Formulating a New Atrocity Speech Offense: Incitement to Commit War Crimes

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"Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing those among his subordinates whose wills are weak or whose passions are strong . . . ."

– Theodore Roosevelt[1]

I. INTRODUCTION

Since the time of the Pharaohs, certain military commanders have sought to demonize the enemy in speeches given to troops before sending them into battle. If officers could equate their foes with filthy vermin, ferocious beasts, or unholy goblins, then their subordinates might take the field in a frenzy, ready to slaughter every last combatant—even those wounded or attempting to surrender. In certain cases, so whipped up with hatred, troops might even go so far as to kill women and children in the vicinity of the battlefield. And such speech has arisen in cases of military campaigns illegitimate from their conception—ethnic cleansing operations, for example, that have required dehumanizing the enemy and thereby conditioning and inspiring the rank and file to inflict violence on innocent civilians. Depending on the words used by the commanding officer in these situations, such speech would not necessarily amount to "orders" given to the troops. But what if, in spite of the noxious intent underlying them

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1. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 65 (2010).

and their being uttered in the context of likely imminent violence, the words failed to have their nefarious effect and soldiers complied with humanitarian law? Or even if the troops were willing to commit atrocities, what if they were captured by enemy forces before the violence began? In a *genocidal* context, the officer's words alone might be actionable as "incitement to genocide." But curiously, under the current state of international humanitarian law, the speech itself would not permit an incitement prosecution of the commander.

In fact, nowhere in the Hague Conventions or the Geneva Conventions and their two Additional Protocols is the word "incitement" even used.[2] That absence is also reflected in the war crimes portions of the current *ad hoc*, hybrid, and permanent international criminal tribunal statutes.[3] Quite simply, "inciting" to commit war crimes has not been criminalized in international law. And yet, mass graves in Africa, Europe, and Latin America attest to the manifestation of this grisly phenomenon in two ways. First, as just described, military commanders can incite their subordinates to commit atrocities, as illustrated so graphically, for example, in early–1980s Guatemala.[4] Second, in more recent times, civilians (especially civilian media) can incite military and paramilitary units to commit atrocities, a common phenomenon during the 1994 Rwandan genocide.[5]

Perhaps this lacuna has not garnered much attention due to a string of recent successful genocide incitement prosecutions, most visibly in the International Criminal Tribunal for Rwanda's *Media Case* (*Prosecutor v. Nahimana, et al.*), against hate radio and newspaper executives.[6] But atrocities rarely rise to the level of genocide, which is, in any event, difficult to prove given its elevated level of intent and its narrow focus on destruction.[7] International prosecutors have also charged hate

2. *See infra* notes 110–13 and accompanying text (discussing these bodies of international law in detail and noting the limited scope of liability for "incitement" to commit war crimes).

3. *See infra* notes 115–27 and accompanying text (examining international criminal tribunal statutes and concluding that these tribunals have also failed to criminalize "incitement" to commit war crimes).

4. *See, e.g.*, *infra* notes 53–58 and accompanying text (describing the mass atrocities that took place in Guatemala as a result of officers promoting a culture of violence and hatred toward innocent civilians).

5. *See infra* notes 64–69 (discussing the role of civilians in the mass violence committed by military and paramilitary personnel in Rwanda).

6. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003), *available at* http://www.rwandainitiative.ca/resources/pdfs/judgment.pdf.

7. *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 265 (2d ed. 2009) ("The specific intent necessary for a conviction of genocide is even more demanding than that required for murder. The crime must be committed with intent to destroy, in whole or in part, a protected group of people, as such.").

speech as a crime against humanity (persecution).[8] However, such charges require proving the threshold existence of a "widespread and systematic attack against a civilian population"—which may also be a hindrance to successful prosecution.

This Article proposes filling the speech gap in international humanitarian law by creating a new inchoate offense—direct incitement to commit war crimes. The Article proceeds in five parts. Part II chronicles instances where both military commanders and prominent civilians have exhorted soldiers and militia to commit atrocities but the civilians' use of such facilitating language was not punished as a violation of the law of war.[9] Part III examines the existing law related to speech crimes in the mass atrocity context and its extremely limited scope in the current laws and customs of war and applicable treaties, including the Geneva and Hague Conventions.[10] Part IV suggests ways in which incitement could be incorporated into the existing framework of both international humanitarian law and international criminal law.[11] Finally, Part V will demonstrate that while the new offense may raise free-expression and operational concerns, it will not run afoul of military individual liberty norms or institutional prerogatives.[12]

Looking ahead, one can easily discern how embedding an incitement prohibition within humanitarian law could become vital to atrocity prosecutions. Our increasingly elastic notion of what constitutes a non-international armed conflict, combined with the rising participation of civilian media in military and paramilitary operations, suggests the potential for war crimes as discrete pockets of *ad hoc* commander-driven or media-fueled atrocity that fails to rise to the level of genocide or widespread and systematic attacks against civilians. The simple fact that those who urge such attacks by soldiers may not issue direct orders or be in uniform themselves should not absolve them of war crimes liability. Although other modes of criminal liability (such as ordering, abetting, instigating, or soliciting) might partially capture this kind of military incitement, its unique nature as an inchoate speech crime should be recognized and, where applicable, prosecuted as a crime of war. This will help fill an unfortunate gap in the law and contribute

8. *See infra* notes 103–09 and accompanying text (describing the use of persecution, a crime against humanity, in the prosecution of hate speech).

9. *See infra* Part II (discussing historical examples of military and civilian speech used to incite mass atrocities).

10. *See infra* Part III (examining current international law as it pertains to violent crimes stemming from speech).

11. *See infra* Part IV (proposing ways in which crimes involving incitement could be built into current international law).

12. *See infra* Part V (describing how the proposed incitement offense will not disturb existing international law or individual freedom of speech).

toward preventing atrocity where it is inherently most likely to occur—in the context of armed conflict.

II. SPEECH AND MILITARY PERSONNEL IN THE ATROCITY CONTEXT

A. Military Commanders Inciting Their Subordinates

In the popular imagination, the word "incitement" might conjure up images of an impassioned speaker arousing the fury of gathered citizen masses over a bullhorn or via the airwaves.[13] But this image ignores the reality that mass violence perpetrated against civilians is often committed by members of organized military and paramilitary units.[14] In the context of an otherwise legitimate operation, commanders may express views to their subordinates that cast protected persons, such as civilians or prisoners of war, in such a negative light that the subordinates interpret their commanders' statements as calls for violence against such protected persons.[15] In other instances, such speech may be an essential part of illegitimate military operations, such as planned and coordinated ethnic cleansing or reprisals against civilians.[16]

The roots of such incitement run deep. Almost two millennia before the Common Era, Egyptian Pharaoh Amenemhet I, in his capacity as commander-in-chief of Egyptian armed forces, incited what today would be considered war crimes by communicating to his troops that the enemies of Egypt were non-human predators.[17] In connection with

13. *See, e.g.*, Closing Argument on Behalf of the Government by Mr. Foran, UMKC Faculty Project – Chicago 7 Trial, http://law2.umkc.edu/faculty/projects/ftrials/chicago7/Foranclose.html (last visited Dec. 15, 2011) ("Davis is there on the bullhorn. He is shouting encouragement to the crowd to 'Fight the pigs' and . . . inciting [the] crowd. . . . They are urging people to violence. . . . The crowd was pretty heated . . . and it [h]ad been whipped up . . . .").

14. *See, e.g.*, Natasha Razak, Book Note, 48 OSGOODE HALL L.J. 379, 380 (2010) (reviewing RYAN GOODMAN & MINDY JANE ROSEMAN, INTERROGATIONS, FORCED FEEDINGS, AND THE ROLE OF HEALTH PROFESSIONALS (2009)) ("Military policies and group psychology work in concert in the military environment to create an 'atrocity-producing situation . . . .'").

15. *See, e.g.*, *infra* notes 23–27 and accompanying text (describing one instance of a mass atrocity fueled primarily by communications from a prominent military commander to his troops).

16. *See, e.g.*, *infra* notes 41–48 and accompanying text (providing a historical example of mass violence directed at a particular ethnic or minority group); *see also* ARNOLD C. BRACKMAN, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS 182 (1987) ("The Rape of Nanking was not the kind of isolated incident common to *all* wars. It was deliberate. It was policy. It was known in Tokyo.").

17. MU-CHOU POO, ENEMIES OF CIVILIZATION: ATTITUDES TOWARDS FOREIGNERS IN ANCIENT MESOPOTAMIA, EGYPT AND CHINA 74 (2005) (explaining the Egyptian attitude towards foreigners as evidenced by royal propaganda); *see also* DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE DEMEAN, ENSLAVE, AND EXTERMINATE OTHERS 109 (2011) (describing how Amenemhet I dehumanized the enemies of Egypt). Amenemhet I's reference to making "the Asiatics do the dog walk" seems a disturbing ancient antecedent to the kind of torture that

this, he is recorded as boasting: "I subdued lions, I captured crocodiles. I repressed those of Wawat, I captured the Medjai, I made the Asiatics do the dog walk."[18]

In modern times, military commanders have used similarly inflammatory rhetoric when speaking to subordinates—with similarly devastating impact. The balance of this Section will chronicle instances of such incitement within the U.S. armed forces and in other militaries.

1. United States Military

Examples of incitement to commit war crimes can be found in U.S. military operations going back to the beginning of the twentieth century. In 1901 after more than forty American soldiers were killed in a surprise guerilla attack in the town of Balangiga on Samar Island during the Philippine-American War, U.S. Army Brigadier General Jacob Smith told his troops: "I wish you to kill and burn. The more you kill and burn, the better you will please me. . . . The interior of Samar must be made a howling wilderness."[19] Although Smith did not give direct orders to kill civilians, U.S. soldiers responded to his speech by burning and pillaging Filipino villages and killing scores of innocent civilians.[20] The Army charged General Smith with "the relatively benign offen[s]e of 'conduct to the prejudice of good order and military discipline'" for uttering these words and tried him before a general court-martial at Manila in 1902.[21] Although the court adjudged Smith guilty, his sentence was quite lenient—the sixty-two-year-old general was merely forced to retire.[22]

Just prior to the American invasion of Sicily in World War II, on June 27, 1943, General George S. Patton told the officers of his 45th Infantry Division:

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occurred at Abu Ghraib prison millennia later. *See infra* notes 28–32 and accompanying text.

