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# Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide

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# PUBLIC ENEMY: THE PUBLIC ELEMENT OF DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

*Brendan Saslow\**

*Direct and public incitement to commit genocide has been an international crime since the 1940s. The public element plays a role in each international incitement case, yet many scholars consider it straightforward and unworthy of attention. This article seeks to analyze jurisprudence, primarily developed at the International Criminal Tribunal for Rwanda, on how to determine whether inciting to commit genocide is public. This element is most problematic in cases involving speech through broadcast media such as television and radio. Moreover if ICTR case law informs future international criminal proceedings it may be an issue in a future genocide that involves the Internet and social media. This Article ultimately concludes with several suggestions on how factors for finding whether speech is public or private should evolve in order to account for modern forms of communication.*

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*“Public incitement occurs only if the appeal is likely to be heard by a large, undefined audience.”*<sup>1</sup>

Imagine a depraved government official issuing a message via Twitter. The message contains a veiled order to thousands of citizens to violently attack a minority group. The citizens lash out and slaughter the group nearly to extinction, as performed in genocides throughout history. To hold the provocateur liable, a law must predictably consider when speech constitutes a crime.

Incitement to commit genocide is a notoriously problematic international crime.<sup>2</sup> Susan Benesch, founder of the Dangerous Speech Project and professor at American University, explains that it is critical to clearly define it.<sup>3</sup> Distinguished Chair of Human Rights at the University of Connecticut, Richard Wilson has approached incitement by clarifying causation.<sup>4</sup> Meanwhile, international criminal bodies continue to develop speech crimes.<sup>5</sup> Despite attempts to clarify incitement to genocide, defendants have exploited the public element with varying degrees of success.<sup>6</sup> This element may also expand the

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1. Mordechai Kremnitzer & Khaled Ghanayim, *Incitement, Not Sedition, in Freedom of Speech and Incitement Against Democracy* 147, 160 (David Kretzmer & Francine Kershman Hazan eds., 2000).
  2. See Richard Wilson, *Inciting Genocides with Words*, 36 MICH. J. INT'L L. 277, 293 (2015) (“It is fair to say [incitement to commit genocide] has been one of the most controversial areas of international criminal law in the last twenty years.”).
  3. Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 487 (2008) (“It is critical to define [incitement to commit genocide] properly.”).
  4. Wilson, *supra* note 2, at 281 (“This Article examines the framework of criminal accountability for direct and public incitement to commit genocide and critically evaluates the claim made in ICTR Trial Chamber judgments that a causal connection exists between propagandistic speech acts and genocidal acts of violence.”).
  5. Wilson, *supra* note 2, at 280 (“[I]nternational criminal courts have increasingly targeted public speech that incites inter-group violence. . . [a]s international tribunals target speech crimes with ever more alacrity”).
  6. See Callixte Kalimanzira v. Prosecutor (*Kalimanzira English Appeals Judgement*), Case No. ICTR-05-88-A, Judgement, ¶ 152 (Oct. 20, 2010) (Kalimanzira asserts that the Tribunal’s jurisprudence requires a very large number of individuals to be exposed to a call to commit genocide before it can be qualified as direct and public incitement.”); see also Augustin Ngirabatware v. Prosecutor (*Ngirabatware Appeals Judgement*), MICT-12-29-A, Judgment, ¶ 50 (Dec. 18, 2014) (“[Ngirabatware] submits that: (i) the mere presence of a group at the vicinity of the roadblock does not suffice to show that the alleged inciting statements were received by the public as, at best, the statements were heard by only three persons; and (ii) the group was

application of international incitement by extending its application to virtual communications, like email and social media.

Under the Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”) and the Statutes of the Rwanda and Yugoslavia Tribunals, direct and public incitement is a separate crime from genocide.<sup>7</sup> In each of these three instruments, direct and public incitement to commit genocide exists in a list that includes genocide and four distinct crimes (conspiracy, incitement, attempt, and complicity).<sup>8</sup> While all four relate to genocide, listing each in its own independent section allows ad hoc tribunals to convict defendants for actions that implicate genocide without actually convicting a defendant of genocide proper.<sup>9</sup> This is helpful because genocide is particularly difficult to prove.<sup>10</sup>

Direct and public incitement to commit genocide is established in Article III(c) of the Genocide Convention,<sup>11</sup> Article II(3)(c) of the International Criminal Tribunal for Rwanda (ICTR) statute,<sup>12</sup> Article IV(3)(c) of the International Criminal Tribunal for Yugoslavia (ICTY) statute,<sup>13</sup> and Article 25(3)(e) of the Rome Statute of the International Criminal Court (ICC).<sup>14</sup> In the international criminal

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selected and limited to the Interahamwe and Impuzamugambi manning the roadblock.”).

7. Thomas Davies, Note, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*, 22 HARV. HUM. RTS. J. 245, 268 (2009) (“The Genocide Convention . . . treats incitement to genocide as a separate crime. . . . The ICTY and ICTR Statutes follow the Genocide Convention.”).
8. The Convention on the Prevention and Punishment of the Crime of Genocide, art. III(a)–(e), Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; S.C. Res. 955, Annex art. 2(3) U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 25704, Annex art. 4(3) U.N. Doc. S/RES/25704 (May 25, 1993).
9. See Davies, *supra* note 7, at 257 (“The fact that incitement is a crime in itself under the Genocide Convention and the tribunal statutes also means that a person can be prosecuted for incitement when no genocide has (yet) occurred.”).
10. Harry de Quetteville, *How do you prove genocide?*, TELEGRAPH (Oct. 17, 2008), [http://blogs.telegraph.co.uk/news/harrydequetteville/5474057/How\\_do\\_you\\_prove\\_genocide/](http://blogs.telegraph.co.uk/news/harrydequetteville/5474057/How_do_you_prove_genocide/) [perma.cc/W7VW-9TBD] (“Genocide has become one of the hardest charges to prove”).
11. Genocide Convention, article III(a)–(e), Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.
12. S.C. Res. 955, Annex art. 2(3), U.N. Doc. S/RES/955 (Nov. 8, 1994).
13. S.C. Res. 25704, Annex art. 4(3), U.N. Doc. S/RES/25704 (May 25, 1993).
14. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter *Rome Statute*].

context, the ICTR remains the only international criminal tribunal that has ever indicted an individual for the crime. Neither the ICC<sup>15</sup> nor ICTY<sup>16</sup> has had occasion to contribute to the crime's case law. The public element is noteworthy for its covert power to undermine rulings of incitement to genocide. In some cases judgments only give it lip service, whereas, in more recent cases, it has led to acquittals.<sup>17</sup> A beneficial approach would distill a method to consistently and efficiently decide whether incitement to commit genocide is public.

This note attempts to capture the developing complexity of the public element. It argues that the select and limited factor is more appropriately characterized as a defense. The place factor must be appropriately defined and the medium factor should ascend to a more dominant role of the legal analysis.<sup>18</sup> This new structure will help future courts evaluate the public element given modern virtual forms of communication. Part I begins by summarizing the development of the public element, emphasizing the purposes for including it in the Genocide Convention and the contemporary legal framework developed at the ICTR. Next, part II recommends that future decisions approach the select and limited factor as a defense and clarify the public and medium factors. Part III then considers how future rulings should develop the public element in regard to email and social networking platforms. Finally, part IV offers concluding remarks.

#### I. NUREMBURG TO ARUSHA: THE JURISPRUDENCE OF PUBLIC INCITEMENT TO COMMIT GENOCIDE

Direct and public incitement to commit genocide is an inchoate crime.<sup>19</sup> Genocide does not ever have to occur for a defendant to be convicted.<sup>20</sup> To make a conviction, a criminal chamber must find the

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15. Davies, *supra* note 7, at 248 n.11 (“[N]o incitement cases have yet been litigated at the ICC”).
  16. WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 326 (2d ed. 2009) (“There have been no indictments by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia for direct and public incitement to commit genocide.”).
  17. *E.g.*, Callixte Kalimanzira v. Prosecutor (*Kalimanzira English Appeals Judgement*), Case No. ICTR-05-88-A, Judgement (Oct. 20, 2010).
  18. *See infra* notes 76–78 and accompanying text.
  19. GUÉNAËL METTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* 256 (2005) (“‘Direct and public incitement to commit genocide’ is an inchoate offence . . . the Prosecution need not show . . . that anyone acted upon the act of incitement . . . nor that it produced any other result.”).
  20. *See* Davies, *supra* note 7, at 257 (“The fact that incitement is a crime in itself under the Genocide Convention and the tribunal statutes also

accused (1) intended to perpetrate direct and public incitement to commit genocide, and (2) perpetrated action that constitutes direct and public incitement to commit genocide.<sup>21</sup> Genocidal intent is assumed to be present when a judge finds intent to commit direct and public incitement to commit genocide.<sup>22</sup> Directness and publicness are elements of genocidal incitement.<sup>23</sup> The public element requires a finding that both the actus reus was public and the accused had the mens rea to perpetrate incitement to genocide that was public.<sup>24</sup> This element does not fit squarely within the traditional elements of a crime (actus reus and mens rea).<sup>25</sup>

Throughout its history scholars have treated the public element as straightforward.<sup>26</sup> Still, as an element, if a court does not find that

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means that a person can be prosecuted for incitement when no genocide has (yet) occurred.”).

