¹³⁹

Nevertheless, many of Pauli's criteria overlap with those of Benesch.¹⁴⁰ For instance, Benesch's "Nature of Message and Audience Understanding" prong is comparable to Pauli's "Content of Message" and "Audience Characteristics" factors. The "Speaker Authority and Audience Capacity" prong in the Benesch test largely overlaps with the "Authority of Message Source" and the "Audience Characteristics" in the Pauli framework. Benesch's "Survival of the Marketplace of Ideas" prong is equivalent to Pauli's "Media Environment." Otherwise, Benesch's "Recent Violence" and "Prior Similar Messages," and Pauli's "Political Context" and "Channel of Communication," respectively, find no comparable elements in the other test.

3. *Problems with the Pauli Framework*

While there is substantial overlap between the two tests, Pauli's framework is different in two significant ways that are problematic. First, from a procedural perspective, her test only seeks to determine whether speech should be the object of prior restraint—not whether someone has engaged in criminal incitement.¹⁴¹ Presumably, her test would carry a different standard of proof, would involve a more simplified adjudication process, and would be used by other adjudicatory bodies—for example, international administrative agencies, such as the International Telecommunications Union.¹⁴²

Additionally, Pauli impermissibly alters the substantive burden of proving incitement. First, she erroneously presumes the ICTR framework adds a causation requirement: "Since speech does no physical harm, the ICTR convictions required a finding of an additional proximate cause in order to link incitements to genocide."¹⁴³ From this, she concludes

138. Benesch, *supra* note 14, at 491–97.

139. Pauli, *supra* note 16, at 14–21.

140. *Id.* at 4 (noting that the Benesch test's "elements overlap and support several that are also proposed here").

141. *Id.* at 27.

142. Pauli notes that the "ITU constitution prohibits harmful interference to radio signals of other states or recognized broadcast agencies, whether from competing radio signals or other 'electrical apparatus.'" *Id.* at 29.

143. *Id.* at 20. Pauli reaches this conclusion by taking out of context a

she is doctrinally justified in adding an “overt acts” element for her framework.¹⁴⁴ This is tantamount to a “causation-light” requirement, which is clearly incompatible with the fundamentally inchoate nature of the crime.¹⁴⁵

Second, her test completely omits the element of intent—the key element for any genocide prosecution.¹⁴⁶ Pauli concedes that “because the framework focuses on prevention rather than culpability, it does not . . . include the criminal element of purpose or intent.”¹⁴⁷ Without intent, however, there can be no proof of the target crime of genocide, and thus, a prerequisite of the inchoate crime of incitement to

quotation from the *Media Case* Trial Chamber decision: “The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself.” *Id.* at n.148. In the next sentence, however, the decision goes on to state: “In the Chamber’s view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication.” *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 952 (Dec. 3, 2003). Indeed, in this paragraph, the *Media Case* Trial Chamber decision explicitly rejects a causation requirement for incitement.

144. Unfortunately, this runs counter to her purpose of using incitement for prevention. Adding a physical conduct requirement (overt acts) where there was previously none only increases the burden of proving incitement and of seeking enforcement at an early stage that would result in prevention, rather than mere punishment after the fact.

145. See *Prosecutor v. Musema*, ICTR Case No. 96-13-A, Judgment and Sentence, ¶ 193 (Jan. 27, 2000) (noting that inchoate crimes (in that case conspiracy) are “punishable by virtue of the criminal act as such and not as a consequence of the result of that act.”). See also Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 3 (1989) (“Indeed, the main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime.”); Nick Zimmerman, *Attempted Stalking: An Attempt-to-Almost-Attempt-to-Act*, 20 N. ILL. U. L. REV. 219, 222 (2000) (“Crimes that are punished before the harm that is the ultimate concern of society occurs are called inchoate crimes.”).

