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APPLYING INTERNATIONAL LAW TO THE REGULATION OF MEDIA INCITED GENOCIDE: RWANDA AND MYANMAR

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By Savannah E. Whittemore

A thesis presented in partial fulfillment of the requirements for completion
Of the Bachelor of Arts degree in International Studies
Croft Institute for International Studies
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University, Mississippi
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DEDICATION

I would like to dedicate this thesis to my grandparents.

To my grandmother Bettye Lott for teaching me what it means to be an independent woman who loves others.

To my grandmother Beth Whittemore for showing me encouragement and what it looks like to go the extra mile for those you love.

To my grandfather Roy Lee Whittemore for never failing to support me and to let me know that my voice and opinions matter.

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ABSTRACT SAVANNAH E. WHITTEMORE:

The goal of this thesis is to demonstrate the connection between word and action in relation to media incited genocide. By employing the operational definitions of intent, incitement, genocide, and hate speech from legal texts such as the Genocide Convention and the International Covenant on Civil and Political Rights, this thesis shows that there is suitable jurisprudence on the crime of direct and public incitement to genocide with the legal bodies statute mirrors the language of the Genocide Convention. This in conjunction with the language gradient on the changing role of messages before and during genocide shows that regulation could be achieved by legal bodies such as the International Criminal Court (ICC) if the language of their governing document changes. The evidence provided by the case studies of Rwanda and Myanmar supports the suggestion of amending language for more widespread enforcement power. This thesis does not seek to address all genocide, but rather the instances of genocide where direct and public incitement to violence occurred through media sources.

Keywords: media, incitement, genocide, hate speech, Genocide Convention, Rwanda, Myanmar, ICC, and Rome Statute

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LIST OF ABBREVIATIONS

FAR	Forces Armées Rwandaises
Genocide Convention	The Convention for the Prevention and Punishment of the Crime of Genocide
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IMT	International Military Tribunal at Nuremberg
MRND	Mouvement Révolutionnaire National pour le Développment
Rome Statute	The International Criminal Court's Rome Statute
RPF	Rwandan Patriotic Front
RTLM	Radio Télévision Libre des Mille Collines
The Gambia	The Republic of The Gambia
UN	United Nations
UNAMIR	UN Assistance Mission for Rwanda
UN Fact-Finding Mission	UN Human Rights Council Independent International Fact-Finding Mission for Myanmar

Introduction

Incitement through language comes from ethnocentric or völkisch words repurposed as rhetorical weapons. Repurposed words or abbreviated language are where the complexity of a word is reduced to phrases suitable for the masses. The greatest mobilization of the apolitical sections of society is achieved with recoded words. This section of society views themselves as increasingly powerless and believe less and less in political participation. Although the verbal path from complexity reduction to prejudice is a multi-step process, there exists a direct correlation from word to action.[1] The correlation refers to the violence achieved with aggressive language and negative connotation. The violence achieved does not always include crimes on the scale of genocide; however, the use of abbreviated language as a means of incitement often results in humanitarian crises such as genocide, the focus of this thesis.

The phenomena of genocides are not a new outcome of global conflict. There have been genocides long before the term was coined in the 20th Century. This thesis does not attempt to address all genocides based on how we define it today. It will address the methods for inciting genocide that have evolved along with modern media from written word to radio, and most recently with social media. These mass media sources allow for the dissemination of information easily across large populations. This thesis defines genocide, intent, direct and public incitement, and hate speech with the general objective of establishing operational definitions for application to legal issues. This thesis combines relevant legal texts and the appropriate case law to elucidate each term within the analysis. To clarify whether the existing international legal institutions have the

[1] Paul Sailer-Wlasits, "Hass-Rede: Zur Kulturgeschichte Eines Sprachlichen Phänomens," carta.info, September 19, 2016, http://carta.info/hass-rede/)

enforcement power to prosecute media incited genocide, this thesis examines the texts of the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention), International Covenant on Civil and Political Rights (ICCPR), and the Rome Statute of the International Criminal Court (Rome Statute) on the adjudication of hate speech and genocide to create a legal framework for case study analysis.

This thesis seeks to address the question of whether existing international law has the necessary customs and norms to regulate hate speech as defined by the ICCPR. Using the language of the ICCPR and the mirroring language of the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) Statutes to the Genocide Convention, this thesis will argue that the jurisprudence in case law offers suitable standards for the consistent criminal prohibition of hate speech that has evolved into direct and public incitement to genocide. In addition to these sufficient customs and norms on the prosecution of genocide, this thesis will emphasize the lack of necessary enforcement power to regulate hate speech that ultimately results in incitement to genocide by legal institutions such as the ICC. The goal of case study analysis is to show that by treating incitement to genocide as a separate crime the regulation of genocide can be better achieved.

The case law used in this thesis includes Akayesu, Kamuhanda, Kayishema et al., Muvunyi, Nahimana et al., Rutaganda, and Seromba. The cases of Akyesu, Muvunyi, and Nahimana et al. establish the jurisprudence on direct and public incitement to genocide. Others such as the accused in cases such as Kamuhanda, Muhimana, Rutaganda, Seromba, and Kayishema et al., were held responsible for conspiracy to commit genocide

and other related crimes against humanity. In each of these selected cases, individuals were held responsible for inciting or acting out genocide.

In Chapter One, the legal analysis of genocide from Nuremberg to the ICC establishes individual culpability of genocide before various courts and tribunals. This chapter builds operational definitions of genocide, intent, and direct and public incitement to genocide to clarify that jurisprudence exists on incitement to genocide through hate speech through case study analysis. This chapter introduces the primary case study analysis that draws from the convictions and sentences of Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze for genocide, incitement to genocide, conspiracy, crimes against humanity, extermination, and persecution.[2] This case was popularly dubbed the "Media Case," and serves as a precedent for the future prosecution of direct incitement to genocide. This chapter ends with the introduction of the International Criminal Court's (ICC) Rome Statute and the limitations of the language used on the crime of incitement.

Two case studies were selected as examples of how colonial presence can evolve into ethnic disparities long after the disappearance of colonial power. Chapter Two introduces the Rwandan genocide with a history of the conflict. This overview includes a preview of the issues that arose from the colonial occupation of Rwanda by Belgium and the historic differences between the two majority ethnic groups, Hutu and Tutsi. This chapter emphasizes that the differences that played a role in the Rwandan Genocide were exacerbated by the Belgian colonial occupation. In addition, this chapter investigates the role of both newspapers and radio in Rwanda in the early 1990s with a focus on the role

[2] Nahimana, et al., (Amended Indictment), 13 April 2000, section 8.

of radio and newspaper. This investigation will focus on the changing role of the messages that arose before and during the genocide. The evolution from word to action is proven through the differences in speech acts.

Chapter Three introduces the second case study with a historical overview of the conflict focusing on the colonial rule in Myanmar and the evolution of a Muslim Nationalist Movement. The overview provides a background on the historical claims that Rohingya Muslims have made for political emancipation and present-day events that have contributed to ethnic tensions in several townships. This chapter demonstrates the influences of military-style rule in post-dictatorial Myanmar on claims made regarding a targeted genocide against the Rohingya. Presently, The Republic of The Gambia (The Gambia) has brought forth proceedings in front of The International Court of Justice (ICJ) to issue a provisional order on the possibility and potential of genocide in Myanmar.

Chapter Four introduces a language gradient used to demonstrate the extent to which words have power over action. The types of messaging explained in this chapter can be compared to the escalation of rhetoric in media sources in both Rwanda and Myanmar. This chapter confirms the culpability of an individual on genocide with the previous decisions made by international courts and tribunals. The end of this chapter will suggest how the research discovered with types of language, the role of the media, and existing jurisprudence on genocide cannot regulate speech at the level necessary to prevent large scale genocide. Building on these conclusions, the last section will suggest reasons for how amending the Rome Statute's language could enable more strict regulations of incitement to genocide.

Chapter One: A Legal Analysis of Genocide: From Nuremberg to the ICC

Before Raphaël Lemkin's 1944 book, *Axis Rule in Occupied Europe*'s introduction of the term genocide, no word existed to describe the atrocities of the Holocaust and other similar events that occurred in the early twentieth century such as the Armenian Genocide.[3] Lemkin, a Holocaust survivor and refugee living in the United States of America, combined Latin and Greek root words to form a term now regularly used in legal proceedings.[4] The term genocide comes from the root words "genus" and "cide." "Genus" is Greek for race and "cide" is Latin for killing. The combined roots were combined to describe the horrific, systematic murders of the Holocaust.[5] Before and during the Nuremberg International Military Tribunal (IMT), the crime of genocide was not yet codified under international law.[6] Before the legal proceedings took place, Lemkin described genocide as the following:

> A coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion and economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against individuals, not in their individual capacity, but as members of the national group.[7]

Atrocity Speech Law Scholar Gregory Gordon uses the words of Lemkin to emphasize the history of the term. In his book, Raphaël Lemkin insisted that future anti-genocide

[3] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition* (New York, NY: Oxford University Press, 2017), p. 116.
[4] United States Holocaust Memorial Museum (United States Holocaust Memorial Museum), accessed November 11, 2019, https://www.ushmm.org/learn/timeline-of-events/after-1945.
[5] United States Holocaust Memorial Museum (United States Holocaust Memorial Museum), accessed November 12, 2019, https://encyclopedia.ushmm.org/content/en/article/what-is-genocide.
[6] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 116.
[7] Raphaël Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International, 1944): 79.

laws needed to include criminal liability for those who created teaching materials intended to instruct future perpetrators on the philosophy of genocide and not only those who incited genocide.[8]

While the term genocide had no legal function during the Nuremberg proceedings, the term enabled prosecutors from the United States, France, and the United Kingdom to qualify the systematic persecution of various groups by the Nazis.[9] Following the decisions made by the Tribunal, the United Nations General Assembly Resolution 96 (I) adopted on December 11, 1946, affirmed, "that genocide is a crime under international law which the civilized world condemns."[10] While this resolution failed to reference the crime of genocide during peacetime, it set forth a three-phased process for drafting the Genocide Convention.[11]

1.1 Drafting the Genocide Convention

On December 9, 1948, the United Nations General Assembly adopted the Genocide Convention which outlined the specific conditions for international law to use to prosecute future cases of genocide.[12] The prohibition and the international community's responsibility to prevent genocide are recognized as international obligations under the Genocide Convention. In Article 1 of the Genocide Convention, the parties "confirm that genocide whether committed in time of peace or in time of war, is a crime under international law…"[13] The contracting parties of the treaty assigned

[8] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 116-7.
[9] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 117.
[10] G.A. Res. 96 (I), U.N. Doc. A/64/Add. 1, at 189 (1946).
[11] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 119.
[12] William A. Schabas, "Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide," Rutgers Law Review 61, no. 1 (Fall 2008): 161.
[13] Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

importance to the need to prevent future atrocities that mirrored the Holocaust in scale. This convention asserts that every state in the international community is obligated to punish the crime of genocide as described.[14]

The convention is used by many legal scholars as the basis of arguments made for the prosecution of genocide in both international military tribunals and international courts. Principles which create the framework and legal norms of international law that cannot be placed to the side.[15] The principles outlined in the Genocide Convention are considered jus cogens norms under international law. Jus cogens norms are the fundamental overriding principles of international law.[16] As such, even if a nation is not a party to the Genocide Convention or has ratified the document with reservations, the prohibition on genocide as a jus cogens norm means that no one anywhere can commit, conspire to commit, or incite genocide.