21. See SCHABAS, *supra* note 16, at 319 (“It is sufficient to establish that direct and public incitement took place, that the direct and public incitement was intentional, and that it was carried out with the intent to destroy in whole or in part a protected group as such.”); see also Callixte Kalimanzira v. Prosecutor (*Kalimanzira English Trial Judgement*), Case No. ICTR-05-88-T, Judgement, ¶ 510 (June 22, 2009); Callixte Nzabonimana v. Prosecutor (*Nzabonimana Appeals Judgement*), Case No. ICTR-98-44D-A, Judgement, ¶ 121 (Sept. 29, 2014).
22. SCHABAS, *supra* note 16, at 326 (“To be convicted of direct and public incitement, it must be established that the perpetrator had a genocidal intent.”). Genocidal intent is considered a *dolus specialis* or special intent. Special intent as applied to genocide requires that “[t]he acts . . . must be done with intent to destroy the group as such in whole or in part.” Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro) 2007 I.C.J. 43, ¶ 187 (Feb. 26). Professor William Schabas points out that no individual could “plausibly be responsible for destroying a group in whole or in part.” SCHABAS, *supra* note 16, at 280. Genocidal intent is a high burden due to the fact that “genocide is an organized and not a spontaneous crime.” SCHABAS, *supra* note 16, at 246.
23. Prosecutor v. Jean-Paul Akayesu (*Akayesu English Trial Judgement*), Case No. ICTR-96-4-T, Judgement, ¶¶ 556–57 (Sept. 2, 1998) (“The public element of incitement to commit genocide may be better appreciated in light of two factors . . . . The ‘direct’ element of incitement implies that the incitement assume a direct form”).
24. *Nzabonimana Appeals Judgement*, Case No. ICTR98-44D-A, ¶ 129 (“the Appeals Chamber notes that establishing the public element requires not only that the accused publicly incited (actus reus), but also that the accused had the intent to incite publicly (mens rea)”).
25. *Id.*
26. See ROBERT CRYER, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 315 (2007) (“So far, determining what is public has not been too difficult.”); see also SCHABAS, *supra* note 16, at 329

incitement was public, then it cannot convict a defendant.<sup>27</sup> Interestingly, defendants cannot be convicted for inciting genocide in private.<sup>28</sup> If a superior incites his or her subordinates to commit genocide, that conversation is likely to be considered private.<sup>29</sup> The drafters of the Genocide Convention chose this method to limit the inchoate breadth of incitement to genocide.<sup>30</sup> The modern definition of “public” relies on civil law formulations and the International Law Commission’s 1996 definition. Under the ILC definition, “public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media.”<sup>31</sup> In other words, incitement

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(“The word ‘public’ is the less difficult [element of incitement] to interpret.”).

27. *E.g.*, Callixte Kalimanzira v. Prosecutor (*Kalimanzira English Appeals Judgement*), Case No. ICTR-05-88-A, Judgement, ¶ 163, 165 (Oct. 20, 2010) (“The Appeals Chamber, however, is not satisfied that the evidence reasonably supports the Trial Chamber’s findings concerning Kalimanzira’s intent to incite anyone other than those manning the Kajyanama roadblock. . . . Accordingly, the Appeals Chamber grants Kalimanzira’s Eighth and Ninth Grounds of Appeal and reverses the convictions for direct and public incitement based on the events at the Jaguar and Kajyanama roadblocks.”). *But see*, SCHABAS, *supra* note 16, at 319 (“incitement in private is subsumed within the act of complicity, listed in Article III(e) [of the Genocide Convention]. Incitement in private is punishable only if the underlying crime of genocide occurs, whereas incitement in public can be prosecuted even where genocide does not take place. . . . incitement, if successful, becomes a form of complicity covered by paragraph (e)”).
28. *Nzabonimana Appeals Judgement*, Case No. ICTR-98-44D-A, ¶ 126 (“The Appeals Chamber notes that . . . public incitement was understood as ‘public speeches or in the press, through the radio, the cinema or other ways of reaching the public,’ . . . it expressly excluded ‘private’ incitement.”).
29. *Kalimanzira English Appeals Judgement*, Case No. ICTR-05-88-A, n.414 (“The . . . definition adopted by the Sixth Committee . . . differentiated acts such as instructions from officials to subordinates or heads of organizations to members from ‘direct public incitement.’”).
30. SCHABAS, *supra* note 16, at 321–23 (“In the Sixth Committee, the United States . . . contest[ed] entirely any reference to incitement as an inchoate offence. . . . Poland insisted that prevention was also the goal of the convention . . . . Belgium urged a ‘happy compromise’, deleting the phrase ‘or in private’. . . . The Committee voted to delete the words ‘or in private’.”).
31. Prosecutor v. Jean-Paul Akayesu (*Akayesu English Trial Judgement*), ICTR-96-4-T, Judgment, ¶ 556 n. 126 (Sept. 2, 1998). The International Law Commission was created by the United Nations General Assembly in 1947. Its purpose is to “promote the progressive development of international law and its codification.” INT’L L. COMM’N, <http://legal.un.org/ilc/work.shtml> [<https://perma.cc/RM8S-YGMR>] (last visited July 29, 2015).

is public when a perpetrator incites genocide in a public place, public by definition, or to the general public by radio or television.<sup>32</sup> It took 60 years for the international community to develop this modern formula.

*A. History of the Public Element Before the Genocide Convention*

Incitement to genocide dates to the International Military Tribunal at Nuremberg, following the Holocaust.<sup>33</sup> Prosecutors accused German defendants Julius Streicher and Hans Fritzsche of speech crimes, at the time categorized as a crime against humanity.<sup>34</sup> Streicher, editor of the anti-Semitic publication *Der Stürmer*,<sup>35</sup> was convicted of “incitement to murder and extermination” for “persecution on political and racial grounds.”<sup>36</sup> He was the only IMT defendant executed exclusively for crimes against humanity.<sup>37</sup> Fritzsche was a senior Nazi official and radio announcer known for his

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32. Examples of methods for conveying speech to the general public include “speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.” *Akayesu English Trial Judgement*, Case No. ICTR-96-4-T, Judgement, ¶¶ 556, 559 (Sept. 2, 1998); Callixte Nzabonimana v. Prosecutor, Case No. ICTR98-44D-A, ¶ 122 (“The *travaux préparatoires* of the Genocide Convention confirm[] that ‘public’ incitement to genocide pertains to mass communications.”).
33. Wibke Kristin Timmermann, *Incitement in International Criminal Law*, 88 INT. REV. RED CROSS 823, 827 (2006) (“Incitement to genocide first became a crime under international law when the International Military Tribunal (IMT) at Nuremberg passed judgment on the accused Julius Streicher and Hans Fritzsche in 1946.”).
34. Wilson, *supra* note 2, at 283 (“the prosecution held the two propaganda defendants—Streicher and Fritzsche—liable for crimes against humanity as accessories or abettors who incited and encouraged others.”).
35. The English translation is ‘The attacker.’ Ronald Koven, *Put Your Own House in Order First*, 35 INDEX ON CENSORSHIP 177 (2006) (“Nobody ever thought to allege that the Holocaust happened in World War II because of Nazi propaganda minister Josef Goebbels or Julius Streicher and his hate sheet *Der Stürmer* (The Attacker).”). Streicher infamously wrote “[t]he Jews in Russia must be killed. They must be exterminated root and branch.” International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT’L L. 172, 295 (1946) [hereinafter *Nuremberg Decisions*].
36. *Nuremberg Decisions*, *supra* note 35, at 296.
37. Wilson, *supra* note 2, at 283 (“Streicher’s case was exceptional in that he was the only defendant convicted and executed at Nuremberg solely on Count Four of ‘Crimes Against Humanity.’”).



radio program “Hans Fritzsche speaks.”<sup>38</sup> He was acquitted.<sup>39</sup> Streicher, specifically, set the foundation for modern international criminal liability for incitement to commit genocide.<sup>40</sup>

After the Nuremberg tribunal, the United Nations drafted the modern day Genocide Convention, defining genocide for the first time.<sup>41</sup> Article III(c) sets “direct and public incitement to commit genocide” as an international crime.<sup>42</sup> It was adopted into force, as part of the Genocide Convention, on January 12, 1951, after a lengthy drafting process.<sup>43</sup>

In comments to the first draft, the Secretariat explained that “direct public incitement” did not encompass “orders or instructions by officials to their subordinates” or by “heads of an organization to its members.”<sup>44</sup> The Secretariat also emphasized the importance of inchoate offenses in its initial draft.<sup>45</sup> It referred to some as

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38. The prosecution argued that Fritzsche “incited and encouraged the commission of war crimes by deliberately falsifying news.” Wilson, *supra* note 2, at 328. Timmermann, *supra* note 33, at 828 (“Hans Fritzsche was a senior official in Goebbels’s Ministry of Popular Enlightenment and Propaganda as well as head of the ministry’s Radio Division from 1942 onwards.”).
39. Nuremberg Decisions, *supra* note 35, at 326.
40. Wilson, *supra* note 2, at 283 (“In international criminal law, responsibility for propaganda and violent speech was first established in 1945–46 at the International Military Tribunal (IMT) at Nuremberg in the *Streicher* case.”).
41. SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 29, 40–45, 54–60 (2007) (Citing a speech by Winston Churchill on August 24, 1941 stating “[w]e are in the presence of a crime without a name” and explaining Raphael Lemkin’s development of the term ‘genocide’ and its first legal definition in the Genocide Convention).
42. Genocide Convention, *supra* note 8, at art. III(c).
43. The process began with the creation of a Secretariat draft. Article II(II)(2) proposed that “direct public incitement to any act of genocide, whether incitement be successful or not” was a punishable international criminal offense. HIRAD ABTAHI & PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PREPARATOIRES 216 (2009). Next, member states offered comments and amendments then the Economic and Social Council created an ad hoc committee to debate relevant issues. Finally, the Convention was adopted by the General Assembly. *Id.* at 644.
44. *Id.* at 238.
45. It offered two reasons. First, genocide is an exceptionally grave crime. *Id.* at 237 (“genocide is an extremely grave crime, the effects of which, once it has been committed, are irreparable”). Second genocide requires preparation and support from many individuals. *Id.* at 237 (“[genocide] is a crime that normally requires the support of a comparatively large number of individuals and substantial preparation.”). In addition inchoate crimes serve a preventive purpose, which was probably

“preparatory acts.” Strikingly, the Secretariat distinguished the inchoate offense of incitement,<sup>46</sup> a crime that excluded inciting orders from superiors to subordinates.<sup>47</sup> Instead, these crimes were eventually eliminated as types of preparatory acts, but incitement to genocide survived in its modern form.<sup>48</sup> William Schabas, professor of international law and a preeminent genocide scholar, argues that defendants are liable for such orders under complicity in genocide, Article III(e).<sup>49</sup> This context complicates charges and may lead to acquittals if prosecutors indict a defendant for incitement, rather than complicity.