18. POO, *supra* note 17, at 74. The Wawat and Medjai were Nubian people who lived in the area of modern-day Sudan, south of Egypt. *See* WILLIAM JAMES HAMBLIN, WARFARE IN THE ANCIENT NEAR EAST: HOLY WARRIORS AT THE DAWN OF HISTORY 416 (2006) (discussing Egyptian execration texts and describing particular enemies of Egypt, including the Medjai and the "Nubians of Wawat"); RICHARD A. LOBBAN, JR., HISTORICAL DICTIONARY OF ANCIENT AND MEDIEVAL NUBIA 404 (2004) (defining "Wawat" as a "sometimes independent polity in Lower Nubia").

19. *See* Guénaël Mettraux, *US Courts-Martial and the Armed Conflict in the Philippines (1899-1902): Their Contribution to National Case Law on War Crimes*, 1 J. INT'L CRIM. JUST. 135, 136–37, 139 (2003) (giving the details of the incident involving Gen. Smith and his subsequent court-martial).

20. PAUL A. KRAMER, THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES 145 (2006) (discussing letters written by U.S. Marines that suggest they were acting upon Gen. Smith's statements).

21. Mettraux, *supra* note 19, at 139 (detailing the court-martial of Gen. Smith).

22. *Id*. at 143 (explaining Gen. Smith's sentence).

> When we land against the enemy, don't forget to hit him and hit him hard. We will bring the fight home to him. When we meet the enemy, we will kill him. We will show him no mercy. He has killed thousands of your comrades, and must die. . . . You will tell your men that. They must have the killer instinct. . . . We will get the name of killers and killers are immortal.[23]

Several days later in heavy fighting in Biscari, troops of the 45th Division massacred dozens of German and Italian prisoners of war.[24] Two of Patton's responsible subordinates were court-martialed: one was convicted, and the other was acquitted.[25] At their trials, they claimed they had acted in accordance with Patton's June 27th speech.[26] But Patton himself was never even so much as disciplined for his incendiary rhetoric.[27]

Several decades later at Abu Ghraib Prison in 2003, U.S. military personnel infamously raped and tortured Iraqi detainees.[28] According to criminal justice professor Adam Lankford, "The military . . . endorsed the notion that prisoners were mere animals."[29] The top commander at Abu Ghraib, General Geoffrey D. Miller, allegedly told his subordinates, "You have to treat the prisoners like dogs. If . . . they believe that they're any different than dogs, you have effectively lost control of your interrogation from the very start. . . . And it works. This is what we do down at Guantánamo Bay."[30]

Lankford points out that the Military Police guards under General Miller clearly got the message: "[A]t different times, they rode the prisoners around like animals, made them bark like dogs, and led them

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23. JOANNA BOURKE, AN INTIMATE HISTORY OF KILLING: FACE-TO-FACE KILLING IN TWENTIETH-CENTURY WARFARE 171–72 (1999) (discussing Patton's words and how his officers interpreted these words as orders to slaughter prisoners "en masse"). *See generally* SOLIS, *supra* note 1, at 385–86 (discussing the Sicilian attack and subsequent court-martial of Gen. Patton's subordinates).

24. BOURKE, *supra* note 23, at 171 ("American troops of the 45th Infantry Division massacred around seventy Italian and German prisoners of war at Biscari (Sicily).").

25. SOLIS, *supra* note 1, at 386 ("The sergeant was convicted and sentenced to imprisonment for life; the captain was acquitted.").

26. *Id*. (explaining how the court-martialed subordinates of Gen. Patton "raised as their defense the 'orders' issued by Patton in his June 27 speech").

27. *See id*. (explaining how a "Washington-initiated inquiry into Patton's remarks exonerated the general").

28. Adam Lankford, *Promoting Aggression and Violence at Abu Ghraib: The U.S. Military's Transformation of Ordinary People into Torturers*, 14 AGGRESSION & VIOLENT BEHAV. 388, 389 (2009).

29. *Id*. at 394.

30. PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 414 (2007) (discussing certain statements that Brig. Gen. Janis Karpinsky attributed to Gen. Miller).

around on leashes."[31] General Miller retired from the Army without having been disciplined or prosecuted in connection with his statements.[32]

More recently, an American commander used similarly inflammatory speech in connection with military operations in Afghanistan. By many accounts, Colonel Harry Tunnell "was seriously at odds with the counterinsurgency strategy of outreach favored by military brass in Afghanistan. His proclivities apparently ran more to 'search and destroy' than 'hearts and minds.'"[33] In speaking about "the enemy" with his troops, he stressed that the military "must stay focused on the destruction of the enemy" and that the enemy "must be attacked relentlessly."[34] Tunnell has noted that attacking Afghans in this fashion involved measures "political correctness dictates that we cannot talk about."[35] Inspired in part by his rhetoric, soldiers under Tunnell's command in the 5th Stryker brigade of the 2nd Infantry Division have been charged with forming a "kill team" that randomly murdered unarmed Afghan civilians for sport and cut off their fingers as war trophies.[36] At the court-martial of one of the soldiers who has already been convicted, an expert witness testified that Col. Tunnell set an example that led his troops to commit the charged war crimes.[37] According to a senior U.S. military official who worked with the brigade in early 2009 at the National Training Center before it deployed to Afghanistan:

> When you feel violent intent coming down from the command and into the culture of the brigade, that's when you end up with things like the rogue platoon . . . . He established a culture that allowed that kind of mindset to percolate. And there are second- and third-order effects that come with that.[38]

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31. Lankford, *supra* note 28, at 394.

32. Josh White, *General Who Ran Guantanamo Bay Retires*, WASH. POST, Aug. 1, 2006, at A6 (discussing Gen. Miller's retirement and noting the fact that "[m]ilitary commanders twice have cleared Miller of wrongdoing").

33. Anne Mulrine, *Pentagon had Red Flags about Command Climate in 'Kill Team' Stryker Brigade*, CHRISTIAN SCI. MONITOR (Oct. 28, 2010), http://www.csmonitor.com/USA/Military/2010/1028/Pentagon-had-red-flags-about-command-climate-in-kill-team-Stryker-brigade (noting the Pentagon's concerns with Col. Tunnell's methods and the way in which Col. Tunnell's subordinates were interpreting his commands).

34. *Id*.

35. *Id*.

36. *Id*.

37. Mary Sanchez, *Rogue Soldiers Stain Military Reputations*, KAN. CITY STAR, Mar. 29, 2011, at A11.

38. Mulrine, *supra* note 33.

And yet the Army has not brought criminal charges against Tunnell.[39] As one commentator put it: "[T]he Army has no interest in moving the court-martial proceedings up the chain of command."[40]

2. Beyond the U.S. Military

This phenomenon is certainly not limited to the United States military. For example, during six nightmarish weeks at the end of 1937 and the beginning of 1938, Japanese armed forces committed systematic atrocities following the capture of the Chinese city of Nanking.[41] The "Rape of Nanking," as history now calls it, involved soldiers killing, mutilating, sexually assaulting, and torturing thousands of innocent Chinese civilians.[42] Preceding and even during the massacres, Japanese Army officers employed speech to dehumanize Chinese civilians and thereby inspire their troops to commit these horrors.[43] In particular, soldiers were taught by their superiors that the Chinese were *chancorro*, or sub-humans.[44] Japanese soldiers came to believe the Chinese were "below human, like bugs or animals" and that "[t]he Chinese didn't belong to the human race."[45] In speaking about bayoneting unarmed Chinese civilians, one soldier confessed: "If I'd thought of them as human beings I couldn't have done it. But because I thought of them as animals or below human beings, we did it."[46] Another soldier described the impact of such indoctrination: when women were killed they were thought of as "pigs."[47] The speech responsible for such mental conditioning of these soldiers was never specifically the subject of criminal proceedings.[48]

Within a few years of the Rape of Nanking, German officers in Poland were vilifying Jews in speeches that inspired Holocaust atrocities. Nazi historian Christopher Browning provides one chilling

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39. *See id*. (discussing the interactions between Col. Tunnell and his superiors, including a video teleconference during which Col. Tunnell was reprimanded, but also noting that Tunnell remains in the Army).

40. Sanchez, *supra* note 37.

41. SMITH, *supra* note 17, at 17.

42. *Id*.

43. LAURENCE REES, HORROR IN THE EAST: JAPAN AND THE ATROCITIES OF WORLD WAR II 28 (2002).

44. *Id*.

45. *Id*.

46. *Id*.

47. DAVID ANDREW SCHMIDT, IANFU – THE COMFORT WOMEN OF THE JAPANESE IMPERIAL ARMY OF THE PACIFIC WAR: BROKEN SILENCE 87 (2000).

48. *See* M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191, 197 (2003) (noting that at the International Military Tribunal for the Far East not a single person was indicted or prosecuted specifically "for the horrific violations that have come to be known as the 'Rape of Nanking'").

example: on the morning of July 13, 1942, German Major Wilhelm Trapp addressed his battalion in the Polish village of Jósefów.[49] Filled with emotion, he told his subordinates that Jews had instigated the boycott that had damaged Germany, where bombs were then falling on women and children.[50] And Jews, he told them, had collaborated with partisans.[51] After his speech, Trapp's men went into the village and murdered 1500 Jews.[52]

Over four decades later, during Guatemala's mass atrocities of the early 1980s, military commanders incited subordinates to attack innocent civilians.[53] The officers inflamed the passions of their troops against ethnic Mayans by telling them that these civilians in the remote highlands were pro-guerilla.[54] Officers told their subordinates that "[t]he innocent must pay for the sins of the guilty."[55] They also told their troops that the sea was to the fish what the population was to the guerrilla and thus it was necessary "to drain the sea to kill the fish."[56] Based in part on this sort of incitement, Guatemalan soldiers massacred thousands of innocent civilians from early 1982 until mid-1983.[57] Although Guatemala established a truth commission to chronicle the details of the genocide and give voice to the victims, the officers responsible for this inflammatory language escaped liability for their conduct.[58]

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49. CHRISTOPHER R. BROWNING, ORDINARY MEN 1–2 (1991). Although Trapp's unit was technically referred to as a battalion of the "Order Police," the Order Police was deployed after being given "military training and equipment" and it was thought of as a "police army" or "large military formations within the police." *Id*. at 3–4. Browning compares the Order Police to "U.S. National Guard units" and reports that certain units "fought in the Ardennes . . . and took part in the attack on Leningrad . . . ." *Id*. at 5.

50. *Id*. at 2.

51. *Id*.

