

# Accusation in a Mirror

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## I. INTRODUCTION

One of the most astonishing discoveries in the history of genocide studies was the *Note Relative à la Propagande d'Expansion et de Recrutement* (the “*Note*”), a mimeographed document found in Butare prefecture in the wake of the Rwandan genocide. The *Note*, which draws from Goebbels, Lenin, and others, is a manual of the rhetorical methods that could be used to inflame ordinary people to attack their countrymen.<sup>1</sup> For jurists attempting to interpret or apply the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”)<sup>2</sup> and related statutes,<sup>3</sup> this

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1. See ALISON LIEBHAFSKY DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 65 (1999) (describing the *Note* as a detailed analysis of how to use propaganda to sway the public).

2. For purposes of this Article, the term “genocide” will be used as defined by the Convention on the Prevention and Punishment of the Crime of Genocide, simply because it is legally binding on its signatories. The Genocide Convention defines “genocide” as:

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

Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. GAOR, 3d Sess., U.N. Doc. A/RES/260, at 174 (Dec. 9, 1948) [hereinafter *Genocide Convention*]. It should be noted, however, that many commentators have lamented the narrowness of this definition. See William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40 CASE W. RES. J. INT’L L. 35, 53–54 (2008) (summarizing these criticisms).

3. The Rome Convention is also applicable here, as is Article II 3(c) of the International

discovery has been illuminating because it demonstrates the instrumentalities through which propaganda can be used to incite mass-murder.<sup>4</sup> The Genocide Convention's prohibition of incitement is central to efforts to prevent genocide,<sup>5</sup> so it is unfortunate that the *Note's* principal rhetorical contribution—the method called “accusation in a mirror” (“AiM”)—has yet to receive the attention from legal scholars<sup>6</sup> and tribunals<sup>7</sup> that it deserves. If properly understood, the concept of AiM could assist jurists in correcting the Genocide Convention's most conspicuous weakness (i.e., its utter failure to prevent genocides before the killings occur).<sup>8</sup>

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Criminal Tribunal for Rwanda Statute, which mirrors the Genocide Convention's Article III (b). 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, 150 (2004) [hereinafter *Media Trial*] (comparing statutes).

4. DES FORGES, *supra* note 1, at 57. As Alexander Tsesis has noted, it also demonstrates the long-term effects of propaganda.

5. The other four acts punishable under the Genocide Convention are genocide, conspiracy to commit genocide, attempt to commit genocide, and complicity in genocide. Genocide Convention, *supra* note 2. See generally NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: ITS ORIGINS AND INTERPRETATION 19–22* (1949), reprinted in 40 CASE W. RES. J. INT'L L. 315 (2008) (describing both the importance and the ambiguity of the “incitement” provision).

6. Indeed, these issues have been wholly unexamined except for a trilogy of articles by Gregory Gordon and a single article by Susan Benesch. See Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 509 (2008) (examining accusation in a mirror as one of the techniques used in incitement of genocide); 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, 900 (2008) [hereinafter *Incitement to Indictment?*] (explaining, in the context of the “direct element” of incitement, Ahmadinejad's use of accusation in a mirror to pit the Hutus against the Tutsis); *Media Trial*, *supra* note 3, at 186–87 (discussing how the Rwandan government appeared to use accusation in a mirror as a propaganda technique); Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 SANTA CLARA L. REV. 607, 609 (2010) [hereinafter *Music and Genocide*] (describing the failure of the International Criminal Tribunal for Rwanda to build upon the framework for incitement law that had otherwise begun to take shape).

7. Gregory Gordon has repeatedly taken the International Criminal Tribunal for Rwanda (“ICTR”) to task for failing to properly explain the significance of accusation in a mirror. See *Music and Genocide*, *supra* note 6, at 638 (challenging the ICTR for failure to keep track of incitement techniques, such as accusation in a mirror); *Media Trial*, *supra* note 3, at 186–87 (criticizing the ICTR for failing to consider an analysis of accusation in a mirror when issuing the *Nahimana* judgment).

8. See W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT'L L. 57, 78 (2008) (“For anyone who is horrified by the prevalence of mass killing on our planet and expects the institutions of international law in the twenty-first century to act—or to authorize someone to act—to prevent or arrest it, the legal situation is not encouraging.”); Michael P. Scharf & Brianne M. Draffin, *Foreword: To Prevent and to Punish: An International Conference in Commemoration of the Sixtieth Anniversary of the Genocide Convention*, 40 CASE W. RES. J. INT'L L. 1, 1–2 (2008) (lambasting the Genocide Convention's “utter irrelevance” in the face of genocidal crimes committed subsequent to its passage).

The basic idea of AiM is deceptively simple: propagandists must “impute to enemies exactly what they and their own party are planning to do.”<sup>9</sup> In other words, AiM is a rhetorical practice in which one falsely accuses one’s enemies of conducting, plotting, or desiring to commit precisely the same transgressions that one plans to commit against them. For example, if one plans to kill one’s adversaries by drowning them in a particular river, then one should accuse one’s adversaries of plotting precisely the same crime. As a result, one will accuse one’s enemies of doing the same thing despite their plans.<sup>10</sup> It is similar to a false anticipatory *tu quoque*: before one’s enemies accuse one truthfully, one accuses them falsely of the same misdeed.<sup>11</sup>

This may seem an unlikely means of inciting mass-murder, since it would intuitively seem likely not only to fail but also to backfire by publicly telegraphing its speakers’ malicious intentions at times when the speakers may lack the wherewithal to carry out their schemes.<sup>12</sup> The counter-intuitiveness of this method is best appreciated when one grasps that its injunctions are to be taken literally. There is no hyperbole in the *Note*’s directive that the propagandist should “impute to enemies *exactly* what they and their own party are planning to do.”<sup>13</sup> The point is not merely to impute iniquities that are as bad as the misdeeds that the propagandist’s own party intends. Instead, AiM is the more audacious idea of charging one’s adversary with “exactly” the misdeeds that the propagandist’s party intends to commit. But why, out

9. DES FORGES, *supra* note 1, at 66.

10. As Alison Des Forges explains in her authoritative examination of the *Note* that presents a detailed analysis of *Psychologie de la publicité et de la propagande* that “[a propagandist] advocates using lies, exaggeration, ridicule, and innuendo to attack the opponent, in both his public and his private life.” *Id.* The propagandist suggests that “moral considerations are irrelevant, except when they happen to offer another weapon against the other side.” *Id.* A propagandist “must persuade the public that the adversary stands for war, death, slavery, repression, injustice, and sadistic cruelty.” *Id.* The propagandist then suggests two techniques that would later be used in the Rwanda genocide. *Id.* The first is to create phony events that could be used later to give credence to propaganda. *Id.* The second is AiM: “In this way, the party which is using terror will accuse the enemy of using terror.” *Id.*

11. The *tu quoque* argument attempts to defeat an opponent’s position by claiming that the opponent has failed to comply with that position. Also known as an appeal to hypocrisy, the *tu quoque* argument is a type of logical fallacy and may be considered to be a form of *argumentum ad hominem*.

12. The intuition is that an Adolf Hitler who plans to destroy a particular ethnic population en route to global domination should not go around talking about ethnic destruction and world domination before he has the wherewithal to pull it off. Yet this is precisely what Hitler did, *see infra* Part II.B (describing the actions taken by Hitler to reach his goals), and others have done it too. Some readers have challenged this intuition on the ground that the technique relies upon lies that the listener will not be able to detect. But why is it so clear that the listeners will not be able to see through the lies? Some, if not all, of the lies described are rather incredible. The point here is that the success of these lies is counter-intuitive.

13. DES FORGES, *supra* note 1, at 66 (emphasis added).

of all of the serious allegations that one might level at one's enemy, should one accuse the adversary of precisely the wrongs that one's own party intends to commit? After all, the risks are apparent. By revealing the propagandist's own intentions, AiM deprives the propagandist's party of the advantages of speed and surprise and gives the adversary an opportunity to anticipate and prepare. At the same time, this method provides independent observers and subsequent judicial tribunals with evidence of intent. Moreover, AiM is not based on any evaluation of what misdeeds are most plausibly ascribed to the enemy, such as those that are based on traditional stereotypes, defamations, or actual culpability, since it relies instead on the plans of the propagandist's party.

Despite its counter-intuitive nature, AiM has proven to be one of the central mechanisms by which *genocidaires* publicly and directly incite genocide, in part because it turns out to be quite effective. Once AiM's structure and functions are understood, its pervasive and efficacious presence can be discerned not only in mass-murder but also in a host of lesser persecutions. These qualities can make AiM an indispensable tool for identifying and prosecuting incitement.

The Genocide Convention criminalizes "direct and public incitement to commit genocide,"<sup>14</sup> regardless of whether actual genocide occurs.<sup>15</sup> Nevertheless, actionable incitement must be a direct instigation to commit an act of genocide rather than vague hate speech.<sup>16</sup> This doctrinal element is important because it protects against prosecutions that would otherwise intrude upon internationally and domestically recognized norms of free speech. In light of the covert, coded, and euphemistic manner in which genocidal appeals are generally communicated, it is often difficult to determine what expressions may be deemed sufficiently direct.<sup>17</sup> At the same time, it is critical for judicial bodies to recognize incitement even when it takes such forms because these bodies will otherwise fail to satisfy the Genocide Convention's purpose of preventing genocide rather than merely punishing its perpetrators.<sup>18</sup> In light of its common usage, false

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14. Genocide Convention, *supra* note 2, at 174.

15. William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141, 149 (2000).

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

17. *See* Schabas, *supra* note 15, at 160 ("The problem with the requirement that incitement be 'direct' is that history shows that those who attempt to incite genocide speak in euphemisms. It would surely be contrary to the intent of the drafters to view such coded language as being insufficiently direct.")

18. Some have argued that punishing genocidal crimes will deter potential future genocides. *See, e.g.*, Stephen J. Rapp, *Achieving Accountability for the Greatest Crimes—The Legacy of the International Tribunals*, 55 DRAKE L. REV. 259, 285 (2007) (explaining the long process that the

genocidal claims leveled against a vulnerable population should be deemed to satisfy the Genocide Convention's requirement that incitement to genocide must be "direct."<sup>19</sup> This means that they can be used to demonstrate that certain expressions call for the elimination of target populations even though they do not do so in explicit terms.

The directness of AiM is hardly obvious: at first blush, it seems unlikely that a false charge against an adversary—even if maliciously intended—should be considered a direct incitement to the wrong-doing that the speaker condemns. Indeed, nothing could seem more indirect. After all, the speaker need not urge listeners to take any action; yet if any actions are urged, the actions are likely to be framed in the language of self-defense or the pursuit of just goals.<sup>20</sup> When AiM is properly understood, it is clear that this rhetorical method, while oblique in its form, is actually quite direct in operation.<sup>21</sup>

AiM's directness can be seen in both its widespread usage by *genocidaires* and its effectiveness. First, AiM has historically been an almost invariable harbinger of genocide. As this Article explains, AiM has been commonly used in atrocities committed by Nazis, Serbs, and Hutus, among others. This is a peculiar feature, not of genocide, but of AiM since non-genocidal forms of AiM have also been ubiquitous with respect to other forms of persecution. This can be seen in what this Article will describe as the myths of the Indian giver, the black rapist, and the murderous Jew.

Second, AiM is extraordinarily effective as a means of facilitating genocide and other forms of persecution. This is largely because of the manner in which it legitimizes the crimes it describes, but also because AiM serves at least five other functions, both in genocidal and non-genocidal contexts: to shock, to silence, to threaten, to insulate, and, finally, to motivate or incite. The extraordinary efficacy of this method,

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international community will go through to regulate incitement while arguing that this might be difficult but it is necessary). This theory, however, has not been supported by the sorry history of the post-Nuremberg period.

19. The "directness" requirement is explained *infra* Part IV. The Rome Statute of the ICC also prohibits direct and public incitement to commit genocide. The Rome Statute has been criticized for weakening the criminal prohibition against incitement to genocide on the grounds that "the status of incitement from a crime in its own right to a mode of criminal participation in genocide." Thomas E. Davies, Note, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*, 22 HARV. HUM. RTS. J. 245, 245 (2009).