Debates over incitement, as an inchoate crime, were particularly fierce. The United States was concerned about limiting free speech. The Soviet Union, on the other hand, felt that inchoate incitement

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important to fulfill the preventive function as indicated in the full title, the Convention on the *Prevention and Punishment of the Crime of Genocide*. Genocide Convention, *supra* note 8. *But see*, Wilson, *supra* note 2, at 298 (“thus far, no defendant has been indicted for ICG in the absence of an actual genocide.”).

46. ABTAHI, *supra* note 43, at 216 (organizing preparatory acts under Article II.I(2) and incitement under Article II.II(2)). *See also* Callixte Kalimanzira v. Prosecutor (*Kalimanzira English Appeals Judgement*), Case No. ICTR-05-88-A, Judgement, n.414 (Oct. 20, 2010) (“The proposal of the Secretariat differentiated acts such as instructions from officials to subordinates or heads of organizations to members from ‘direct public incitement.’ . . . These acts were considered as ‘preparatory acts’ and covered by other sections of the convention.”).
47. Preparatory acts included “studies and research for the purpose of developing the technique of genocide; setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; issuing instructions or orders, and distributing tasks with a view to committing genocide.” ABTAHI, *supra* note 43, at 216.
48. None of the preparatory acts were included in the modern genocide convention. *See* ABTAHI, *supra* note 43, at 216. *See also* Genocide Convention, *supra* note 8 (noting the absence).
49. SCHABAS *supra* note 16, at 319; Genocide Convention, *supra* note 8.

was not potent enough.<sup>50</sup> To strike a balance, the drafters attached the word “public,” thereby limiting the crime’s application.<sup>51</sup>

In Ad Hoc Committee sessions, the Venezuelan delegation suggested adding the terms “publicly or privately.”<sup>52</sup> The committee adopted these words on a vote of five delegates in favor and two abstaining, but the General Assembly Sixth Committee eventually eliminated the word “privately.”<sup>53</sup> Venezuela contested the change, asserting that incitement to genocide could occur in public and in private. It further alleged private incitement exclusively covered correspondence via letter and telephone.<sup>54</sup> Venezuela’s pleas had little effect, as the crime was ultimately codified as direct and public incitement to commit genocide.

*B. How the Public Element Developed at the Rwanda Tribunal*

Beginning on April 6, 1994, approximately 800,000 Rwandans were slaughtered.<sup>55</sup> Earlier that day dissidents shot the Rwandan

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50. The U.S. contested the Soviet approach in the General Assembly, feeling that such power could chill and criminalize free speech. *See* ABTAHI, *supra* note 43, at 697, 1527 (“If it were admitted that incitement were an act of genocide, any newspaper article criticizing a political group, for example, or suggesting certain measures with regard to such group for the general welfare, might make it possible for certain states to claim that a government which allowed the publication of such an article was committing an act of genocide; and yet that article might be nothing more than the mere exercise of the right of freedom of the press.”).
51. SCHABAS, *supra* note 16, at 329 (“[The terms direct and public] were the technique by which the drafters meant to limit the scope of any offence of inchoate incitement.”).
52. SCHABAS, *supra* note 16, at 321 (“Venezuela’s suggestion that ‘publicly or privately’ be added . . . was also accepted.”). Venezuela sought to expand incitement to the press and radio. SCHABAS, *supra* note 16, at 321 (“According to Venezuela, the addition of ‘publicly or privately’ would obviate the need for further particulars, such as ‘press, radio, etc.’”).
53. SCHABAS, *supra* note 16, at 320 n.73 (“five in favor, with two abstentions”); SCHABAS, *supra* note 16, at 322 (“[S]everal delegations, while supporting the incitement provision, were concerned about the scope of the Ad Hoc Committee text. Belgium urged a ‘happy compromise,’ deleting the phrase ‘or in private.’”); SCHABAS, *supra* note 16, at 323 (“The Committee voted to delete the word ‘or in private.’”); SCHABAS, *supra* note 16, at 323, n.91 (“[T]wenty-six in favour, six against, with ten abstentions”).
54. ABTAHI, *supra* note 43, at 1521 (“Venezuela . . . had serious objections however, to the deletion . . . of the words ‘or in private’ . . . . Incitement could be carried out in public, but it could also take place in private, through individual consultation, by letter or even by telephone. It was necessary to punish both forms of incitement.”).
55. Samantha Power, *Bystanders to Genocide*, ATLANTIC (Sept. 1, 2001, 12:00 PM) *available at*

President's plane from the sky.<sup>56</sup> His assassination was allegedly a Hutu plot to scapegoat the Tutsi minority and spark a powder keg of ethnic hatred.<sup>57</sup> Soon after, neighbors wielding machetes, led by Rwandan officials, massacred people of all ages and genders.

Mere hours after the president's plane crashed, the Rwandan Armed forces and militia groups began setting up roadblocks throughout the country.<sup>58</sup> The attendants at the roadblocks acted violently. Asking passersby for proof of ethnicity, they killed Tutsi and moderate Hutu civilians on the spot.<sup>59</sup> Lasting just 100 days, the Rwanda genocide has been labeled the most efficient genocide of the twentieth century.<sup>60</sup>

When the violence subsided, the Security Council passed resolution 955.<sup>61</sup> The foundational document of the International

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<http://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571/> [perma.cc/87DG-Q62E] ("Using firearms, machetes, and a variety of garden implements, Hutu militiamen, soldiers, and ordinary citizens murdered some 800,000 Tutsi and politically moderate Hutu.").

56. PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 110 (1999) (On the evening of April 6, 1996 . . . President Habyarimana's plane . . . had been shot down over Kigali . . . . The new Hutu President of Burundi and several of Habyarimana's top advisers had also been on board. There were no survivors."). Juvenal Habyarimana, an ethnic Hutu, had fallen out of favor with radical members of his cabinet. *Id.* at 113 ("Habyarimana's assassins have never been positively identified, suspicion has focused on the extremists in his own entourage").
57. Ethnic tensions in Rwanda date back to, and possibly precede, European colonization, first by Germany then Belgium, as a result of the Berlin Conference. *See id.* at 47–58.
58. Amnesty International, Rwanda: Mass Murder by government supporters and troops in April and May 1994 2.1 (Apr. 30, 1994) ("Militia set up roadblocks in Kigali and its suburbs. . . . Evidence of similar coordinated action was to emerge countrywide in the weeks to come.").
59. *Id.* ("Each individual passing through these roadblocks had to produce an identity card which indicates the ethnic origin of its bearer. Being identified as or mistaken for a Tutsi meant immediate and summary execution. The killers made no attempt to conceal the killings—or hide the bodies after the fact, as witnessed by journalists and other foreign nationals. There was no evidence that either central government or local government authorities or senior army officers opposed the killings by those acting on their authority. Quite the contrary, the evidence suggests the *de facto* authorities and top armed forces leaders had ordered and directed even this early stage of the murder campaign.").
60. Power, *supra* note 55 ("[The Rwandan Genocide] was the fastest, most efficient killing spree of the twentieth century.").
61. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

Criminal Tribunal for Rwanda (ICTR), which encouraged convictions of high profile individuals accused of orchestrating the genocide.<sup>62</sup> The ICTR is particularly relevant to a discussion of incitement to genocide because it was the first international criminal body to impose the crime in its modern form.<sup>63</sup> Since its first trial, in January 1998, the ICTR has indicted over fifteen individuals for incitement.<sup>64</sup> Notably, the ICTR had considerable leeway to interpret the crime, as the U.N. Ad Hoc Drafting Committee never discussed the meaning of the words “public” and “direct.”<sup>65</sup> The Tribunal, as a result, has produced the most developed body of jurisprudence on these elements.

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62. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (The resolution was created for “the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide.”).
63. Benesch, *supra* note 3, at 489 (“[T]he world’s first conviction for incitement to genocide [was] in the case of a former Rwandan bourgmestre [Jean-Paul Akayesu].”).
64. Historic Judgement Finds Akayesu Guilty of Genocide, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Sept. 2, 1998), <http://www.unicttr.org/en/news/historic-judgement-finds-akayesu-guilty-genocide> [perma.cc/3GKE-Z26H] (“[T]he International Criminal Tribunal for Rwanda, in the first-ever judgement by an international court for the crime of genocide, today found Jean-Paul Akayesu guilty of Genocide and Crimes Against Humanity.”); *see generally* Prosecutor v. Jean-Paul Akayesu (*Akayesu English Trial Judgement*), Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998); Prosecutor v. Jean Kambanda, Case No. ICTR97-23-S, Judgement and Sentence, (Sept. 4, 1998); Prosecutor v. Georges Ruggiu (*Ruggiu English Judgement*), Case No. ICTR-97-32-I, Judgement and Sentence, (June 1, 2000); Prosecutor v. Joseph Serugendo, Case No. ICTR-2005-84-I, Judgement and Sentence, (June 12, 2006); Prosecutor v. Nahimana, Barayagwiza, Ngeze (*Nahimana Trial Judgement*), Case No. ICTR-99-52-T, Judgement and Sentence, (Dec. 3, 2003); Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, (May 16, 2003); Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-2000-55A-T, Judgement and Sentence, (Sept. 12, 2006); Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement and Sentence, (Dec. 1, 2003); Prosecutor v. Simon Bikindi, Case No. ICTR-01-72-T, Judgement, (Dec. 2, 2008); Prosecutor v. Callixte Kalimanzira (*Kalimanzira English Trial Judgement*), Case No. ICTR-05-88-T, Judgement, (June 22, 2009); Prosecutor v. Callixte Nzabonimana (*Nzabonimana Trial Judgement*), Case No. ICTR-98-44D-T, Judgement and Sentence, (May 31, 2012); Prosecutor v. Augustin Ndirabatware, Case No. ICTR-99-54-T, Judgement and Sentence, (Dec. 20, 2012); Prosecutor v. Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi Ndayambaje (*Nyiramasuhuko Trial Judgement*), Case No. ICTR-98-42-T, Judgement and Sentence, (June 24, 2011).
65. SCHABAS, *supra* note 16, at 321 (“At no point did the Committee discuss what ‘direct’ or ‘public’ might mean.”).