52. *Id*. at 2–3. Although the men were technically ordered to engage in the killing operation, Trapp told them they could bow out if they wanted. In other words, it was voluntary. *Id*. at 2.

53. *See generally* Frank Smyth, *Painting the Maya Red: Military Doctrine and Speech in Guatemala's Genocidal Acts*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM SYMPOSIUM: SPEECH, POWER, VIOLENCE (2009), at 2–4, 12–13, http://www.ushmm.org/genocide/spv/pdf/smyth_frank.pdf (explaining the role that speech played in Guatemalan human rights violations).

54. *Id*. at 3–4 (explaining that the Guatemalan military officer corps used language that "in each case served to dehumanize civilians especially ethnic Mayans suspected of supporting the nation's Marxist guerrillas").

55. *Id*. at 14–15.

56. *Id*. at 9 (discussing how the Guatemalan military inverted the Maoist metaphor that "the guerrilla must move among the people as a fish swims in the sea" to justify killing civilians).

57. *Id*. at 5 ("More than 200,000 people were killed or forcibly disappeared in Guatemala, largely back in the late 1970s and early 1980s . . . .").

58. *See* Matt Halling, *A Law of No Gods, No Masters – Developing and Defending a Participatory Legal System*, 32 HASTINGS INT'L & COMP. L. REV. 237, 254 (2009) (contrasting "the work done by the International Criminal Tribunal for Rwanda with the absent accountability for genocide in Guatemala"); Ming Zhu, *Power and Cooperation: Understanding the Road*

This kind of incitement has also played a role in the commission of war crimes in the Democratic Republic of the Congo's ongoing civil war. As has been revealed in testimony elicited at the trial of former Congolese warlord Thomas Lubanga at the International Criminal Court ("ICC"), words of rebel officers expressed to subordinates, not necessarily amounting to orders, have contributed to the mass rape phenomenon in that violence-stricken country.[59] For example, according to the testimony of a former child soldier, at one point during the fighting in Congo's Ituri region, officers under the command of Lubanga in the Union of Congolese Patriots told young recruits that they could have sex with females in their camp—young girls who had been abducted from their families.[60] Commanders are alleged to have said: "You're free to take any of the girls and sleep with her."[61] The young male troops understood this as an encouragement to rape the girls.[62] And mass rape of the girls did follow.[63] The ICC is currently prosecuting Lubanga for recruitment of child soldiers but his subordinate officers and their acts of incitement are not the specific object of ICC criminal proceedings.

B. Civilians Inciting Military Personnel

Modern internal armed conflicts typically involve participation by actors whose role as strictly military or civilian can often be hard to discern. Particularly in the case of the 1994 Rwandan civil war—connected to the Rwandan Genocide—civilians often assumed the responsibility of directing military and paramilitary units in committing atrocities against other civilians. The most egregious example in this regard involved the radio announcers of the Radio Télévision Libre des Milles Collines ("RTLM"). As described by Cassandra Cotton:

> Many such broadcasts were directed to the militiamen manning 'each roadblock [where] portable radios blasted the music and exhortations of RTLM' so that any Tutsi trying to escape would be captured and promptly exterminated, as those fleeing were targeted by RTLM as

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Towards a Truth Commission, 15 BUFF. HUM. RTS. L. REV. 183, 195 (2009) (describing the establishment of a truth commission in Guatemala).

59. *See* Jeanine Oury, Comment, *The Rape Epidemic in the Congo: Why Impunity in the Congo Can Be Solved by International Intervention*, 6 LOY. U. CHI. INT'L L. REV. 421, 424, 426 (2009) (noting that in October 2008 there were up to fifty rapes committed daily in the Congo and concluding that "impunity to perpetrators of sexual violence is the primary cause of the mass rape epidemic in the Congo").

60. Rachel Irwin, *Court Hears Rape Allegations*, ALLAFRICA.COM (Feb. 27, 2009), http://allafrica.com/stories/200904280753.html (reporting on the testimony of a former child soldier with the Union of Congolese Patriots at the trial of Thomas Lubanga at The Hague).

61. *Id*.

62. *Id*. (explaining that "[r]ape was . . . encouraged in the camp").

63. *Id*.

> traitors and RPF accomplices. A well-documented example, popularized in the film Hotel Rwanda, involved RTLM broadcasting the names of sixty-two evacuees on a convoy authorized by the interim government; both vehicles were stopped at roadblocks after the radio directed the militia to attack. As several survivors have said, listening to RTLM was the most accurate method of determining if one was being targeted by the militias.[64]

Civilians outside of the media context also exhorted militia to commit atrocities during the Rwandan Genocide. For instance, while traveling in a truck from one town to another where killing was taking place, Rwandan pop music composer Simon Bikindi—a prominent member of the extremist Hutu ruling party—spoke on a loudspeaker to militias urging them to "[r]ise up" and not to "spare" any Tutsi.[65] On the way back, he asked the militias whether they had killed the "snakes."[66] Although Bikindi was convicted of direct and public incitement to commit genocide, the military nature of his transgressions was essentially overlooked.[67]

More recently, during spring 2011 in Cote d'Ivoire, as President Laurent Gbagbo refused to cede power after losing a November 2010 election, radio broadcasters loyal to him used the airwaves to demonize

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64. Cassandra Cotton, *Where Radio Is King: Rwanda's Hate Radio and the Lessons Learned*, ATLIS J.: GENDER, ENV'T & HUM. RTS. (Spring 2007) (internal citations omitted), http://atlismta.org/online-journals/0607-journal-gender-environment-and-human-rights/where-radio-is-king/. During the Rwandan Genocide, militias were considered part of the Rwandan armed forces. *See* Sonja Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT'L L. 747, 763 (2001) (noting that "paramilitary and irregular militia" were operating during the conflict in Rwanda, and also discussing the commanders' potential for criminal liability); Chi Mgbako, *Ingando Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda*, 18 HARV. HUM. RTS. J. 201, 205 (2005) (describing how Rwandan Armed Forces and militia death squads "formed a nucleus of Armed Groups"). In these circumstances, militia forces are subject to the same law of war requirements as regular forces. *See* Christiane Amanpour, *Paramilitaries*, *in* CRIMES OF WAR (Roy Gutman, David Rieff & Anthony Dworkin eds., rev. & expanded ed. 2007) (stating that paramilitaries, including militia, may qualify as lawful combatants as long as they are under responsible command, carry distinctive signs, carry arms openly, and obey the laws and customs of war and noting that paramilitaries "may be tried for war crimes they commit").

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

66. *Id.* ("The witness also testified that on the way back . . . Bikindi stopped at a roadblock and met with leaders . . . where he insisted, 'you see, when you hide a snake in your house, you can expect to face the consequences.' After Bikindi left the roadblock, members of the surrounding population . . . intensified their search for Tutsi[s] . . . ."). Bikindi was later convicted of direct and public incitement to commit genocide based on this conduct. *See infra* notes 98–99 and accompanying text. Conviction for incitement to commit war crimes would have had important expressive value with respect to the military nature of the crime.

67. *Bikindi*, Case No. ICTR-01-72-T, Judgment and Sentence, ¶ 441 (stating the crimes for which Bikindi was convicted and those for which he was not convicted).

the supporters of Gbagbo's victorious opponent, Alassane Ouattara.[68] Partly as a result of such inflammatory speech, the Ivoirian military attacked civilians perceived as Gbagbo enemies. And in March 2011, "Ivoirian troops machine-gunned a group of women marching peacefully in favor of Ouattara in Abidjan."[69] Given the current state of the law, these journalists cannot be charged with incitement to commit war crimes and may escape liability altogether.

III. THE EXISTING BODY OF INTERNATIONAL SPEECH CRIME LAW

As a preliminary matter, any proposal to expand the scope of incitement offenses requires consideration of the existing body of international speech crime law. The most developed delict, in that regard, is direct and public incitement to commit genocide. There is also jurisprudence fleshing out the offense of persecution in the form of speech as a crime against humanity. Finally, there are some rudimentary speech-related provisions in international humanitarian law that should be points of reference in formulating an incitement to war crimes offense. Each of these will be considered in turn.

A. Direct and Public Incitement to Commit Genocide

The International Criminal Tribunal for Rwanda ("ICTR"), which has had to assess liability for mass murder exhortations disseminated through various media, has served as a laboratory for the development of atrocity speech law. Its primary charge lay in parsing the elements of direct and public incitement to commit genocide. That was accomplished in a series of groundbreaking decisions: *Prosecutor v. Akayesu*[70] (ICTR's first incitement decision finding liability based on defendant's urging Hutu militia to slaughter the town's Tutsi population); *Prosecutor v. Kambanda*[71] (incitement charge against Prime Minister of rump genocide regime based in part on his congratulating génocidaires who had already killed and analogizing Tutsis to dogs drinking Hutu blood); *Prosecutor v. Ruggiu*[72] (Belgian RTLM announcer's incitement conviction based on broadcast of euphemisms, such as "go to work," idiomatically understood by

68. *Ivory Coast in Speech-Fueled Catastrophe*, VOICES THAT POISON (Apr. 2, 2011), http://voicesthatpoison.wordpress.com/2011/04/02/ivory-coast-in-speech-fueled-catastrophe/ (noting Gbagbo's use of "inflammatory speech to frighten the population and incite his supporters").

69. *Id.*

70. Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998).

71. Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

72. Case No. ICTR 97-32-I, Judgment and Sentence (June 1, 2000).

listeners as calls for mass murder); *Prosecutor v. Niyitegeka*[73] (Rwandan minister's use of bullhorn directly after massacre to thank killers for "good work" considered incitement); *Prosecutor v. Nahimana, Barayagwiza & Ngeze*[74] (finding radio and print media executives guilty of incitement in connection with establishment of RTLM and dissemination of its genocidal broadcasts as well as founding and publishing of anti-Tutsi newspaper *Kangura*); *Prosecutor v. Bikindi*[75] (extremist Hutu tunesmith's liability based on code-word calls for murder directly before massacre, not on hate songs written before the genocide and disseminated by others).

As a starting point in these decisions, the Tribunal referred to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[76] Article II of the Convention defines "genocide" as a series of acts (including, for example, killing and causing serious bodily or mental harm) committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.[77] Article III then states that a number of related acts committed in furtherance of Article II shall also be punishable.[78] This includes, at Article III(c), "direct and public incitement to commit genocide."[79]

As Article II 3(c) of the ICTR Statute[80] essentially mirrors Article III (b) of the Genocide Convention, the Rwanda Tribunal used the latter as its jurisprudential point of repair.[81] The wording itself of Article II 3(c)—*direct* and *public* incitement to commit genocide—furnishes two of the most important elements of the crime. In *Akayesu*, the Tribunal found that, for purposes of incitement to genocide, speech could be

73. Case No. ICTR 96-14-T, Judgment and Sentence (May 16, 2003).

74. Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003).