146. See Louis Rene Beres, *After the Gulf War: Israel, Pre-emption, and Anticipatory Self-Defense*, 13 HOUS. J. INT’L L. 259, 271 (1991) (“The key to understanding and identifying genocide lies in the ‘intent to destroy.’”); Mark A. Bland, *An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects*, 2 IND. J. GLOBAL LEGAL STUD. 233, 255 (1994) (“The word ‘intent’ is key: without the requisite intent to destroy a group, the heinous act cannot qualify as genocide.”); Walter Gary Sharp, Sr., *The International Criminal Tribunal for the Former Yugoslavia: Defining the Offenses*, 23 MD. J. INT’L L. & TRADE 15, 25 (1999) (“The key distinction between genocide and similar crimes . . . is that a conviction of genocide requires proof that the act was committed with the intent to take part in a plan to destroy a particular national, ethnical, racial, or religious group.”).

147. Pauli, *supra* note 16, at 11.

commit genocide is missing.¹⁴⁸ Overall, then, Pauli's test is clearly not a suitable wholesale replacement for the framework developed by the ICTR decisions.

V. SYSTEMATIZING, HARMONIZING AND REFINING THE TESTS

A. *Systematization*

So where does incitement law go from here? Certainly, it will be necessary for future decisions to apply the analytic criteria more rigorously and systematically. The degree to which the courts have laid out criteria and applied them in a methodical manner seemed to reach a peak in the *Media Case* decision, but we have seen a progressive laxness from *Mugesera* to *Bikindi* (even though *Bikindi* impliedly introduced the additional elements of temporality and instrumentality).¹⁴⁹

For future opinions, a further slide in analytic rigor could either represent the undoing of the jurisprudential advances made by the Rwandan cases or, at worse, signify an impermissible encroachment on hallowed free expression rights.¹⁵⁰ As the world seeks to prevent and punish the use of speech to foment violence based on pernicious discrimination, international courts, and even domestic ones operating under the principle of universal jurisdiction, must religiously apply the elements established by incitement jurisprudence.

B. *Harmonization*

Crafting disciplined, orderly judicial opinions should not be incitement law's only concern going forward. One would hope that the content of any such decisions would also reflect progress in furthering incitement law's primary objectives:

148. See Susan F. Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENVTL. L. 1165, 1223 (1995) ("[To prove liability for an inchoate crime,] the government must prove a specific intent to achieve the target harm.").

149. And, as noted previously, the *Media Case* Appeals Chamber decision also unfortunately passed up on the opportunity to set out the elements of incitement in a higher court ruling.

150. See Natalie A. Hurley, *Religious Entanglement by the Bankruptcy System—Avoidable Transfers and RFRA*, 27 U. MEM. L. REV. 177, 191 (1996) (in reference to freedom of religion, indicating that more rigorously applied standards are beneficial in safeguarding First Amendment freedoms).

deterring genocide before it can happen and protecting robust free expression. Can these seemingly discrepant objectives be reconciled?

The Benesch and Pauli scholarship could be of great assistance in this regard. But, for the reasons outlined above, following Benesch's advice to eliminate the ICTR framework altogether would be a mistake. Instead, certain portions of the Benesch and Pauli tests should be folded into the existing ICTR framework. How could this be accomplished?

First of all, it is important to realize that most of the criteria proposed by Benesch and Pauli fit logically into the broader categories of the ICTR framework. Benesch's "Audience Understanding" criterion,¹⁵¹ for example, tracks perfectly the ICTR framework's "Direct" analysis, which asks whether the person for whom the message was intended immediately grasped the significance thereof.¹⁵² Similarly, Benesch's "Nature of Message"¹⁵³ and Pauli's "Content of Message"¹⁵⁴ factors correspond more or less directly with the "Text" and "Purpose" criteria in the ICTR framework.¹⁵⁵ Along the same lines, when Benesch alludes to "Speaker Authority"¹⁵⁶ and Pauli to "Authority of Message Source" and "Audience Characteristics,"¹⁵⁷ each implicates, at least in part, the ICTR's "Relationship between the Speaker and Subject" criterion.¹⁵⁸

In large part, however, the balance of Benesch/Pauli factors can be placed into the "Context" criterion of the existing ICTR test.¹⁵⁹ In other words, evaluative factors such as "Political Context," "Media Environment," "Recent Violence," and "Prior Similar Message" are extremely useful in helping the finder of fact determine whether hate speech has corroded into incitement to commit genocide.¹⁶⁰

Unlike the Benesch approach, however, which strictly

151. Benesch, *supra* note 14, at 498.

152. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 557 (Sept. 2, 1998).