As the first international criminal body to approach an incitement to commit genocide indictment since the adoption of the Genocide Convention, the *Akayesu* Trial Chamber developed the basic framework. In the case of Jean-Paul Akayesu, Bourgemestre of Taba commune in central Rwanda, the Tribunal issued its first conviction for direct and public incitement to commit genocide.<sup>66</sup> Early in the morning, approximately thirteen days after the President's death, Akayesu urged a crowd of 100 to 200 Rwandans to "eliminate the sole enemy."<sup>67</sup> He knew the crowd understood that the enemy was the Tutsis.<sup>68</sup>

In finding Akayesu's speech "public,"<sup>69</sup> the Court recognized two definitions and two relevant factors for deciding future cases.<sup>70</sup> One definition derives from a civil law source.<sup>71</sup> It states that "words [are] public where they are spoken aloud in a place that is public by definition."<sup>72</sup> The second definition, developed by the International

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66. *Akayesu English Trial Judgement*, Case No. ICTR-96-4-T, ¶¶ 674, 734. Benesch, *supra* note 3, at 489 ("[T]he world's first conviction for incitement to genocide [was] in the case of a former Rwandan bourgemestre [Jean-Paul Akayesu]."). Akayesu was also the first person ever convicted of genocide. Benesch, *supra* note 3, at 512 ("In September 1998 the Tribunal convicted Akayesu . . . of genocide (making his case the first such conviction ever)").
67. *Akayesu English Trial Judgement*, Case No. ICTR-96-4-T, ¶¶ 326, 358-62, 673 ("[A]t about 4 a.m., on the night of 18 to 19 April 1994, . . . . [Akayesu] immediately alerted the police and went to the scene . . . . In Gishyeshye, he found a body stretched out on the ground . . . . The Accused puts the crowd at the meeting at about 100 to 200 people . . . . The Accused admitted before the Chamber that he asked the crowd to draw closer, and then addressed the crowd . . . . the Chamber is satisfied beyond a reasonable doubt that the Accused clearly called on the population to unite and eliminate the sole enemy: accomplices of the Inkotanyi.").
68. *Id.* at ¶ 709 ("Akayesu himself knew of the impact of his statements on the crowd and of the fact that his call to fight against the accomplices of the Inkotanyi would be understood as exhortations to kill the Tutsi in general.").
69. *Id.* at ¶ 674 ("[T]he Chamber is satisfied beyond a reasonable doubt that, by the above-mentioned speeches made in public and in a public place, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group, as such.").
70. *Id.* at ¶ 556.
71. *See infra* Part I.B.1.
72. *Akayesu English Trial Judgement*, ICTR-96-4-T, ¶ 556 ("A line of authority commonly followed in Civil law systems would regard words as being public where they were spoken aloud in a place that were public by definition.").

Law Commission (ILC), expands upon the first.<sup>73</sup> It incorporates statements conveyed to the general public through the mass media.<sup>74</sup> This second definition, importantly, draws in the Genocide Convention drafting committee's intent to punish incitement through mass media.<sup>75</sup>

The two "primary" factors, also set forth by the *Akayesu* Court, are crucial to the modern analysis.<sup>76</sup> The first factor is "the place where the incitement occurred" (the "place" factor).<sup>77</sup> The second factor is "whether or not an audience is select or limited" (the "select or/and limited" factor).<sup>78</sup> A finding that an audience is select and limited implies that an audience to the incitement was private, not public, and therefore the defendant may not be convicted of incitement.<sup>79</sup> Later judgments adjoin two more factors to decide whether an audience is select and limited. These factors include the

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73. International Law Commission, Report of the Int'l Law Comm'n on the Work of Its Forty-Eighth Session, May 6 - July 26, 1996, U.N. Doc. A51/10 22 ¶ 16-19 (1996). *See also* INTERNATIONAL LAW COMMISSION, *supra* note 31.
74. *Akayesu English Trial Judgement*, ICTR-96-4-T, ¶ 556 ("According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place at large by such means as the mass media, for example, radio or television.").
75. *Callixte Nzabonimana v. Prosecutor (Nzabonimana Appeals Judgement)*, Case No. ICTR-98-44D-A, Judgement, ¶ 122 (Sept. 29, 2014) ("The *travaux préparatoires* of the Genocide Convention confirm[] that 'public' incitement to genocide pertains to mass communications.").
76. *Akayesu English Trial Judgement*, Case No. ICTR-96-4-T, ¶ 556.
77. *Id.* ("The public element of incitement to commit genocide may be better appreciated in light of . . . the place where the incitement occurred").
78. *Id.* ("The public element of incitement to commit genocide may be better appreciated in light of . . . whether or not assistance was selective or limited."); *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence, ¶ 851 (Dec. 1, 2003). Later, judgments explain that assistance really means audience. *E.g.*, *Augustin Ndirabatware v. Prosecutor (Ndirabatware Appeals Judgement)*, MICT-12-29-A, Judgment, ¶ 52 (Dec. 18, 2014) ("When assessing the 'public' element of the incitement, factors such as . . . whether the audience was selected or limited can be taken into account.").
79. *Prosecutor v. Callixte Kalimanzira (Kalimanzira English Trial Judgement)*, Case No. ICTR-05-88-T, Judgement, ¶ 515 n.554 (June 22, 2009) ("At the time the Genocide Convention was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime, thereby underscoring their commitment to set aside for punishment only the truly public forms of incitement."). Private incitement to commit genocide is also confusingly punishable under complicity. *See supra* notes 27, 48.

“number of persons” (the “number” factor) and the “medium through which the message is conveyed” (the “medium” factor).<sup>80</sup>

Although the *Akayesu* trial judgment provided a legal framework, it is noticeably devoid of any explanation on how to apply either primary factor. Rather, it bluntly found Akayesu’s speech public.<sup>81</sup> Cases after *Akayesu* provide more insight into how the factors apply in hypothetical scenarios.<sup>82</sup>

1. Soapbox speeches and clandestine meetings: the primary factors of public incitement.

The *Akayesu* judgment is the first word on whether incitement to commit genocide is public. The case established the two primary factors. The first describes the place where the inciting speech is enunciated. The place factor appears intuitive, but has two aspects: (1) the geographic place where a speaker spoke and; (2) whether a type of setting is typically public. The *Akayesu* judgment pinpoints the geographic location where Akayesu inflamed his audience.<sup>83</sup> Two witnesses indicated that the meeting was held at a crossroads or on a

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80. *Ngirabatware Appeals Judgement*, Case No. MICT-12-29-A, ¶ 52 (“The ICTR Appeals Chamber has held that ‘the number of persons and the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public.’”).
  81. Ostensibly Akayesu’s speech was public because it was in a public place, a roadside, and the audience was not select or limited. The Canadian Supreme Court case against Léon Mugesera demonstrates similar disregard for the public element. *Mugesera v. Canada*, [2005] S.C.R. 100 (Can.), para. 94 (“The criminal act requirement for incitement to genocide has two elements: the act of incitement must be direct and it must be public. . . . The speech was public. We need only consider the meaning of the requirement that it be direct.”).
  82. *E.g.*, Callixte Nzabonimana v. Prosecutor (*Nzabonimana Appeals Judgement*), Case No. ICTR-98-44D-A, Judgement, ¶¶ 231–32 (Sept. 29, 2014) (“The Appeals Chamber considers that, though not required, the number of persons and the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited . . . . The Appeals Chamber observes the Trial Chamber’s consideration that: (i) the audience consisted of approximately 20 members of the general population, including Tutsis, who happened to be present in the area at the time; and (ii) the incitement occurred in an undeniably public location.”).
  83. *Prosecutor v. Jean-Paul Akayesu (Akayesu English Trial Judgement)*, Case No. ICTR-96-4-T, Judgement, ¶ 359 (Sept. 2, 1998) (“[T]he Accused was present in Gishyeshye, during the early hours of 19 April 1994, that he joined the crowd gathered around the body of a young member of the Interahamwe militia, and that he took that opportunity to address the people.”).



street.<sup>84</sup> Still, the court never formally held that the speech was enunciated on a road, and that roads are public places.<sup>85</sup> Instead, Chamber I wrote that a place is public when it is public by definition.<sup>86</sup> Yet the ICTR never explained what “public by definition” means. It only referred to civil law jurisprudence on public places, specifically an obscure criminal judgment issued by the French Court of Cassation from 1950.<sup>87</sup> Without a modern articulation of places that are public by definition the court’s logic seems circular. The ILC’s second definition extends the place factor by incorporating “mass media.”<sup>88</sup> This is relevant, except it relates more closely under the modern framework to the second factor: whether an audience is select or limited.<sup>89</sup>

In English translations, the ICTR articulates the select or limited factor in several ways.<sup>90</sup> Original French ICTR judgments, deciding a

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84. *Id.* at ¶ 321 (“Prosecution witness A testified that . . . he went to Gishyeshye on 19 April 1994, towards 6 or 7 o’clock in the morning, where he found a large gathering of 300 to 400 people at a crossroads.”).  
*Id.* at ¶ 323 (“[A Witness] confirmed that a meeting was then held on the road in Gishyeshye, in the presence of [Akayesu]”).
85. *Id.* at ¶¶ 358–62, 549–562, 672–675.
86. *Id.* at ¶ 556 (“A line of authority commonly followed in Civil law systems would regard words as being public where they were spoken aloud in a place that were public by definition.”).
87. *Id.* at n.125 (“French Court of Cassation, Criminal Tribunal, 2 February 1950, Bull. crim. No. 38, p. 61.”).
88. *Akayesu English Trial Judgement*, Case No. ICTR-96-4-T, at ¶ 556 (“According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place at large by such means as the mass media, for example, radio or television.”).
89. *Callixte Nzabonimana v. Prosecutor (Nzabonimana Appeals Judgement)*, Case No. ICTR-98-44D-A, Judgement, ¶ 231 (Sept. 29, 2014) (“[T]hough not required, . . . the medium through which the message is conveyed may be relevant in assessing whether the attendance was select or limited, thereby determining whether or not the recipient of the message was the general public.”).
90. *See Akayesu English Trial Judgement*, Case No. ICTR-96-4-T, Judgement, ¶ 556 (Sept. 2, 1998) (whether “*assistance* was selective or limited”) (emphasis added); *Prosecutor v. Georges Ruggiu (Ruggiu English Judgement)*, Case No. ICTR-97-32-I, Judgement and Sentence, ¶ 17 (June 1, 2000) (whether “incitement was selective or limited”); *Prosecutor v. Callixte Kalimanzira (Kalimanzira English Trial Judgement)*, Case No. ICTR-05-88-T, Judgement, ¶ 515 (June 22, 2009) (whether “*attendance* was selective or limited.”) (emphasis added); *Augustin Ndirabatware v. Prosecutor (Ndirabatware Appeals Judgement)*, Case No. MICT-12-29-A, Judgement, ¶ 52 (Dec. 18, 2014) (whether the “*audience* was select or limited.”) (emphasis added). Assistance is less precise than audience because it may apply to a

charge of incitement to commit genocide, consistently use the French word *assistance*.<sup>91</sup> Translation, from French to English, probably obscured the meaning of this factor in subsequent decisions. In the English *Akayesu* judgment, the ICTR introduced the “select and limited factor” as whether “assistance” is select or limited to the inciting speech.<sup>92</sup> The English judgment translated *assistance*, which means audience or attendance in French, to “assistance” in English.<sup>93</sup> Later judgments adopted the more lucid translation “audience.”<sup>94</sup> No ICTR trial chamber or appeal chamber discussed how to apply the select or limited factor until the *Nahimana* Appeal Chamber acquitted defendant Barayagwiza, in 2007.<sup>95</sup>