This thesis will use the definition of genocide provided in Article 2 of the treaty in the application on the crimes considered by contracting parties to be genocide. Article 2 explains that the crime of genocide includes:

> "…any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[17]

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[14] Irwin Cotler, "State-Sanctioned Incitement to Genocide: The Responsibility to Prevent," in *The Content and Context of Hate Speech: Rethinking Regulation and Responses,* 1st ed. (New York, NY: Cambridge University Press, 2012, pp. 430-455): 430.
[15] "Jus Cogens," Legal Information Institute (Legal Information Institute), accessed April 10, 2020, https://www.law.cornell.edu/wex/jus_cogens)
[16] Irwin Cotler, "State-Sanctioned Incitement to Genocide: The Responsibility to Prevent," pp. 430-1.
[17] Genocide Convention, Art. 2.

The following article, Article 3 of the Genocide Convention, establishes the aspects of genocide that result in punishment. The language of the Convention remains vital to legal decisions today as it not only requires the parties to punish genocide but holds those who orchestrate and premeditate acts of genocide accountable.

Article 3 of the Genocide Convention assigns the type of genocide punishable as agreed by the contracting parties. It states, "…(a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide."[18] This article in conjunction with the second article supports the argument that not only committing the act of genocide results in the punishment of such a crime but also the conspiracy and direct and public incitement to genocide. Applying both Articles II and III of the Genocide Convention to cases of media incited genocide, allows the individuals who contribute to "direct and public incitement to commit genocide" to be prosecuted under institutions such as post-war military tribunals and international courts.[19]

1.2 ICTY and ICTR Statutes and Case Law

In the immediate aftermath of genocide, the legal institutions of the world face the problem of individual culpability to incitement of genocide through hate speech. The previous cases of Streicher and Fritzsche in front of Nuremberg dealt with incitement to murder and extermination as crimes against humanity.[20] In the post-war trials at the IMT, the initial precedent for culpability on incitement to genocide was established with the indictment and sentence of Julius Streicher, the founder of the anti-Semitic and racist

[18] Genocide Convention, Art. 3.
[19] Genocide Convention, art. 3, c.
[20] Muvunyi, (Trial Chamber), September 12, 2006, paras. 500-01.

publication titled Der Stürmer.[21] Streicher's commitment to the spread of National Socialism throughout Bavaria in the 1920s helped establish him as the voice of National Socialism in his region.[22] Also, Streicher's position as the leading organizer of Nazi Germany's first official boycott of Jewish owned businesses set him apart as an influential source of propaganda for the everyday German.[23]

In the judgment rendered by the IMT, Streicher was found guilty on Count Four. The Judgment cites, "There is no evidence to show that he was ever within Hitler's inner circle advisers; nor during his career was he closely connected with the formulation of the policies which led to war"[24] This decision alone sets the legal precedent that individuals can be held accountable for crimes against humanity in the absence of clear involvement. The precedent set before the IMT on individual culpability has influenced the decisions made before the ICTY and ICTR on incitement, particularly with hate speech.

Until 1993, there was no major legal advancement on Genocide until the ICTY was formed in response to the Yugoslav War, and a year later the ICTR in response to the Rwandan Genocide.[25] The ICTY was responsible for the prosecution of peoples in serious violation of international humanitarian law committed in the former Yugoslavia in 1991.[26] This international tribunal is relevant as it treated direct incitement as a

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[21] Ermakov, Alexandr. "'A Blood Czar of Franconia': Gauleiter Julius Streicher." Historia Provinciae: журнал региональной истории 2, no. 2 (2018): pp. 43.
[22] "'A Blood Czar of Franconia': Gauleiter Julius Streicher." pp. 32.
[23] "'A Blood Czar of Franconia': Gauleiter Julius Streicher." pp. 36.
[24] "The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany," Avalon Project - Documents in Law, History and Diplomacy, accessed April 10, 2020, https://avalon.law.yale.edu/imt/judstrei.asp)
[25] Thomas E. Davies, "How the Rome Statute Weakens the International Prohibition on Incitement to Genocide," Human Rights Documents Online, August 21, 2009, pp. 245-270, https://doi.org/10.1163/2210-7975_hrd-9944-0021, p.245-6.
[26] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, available at: https://www.refworld.org/docid/3dda28414.html [accessed 10 April 2020] [hereinafter ICTY Statute]

separate crime in cases such as Jelisic.[27] In 1994, the ICTR was the first international court of law established to prosecute individuals for crimes against humanity in Africa.[28] The function of this court was to hold those allegedly responsible for the 1994 Rwandan Genocide accountable.[29] The ICTR is a notable source of case law due to the decisions rendered on intent and direct and public incitement to genocide.[30]

In Akayesu, he was charged with using his executive ability to commit the crime of genocide as a leader of his prefecture.[31] In Muvunyi, he was charged and sentenced on the charges of complicity in genocide and direct and public incitement to genocide.[32] In Nahimana et al., the three individuals were charged with direct and public incitement to genocide.[33] In Kamuhanda, the accused was held responsible for the charges of conspiracy to commit genocide and direct and public incitement to genocide.[34] In Kayishema et al., the individuals were held responsible for several large-scale massacres that contributed to genocide.[35] In Muhimana, he was held responsible for complicity in genocide and rape and murder as crimes against humanity.[36] In Rutaganda, he was charged and held responsible for genocide and crimes against humanity. In Seromba, he was charged and sentenced for his role in the genocide, complicity in genocide,

[27] ICTY Statute Art. 4(3)(c)
[28] "The ICTR in Brief," The ICTR in Brief | United Nations International Criminal Tribunal for Rwanda, accessed April 10, 2020, https://unictr.irmct.org/en/tribunal)
[29] "The ICTR in Brief."
[30] "The ICTR in Brief."
[31] Akayesu, (Amended Indictment), 17 June 1997, paras. 6-8.
[32] Muvunyi, (Indictment), 22 December 2003.
[33] Nahimana et al, (Judgment and Sentence), 3 December 2003.
[34] Kamuhanda, (Indictment), 27 September 1999.
[35] Kayishema et al. (Amended Indictment), 29 April 1996.
[36] Muhimana, (Indictment), 3 February 2004.

conspiracy to commit genocide, and crimes against humanity for his role in extermination.[37]

As with all crimes tried before international courts or tribunals, the norms, customs, and jurisdiction of the international law community dictate whether an individual or state can be held responsible for their actions. Both the ICTY and the ICTR were guided by principles outlined in the Genocide Convention with mirroring structure and language. Article 4 of the ICTY Statute and Article 2 of the ICTR Statute match the language of Article 3 of the Genocide Convention. The mirroring language and subsequent case law establish jurisprudence on genocide.

In the case of Mikaeli Muhimana before the ICTR, the Tribunal acknowledged that Rwanda was party to the Genocide Convention as it was signed on February 12, 1975.[38] In other cases before the ICTR, the accused admitted that Rwanda was a party to the genocide during the period of the one-hundred-day massacre.[39] Article 2 states, "1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article."[40] These two paragraphs borrow from Article 2 and 3 of the Genocide Convention. Article II of the ICTR Statute's language allows for case law comparisons on the prosecution of media incited genocide in Rwanda and beyond.

[37] Seromba, (Indictment), 5 July 2007.
[38] Muhimana, (Trial Chamber), 28 April 2005, para. 492.
[39] Kamuhanda, (Judgment), 22 January 2004, para. 576.
[40] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, available at: https://www.refworld.org/docid/3ae6b3952c.html [accessed 1 December 2019], [hereinafter ICTR Statute] Art. 2.

The ICTR made decisions based on the perceived intent of an individual to commit genocide. In the case of Seromba, the tribunal found that genocide should be interpreted by several markers.[41] The most prominent markers included knowledge and intent to commit genocide.[42] Article 2 of the Statute defines intent to commit genocide as "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such."[43] By confirming intent as a punishable offense the Appeals Chamber recalls, "…in addition to intent and knowledge as regards the material elements of the crime of genocide, the mental element of the crime also requires that the perpetrator have acted with the specific intent to destroy a protected group as such in whole or in part."[44]

This thesis will look at intent as it relates to several key elements of genocide outlined in Article 2(c) of the Genocide Convention. The Appeals Chamber of the ICTR in Rutaganda mirrored the findings of the ICTY in Jelisic in the shared requirement for the crime of genocide as "the intent to accomplish certain specific types of destruction against a targeted group.[45] The type of intent interpreted by both tribunals can be divided into sections including proof through overt statements and proof with circumstantial evidence.[46] The intent to destroy has been interpreted broadly by the ICTR concerning the infamous Media Case. The Appeals Chamber indicated, "genocide is a crime requiring special intent, and… this intent may be proven through inference from the facts and circumstances of a case," in the case of Seromba before the ICTR.[47]

[41] Seromba, (Judgment), 13 December 2006, para. 316.
[42] Seromba, (Judgment), 13 December 2006, para. 319.
[43] ICTR Statute Art. 2(2).
[44] Seromba, (Judgment) 12 March 2008, para. 175.
[45] Rutaganda, (Judgment), 26 May 2003, para. 524.
[46] Akayesu, (Judgment), 2 September 1998, para. 548.
[47] Seromba, (Judgment), 12 March 2008, para. 176.

The intent is shown with overt statements that indicate premeditated direct and public incitement. Often intent cannot be understood without cultural context, but overt statements by a perpetrator demonstrate clear intent with the use of circumstantial evidence. In Nahimana, et al. before the ICTR, the Tribunal writes, "the jurisprudence accepts that in most cases genocidal intent will be proved by circumstantial evidence."[48] Intent is hard to discern outside of overt statements because mind-reading is impossible. In Rutaganda, the Appeals Chamber argued, "in the absence of explicit, direct proof, the dolus specialis may therefore be inferred from relevant facts and circumstances.[49] The harm resulting from an act intended to result in that harm constitutes dolus specialis or reasonable inference from the totality of the evidence will confirm whether circumstantial evidence supports the accusation made.