20. See Karen Eltis, *A Constitutional "Right" to Deny and Promote Genocide? Preempting the Usurpation of Human Rights Discourse Towards Incitement from a Canadian Perspective*, 9 CARDOZO J. CONFLICT RESOL. 463, 464–65 (2008) ("[G]enocidal affirmations are increasingly cast in human rights discourse as a religious right or a right of the oppressed to self-defense or self-determination, often preceded by the denial of previous atrocities perpetrated against the vilified group.").

21. See *infra* Part III.B (explaining how AiM functions).

combined with the great frequency of its usage, suggests that it should raise the same flags as the more commonly discussed methods of demonization and dehumanization. In contrast to these techniques, however, AiM is more direct in the sense that it communicates a specific message to its listeners (i.e., do unto others as they would do unto you).

This Article demonstrates that AiM is sufficiently direct to constitute incitement to genocide. In Part II, this Article will situate the surprising ubiquity of AiM, both in modern genocide and in other persecutions. This is important to understand because it shows two things. On the one hand, it shows that the technique is sufficiently commonplace to be readily understood—in its gruesome implications—by its hearers. On the other hand, this frequency of usage suggests that genocide doctrine needs to account for it carefully. Part III will show why AiM has become so commonplace (i.e., because it works). AiM is strikingly effective, not only at motivating genocide but also at meeting the perpetrators' psychological needs and fulfilling a number of other functions necessary to subject a victim population to the prospect of mass-murder. Part IV will build on these demonstrations, showing that this widespread and causally effective technique should be considered sufficiently "direct" to meet the "directness" element for charging incitement to genocide. Part V will show why other approaches to the treatment of AiM are either too loose or too stringent.

## II. THE OMNIPRESENCE OF ACCUSATION IN A MIRROR

### A. *The General Pervasiveness of the Practice*

AiM's genocidal directness can be seen first in the frequency with which it is used as a precursor to mass-murder. As a general rule, the more frequently a trope is repeated in common discourse, the more readily its meaning is understood. It is in this sense that Judith Butler observes, "[I]f a performative provisionally succeeds . . . then it is . . . only because that action echoes prior actions, and accumulates the force of authority through the repetition or citation of a prior and authoritative set of practices."<sup>22</sup> AiM operates by issuing false claims against a vulnerable population through repetition in a manner that listeners have already been primed by prior practices to understand as a call to arms.

AiM has been widespread not only among those who intend to perpetrate genocide, but also among a wide range of persons who consciously or unconsciously defame persecuted minorities. This is illustrated in the myths of the Indian giver, black racist, and murderous

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22. JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 51 (1997).

Jew.<sup>23</sup> Genocide scholars will better understand the concept if they situate it within a broader domestic and international human rights context. Similarly, civil and human rights scholars will better understand other forms of discrimination and persecution if they can discern the continuities between domestic defamations and genocidal murder.<sup>24</sup> The commonness of the technique is important to appreciate, not only because it underscores the need to identify its occurrence in genocidal and pre-genocidal contexts and to respond with appropriate alacrity, but also because it underscores how critical it is for courts to recognize its relationship to incitement.

### B. Pervasiveness in Twentieth Century Genocide

In its genocidal form, AiM has been used and refined by Nazi, Serbian, and Hutu propagandists.<sup>25</sup> Adolf Hitler, for example, warned that Jews intended to engage in mass-murder while he devised his own plans for Aryan domination.<sup>26</sup> Similarly, the International Criminal Tribunal for the Former Yugoslavia observed this phenomenon in Serbia: “In articles, announcements, television programs and public proclamations, Serbs were told that they needed to protect themselves from a fundamentalist Muslim threat . . . that the Croats and Muslims were preparing a plan of genocide against them.”<sup>27</sup> Indeed, this form of propaganda has been so widely used as a means of inciting genocide that it can properly be classified with demonization and dehumanization as a basic form of genocidal rhetoric.<sup>28</sup>

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23. See *infra* Part II.D (exploring the myths of the Indian giver, black racist, and murderous Jew).

24. Some readers have cautioned that grouping genocidal incitement together with lesser group defamations could create problems for the freedom of speech. This assumes, however, that these parallels are drawn for regulatory or punitive purposes. In fact, a better understanding of the commonness and efficacy of AiM—even in domestic, non-regulable contexts—can advance our understanding of the consequences of certain forms of communication in ways that have little to do with criminal prosecution. Among other implications, it may substantiate Alexander Tsesis’s argument regarding the long-term effects of hate speech. See Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 731 (2000) (“[H]ate speech is not only dangerous when it poses an immediate threat of harm, but also when it is systematically developed and thereby becomes part of culturally acceptable dialogue.”).

25. Benesch, *supra* note 6, at 511.

26. ADOLF HITLER, *MEIN KAMPF* 65 (Ralph Manheim trans., Houghton Mifflin 1971) (1927).

27. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 91 (Geneva Convention, May 7, 1997), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf>.

28. Dehumanization impugns the target population with impaired biological capacity, while demonization charges them with a depraved moral condition. See DANIEL JONAH GOLDHAGEN, *WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ASSAULT ON HUMANITY* 320 (2009).

### C. Genocide Cases

Some of the most important genocide law cases illustrate the tactic of AiM, although they discuss it with varying degrees of explicitness. For present purposes, these cases are interesting not only for their doctrinal development, but also for their documentation of the relationship between AiM and incitement to genocide. It is telling that the history of modern incitement law is virtually coextensive with the modern history of AiM: incitement is invariably accompanied by AiM in law as it is in fact.

#### 1. Nazi Genocide: The Nuremberg Trials

Adolf Hitler and the Nazis used AiM against the Jews during Hitler's rise to power and throughout the Nazi regime. In *Mein Kampf*, Hitler charged, "[I]f, with the help of his Marxist creed, the Jew is victorious over the other peoples of the world, his crown will be the funeral wreath of humanity and this planet will, as it did millions of years ago, move through the ether devoid of men."<sup>29</sup> The Nazis' AiM technique evolved in tandem with their human rights abuses leading up to genocide.<sup>30</sup> Early on, for example, Nazi propagandist Josef Goebbels wrote about fictitious Jewish plans to sterilize Germans at a time when Germans were actually sterilizing thousands of Jewish victims, as well as persons with various disabilities.<sup>31</sup> Later, as the German government escalated its persecution of Jews to mass-murder, Nazi AiM was similarly upgraded.<sup>32</sup> Thus, Goebbels asked in a 1941 pamphlet, "Who should die, the Germans or the Jews? . . . You know what your eternal enemy and opponent intends for you. There is only one instrument against his plans for annihilation."<sup>33</sup>

The International Military Tribunal ("IMT") at Nuremberg provides a window into some of the Nazis' AiM technique, although Hitler and many other Nazi perpetrators were able to avoid prosecution for their crimes. The IMT tried two defendants, Julius Streicher,<sup>34</sup> editor of the notoriously anti-Semitic Nazi tabloid *Der Stürmer*, and senior Nazi propaganda official Hans Fritzsche, for acts that today would be

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29. HITLER, *supra* note 26, at 65.

30. See Benesch, *supra* note 6, at 505 (asserting that as the genocide expanded, so too did AiM).

31. See *id.* (noting that Goebbels emphasized the Jews' fictitious plan to sterilize the Germans in his newspaper articles).

32. *Id.*

33. *Id.*

34. See THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, PART 10, at 1 (H.M. Attorney-General By His Majesty's Stationery Office, 1946) (restating the record between the president of the tribunal and Streicher's defense counsel, Dr. Marx).



charged incitement to genocide.<sup>35</sup> Since the Nuremburg trials preceded the Genocide Convention, the defendants were alternatively tried instead for crimes against humanity.<sup>36</sup> Both Streicher and Fritzsche had engaged in AiM.<sup>37</sup> Streicher, for example, accused the Jews of harboring genocidal intent against the Germans, writing in May 1939 that the Jews must be exterminated precisely for this reason:

A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.<sup>38</sup>

Fritzsche, head of the German Propaganda Ministry's Radio Division, was accused of falsifying news to incite the German people to commit atrocities.<sup>39</sup>

Although Streicher denied that he was advocating the literal killing of Jews, prosecutors established that he had continued his incitement after he knew that thousands of Eastern European Jews had been slaughtered.<sup>40</sup> Streicher was ultimately convicted by the Nuremburg tribunal and executed in what has been called "the most famous conviction for incitement."<sup>41</sup> Fritzsche, by contrast, was acquitted at Nuremburg, on the grounds that his language was insufficiently direct and his intent was insufficiently clear. Specifically, the court found that Fritzsche did not have control over the development of propaganda policies, but was instead merely a conduit for directives from more senior officials.<sup>42</sup> Nevertheless, a German court later convicted Fritzsche on similar charges and sentenced him to nine years of hard labor.<sup>43</sup> The German appeals court affirmed the conviction, emphasizing that Fritzsche had practiced what one might call AiM.<sup>44</sup>

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35. *See id.* (discussing Streicher's involvements in demonstrations against the Jewish population).

36. *See* Benesch, *supra* note 6, at 509 (explaining that because the crime of incitement to genocide was not yet known, Streicher and Fritzsche were charged with crimes against humanity).

37. *See id.* at 510–11 (asserting that both Streicher and Fritzsche used the AiM technique).

38. *Id.* at 510 (quoting MARTIN GILBERT, *THE SECOND WORLD WAR: A COMPLETE HISTORY* 731 (2004)).

39. *See id.* at 510 (discussing Fritzsche's accusation and subsequent acquittal).

40. *See id.* (recognizing that while Streicher claimed that he had only advocated for the classification of the Jews as aliens, prosecutors were able to show that he had in fact called for the their extermination by pointing to a series of inciting articles he drafted).

41. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 550 (Sept. 2, 1998); *Media Trial*, *supra* note 3, at 143.

42. *Media Trial*, *supra* note 3, at 144.

43. Benesch, *supra* note 6, at 511.

44. *See id.* (recognizing that in affirming the conviction, the court noted that Fritzsche practiced the AiM technique).

## 2. Rwandan Genocide I: The *Mugesera* Case

Since the Nuremberg Trials, *Mugesera v. Canada* has become the leading case on AiM.<sup>45</sup> In this Canadian case, Rwandan politician Leon Mugesera was charged with inciting his fellow Hutus to massacre the Tutsis of Rwanda.<sup>46</sup> On November 22, 1992, Mugesera delivered a long, passionate speech to over 1000 Hutus in Kabaya, Rwanda.<sup>47</sup> In this oration, Mugesera warned the Hutus that they were about to be exterminated by “inyenzi,” a term that has been translated as “cockroaches,” and he urged the Hutus to kill the Tutsis. The next day, several killings took place nearby.<sup>48</sup> Less than a year and a half later, the Rwandan genocide began in earnest.<sup>49</sup> But it was not the Tutsis who massacred the Hutus. Rather, it was the Hutus who attacked the Tutsis, killing at least 500,000.<sup>50</sup>

The AiM technique was used throughout the Rwandan massacre, not only by Mugesera, but also by other Hutu leaders who falsely accused Tutsis of plotting precisely the crimes that the Hutus were plotting against them.<sup>51</sup> For example, in 1991, La Médaille Nyiramacibiri claimed that Tutsis were conspiring to “clean up Rwanda . . . by throwing Hutu in the Nyabarongo [River].”<sup>52</sup> This accusation would become infamous when Leon Mugesera leveled it against Tutsis the following year.<sup>53</sup> The specificity of the accusation is significant because the Hutus did not merely charge Tutsis with murderous intent; rather, they accused them specifically of wanting to throw Hutus to their death in the Nyabarongo. This is a perfect example of inversion,

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45. See *Mugesera v. Canada* (Minister of Citizenship and Immigration) (2003), [2004] 1 F.C. 325 (Can. Que. Fed. Ct. App.) (ordering the deportation of Rwandan politician for using speech to incite people to commit crimes against humanity).

46. See *Mugesera v. Canada*, (Minister of Citizenship and Immigration) [2005] 2 S.C.R. 100 (Can.) (discussing how Mugesera used extremely violent language to incite the Hutus to exterminate the Tutsi).