The ICTR developed the select and limited factor more thoroughly in the case of Jean-Bosco Barayagwiza. The Appeals Chamber reversed Barayagwiza’s conviction for incitement on the basis that the audience was select and limited.<sup>96</sup> His incitement

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speaker’s subordinates, which cannot be considered in finding a ruling public. *See supra* note 78.

91. *See* Prosecutor v. Jean-Paul Akayesu (*Akayesu French Trial Judgement*), Case No. ICTR-96-4-T, Jugement, ¶ 556 (Sept. 2, 1998) (“assistance a été ou non sélectionnée ou limitée”); Prosecutor v. Georges Ruggiu (*Ruggiu French Trial Judgement*), Case No. ICTR-97-32-I, Jugement, ¶ 17 (June 1, 2000) (“l’incitation a été ou non sélectionnée ou limitée”); Prosecutor v. Callixte Kalimanzira (*Kalimanzira French Trial Judgement*), Case No. ICTR-05-88-T, Jugement, ¶ 515 (June 22, 2009) (“l’assistance était ou non sélectionnée ou limitée”).
92. *Akayesu English Trial Judgement*, Case No. ICTR-96-4-T, ¶ 556.
93. *Compare id.* at ¶ 556 (“whether or not assistance was selective or limited.”) *with Akayesu French Trial Judgement*, Case No. ICTR-96-4-T, ¶ 556 (“assistance a été ou non sélectionnée ou limitée”).
94. *E.g.*, *Ngirabatware Appeals Judgement*, Case No. MICT-12-29-A, ¶ 52 (“When assessing the ‘public’ element of the incitement, factors such as the place where the incitement occurred and whether the audience was selected or limited can be taken into account.”).
95. Jean-Bosco Barayagwiza was joined in the *Nahimana* case. Prosecutor v. Nahimana, Barayagwiza, Ngeze (*Nahimana Trial Judgement*), Case No. ICTR-99-52-T, Judgement and Sentence (Dec. 3, 2003); Nahimana, Barayagwiza, Ngeze v. Prosecutor (*Nahimana Appeals Judgement*), Case No. ICTR-99-52-A, Judgement (Nov. 28, 2007). This case has been called “the most contentious of all the ICTR’s judgments.” Wilson, *supra* note 2, at 295. Alexander Zahar, legal officer at the ICTY, calls it a “very poor precedent.” Alexander Zahar, *The ICTR’s “Media” Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide*, 16 CRIM. L. F. 33 (2005) (“The ICTR’s ‘Media’ judgment marks a low point in international criminal justice, where the quality of decisions has fluctuated considerably.”).
96. *Nahimana Appeals Judgement*, Case No. ICTR-99-52-A, ¶ 862 (“In particular, the supervision of roadblocks cannot form the basis for the Appellant’s conviction for direct and public incitement to commit

acquittal opened a new vein of arguments pertaining to the public element.<sup>97</sup> One alleges that a roadblock is per se private.<sup>98</sup> A second suggests that speech is not public until an audience exceeds a minimum number of people.<sup>99</sup> Kalimanzira, the former Rwandan Interior Minister, won an acquittal, in part, on the second argument.<sup>100</sup> Judge Fausto Pocar took issue with the majority's reasoning, in a separate opinion.<sup>101</sup> He wrote that the decision created a dangerous possibility and contended that a group should be considered public or private based on its location and characteristics.<sup>102</sup> An audience need not be large; a small group may also be public.<sup>103</sup>

In *Nzabonimana*, the court refined the second factor: whether an audience is select or limited. At the so-called Murambi meeting, Nzabonimana, an official, endorsed killing Tutsis.<sup>104</sup> After the ICTR

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genocide; while such supervision could be regarded as instigation to commit genocide, it cannot constitute public incitement, since only the individuals manning the roadblocks would have been the recipients of the message and not the general public.”).

97. Barayagwiza was a founding member of the Coalition for the Defense of the Republic (CDR) a Hutu nationalist party. *Nahimana Trial Judgement*, Case No. ICTR-99-52-T, ¶ 7. He was responsible for supervising roadblocks in the Rwandan capital, Kigali. *Id.* at ¶ 707. The Appeal Chamber reasoned that “only the individuals manning the roadblocks would have been the recipients of the message and not the general public.” *Nahimana Appeals Judgement*, Case No. ICTR-99-52-A, ¶ 862.
98. *E.g.*, *Ngirabatware Appeals Judgement*, Case No. MICT-12-29-A, ¶ 50 (“[Ngirabatware] submits that: . . . (ii) the group was selected and limited to the Interahamwe and Impuzamugambi manning the roadblock.”).
99. *E.g.*, *Id.* (“[Ngirabatware] submit[ed] that: (i) the mere presence of a group at the vicinity of the roadblock does not suffice to show that the alleged inciting statements were received by the public as, at best, the statements were heard by only three persons”).
100. Callixte Kalimanzira v. Prosecutor (*Kalimanzira English Appeals Judgement*), Case No. ICTR-05-88-A, Judgement, ¶¶ 152, 165 (Oct. 20, 2010) (“Kalimanzira asserts that the Tribunal’s jurisprudence requires a very large number of individuals to be exposed to a call to commit genocide before it can be qualified as direct and public incitement.”).
101. *Id.* at, ¶¶ 41–45 (Pocar, J., dissenting).
102. *Id.* at ¶ 45 (“In my view, [requiring an audience to be broad] establishes a dangerous and incorrect precedent linked with the question of what minimum audience size is required to satisfy the “public” element of the crime of direct and public incitement to commit genocide.”).
103. *Id.*
104. Nine days after the start of the genocide, Nzabonimana attended the Murambi meeting with other Rwandan officials including interim Prime Minister Jean Kambanda. Prosecutor v. Callixte Nzabonimana

convicted him, Nzabonimana argued, on appeal, that his speech was private, based on the characteristics of his audience. He argued that the group was select and limited because the audience was composed of political officials.<sup>105</sup> The Appeal Chamber distinctly agreed.<sup>106</sup> In its decision, on the Murambi meeting, the ICTR explained the select or limited factor using two subordinate factors. It also implied that inciting speech may be private, even if it occurs in a public place, when the audience is private.

2. Tipping points and television: subordinate factors of public incitement.

The *Kalimanzira* Appeal Judgment was the first to attempt to pin down an analysis of the select and limited factor through subordinate factors. The two subordinate factors it articulated are (1) the number of people in an audience and (2) the medium of the speech.<sup>107</sup> In an extensive footnote, numbered 410, the Appeal Chamber considered both factors, but focused on the size of audiences

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(*Nzabonimana Trial Judgement*), Case No. ICTR-98-44D-T, Judgement and Sentence, ¶ 1769 (May 31, 2012) (“On 18 April 1994, the Prime Minister of Rwanda and other members of the Interim Government, including Nzabonimana, held a meeting for the bourgmestres of Gitarama préfecture. Nzabonimana ordered the killings of bourgmestres and other local officials opposed to the massacre of Tutsis during the meeting.”). At the Murambi meeting, Nzabonimana ordered people who opposed massacring Tutsis, killed. *Id.* at ¶¶ 1769, 1772 (Nzabonimana made an “explicit threat to kill persons opposing the massacre of Tutsis.”).

105. Callixte Nzabonimana v. Prosecutor (*Nzabonimana Appeals Judgement*), Case No. ICTR-98-44D-A, Judgement, ¶ 380 (Sept. 29, 2014) (“Nzabonimana replies that the fact that public officials were convened in their function as public officials excludes the characterisation of the meeting as public. . . . these officials were selected and convened in their official capacity and . . . the meeting was purely private. He further replies that the meeting was held in a closed room devoid of any public character.”).
106. The Trial Chamber held that Nzabonimana’s speech was public because “the message of the meeting was intended to be broadcast to the public at large and evinces that Nzabonimana had the requisite mens rea to incite genocide publicly.” *Nzabonimana Trial Judgement*, Case No. ICTR98-44D-T, ¶ 1772. The Appeal Chamber reversed his conviction. *Nzabonimana Appeals Judgement*, Case No. ICTR-98-44D-A, ¶ 385 (“the Appeals Chamber notes the Trial Chamber’s acknowledgement that the incriminating message was not disseminated by the media. Furthermore, the Appeals Chamber is of the view that the evidence does not support a finding that the meeting occurred in a public place.”).
107. *Nzabonimana Appeals Judgement*, Case No. ICTR-98-44D-A, ¶¶ 231, 384 (“though not required, the number of persons and the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public.”).

in prior incitement convictions.<sup>108</sup> Footnote 410 also referred to three cases to quantify the size of a typically public audience.<sup>109</sup> The Court found audiences, where a defendant's speech was deemed public, ranged from "over 100" to "approximately 5,000 individuals."<sup>110</sup> While messages that reach 5,000 or more people are generally public, audiences comprised of individuals fewer than one hundred are harder to label without more facts.