75. Case No. ICTR-01-72-T, Judgment (Dec. 2, 2008).

76. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, 78 U.N.T.S. 277 (Dec. 9, 1948).

77. *Id*. at 280.

78. *Id*.

79. *Id*.

80. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, art. 2, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

81. It should also be mentioned that the Rome Statute of the International Criminal Court criminalizes incitement to genocide at Article 25(3)(e): "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . in respect of the crime of genocide, directly and publicly incites others to commit genocide . . . ." Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 3, *reprinted in* 1 UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, OFFICIAL RECORDS (1998) [hereinafter Rome Statute].

considered "public" if addressed 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."[82] And the message could be deemed "direct" if, when viewing the language "in the light of its cultural and linguistic content . . . the persons for whom the message was intended immediately grasped the implication thereof."[83] The requisite mens rea consists of a dual intent: (1) to provoke another to commit genocide, and (2) to commit the underlying genocide itself.[84] Significantly, causation is not an element—in other words, to establish liability, it is not necessary for the advocacy to result in genocide.[85]

The most complex, and controversial, aspect of the crime centers on its key descriptor—"incitement." In defining it, the Tribunal has grappled with distinguishing between free exercise of legitimate speech (regardless of how offensive) and corrosion of such speech into criminal advocacy. The *Nahimana* Trial Chamber explicitly identified two analytic criteria to determine whether discourse could be categorized as either legitimate expression or criminal advocacy: its purpose[86] (encompassing, on one end of the continuum, patently legitimate objectives, such as historical research or dissemination of news, and, on the other end, clearly criminal ends such as explicit pleas for violence)[87] and its context (circumstances surrounding the speaker's text—such as contemporaneous large-scale interethnic violence, and the speaker's tone of voice).[88]

Moreover, my scholarship has identified two additional criteria implicitly used by the *Nahimana* Trial Chamber in formulating its analysis: text and the relationship between speaker and subject.[89] The

82. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 556 (Sept. 2, 1998).

83. *Id*. ¶¶ 557–58.

84. *Id*. ¶ 560.

85. *Id*. ¶ 553 (stating that someone is considered an "accomplice" if he incites prohibited acts "even where such incitement fails to produce results"); *see also* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment, ¶ 1015 (Nov. 28, 2007) ("The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement.").

86. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment, ¶¶ 1000–1006 (Nov. 28, 2007).

87. *Id*. ¶¶ 1004–1006. The space between these two ends of the spectrum clearly invites contextual analysis, and the Tribunal has proposed certain evaluative factors such as surrounding violence and previous rhetoric. *See id.* ¶ 1004 (speaking of massacres taking place surrounding the speaker's utterance); *id*. ¶ 1005 (focusing on previous conduct to reveal purpose of text).

88. *Id*. ¶ 1022.

89. *See* Gregory S. Gordon, *"A War of Media, Words, Newspapers, and Radio Stations": The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 172–74 (2004) (discussing the four elements of incitement and how the Chamber treated each element); Gregory S. Gordon, *Defining Incitement to Genocide: A Response to Susan Benesch*, OPINIO JURIS BLOG (Apr. 17, 2008, 12:45 PM), http://opiniojuris.org/2008/04/17/

Trial Chamber's discussion of the "text" element was an implicit part of its "purpose" subheading analysis.[90] Applying this element involved a parsing and exegetical interpretation of the key words in the speech.[91] With respect to speaker and subject, the Tribunal revealed that the analysis should be more speech-protective when the speaker is part of a minority criticizing either the government or the country's majority population (and less so in other situations).[92]

My scholarship has also advocated bifurcating the context criterion into "internal" and "external" components.[93] Internal context refers to characteristics of the speaker herself: her background and professional profile, her previous publication and broadcast history, and her personal manner of transmitting the message (including tone of voice).[94] External context examines the circumstances surrounding the speech, which could include recent incidents of mass violence or the imminent outbreak of war (empirically an indicator of a genocidal environment).[95] Based on the work of incitement scholars Susan Benesch and Carol Pauli—supplemented in part by my own work—I have also suggested reference to a series of evaluative factors to help determine external context: prior similar messages, media environment (e.g., is the "marketplace of ideas" still functioning or has it been stifled?), recent violence, political context, and the existence or imminent outbreak of war between the perpetrating government and external or internal armed forces (as genocide has empirically been linked with war).[96]

The ICTR jurisprudence has indirectly identified two other criteria for incitement analysis in cases where speech is re-published by a third party after initially being uttered by the original speaker.[97] In the *Bikindi* decision, given that the defendant wrote his hate tunes years before they were broadcast during the genocide, the Tribunal impliedly incorporated a "temporality" criterion—the offensive words must have been uttered at or near the time of the contextual violence that renders

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defining-incitement-to-genocide-a-response-to-susan-benesch-2/.

90. *See generally* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment (Nov. 28, 2007) (including both the text of the speech and the relationship between the speaker and the subject in the analysis of the speech at issue).

91. *Id.* ¶ 1001.

92. *Id.* ¶ 1006.

93. *See* Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 SANTA CLARA L. REV. 607, 637 (2010).

94. *Id.*

95. *Id.* at 637–38.

96. *Id.* at 638. This proposed list of contextual elements is not definitive or final—as new fact patterns are evaluated, additional contextual factors may suggest themselves over time. Also, none of these factors is meant to be mandatory—they should only serve as helpful and flexible markers in assisting a finder of fact to evaluate external context.

97. *Id.* at 622–23.

them genocidal.[98] The Tribunal also implied an "instrumentality" criterion: when recordings are involved, the defendant must have actually disseminated the recording himself during the relevant time period.[99]

Finally, my scholarship has identified another criterion that courts should use in determining whether incitement has occurred: channel of communication.[100] This element recognizes that, depending on the situation, certain media may be more effective than others at disseminating criminal advocacy. All things being equal, newspapers are much less apt to incite imminent lawless violence than broadcast media—especially in a largely illiterate society.[101] On the other hand, one could imagine scenarios in which written social media messages might have a greater impact than broadcast media when, for example, television or radio broadcast facilities have been damaged in clashes between armed forces. Thus, channel of communication must be analyzed on a case-by-case basis.[102]

When all of these elements are cobbled together, (the existing framework and my suggested additions), the test for determining whether hate speech constitutes incitement should consist of seven elements: (1) purpose; (2) text; (3) context; (4) relationship between speaker and subject; (5) channel of communication; (6) temporality; and (7) instrumentality—the latter two applying only in cases where pre-recorded speech is disseminated.

B. Crimes against Humanity (Persecution)

Criminal advocacy can also be prosecuted as a crime against humanity. Beginning with the International Military Tribunal's ("IMT") 1945–1946 prosecution of top Nazi leaders at Nuremberg, international law has recognized that hate speech that targets groups on certain pernicious discriminatory grounds constitutes the crime against humanity of persecution.[103] The IMT convicted Nazi newspaper publisher Julius Streicher of this crime based on consistent calls for the extermination of Jews in his Hitlerian propaganda rag *Der Stürmer*.[104]

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98. *Id*. at 622–23.

99. *Id*. at 623.

100. *Id.* at 635–36.

101. *Id.* at 636.

102. *Id.*

103. *See* London Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279 [hereinafter London Charter]. Article 6(c) of the London Charter declares that "persecutions on political, racial or religious grounds" constitutes Crimes against Humanity within the IMT's jurisdiction. *Id*.

104. *See* IMT Judgment, Oct. 1, 1946, *reprinted in* 22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT

The ICTR Statute similarly classifies persecution as a crime against humanity. In particular, pursuant to Article 3, persecutions on political, racial, and religious grounds—when committed as part of a widespread or systematic attack against any civilian population—constitute crimes against humanity.[105] In its *Ruggiu* judgment, the Tribunal set forth what must be proved to establish the crime: (1) those elements required for all crimes against humanity under the Statute; (2) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 3; and (3) discriminatory grounds.[106] The Tribunal then found that Ruggiu's broadcast satisfied these elements:

> [W]hen examining the [admitted] acts of persecution . . . it is possible to discern a common element. Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group . . . on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.[107]

The *Nahimana* judgment specified that persecution is not a provocation to cause harm—it is the harm itself.[108] Thus, "there need not be a call to action in communications that constitute persecution [and thus] there need be no link between persecution and acts of violence."[109]

NUREMBERG GERMANY 501–02 (1946) [hereinafter Streicher Judgment]. However, the IMT acquitted Hans Fritzsche, Head of the Nazi Propaganda Ministry Radio Section, on the same charges for a supposed lack of evidence of clear incitement and a supposed lack of control over formulation of propaganda policy. *Id.* at 525–26 [hereinafter Fritzsche Judgment].

105. ICTR Statute, *supra* note 80, art. 3.

106. Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 21 (June 1, 2000) (citing Prosecutor v. Zoran Kupreškić, Case No. IT-95-16, Judgment (Jan. 14, 2000)).

107. Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 22 (June 1, 2000). In contrast, the International Criminal Tribunal for the former Yugoslavia found in Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 209 (Feb. 26, 2001) that the hate speech alleged in the indictment did not constitute persecution because it did not rise to the same level of gravity as the other enumerated acts.

108. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment, ¶ 1073 (Nov. 28, 2007).

109. *Id.* The International Criminal Court also has crimes against humanity (persecution) within its subject matter jurisdiction. *See* Rome Statute, *supra* note 81, at 93–94. The chapeau of Article 7 of the Rome Statute similarly consists of a "widespread or systematic attack directed against any civilian population, with knowledge of the attack." *Id.* at 93. Subsection (h) of the enumerated acts includes: "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court . . . ." *Id.* at 94. The ICC has yet to decide if hate

C. Military Speech in International Law

International humanitarian law ("IHL") has taken a relatively circumscribed view of illegal advocacy. Certain provisions related to speech do appear in the Geneva Conventions. But this has not translated to development of liability for incitement in international criminal law. This Section will consider the portions of IHL that touch on illegal speech. It will then examine the relationship between these provisions and development of incitement doctrine in international criminal law.