153. Benesch, *supra* note 14, at 498.

154. Pauli, *supra* note 16, at 10.

155. Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1000-06 (Dec. 3, 2003).

156. Benesch, *supra* note 14, at 498.

157. Pauli, *supra* note 16, at 10.

158. *Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, ¶ 1006.

159. *Id.* ¶¶ 1001, 1022.

160. See *supra* text accompanying footnotes 120 & 137.

requires that each criterion be satisfied for an incitement finding,¹⁶¹ using these criteria for evaluative purposes provides guidance and flexibility. It permits judges to perform a nuanced contextual analysis to ascertain if the speech has reached inchoate genocidal critical mass.¹⁶² That “recent violence” or “prior similar messages” may be lacking, for example, should not necessarily prevent an incitement finding if many of the other contextual factors are present (especially in high degrees). In effect, this approach allows for a “totality of the circumstances” analysis that will better respect freedom of expression (given the wealth of evaluative factors) while allowing sufficient flexibility for the incitement crime to satisfy its primary preventive function.¹⁶³

C. Further Refinement

1. Adding a “Channels of Communication” Criterion to the Existing ICTR Test

Refinement should not end with an incorporation of the Benesch/Pauli elements into the existing framework. In the first place, one of the Pauli factors, “Channels of Communication”¹⁶⁴ does not fit as neatly into the existing framework. In fact, it should be a separate element.¹⁶⁵

First, from a temporal perspective, written

161. See Benesch, *supra* note 14, at 520.

162. See Vihar R. Patel, *Are Patented Research Tools Still Valuable? Use, Intent, and a Rebuttable Presumption: A Proposed Modification for Analyzing the Exemption from Patent Infringement under 35 U.S.C. § 271(E)(1)*, 47 IDEA 407, 447 (2007) (“Despite the illusory attractiveness of precise rules, ‘nuanced and flexible standards are generally more appropriate for [a legally] dynamic innovation environment’” (quoting Janice E. Mueller, *The Evanescent Experimental Use Exemption from United States Patent Infringement Liability: Implications for University and Non Profit Research and Development*, 56 BAYLOR L. REV. 917, 965 (2004))).

163. See M. Eric Eversole, *Eight Years After Milkovich: Applying a Constitutional Privilege for Opinions under the Wrong Constitution*, 31 IND. L. REV. 1107, 1130 (1998) (stating that the cherished constitutional guarantee of free speech is best preserved under a totality of circumstances test in distinguishing fact from opinion in defamation cases).

164. Pauli, *supra* note 16, at 10.

165. The ICTR has suggested it should be considered as part of the “context” element. See *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1006 (Dec. 3, 2003) (noting that a literary work would have less of an impact than mass media). Given the importance of communication media in spreading violence, however, this should be considered a separate element.

communication media are much less apt to incite to mass violence than broadcast media.¹⁶⁶ Professor Pauli, for example, distinguishes “the impact of a book from that of a bullhorn.”¹⁶⁷ Furthermore, certain of the decisions on which the ICTR based its test distinguishing between hate speech and incitement, also seem to distinguish between written and broadcast materials. In *Arslan v. Turkey*, the European Court of Human Rights (ECHR) overturned the conviction of a journalist who had been sentenced to more than a year in prison¹⁶⁸ because his prizewinning¹⁶⁹ book, *History in Mourning, 33 Bullets*,¹⁷⁰ characterized the Turks as invaders who had massacred peasants and intended to exterminate the Kurds.¹⁷¹ Professor Pauli notes the Court’s differential treatment of written media:

The [*Arslan*] Court was more forgiving toward a book than it apparently would have been toward other channels of communication. It found a literary work to be less likely than the mass media (presumably meaning the broadcast media) to disturb national security and public order. In this case, the Court overturned speech restrictions placed on a book that painted a negative picture of Turks and their treatment of Kurds.¹⁷²

Similarly, “the United States has not criminalized or prosecuted the mere publication of written materials as incitement”¹⁷³ because “[t]he root of incitement theory appears to have been grounded in concern over crowd behavior.”¹⁷⁴

The availability and circulation of the material should also be taken into account. With respect to the *Media Case*,

166. See Scott Hamack, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts’ Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 100 (2002) (“[A] written, as opposed to spoken, medium . . . will be less likely to give rise to an imminent lawless action.”).

167. Pauli, *supra* note 16, at 6.

168. *Arslan v. Turkey*, 31 Eur. Ct. H.R. 264, 287 (2001).

169. *Id.* at 269.

170. *Id.*

171. *Id.* at 286.

172. Pauli, *supra* note 16, at 20.

173. Elizabeth M. Renieris, *Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and United Kingdom and the Need for International Solution*, 11 VAND. J. ENT. & TECH. L. 673, 682 (2009).

174. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987).

for example, American First Amendment attorney Floyd Abrams has pointed out that Hassan Ngeze's newspaper, *Kangura*, was circulated in an environment where "only [thirty percent] of Rwandans are literate, [so] the paper was never widely read."¹⁷⁵ By contrast, in *Zana v. Turkey*,¹⁷⁶ the ECHR upheld the conviction of a former mayor who spoke approvingly of Kurdish Worker Party violence in a major national daily newspaper.¹⁷⁷ Pauli notes that "the resulting prominence of the statement [given its placement in a major daily national newspaper] was a factor as the Court upheld the speaker's conviction."¹⁷⁸

In the end, when this additional criterion is tacked on, the existing framework for determining whether hate speech constitutes incitement should consist of seven elements: (1) purpose, (2) text, (3) context, (4) relationship between speaker and subject, (5) channel of communication, (6) temporality, and (7) instrumentality.

2. Refining and Fleshing Out the Context Criterion

Further development of the "context" element of the existing ICTR framework is also in order. To begin, it would be helpful to bifurcate "context" into two separate sub-prongs—internal and external.¹⁷⁹ Internal context would encompass characteristics of the speaker himself: the speaker's background and professional profile, his previous publication/broadcast history, and his personal manner of transmission (including tone of voice).¹⁸⁰

External context would consist of the circumstances

175. Miller, *supra* note 115.

176. *Zana v. Turkey*, 27 Eur. Ct. H.R. 667, 673 (1999).

177. *Id.* at 691.

178. Pauli, *supra* note 16, at 20.

179. See Lawrence Schlam, *Legislative Term Limitation under a "Limited" Popular Initiative Provision?*, 14 N. ILL. U. L. REV. 1, 60 (1993) (explaining the significance of distinguishing between internal and external context in statutory interpretation and concluding that "[w]hen ambiguity exists . . . both internal and external context usually must be taken into account to weigh the chances of absurd, unfair or unreasonable results should one interpretation be adopted as compared to another").

180. As indicated above, tone of voice has already been flagged by the ICTR as an important evaluative factor for the contextual consideration of whether hate speech has devolved into incitement. See *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1022 (Dec. 3, 2003).

surrounding the speech. In addition to incorporating the Benesch/Pauli factors discussed above, the supplemental contextual elements alluded to in connection with the Benesch test could also be included (in other words, elements such as the speaker's past history).¹⁸¹

Of particular note, the fact finder should consider the existence or imminent outbreak of war between the perpetrating government and another sovereign (or between the perpetrating government and an internal armed rebel group).¹⁸² Clearly, the current proposed list of contextual elements is not definitive or final—as new fact patterns are evaluated, additional contextual factors may be gleaned over time.