47. See Benesch, *supra* note 6, at 486 (citing DES FORGES, *supra* note 1, at 83–86; *Broadcasting Genocide: Censorship, Propaganda & State-Sponsored Violence in Rwanda 1990–1994*, ARTICLE 19, 18–20, 38–40 (Oct. 15, 1996) [hereinafter ARTICLE 19], <http://www.article19.org/pdfs/publications/rwanda-broadcasting-genocide.pdf> (analyzing the Mugesera speech and deeming it “the most explicit call for violence against Tutsi civilians and Hutu opposition supporters at that time”).

48. *Mugesera*, [2004] 1 F.C. para. 7.

49. THE INTERNATIONAL PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS, RWANDA: THE PREVENTABLE GENOCIDE § 14.20 (1998) [hereinafter PREVENTABLE GENOCIDE], available at <http://www.scribd.com/Report-Rowanda-Genocide/d/45636507>.

50. *Id.* § 14.80.

51. DES FORGES, *supra* note 1, at 65 (recounting that Hutu leaders often “attributed to Tutsi the words that Hutu themselves would eventually use in inciting the slaughter of Tutsi”).

52. *Mugesera*, [2004] F.C. para. 227.

53. *Id.* para. 172.

considering many Tutsis were thrown to their deaths in the very same river.

Mugesera's speech is worth considering in detail, as it has become paradigmatic of AiM. Charging the "inyenzis" with various capital crimes, such as attempting to demoralize military troops, Mugesera insisted that capital punishment must be meted out by the people if the government did not take action:

I should like to tell you that we are now asking that these people be placed on a list and be taken to court to be tried in our presence. If they (the judges) refuse, it is written in the Constitution that 'ubutabera buberabaturage.' In English, this means that [TRANSLATION] 'JUSTICE IS RENDERED IN THE PEOPLE'S NAME.' If justice therefore is no longer serving the people . . . we must do something ourselves to exterminate this rabble.<sup>54</sup>

Having urged the Hutus to exterminate the Tutsis because of the Tutsis' purported criminality, Mugesera added urgency to his charge by insisting that the Tutsis would otherwise exterminate them. "'Why do they [the government] . . . not exterminate all of them?' he asked, 'Are we really waiting till they come to exterminate us?'"<sup>55</sup> He insisted the issue was neither speculative nor distant. "'These people called Inyenzis,' he emphasized, 'are now on their way to attack us.'"<sup>56</sup> Moreover, he insisted that this lethal threat was central to the Tutsis' being, "I am telling you, and I am not lying, . . . they only want to exterminate us. They only want to exterminate us: they have no other aim. We must tell them the truth."<sup>57</sup> It was precisely to meet this inverted genocidal threat that Mugesera urged his countrymen, "[W]e must all rise, we must rise as one man . . ."<sup>58</sup>

After the war, Mugesera moved to Quebec, where some of his countrymen insisted that the government deport him for inciting genocide and committing crimes against humanity. The Canadian Minister of Citizenship and Immigration began deportation proceedings against him, which were followed by a long and complicated process through the Canadian immigration and judicial system. Under Canadian law, statements constitute incitement to genocide if they are "1) likely to incite, and 2) are made with a view to inciting the commission of the offence."<sup>59</sup> An adjudicator determined that the allegations against Mugesera were valid and issued a deportation order

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54. *Id.* at para. 17 (emphasis added).

55. *Id.* at para. 16.

56. *Id.* at para. 13.

57. *Id.* at para. 13.

58. *Id.* at para. 29.

59. *Mugesera*, [2005] 2 S.C.R. para. 6.

against him, which Canada's Immigration and Refugee Board (Appeal Division) upheld. Mugesera appealed next to a federal trial court, which dismissed his application for judicial review on incitement to commit murder, genocide or hatred, but affirmed with respect to the allegation of crimes against humanity.

Nevertheless, a Canadian appeals court reversed the lower court's decision, rejecting the Minister's argument that Mugesera's speech was an incitement to genocide or a crime against humanity. More broadly, the court was not convinced that Mugesera was motivated by ethnic animus or that his intent was to incite murder.<sup>60</sup> However, the court acknowledged that the prosecution's case could be taken to mean "that the speech could be very valuable in establishing the presence of a criminal intent when the perpetrators of the genocide were brought to justice."<sup>61</sup>

The Supreme Court of Canada reversed, finding that Mugesera's speech "was likely to incite, and was made with a view to inciting murder."<sup>62</sup> The Court held Mugesera culpable for his criminal acts because he met the two criminal act requirements of incitement: his words were direct and public. At the same time, the Court held Mugesera had specific intent, since as an educated and sophisticated man he must have known the import of his words, which were made at a public event before a primed audience at a time when ethnic violence was already occurring. Mugesera's use of AiM was central to this incitement.

### 3. Rwandan Genocide II: The Media Trial

The ICTR's 2003 tribunal decision and 2007 appellate decision in *Prosecutor v. Nahimana, et al.*, better known as the *Media Trial*, have quickly joined the *Nuremburg* and *Mugasera* trials in the pantheon of leading cases on incitement to genocide.<sup>63</sup> For present purposes, the *Media Trial* is particularly important because the trial featured considerable testimony on AiM. The three *Media Trial* defendants were all prominent Rwandan media figures: Jean-Bosco Barayagwiza and

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60. See *Mugesera*, [2004] F.C. paras. 44, 58 (arguing that there was nothing in the record to suggest that the massacres that took place were coordinated and for a common purpose, nor was there any evidence in the record that Mugesera's speech "was part of any strategy whatever").

61. *Id.* para. 43.

62. *Mugesera*, [2005] 2 S.C.R. para. 7 (stating that the elements of the actus reus were met, as "Mugesera conveyed to his listeners, in extremely violent language, the message that they faced a choice of either exterminating the Tutsi, the accomplices of the Tutsi, and their own political opponents, or being exterminated by them").

63. See *Media Trial*, *supra* note 3, at 140-41 (pointing out that the *Media Trial* was the first case since the trials at Nuremburg to face an international tribunal on the issue of free expression in the media with respect to genocide).

Ferdinand Nahimana were founders of the notorious Radio Télévision Libre des Mille Collines (“RTLM”), also known as “Radio Machete,” while Hassan Ngeze was editor of the equally discredited newspaper *Kangura*.<sup>64</sup>

Hassan Ngeze, an experienced journalist, edited and published *Kangura* (translated as “wake others up”), which was considered the most popular newspaper in Rwanda for its time.<sup>65</sup> In December 1990, *Kangura* ran an article entitled “Appeal to the Conscience of the Hutu,” which described the Tutsis as “bloodthirsty” and warned readers that Tutsi “infiltrators” were conspiring to seize control of the country and rule over the Hutus.<sup>66</sup> Hutus were encouraged to “take all necessary measures to deter the enemy from launching a fresh attack.”<sup>67</sup> In other issues, *Kangura* continued its drumbeat of anti-Tutsi propaganda.<sup>68</sup> Here again, a vulnerable population (Tutsis) was described as “bloodthirsty” in terms that would better describe the views and intentions of the writer towards that population. In the same way, *Kangura* misreported that Tutsi soldiers captured by the government forces confessed that they “had come to clean the county of the filth of Hutu,” when actually it was the Hutu who frequently spoke of cleansing their communities of the Tutsi “filth.”<sup>69</sup> *Kangura* was not, however, alone in this approach. In April 1992, the *Jyambere* newspaper accused Tutsi parties of arming their youth groups, demonstrating by AiM precisely what Hutu forces were planning at the time.<sup>70</sup>

Ferdinand Nahimana was a prominent historian and university administrator at the National University of Rwanda before being appointed to the directorship of the Rwandan Office of Information. In that position, he oversaw Radio Rwanda, the national radio station, from 1990 until 1992, during which he ordered five Radio Rwanda broadcasts describing a supposed Tutsi plot to murder several Hutu leaders.<sup>71</sup> Hundreds of Tutsis were murdered because of these broadcasts,<sup>72</sup> which led to Nahimana’s termination.<sup>73</sup> Within months of

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64. *Nahimana v. Prosecutor*, Case No. ICTR-99-52-T, Judgment, ¶ 1 (Nov. 28, 2007), [http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128\\_judgement.pdf](http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgement.pdf); see also *Media Trial*, *supra* note 3, at 140–41.

65. See *Media Trial*, *supra* note 3, at 157 (illustrating that during its publication, the *Kangura* newspaper was the most widely read Rwandan newspaper).

66. *Nahimana*, ICTR-99-52-T, ¶ 259.

67. *Id.*

68. See *Media Trial*, *supra* note 3, at 157–58. The Tutsis were described as being “biologically distinct” from Hutus due to their bloodthirsty and malicious nature. *Id.*

69. DES FORGES, *supra* note 1, at 79.

70. *Id.*

71. *Media Trial*, *supra* note 3, at 158–59.

72. *Nahimana Judgment*, ICTR-99-52-T, Judgment, ¶ 691 (Nov. 28, 2007).

73. *Id.* ¶ 690.

his firing, Nahimana co-founded and helped to develop and lead a new radio station, RTLM, that he hoped would better reflect the views of his party.<sup>74</sup> During two formal meetings on November 26, 1993, and February 10, 1994, Rwanda's Minister of Information warned Nahimana and other RTLM leadership that they were inciting ethnic violence and hatred against Tutsis.<sup>75</sup> Nevertheless, RTLM continued to broadcast flagrant propaganda encouraging such animus, including one notorious episode in which RTLM announced that:

One hundred thousand young men must be recruited rapidly. They should all stand up so that we kill the Inkotanyi and exterminate them . . . . [T]he reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it.<sup>76</sup>

Jean-Bosco Barayagwiza, a lawyer by training, co-founded RTLM with Nahimana and helped to lead the station while directing the political affairs function as a senior official of the Rwandan Ministry of Foreign Affairs.<sup>77</sup> If Nahimana was the "top man" at RTLM, Barayagwiza was considered the "number two."<sup>78</sup> During the time of the Rwandan genocide, Barayagwiza continued in his position with RTLM.<sup>79</sup>

The Tribunal's judgment indicated that the Rwandan government had deliberately and self-consciously used AiM. Alison Des Forges testified at length about the *Note*, explaining the significance of its methods in the Rwandan tragedy, and the *Nahimana* tribunal describes Des Forges's testimony regarding AiM in detail.<sup>80</sup> Nevertheless, Professor Gregory Gordon, who acknowledges the Tribunal's one key reference to a pre-genocide broadcast that warned of murderous Tutsi intentions, criticizes the Tribunal for not adequately analyzing it since: "[o]ut of the hundreds of RTLM tapes introduced into evidence, one might expect to find genocide-period passages where Tutsis were falsely accused of committing or planning to commit against Hutus the types of atrocities extremist Hutus were actually committing against Tutsis."<sup>81</sup>

Ngeze, Barayagwiza, and Nahimana were all convicted of genocide, direct and public incitement to commit genocide, conspiracy to commit

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74. *Id.* ¶¶ 489–90; *Media Trial*, *supra* note 3, at 159.

75. *Nahimana Judgment*, ICTR-99-52-T, ¶¶ 573–607; *Media Trial*, *supra* note 3, at 161–62.

76. *Nahimana Judgment*, ICTR-99-52-T, ¶ 396.

77. *Id.* ¶ 6; *Media Trial*, *supra* note 3, at 165.

78. *Nahimana Judgment*, ICTR-99-52-T, ¶ 511; *Media Trial*, *supra* note 3, at 165.

79. *Nahimana Judgment*, ICTR-99-52-T, ¶ 541–42; *Media Trial*, *supra* note 3, at 166.

80. *Nahimana Judgment*, ICTR-99-52-T, ¶ 111.