In Muvunyi, before the ICTR, the trial chamber agreed with the findings from another case, Akayesu. The Trial Chamber noted, "…that in the absence of a confession or other admission, it is inherently difficult to establish the genocidal intent of an accused…the Chamber may make a valid inference about the mental state of the accused on the basis of a number of factors."[50] These factors allow for an assessment of genocidal intent. In Seromba before the Appeals Chamber of the ICTR, The Tribunal established criteria for specific intent to commit genocide stating:

> "…including but not limited to (a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts

[48] Nahimana, et al., (Appeals Judgment), 28 November 2007, para. 524.
[49] Rutaganda, (Judgement), 26 May 2003, para. 525.
[50] Muvunyi, (Judgment), 12 September 2006, para. 480.

> which violate the very foundation of the group or considered as such by their perpetrators."[51]

The specific acts that fit within the factors clarified in Seromba include the physical targeting of a group or of their property, derogatory language towards a targeted group, and the type of weapons employed to inflict bodily harm. In the case of Seromba, he was found to have targeted and destroyed the church with the intention of killing the Tutsis seeking refuge inside.[52]

This approach is seen across ICTR rulings. These factors remain the same across all decisions only adding stipulations that the number affected and scale of any attempt at the destruction of a group.[53] A plan or policy is not required to prove the intent of the perpetrator, nor does the perpetrator need to play a key coordinating role. In Rutaganda, the Appeals Chamber states the requirements for a defendant to be found guilty of the crime specified in Article 2(3)(c) of the Statute as being if the intentional element or mens rea is present.[54] The mirroring language in the ICTR Statute to the Genocide Convention enables a strict interpretation of direct and public incitement.

1.3 Direct and Public Incitement to Genocide

The definition of "public incitement" in civil law systems is "characterized by 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."[55] This interpretation clarifies that "direct" indicates a display of "audiovisual communication" in a conspicuous location. This definition enables an application of

[51] Seromba, (Judgment), 12 March 2008, para. 176.
[52] Seromba (Judgment), 12 March 2008, para. 177.
[53] Kayishema and Ruzindana, (Judgment), 21 May 1999, para. 527.
[54] Rutaganda, (Judgment), 26 May 2003, para. 523-4.
[55] Akayesu, (Judgment), 2 September 1998, para. 556.

direct and public incitement to the crime of genocide. Even though this employs a clear explanation of "public" with the inclusion of mass media, this type of incitement does not need to be successful to fulfill this definition. Whether the incitement to genocide was "public" should be evaluated on the two factors explained by the Tribunal. In Akayesu, the factors are noted as "the place where the incitement occurred and whether or not assistance was selective or limited."[56]

According to the Tribunal's judgment in Akayesu, Rwanda was the first time after Nuremberg in which the specific crime of direct and public incitement to genocide's punishment was actualized.[57] The Akayesu Trial Chamber used definitions previously included in the Genocide Convention and Article 2(3)(c) of the Statute. In this interpretation, direct and public incitement means:

> "directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting, or threats uttered in public places at public gatherings, or through the sale or dissemination, offer for sale or display of written or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication."[58]

This definition has been used in other decisions rendered by the Tribunal in the aforementioned cases such as Akayesu and Muvunyi. The above definition specifies what the Tribunal and the international community considered public with little emphasis on the direct aspect.

In the cases of Akayesu, Muvunyi, and Nahimana et al., the Chamber affirmed that the drafters intended the Genocide Convention to criminalize public incitement and establish what may be considered private types of incitement. In Muvunyi before the

[56] Akayesu, (Judgment), 2 September 1998, para. 556.
[57] Akayesu, (Judgment), 2 September 1998, para. 1-2.
[58] Akayesu, (Judgment), 2 September 1998, para. 548.

ICTR Trial Chamber, there is a stipulation stating, "there is no requirement that the incitement message be addressed to a certain number of people or that it should be carried through a specific medium such as radio, television, or a loudspeaker."[59] While there is no requirement that the message promoting incitement be broadcast, the scope of influence is an important element in applying the standard of context to interpretation.

In Nahimana et al., before the Tribunal, the Chamber dismissed Appellant Negeze's argument "that the genocide would have occurred even if the *Kangura* newspaper articles had never existed, because it is not necessary to show that direct and public incitement to commit genocide was followed by actual consequences."[60] In other cases such as Akayesu, the Tribunal found that there existed a causal relationship between the defendant's speech that enabled further widespread extermination of Tutsis. The Chamber noted that this type of relationship was not necessary to establish incitement to genocide.[61] The Chamber states, it is the potential of the communication to cause genocide that makes it incitement. When this potential is realized, a crime of genocide as well as incitement to genocide has occurred."[62]

Nahimana, et al. provides the legal precedent necessary within the confines of an international tribunal for future adjudication of media incited genocide. The Chamber noted, "in considering whether particular expression constitutes a form of incitement on which restrictions would be justified, the international jurisprudence does not include any specific causation requirement linking the expression at issue with the demonstration of a

[59] Muvunyi, (Judgment), 12 September 2006, para. 503.
[60] Nahimana, et al., (Judgment), 28 November 2007, para. 766.
[61] Nahimana, et al., (Judgment), 28 November 2007, paras. 1015 &1029.
[62] Nahimana, et al., (Judgment), 28 November 2007, paras. 1015 &1029.

direct effect."[63] The chamber also noted in this instance that editors and publishers have typically been held accountable for the source of media they control. In this case, the Tribunal emphasizes the intent of those who control the source when determining the scope:

> "In determining the scope of this responsibility, the importance of intent, that is the purpose of the communications they channel, emerges from the jurisprudence—whether or not the purpose in publicly transmitting the material was of a bona fide nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities)."[64]

In other words, the actual language used in the media has often been linked to a defendants' intent to commit genocide. In this instance, the Appeals Chamber was not satisfied that the occurrence of genocide demonstrated that journalists, broadcasters, and individuals in Rwanda who had control of media sources had the necessary intent to commit genocide.

The decision rendered in this case helps to set the precedent for future cases such as the adjudication of Myanmar for crimes committed against Rohingya Muslims. Placing liability on the journalists and editors who disperse inciting language through mass media sources such as radio or newspapers before the ICTR, sets forth the necessary guidelines with regard to the intent of the speaker. This framework will allow courts to use the definitions for situational context and public to apply a narrower definition to crimes committed.

1.4 Hate Speech

Addressing the strengths and weaknesses of international customs and norms on the regulation of hate speech, a definition encompassing hate speech is necessary. The

[63] Nahimana, et al, (Judgment), 3 December 2003, para. 677.
[64] Nahimana, et al, (Judgment), 3 December 2003, para. 1001.

definition used by the ICCPR offers suitable standards for the consistent criminal prohibition on hate speech. The term hate speech here refers to any type of speech that promotes racism or any other acts enumerated in the ICCPR. The United Nations (UN) provides clarity on hate speech crimes by affirming in Article 20 of the ICCPR that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[65] This language is precise and coherent when combined with existing international customary law.

While this does not explicitly refer to hate speech, the definition above indicates the intrinsic qualities of human beings that should be free of discrimination. The conclusion reached by the Chamber in conjunction with the travaux préparatoires to the Genocide Convention states, "in most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement is prohibited under Article 2(3)(c) of the Statute."[66] This distinction helps to preserve the right to freedom of expression.

Toby Mendel, in his chapter, *Does International Law Provide for Consistent Rules on Hate Speech?,* asserts that the terminology of the ICCPR is suitable for criminal adjudication.[67] Despite the suitability of the text, Mendel's chapter recognizes that the international courts have not provided clear interpretations of the hate speech rules in the ICCPR.[68] The interpretations of hate speech are limited due to the jurisdiction of military tribunals and international courts. Whether the necessary parties have ratified the

[65] Adopted and opened for signature, ratification, and accession by G.A. Res. 2200A (XXI), 999 U.N.T.S. 171 (Dec. 16, 1966) (entered into force Jan. 3, 1976), [hereinafter ICCPR] Article 20(2).
[66] Nahimana, et al, (Judgement), 28 December 2007, para. 693.
[67] Michael E. Herz and Molnár Péter, The Content and Context of Hate Speech: Rethinking Regulation and Responses (New York: Cambridge University Press, 2012), p. 417-8.
[68] Herz and Péter, The Content and Context of Hate Speech, p. 418.

Genocide Convention and other relevant texts place constraints on the ability of a tribunal or court to hold a responsible party accountable for incitement to genocide as a separate crime. The modern institutions today lack the enforcement power to hold the states who have ratified treaties to the decision made by the courts.

The key standards in the ICCPR provide for a more uniform framework within international law as 165 states have ratified the document. [69] Articles 19 and 20 of the ICCPR are intrinsically linked together to consistently apply standards for freedom of expression while protecting the interests of the public. Article 19 guarantees the right to express oneself freely and the narrow definition of Article 20 works together to allow nations to adopt individual laws against hate speech. This is possible while still respecting the legal framework created by the ICCPR.[70]

The allowance for freedom of expression helps to make clear rulings in the case of the ICTR and sets the precedent for the future. The Appeals Chamber of the ICTR opined in the case of Nahimana that:

> "the Trial Chamber did not confuse mere hate speech with direct incitement to commit genocide. Moreover, it was correct in holding that the context is a factor to consider in deciding whether discourse constitutes direct incitement to commit genocide. For these reasons, the Appeals Chamber concludes that the Trial Chamber committed no error with respect to the notion of direct incitement to commit genocide."[71]

Nahimana et al. considered the difference between hate speech in general and using the same language to incite discrimination or violence against a targeted group on the one hand, and direct and public incitement to commit genocide as it is referred to in Article

[69] Herz and Péter, The Content and Context of Hate Speech, p. 418.
[70] Herz and Péter, The Content and Context of Hate Speech, p. 419.
[71] Nahimana, et al, (Judgement), 28 December 2007, para. 693.

2(2) of the ICTR Statute on the other.[72] In the Appeals Chamber for Nahimana et al., the Chamber discerned the difference: "direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion."[73] The distinction separates hate speech and direct and public incitement to commit genocide. The allowance of freedom of expression distinguishes the language based on the intent of the speaker to protect speech under other agreements such as the International Covenant on Civil and Political Rights (ICCPR).

An important component in using Article 2 of the ICTR Statute to establish jurisprudence on the prosecution of genocide is confirming whether the individual responsible took part in a targeted attack using language consistent with hate speech. Throughout the 20th and 21st centuries, many examples varying from low to high extremes have demonstrated what could be interpreted as hate speech in society. These examples include the language used against the Jewish, Tutsi, and Rohingya peoples in addition to less violent hate speech found on social media today.

The purpose of the speech used is a contributing factor to all decisions rendered by the Tribunal. Before the Appeals Chamber in Nahimana et al., the Tribunal affirmed:

> "The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to genocide."[74]

[72] Nahimana, et al., (Judgement), 28 December 2007, para. 692-93.
[73] Nahimana, et al., (Judgement), 28 December 2007, para. 693.
[74] Nahimana, et al., (Judgement), 28 December 2007, paras. 700-03.