A factual scenario in the *Nyiramasuhuko* trial judgment indicates that when an audience is composed of a single member of the public, inciting speech is unlikely to be held public.<sup>111</sup> In the *Butare* case, which joined six defendants, Trial Chamber II found Paulene Nyiramasuhuko not guilty of incitement to commit genocide.<sup>112</sup> Nyiramasuhuko, the former Rwandan Minister of the Family and Women's development, allegedly distributed condoms to a civilian woman, in the presence of four men, directing her to "[g]o and distribute these condoms to [her] young men, so that they use them to rape Tutsi women and protect themselves from AIDS, and after having raped them they should kill all of them. Let no Tutsi woman survive because they take away our husbands."<sup>113</sup> Chamber II found that the public element was not satisfied, based in large part on the number of individuals present.<sup>114</sup> It further indicated that the communication was comparable to a private conversation.<sup>115</sup> Based on *Nyiramasuhuko* and *Kalimanzira* alone, it appears that there is a magic tipping point between zero and one hundred audience members where public speech becomes private and vice versa.

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108. *Id.* at n.410.

109. *Id.*

110. *Id.* ("[I]nciting speeches at public meetings to "crowds" of people – ranging from "over 100" to approximately 5,000 individuals – were found to constitute public incitement.").

111. *Nyiramasuhuko Trial Judgement*, Case No. ICTR-98-42-T, ¶ 6016.

112. Butare is a region in Rwanda that the case is colloquially called. The case is officially named *Nyiramasuhuko*. *Id.* at ¶ 6186.

113. *Id.* at ¶¶ 6014, 6016 ("The evidence shows that Nyiramasuhuko directed her speech to one woman, in the presence of four other men.").

114. *Id.* at ¶ 6016 ("the Chamber is not satisfied that the "public" element of this crime has been established.").

115. *Id.* ("In order to possess the requisite *mens rea* for the crime of direct and public incitement, the audience must be much broader than that found in the present circumstance. Here, Nyiramasuhuko's statements are more akin to a 'conversation', consistent with the definition of private incitement found in the *travaux préparatoires* of the Genocide Convention. There is no indication in the record that anyone other than those cited was present.").

This magic number is the very notion which Judge Pocar took issue with in his separate opinion to *Kalimanzira*.<sup>116</sup> He asserted that there should be no threshold. Furthermore, the number of individuals should not be dispositive of whether or not the speech was public.<sup>117</sup> The *Nzabonimana* Appeal Chamber affirmed Judge Pocar's reasoning less than four years later, finding that numbers may be probative but are not required in an analysis of the public element.<sup>118</sup> In other words, the number of individuals present is a factor; it is not an element.<sup>119</sup>

*Nzabonimana* is a second example of a case where a court prominently weighed the amount of individuals in an audience of less than 100 members. In relation to the Cyayi centre, Nzabonimana was initially convicted for direct and public incitement to commit genocide when he addressed 30 individuals approximately 250 to 300 meters from a government office.<sup>120</sup> The Appeals Chamber accepted the trial courts finding that Nzabonimana's speech to a group, at a government office, including a Tutsi, and an individual that was called over, was public.<sup>121</sup> The Trial Chamber found that the audience

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116. Callixte Kalimanzira v. Prosecutor (*Kalimanzira English Appeals Judgement*), Case No. ICTR-05-88-A, Separate Opinion of Judge Pocar, ¶¶ 41–45 (Oct. 20, 2010).

117. *Id.* at ¶¶ 45, 156 (Pocar, J., dissenting) (“I believe, no threshold exists and none should be established. There is no clear indication in the jurisprudence of the Tribunal that a speech must be made to a large group of people in order to qualify as public incitement.”). *Id.* at 45 (“There is no clear indication in the jurisprudence of the Tribunal that a speech must be made to a large group of people in order to qualify as public incitement. For the purpose of the law, it suffices that the speech was directed at a number of individuals at a public place or at members of the general public”).

118. Callixte Nzabonimana v. Prosecutor (*Nzabonimana Appeals Judgement*), Case No. ICTR-98-44D-A, Judgment, ¶ 231 (Sept. 29, 2014) (“Though not required, the number of persons . . . may be relevant in assessing whether the attendance was select or limited, thereby determining whether or not the recipient of the message was the general public.”); *see also id.* at ¶ 126 (“The number of individuals in the audience is not an element of the crime of direct and public incitement to commit genocide.”).

119. *Id.* at ¶ 231 (“[T]he number of persons present is not an essential factor in this assessment.”).

120. Callixte Nzabonimana v. Prosecutor (*Nzabonimana Trial Judgement*), Case No. ICTR-98-44D-T, Judgment and Sentence, ¶ 887 (May 31, 2012).

121. *Nzabonimana Appeals Judgement*, Case No. ICTR-98-44D-A, ¶ 129 (“[T]he Appeals Chamber observes that in this specific instance, the facts used by the Trial Chamber to establish the public element – the public location, a crowd of approximately 30 people, and audience that

was composed of 30 people, refining the requisite composition of small public groups, beyond simply a 100-person threshold. This appeal judgment permits audiences to be small, yet still public.

The second subordinate factor is the “medium through which the message is conveyed.”<sup>122</sup> The drafters specified that messages broadcast in the press, over the radio, or in the cinema constitute incitement.<sup>123</sup> This notion was a prominent consideration in the *travaux préparatoires*.<sup>124</sup> ICTR cases confirm that individuals will be liable for messages through these media. In one case, the Interim Prime Minister of Rwanda, Jean Kambanda was convicted for incitement to commit genocide, based on a video recording of a speech he delivered that was broadcast during the genocide.<sup>125</sup> In another, a Belgian social worker and radio personality for Radio Television Libre de Milles Collines (Radio RTLM) pled guilty to incitement to commit genocide. His speech was found public because his “messages were broadcast in a media forum and to members of the general public.”<sup>126</sup>

The medium factor plays a role in decisions where speech that normally appears public is found to be private. When a speech is recorded in a private place, it may be found public only if it is broadcast or disseminated. An issue in the *Nzabonimana* appeal judgment, about the Murambi meeting, demonstrates how this idea applies. Although the Trial Judgment noted the presence of a journalist and convicted Nzabonimana, the Appeal Chamber found the conviction an error.<sup>127</sup> Instead, it held that the discussion was not

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was not selected or limited – showed that the incitement was public and that Nzabonimana intended it to be so.”).

122. *Id.* at ¶ 231 (“[T]hough not required, . . . the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public.”).
123. Callixte Kalimanzira v. Prosecutor (*Kalimanzira English Appeals Judgement*), Case No. ICTR-05-88-A, Judgement, ¶ 158 (Oct. 20, 2010) (“the Appeals Chamber recalls that the language of Article 2 of the Tribunal’s Statute tracks the language of the Genocide Convention. A review of the travaux préparatoires of the Genocide Convention confirms that public incitement to genocide pertains to mass communications. . . . understood as incitement ‘in public speeches or in the press, through the radio, the cinema or other ways of reaching the public.’”). See also ABTAHI, *supra* note 43, at 986.
124. *Nzabonimana Appeals Judgement*, Case No. ICTR-98-44D-A, ¶ 126.
125. Prosecutor v. Jean Kambanda, Case No. ICTR97-23-S, Judgement and Sentence, ¶ 39(x) (Sept. 4, 1998).
126. Prosecutor v. Georges Ruggiu (*Ruggiu English Judgement*), Case No. ICTR-97-32-I, Judgement and Sentence, ¶ 17 (June 1, 2000).
127. *Nzabonima Appeals Judgement*, Case No. ICTR98-44D-A, ¶¶ 382–383.

public because the journalist never disseminated the message.<sup>128</sup> The Chamber drew a line in the sand designating that a private conversation only becomes public once it is broadcast.<sup>129</sup>

*C. Summary of the Modern Legal Framework*

The modern legal framework is composed of primary and subordinate factors. A Trial Chamber should begin an analysis of the public element by considering the primary factors. First, it should examine the characteristics of the place where the speech was pronounced. If the location is a street corner, then the place is likely to be considered public. If the location is a closed room, then the place is likely to be private. Once it determines if the place is by definition public, it should move on to the select or limited factor. This primary factor incorporates the subordinate factors. It relies on a determination of the nature of an audience privy to inciting speech.

There is no predetermined progression for considering the subordinate factors. A court may begin by evaluating how many individuals were present and composed the audience. The court may use audience size as one indicator to determine that speech is public. Audiences consisting of many individuals are more likely to be public, but small speeches do not necessarily point to a private conversation. Given the existing jurisprudence, it would be erroneous for a judgment to find that a speech is private based solely on the presence of a small number of individuals. A court should also consider whether the speech was broadcast through the media. If speech is broadcast it is likely to be public. However, if speech is not broadcast and the audience is small, judges should consider unspecified characteristics of an audience to determine whether it is public.

II. SUGGESTIONS TO CLARIFY THE PUBLIC ELEMENT

Instead of a factor, the select and limited character of an audience should be a defense. Only defendants have ever raised the argument and in many cases a judgment can be rendered without considering the character of an audience. This would also shift the burden to

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128. *Id.* at ¶¶ 385–87 (“[T]he Appeals Chamber finds that the attendance at the Murambi meeting was selected and limited, that the location was not a public place, and that the incriminating message was not broadcasted. The Appeals Chamber therefore finds that no reasonable trier of fact could have found that the incitement was public.”).

129. *Id.* at ¶ 385 (“The Appeals Chamber considers that the mere presence of a journalist does not automatically render the meeting public, rather it is the broadcast of the incriminating message which would render the incitement public. In this respect, the Appeals Chamber notes the Trial Chamber’s acknowledgement that the incriminating message was not disseminated by the media.”).



defendants, which is appropriate, as they are in a better position to shed light on facts relating to the composition of an audience.

Another method to clarify the public element is to designate the medium and place factors as “or” factors. Both medium and place should satisfy the public element independently. Media is more appropriately considered at the first stage of the public element framework. This recommendation seeks to separate the medium of speech from the place factor and the select and limited defense by eliminating any connection to the number of individuals in an audience. Instead it relies on the broadcast qualities of media.