81. *Media Trial*, *supra* note 3, at 186–87.

genocide, and crimes against humanity.<sup>82</sup> Barayagwiza was sentenced to thirty-five years incarceration, while Ngeze and Nahimana were sentenced to life imprisonment.<sup>83</sup>

On November 28, 2007, the Appeals Chamber affirmed the Tribunal's judgment in part, reducing Ngeze's sentence to thirty-five years' imprisonment,<sup>84</sup> Nahimana's to thirty,<sup>85</sup> and Barayagwiza's to thirty-two.<sup>86</sup> The Appeals Chamber concluded that the appellants "were consciously, deliberately and determinedly using the media to perpetrate direct and public incitement to genocide."<sup>87</sup> Although the appeals court was no less vulnerable than the original tribunal to Gordon's criticism that it failed to properly catalog AiM, the appeals court nevertheless identified this passage in the *Kangura* as inciteful:

If the *Inkotanyi* have decided to massacre us, the killing should be mutually done. This boil must be burst. The present situation warrants that we should be vigilant because they are difficult. . . . It will be necessary for the majority people and its army to defend itself . . . . On that day, blood will be spilled. On that day, much blood must have been spilled.<sup>88</sup>

The Appeals Chamber noted that this article contained an appeal to "the majority people" to kill the *Inkotanyi* and their "accomplices within the country" (meaning the Tutsis) in case of an attack by the RPF. Accordingly, the Appeals Chamber found that this article constituted direct and public incitement to commit genocide.<sup>89</sup>

#### *D. Other Examples*

To fully grasp the pervasiveness of AiM, it is helpful to consider not only the handful of well-known twentieth-century genocide cases, but also the range of other persecutions in which the technique is used. The contemporary genocidal practice is merely a specific application of a more general phenomenon. To choose just one current example from today's newspaper headlines,<sup>90</sup> consider that much of the violent persecution that Egypt's Coptic Christians now suffer is related to the continually repeated but unfounded allegation that the Coptic Church is

82. *Nahimana Judgment*, ICTR-99-52-T, ¶¶ 1105–08; *Media Trial*, *supra* note 3, at 140–41.

83. *Nahimana Judgment*, ICTR-99-52-T, ¶¶ 1105–08.

84. *Nahimana v. Prosecutor*, Case No. ICTR 99-52-A, Appeal, ¶ 1115 (Nov. 28, 2007).

85. *Id.* ¶ 1052.

86. *Id.* ¶ 1097.

87. *Id.* ¶ 73 (Shahabuddeen, J., partially dissenting).

88. *Id.* ¶ 772.

89. *Id.*

90. See David D. Kirkpatrick, *Egypt's Christians Fear Violence as Changes Embolden Islamists*, N.Y. TIMES, May 31, 2011, at A1 (highlighting an unconfirmed case where a young Muslim alleged that Coptic Christians abducted her and tattooed her with a cross).

abducting and abusing Coptic women who convert to Islam. Ironically, the opposite is occurring—Egyptian Muslims are kidnapping Coptic women and forcing them to convert to Islam.<sup>91</sup> This is a textbook example of AiM.

Historically, AiM prefigures many, if not all, of the worst persecutions that despised groups have faced. They include, for example, what will be described below as the myths of the black rapist, the Indian giver, and the murderous Jew. In each case, the victim is falsely accused of precisely the crimes that the perpetrator would visit upon him or her.

Situating AiM within this broader context allows us to better appreciate its nature, frequency, etiology, and function. In so doing, it demonstrates that this practice often amounts to a direct, public, and effective means of incitement. But at the same time, this contextualization suggests an inconvenient insight obscured by the association of the practice with its explicit elucidation in the *Note*—that AiM, while sometimes a deliberate propagandistic tactic, also sometimes expresses an unconscious impulse.

### 1. The Myth of the Indian Giver

Consider the term “Indian giver” with all that it signifies within American idiomatic English: the notion that Indians have so frequently, recklessly, and materially breached their promises to the white man as to render promise-breaking a defining feature of their character—indeed, a feature so defining of their character as to justify applying the name to the promise-breaking of all the world’s peoples. The Oxford English Dictionary illustrates that the term has long signified an illusory form of gift giving.<sup>92</sup>

It is not coincidental that *promise-breaking* is the evil that has been uniquely visited upon Native Americans *by* the white man. Indeed, the U.S. Commission on Civil Rights titled its most recent evaluation of Native American health care policy *Broken Promises*.<sup>93</sup> Even a

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91. See CHRISTIAN SOLIDARITY INT’L & COPTIC FOUND. FOR HUMAN RIGHTS, THE DISAPPEARANCE, FORCED CONVERSIONS, AND FORCED MARRIAGES OF COPTIC CHRISTIAN WOMEN IN EGYPT (Nov. 2009) (asserting that the abduction, forcible marriage, and conversion of Coptic Christian women by Muslim men is considered a crime against humanity); Raymond Ibrahim, *Islamists Project Islam’s Worst Traits onto Christians*, MIDDLE EAST F. (May 25, 2011), <http://www.meforum.org/2915/islamists-project-islam-worst-traits-onto> (alleging that the abduction and conversion of Coptic Christian women by Muslim men is a “notorious phenomenon in Egypt”).

92. See OXFORD ENGLISH DICTIONARY 856–57 (2d ed. 1989) (substantiating the term’s long usage). When the material in this section was first delivered before an international audience in Toronto, references to the term “Indian giver” were met with blank stares. In the United States, audiences understand the term completely.

93. U.S. COMM’N ON CIVIL RIGHTS, *BROKEN PROMISES: EVALUATING THE NATIVE*



cursory Google search for the words “broken promises” and “Indians” yields an extraordinary volume and range of materials documenting promises broken against Native Americans.<sup>94</sup>

The best-known example is the United States’s historical breach of promises with respect to Indian lands. For example, the Northwest Ordinance ensured Indian tribes that “lands and property shall never be taken from [the Indians] without their consent[,] and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress.”<sup>95</sup> The United States repeatedly and violently breached this promise. For example, during the infamous “trail of tears,”<sup>96</sup> the United States government compelled the relocation of Indian tribes located east of the Mississippi River under the Indian Removal Act.<sup>97</sup>

The stereotypical view of Indians as promise-breakers—a deeply entrenched American English idiom—is a classic example of human rights inversion, or AiM: white North Americans systematically broke their promises to Native Americans while accusing Indians of precisely this malfeasance, going so far as to name one form of promise-breaking after them.

## 2. The Myth of the Black Rapist

A second example is the myth of the black rapist. This defamation was so widespread in the Jim Crow South<sup>98</sup> that it provided a leading justification—perhaps the leading justification—for the practice of lynching,<sup>99</sup> which took over 3700 American lives through 1930.<sup>100</sup> Many black men accused of raping white women were lynched, when their only true crime may have been allegedly glancing for a moment too long at a white woman.<sup>101</sup> Unsubstantiated allegations were

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AMERICAN HEALTH CARE SYSTEM (Sept. 2004).

94. See, e.g., ENCYCLOPEDIA OF NATIVE AMERICAN WARS AND WARFARE 143 (William B. Kessel & Robert Wooster eds., 2005) (“Disease, broken promises, corruption, and the poor lands reserved for Indian use decimated Native American populations.”).

95. Northwest Ordinance, 1 Stat. 50 (1787).

96. Lindsay Glauner, *The Need for Accountability and Reparation: 1830–1976 The United States Government’s Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 931–32 (2002).

97. INDIAN REMOVAL ACT OF 1830, reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 52 (Francis Paul Prucha ed., 3d ed. 2000).

98. See DIANE MILLER SOMMERVILLE, RAPE AND RACE IN THE NINETEENTH-CENTURY SOUTH 223 (2004) (“The American South’s hysterical fear of black men as rapists, often referred to as the ‘rape myth’ or ‘rape complex,’ is well documented and has been memorialized in the pages of fiction and nonfiction alike for over a hundred years.”).

99. This was famously the point of the classic novel *To Kill a Mockingbird*. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

100. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 118 (2002).

101. See SOMMERVILLE, *supra* note 98, at 224 (“To be a black man accused of raping or

sufficient because “[w]hite supremacy norms did not permit white jurors to believe a black man over a white woman . . . . Because most southern white men believed that black males secretly lusted after ‘their’ women, they generally found rape allegations credible.”<sup>102</sup> White men were willing to believe that black males secretly lusted after and forcibly raped white women because, in numerous cases, they harbored precisely these same desires and committed exactly these same crimes against black women.<sup>103</sup>

It is clearly not coincidental that rape was systematically inflicted upon African-American women throughout and well after the long period of slavery.<sup>104</sup> These rapes were almost never punished in the Jim Crow South.<sup>105</sup> Until emancipation, black women lacked the right to bring charges of rape, but some racial distinctions persisted in rape law well into the later years of Reconstruction.<sup>106</sup> As recently as 1867, Kentucky law defined a rapist as one who shall “unlawfully and carnally know any white woman, against her will or consent.”<sup>107</sup> Even with the change in rape law, white men frequently used rape as a “weapon of terror” against black women in the Reconstruction South.<sup>108</sup>

### 3. The Myth of the Murderous Jew

Since ancient times, European anti-Semites constructed the Jew as a murderous criminal.<sup>109</sup> This defamation was frequently the precursor to anti-Jewish violence and mass-killings.<sup>110</sup> This can be seen in historical examples, such as “blood libel,”<sup>111</sup> which is the myth that Jews kill

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attempting to rape a white woman in the American South was to face certain death, at the hands of either the executioner or an angry mob.”).

102. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 118 (2004).

103. See, e.g., RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 178 (2003) (“[T]hroughout the Reconstruction period, violent white supremacists used rape as a weapon of terror aimed at intimidating or punishing blacks who dared to read, travel, work for themselves, or pursue politics.”).

104. See, e.g., Osagie K. Obasogie, *Anything but a Hypocrite: Interactional Musings on Race, Colorblindness, and the Redemption of Strom Thurmond*, 18 YALE J.L. & FEMINISM 451, 464–69 & nn.37–63 (2006) (describing the widespread rape of African-American women by white Southern men during the period slavery and throughout the Jim Crow South).

105. FRIEDMAN, *supra* note 100, at 119.

106. SOMMERVILLE, *supra* note 98, at 148.

107. *Id.*

108. *Id.*

109. MARVIN PERRY & FREDERICK SCHWEITZER, ANTISEMITISM: MYTH AND HATE FROM ANTIQUITY TO THE PRESENT 43–72 (2002).

110. ROBERT S. WISTRICH, A LETHAL OBSESSION: ANTI-SEMITISM FROM ANTIQUITY TO THE GLOBAL JIHAD 90 (2010).

111. See *id.* at 88–90 (noting that the term “blood libel” was invented in 1944). The term arose after the murder of a twelve-year-old Christian boy just before Easter. *Id.* The crime was attributed to local Jews without any evidence, with a claim that “the Jews of Norwich bought a

gentile children for ritual purposes.<sup>112</sup> Since twelfth-century England, the primary version of the blood libel is that Jews kill Christian babies in order to use their blood to bake traditional flatbread, or *matzah*, on the holiday of Passover.<sup>113</sup> Throughout the Middle Ages, the recurrent false accusation of Jewish ritual murder was invariably followed by the actual murder of countless Jews.<sup>114</sup> The most salient, contemporary form of the myth of the murderous Jew, however, has been the Holocaust inversion defamation, which accuses Jews of perpetrating the crimes that were perpetrated against them.<sup>115</sup> In some cases, the speaker himself is intending to perpetrate such crimes against Jews, especially Israeli Jews, in the future.

It has become commonplace in the Middle East for Israel's extremist adversaries to accuse the Jewish state of harboring genocidal ambitions while simultaneously urging the destruction of the Jewish state and the Jewish people. Over the last several years, for example, Iranian President Mahmoud Ahmadinejad has repeatedly engaged in AiM,<sup>116</sup> insisting that Israelis "have no boundaries, limits, or taboos when it comes to killing human beings," while simultaneously asserting that Israel "should be wiped off the map."<sup>117</sup> As if to dispel any ambiguities about his intentions, President Ahmadinejad paraded a Shahab-3 missile through the streets of Tehran in 2008 with the message, "Israel must be wiped off the map."<sup>118</sup> As historian Robert Wistrich observed, "There is a compulsive annihilationist dimension to these declarations."<sup>119</sup>

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Christian child before Easter and tortured him . . ." *Id.* Ritual crucifixion of a Christian was, according to claimant Theobald, a way to expedite the coming of the Messiah. *Id.* "The blood libel was linked . . . to the notion of an international Jewish conspiracy." *Id.*; ANTISEMITIC MYTHS: A HISTORICAL AND CONTEMPORARY ANTHOLOGY 11–19 (Marvin Perry & Frederick M. Schweitzer eds., 2008) (collecting historical examples of the blood libel from ancient to early modern times).