The same case indicated the importance of considering the context of the speech. The Appeals Chamber of the ICTR said that the cases of Streicher and Fritzsche before Nuremberg could not adequately demonstrate that a strict interpretation of discourse applied to all cases where claims of direct and public incitement to genocide occurred.[75] The Appeals Chamber left the ability to interpret the context in cases of direct and public incitement ambiguous.[76] In Nahimana, et al. before the Tribunal, the Chamber stated, "[The Appeals Chamber] is of the opinion that the purpose of the speech is indisputably a factor in determining whether there is direct and public incitement to commit genocide …"[77] Factors contributing to a contextual analysis include the purpose of such speech, political or community affiliation of the speaker, and the situational application of the words.[78]

The purpose of the speech by the speaker or author illustrates the result or causal relationship intended. While the case law is not fully clear, the previous cases establish that overt statements and circumstantial evidence can help prove the intent of the perpetrator in the absence of explicit evidence. The political and community affiliation of the perpetrator is integral to the application of this rule. In cases such as the Rwandan Tutsis, who experienced targeted attacks based on ethnical and national relations, this factor plays a crucial role in the prosecution. In the case of Nahimana et al, the Appeals Chamber notes:

> "…that the relevant issue is not whether the author of the speech is from the majority ethnic group or supports the government's agenda…on the other hand, it recognizes

[75] Nahimana, et al., (Judgement), 28 December 2007, para. 680.
[76] Nahimana, et al., (Judgement), 28 December 2007, para. 711.
[77] Nahimana, et al., (Judgement), 28 December 2007, para. 706.
[78] Nahimana, et al., (Judgement), 28 December 2007, para. 713.

that the political or community affiliation of the author of a speech may be regarded as a contextual element which can assist in its interpretation."[79]

The contextual inference is emphasized in all cases presented before the ICTR. The application of the words varies with the method of dispersal. The type of messages and modes of dispersal will be further discussed in later chapters.

1.5 The ICC's Rome Statute

The most recent international legal instrument to address genocide is the International Criminal Court's (ICC) Rome Statute. It draws from the language in the Genocide Convention and the ICCPR on the crime and punishment of genocide similarly to the ICTR Statute without the same prohibition on incitement.[80] The full efficacy of previous decisions rendered from Nuremberg to the ICTR on the crime of incitement to genocide has been undermined by the Rome Statute. The Rome Stature treats incitement as a mode of criminal participation in genocide, not as a separate crime in its own right.[81] By doing this any type of decision made by the ICC on incitement to genocide will face rather stringent requirements. The ICC's Rome Statute as it is today does not have the necessary language to draw from the jurisprudence of the ICTY and ICTR on the crime of direct and public incitement to genocide to regulate hate speech.

[79] Nahimana, et al., (Judgement), 28 December 2007, para. 713.
[80] Thomas E. Davies, "How the Rome Statute Weakens the International Prohibition on Incitement to Genocide," pp. 245.
[81] Thomas E. Davies, "How the Rome Statute Weakens the International Prohibition on Incitement to Genocide," pp. 245.

Chapter Two: Rwanda

This thesis will use Rwanda for case study analysis because of three factors. Firstly, the use of media in transmitting incitement before and during the genocide occurred. Secondly, the jurisprudence established by the ICTR on the crime of direct and public incitement to genocide in the case Nahimana et al. And lastly, the colonial influence on Rwanda by Belgium parallels to the colonial influence on Myanmar by Britain examined in later chapters. By using a historical timeline to show the evolution from word to action and its impact on the eventual Rwandan Genocide. To do this the seminal case on direct and public incitement to genocide that resulted from this conflict and involved leaders of mass media sources Nahimana et al. (Media Case) will be used to establish legal precedent for the following case study example, Myanmar today.

2.1 History of the Conflict

Rwanda, one of the smallest countries on the African mainland, is bordered by Uganda, Tanzania, Burundi, and the Democratic Republic of the Congo.[82] Formerly, Rwanda operated as a Belgian colony until 1962. At the onset of independence, the nation was divided between three groups. These groups consist of eighty-four percent Hutu, fifteen percent Tutsi and one percent Twa.[83] During the period of Rwanda's history governed by Belgium, the Hutu majority came to resent the Tutsis. With the end of the colonial era in Rwanda, the highly privileged minority distinct from the rest of the population and preferred by Europeans, the Tutsis, took control. Ethnic and racial

[82] Daniel Clay and René Lemarchand, "Rwanda," Encyclopædia Britannica (Encyclopædia Britannica, inc., October 4, 2019), https://www.britannica.com/place/Rwanda).
[83] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition* (New York, NY: Oxford University Press, 2017), p. 46.

distinctions serve as two of the major factors in political upheaval.[84] M. Catharine Newbury explains the role of political centralization and colonialism stating, "Through superior force, prestige, and wealth, the colonial powers persuaded and often coerced the incumbent elite (Arabs in Zanzibar, Tutsis in Rwanda) to serve as intermediaries for colonial administration."[85] Through dependence on the colonial authority, the incumbent elite, Tutsis, obtained more effective power.[86] The European preference for the Tutsis stemmed from the hierarchal system imposed that preferred more European or Aryan features.[87] After a series of pogroms were unleashed in 1963, the assumption of power by the Hutu majority furthered crisis and displacement. Many Tutsis fled to the Central African Great Lake's region finding safety in Uganda. Those in exile established the Rwandan Patriotic Front (RPF) which would go on to lead a military invasion of Rwanda in 1990.[88]

In the early days of the First Republic, the first independent government of Rwanda was marked by ethnic confrontations. During the transitional period, the Tutsis became victims as they were viewed as members of the historically elite ruling class.[89] The one-party government system was led by Mouvement Révolutionnaire National pour le Développement (MRND). In the amended indictment of Nahimana, et. al before the ICTR, the Tribunal notes, "From 1973 to 1994, the government of President

[84] Catharine M Newbury, "Colonialism, Ethnicity, and Rural Political Protest: Rwanda and Zanzibar in Comparative Perspective," Comparative Politics 15, no. 3 (1983): pp. 253.
[85] Catharine M Newbury, "Colonialism, Ethnicity, and Rural Political Protest: Rwanda and Zanzibar in Comparative Perspective," pp. 254.
[86] Catharine M Newbury, "Colonialism, Ethnicity, and Rural Political Protest: Rwanda and Zanzibar in Comparative Perspective," pp. 254.
[87] Catharine M Newbury, "Colonialism, Ethnicity, and Rural Political Protest: Rwanda and Zanzibar in Comparative Perspective," pp. 258-9.
[88] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 47.
[89] Nahimana, et al, (Judgment), 3 December 2003, 1.2.

Habyarimana used a system of ethnic and regional quotas which was supposed to provide educational and employment opportunities for all but was increasingly used to discriminate against both Tutsis and Hutus from regions outside the northwest."[90] This level of systematic discrimination fostered resentment among different ethnic groups.

In addition to the systematic discrimination endured by Tutsis, the rising importance and influence of the president's inner circle Akazu begin to threaten the Tutsi population. This group of supporters was almost exclusively comprised of ethnic Hutus, supplemented only by individuals who shared the same extremist Hutu ideology and origin as President Habyarimana.[91] The aftermath of the ethnic confrontation and President Habyarimana's regime served as a Petri dish for the growing industry of "hate media" in Rwanda that benefited the Radio Télévision Libre des Mille Collines (RTLM), Radio Rwanda, and the *Kangura* during the genocide.[92] The rhetoric and systematic discrimination used by President Habyarimana's regime was a large factor in allowing hate media to grow.

On October 1, 1990, President Habyarimana permitted the introduction of multiple political parties and the adoption of a new constitution the following year on June 10, 1991. This first transitional government remained dominated by MRND members due to the refusal of the largest opposition parties to participate. This first transitional government helped reinforce a feeling of betrayal and resentment in those with extremist Hutu ideological beliefs. The second transitional government formed in April 1992 would be the first time the MRND had minority representation in the national

[90] Nahimana, et al, (Judgment), 3 December 2003, 1.5.
[91] Nahimana, et al, (Judgment), 3 December 2003, 1.5.
[92] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 47.

government. Even with the inclusion of more political parties on the national stage, the MRND maintained dominance over local governments.[93] This new government entered into negotiations with the RPF which resulted in the signing of the Arusha Accords on August 4, 1993.[94]

The terms of the Arusha Accords provided for the combination of both sides' armed forces. The new national army was intended to include only 13,000 men consisting of sixty percent FAR (Forces Armées Rwandaises) and forty percent RPF. The two sides were meant to equitably distribute command posts. This equitable distribution was intended to assuage fears of one party's dominance over another. In addition to this new separation of powers, the Accords limited the number of ministerial portfolios the MRND could hold. The new government's ministerial portfolios would be split between MRND and other parties. The Accords restricted the MRND to no more than five ministerial portfolios including the presidency. The main aim of the Arusha Accords was to reach an agreement with all sides and combat any political ideology based on ethnic differences. The political forces participating in the transitional governments accepted a proposal to abstain from all violence including the incitement of violence.[95]

A notable inclusion of the Accords is the allotment for a UN peacekeeping mission, UN Assistance Mission for Rwanda (UNAMIR) which was tasked with monitoring implementation of the new transitional government. The Hutu extremists who felt disenfranchised by this new agreement would soon have the necessary catalyst for ethnic cleansing.[96] On April 6, 1994, Juvénal Habyarimana, the President of Rwanda died

[93] Nahimana, et al, (Judgment), 3 December 2003, 1.8.
[94] Nahimana, et al, (Judgment), 3 December 2003, 1.9.
[95] Nahimana, et al, (Judgment), 3 December 2003, 1. 10-1.12.
[96] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 49.

in a questionable plane crash triggering widespread chaos and almost immediate genocide. Human Rights Watch reported the murders of an initial estimate between 200,000 and 500,000 unarmed and unresisting civilians.[97]

President Habyarimana supported a campaign of violence against Tutsis, the minority ethnic group.[98] The president and other Rwandan authorities encouraged a systematic massacre through various methods including instructions to individual political party militias such as the Impuzamugambi and the Interahamwe.[99] Interahamwe meaning those work together or attack together.[100] To avoid the power-sharing dictated by the Arusha Accords, several prominent civilian and military figures pursued a strategy of ethnic division and violence encouraged by the level of training received by militias.[101] The militias cannot be held individually responsible. Human Rights Watch Reported that in attacks involving civilians, the militias were often led by soldiers or national policemen. The militias killed far more people than uniformed members of the armed forces, but the leadership provided by government-sanctioned training enabled efficient, systematic extermination.[102]

The three most prominent sources of media in Rwanda before and during the genocide were RTLM, and Radio Rwanda and *Kangura*. The RTLM began in July 1993. Several witnesses brought forth by the prosecution in Nahimana et al. emphasized the importance of the radio in everyday Rwandans lives by pointing out that young people

[97] "Genocide in Rwanda: April-May 1994," Human Rights Watch Africa 6, no. 4 (May 1994): pp. 1-15, https://doi.org/10.1163/2210-7975_hrd-3169-0127, p.2.
[98] "Genocide in Rwanda: April-May 1994," p. 2.
[99] "Genocide in Rwanda: April-May 1994," p. 2.
[100] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 51.
[101] Nahimana, et al, (Judgment), 3 December 2003, 1.15.
[102] "Genocide in Rwanda: April-May 1994," p. 2.

could often be found carrying radios down the street.[103] Several hundred of the RTLM's broadcasts were introduced into evidence and proved that several broadcasts had raised the issue of ethnicity that served as calls to action.[104] In addition to the RTLM, Radio Rwanda would play a key role. In one interview given in June 1994, Ngeze explicitly refers to the crimes committed at roadblocks. The crimes included the targeting of members of society that the RPF had not been able to kill.[105]

Before the one-hundred-day genocide, one of the most prominent hate speech mouthpieces was a written extremist Hutu magazine called *Kangura*, meaning "wake them up" or "wake it up" in English. *Kangura* was formed by Hassan Ngeze in 1990 and became a prominent publication. With the first publication in May 1990 and lastly in 1995, Kangura served as a mouthpiece for dangerous rhetoric. Although there was a hiatus in the publication in 1994, the prosecution of Nahimana et al.'s expert witness Marcel Kabanda pointed to this publication as a well-known source of information for Rwandans.[106] These media sources played a role in the genocide with the type of language used to incite others to join the cause.