*A. The Select or Limited Factor as a True Affirmative Defense*

The select and limited factor is more appropriately considered a defense to public incitement than a factor. It allows a Chamber to hold that a meeting was private, absolving a defendant of an incitement allegation. Relying on the characteristics of an audience, the defense recalls early debates on what crimes of genocide were punishable under international law. The select and limited defense should override both the place and medium factors requiring a court to rule on the composition of an audience.

One consistent consideration in deciding whether an audience is select or limited is the number of audience members. This is not necessary, but may be helpful, to find an audience select or limited.<sup>130</sup> It may be an indicator because it helps judges gauge the context of a speech. Though it is difficult to empirically prove an amount of audience members, the number may capture the character of communications and the relationship between the speaker and the audience.

The second factor, medium of speech, appears to conflate characteristics of a communication with the amount of audience members. A more precise inquiry would consider the relationship between the speaker and his or her audience. In early conversations on the public element the U.N. Secretariat acknowledged that communications between superiors and subordinates were not public speech. Instead of using medium as a way to emphasize the scope of an audience (i.e. speech that is communicated through the television reaches large audiences) an analysis could rely on a factor that considers the relationship between the speaker and any person in his or her audience.

The number factor may inappropriately exclude speeches that target a small group of public individuals. If, hypothetically, a speaker

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130. *Id.* at ¶¶ 231, 384 (“though not required, the number of persons and the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited, thereby determining whether or not the recipient of the message was the general public.”).

holds a meeting in a room with twelve members of the public, the relationship between the speaker and audience members is crucial to determine whether the conversation should be public or private. If all twelve individuals are members of the public then the meeting may be found public. However, if the twelve audience members are the speaker's subordinates then the meeting may not be found public. The juxtaposition between the number of individuals present and the relationship is key. These two factors, much more than number and medium, align in situations that are typically public and diverge in more complex factual scenarios.

*B. Refine the Definition of a Public Place*

Place is a factor in every ICTR case involving the public element. It allows judges to swiftly pinpoint a location of incitement, explain the setting's qualities, and label it inherently public or private. A crossroads is one example of a place commonly considered public.<sup>131</sup> A commercial center is a second.<sup>132</sup> On the other hand, an isolated room should be considered private. The ICTR's definition seeks to incorporate these scenarios, but relies on civil law definitions.<sup>133</sup> The *Akayesu* judgment alludes directly to the French legal theory,<sup>134</sup> but Trial Chamber I never established which places are public by definition. That introduces a lacuna into the jurisprudence. Articulating a method for deciding whether places are public or private would alleviate that ambiguity.

American public accommodations laws may be one helpful way to delineate a method for distinguishing public and private places.<sup>135</sup>

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131. Prosecutor v. Jean-Paul Akayesu (*Akayesu English Trial Judgement*), Case No. ICTR-96-4-T, Judgement, ¶ 323 (Sept. 2, 1998) (“[A Witness] confirmed that a meeting was then held on the road in Gishyeshye, in the presence of [Akayesu]”); *id.* at ¶ 674 (“From the foregoing, the Chamber is satisfied beyond a reasonable doubt that, by the above-mentioned speeches made in public and in a public place, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group, as such.”).

132. Prosecutor v. Callixte Nzabonimana (*Nzabonimana Trial Judgement*), Case No. ICTR-98-44D-T, Judgement and Sentence, ¶ 1760 (“Nzabonimana’s speech was given in an undeniably public location to twenty members of the general population, including Tutsis, who happened to be present in [Butare Trading Centre] at the time of his arrival.”).

133. *Akayesu English Trial Judgement*, Case No. ICTR-96-4-T, ¶ 556 (“A line of authority commonly followed in Civil law systems would regard words as being public where they were spoken aloud in a place that were public by definition.”).

134. *Id.* at n.125

135. American legal theories on publicness such as copyright law may additionally help clarify the definition of public places. *See* Julie E.

Both the Civil Rights Act and the Americans with Disabilities Act (ADA) contain provisions on public accommodations.<sup>136</sup> These Acts characterize public accommodations by anchoring the term “public” in interstate commerce.<sup>137</sup> Though this concept is grounded in the American Commerce Clause, the goal is similarly to identify public places and exclude places that are private. The Civil Rights Act of 1964 defines a place as a public accommodation “if its operations affect commerce, or if discrimination or segregation by it is supported by State action.”<sup>138</sup> The Americans with Disabilities Act distinguishes public and private “entities.”<sup>139</sup> Section 12131(1) defines public entities as “any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and the National Railroad Passenger Corporation.”<sup>140</sup> Public accommodations could be characterized based on their affiliation with government functions, such as roads and government offices, or private entities, such as a room within a store or restaurant.

An alternative, but unfavorable, approach would be to eliminate the public factor altogether.<sup>141</sup> A judgment could theoretically rely on the character of an audience without ever considering the place where a speech was made. This approach is disadvantageous as supported by all ICTR incitement cases, because it leads to lengthy and complicated reasoning, even in straightforward factual scenarios. As a result, judgments would become less predictable. In international

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Cohen, Comment: *Copyright’s Private Public Distinction*, 55 CASE W. RES. L. REV. 963 (2005) for a discussion of the public-private distinction in copyright.

136. Civil Rights Act, 42 U.S.C. § 2000a (2012); Americans with Disabilities Act, 42 U.S.C. § 12181 (2012).

137. 42 U.S.C. § 2000a(b) (“Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation”).

138. 42 U.S.C. § 2000a(b).

139. 42 U.S.C. § 12181(6) (“The term ‘private entity’ means any entity other than a public entity”).

140. 42 U.S.C. § 12131(1).

141. See also Mordechai Kremnitzer & Khaled Ghanayim, *Incitement, Not Sedition*, in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 147, 160 (2000) (“The determining criterion for incitement is anchored to the concrete circumstances of the behaviour and the non-specificity of the incitees, not the location of the occurrence. The location as such is irrelevant, and thus the criterion for defining the term ‘public’ should not include the location of the incitement.”). This method also parallels the term “publication” in American defamation law, defined as “the communication of defamatory words to someone other than the person defamed.” Black’s Law Dictionary 611 (4<sup>th</sup> pocket ed. 1996).

criminal cases, where a judgment may be thousands of pages long, retaining but redefining the place factor balances effectiveness with efficiency.

*C. Elevate the Medium Factor from a Subordinate to a Primary Factor*

Though it acts as a subordinate factor in recent ICTR cases,<sup>142</sup> the medium factor interacts with the place factor beyond its present role under the select and limited factor. Medium is an alternate way to evaluate whether speech is public. If the select and limited defense relies on the number of individuals in an audience and the relationship between a speaker and his or her audience members, then the medium factor is free to play a more expansive role in the legal framework.<sup>143</sup> For instance, the place factor is only relevant when a location can be identified. If a defendant records a speech, and a court cannot ascertain facts about where it was recorded or where an audience perceived it, then location is impossible to determine. Medium can step in and describe an abstract place where that speech exists. If the speech exists in a broadcast medium, or if the place is public, then incitement should be public. The medium factor is properly weighed against the place factor as an “or” factor because it has the potential to describe place when a physical description is elusive.

The threshold question regarding medium is whether a statement or speech was broadcast. In *Nzabonimana*, the Appeal Chamber ruled that if speech is otherwise private, it is not public until it is broadcast. If speech is transferred into a recorded medium but is never broadcast, then the factor is not satisfied.<sup>144</sup> However, it is incorrect to assume that broadcasted messages are public merely because they reach a larger audience. Instead, broadcasted messages are public because they have been disseminated to individual citizens.

Finally, medium can stand in for the place factor when a place analysis is misleading. For example, if someone utters a statement in

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142. *See supra* Section II.B.2.

143. This is appropriate because the Genocide Convention drafters emphasized the significance of criminalizing broadcasted speech. Prosecutor v. Callixte Nzabonimana (*Nzabonimana Trial Judgement*), Case No. ICTR-98-44D-T, Judgement and Sentence, ¶ 1754 (May 31, 2012) (“the Appeals Chamber has taken into account the travaux préparatoires of the Genocide Convention, which confirm that “public” incitement to genocide pertains to mass communications.”).

144. The *Nzabonimana* Appeal Court found speech private although a journalist was present to record the speech for dissemination. Callixte Nzabonimana v. Prosecutor (*Nzabonimana Appeals Judgement*), Case No. ICTR-98-44D-A, Judgement, ¶ 385 (Sept. 29, 2014) (“[T]he mere presence of a journalist does not automatically render a meeting public, rather it is the broadcast of the incriminating message which would render the incitement public.”).

a private place, then broadcasts it over the radio into thousands of homes, the place factor improperly indicates that the location is private. In this scenario every relevant location is private, but the speech still effectively reaches the public. Therefore it should be public. Medium still indicates that the inciting speech is public, because it was broadcast on television. Preserving the place factor and matching it alongside the medium factor seeks to simplify inquiries into the public element without sacrificing complexity.