D. Establishing a Typology of Incitement

By now, international and domestic courts have scoured a wide variety of fact patterns involving hate speech that spurred ordinary citizens to slaughter their neighbors by the thousands. Unfortunately, the ICTR has failed to systematically catalogue these incitement techniques and explain their legal significance. This project should be undertaken in future incitement jurisprudence.¹⁸³

In particular, future decisions should explicitly recognize the following as legally chargeable forms of incitement: (1) direct calls for destruction; (2) predictions of destruction; (3) verminization, pathologization, and demonization; (4) accusation in a mirror; (5) euphemisms and metaphors; (6) justification during contemporaneous violence; (7) condoning and congratulating past violence; (8) asking questions about violence; and (9) victim-sympathizer conflation.

1. Direct Calls for Destruction

Direct calls for destruction are relatively rare but there are instances where they should be identified as a separate category of incitement. Examples would include RTL

181. See *supra* text accompanying footnotes 130–32.

182. See SHAW, *supra* note 132, at 28.

183. This is an initiative I suggested should have been undertaken in the *Media Case Trial Chamber* judgment. See Gordon, *supra* note 20, at 186–87 (“Incitement can take many forms and this might have been a golden opportunity for international law to recognize them explicitly.”).

announcer Kantano Habimana's June 4, 1994 broadcast in which he urged listeners to exterminate the "Inkotanyi," or Tutsis, discernible by height and physical appearance.¹⁸⁴ Habimana concluded: "Just look at his small nose and then break it."¹⁸⁵ Another prominent example occurred when Iranian President Mahmoud Ahmadinejad called for Israel's destruction by telling an audience in October 2005 that Israel "must be wiped off the map."¹⁸⁶

2. Predictions of Destruction

Prophecy of destruction is another incitement technique. In the *Media Case* Trial Chamber decision, for example, certain RTLM broadcasts that predicted destruction of the *Inyenzi* (i.e., Tutsis) were among those emissions found to constitute incitement, including the following:

I think we are fast approaching what I would call dawn . . . dawn, because—for the young people who may not know—dawn is when the day breaks. Thus when day breaks, when that day comes, we will be heading for a brighter future, for the day when we will be able to say "There isn't a single *Inyenzi* left in the country." The term *Inyenzi* will then be forever forgotten, and disappear for good¹⁸⁷

Mahmoud Ahmadinejad has also engaged in this type of incitement. In 2008, for instance, as Israel celebrated its sixtieth anniversary, Ahmadinejad told an audience that the Jewish state was "dying" and its statehood anniversary festivities were an attempt to prevent its "annihilation."¹⁸⁸

3. Verminization, Pathologization, and Demonization

Verminization, pathologization, and demonization each

184. *Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, ¶ 396.

185. *Id.*

186. See Nazila Fathi, *Iran's New President Says Israel Must Be "Wiped Off the Map,"* N.Y. TIMES, Oct. 27, 2005, at A8. Certain commentators have disputed that this constitutes direct and public incitement to commit genocide. See, e.g., Benesch, *supra* note 14, at 490–91 ("Ahmadinejad's speech was reprehensible and perhaps even dangerous, but did not constitute incitement to genocide, in my view.").

187. *Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, ¶ 405 (internal quotation marks omitted).

188. Ali Akbar Dareini, *Iranian Leader Marks Israeli Anniversary with Menace*, HERALD SCOT., May 15, 2008, <http://www.theherald.co.uk/news/foreign/display.var.2272254.0.0.php#comments>.

represent means by which the speaker attempts to dehumanize the target and, at the same time, convey that the target should be the object of elimination. Verminization consists of telling an audience that the victims are the same as a vile, pestilent creature, such as a cockroach, that is fit for extermination.¹⁸⁹ Throughout the Rwandan genocide, for example, extremist Hutu propagandists referred to Tutsi as *Inyenzi*, Kinyarwanda for “cockroach.”¹⁹⁰ In pleading guilty to incitement to genocide, RTLM announcer Georges Ruggiu admitted that the word *Inyenzi*, as used in the socio-political context of the time, came to designate the Tutsis as “persons to be killed.”¹⁹¹