2.2 Role of Media in the Rwandan Genocide

To best clarify the importance of the shift in language and programming promoted by Radio Rwanda and later RTLM, this section will engage with a before and during analysis. The radio was used to disseminate propaganda and hate speech in accordance with a genocidal end solution. Gregory Gordon emphasizes the role of individuals in the decision-making process for the information aired by both Radio Rwanda and RTLM.

[103] Nahimana et al. (Judgment), 3 December 2003, para. 342.
[104] Nahimana et al. (Judgment), 3 December 2003, para. 344-5.
[105] Nahimana et al. (Judgment), 3 December 2003, para. 744.
[106] Nahimana et al. (Judgment), 3 December 2003, para. 122.

The individuals in control of this technology viewed President Habyarimana as a sellout.[107] Gordon notes the impact of Ferdinand Nahimana on the pogroms against the Tutsi in March 1992 in the Bugesera region of the Kigali prefecture which has been viewed as the final rehearsal before the genocide.[108] Nahimana, a former university professor who was then head of the government agency, instructed Radio Rwanda to air an invented report based on misconstrued information. He declared that the Tutsis had compiled a "hit list" of Hutus to exterminate in the Bugesera region.[109] This type of intentional misinformation suggests an intent to direct and public incitement of genocide.

The commitment of the political forces behind the Arusha Accords to refrain from incitement failed to ensure long term results. This can be shown by the different types of media messages transmitted throughout Rwanda. The lead up to genocide can be separated into campaigns of hate speech and campaigns for genocide. There exists a distinct shift from hate speech into direct incitement to genocide. Human Rights Watch notes that by the end of 1993, the broadcasts began shifting into the rhetoric found during the genocide. The messages became more virulent and began targeting individuals who became known as "enemies," "traitors," or ones "who deserved to die."

Kangura published pieces such as the Hutu ten commandments not long after the RPF's military invasion.[110] Gregory Gordon notes that these commandments enforced Hutu solidarity against a common enemy, the Tutsi. This definition can be increased by adding that anyone who persecutes his brother Hutu by abstaining from spreading the

[107] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 50.
[108] Susan Benesch, "Vile Crime or Inalienable Right: Defining Incitement to Genocide," Virginia Journal of International Law 48, no. 3 (2008): pp. 541.
[109] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 51-51.
[110] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 47.

Hutu ideology is an enemy, one of the Hutu Commandments.[111] Types of imagery used to create ethnic tension include the cover of issue No. 26 published in November 1991. This cover depicted Rwanda's first post-independence president, who presided over the period of initial mass violence. The imagery was clear to Rwanda who understood the allusion to the previous Hutu uprising that overthrew the Tutsi monarchy.[112] A clear example of individual targeting is the murder of Lando Ndasingwa, Minister of Labor and Social Affairs. He was one of the first victims along with his mother, wife, and his children whose names were broadcast before their eventual murder.[113] These precursors to conflict help to apply the legal standard of direct and incitement to genocide.

The language used both in this publication and also the RTLM and Radio Rwanda included inyenzi and inkotanyi. In the context of the Rwanda genocide, the term inyenzi or cockroaches refers to the group of refugees that set up a new regime in 1959. This term refers to the perceived necessity to conquer the inyenzi.[114] This references the revolution by which the Hutus conquered the Tutsis and retook the land. The rhetoric used often repeated the phrase, "to conquer the inyenzi once and for all."[115] Other terms used include the Inkotanyi which refers to the Tutsi and their accomplices.[116]

The messages used by RTLM before and during the active genocide changed dramatically. By separating the messages into categories, it becomes easier to illustrate the campaign for genocide (see table 1). These categories are referenced in the Judgement

[111] Nahimana et al. (Judgment), 3 December 2003, para. 140.
[112] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 51.
[113] "Genocide in Rwanda: April-May 1994," p. 2.
[114] Nahimana et al. (Judgment), 3 December 2003, para. 171.
[115] Nahimana et al. (Judgment), 3 December 2003, para. 171-2.
[116] Nahimana et al. (Judgment), 3 December 2003, para. 189.

and Sentence of Prosecutor v. Nahimana et al. before the ICTR. In the Tribunal's ruling, Judge Naventhem Pillay stated:

> "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." [117]

By asserting the connection between the media and the actual events of genocide, the ICTR established legal precedent for future ad hoc tribunals and international courts. By picking up fifty years after the judgments rendered at Nuremberg, the ICTR differentiates between permissible speech and illegal incitement in the cases of *Kangura* and RTLM.[118]

Table 1. Categories of RTLM Messages Before and During the Genocide

Before the Genocide	**During the Genocide**
1. Trying generally to create animosity toward Tutsis	1. Calling for the extermination of all Tutsis
2. Equating the terms *inyenzi* and *inkotanyi* with Tutsis in general	2. Reporting the extermination had taken place and praising it
3. Acknowledging its own reputation as anti-Tutsi and inciting hatred toward Tutsis	3. Calling for attacks on the remaining skeletal UNAMIR force
4. Launching specific verbal attacks against Tutsis	4. Downplaying or urging concealment of the extermination

Source: Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition* (New York, NY: Oxford University Press, 2017), p. 55.

The descriptions above will be beneficial in the further chapter in displaying the gradient between positive and negatively connotated messages. The type of messaging described

[117] Nahimana, et al., (Judgment), 3 December 2003, para. 953.
[118] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 162.

above can be placed along the gradient to demonstrate the jump from word to action. The messages above align with negatively connotated aggression.

2.3 The Media's Role in Incitement

The decisions rendered by the ICTR resumed where the Nuremberg judgment stopped nearly fifty years prior.[119] The decisions made in the Akayesu case before the ICTR laid the legal groundwork for incitement and individual culpability.[120] In Akayesu, the Tribunal's inclusion of individual responsibility helped enforce a consistent legal precedent in all cases.[121] Decisions made between Akayesu and the infamous Media Case helped strengthen the definition of incitement.[122] Gregory Gordon clarifies the two analytic criteria established for use by the ICTR with the statement, "…the purpose of the speech appeared to be advocacy of ethnic consciousness."[123] This clarified the difference between permissible speech and illegal incitement in the instances of *Kangura* and RTLM.[124]

In this case, the Appeals Chamber was not satisfied that the simple occurrence of genocide demonstrated that journalists, broadcasters, and individuals in Rwanda who had the control of media sources had the necessary intent to commit genocide.[125] The Chamber did not rule out the possibility that the individuals could have intended to incite others and that the encouragement via mass media sources contributed to the massacre of

[119] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 171.
[120] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 136-7.
[121] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 174.
[122] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 140.
[123] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 162.
[124] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 162.
[125] Nahimana, et al, (Judgment), 28 November 2007, para. 708-9.

the Tutsi population. Furthermore, the Chamber notes that the genocide could have been the result of other factors outside of the control of Appellants.[126]

The ICTR only had the necessary jurisdiction to prosecute offenses committed in 1994. In the Appeals Chamber before the Tribunal, the Chamber recalls, "…even where offenses may have commenced before 1994 and continued in 1994, the provisions of the Statute on the temporal jurisdiction of the Tribunal mean that a conviction may be based only on criminal conduct having occurred during 1994."[127] Therefore, any perpetrators could only be held accountable and prosecuted for acts including direct and public incitement to commit genocide during 1994 and not the months leading up to conflict in 1993.[128]

The link between verbal and written conduct and atrocity in Rwanda proved that speech-related international crimes would play a key role in the outcome of the ICTR.[129] The legal precedents set by the Tribunal continue to aid in the prosecution and regulation of media incited crimes today. In the case of Rwanda, the Tribunal noted the necessity of taking into account the nation's language and culture in ascertaining whether the speech in RTLM and *Kangura* during the one-hundred-day civil war constituted direct incitement to commit genocide. This is significant because the purpose behind the language used should be considered to determine the reach and understanding of the incitement to genocide. The Tribunal stated in Nahimana et al.:

> "The culture, including the nuances of Kinyarwanda language, should be considered in determining what constitutes direct and public incitement to commit genocide in

[126] Nahimana, et al, (Judgment), 28 November 2007, para. 709.
[127] Nahimana, et al, (Judgment), 28 November 2007, para. 724.
[128] Nahimana, et al, (Judgment), 28 November 2007, para. 725.
[129] Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, and Fruition,* p. 136.

> Rwanda. For this reason, it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message."[130]

The primary concern with analyzing hate speech and its role in direct and public incitement to genocide is understanding how the intended audience interpreted the language.

The conclusion reached in the Appeals Chamber in Nahimana et al., established how the broadcasts by RTLM must be considered in their entirety and within the context of the broader conflict. The Appeals Chamber stated, "thus, even though the terms Inyenzi and Inkotanyi may have various meanings in various contexts (as with many words in every language) …the Appeals Chamber further considers that it was reasonable to conclude that certain RTLM broadcasts had directly equated the Tutsi with the enemy."[131] Viewing the language in the context of history is key to an accurate interpretation.

[130] Nahimana, et al., (Judgment), 28 November 2007, paras. 698, 700-03.
[131] Nahimana, et al., (Judgment), 28 November 2007, para. 713.

Chapter Three: Myanmar

This chapter examines the role of present-day Myanmar in furthering the hierarchal differences established in the post-colonial era by former Burma. This chapter explains how the continued struggles between ethnic groups and the intervention by colonial powers led to large scale conflict. This chapter will conclude with the overview of the proceedings brought forth by The Gambia at the ICJ and what that means for Myanmar. The case brought forth by The Gambia in front of the ICJ helps argue for the treatment of incitement to genocide as a separate crime.