1. IHL and Criminal Speech

Existing rules in IHL related to speech are rather sparse and focus on direct orders in connection with grave breaches. For example, Article 49 of the First Geneva Convention (for the Amelioration of the Condition of the Wounded in Armies in the Field), Article 50 of the Second Geneva Convention (for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea), Article 129 of the Third Geneva Convention (relative to the Treatment of Prisoners of War), and Article 146 of the Fourth Geneva Convention (relative to the Protection of Civilian Persons in Time of War) contain the same general introductory provision regarding grave breaches: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, *or ordering to be committed*, any of the grave breaches of the present Convention defined in the following Article.[110]

Similarly, Article 40 of Additional Protocol I to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, provides in pertinent part: "It is prohibited *to order* that there shall be no survivors [or] to threaten an adversary therewith . . . ."[111] Additional Protocol II, relating to the Protection of Victims of Non-International Armed Conflicts, contains a similar provision. Its

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speech may qualify as persecution under the Rome Statute.

110. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention] (emphasis added); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention] (emphasis added); Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (emphasis added); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (emphasis added).

111. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 40, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (emphasis added).

Article 4(1) declares: "It is prohibited *to order* that there shall be no survivors."[112]

Those are the only sections related to criminal speech in the Geneva Conventions and their Additional Protocols. There are also no provisions whatsoever related to criminal speech in either the 1899 or 1907 Hague Conventions with Respect to the Laws and Customs of War on Land or their annexes.[113]

2. Military Speech in International Criminal Law

A review of the primary constituent instruments of international criminal law ("ICL") reveals a similar dearth of rules related to criminalized military speech. Going back to ICL's foundation, Article 6 of the London Charter sets forth a "War Crimes" provision in subsection (b) and then concludes with a sentence declaring that liability for conspiracy to commit the crimes laid out in Article 6 attaches to, among others, "instigators."[114]

The statutes for the *ad hoc* Tribunals for the former Yugoslavia and Rwanda also have little in the way of criminal military speech provisions. International Criminal Tribunal for Yugoslavia ("ICTY") Statute Article 2 (Grave Breaches of the Geneva Conventions of 1949) states that the "International Tribunal shall have the power to prosecute persons committing or *ordering to be committed* grave breaches . . . ."[115] Additionally, Article 7 (Individual Criminal Responsibility), which is explicitly linked to Article 2 (Grave Breaches) and Article 3 (Violations of the Laws or Customs of War), provides that "a person who planned, *instigated*, *ordered*, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to

112. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (emphasis added).

113. Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 410 [hereinafter 1899 Hague Convention]; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter 1907 Hague Convention]. Regulations Respecting the Laws and Customs of War on Land were attached as Annexes to each Convention.

114. London Charter, *supra* note 103, art. 6 ("Leaders, organizers, *instigators* and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." (emphasis added)).

115. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc S/25704, art. 2 (May 3, 1993) [hereinafter ICTY Statute] (emphasis added) (approved by S.C. Res. 827, art. 2, U.N. Doc. S/RES/827 (May 25, 1993)).

in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."[116]

A parallel rule related to non-international armed conflict is found in ICTR Statute Article 4 (Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II), which states that the "International Tribunal for Rwanda shall have the power to prosecute persons committing or *ordering to be committed* serious violations" of Common Article 3 and Additional Protocol II.[117] Also analogous to the ICTY "Individual Criminal Responsibility" provision, Article 6 of the ICTR Statute declares that a "person who planned, *instigated, ordered*, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime."[118]

With respect to the hybrid tribunals, the Statute of the Special Court for Sierra Leone ("SCSL") contains provisions identical to the ICTR Statute regarding violations of Common Article 3 and Additional Protocol II (SCSL Statute Article 3) and Individual Responsibility (SCSL Statute Article 6).[119] Article 6 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") states that "[t]he Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or *ordered the commission of* grave breaches of the Geneva Conventions."[120] The ECCC Law also contains an individual criminal responsibility provision at Article 29: "Any Suspect who planned, *instigated*, *ordered*, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime."[121]

Given that it is the constituent instrument of the only *permanent* institution among the current ICL bodies, the most important source of insights regarding military speech in international criminal law comes from the Rome Statute of the International Criminal Court.[122] Again,

116. *Id.* art. 7(1) (emphasis added).

117. ICTR Statute, *supra* note 80, art. 4 (emphasis added).

118. *Id.* art. 6 (emphasis added).

119. *See* Statute of the Special Court for Sierra Leone arts. 3, 6, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter SCSL Statute] (emphasis added).

120. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Royal Decree No. NS/RKM/1004/006, art. 6 (Oct. 27, 2004) [hereinafter ECCC Law] (emphasis added), *available at* http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

121. *Id.* art. 29 (emphasis added).

122. *See generally* Rome Statute, *supra* note 81, art. 1 ("[The International Criminal Court] is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . .").

there is little there. Of note, the Rome Statute structures its ordering and instigating provisions differently from the other ICL foundation documents.[123] Rather than graft language directly onto specific war crimes articles and then set out a separate, and repetitive, individual responsibility provision, the Rome Statute consolidates all substantive war crimes provisions into a unified Article 8 and then handles individual criminal responsibility exclusively in Article 25.[124] Subsection (3)(b) of that Article states that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . orders, solicits or induces the commission of such a crime which in fact occurs or is attempted . . . ."[125]

Compared to the other ICL individual liability provisions already considered, Article 25(3)(b) expands the scope of liable conduct by adding "soliciting" and "inducing" to simple "ordering."[126] However, it also circumscribes its scope by limiting liability to instances in which the crime actually occurs or is attempted.[127] As will be discussed below, this is unnecessarily restrictive and would be remedied by an incitement provision for war crimes, which, given its focus on inchoate liability, would inculpate the speaker based strictly on his utterance.[128]

Overall, existing doctrine on criminal speech in the military context covers a limited range of offensive conduct, primarily direct orders to commit war crimes. Even in the case of the Rome Statute, which includes "soliciting" and "inducing" commission of war crimes, actual consummation or attempt of the target crime is necessary to find a defendant guilty. This clearly undercuts any preventive enforcement value of including solicitation or inducement as law enforcement cannot intervene to prevent commission of war crimes once conditioning through speech begins. Only the start of massacres or their completion, then, would trigger solicitation/inducement liability. This is a significant gap in the law that must be remedied.

IV. AMENDING THE GENEVA CONVENTIONS AND FORMULATING THE NEW OFFENSE OF DIRECT INCITEMENT TO COMMIT WAR CRIMES

As has been demonstrated, military commanders, and civilian broadcasters have used speech to inspire military personnel to commit atrocities. With respect to military commanders, existing law focuses

123. *Id.*
124. *Id.* arts. 8, 25.
125. *Id.* art. 25(3)(b).
126. *Id.*
127. *Id.*
128. *See infra* notes 166–71 and accompanying text (discussing the inchoate nature of the proposed incitement to commit war crimes offense).

almost exclusively on liability for *ordering* troops to engage in criminal conduct on the battlefield or against civilians. As for civilians, their exhorting soldiers to commit massacres finds no prohibition within IHL. The solution to this problem lies in formulating a new offense: direct incitement to commit war crimes ("ICWC"). But what would this crime look like? How would it be formulated? Where would it be codified?

A. Amending the Geneva Conventions

First, establishing this new norm in international humanitarian law should involve amending the Geneva Conventions.[129] In particular, the article immediately preceding the grave breaches provision of each Geneva Convention should be amended as follows (the language to be added appears in italics): The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, ordering, *or directly inciting to be committed*, any of the grave breaches of the present Convention defined in the following Article.[130]

Similarly, Article 40 of Additional Protocol I should be amended to read as follows (suggested new language in italics): "It is prohibited to order *or directly incite* that there shall be no survivors [or] to threaten an adversary therewith . . . ."[131] Also, Additional Protocol II should undergo a comparable revision: "It is prohibited to order *or directly incite* that there shall be no survivors."[132] To the extent that any other instruments of IHL contain provisions criminalizing orders to commit war crimes, those should also be modified to include incitement language similar to the amendments just suggested.

Consistent with this, the individual criminal responsibility provision of the Rome Statute covering incitement, Article 25(3)(e), should be expanded.[133] That provision currently reads: "[A] person shall be

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129. *See* Sarah M. Buel, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295, 1347 n.282 (2010) ("The main source of international humanitarian law is the four Geneva Conventions of 1949 . . . ."). Recently, certain IHL norms, such as the prohibition against forced marriages, have been developed outside the Geneva Conventions. *See, e.g.*, Wanda M. Akin, *Justice on the Cheap*, 28 T. JEFFERSON L. REV. 19, 27 (2005) (noting that the Special Court for Sierra Leone's "forced marriage" charges against Revolutionary United Front defendants broke new ground in IHL). But it is submitted that an amendment of the Geneva Conventions would make more sense in terms of assuring textual and institutional coherence and compliance.

130. The added text inserts language criminalizing direct incitement into each of the four Geneva Conventions. *See supra* note 110 (emphasis added).

131. *See* Protocol I, *supra* note 111 (emphasis added) (inserting language into Protocol I criminalizing direct incitement).

132. *See* Protocol II, *supra* note 112 (emphasis added) (inserting language into Protocol II criminalizing direct incitement).

133. Given that they are dealing with crimes that have already taken place, as well as fixed temporal jurisdictions, there is no need to consider amending the constituent instruments for the

criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . in respect of the crime of genocide, directly and publicly incites others to commit genocide . . . ."[134] The language should be supplemented as follows (again, the language to be added appears in italics):

> [A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . in respect of the crime of genocide *or war crimes*, directly and publicly incites others to commit genocide *or directly incites others to commit war crimes* . . . .[135]

B. Formulating the Elements of the Crime

1. The Public Component

Of course, for these changes to be meaningful, courts must have guidance regarding the elements of the new crime. One element stands out by its absence—"public." Why is the proposed crime not styled "direct and *public* incitement to commit war crimes"—consistent with "direct and *public* incitement to commit genocide"? War crimes and genocide are quite distinct offenses. The latter entails mass mobilization and involvement of the entire spectrum of society. As James Hughes notes:

> [Genocide,] whether perpetrated by a technologically advanced modern bureaucratic state like Nazi Germany or a relatively undeveloped rural society like Rwanda, requires mass mobilisation. It is the mass of 'ordinary' citizens that become engaged. This may generally involve assisting the state with the process of identification, exclusion, dehumanisation, and ultimately extermination.[136]

Given this dynamic, it makes sense that incitement to *genocide* would include a "public" element involving, as described in the Genocide Convention's travaux préparatoires, "direct appeals to the public by means of speeches, radio or press inciting it to genocide . . . ."[137] War

existing *ad hoc* and hybrid tribunals. To the extent new tribunals are created going forward, their constituent instruments should model the suggested amended provision of the Rome Statute.