112. WALTER LAQUEUR, *THE CHANGING FACE OF ANTI-SEMITISM: FROM ANCIENT TIMES TO THE PRESENT* 55 (2006).

113. *See id.* at 55–57 (describing this use of the blood libel beginning in 1144).

114. WISTRICH, *supra* note 110, at 90.

115. Paul Iganski and Abe Sweiry call this practice "playing the Nazi card." PAUL IGANSKI & ABE SWEIRY, *EUROPEAN INSTITUTE FOR THE STUDY OF CONTEMPORARY ANTISEMITISM, UNDERSTANDING AND ADDRESSING THE 'NAZI CARD'* (2009).

116. Gordon, *From Incitement to Indictment?*, *supra* note 6, at 900–01; Kenneth L. Marcus, *Iran's Nuclear Anti-Zionism Is Genocidal, Not Political*, *INFOCUS Q.*, Winter 2009, available at <http://www.jewishpolicycenter.org/1521/iran-nuclear-anti-zionism-genocidal-political>; Kenneth L. Marcus, *Iranian Incitement to Genocide 5* (unpublished manuscript), available at <http://digitalcase.case.edu:9000/fedora/get/ksl:marira00/marira00.pdf>.

117. There has been, however, substantial debate over the translations of Ahmadinejad's pronouncements. *See, e.g.*, Ethan Bronner, *Just How Far Did They Go, Those Words Against Israel?*, *N.Y. TIMES*, June 11, 2006, at WK4 (noting that some translators argue that Ahmadinejad was calling an end to the Jewish-Zionist state occupying Jerusalem, rather than calling for Israel to be wiped off the map).

118. Irwin Cotler, *Iran's Incitement to Genocide Can't Be Treated as Bombast*, *NAT'L POST*

Among its myriad variants, Holocaust inversion includes portraying Jews—especially Israeli Jews—as Nazis, crypto-Nazis, Nazi sympathizers, Holocaust perpetrators, or Holocaust “copycats.”<sup>120</sup> As a category of “Holocaust distortion,” inversion is distinguished in part from such kindred practices as Holocaust denial, minimization, and trivialization by its precisely targeted offensive usage—such as its tendency not only to disarm but to accuse. Several agencies and commentators have characterized Holocaust inversion not only as a form of anti-Semitism but also as a primary criterion by which contemporary anti-Semitism can be discerned.<sup>121</sup> For example, the

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(Canada) (Dec. 5, 2008), <http://network.nationalpost.com/np/blogs/fullcomment/archive/2008/12/05/irwin-cotler-iran-s-incitement-of-genocide-can-t-be-treated-as-bombast.aspx>.

119. WISTRICH, *supra* note 110, at 885. Such exhortations may constitute incitement to genocide. *See, e.g., Incitement to Indictment?*, *supra* note 6, at 864–68 (commenting that Ahmadinejad’s hostile public statements about Israel, Jews, and the Holocaust can be “divided into seven categories: (1) calling for Israel’s destruction; (2) predicting Israel’s destruction; (3) dehumanizing Israeli Jews; (4) accusing Israel of perpetrating mass murder; (5) condoning past violence against Israel and issuing threats against those who would protect Israel; (6) advocating expulsion of Israeli Jews from the Middle East; and (7) denying the Holocaust”); Marcus, *Iran’s Nuclear Anti-Zionism*, *supra* note 116; DAVID MATAS ET AL., B’NAI BRITH CAN., INDICTMENT OF IRANIAN PRESIDENT MAHMOUD AHMADINEJAD FOR INCITEMENT TO GENOCIDE AGAINST THE JEWISH PEOPLE (2007), *available at* <http://www.bnaibrith.ca/pdf/institute/IndictmentIranianPresidentMarch07.pdf> (illustrating Jewish organization B’nai Brith’s request that Canada prosecute President Ahmadinejad for inciting genocide against the Jewish people). Hassan Nasrallah, Secretary General of the Iranian-sponsored Hezbollah made the genocidal element in such declarations more explicit when he explained in 2006, “If Jews all gather in Israel, it will save us the trouble of going after them worldwide.” Elena Lappin, *The Enemy Within*, N.Y. TIMES, May 23, 2004, at V15. Nasrallah calls for “an open war until the elimination of Israel and until the death of the last Jew on earth.” Michael Rubin, *Nasrallah Urges Arabs to Evacuate Haifa*, NAT’L REVIEW ONLINE (Aug. 9, 2006), <http://www.nationalreview.com/corner/126871/nasrallah-urges-arabs-evacuate-haifa/michael-rubin>.

120. In his useful taxonomy of Holocaust distortion, Manfred Gerstenfeld has catalogued eleven distinct forms: Holocaust Promotion; Holocaust Denial; Holocaust Depreciation; Holocaust Deflection; Holocaust Inversion; Prewar and Wartime Holocaust Equivalence; Postwar Holocaust Equivalence; Accusations of Jewish Holocaust-Memory Abuse; Obliterating the Holocaust Memory; Holocaust-Memory Silencing; and Universalizing/Trivializing the Holocaust. Manfred Gerstenfeld, *The Multiple Distortions of Holocaust Memory*, 19 JEWISH POL. STUD. REV. 3–4 (2007).

121. *See, e.g.,* BERNARD HARRISON, AM. JEWISH COMM., ISRAEL, ANTI-SEMITISM, AND FREE SPEECH 22–23 (2007) (discussing how the “Nazi Analogy” is factually flawed and how the use of the analogy absent circumstances more akin to the Holocaust makes it a mere abusive epithet of anti-Semitism, not a “serious political point”); Howard Jacobson, *Wordsmiths and Atrocities Against Language: The Incendiary Use of the Holocaust and Nazism Against Jews*, in A NEW ANTISEMITISM? DEBATING JUDEOPHOBIA IN 21ST CENTURY BRITAIN 102 (P. Iganski & B. Kosmin eds., 2003) (criticizing other authors for their “stupidity” for equating Zionism with Nazism); U.S. DEP’T OF STATE, REPORT ON GLOBAL ANTI-SEMITISM 1 (2005); *Working Definition of Antisemitism*, EUROPEAN FORUM ON ANTISEMITISM (Mar. 16, 2005), <http://www.european-forum-on-antisemitism.org/working-definition-of-antisemitism/english/> (providing a contemporary example of anti-Semitism by examining how in certain countries in the Middle East the media has publicized “comparisons of Israeli leaders to Hitler and the Nazis” without government response, whereas in other countries, such as France and Germany, laws that

European Monitoring Centre on Racism and Xenophobia's ("EUMC") authoritative<sup>122</sup> working definition of anti-Semitism correctly characterizes Holocaust inversion as a discrete form of anti-Semitism.

Analogous practices have been used with other groups as well. For example, Des Forges observed that Mugesera and Ngeze (in *Kangura*) explicitly tried to connect the Tutsis with the Nazis in the course of employing AiM.<sup>123</sup> The irony in this tactic, as Des Forges recognized, is that it is the *Hutu* perpetrators who may have been admirers of Hitler and Nazi Germany.<sup>124</sup> Indeed, films about Hitler and Nazism were found in the residence of Rwandan President Juvénal Habyarimana after he was assassinated in April 1994.<sup>125</sup> Similarly, Holocaust inversion appears more deeply ironic in the face of documented collaboration, including genocidal conspiracy<sup>126</sup> between the Nazi regime and the Palestinian leadership of the Holocaust era.<sup>127</sup> The continuing influence of Nazi propaganda can be seen in the anti-Semitic doctrines of extremist Islam from World War II to the present day.<sup>128</sup>

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punish those who publicly equate Israel with Nazism have been promoted).

122. The influence of this definition, and particularly of its examples, can be seen in its rapid international adoption. See, e.g., U.S. DEP'T OF STATE, CONTEMPORARY GLOBAL ANTI-SEMITISM 6–7 (2008) (“[E]xamples of the ways in which anti-Semitism manifests itself with regard to the state of Israel taking into account the overall context could include: . . . [d]rawing comparisons of contemporary Israeli policy to that of the Nazis . . . .”); ALL-PARTY PARLIAMENTARY GROUP AGAINST ANTISEMITISM, REPORT OF THE ALL-PARTY PARLIAMENTARY INQUIRY INTO ANTISEMITISM 5 (2006) (recommending the adoption of the EUMC’s working definition). Increased international adoption of this definition is a goal of the 2009 London Declaration on Combating Antisemitism and the 2010 Ottawa Protocol of the Interparliamentary Coalition to Combat Antisemitism.

123. DES FORGES, *supra* note 1, at 79–81.

124. *Id.*

125. *Id.*

126. See KLAUS-MICHAEL MALLMANN & MARTIN CÜPPERS, NAZI PALESTINE: THE PLANS FOR THE EXTERMINATION OF THE JEWS IN PALESTINE (Krista Smith, trans., 2010) (examining the relations between the Third Reich in Germany and Arab nationalists and positing the two shared common schemes to eradicate Jews).

127. See, e.g., MATTHIAS KÜNTZEL, JIHAD AND JEW-HATRED: ISLAMISM, NAZISM AND THE ROOTS OF 9/11 (C. Meade trans., 2007) (documenting Nazi collaboration with Palestinian leadership and continuing influence of Nazi propaganda on extremist elements within Islamist movement).

128. See, e.g., JEFFREY HERF, NAZI PROPAGANDA AND THE ARAB WORLD (2009) (recounting the influence of Nazi propaganda on the development of anti-Semitic doctrines within extremist elements of the Islamic world); PAUL BERMAN, THE FLIGHT OF THE INTELLECTUALS (2010) (analyzing the continuing influence of Nazi anti-Semitism within radical Islam).

## III. EFFECTIVENESS

A. *Effectiveness as a Means of Facilitating Persecution*

Despite its evident drawbacks, AiM has turned out to be extraordinarily effective. As Catharine MacKinnon observed of one case before the International Criminal Tribunal for Rwanda, “This infamous ‘accusation in a mirror’—the propaganda technique in which one side falsely attributes attacks to the other in order to justify retaliation in kind, casting aggression as self-defense—was especially causally potent.”<sup>129</sup> That is to say, the use of AiM has a direct causal effect on the perpetration of genocide. Similarly, Des Forges explained that this tactic was used quite effectively both in specific incidents, such as the March 1992 Bugesera massacre and also more generally in the propaganda campaign to convince Hutu to rise up against the Tutsi and to exterminate them.<sup>130</sup> The Hutu officials and propagandists repeatedly employed the *Note*’s techniques, even if it cannot be proven that that they were personally familiar with the actual document.<sup>131</sup>

The technique’s effectiveness is poignantly described by Coptic activist Mounir Bishai, who describes the manner in which his community has recently been subjected to abuse in Egypt:

Suddenly we have shifted from complaints to self-defense, from demanding [our] rights to [trying to] convince the public that we are not depriving others of their rights. . . Before [Hurricane] Fitna we were known as the weak and attacked [party], and now we are being accused of amassing weapons. . . How have we suddenly turned from persecuted into persecutors, from the weak [party] into the strong and tyrannical [one], from the attacked [party] into the infamous attackers, and from the poor [party] into the rich exploiters? How did these lies become widespread, without us gaining any ground or improving our situation one whit? . . .<sup>132</sup>

The answer to Bishai’s lament has been the rhetorical effectiveness of AiM.

In order to fully understand AiM’s effectiveness, however, one must identify each of the functions that it plays. The effectiveness is most frequently addressed in terms of its legitimizing function, but, in fact, it serves at least five other primary functions, each of which must be

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129. Catharine MacKinnon, *International Decisions: Prosecutor v. Nahimana, Barayagwiza & Ngeze*, 98 AM. J. INT’L L. 325, 330 (2004).

130. DES FORGES, *supra* note 1, at 66.

131. *Id.*

132. L. AZURI, MEMRI, INQUIRY & ANALYSIS SERIES REPORT NO.646, RISING TENSIONS BETWEEN MUSLIMS, CHRISTIANS IN EGYPT (Nov. 15, 2010), available at <http://www.memri.org/report/en/0/0/0/0/0/4765.htm>.

understood to fully appreciate the extent to which it can serve as an effective form of incitement.