3.1 History of the Conflict

Muslim populations have existed in the area known as Arakan, a coastal plain, connecting Bangladesh to the area presently known as Myanmar.[132] The fifteenth-century presence of Muslim titles used by Arakanese kings suggests long term presence and influence on the region from Muslims. The percentage of the population that identifies as Muslim has varied through the decades and research suggests a complex picture.[133] The history of this area sits at the center of ethnic claims raised by the Rohingya in the mid-twentieth century. The early modern Buddhist kingdom of Arakan established a large Buddhist presence.[134] The contemporary ethnocultural identities and rivalries cannot be understood without background on the counterclaims and the rise of a Muslim Nationalist Movement in 1942-1964.[135] Overall demographic growth during the colonial period of 1881 until 1941 demonstrates a steady growth to twenty-seven percent of the

[132] Jacques Leider. Rohingya: The History of a Muslim Identity in Myanmar. Oxford Research Encyclopedia of Asian History, 2018, 10.1093/acrefore/9780190277727.013.115. pp. 5.
[133] Jacques Leider. "Rohingya." Pp 4
[134] Jacques Leider. "Rohingya." pp. 5.
[135] Jacques Leider. "Rohingya." pp. 7.

population.[136] This helps explain the modern roles of Muslim and Buddhist communities in the Rakhine State. The modern state of Myanmar has ethnic struggles between Muslim and Buddhist communities that have resulted in the beginnings of genocide.

Jacques Leider states that no information exists on the social, political, and religious organizations of Muslims in North Arakan during the colonial period of 1881 to 1941. According to Leider, Muslims became politically active only in the aftermath of World War II in Burma. With the arrival of the Japanese in Burma in 1942, a refugee crisis with more than 400,000 Indians crossing the Arakan to reach Bengal served as a force for political awakening in Muslim communities. With the arrival of the Japanese, there was a forced exodus that aided in a collapse of the colonial order.[137] This collapse influenced an anti-colonial Burma Independence Army (BIA), consisting of Arakanese Buddhists, to attack Muslim villages whose inhabitants were either driven away or killed. As with most ethno-based conflicts, Arakanese Buddhists were targeted in retaliation in predominantly Muslim areas. These early conflicts helped to form differing claims of injustice and victimhood and have aided the sustained bitterness of future generations. [138]

By 1949, Burma was the center of a civil war. In North Arakan, the Mujahid insurrection, which lasted for more than a decade, caused "the violent exactions of local militias, the dissatisfaction of local landlords, the unfair *treatment* of Muslims by Arakanese administrators, and murky business conflicts."[139] Allegedly the Mujahid claimed to fight on behalf of an autonomous Muslim area, but not even modern Muslim nationalist supporters invoke this model for a national cause in the present day. Later

[136] Jacques Leider. "Rohingya." pp. 6
[137] Jacques Leider. "Rohingya." pp. 7.
[138] Jacques Leider. "Rohingya." pp. 7
[139] Jacques Leider. "Rohingya." pp. 8.

during the 1950s, a younger generation of Arakan Muslims brought a nationalist movement to the forefront of the region. These Muslim leaders and students in North Arakan asserted a new cohesive ethnoreligious identity for the region's Muslim population. This unsatisfied generation sought to affirm a singular national identity by pushing for the adoption of a common name, *Rohingya.*[140] The rise of Muslim identity in Myanmar can be elucidated with a discourse on the term Rohingya. This term aimed to separate the Muslim population from the majority Buddhist population in Burma, later Myanmar. "Rohingya" results from the ongoing process to unify Muslims in this region with a similar cultural profile, but a diverse historical background. The new terminology aided identity formation in Muslim communities across the North Arakan Region and adjacent communities in Bangladesh and India.[141]

3.2 Rohingya in Modern Times

While this community works towards the formation of their identity, Myanmar officials reject Rohingya as ethnicity and any related colonial claims for Rohingya emancipation. Rohingya leaders have used evidence of Muslim communities in the colonial period as a support for the claim for an autonomous Muslim state in the North Arakan region, Myanmar officials face steep obstacles in denying emancipation for Rohingyas due in part to their large population. According to the 2014 Myanmar census nearly one-third of the Rakhine State's three million residents identify as Rohingya. As of 2020, there are more than 43 million total residing within Myanmar's borders.[142]

[140] Jacques Leider. "Rohingya." pp. 8.
[141] Jacques Leider. "Rohingya." pp. 2.
[142] "Population, Total - Myanmar," Data, accessed April 18, 2020, https://data.worldbank.org/indicator/SP.POP.TOTL?locations=MM)

The Rohingya minority reportedly make up one million of the Maungdaw, Buthidaung, and Rathedaung townships. The townships are the organizational structure of local governments inside of Myanmar. In addition to the population density in these areas another one million Rohingya reside outside of Myanmar.[143] Because those living in other areas, outside of Myanmar have different migration backgrounds and live primarily as refugees with semi-illegal identities, the ethnic cleansing and genocide referenced in this thesis do not necessarily encompass those outside Myanmar's borders. Even though over one-third of the population identify as Rohingya, the majority population of the Rakhine State consists of Buddhist Rakhine or Arakanese who are ethnically similar to the Bamar or Burmans.[144]

In 2008, Myanmar's military government developed a new constitution and held general elections in 2010 with the hope for normal relations with the international community. When the initial violence in the Rakhine State began with the alleged rape and murder of a Buddhist woman by three Rohingya men, pamphlets circulated by local Rakhine activists arguing that the Rohingya were to blame and called for retribution. At the same time, anonymous internet users circulated photos of the Buddhist woman's body on the internet, with a call to seek retribution against all Muslims in Myanmar. During this online campaign, Government newspapers used the term "Muslim Kala," a localized term used to lump all Muslims into a group with the use of a derogatory word for South-Asians.[145]

[143] Jacques Leider. "Rohingya." pp. 2.
[144] Jacques Leider. "Rohingya." pp. 2.
[145] Allard K. Lowenstein "Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?" pp. 18.

This call for retribution was successful as it incited a mob of three hundred Rakhine citizens to surround a bus filled with Muslim travelers at a checkpoint in Toungop. With witnesses in the hundreds, the mob forced ten Muslims into the street where they were beaten to death. After this massacre, violence spread rapidly across the Rakhine State. In Maungdaw, Rohingya rioted following prayer with at least seven reported Rakhine deaths. Less than two weeks later, then President Thein Sein was forced to declare a state of emergency in the Rakhine State giving administrative authority to the military. Even with enforced curfews and banned public gatherings, Human Rights Watch reported more than 100,000 displaced Rohingya and Rakhine living in tents within temporary camps.[146] The state of emergency in the Rakhine enhanced the presence of the military and other security forces. The forces claimed to search for criminals; however, these forces performed sweeps through predominantly Muslim communities supporting claims of discrimination. These sweeps would result in arbitrary arrests which served only to inflame existing ethnocultural tension.[147]

3.3 Social Media's Role in Incitement

The role of social media in local politics began to be a point of international discussion in 2018 with the publication of a possible genocide by multiple Western news sources including *The New York Times.*[148] In one article, Paul Mozur notes that the messages appearing on Facebook's platform. Posts stating that Islam was a global threat to Buddhism and the spread of the rape of a Buddhist woman by military personnel that

[146] Associated Press, "Burma Ethnic Violence Escalates As Villagers Flee," The Guardian (June 12, 2012), http://www.theguardian.com/world/2012/jun/12/burma-ethnic-violence-escalates.
[147] Lowenstein "Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?" pp. 19-20.
[148] Paul Mozur, "A Genocide Incited on Facebook, With Posts From Myanmar's Military," The New York Times (The New York Times, October 15, 2018), https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html)

has turned to social media to perpetuate ethnic cleansing. The military exploited the widespread capability of the platform by disseminating information to the eighteen million residents of Myanmar who use the internet. The posts made by senior military officials were taken down by Facebook; however, there still exists a propaganda campaign hidden behind false names and sham accounts. According to *The New York Times*, Facebook confirmed that a series of accounts had been removed due to their connection with Myanmar's military. These accounts were estimated to have a reach of over 1.3 million followers.[149] While Myanmar's government was attempting to influence the opinions of their residents, such measures have gained the attention of nations all over the world resulting in criticism.

3.4 The International Court of Justice and The Republic of the Gambia

While the present ethnocultural tensions between the two groups extend from state policies excluding one group, both groups contribute to the lasting regional conflict. Violence and discrimination in the region did not arise with the invention of the term Rohingya but as a result of history and state-sanctioned discrimination. Since 1980, Myanmar's military and authoritarian government have denied Rohingyas intrinsic human rights including citizenship.[150] The term Rohingya became known outside the region with reports of human rights violations against Muslims in the North Rakhine State during the 1990s and again in 2012. Access to information via the internet has made the Rohingya crisis globally accessible increasing the likelihood other states might intervene. Worldwide reports have called the Rohingyas' a "stateless victims of systematic oppression, whose refugee status and disenfranchisement are defining

[149] Paul Mozur,"A Genocide Incited on Facebook, With Posts From Myanmar's Military."
[150] Jacques Leider. "Rohingya." pp. 2.

elements of their public identity."[151] The level of human rights violations and the spread of hate speech in the region could aid in inciting others to commit genocide.

This description aids the claims brought forth by a fellow global south state, The Republic of the Gambia (The Gambia). When hundreds of thousands of Rohingya fled to Bangladesh after military operations widely interpreted as ethnic cleansing, the Rohingya Crisis gained prominence as an issue for post-dictatorial Myanmar in 2011.[152] The scale of the refugee crisis prompted the UN High Commissioner for Human Rights to acknowledge that certain elements of genocide may be occurring in the Rakhine State of Myanmar.[153] This issue was brought to the attention of other international authorities with varying levels of demand to hold Myanmar accountable for their actions. International media outlets produced an analysis of the situation from the ground. Outlets like CBS News have commented on the role of social media in the spread of violence across the Rakhine State.[154] Journalists in Myanmar noticed the necessity of cell phones to receive outside news. Independent Analysts say that the satellite imaging shows that at least 340 villages, not houses, have been destroyed.[155] International coverage on the scale of these atrocities led to the proceedings instituted in November 2019.

[151] Jacques Leider. "Rohingya." pp. 3.
[152] Jacques Leider. "Rohingya." pp. 1.
[153] "Report of the Independent International Fact-Finding Mission on Myanmar: Human Rights Council, Thirty-Ninth Session, 10-28 September 2018, Agenda Item 4, Human Rights Situations That Require the Councils Attention," Report of the Independent International Fact-Finding Mission on Myanmar: Human Rights Council, thirty-ninth session, 10-28 September 2018, agenda item 4, human rights situations that require the Councils attention § (n.d.)).
[154] "Weaponizing Social Media: The Rohingya Crisis," CBS News (CBS Interactive, February 26, 2018), https://www.cbsnews.com/news/rohingya-refugee-crisis-myanmar-weaponizing-social-media-main/)
[155] "Weaponizing Social Media: The Rohingya Crisis."