Similarly, pathologization, or the characterization of something as a disease, is a means of exhorting liquidation.¹⁹² According to a prominent group of medical doctors and scholars, pathologization “expropriates pseudo-medical terminology to justify massacre [and it] dehumanizes the victims as sources of filth and disease, [propagating] the reversed social ethics of the perpetrators.”¹⁹³ In Nazi Germany, for example, Jews fell victim to pathologization:

[F]rom the inception of the regime, there is a continuous stream of metaphors equating Jews with disease. Respiriologist Kurt Klare, co-founder of the Nazi Physicians' League . . . communicated . . . about the “decomposing influence of Jewry” within the German organism, as if Jewry were a sickness. This theme of Jewish “racial decomposition” and the consequent “cleansing of our *völkisch* body,” was graphically reiterated by Dr. [Gerhard] Wagner and his medical aides on the occasion of the Nazi party rally in fall 1935—the fatal rally that introduced the anti-Jewish race laws.¹⁹⁴

Demonization is quite similar and can include statements referring to the victims as devils, criminals, and other evil

189. See Benesch, *supra* note 14, at 503.

190. *Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-T, ¶ 179.

191. *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 44(iii) (June 1, 2000).

192. Rony Blum et al., “Ethnic Cleansing” Bleaches the Atrocities of Genocide, 18 EUR. J. PUB. HEALTH 204, 204 (2007), available at <http://eurpub.oxfordjournals.org/cgi/reprint/18/2/204>.

193. *Id.*

194. MICHAEL H. KATER, DOCTORS UNDER HITLER 178 (1989).

personages.¹⁹⁵ For example, Mahmoud Ahmadinejad once asked an audience if Israeli Jews are human beings, and answered his own question in the negative: “They are like cattle, nay, more misguided.’ A bunch of bloodthirsty barbarians. Next to them, all the criminals of the world seem righteous.”¹⁹⁶ Soon thereafter, he variously described the Israeli citizenry to supporters at a rally as “filthy bacteria,” a “wild beast,” and a “scarecrow.”¹⁹⁷

4. *Accusation in a Mirror*

The technique of “accusation in a mirror” consists of imputing to the victim the intention of committing the same crimes that the actual perpetrator is committing.¹⁹⁸ As described by one Rwandan propagandist, “the party which is using terror will accuse the enemy of using terror” which will “persuade listeners and ‘honest people’ that they are being attacked and are justified in taking whatever measures are necessary ‘for legitimate [self-]defense.’”¹⁹⁹ Léon Mugesera used this technique in his infamous 1992 speech when he repeatedly claimed that the *Inyenzi* planned to commit genocide against the Hutu:

These people called Inyenzis are now on their way to attack us . . . I am telling you, and I am not lying, it is . . . they only want to exterminate us. They only want to exterminate us: they have no other aim. Are we really waiting till they come to exterminate us?²⁰⁰

As Professor Catherine MacKinnon has noted: “This infamous ‘accusation in a mirror’—the propaganda technique in which one side falsely attributes attacks to the other in order to justify retaliation in kind, casting aggression as self-

195. See David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 120–21 (2004).

196. *Iranian President Ahmadinejad Addresses Rally & Warns the U.S. & England*, 1229 SPECIAL DISPATCH SERIES (Middle E. Media Research Inst.), Aug. 3, 2006, <http://www.memri.org/report/en/0/0/0/0/0/1769.htm>.

197. Michal Lando et al., *Ahmadinejad: Israel Filthy Bacteria*, JERUSALEM POST, Feb. 20, 2008, <http://www.jpost.com/servlet/Satellite?cid=1203343707673&pagename=JPost%2FJPArticle%2FShowFull>.

198. Catherine MacKinnon, *International Decision: Prosecutor v. Nahimana, Barayagwiza & Ngeze*, 98 AM. J. INT’L L. 325, 330 (2004).