134. *See* Rome Statute, *supra* note 81, art. 25(3)(e).

135. *See id*. (emphasis added) (inserting language into the Rome Statute criminalizing direct incitement to commit war crimes).

136. James Hughes, *Genocide*, *in* ROUTLEDGE HANDBOOK OF ETHNIC CONFLICT 122, 123 (Karl Cordell & Stefan Wolff eds., 2011) (citation omitted).

137. HIRAD ABTAHI & PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 238 (2008). On the other hand, direct and public incitement to commit genocide has been established at the ICTR in the case of an individual directing a discrete group of militia in code language to kill Tutsis. This did not involve a general broadcast to a large segment of the public. *See* Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶ 268 (Dec. 2, 2008). The Appeals Chamber in *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, Judgment, ¶ 155 n.409 (Oct. 20, 2010) has opined that Bikindi's incitement was nevertheless sufficiently "public"

crimes are different.[138] They may often be "committed by soldiers acting on their own rather than according to a larger policy" and they do not require "an illegal collective action."[139] Moreover, they are committed in the context of a "chain of command or formal hierarchical ordering that characterizes armed conflict as such."[140] This proposed crime involves superiors speaking to subordinates. A massive public rally or radio broadcast to the anonymous hordes should thus not be required for incitement to war crimes.[141]

2. The "Direct" Element

In contrast, the requirement that the incitement be "direct" ought to remain. Limiting liability to instances in which there is an *imminent* danger that the speech would inspire commission of the target crime helps curb preventive enforcement overreaching in the interest of free speech.[142] Commanding officers should be able to voice their opinions,

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because he used a "public address system" while traveling on a "public road." This reasoning is specious. Merely because Bikindi used a bullhorn on a thoroughfare not located on private property does not change the fact that he addressed himself to a discrete group of militia. The bullhorn may have been used because, for example, the truck from which Bikindi make his remarks was, due to the terrain perhaps, located at a distance from the militia members.

138. Significantly, the United States Army Field Manual on the Law of Land Warfare criminalizes "direct incitement to commit war crimes," not direct *and public* incitement to commit war crimes. U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 500 (1956) [hereinafter FM 27-10].

139. Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 472 (2001). It should be noted, however, that Article 8 of the Rome Statute declares that "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." Rome Statute, *supra* note 81, art. 8. However, this has been held to be a jurisdictional prerequisite as opposed to an element or the crimes. *See* Beth Van Schaack, *Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, 17 AM. U. J. GENDER SOC. POL'Y & L. 361, 385 n.105 (2009) (describing this text as "soft threshold language").

140. Catharine A. MacKinnon, *The ICTR's Legacy on Sexual Violence*, 14 NEW ENG. J. INT'L & COMP. L. 211, 217 (2008) (distinguishing war crimes from genocide on this point).

141. *But see* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-A, Judgment, ¶ 862 (Nov. 28, 2007) (holding that supervision of roadblocks was not sufficiently "public" for incitement to genocide since only the individuals manning the roadblocks were recipients of the message and not the general public; while such supervision could be regarded as instigation to commit genocide, it cannot constitute public incitement); Prosecutor v. Kalimanzira, Case No. ICTR-05-88-A, Judgment, ¶¶ 151–68 (Oct. 20, 2010) (involving a high-ranking Rwandan Interior Ministry official, who commanded, via code language, soldiers, police and militia to kill Tutsis, not guilty of incitement to genocide because incitement not "public" given that message was not communicated to sufficiently large audience or via TV, radio, cinema or bullhorn).

142. ABTAHI & WEBB, *supra* note 137, at 1160; *see also* A.J.P., Jr., *Constitutional Law—Due Process—Freedom of Speech*, 15 TEX. L. REV. 373, 374 (1937) ("The early test as applied to *limitations on federal power to abridge free speech* under the Espionage Act, enacted during the war, *required a direct incitement* to violent resistance to the government.") (emphasis added); Robert Cryer, *Incitement*, ENOTES.COM, http://www.enotes.com/genocide-encyclopedia/

however odious, if they are not reasonably likely to result in imminent commission of war crimes. And the definition of "direct" used for incitement to genocide should be adopted for the proposed new crime. In other words, consistent with ICTR precedent, the message could be deemed "direct" if, when viewing the language in the light of its cultural and linguistic content, the persons for whom the message was intended immediately grasped the implication thereof.[143] This provides for flexibility regarding the particular military and national culture of the soldiers involved. At the same time—when necessary—it permits the possibility that fact and expert witnesses can establish the speaker used code words or other veiled means of incitement.

3. Mens Rea

The mens rea for the new crime would also be comparable to that for incitement to genocide—in other words a dual intent: (1) to provoke another to commit war crimes; and (2) to commit the underlying war crime itself. With respect to the latter, as compared to the *dolus specialis* of genocide, war crimes are primarily characterized by a simple intentionality or willfulness mens rea.[144]

4. Content

Regarding speech content, the existing incitement to genocide framework—with slight modifications for the war crimes context—can be applied here as well. In other words, the key elements to analyze will be purpose, text, and context.[145] Regarding purpose, one can imagine, at one end of the spectrum, legitimate objectives such as commanders explaining to troops the circumstances surrounding—and history of—a counterinsurgency operation. At the other end of the spectrum, direct calls for civilian massacres would evince a patently illegitimate purpose. The more "grey-zone" cases will require judicial

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incitement (last visited Aug. 13, 2011) ("To be prosecuted as criminal, the incitement must also be direct. Vague suggestions or hints are not enough. One reason for this limitation is the need to strike a balance between criminalizing incitement and preserving freedom of speech.").

143. *See* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 556 (Sept. 2, 1998).

144. *See* WILLIAM SCHABAS, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, *in* WAR CRIMES AND HUMAN RIGHTS: ESSAYS ON THE DEATH PENALTY JUSTICE AND ACCOUNTABILITY 467, 472–74 (2008).

145. Regarding the relationship between speaker and subject criterion, in the war crimes context, the issue of whether the speaker is a member of a majority or minority group criticizing or not the powers that be or disenfranchised minorities is not implicated. Similarly, although possibly relevant, channel of communication as well as temporality and instrumentality are not as central to the analysis given that most speech at issue in the military context will be limited to non-recorded, person-to-person communications. Of course, to the extent recordings or print or broadcast media might be involved (the latter being quite possible in the case of civilians inciting military personnel), then these criteria can certainly be consulted.

analysis in light of the totality of the circumstances (including all the contextual evaluative factors discussed below).

As for text, the words should be parsed to determine if code language was being used or, to the contrary, if there is an innocent explanation for the language used. For example, in the case of a counterinsurgency operation, a commander stating to his troops that he wants them to *conquer the hearts and minds* of the villagers likely means that he wants his troops to win the villagers over with kindness, not subject them to physical violence (notwithstanding the ambiguity of the word "conquer").[146]

Of primary importance, however, is the "context" analysis. Again, this analysis should bifurcate into internal and external prongs. Internal contextual examination would include factors such as the speaker's personal and professional history (including rank and previous communications with troops), and the tone, cadence, and volume of the communication at issue. Related to this, the means of transmission and location might also prove relevant. For instance, was the message transmitted via a public address system to a large gathering or was it communicated to a smaller group in the barracks?[147] Another consideration here might be the rank differential between the speaker and the message recipients. Depending on the context, greater rank disparity, for example, could help militate in favor of finding incitement. External context considers the circumstances surrounding the speech, which could include prior similar messages within the same national armed forces but by different speakers and recent commission of war crimes by the same unit or military force.[148]

5. Causation

Finally—as with incitement to genocide—causation should not be an element of the crime.[149] It bears repeating that this proposed new crime is inchoate and that has special enforcement significance. As explained by David Brody and James Acker:

> [The] criminal law typically concerns itself with the harms associated with illegal acts that are consummated. With inchoate crimes . . . the law criminalizes behaviors that have not yet necessarily culminated in

146. Of course, this could be the subject of a battle of experts regarding the meaning of code words within those armed forces in that particular place and time.

147. A loud, electronically enhanced speech to a division might look more like incitement than a more personal chat using a subdued voice in a comparatively private setting.

148. *See generally supra* notes 95–96 and accompanying text (discussing external factors to be taken into account when analyzing the speech at issue).

149. *See infra* notes 166–71 and accompanying text (stating that incitement to commit war crimes would be an inchoate crime without a causation requirement).

> a tangible social harm. . . . [I]nchoate crimes deal with conduct that is designed to culminate in the commission of a substantive offense but . . . has not yet achieved its culmination because there is something the actor or another still must do. . . . Society feels justified in stepping in to assure that the target of the inchoate offense . . . does not occur.[150]

Thus, assuming all the other required elements are demonstrated, once officers communicate the incitement message to their troops, or civilians to soldiers, liability attaches. It does not hinge on the subsequent commission of war crimes.

V. PUTTING THE NEW CRIME IN PERSPECTIVE

A. Other Calls for Expanding Incitement

This Article advocates expanding the ambit of incitement—an offense that generally tends to trouble both defenders of free speech and those leery of inchoate liability's license for more intrusive law enforcement.[151] But calls for widening the scope of incitement to cover more than just genocide certainly predate this Article. For example, international criminal law expert Robert Cryer has noted:

> [Incitement] to particular examples of war crimes and crimes against humanity may be as serious as some instances of incitement to genocide. If a sadistic person sought to persuade others to drop a nuclear device on a city which would kill 100,000 people, for motives of personal pleasure or in order to persecute, rather than eliminate, a group, the act he or she seeks to incite would not meet the formal definition of genocide. Yet the act being encouraged is not much less serious than certain examples of genocide.[152]

Others have sought to criminalize incitement to terrorism.[153] Article 5 of the 2005 Council of Europe Convention on the Prevention of Terrorism obliges State parties to enact domestic legislation making it a crime to incite to terrorism.[154] Daphne Barak-Erez and David Scharia

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150. DAVID C. BRODY & JAMES R. ACKER, CRIMINAL LAW 368 (2d ed. 2010).

151. Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L.J. 87, 88 (2001) (noting that a U.S. representative at the drafting of the Genocide Convention "declared the [incitement provision] was a plain infringement on the guarantees of free speech protected by the First Amendment"); JAY M. FEINMAN, LAW ONE HUNDRED ONE 289 (3d ed. 2010) ("The use of inchoate crimes as a law enforcement tool raises the central problem in this area . . . . If we define it too broadly, we will criminalize behavior that is far removed from causing harm.").

152. Cryer, *supra* note 142.

153. *See generally* Ben Saul, *Speaking of Terror: Criminalising Incitement to Violence*, 28 U. NEW S. WALES L.J. 868 (2005) (discussing how the law does, and should, respond to incitement to violence).

154. Council of Europe Convention on the Prevention of Terrorism, art. 5, May 16, 2005, C.E.T.S. 196, *available at* http://conventions.coe.int/Treaty/en/Treaties/html/196.htm.

point out that the Convention "regards the prevention of incitement to terrorism as one of the main elements of an effective counter-terrorism strategy."[155] And various European countries have criminalized incitement to terrorism.[156] On the international level, in 2005 the United Nations Security Council adopted Resolution 1624, which "calls upon all states to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to . . . prohibit by law incitement to commit a terrorist act or acts."[157]

B. Existing Domestic Incitement to War Crimes Provision

In at least one jurisdiction, incitement to commit war crimes has also been codified—on the domestic level. United States Army Field Manual 27–10 (The Law of Land Warfare), Article 500 defines as criminal: "Conspiracy, *direct incitement*, and attempts *to commit*, as well as complicity in the commission of, crimes against peace, crimes against humanity, and *war crimes* . . . ."[158] Unfortunately, at least insofar as incitement to commit war crimes is concerned, it does not appear as if this provision has been used in an actual prosecution or fleshed out in commentary by the U.S. Army or other experts.[159] Significantly, it appears in Section II of the Manual, titled "Crimes under International Law." Thus, from the American perspective, the crime already belongs to the transnational legal order.[160]

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155. Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT'L SEC. J. 1, 9 (2011).

156. *See, e.g.*, Terrorism Act 2006, c. 11, § 1(1) (United Kingdom), Loi du 29 juillet 1881 sur la liberté de la presse [Law of July 29, 1881 on the Freedom of the Press], *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20110918.

157. S.C. Res. 1624, ¶ 1, U.N. Doc. S/RES/1624 (Sept. 14, 2005), *available at* http://www.un.org/documents/scres.htm.

158. FM 27-10, *supra* note 138, at para. 500 (emphasis added).

159. At least one article refers to the provision. In a piece criticizing the administration of George W. Bush for its policies in the Middle East, Francis A. Boyle refers to the provision and generally states:

> Furthermore, various members of the Bush Jr. administration have committed numerous inchoate crimes incidental to these substantive offences that under the Nuremberg Charter, Judgment, and Principles as well as U.S. Army Field Manual 27-10 (1956) are international crimes in their own right: planning, and preparation—which they are currently doing today against Iran—solicitation, incitement, conspiracy, complicity, attempt, aiding and abetting.

Francis A. Boyle, *Law and Resistance: The Republic in Crisis and the People's Response*, 2 CRIT 154, 155–56 (2009). Other than this publication, extensive research has not revealed any application of, or commentary on, this provision. Discussions with various IHL experts have similarly not revealed any additional information regarding this provision.

160. It is not clear on what basis the U.S. Army believes incitement to commit war crimes is already a crime under international law. It could be based on a generous reading of the

C. Situating the New Crime Conceptually

1. Commission and Omission Liability

The value of including direct incitement to commit war crimes can be appreciated from both a practical and theoretical perspective. Currently, a commander's liability for war crimes committed by a subordinate falls primarily into one of two categories: either commission or omission liability. Regarding the former, as indicated previously, most of the existing IHL and ICL instruments contain provisions criminalizing a commander's *ordering* commission of war crimes.[161] Similarly, commission liability would include a commander's *instigating* commission of war crimes.[162]

As for *omission* liability in this area, there has developed the doctrine of "command responsibility." It is found, for example, in ICTY Statute Article 7(3), which states:

> The fact that any of the acts . . . was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior *failed* to take the necessary and

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Nuremberg precedent. In particular, pursuant to Article 6 of the London Charter, to charge crimes against humanity, the IMT had to demonstrate a nexus between it and war crimes or crimes against peace. *See* Darryl Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 46 n.16 ("The Nuremberg Charter stated that crimes against humanity could occur 'before or during the war,' but a nexus was indirectly introduced by the requirement that the crime be connected to war crimes or a crime against peace."). Given the nexus requirement, perhaps incitement charged as a crime against humanity was seen as encompassing incitement to war crimes. *See, e.g.*, Charity Kagwi-Ndungu, *The Challenges in Prosecuting Print Media for Incitement to Genocide*, *in* THE MEDIA AND THE RWANDA GENOCIDE 330, 337 (Allan Thompson ed. 2007) ("The International Military Tribunal at Nuremberg linked Streicher's propaganda with the war crimes that had been carried out . . . and implicitly linked the alleged crimes against humanity with war crimes."); Robert H. Snyder, *Disillusioned Words Like Bullets Bark: Incitement to Genocide, Music, and The Trial of Simon Bikindi*, 35 GA. J. INT'L & COMP. L. 645, 654 n.72 (2007) ("Even though the Nuremberg Charter did not set out incitement to commit crimes against humanity or war crimes as a separate offense, the International Military Tribunal (IMT) had little trouble convicting Streicher of the charge.").

161. *See, e.g.*, First Geneva Convention, *supra* note 110, art. 49 ("The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, *or ordering to be committed*, any of the grave breaches of the present Convention defined in the following Article." (emphasis added)); ICTY Statute, *supra* note 115, art. 2 ("The International Tribunal shall have the power to prosecute persons committing or *ordering to be committed* grave breaches . . . ." (emphasis added)).

162. *See, e.g.*, ICTR Statute, *supra* note 80, art. 6(1) ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime."). As indicated by ICTR Statute Article 6(1), commission liability in this area would also include planning and aiding and abetting.

> reasonable measures to prevent such acts or to punish the perpetrators thereof.[163]

Pursuant to the jurisprudence developed by the *ad hoc* tribunals and the SCSL, to establish liability under a command responsibility theory, the following three elements must be proved: (1) the existence of a superior–subordinate relationship of effective control; (2) the existence of the requisite mens rea, namely that the commander knew or had reason to know of his subordinates' crimes; and (3) that the commander failed to take the necessary steps to prevent or punish the offenses.[164] Command responsibility is classified as a form of *omission* liability, given that liability focuses on the commander's *failure* to act.[165]

2. Inchoate Liability

ICWC would add a third, intermediary form of liability in this area: inchoate liability. Not quite commission liability, because consummation of the target offense by the subordinate is not necessary to establish culpability, and different from omission liability as it entails some affirmative action by the commander, it criminalizes conduct because of its likely *potential* to cause harm. And thus, theoretically, if not practically, it gives law enforcement the opportunity to *prevent* atrocities before they occur. This preventive value is what makes direct incitement to commit war crimes a necessary addition to commander–subordinate modes of criminal liability.

Some may argue that "instigation" already covers the criminal conduct implicated in the proposed new crime because it has been defined as "prompting another to commit an offence"[166] or "urging, encouraging, or prompting" another to commit a transgression.[167] But there is a crucial difference, as explained by Wibke Timmermann:

> Instigation has been considered to be punishable only where it leads to the commission of the substantive crime, which means that it is not an inchoate crime; the instigation must be causally connected to the substantive crime in that it must have contributed significantly to the

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163. ICTY Statute, *supra* note 115, art. 7(3) (emphasis added). The ICTR and SCSL have identical provisions. *See also* ICTR Statute, *supra* note 80, art. 6(3); SCSL Statute, *supra* note 119, art. 6(3).

164. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 486 (Sept. 2, 1998); Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶¶ 760–62 (June 20, 2007); Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 346, (Nov. 16, 1998).

165. *See* ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW 259 (2008) ("Command responsibility is a form of omission liability, for it is based on proof of failure to restrain the actions of others.").

166. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 280 (Mar. 3, 2000); *see also* Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 601 (Aug. 2, 2001).

167. Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶ 381 (May 15, 2003).

> commission of the latter, the instigator must act intentionally or be aware of the substantial likelihood that the substantive crime will be committed, and he must intend to bring about the crime instigated. By contrast, direct and public incitement has been held to be an inchoate crime, which is applicable only in connection with the crime of genocide.[168]

Others may point out that the Rome Statute prohibits "solicitation" of crimes in Article 25(3)(b). The Model Penal Code defines solicitation as commanding, encouraging, or requesting another to engage in criminal conduct, with the purpose of promoting or facilitating that crime.[169] In large part, these elements resemble those of incitement. And solicitation is considered an inchoate crime because it is punishable regardless of whether the target crime is committed.[170] But Article 25(3)(b) of the Rome Statute refers to soliciting a crime "which in fact occurs or is attempted." This means liability is contingent on commission, or attempted commission, of the target offense. As a result, it cannot be considered a true inchoate offense.

And, again, the importance of incitement as an *inchoate* offense, not dependent on ultimate outcome, cannot be exaggerated. In the words of Jay M. Feinman:

> Criminal law punishes inchoate offenses for two simple reasons. First, people who engage in [inchoate offenses, including solicitation,] are about as dangerous as those who actually commit the crimes. . . . [The bosses] who plan the hit . . . are about as culpable as a hit man who actually [commits the target offense] . . . . Second, establishing inchoate crimes is necessary for law enforcement. If attempted murder was not a crime[, for example,] a police officer who observed the hit men pulling out their guns and approaching Don Corleone could not arrest them until shots were fired. And many crimes . . . depend on attempt and solicitation prosecutions.[171]

Additionally, this would be a preventive law enforcement tool in an environment, the battlefield, arguably more violent than any other and much more susceptible to the outbreak of mass atrocity. If incitement charges are possible within the civilian realm, which is by nature much less inherently violent, they should certainly be available in the military environment, where the normative baseline objective is homicide. In that sense, commanders knowing that they may be liable for incitement would be more careful in choosing their words and their subordinates

168. Wibke Kristin Timmermann, *Incitement in International Criminal Law*, 88 INT'L REV. RED CROSS 823, 839 (2006).

169. Model Penal Code § 5.02 (1985).

170. *See* Ira P. Robbins, *Anthrax Hoaxes*, 54 AM. U. L. REV. 1, 71 (2004).