On November 11, 2019, The Gambia filed an Application Instituting Proceedings and Request for Provisional Measures against The Republic of the Union of Myanmar.[156] In the document addressed to the Registrar of the International Court of Justice (ICJ), The Gambia stated:

> "…This Application concerns acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group, a distinct ethnic, racial and religious group that resides primarily in Myanmar's Rakhine State. These acts, which include killing, causing serious bodily and mental harm, inflicting conditions that are calculated to bring about physical destruction, imposing measures to prevent births, and forcible transfers, are genocidal in character because they are intended to destroy the Rohingya group in whole or in part."[157]

The Gambia alleges that Myanmar has breached and will continue to breach the Genocide Convention under Articles 1, 3(a), 3(b), 3(c), and 3(e), 4, 5, and 6. The Gambia argues that Myanmar must commit to reparations to the displaced Rohingya communities and the allowance for "safe and dignified" return with full citizenship and protection of human rights.[158] Furthermore, The Gambia takes note of the jurisprudence of the ICJ in addition to other courts or tribunals such as the ICTR and ICTY.[159] The inclusion of other internationally recognized bodies in their application gives strength to the claims brought forth by The Gambia.

In Article 1 of the Genocide Convention, the contracting parties confirmed that whether a nation commits genocide during a time of peace or war remains a crime under international law.[160] The Gambia asserts that Myanmar meets at least one of the five acts

[156] The Republic of The Gambia v. The Republic of the Union of Myanmar, (Instituting Proceedings), 11 November 2019, para. 1.
[157] The Republic of The Gambia v. The Republic of the Union of Myanmar, (Instituting Proceedings), 11 November 2019, para. 2.
[158] ICJ Order on Provisional Measures The. Gambia v. Myanmar, 23 January 2020, para. 2.
[159] The Republic of The Gambia v. The Republic of the Union of Myanmar, (Instituting Proceedings), 11 November 2019, para. 3.
[160] Genocide Convention Art. I.

considered to be genocide in Article 2 of the Genocide Convention. The Gambia's allegations refer to October 2016 military operations conducted both by Myanmar's government and outside security forces. The systematic acts referred to by The Gambia indicate that:

> "during the course of which they committed mass murder, rape and other forms of sexual violence, and engaged in the systematic destruction by fire of Rohingya villages, often with inhabitants locked inside burning houses, with the intent to destroy the Rohingya as a group, in whole or in part."[161]

The Gambia affirms that from August 2017 onward, Myanmar resumed genocidal acts referenced as "clearance operations" on a larger stage.[162] The lawsuit's attribution of responsibility to the leaders of the government serves as justification on why those perpetuating genocide in Myanmar can be held to the same legal standard as the individuals brought before the ICTR and ICTY.[163]

Traditionally, global south nations have not been involved in bringing cases against fellow global south nations. The Gambia presenting a case against Myanmar for violations of the Genocide Convention represents a significant move for a tiny nation of only 7 million.[164] Theoretically, the United Nations holds all member states equal; however, this is not always the case in practice. As Myanmar is not a party to the Rome Statute, the claims made by The Gambia cannot be presented before the ICC; however, Article 8 of the Genocide Convention states:

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they

[161] The Republic of The Gambia v. The Republic of the Union of Myanmar, (Instituting Proceedings), 11 November 2019, para. 21.
[162] The Republic of The Gambia v. The Republic of the Union of Myanmar, (Instituting Proceedings), 11 November 2019, para. 6.
[163] The Republic of The Gambia v. The Republic of the Union of Myanmar, (Instituting Proceedings), 11 November 2019, para. 8.
[164] "The World Factbook: Gambia, The," Central Intelligence Agency (Central Intelligence Agency), accessed April 18, 2020, https://www.cia.gov/library/publications/the-world-factbook/geos/print_ga.html)

> consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."[165]

With the support of Article 8 of the Genocide Convention, The Gambia concludes based on the findings of the UN Human Rights Council's Independent International Fact-Finding Mission (UN Fact-Finding Mission) that Myanmar's escalation to violence against the Rohingya can be classified as genocide and brought forth before the ICJ.[166]

3.5 Myanmar's Reservations to the Genocide Convention

Even though The Gambia's claims are supported by the Genocide Convention and prior legal proceedings, Myanmar has reservations to the Genocide Convention on Article 6 and 8. Article 6 states that the parties responsible for committing genocide may be tried by a competent jury in their jurisdiction.[167] Article 8 says that any competent organs of the United Nations may take part in the prevention or suppression of acts of genocide.[168] Article 8 of the Genocide Convention, as defined above, would support bringing the claims made by The Gambia before the ICJ if Myanmar did not have reservations to the Genocide Convention.[169]

Reservations are provisions made usually upon the ratification of a document that withholds some powers to the signatory state.[170] These reservations inhibit what little enforcement power the Genocide Convention has as a legal document. The Genocide Convention intended to hold all contracting parties accountable, and it encouraged all

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[165] Genocide Convention Art. VIII
[166] The Republic of The Gambia v. The Republic of the Union of Myanmar, (Instituting Proceedings), 11 November 2019, paras. 10-15.
[167] Genocide Convention Art. VI.
[168] Genocide Convention Art. VIII.
[169] Jim Fussell, Reservations and Declarations to the Genocide Convention - - Prevent Genocide International, accessed April 18, 2020, http://www.preventgenocide.org/law/convention/reservations/)
[170] "International Law, Codification, Legal Affairs, Commission, ILC, Instruments and Reports, Yearbook," United Nations (United Nations), accessed April 10, 2020, https://legal.un.org/ilc/summaries/1_8.shtml)

nations to act as a watchdog for crimes of genocide in the aftermath of WWII. The international community can no longer turn a conscious blind eye to genocide which is evidenced by The Gambia a nation 7,000 miles away from the state it instituted legal proceedings against.

The provisional order issued by the ICJ on January 23, 2020, offers four unanimous provisional measures. In these measures the ICJ determines that despite reservations Myanmar still has obligations under the Genocide Conventions, stating:

> "The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention…"[171]

The decision rendered by the ICJ argues that Myanmar should be held responsible for genocidal acts in line with the Genocide Convention. The court's order to, "…take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide…"[172] lacks enforcement power, however. Due to previous recognition of the ICJ's authority, Myanmar's obligation to fulfill the court's orders and decisions should not remain a legal question.[173] But without a physical presence within Myanmar's borders, the ICJ's orders have no lasting impact on the conflict at large.

[171] ICJ Order on Provisional Measures The. Gambia v. Myanmar, 23 January 2020, para. 86 (1).
[172] ICJ Order on Provisional Measures The. Gambia v. Myanmar, 23 January 2020, para. 86 (3).
[173] "Questions and Answers on Gambia's Genocide Case Against Myanmar before the International Court of Justice," Human Rights Watch, December 9, 2019, https://www.hrw.org/news/2019/12/05/questions-and-answers-gambias-genocide-case-against-myanmar-international-court#_Why_has_Gambia)

Chapter Four: A Case for Incitement as a Separate Crime

The evolution of hate speech to genocide is a multifaceted jump from word to action. The steps between hate speech and incitement to genocide have been shown in the previous case studies with case law in chapters two and three. This jump involves individuals utilizing dissemination of information with the intent to cause harm to a group of peoples with intrinsically protected characteristics as defined in Article 20 of the ICCPR. Intent rests on both the intended meaning by a speaker and the understood meaning by the audience. In the previous chapter on Rwanda, the evolution of speech was separated into categories before and during the genocide which illustrates the evolution of a speaker inciting widespread violence. This chapter will build on those examples with an explanation of the types of messages in a language that depends on illocution for understanding. By defining these messages, the levels between hate speech and genocide are easier to comprehend.

4.1 Individual Culpability on Genocide

Joseph Goebbels, the mastermind of the Final Solution, gave a speech on August 18, 1933, on the implications of a source of massive influence with the *Volksempfänger*, a device cheap enough to distribute among all of Germany.[174] Nazi Germany would go onto utilizing the radio as key to Goebbels' propaganda policy. Goebbels argued:

> "It would not have been possible for us to take power or to use it in the ways we have without the radio and the airplane. It is no exaggeration to say that the German revolution, at least in the form it took, would have been impossible without the airplane and the radio."[175]

[174] Randall Bytwerk, Goebbels on Radio (1933), accessed April 5, 2020, https://research.calvin.edu/german-propaganda-archive/goeb56.htm)
[175] Randall Bytwerk, Goebbels on Radio (1933).

The use of the radio by Nazi Germany signaled a turn towards a simpler method of convincing the masses to act. Goebbels and his contemporaries were concerned with the way this new revolution of media and technology could help National Socialism.[176] Similarly, the individuals charged with direct and public incitement to genocide before the ICTR were only concerned with spreading propaganda through mass media. In both cases, the individuals were held responsible for the crime of genocide and not just the regime.

The true power of mass media sources to invoke a violent response from everyday Germans was shown with the indictment of Julius Streicher for his involvement with the publication Der Stürmer as Goebbels committed suicide in the last days of the war.[177] Although Streicher had not worked within the inner circle of National Socialism, he was an example of an individual motivated by those in Hitler's inner circle. His reputation as "Jew-Baiter Number One" set him apart with his speeches and articles given weekly that placed anti-Semitism into the minds of German peoples.[178] In the judgment rendered by the IMT, Streicher was found to, "…incited the German people to active persecution. Each issue of *Der Stürmer*, which reached a circulation of 600,00 in 1935, was filled with such articles, often lewd and disgusting."[179] Later the ICTR would recognize the responsibility of individuals in the incitement of genocide.

4.2 Types of Messaging

[176] Randall Bytwerk, Goebbels on Radio (1933).
[177] "The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany," Streicher Judgment.
[178] "The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany," Streicher Judgment.
[179] "The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany," Streicher Judgment.

Populists embracing hate speech users of today feed on verbal contamination by establishing a poisonous base through verbal radicalism. This cultural phenomenon is not new and builds on remnants of a racially derogatory vocabulary from past decades, which continued to exist in the language merely hidden behind a cloak of polite indifference. According to Paul Sailer-Wlasits, the polluted and damaged core of ethnocentric and völkisch language of the first half of the 20th Century has been repurposed by today's morally depraved populists as a rhetorical weapon. Such political leaders use the abbreviated language to relate to large, apolitical sections of the population, who consider themselves disenfranchised. Political leaders use words that are prejudiced to manipulate a society hidden beneath cultural norms. The jump from spoken words to complexity reduction and then to prejudice is multi-faceted.[180] The same multi-step process that takes hate speech to incitement can be viewed in a gradient of language, as in the model proposed below.