### B. *Functions in Facilitating Persecution*

AiM has six interrelated functions: to shock, to silence, to threaten, to insulate, to legitimize, and, finally, to motivate or incite.<sup>133</sup> First and most unmistakably, it is *shocking*, even when it is frequently repeated, which is why it is frequently repeated. No one tells Holocaust survivors—or a nation of Holocaust survivors and their children—that they are Nazis without expecting to shock. The same can be said of the inversive accusations leveled at Bosnians, Tutsis, and Copts.

But AiM is shocking in a particular manner—a manner that tends to *silence*. As Charles Lawrence has explained, the visceral “[f]ear, rage, [and] shock” of hate speech systematically preempts response.<sup>134</sup> Lawrence wrote about hate speech expressed in the United States against African Americans and other American minorities, but his observations are also applicable to other groups that have experienced human rights inversion. Given the sensitivity of many Jews to issues concerning the *Shoah*, for example, Holocaust inversions have the power not only to shock, but also to silence expression of Jewish viewpoints, including speech sympathetic to the State of Israel.<sup>135</sup> Moreover, the stereotype of Jewish conspiratorial power, combined with the use of Nazi motifs, has a peculiarly chilling effect. As activist Melanie Kaye-Kantrowitz explains, it “mutes our loud, proud Jewish energy, make[s] us afraid of seeming too powerful, too . . . well, Jewish. How can we fight injustice powerfully if we fear our power?”<sup>136</sup> The silencing function of inciteful speech is worth noting in light of the inevitable claims that those who oppose hate speech are the silencers.<sup>137</sup>

Beyond silencing, AiM is also *threatening*. It is threatening, because the ascription of guilt carries with it the threat of punishment. For example, this can be seen in the warning that Jewish students at the University of California at Irvine recently received from one recent campus speaker who said, “[I]t’s time for you to live in some fear now

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133. See KENNETH L. MARCUS, *JEWISH IDENTITY AND CIVIL RIGHTS IN AMERICA* 63–64 (2010) (introducing most of these functions).

134. Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452.

135. The point is amplified in Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL RTS. J. 1025, 1050–52 (2008).

136. Melanie Kaye/Kantrowitz, *Some Notes on Anti-Semitism from a Progressive Jewish Perspective*, JEWISH CURRENTS (Mar. 2007), <http://www.jewishcurrents.org/2007-mar-kayekantrowiz.htm>.

137. See JEWISH IDENTITY, *supra* note 133, at 71–75 (analyzing such claims).

because you were so good at dispensing fear.”<sup>138</sup> Significantly, it is not only the target group that is threatened by such forms of expressive conduct, but also bystanders who might be dissuaded from supporting the out-group.<sup>139</sup>

AiM’s threatening function is also apparent in the United States’s sad history of lynching. By the most conservative estimates, the proportion of black victims lynched for purportedly rape-related offenses varied between 26.7% and 40.6%, but some authorities suggest that in Georgia, sexual allegations were associated with more than 60% of lynchings between 1880 and 1889 and approximately half of all lynchings.<sup>140</sup> Moreover, when black men were accused of raping women, the difference between lynching and “regular” justice was sometimes more a matter of form than of substance.<sup>141</sup> Indeed, “guilt or innocence was often beside the point when southern blacks were accused of . . . sexually assaulting white women.”<sup>142</sup>

Nevertheless, AiM is presented in a manner that is frequently immune from criticism because its political guise is *insulting*. The insulting function provides a means by which animus can be expressed without provoking the resistance that post-World War II racism tends to precipitate. Like other contemporary hate and bias modalities, Holocaust inversion has been protected from normal anti-discrimination enforcement by its ability to replicate or mimic the tropes of a dissident political discourse. This masking effect has permitted the growth and dissemination of hate and bias that would otherwise be checked by

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138. Letter from Charles R. Love, Program Manager, U.S. Dep’t of Educ., Office for Civil Rights, Region IX, to Dr. Michael V. Drake, Chancellor, Univ. of Cali., Irvine, *In re* OCR Case No. 09-05-2013 (Nov. 30, 2007) [hereinafter *In re* University of California at Irvine, OCR Case No. 09-05-2013], available at [http://www.ocreger.com/newsimages/news/2007/12/OCR\\_Report\\_120507-Z05145157-0001.pdf](http://www.ocreger.com/newsimages/news/2007/12/OCR_Report_120507-Z05145157-0001.pdf) (quoting an unnamed campus speaker). In this case, the speaker taunted, “You were so good at making people think that y’all was all that and the Islamic tide started coming up.” *Id.* For a discussion of the *Irvine* case, see JEWISH IDENTITY, *supra* note 133 and Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371, 383–93 (2009). The Israelis-as-Nazis analogy serves to justify not only anti-Israeli, but also anti-Jewish activity, which is otherwise socially or legally repelled. In light of the social stigma associated with anti-Semitism and racism, inversion serves to legitimate prejudice that would otherwise be socially unacceptable. In many cases, Holocaust inversion is coupled with suggestions that Jews should be treated in a manner consistent with their putative status as genocidal criminals. This particular quotation is taken from the official report of the U.S. Department of Education, Office for Civil Rights and investigation into charges of unlawful anti-Semitic harassment at the University of California at Irvine.

139. See STEVEN K. BAUM, *THE PSYCHOLOGY OF GENOCIDE: PERPETRATORS, BYSTANDERS AND RESCUERS* 119 (2008) (noting that even if 80% of community members may be compassionate and caring, a vocal 20% biased minority may nevertheless intimidate the rest of the community).

140. SOMMERVILLE, *supra* note 98, at 223.

141. FRIEDMAN, *supra* note 100, at 118.

142. KLARMAN, *supra* note 102, at 118.



various social, political, administrative, and legal controls, including human and civil rights law.

More significantly, AiM is *legitimizing*. In the genocidal context, AiM's legitimizing function is particularly important because of the enormity of the crime that must be justified. Des Forges has observed that "[w]ith such a tactic, propagandists can persuade listeners and 'honest people' that they are being attacked and are justified in taking whatever measures are necessary 'for legitimate [self-]defense.'"<sup>143</sup> As Joseph Goebbels put it, "The Jews are guilty [and] the punishment is coming." Similarly, Heinrich Himmler, *Reichsführer* of the SS, argued that "we had the moral right vis-a-vis our people to annihilate this people which wanted to annihilate us."<sup>144</sup> AiM has served the same function in a wide range of contexts, whether the victims' purported crimes are contemporaneous (as with the "black racist"), prospective ("Tutsi exterminators"), or retrospective ("Zionist Holocaust").

In the mind of Southern racists, the myth of the black rapist served to legitimize Jim Crow lynchings. Similarly, it provided the Nazis with a justification for their murder of the Jews. In the same way, Hutu claims of Tutsi aggression "legitimized" the violence that Hutus would visit upon them. For example, Mugesera warned his Hutu countrymen, "[K]now that anyone whose neck you do not cut is the one who will cut your neck."<sup>145</sup>

Thus, as Susan Benesch explains, the propagandist understood at least one aspect of genocide inversion's legitimizing function: it provides a collective self-defense justification for mass atrocities in the same way that individual self-defense provides a defense against the crime of murder.<sup>146</sup> Even in its legitimizing function, however, genocide inversion does more than provide a prospective defense against subsequent charges. Beyond such persuasion, AiM also functions as a means of constructing the identity of a despised other. In the simplest sense, genocide AiM may be, as Benesch has defined it, the technique of "claim[ing] (falsely) that the victims-to-be are planning to commit atrocities against the genocidaires-to-be."<sup>147</sup> In a broader sense, however, it is not merely a set of explicit claims, but rather a practice of constructing the other in a particular manner. Specifically, genocide inversion consists of constructing an identifiable other as so deeply and ineradicably criminal as to justify and even to require extermination

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143. DES FORGES, *supra* note 1, at 58

144. *Id.*

145. Mugesera v. Canada (Minister of Citizenship and Immigration) (2003), [2004] 1 F.C. 325 (Can. Que. Fed. Ct. App.).

146. *Id.*

147. Benesch, *supra* note 6, at 504.

precisely because the drive to exterminate is so central within the constructed self of the other.

Finally, AiM is *motivating* or *inciting*. That is to say, AiM not only provides a reason or justification for aggression, as other less effective forms of incitement also do; more insidiously, it also communicates to the listener that it is necessary to attack another group in order to avoid having the same fate visited upon one's own community. As Benesch has explained, other rhetorical techniques such as demonization can make mass-murder seem acceptable, but AiM makes it appear *necessary*.<sup>148</sup> This function follows in part from the functions described above but also goes beyond them. Although this motivating quality is useful in lesser forms of incitement, it is critical to those who are inciting genocide because these perpetrators must overcome the strong social prohibitions on such heinous deeds.<sup>149</sup> AiM is able to accomplish this by redefining the target population as being guilty of such a vile transgression as to lie outside the scope of mutual obligations and lawful protections.<sup>150</sup> In his most infamous speech, Mugesera repeatedly claimed that the "inyenzi" planned to commit genocide against the Hutu: "These people called Inyenzis are now on their way to attack us . . . I am telling you, and I am not lying [that] . . . they only want to exterminate us. They only want to exterminate us: they have no other aim."<sup>151</sup> Mugesera used this form of AiM precisely because he understood its motivating quality: "Are we really waiting till they come to exterminate us?" Mugesera demanded.<sup>152</sup>

Similarly, Bernard-Henri Lévy argues that Holocaust inversion, together with other elements of the "new anti-Semitism," erodes the inhibitions that have, for several decades, prevented most Europeans from wanting to exterminate Jews.<sup>153</sup> Such defamations enable "people to feel once again the desire and, above all, the *right* to burn all the synagogues they want, to attack boys wearing yarmulkes, to harass large numbers of rabbis, to kill not just one but many Ilan Halimis—in order for anti-Semitism to be reborn on a large scale."<sup>154</sup> The directness of AiM can be seen, not only in its common usage, but in the effectiveness with which it accomplishes its intention. Most

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148. *Id.* at 506.

149. *Id.* at 486 (quoting FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE* 28 (1990)).

150. *Id.*

151. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.R. 100, 93 paras. 16, 18 (Can.).

152. *Id.* para. 49.

153. BERNARD-HENRI LÉVY, *LEFT IN DARK TIMES* 155 (Benjamin Moser trans., 2008).

154. *Id.*

importantly, AiM motivates people to commit precisely the transgressions that are falsely attributed to the victim group. This is particularly important in the case of heinous crimes such as genocide, which require powerful motivation to overcome strong social bonds. But it can also explain the way in which large numbers of people are induced to engage in other forms of persecution, such as the systematic rape of black women during the Jim Crow South or the United States government's callous disregard for the rights of Indians during the Trail of Tears. This direct motivation is, moreover, only one facet of the complex efficacy through which AiM aids perpetrators in subjecting target populations for persecution or destruction. In fulfilling the range of functions described above, AiM facilitates aggression against its victims with peculiar effectiveness. For this additional reason, the use of AiM in genocidal or non-genocidal contexts cannot reasonably be viewed as being anything but direct.

### C. Psychological Functions

A full assessment of AiM's effectiveness must acknowledge that the technique serves important psychological functions for the speaker as well as critical functions for the speaker's party. In this sense, the widespread use of AiM results not only from its effectiveness at facilitating persecution, up to and including genocide, but also because AiM fulfills independent psychological needs of the perpetrators who use it.

First, there is no phenomenon that better exemplifies the defense mechanism that prejudice, classically, has been understood to provide. "Projection" is the process of displacing unwanted feelings onto despised others, who may then appear to be external threats.<sup>155</sup> While projection has been explained as a source of all prejudice, including anti-Semitism, it is never more conspicuous than when it takes the form of AiM.<sup>156</sup>

Second, AiM is a paradigmatic form of what might be called "secondary prejudice." Secondary prejudice is any form of bias that is itself a reflection of the taboo of open bigotry.<sup>157</sup> For example, the European Union's Agency for Fundamental Rights ("FRA") recently noted that "secondary anti-Semitism" could be most broadly defined as

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155. AVNER FALK, *ANTI-SEMITISM: A HISTORY AND PSYCHOANALYSIS OF CONTEMPORARY HATRED* (2008) 67, 71–72, 83 (discussing the possible roots behind the psychological projections that Christians place on Jews that manifest into anti-Semitism).