199. ALISON DES FORGES, “LEAVE NONE TO TELL THE STORY”: GENOCIDE IN RWANDA 66 (1999).

200. *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 2005 SCC 40 app. III, ¶ 18.

defense—was especially causally potent.”²⁰¹

5. *Euphemisms and Metaphors*

Genocide solicitors rarely use direct language to persuade their agents of destruction to do the dirty deeds. Instead, they typically use code words and this is another incitement technique.²⁰² In the Rwandan genocide, for example, “go to work,” which was perhaps the most prevalent mass slaughter directive, meant “kill Tutsis.”²⁰³ As Professor William Schabas has noted: “[t]he history of genocide shows that those who incite the crime speak in euphemisms.”²⁰⁴

6. *Justification During Contemporaneous Violence*

Another incitement technique is to describe atrocities already taking place in ways that convince the audience that they are morally justified. W. Michael Reisman has observed “in many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense.”²⁰⁵ Thus, RTL M announcer Georges Ruggiu would ascribe positive virtues to violence (e.g., by stating that the population is having a “good time” killing).²⁰⁶ Also, Nazi leaders went to great pains to emphasize to potentially complicit Germans the “humaneness” of their massacres, torture, death marches, slavery, and other atrocities.²⁰⁷

7. *Condoning or Congratulating Past Violence*

Yet another incitement method consists of publicly

201. MacKinnon, *supra* note 198, at 330.

202. Benesch, *supra* note 14, at 506.

203. See, e.g., Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 44(iv) (June 1, 2000).

204. William A. Schabas, *International Decision: Mugesera v. Minister of Citizenship and Immigration*, 93 AM. J. INT'L L. 529, 530 (1999).

205. W. Michael Reisman, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75, 77 (1996).

206. Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 44(v) (June 1, 2000).

207. See RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS*, 1010 (3d ed. 2003).

praising killers for past acts of violence. RTLM announcers, such as Georges Ruggiu, thus congratulated the “valiant combatants” who engaged in a “battle” against Tutsi civilians.²⁰⁸ Similarly, Rwandan Transportation Minister Eliézer Niyitegeka thanked the militias for their “good work.”²⁰⁹

8. Asking Questions

The *Bikindi* judgment affirmed that asking questions can qualify as a technique for inciting genocide.²¹⁰ Recall that on Simon Bikindi’s return trip from Kayove, he asked Hutu militia over a truck loudspeaker, “[h]ave you killed the Tutsis here?” and he further asked whether they had killed the “snakes.”²¹¹ These questions were among the factual findings giving rise to Bikindi’s liability for direct and public incitement to commit genocide.²¹²

9. Conflating Victims and Sympathizers

Susan Benesch points out that “inciters intentionally conflate victims-to-be and members of the dominant group who sympathize with them, preparing the audience for the killing of both.”²¹³ In Nazi Germany, for example, non-Jews who sheltered or helped Jews were the targets of vicious attacks, and were often sent to concentration camps and killed solely because of their sympathy for Jews.²¹⁴ Similarly, in Rwanda, Hutus who were deemed sympathetic to Tutsis were called “traitors,” conflated with Tutsis or “the enemy,” and killed as if they had been Tutsi themselves.²¹⁵ More

208. *Ruggiu*, Case No. ICTR 97-32-I, ¶ 44(v).

209. *Prosecutor v. Niyitegeka*, Case No. ICTR 96-14-T, Judgment and Sentence, ¶ 142 (May 16, 2003).

210. *See Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶ 423 (Dec. 2, 2008).

211. *Id.* ¶ 269.

212. *Id.* ¶423.

213. Benesch, *supra* note 14, at 506.

214. *See, e.g.*, KENNETH S. BORDENS & IRWIN A. HOROWITZ, *SOCIAL PSYCHOLOGY* 430 (2d ed. 2002) (“Those caught helping Jews, even in the smallest way, were subjected to punishment, death in an extermination camp, or summary execution.”).