171. FEINMAN, *supra* note 151, at 289.

may be more likely to report what appears to be criminal speech. This promotes better awareness of the law and deterrence in terms of adhering to battlefield restrictions.

D. Extending Liability to Cover Civilians

Moreover, the proposed new law would allow for prosecution of *civilians* for incitement to war crimes. As demonstrated above, especially in the Rwandan cataclysm of 1994, civilians—including radio announcers and other persons of prominence—may be in a position to exhort soldiers and militia to massacre innocent civilians.[172] This proposed expansion of incitement would mean their exhortations to violate the laws of war could be punished before their ultimate aims came to fruition.[173] Even if such conduct could be prosecuted as another crime, such as incitement to genocide or crimes against humanity (persecution), ICWC would help focus on the uniquely military component of this stripe of incitement and therefore would have more expressive, as well as potential deterrent, value in the armed forces context.

E. Comparing It to Incitement to Genocide and Crimes against Humanity

Additionally, ICWC may be a more effective law enforcement tool. The only "incitement" crime available to prosecutors at present is direct and public incitement to commit genocide. This crime rarely, if ever, would cover atrocities committed on the battlefield. Moreover, even if it could, genocide is a challenging crime to prosecute. As Stuart Ford points out, "[G]enocide is exceptionally difficult to prove because of the specific intent requirement and genocide convictions are relatively rare."[174] Given that direct and public incitement to commit genocide carries the same mens rea, the obstacles faced in prosecuting it are equally daunting.

Prosecutors could also potentially charge crimes against humanity (persecution) but this may not be useful either. For one, by definition, it would only apply to crimes committed against civilians.[175] But military

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172. *See supra* notes 64–69 and accompanying text (describing instances of civilian incitement).

173. *Id.*

174. Stuart Ford, *Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis*, 38 DENV. J. INT'L L. & POL'Y 227, 275 (2010).

175. *See, e.g.*, Rome Statute, *supra* note 81, art. 7 ("For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any *civilian* population . . . ." (emphasis added)).

(as opposed to civilian) victims may be the object of incitement charges in which case crimes against humanity would be of no value. Moreover, even if civilians were targeted, it may be difficult, if not impossible, to demonstrate the existence of a "widespread or systematic attack."[176] What if a captain, although not issuing an official order, nevertheless encouraged his company through code words to murder unarmed women and children in a small village his subordinates were about to enter? And what if this action took place on the periphery of a war zone wherein battlefield atrocities were ultimately charged as war crimes? Given the lack of widespread or systematic attack against civilians elsewhere, that threshold could not be met with respect to the village atrocities. Or what if, in the same case, a private radio station successfully called on military personnel to carry out small, limited attacks on tiny, undefended hamlets? These may not satisfy crimes against humanity's chapeau either.

As well, even if these military atrocities were considered sufficiently "widespread and systematic" for crimes against humanity charges, characterizing the incitement giving rise to the atrocities as a violation of the laws of war would better address the transgression's military nature and more effectively promote deterrence among commanders and rank-and-file soldiers. It would also better sensitize civilians, such as Simon Bikindi, who would egg on military mass atrocity perpetrators, to the fact that they could be liable for war crimes. Finally, prosecuting such offenses as crimes of "incitement," focuses more appropriately on the speech aspect of the crime than the generic charge of persecution. From a public policy standpoint, imparting the lesson that "words kill" could go a long way toward curbing use of violent inflammatory language.

F. Potential Concerns

Criminalizing military incitement raises possible concerns, however. Foremost among these is the potential for impingement on legitimate exercise of free speech. As one commentator has noted: "[Service] personnel are citizens and voters, and insulating them from the discussion of controversial public issues could result in a military cutoff from societal concerns and values, itself a threat to a democracy."[177] Commanders should have the right to discuss their views with subordinates, both from a personal and operational perspective. Often, this may entail providing insights regarding the nature of the enemy.

176. *Id.*

177. Edward F. Sherman, *A Special Kind of Justice*, 84 YALE L.J. 373, 386 (1974) (reviewing JOSEPH W. BISHOP JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW (1974)).

Casting the enemy in a very negative light may certainly be justified by the need to motivate troops and inspire them to fight to their full capacity. Nevertheless, to the extent this speech is the product of illegitimate objectives, such as inspiring troops to kill civilians or take no prisoners, it must be prevented and punished.[178]

Even in the United States, the most speech-protective country in the world, incitement is not absolutely protected speech. Under the test enunciated by the United States Supreme Court in *Brandenburg v. Ohio*, speech will not be protected if it "is directed to inciting or producing imminent lawless action and is likely to produce such action."[179] Arguably, that is consistent with the test proposed in this Article for the crime of ICWC: depending on the circumstances, the direct element of ICWC may satisfy *Brandenburg*'s imminence requirement; the mens rea element of ICWC corresponds with *Brandenburg*'s intent prong; and given that war crimes is the object of the incitement at issue, *Brandenburg*'s "lawless action" element is also easily satisfied.[180] Even were that not the case, *Brandenburg* applies to civilians, not to military personnel.[181] This is significant as "the standard for First Amendment protections applied to military personnel is lower than that applied to civilians."[182] In particular, military courts eschew the *Brandenburg* standard and "in applying the [less strict] clear

178. *See supra* notes 13–15 (discussing the problem that arises when commander "motivation" may cross the line and inspire criminal violence perpetrated by subordinates).

179. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

180. Depending on the surrounding circumstances, even the current international test for incitement to genocide may be arguably consistent with the *Brandenburg* test. *See* Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853, 911 (2008) (arguing that perhaps Iranian President Mahmoud Ahmadinejad's calls for Israel's destruction would not qualify for American Constitutional protection under *Brandenburg*). *But see* Justin La Mort, *The Soundtrack to Genocide: Using Incitement to Genocide in the Bikindi Trial to Protect Free Speech and Uphold the Promise of Never Again*, 4 INTERDISC. J. HUM. RTS. L. 43, 52, 62 (2010) (arguing generally that the current international test for incitement to genocide is not as rigorous as *Brandenburg*). *See also* Audrey Golden, Comment, *Monkey Read, Monkey Do: Why the First Amendment Should Not Protect the Printed Speech of an International Genocide Inciter*, 43 WAKE FOREST L. REV. 1149, 1171–73 (2008) (postulating that the Nazi propaganda would have been protected by the First Amendment under the *Bradenburg* standard). This assumes that the American standard would even be used, but international law has not chosen to adopt wholesale the American framework. *See, e.g.*, Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Judgment, ¶ 1010 (Nov. 28, 2007) ("The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards.").

181. *See* Jeffrey Lakin, *Atheists in Foxholes: Examining the Current State of Religious Freedom in the United States Military*, 9 FIRST AMEND. L. REV. 713, 727 (2011).

182. *Id.*

and present danger test, have virtually excluded any requirement of proof by the military of an immediate likelihood that adverse conduct will result from the speech . . . . Those cases . . . leave servicemen's First Amendment rights largely dependent upon the indulgence of the military."[183]

In addition to free speech issues, the proposed new crime raises potential institutional concerns. As a practical matter, will subordinates be willing to testify against their commanders?[184] This could be especially problematic given that the crime is inchoate and only punishes speech. Related to this, is it realistic to suppose that militaries will actually prosecute this new crime? Militaries are generally reluctant to bring their own soldiers to trial in cases where massacres occur. As one commentator has noted:

> Beyond the text of the various instruments, the key impediment to successful invocation of the humanitarian law of international armed conflict is likely to be the attitude of the combatants toward prosecutions. States have proved reluctant to prosecute their own soldiers for war crimes unless they are especially heinous and publicized, thereby justifying impunity, or a small administrative punishment, on the exigencies of warfare.[185]

Then again, these are obstacles faced by every institution that attempts to enforce the law of war against its own troops. While these issues may be thornier in the case of a crime based on mere speech, this Article has demonstrated there is normative necessity for it. Even if the proposed law ultimately has more value as an educational or aspirational tool, rather than an enforcement tool, there is ample justification for its adoption.[186]

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183. Sherman, *supra* note 177, at 387; *see also* Dale Carpenter, Response, *The Value of Institutions and the Values of Free Speech*, 89 MINN. L. REV. 1407, 1414 n.23 (2005) (describing *Brandenburg* standard as "stricter standard" than clear and present danger test of *Schenck v. United States*, 249 U.S. 47, 52–53 (1919)); Danley K. Cornyn, Note, *The Military, Freedom of Speech, and the Internet: Preserving Operational Security and Servicemembers' Right of Free Speech*, 87 TEX. L. REV. 463, 471 (2008) ("[T]he 'clear and present danger' standard applies to servicemembers' speech . . . .").

184. *See* Samuel Brenner, *"I Am a Bit Sickened": Examining Archetypes of Congressional War Crimes Oversight after My Ly and Abu Ghraib*, 205 MIL. L. REV. 1, 73–74 (2010) (discussing the pressures faced by soldiers who testify against their commanders, specifically in the context of the My Ly massacre and the Abu Ghraib prison scandal).

185. John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 15 (1999).

186. *See* Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EUR. J. INT'L L. 725, 735 (2008) ("The legitimating effect may result from the 'expressive function' of law—an effect that is operative notwithstanding a lack of enforcement of the law.").

VI. CONCLUSION

Speech and atrocity are constant companions. This axiom obtains with equal force on the battlefield, where armed actors seek to kill one another. We have criminalized atrocity speech that results in genocide and crimes against humanity. In the interests of logic and policy, advocacy to commit war crimes should be criminalized too. Conditioning troops to violate international humanitarian law is socially undesirable conduct and yet it is not akin to "ordering" them to do so, which can be prosecuted. Nor is it akin to "instigating" them to engage in such conduct, another possible offense under current law, but only chargeable if troops subsequently commit the target crime. Direct incitement to commit war crimes would allow the law to punish atrocity-conditioning and atrocity-persuading agents *before* international humanitarian law violations can take place. And it would extend international humanitarian law's writ to *civilians* who incite armed forces—a reality of mass-mobilization modern warfare.

Genocide incitement jurisprudence, appropriately modified, provides us with a ready template for determining the elements of this new crime. And those elements, as well as attendant regulations and subsequent case law, should be honed so as to minimize any potential free speech chilling effects or significant operational impediments. Commanders should have every right to educate their troops and inspire them before leading them into battle. But that does not include incentivizing them to commit grave breaches of the Geneva Conventions or other serious violations of the laws and customs of war.