156. *Id.*

157. Clemens Heni, *Secondary Anti-Semitism: From Hard-Core to Soft-Core Denial of the Shoah*, 20 *JEWISH POL. STUD. REV.* 3–4 (2008), available at <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=625&PID=0&IID=2675>.

“any form of anti-Semitism that is in itself a reflection of the taboo of ‘open anti-Semitism.’”<sup>158</sup> Peter Schönbach, a colleague of leading Frankfurt School scholar Theodor Adorno, coined the increasingly used concept of “secondary anti-Semitism.” The classic example, prevalent in post-War Germany and Austria, is the claim that Jews were responsible for the Holocaust.<sup>159</sup> “Rather than constituting a form of anti-Semitism that exists in spite of the history of National Socialism,” the FRA explains, “it exists because of it.”<sup>160</sup> In one pointed formulation, “The Germans will never forgive the Jews for Auschwitz.”<sup>161</sup>

Secondary prejudice is often directed at other persecuted groups as well. For example, Jim Crow laws reflected the South’s refusal to forgive blacks for the sin of slavery. Similarly, when heterosexual majorities deny certain rights or privileges, such as marriage, to gays and lesbians—and then accuse gay rights activists of seeking “special privileges”—they are engaging in AiM. These attitudes can be described as a secondary prejudice because, to a certain extent, the resentment that these majorities experience arises from subconscious shame for their treatment of a disadvantaged minority. In general, secondary prejudice arises from the guilt or shame that non-minority groups experience in the face of their own present or prior hate or bias.

#### IV. ACCUSATION IN A MIRROR AND GENOCIDE LAW DOCTRINE

##### A. *The Doctrinal Significance of Accusation in a Mirror*

AiM is a primary form of incitement, like demonization and dehumanization, which can be used to show the “directness” of expressive conduct that intuitively might appear indirect.<sup>162</sup> The Genocide Convention criminalizes “direct and public incitement to commit genocide,”<sup>163</sup> regardless of whether actual genocide results.<sup>164</sup> Under the Genocide Convention, incitement is an autonomous infraction that—like conspiracy—constitutes an inchoate crime, in the

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158. European Union Agency for Fundamental Rights, *Anti-Semitism: Summary overview of the situation in the European Union 2001–2010*, at 25 (Apr. 2011) (FRA working paper), available at [http://fra.europa.eu/fraWebsite/attachments/Antisemitism\\_Update\\_2011.pdf](http://fra.europa.eu/fraWebsite/attachments/Antisemitism_Update_2011.pdf).

159. *Id.*

160. *Id.*

161. Ben Weinthal, *The Raging Bronx Bull of German Journalism*, JEWISH DAILY FORWARD (June 8, 2007), <http://www.forward.com/articles/10874/> (quoting psychologist Zvi Rex).

162. The importance of accusation in a mirror to incitement law is discussed in *Music and Genocide*, *supra* note 6, at 638; Benesch, *supra* note 6, at 504–06.

163. G.A. Res. 260 (III), at 174, U.N. GAOR, 3d Sess., A/810 (Part I) (Dec. 9, 1948).

164. The key point that actual violence need not be shown was authoritatively established in the *Media Case*. Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Appeals Judgment, n.26, ¶ 720 (Nov. 28, 2007), *aff’g* Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, ¶ 1015.

sense that the result need not be proven, as long as the incitement was direct and public, as well as intentional, with the intent to destroy a protected group completely or partially.<sup>165</sup> The conundrum for genocide law is that incitement doctrine is squeezed between two imperatives: on the one hand, the need to distinguish between genocidal incitement and ordinary hate speech and, on the other hand, the need to address genocidal incitement before it results in murder. By identifying primary incitement techniques, such as AiM, courts can satisfy the latter imperative while still respecting the former.

### *B. Accusation in a Mirror and the Elements of Incitement*

Gregory Gordon has performed the admirable task of elucidating the criteria that actionable incitement must meet under modern genocide law.<sup>166</sup> First, the statements in question must be publicly uttered.<sup>167</sup> Needless to say, AiM may be used publicly or privately. For purposes of applying genocide law, only public utterances are at issue here.

Second, and most importantly for present purposes, actionable statements must be uttered in a sufficiently direct manner.<sup>168</sup> The Genocide Convention and related authorities do not prohibit casual or indirect utterances, nor do they provide a general prohibition on hate speech.<sup>169</sup> As further discussed below, the legally critical aspect of AiM is that it is a substantively direct form of incitement notwithstanding the indirect appearance that it sometimes assumes.

Third, the utterance must be actual incitement rather than protected speech.<sup>170</sup> This criterion overlaps considerably with the directness element, since the directness requirement is intended in no small part to distinguish protected speech from punishable incitement. The two criteria can be distinguished for certain analytical purposes, however, because the directness requirement should also be understood as a creature of contemporary values regarding the freedom of speech.

Finally, an actionable statement must have an underlying intent to provoke mass-murder.<sup>171</sup> This is an important independent requirement that must be satisfied even in cases of AiM. Some advocates might argue that the mirror itself can reveal the speaker's intent, but this is too

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165. Schabas, *supra* note 15, at 149.

166. Gordon bases his analysis largely on the ICTR cases, which have been relatively detailed in their analysis, since the applicable statute mirrors the Genocide Convention. *Incitement to Indictment?*, *supra* note 6, at 869–70.

167. *Id.* at 870.

168. *Id.*

169. Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial*: Prosecutor v. Nahimana, 21 AM. U. INT'L L. REV. 557, 566 (2006).

170. *Incitement to Indictment?*, *supra* note 6, at 869–70.

171. *Id.*

facile. As explained in Part II, AiM can be used consciously or unconsciously and therefore can be either a deliberate propagandistic technique or an expression of unconscious projection.<sup>172</sup> To the extent that AiM is used in an unconscious manner, its communicative process is no less direct, but it would be inaccurate to characterize what it reveals as the speaker's "intent." In genocide cases, the directness is not sufficient to provide a basis for prosecution without the presence of intent.

### C. *Accusation in a Mirror as Evidence of Directness*

Given the importance of protecting the freedom of speech,<sup>173</sup> courts have been appropriately cautious in ensuring that only direct incitements be proscribed.<sup>174</sup> Unfortunately it is often difficult to determine what expressions may be deemed sufficiently direct in light of the covert, coded, and euphemistic manner in which genocidal appeals are generally communicated.<sup>175</sup> This is a serious problem because the Genocide Convention is intended to prevent genocides before they occur and not merely to punish the perpetrators after the killing is done.<sup>176</sup>

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172. See *infra* Part II (discussing how AiM, "while sometimes a deliberate propagandistic tactic, also sometimes expresses an unconscious impulse" by examining the Nazi and Rwandan genocides and the myths of the Indian giver, black racist, and murderous Jew).

173. Indeed, the United States was initially reluctant to enter into the Genocide Convention for reasons relating to the freedom of speech. See Continuation of the Consideration of the Draft Convention on Genocide [E/794]: Report of the Economic and Social Council [A/633], U.N. GAOR 6th Comm., 3d Sess., 84th mtg. at 213 (1948) (discussing the debates over whether or not to include incitement to genocide within the list of punishable acts). When the U.S. Senate finally ratified the Genocide Convention, after decades of debate, it did so only with this reservation: "Nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." 132 CONG. REC. S1252-54 (daily ed. Feb. 18, 1986) (Lugar/Helms/Hatch Reservations to the Genocide Convention).

174. U.S. courts have been similarly cautious, requiring a "directness" element in domestic incitement cases. Compare, e.g., *Masses Publ'g Co. v. Patten*, 244 F. 535, 542 (S.D.N.Y. 1917) ("[I]ndirect result of the language might be to arouse a seditious disposition, [however, this] would not be enough . . . ?"), *rev'd*, 246 F. 24 (2d Cir. 1917) with *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, ¶ 557 (1998) ("[M]ore than mere vague or indirect suggestion [is required to] constitute direct incitement."). Such comparisons are usefully explored in 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, 102-04 (2001).

175. See Schabas, *supra* note 15, at 160 ("The problem with the requirement that incitement be 'direct' is that history shows that those who attempt to incite genocide speak in euphemisms. It would surely be contrary to the intent of the drafters to view such coded language as being insufficiently direct.")

176. Michael P. Scharf & Brianne M. Draffin, *Foreword: To Prevent and to Punish: An International Conference in Commemoration of the Sixtieth Anniversary of the Genocide Convention*, 40 CASE W. RES. J. INT'L L. 1, 4 (2007).

Sadly, for reasons that are both legal and political,<sup>177</sup> the Genocide Convention has failed to prevent or appreciably reduce the incidents of mass-killings.<sup>178</sup> The Genocide Convention's passage has been justly characterized as "utterly irrelevant" when the first half century following its passage witnessed the slaughter of four million by Stalin's Russia, five million in Mao's Chinese Cultural Revolution, two million in Pol Pot's killing field, 750,000 in Uganda, etc.<sup>179</sup> This abject failure prompted the United Nation's High Commissioner for Human Rights to lament: "A person stands a better chance of being tried and judged for killing one human being than for killing 100,000."<sup>180</sup> In recent years, the U.N. has committed to correcting this sorry history, for example, by adopting its Responsibility to Protect doctrine.<sup>181</sup> If the Genocide Convention is to merit its designation as the "Never Again" treaty, its incitement provisions must be interpreted in ways that effectuate its intent to prevent further tragedies. At a minimum this requires that judicial bodies properly recognize the forms that incitement to genocide habitually assume so that they can be properly addressed.

Given the frequency with which genocidal AiM presages actual genocide, courts and tribunals must attribute proper significance to this form of incitement. At a minimum, this requires an appreciation that AiM is generally understood in pre-genocidal and genocidal contexts as a direct call to commit mass-murder, whether it is accompanied by other more explicit exhortations or not. This is important, because courts have taken the directness requirement of incitement seriously. For example, the *Mugesera* court cautioned that an equivocal speech, open to differing interpretations, could not constitute direct and public incitement to commit genocide.<sup>182</sup> *Mugesera's* teaching that actionable incitement must be a direct appeal to commit an act of genocide,<sup>183</sup>

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177. See generally SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002) (discussing why American leaders frequently promise to prevent genocide yet repeatedly fail to do so).

178. See Scharf & Draffin, *supra* note 176, at 2 (describing the Genocide Convention's failure to prevent genocide even after it was established).

179. *Id.*

180. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG xiv (1997).

181. Scharf & Draffin, *supra* note 176, at 4; see also Paul R. Williams & Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 CASE W. RES. J. INT'L L. 97, 105-06 (2008) (elucidating the responsibility to protect, or "R2P"); David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L L. 111 (2008) (drawing lines for determining which atrocity crimes merit application of the R2P doctrine and which do not).

182. *Mugesera v. Canada (Minister of Citizenship and Immigration)* (2003), [2004] F.C. 325 (Can.).

183. *Id.*

rather than a vague advocacy of hate or discrimination, has been influential.<sup>184</sup> Furthermore, the *Media Case*, carefully distinguished between direct incitements and most other forms of hate speech:

Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion. In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute.<sup>185</sup>

Genocidal AiM is inciteful not because it is hate speech, but because it is in fact—if not in form—an appeal to commit particular acts. In the *Media Case*, the appeals court emphasized that while genocide is often preceded by or coupled with hate speech, hate speech is not *per se* actionable unless it directly calls for the commission of genocide.<sup>186</sup> Similarly, the International Law Commission explained, “The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.”<sup>187</sup>

The meaning of coded speech may, however, be unequivocal. That is to say, its meaning may be clear and definite when it is properly decoded. In such cases, its meaning may be well understood to its listeners. It is now well established that the directness element must be “viewed in the light of its cultural and linguistic content.”<sup>188</sup> Whether a particular communication can be considered direct will vary depending on local linguistic contexts. Most importantly, it is a basic principle of genocide law that “incitement may be direct, and nonetheless implicit.”<sup>189</sup>

The value of AiM, as a legal concept, is that it provides a means of understanding how a major category of coded speech can meet the directness element under the Genocide Convention and other laws prohibiting incitement to genocide. The Genocide Convention criminalizes “direct and public incitement to commit genocide.”<sup>190</sup> The

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184. See George William Mugwanya, *Recent Trends in International Criminal Law: Perspectives from the U.N. International Criminal Tribunal for Rwanda*, 6 NW. U. J. INT'L HUM. RTS. 415, 436 (2008) (describing influence of *Mugesera* on ICTR decisions).