215. *See, e.g.*, Thomas Kamilindi, *Journalism in a Time of Hate Media, in THE MEDIA AND THE RWANDA GENOCIDE* 136, 138–39 (Allan Thompson ed., 2007) (featuring a Hutu journalist who describes how he became “one of the targets of the Hutu militia” because he was perceived as sympathetic to Tutsis).

recently, Iranian President Mahmoud Ahmadinejad has issued threats against those who would come to Israel's aid, declaring: "Anybody who recognizes Israel will burn in the fire of the Islamic nation's fury."²¹⁶

VI. CONCLUSION

While the forms of incitement to genocide may be protean in nature, there is a fundamental core nature of the crime that incitement law has been striving to define over the past decade. A concept as elusive as incitement cannot be treated along the lines of U.S. Supreme Court Justice Potter Stewart's oft-quoted approach toward pornography: "I know it when I see it."²¹⁷ Neither can it be subjected to a Procrustean treatment that overlooks the individual characteristics and nuances of each exhortation and its contextual setting. The ICTR framework has instead adopted a Solomonic approach that requires consideration of certain essential elements (purpose, text, context, and relationship between speaker and subject), but also allows jurists a relatively wide berth in applying them to each unique fact pattern.

Nevertheless, this modest degree of structural give at least mandates consistent and rigorous application of the fundamental elements. The post-*Media Case* trial judgment opinions—*Mugesera* and *Bikindi*—have failed to do this, even if they are doctrinally consistent with the spirit of the framework.²¹⁸ And while it is instructive to know that music can be a vessel for incitement, such bare-bones pronouncements will not do. We cannot be left to guess why a judge found one statement criminal and another merely radical. Monday morning armchair quarterbacking by incitement experts will never replace sound judicial reasoning in the first instance.

The framework must be strictly applied for each decision and on a point-by-point basis. Moreover, the factors set forth in both the Benesch and Pauli tests—such as political context, media environment, recent violence, and prior

216. *Ahmadinejad Quotes*, JERUSALEM POST ONLINE EDITION, May 16, 2006, <http://www.jpost.com/servlet/Satellite?cid=1145961353170&pagename=JPost%2FJPArticle%2FPrinter>.

217. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

218. The *Media Case* Appeals Chamber decision was equally lax in applying the incitement framework. See *supra* Part II.C.2.

similar message—should be folded into the existing framework. That would go a long way toward regularizing the mechanics of incitement analysis should they be considered as evaluative factors rather than lock-step requirements within the “context” rubric of the existing framework.

As this article has demonstrated, however, this would not be enough. First, international courts ought to recognize the difference between two kinds of context—internal (speaker’s past messages and his tone of voice, for example) and external (environment and circumstances surrounding the speaker). Such a bifurcation would certainly yield more conceptually refined contextual analysis. In addition, certain supplemental external contextual elements, such as whether the perpetrator’s country is waging war or is about to do so, should be considered.

More importantly, given the differences between the print and broadcast media, among others, an additional “channels of communication” element should be appended to the existing ICTR framework. The analysis should certainly be more speech-protective for written material. And differences among written media, such as paper pamphlet versus instant messaging, should also be taken into account. Rapid cyber-communication arguably has a greater propensity to provoke mass violence than static printing-press materials. As a result, the test for incitement should now consist of seven elements: (1) purpose, (2) text, (3) context, (4) relationship between speaker and subject, (5) channel of communication, (6) temporality, and (7) instrumentality.

Finally, it is about time that international judges explicitly acknowledge that incitement techniques are multifaceted. A popular conception of incitement as a linear directive is misleading and the global citizenry has not been disabused of it through the ICTR’s published judicial pronouncements. The latter have, in a desultory fashion, explored the different characteristics of incitement techniques and, when the required elements were present, have found them to be equally criminal. The jurisprudence would do well, going forward, to recognize them explicitly as such and make of them a well-defined glossary. A clear understanding that, in addition to direct calls, techniques such as “victim-in-

a-mirror” and “sympathizer-victim conflation” constitute legally recognized methods of prosecutable verbal provocation would help further put the incitement house in order.

Normative coherence, free expression, and nonviolence can certainly be harmonized within a maturing incitement framework. None of the nascent problems identified in this article is by any means intractable or deep-seated. But it is far preferable to correct bad habits now lest they become ingrained and incitement law degenerate into a doctrinal tea-leaf reading exercise. Neither free expression nor genocide prevention goals would be well served under such a scenario. That should not be music to anyone’s ears.