The simple prosecution of incitement to genocide is insufficient to prevent future crimes against humanity. One of the steps from word to action is the use of recoded words such as the ones described in Chapter Two and employed before and during the Rwandan Genocide. The main issue of recoded words is that every society has its own social norms more or less regarding language.[181] In order to interpret a message positively or negatively, one must understand the intention of the speaker. In many cases the illocution induces the action.[182]

[180] Paul Sailer-Wlasits, "Hass-Rede: Zur Kulturgeschichte Eines Sprachlichen Phänomens."
[181] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," Sprachliche Gewalt, 2018, pp. 29-40, https://doi.org/10.1007/978-3-476-04543-0_2), pp. 31.
[182] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 32

Table 2: Language Gradient

Non-Aggressive (Positively Connotated)	▲	Polite and Politeness
		Unpolite
	•	Excessively Polite and Excessive Politeness
Aggressive (Negatively Connotated)		Impolite
	▼	Aggressive and Aggression

Source: Szczęk, Joanna. "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression." Sprachliche Gewalt, 2018, pp. 35 and 38.

This section distinguishes between forced politeness and intentional aggression through language using the research of Joanna Szczęk work, which itself builds upon a vast range of preexisting research. The gradient of language moves along a vertical axis, where at the top non-aggressive language meets politeness and at the bottom aggressive language corresponds to physical aggression. In between the two extremes, there exist various types of language that depend on the reception in order to be interpreted as positively or negatively connotated.[183] Szczęk divides the utterances into five categories: polite, unpolite, excessively polite, impolite, and aggressive.[184] I would go even further and claim that at the furthest end of the aggressive spectrum lies hate speech.

Polite pronouncements that can be interpreted as bearing a negative connotation include are generally considered unpolite. Examples of this type include compliments that are manipulative, exaggerated, trite, inadequate, coerced, ego boosting, and self-deprecating.[185] While in themselves they do not discriminate against people, they explain how easily it is to construct words and phrases understood only by a single society.

[183] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 35.
[184] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 32-4.
[185] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 33.

Impolite acts are those whose negative connotation corresponds to the speaker's intention. These speech acts can be divided into four types: the arrogate, the aversive, the limitative, and the unreciprocal.[186] All of these types represent a speaker actively forcing impolite conversation.

The arrogate act corresponds to speakers whose illocutionary goal is to prove their own superiority. In doing this, they position themselves as the authoritative voice in a given context by relying, for example, om vulgar deprecating expressions when addressing their own superiority.[187] In the context of this analysis, both Rwanda's and Myanmar's media relied on such acts when addressing their interlocutors.

The aversive type describes the speakers, who openly offend and attack their interlocutors by charging against and destroying their world view and value system.[188] This type of speech includes vulgar offenses meant to discriminate against a given group. In Rwanda this strategy was used against the Tutsis, when the RTLM utilized allegations and innuendos to discriminate and incite retaliation against them.

The other two types, the limitative and unreciprocal, do not directly align with violent actions. The limitative type appears when speakers exert power by controlling their interlocutors and by limiting their freedom of action in a conversation. Sarcasm, false politeness, and manipulation all belong to this category.[189] The unreciprocal type is when speakers refuse to engage in a dialog and thereby breach the principle of mutuality and acknowledgement of others in a conversation. This type is most often found when a

[186] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 33-4.
[187] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 33.
[188] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 33-4.
[189] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 34.

speaker dominates a discussion but could apply to more extreme language found at the bottom of the vertical axis.[190]

The aggressive nature of the bottom of the axis begin with unpolite speech acts. In these acts, the speaker is aware of the negative undertone of the words. The speaker shifts towards a more cognizant position when saying making utterances aimed at manipulating an outcome.[191] The impolite speech acts combine with aggressive illocution and serve as the basis for hate speech that directly incites violence. Both the intent of aggressive illocution and outcome can lead to dangerous speech. It is important to note that dangerous speech does not always end with genocide.

Impolite phrases mixed with aggressive illocution only understood by certain sectors of society lead to certain disparities between the controlling forces behind mass media sources and the audience. When the individuals behind mass media sources such as National Socialist Germany, Rwanda, and Myanmar are aware of the impact of their words and their role in the overall premeditated plan, outcomes such as genocide are common. In these cases, the question, is not if the genocide occurs but rather when the genocide occurs and on what scale.

Aggression, as shown in the above table, depends on the intent behind the interlocutor and the indirect or direct harm caused to an individual as a result of the speech.[192] For the purposes of this thesis, there are four characteristics of the aggressive speech act. They are the action, intent, context, and outcome of the aggressive speech act.[193] These characteristics are applied in the decisions rendered by the ICTR on direct

[190] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 34.
[191] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 34.
[192] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 35.
[193] Joanna Szczęk, "(Un)Höflichkeit: Indirekte Formen Sprachlicher Aggression," pp. 36.

and public incitement to genocide. The intent of a speaker within a certain context can induce a premeditated outcome. For this reason, the proper procedures and language are needed to regulate media incitement to genocide. In the section below, the case for amending the ICC's Rome Statute is made on the treatment of incitement to genocide as a separate crime in and of itself.

4.3 Amending the ICC's Rome Statute

By using the operational definitions set forth in previous chapters and the integral cases of Streicher before the IMT and Nahimana et al. before the ICTR, the legal constraints of incitement to genocide are elucidated. The allowance of overt statements of intent as punishable before the ICTR establishes a standard that could be used before future military tribunals and international courts with some exceptions. The main exception for applying the jurisprudence established on the crime on incitement in this thesis before the ICC is that this court does not treat incitement as a separate crime.[194] This is because the language of the Rome Statute does not mirror the Genocide Convention which served as the basis for rulings issued by the ICTY and ICTR as shown in the first chapter.

The factors prohibiting the application of this rule are explained in the research of Thomas Davies. The three benefits of treating incitement to genocide as a separate crime that inhibit the ICC's potential as a legal enforcement power are clear. Firstly, when treating incitement to genocide as a separate crime it provides a rather straightforward path for proving the defendant committed incitement based on the characteristics

[194] Thomas E. Davies, "How the Rome Statute Weakens the International Prohibition on Incitement to Genocide," pp. 245.

provided in case law.[195] Secondly, the language used in the past by the ICTY and ICTR Statutes make it possible to hold a defendant accountable for aiding and abetting incitement to genocide.[196] The success of regulating media sources relies on charging defendants with aiding and abetting incitement to genocide in the absence of physical evidence confirming the defendant had committed crimes against humanity. Lastly, treatment as a separate crime allows prosecutors to charge individuals for incitement even when a crime on the scale of genocide has not yet been committed.[197] As the ICC does not treat this as a separate offense, it remains difficult to prosecute or regulate incitement prior to the occurrence of a large-scale crime against humanity.

While changing the language of the Rome Statute to match the ICTY and ICTR Statutes would offer the ability to broadly apply a standard legal definition, the ability of an international body to amend its language in a manner fast enough to prevent genocide in Myanmar is impossible.[198] If the ICC were to amend the Rome Stature's language to mirror the Genocide Convention, then the ICC would have the beginning step towards utilizing their legal enforcement power. In the absence of any change on this issue, the ICC will not have the ability to issue any substantial ruling on the crime of incitement to genocide.

[195] Thomas E. Davies, "How the Rome Statute Weakens the International Prohibition on Incitement to Genocide," pp. 245.
[196] Thomas E. Davies, "How the Rome Statute Weakens the International Prohibition on Incitement to Genocide," pp. 246.
[197] Thomas E. Davies, "How the Rome Statute Weakens the International Prohibition on Incitement to Genocide," pp. 246.
[198] Thomas E. Davies, "How the Rome Statute Weakens the International Prohibition on Incitement to Genocide," pp. 247.

Conclusion

As with Goebbels' speech in 1933, the power to harness means of mass information such as with the radio was not fully understood by the citizens of National Socialist Germany. Goebbels recognized that the enforcement power of the Third Reich came from the strength its air force, but he knew the widespread reach of the radio provided the means necessary to conquer and complete his premeditated plan.[199] The masterminds of events on the scale of genocide are aware of the actions necessary to accomplish their end goal especially in regards to mass media sources. This thesis has argued that the legal standards presented from the IMT at Nuremberg up until the ICJ today offer suitable jurisprudence on prosecuting media incited genocide after the genocide has occurred but not for regulation of the acts before the genocide.

The case studies used in thesis with Rwanda and Myanmar provide examples how long-term hierarchal structures can devolve into crimes against humanity and refugee crises. The governments of National Socialist Germany and Rwanda in the 20th Century, demonstrate that leaders understand the implications of a concerted plan and the benefits of manipulating mass media sources such as the radio and newspaper. In today's social media culture, the impact of mass media is instantaneous. With events occurring thousands of miles away in nations such as Myanmar, the world has begun to realize what the spread of social media as a weapon means for future authoritarian governments.[200]

The case studies and case law selected for this thesis have demonstrated operational definitions for hate speech, intent, and direct and public incitement to

[199] Randall Bytwerk, Goebbels on Radio (1933).
[200] "Weaponizing Social Media: The Rohingya Crisis."

genocide. This inclusion of cases from Nuremberg up until the ICTR demonstrate the capacity in which the Genocide Convention can be employed. Although the Genocide Convention was not developed until after the IMT, the decisions rendered on the crime of incitement to genocide serves as jurisprudence for later cases. By explaining the cases in the historical context, this thesis shows how speech, media, and genocide operate together towards an end goal.

The usage of overt statements shown in publications before a crime has been committed helps to clarify the context and intent of a speech act. The allowance for overt statements of intent as punishable before the ICTR established a standard that could be used before future military tribunals, but not by international courts such as the ICC. The ICC and its language prohibit any meaningful regulation or prevention on behalf of the court itself. If the ICC were to amend its language as proposed in Chapter Four, further action would be easier to implement.

With all issues as large and complicated as genocide, there is never going to be a one size fits all solution. Modern solutions will have to come from international courts governments, and social media corporations themselves. Social media networks such as Facebook, Twitter, and Instagram will need to be held accountable for the ways individuals use their platform. In order to reduce the number of military accounts used on social media platforms, individual corporations will have to police their own sites.

Whether the incentive comes from the government or the industry itself is unknown. What is known about this new phenomena is that both individuals and governments are using new sources of mass media to influence large sections of the population. The sections of the population that are vulnerable to manipulation can be

discerned through the types of language and method for engagement within the online community. In future legislation, policy makers will need to focus on the intersection of speech regulation and private industry. In the United States of America, legislators will have to be mindful of the First Amendment and restrictions it places on regulation of speech. As of now, the international community is bound by the current customs and norms established in this thesis. There is no mechanism in play that can regulate speech in a capacity that will prevent genocide. The international community can prosecute incitement to genocide through post-war tribunals, but current legal institutions require reform before any international regulations are implemented.

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