185. *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Appeals Judgment, n.26, ¶ 693 (Nov. 28, 2007); Mugwanya, *supra* note 184, at 437.

186. *Nahimana Judgment*, ICTR-99-52-A, ¶ 693 (Nov. 28, 2007); Mugwanya, *supra* note 184, at 437.

187. Rep. of the Int'l Law Comm'n, 48th Sess. May 6–July 26, 1996, at 22, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10 (1996).

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

189. *Id.*

190. Genocide Convention, *supra* note 2.



Convention makes genocidal incitement an inchoate crime, in the sense that actual genocide need not occur for its incitement to be actionable.<sup>191</sup> Nevertheless, actionable incitement must be a direct appeal to commit an act of genocide rather than vague hate speech.<sup>192</sup> “Directness” is often difficult to discern in light of the covert, coded, and euphemistic manner in which genocidal appeals are generally communicated.<sup>193</sup> At the same time, it is critical for judicial bodies to recognize incitement, even when it takes such forms, because otherwise they will fail to satisfy the Genocide Convention’s purpose of preventing genocide rather than merely punishing its perpetrators.<sup>194</sup>

At first blush, AiM appears to be entirely indirect. The speaker need not urge the target audience to take any particular course of conduct; moreover, if any actions are urged, they are veiled in the language of self-defense. Nevertheless, as discussed earlier, the “directness” requirement is not construed formalistically to require an explicit exhortation, since that is not the form that genocidal incitement characteristically takes. Indeed, genocide law cannot succeed in preventing mass-killings—as opposed to punishing their perpetrators after the fact—unless incitement doctrine is construed broadly to encompass such ways in which genocidaires actually ply their craft.

For this reason, “directness” is interpreted contextually to require a communication that reasonable listeners would understand—within local conditions—as an appeal to undertake certain actions. As the Rwanda tribunal has explained, “The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.”<sup>195</sup> The Rwandan example demonstrates the clarity with which implicit directives contained within AiM are understood and executed.

In this sense, the directness element should be considered satisfied when it can be shown that a defendant has publicly accused a particular vulnerable population of genocidal practices, or genocidal intent, in a

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191. Schabas, *supra* note 15, at 149.

192. Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] S.C.R. 100 (Can.).

193. See Schabas, *supra* note 15, at 160 (“The problem with the requirement that incitement be ‘direct’ is that history shows that those who attempt to incite genocide speak in euphemisms. It would surely be contrary to the intent of the drafters to view such coded language as being insufficiently direct.”).

194. Scharf & Draffin, *supra* note 176, at 4.

195. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 558 (Sept. 2, 1998).

manner that mirrors practices that have been directed against them. This approach does not push the boundaries impermissibly between incitement and hate speech. This is important not only because domestic constitutional considerations sometimes apply,<sup>196</sup> but also because the Genocide Convention's history indicates an "unambiguous determination" by the Convention's drafters to exclude hate speech from the scope of the clause that criminalizes "direct and public incitement to commit genocide."<sup>197</sup> This approach to AiM does not criminalize speech that provokes hatred towards a protected group, but instead punishes speech that advocates violence against members of the group.<sup>198</sup> Indeed, one of the defining features of AiM is that it does not merely stoke generalized feelings of racial hatred; rather, it incites very specific forms of criminal conduct.

This conclusion follows from the essentially euphemistic character that incitement characteristically assumes. For this reason, other commentators have recommended that euphemisms used to mask incitement should be considered "kinds of incitement."<sup>199</sup>

## V. ALTERNATIVE APPROACHES

This approach to AiM is more stringent than some alternative approaches and less stringent than others. This Part will evaluate two roads not taken here. One alternative would be to treat the use of AiM, at least under some circumstances, as a chargeable offense. The other would be to consider it to constitute (and not merely to satisfy) an element that must be met in a prosecution for incitement. This Section will argue that the former approach is too loose and the latter too stringent.

### A. *Accusation in a Mirror as a Form of Incitement*

This proposal is more stringent than an alternative approach that would recognize AiM as a form of incitement to commit genocide *per*

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196. See, e.g., 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 (2008) (discussing the differences between international customary law, under which genocide inciters would be found in violation of, and the U.S. Constitution, under which genocide inciters would be protected under the First Amendment guaranteeing free speech).

197. Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 NEW ENG. J. INT'L & COMP. L. 17, 22–28 (2005).

198. *Id.* at 39–40 (criticizing the ICTR for convicting defendants in the *Media Case* for crimes against humanity based upon what she considered to be "speech that constitutes incitement to racial hatred but not incitement to violence"); *Incitement to Indictment?*, *supra* note 6, at 910–11 (arguing that incitement to genocide can be distinguished from speech that merely encourages racial hatred).

199. *Incitement to Indictment?*, *supra* note 6, at 857.

*se* regardless of whether genocide actually ensures, as long as the basic elements of genocide are met. For example, one commentator has seemingly argued that AiM should be recognized as a “legally chargeable form of incitement.”<sup>200</sup> In other words, AiM should be considered a category of chargeable offense rather than merely a technique that satisfies only one element of the offense.<sup>201</sup>

Thus, a person who specifically intends to motivate others to engage in genocidal murder and furthers this plan by publicly and directly accusing his or her would-be victims of genocidal intent, has committed incitement to genocide. The virtue of recognizing this distinct category of incitement is that it spares each adjudicator the burden of having to determine in each instance whether this accusatory technique bears a sufficient nexus to any actual or potential killing. The notion is that certain forms of accusation are incitement *per se*.

This approach faces certain challenges, even aside from the usual questions of expressive freedom that invariably surround the issue of incitement. Can specific intent be inferred from the act itself, or must one demonstrate that the accusation is motivated by genocidal intent? Given the difficulty of proving intent, the tendency will be to infer it from the circumstances in which the technique was used. This inference is of limited persuasiveness, however. If the speaker urges the elimination of a particular group at a time when members of that group are notoriously being killed, one can infer that the speaker intends to perpetuate the killing. But if the speaker merely accuses the victim group of plotting similar crimes, can we assume that the speaker’s intent is similarly murderous? The challenge of determining intent is

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200. This approach greatly simplifies the analysis in *Music and Genocide*, *supra* note 6, at 638. Gordon’s approach is much more sophisticated and nuanced than these quotations convey. Indeed, when his three major works on this topic are taken together, it appears that Gordon might consider AiM to be chargeable only when certain other criteria are satisfied and perhaps only when it is anchored in some other form of incitement. For example, in some places Gordon argues that AiM, to be chargeable, must be “anchored to direct calls” to genocide, *Incitement to Indictment?*, *supra* note 6, at 857, which if taken literally almost seems to imply that accusation in a mirror is *not* itself a form of incitement *per se*. A full presentation of the complexities of Gordon’s analysis would however exceed the scope of this Article.

201. Gordon’s nine categories are:

- (1) direct calls for destruction;
- (2) predictions of destruction;
- (3) verminization, pathologization, and demonization;
- (4) accusation in a mirror;
- (5) euphemisms and metaphors;
- (6) justification during contemporaneous violence;
- (7) condoning and congratulating past violence;
- (8) asking questions about violence; and
- (9) victim-sympathizer conflation.

*Id.*

exacerbated by the extent to which AiM often arises from the subconscious process of “projection,” rather than as a conscious intention.

*B. Accusation in a Mirror as an Element of Incitement*

Susan Benesch argues, by contrast, that AiM supports an incitement charge by demonstrating that the speaker not only dehumanized a target population, but also justified mass-killing.<sup>202</sup> In this way, AiM would be a persuasive means of meeting one prong in the six-prong test that Benesch has proposed in place of the current doctrinal framework.<sup>203</sup> Specifically, it would provide an affirmative answer to the second half of the first compound sentence in Benesch’s fifth prong, which goes to what has previously been identified as the requirement of “effectiveness”: Did the speaker describe the victims-to-be as subhuman, or accuse them of plotting genocide? Had the audience been conditioned by the use of these techniques in other, previous speech?<sup>204</sup>

In other words, accusation is one of three techniques—together with dehumanization and repetition—that can be used to demonstrate effectiveness. In Benesch’s scheme, prosecution must establish all six elements in order to achieve a conviction.<sup>205</sup> Thus, under Benesch’s scheme, these three common techniques would effectively become an element of the crime; no matter how directly and forcefully a public speaker urges genocide, it would not be chargeable unless AiM or dehumanization is used, unless the crowd has been primed by prior use of these techniques.<sup>206</sup>

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202. Benesch, *supra* note 6, at 523–24.

203. The six prongs Benesch proposes to identify incitement to commit genocide and to distinguish it from lawfully protected speech are as follows:

1. Was the speech understood by the audience as a call to genocide? Did it use language, explicit or coded, to justify and promote violence?
2. Did the speaker have authority or influence over the audience and did the audience have the capacity to commit genocide?
3. Had the victims-to-be already suffered an outbreak of recent violence?
4. Were contrasting views still available at the time of the speech? Was it still safe to express them publicly?
5. Did the speaker describe the victims-to-be as subhuman, or accuse them of plotting genocide? Had the audience been conditioned by the use of these techniques in other, previous speech?
6. Had the audience received similar messages before the speech?

*Id.* at 498.

204. *Id.*

205. *Id.* at 520.

206. For substantially similar reasons, Gordon has argued that Benesch’s six-prong test is too rigid and has also criticized it on additional grounds. See *Music and Genocide*, *supra* note 6, at 626–30 (criticizing Benesch’s test for failing to encompass scenarios that should pass the test, such as a governmental official in a country experiencing inter-ethnic violence calling for the

Since dehumanization is by no means universally used prior to the commitment of genocide, this places an untenable burden on AiM.<sup>207</sup> Goldhagen has provided a rather lengthy list of genocidaires who have not relied on dehumanization, including the Turks against Armenians and Serbs against Bosnians.<sup>208</sup> In these forms of genocide, which do not involve dehumanization, Benesch's scheme makes accusation a necessary condition for incitement. This approach is far too rigid, as it would exculpate non-dehumanizing genocidaires who do not use AiM.

In short, AiM cannot be an element of incitement, because this requirement would be impracticably rigid. On the other hand, it cannot constitute the crime of incitement *per se*, as this would be too lenient. Rather, it should be considered a primary technique for incitement, and its presence should satisfy the directness requirement, but other elements of incitement must also be met for the statement to be actionable.

## VI. CONCLUSION

AiM is an extraordinary concept that deserves closer attention than it has thus far received. First, AiM has been very *commonly* or frequently employed, both in genocidal and non-genocidal contexts, and in widely differing times and places. Second, AiM is *strange* or counter-intuitive: of all of the false accusations that one might level at one's adversaries, it is surprising that one would draw public attention to precisely the misdeeds that one intends to commit. Third, despite these drawbacks, AiM has had a famous *potency*, to use Catharine MacKinnon's term.<sup>209</sup> That is to say, it has been oddly effective in serving several functions, including those observed by propagandists. Finally, for jurists, this strangely effective and widespread phenomenon has a peculiar *utility*; to wit: it provides a means by which prosecutors can demonstrate the "directness," which is requisite to a showing of genocidal incitement. AiM should be closely considered in incitement cases, not because it is a necessary or a sufficient condition of incitement to genocide, as some have suggested, but rather because it is strong evidence of directness.

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ethnic majority to "go to work" on the ethnic minority, being too final as a "self-contained universe" and containing ambiguous terms).

207. Goldhagen demonstrates that genocide is commonly accompanied by dehumanization, demonization, or both. GOLDHAGEN, *supra* note 28, at 319–30.

208. *Id.* at 331.

209. MacKinnon, *supra* note 129, at 330.