### III. THE FUTURE OF PUBLIC INCITEMENT TO COMMIT GENOCIDE

Future *genocidaires* will likely have access to email and social media. These tools will help them contact an exponentially larger and more geographically diverse audience.<sup>145</sup> This could cause the public-private distinction to grow increasingly technical.<sup>146</sup> Terrorists already use social media to target distant recruits, and sympathizers already spread support online.<sup>147</sup> For example, in autumn 2014, Islamic State

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145. Peter Beinart, *What Does Obama Really Mean by 'Violent Extremism'?*, ATLANTIC (Feb. 20, 2015, 12:06 PM), *available at* <http://www.theatlantic.com/international/archive/2015/02/obama-violent-extremism-radical-islam/385700/> [<http://perma.cc/9MQ4-5DKC>] (“terrorism, . . . is available to people of all ideological stripes and which grows more dangerous as technology empowers individuals or groups to kill far more people far more quickly than they could have in ages past.”).
146. CRYER, *supra* note 26, at 316 (“The internet and e-mail may raise interesting questions over the ‘public’ requirement.”).
147. Thomas Tracy, *ISIS has mastered social media, recruiting ‘lone wolf’ attacks to target Times Square: Bratton*, N.Y. DAILY NEWS, <http://www.nydailynews.com/new-york/isis-recruiting-lone-wolf-terrorists-target-times-square-bratton-article-1.1941687> [<http://perma.cc/K68B-86LR>] (“[ISIS] the terror group responsible for the videotaped executions of two American journalists and a British aid worker are calling for ‘lone wolf’ attacks on Times Square.”). Kathy Gilsinan, *Is ISIS’s Social-Media Power Exaggerated?*, ATLANTIC (Feb. 23, 2015, 7:05 AM), <http://www.theatlantic.com/international/archive/2015/02/is-isis-social-media-power-exaggerated/385726/> [<http://perma.cc/847B-2EPP>] (“The high-quality videos, the online magazines, the use of social media, terrorist Twitter accounts—it’s all designed to target today’s young people online, in cyberspace.”). Michael Schmidt, *Canadian Killed in Syria Lives on as Pitchman for Jihadis*, N.Y. TIMES (July 16, 2014), [http://www.nytimes.com/2014/07/16/world/middleeast/isis-uses-andre-poulin-a-canadian-convert-to-islam-in-recruitment-video.html?\\_r=0](http://www.nytimes.com/2014/07/16/world/middleeast/isis-uses-andre-poulin-a-canadian-convert-to-islam-in-recruitment-video.html?_r=0) [[perma.cc/JCN8-QHBH](http://perma.cc/JCN8-QHBH)]. Ben Hubbard, *Jihadists and Supporters Take to Social Media to Praise Attack on Charlie Hebdo*, N.Y. TIMES (Jan. 11, 2015), <http://www.nytimes.com/2015/01/11/world/europe/islamic-extremists-take-to-social-media-to-praise-charlie-hebdo-attack.html> [<http://perma.cc/CH92-LH5S>] (“Within hours of the deadly attack on

(IS) supporters operated 46,000 Twitter accounts.<sup>148</sup> These accounts produce approximately 90,000 messages, through Twitter and other social media sites, a day.<sup>149</sup> Some even hijack hashtags to draw attention on social networking sites.<sup>150</sup> Government officials, alerted by these and other past communications, warn that attacks incited by social media are plausible in western countries.<sup>151</sup> So, it is possible by extension that these communications could develop into calls capable of inciting genocide.

The distinction between public and private genocide is especially pertinent to new mediums of mass communication. Twitter and Facebook present complicated questions because they combine features of private conversations with public broadcasts. Any user may send a Facebook message to thousands of individuals. One method to address the public element in this context is to designate

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the French satirical newspaper Charlie Hebdo, Islamic extremists and their supporters were praising the killings and lauding the attackers on social media”).

148. J.M. Berger & Jonathon Morgan, *The ISIS Twitter Census: Defining and Describing the Population of ISIS Supporters on Twitter* 7 (2015) (“During the period of October 4 through November 27, 2014, we estimate there were no fewer than 46,000 Twitter accounts supporting ISIS. . . . We estimate that a minimum of 30,000 of these are accurately described as accounts belonging to ISIS supporters and controlled by a human user, using the most conservative criteria.”).
149. Eric Schmitt, *U.S. Intensifies Effort to Blunt ISIS’ Messages*, N.Y. TIMES (Feb. 16, 2015), <http://www.nytimes.com/2015/02/17/world/middleeast/us-intensifies-effort-to-blunt-isis-message.html> [<http://perma.cc/9SA2-B3CU>] (“With the Islamic State and its supporters producing as many as 90,000 tweets and other social media responses every day”).
150. Uri Friedman, *An American in ISIS’s Retweet Army*, ATLANTIC (Aug. 29, 2014), <http://www.theatlantic.com/international/archive/2014/08/an-american-in-isis-retweet-army/379208/> [<http://perma.cc/K3WX-SQM8>] (“On Twitter and Instagram, [ISIS] hijacks trending hashtags on topics ranging from British soccer to California earthquakes to disseminate its messages.”). The Oxford English Dictionary defines “hashtag” as “(on social media websites and applications) a word or phrase preceded by a hash and used to identify messages relating to a specific topic[.]” Oxford English Dictionary (online ed. 2015).
151. Scott Neuman, *Homeland Security Chief: Threat to U.S. Malls ‘A New Phase’ For Terrorists*, NPR (Feb. 22, 2015, 12:28 PM), available at <http://www.npr.org/blogs/thetwo-way/2015/02/22/388242488/homeland-security-chief-threat-to-u-s-malls-a-new-phase-for-terrorists> [<http://perma.cc/25QM-NBR5>] (“Johnson said a video released by the Somali-based group al-Shabab ‘reflects [a] new phase’ in which terrorist networks publicly call ‘for independent actors in their homelands to carry out attacks.’”).

virtual platforms public or private. For that reason, public accommodations laws are particularly relevant.

As of April 2015, there is a circuit split in the United States over whether private websites are subject to public accommodations accessibility requirements under the ADA.<sup>152</sup> In an advance notice of potential rulemaking, the Department of Justice stated that some websites on the Internet should be considered public places, but the entire Internet should not.<sup>153</sup> Using the ADA public accommodation theory would seek to determine whether virtual speech is located in a public place. An account accessible to the public should be public. A message restricted to a small group of viewers, or only accessible by using a password should not be public.

Establishing a method for distinguishing public and private places would also help describe virtual forms of speech. For example, a website would be a public place, but a member-restricted website would be a private place. Similarly, Facebook and Twitter would incorporate the second suggestion that broadcast speech satisfies the medium factor. A tweet, broadcast to the entire Internet community, would be public. A comment posted to a Facebook user's wall would be public, but private messages that are not broadcast to other users on Facebook would be private. The select and limited defense may even play a role in determining whether an email listserv is select or limited, based on the number of recipients and their relationship to the writer. Once speech is filtered through a medium that can be accessed without limitation, it is broadcast.

#### IV. CONCLUSION

The public element is more complicated than it appears. It recalls the IMT at Nuremburg and captures an example of how the ICTR

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152. Trevor Crowley, Note, *Wheelchair Ramps in Cyberspace: Bringing the Americans with Disabilities Act into the 21st Century*, 2013 BYU L. REV. 651 (2013) (“Some circuit courts interpret ‘place of public accommodation’ broadly to include nonphysical places, while other circuit courts interpret this provision narrowly to require a physical tangible facility—putting virtual places like websites outside of Title III coverage.”).

153. Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010), available at [http://www.ada.gov/anprm2010/web%20anprm\\_2010.htm](http://www.ada.gov/anprm2010/web%20anprm_2010.htm) [<http://perma.cc/89VL-K2BN>] (to be codified at 28 C.F.R. pts. 35 & 36) (“The Department has also repeatedly affirmed the application of title III to websites of public accommodations. . . . Although some litigants have asserted that ‘the Internet’ itself should be considered a place of public accommodation, the Department does not address this issue here.”).

has impacted international criminal law.<sup>154</sup> The element has, at times, led to acquittals and reduced sentences.<sup>155</sup> Although the ICTR adopted factors in 1998, it is still having some trouble efficiently applying them. The ICC will be the next international body with power to apply and develop international criminal law on direct and public incitement.<sup>156</sup> It is also possible that the ICC will decide to impose the crime by drafting entirely new jurisprudence.<sup>157</sup>

Although the Rome Statute includes direct and public incitement to commit genocide, along with other forms of individual responsibility, it is generally accepted that Article 25(3)(e) “direct and public incitement to commit genocide” is consistent with earlier formulations of incitement to genocide.<sup>158</sup> This wrinkle has the

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154. *See supra* Parts I.A and I.B.

155. *See supra* note 27.

156. *Rome Statute*, art. 25(e) (Article 25(e) of the Rome Statute provides that the International Criminal Court may hold a defendant “liable for punishment for a crime within the jurisdiction of the Court if that person . . . directly and publicly incites others to commit genocide.”). Domestic trials may prove helpful in learning about public incitement to commit genocide in the future. *See* HJ Van Der Merwe, *The Prosecution of Incitement to Genocide in South Africa*, 16 POTCHEFSTROOM ELEC. L.J. 327, 329 (2013) (“although incitement to genocide is now also criminalised in many domestic legal systems, the prosecution thereof is almost without precedent on the domestic level. . . . [I]n general international criminal justice, and in particular the Rome Statute, place the primary responsibility for prosecuting international crime on domestic legal systems.”). One example is the case of Yvonne Basebya who was convicted of incitement to commit genocide in the Netherlands, in 2013. Rb. 1 maart 2013, JOR 2013, 8710 m.nt EVS (Basebya/Neth.) (Neth.) *available at* <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBDHA%3A2013%3A8710> [<http://perma.cc/8RJE-LZSY>]. The International Court of Justices may provide another opportunity for developing incitement and the public element as in the recent case on incitement between Croatia and Serbia. Application of the Convention on the prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment (Feb. 3, 2015), *available at* <http://www.icj-cij.org/docket/files/118/18422.pdf> [<http://perma.cc/6VB7-RT2G>] (acquitting Croatia of any allegations of incitement to commit genocide).

157. Thomas Davies, as a student, argued that incitement, in the Rome Statute, is no longer an inchoate crime. Rather, it is a form of individual criminal responsibility for convicting an individual of genocide. *See* Davies, *supra* note 7, at 245 (“[T]he full effectiveness of the criminalization of incitement is threatened by the Rome Statute of the International Criminal Court, which reduces the status of incitement from a crime in its own right to a mode of criminal participation in genocide.”).

158. *Rome Statute*, *supra* note 14, at art. 25 (titled “Individual Criminal Responsibility”). Gerhard Werle, *Individual Criminal Responsibility in*



potential to complicate incitement jurisprudence, but, for the time being, scholars continue to consider it an inchoate crime.<sup>159</sup> It is impossible to know precisely how the ICC will evaluate the public element, since it has never convicted anyone of incitement to commit genocide.<sup>160</sup>

If the ICC chooses to adopt the ICTR framework on incitement, as it should, it has a wealth of case law, developed over sixty years, to draw from, as well as an opportunity to reorganize the public element by adopting measures to ease its implementation.<sup>161</sup> The element is beneficial because it facilitates punishments for inciting speech, while indicating when defendants will be held accountable under the law. The ICC may also clarify the public element looking towards new forms of communication and strategies that mirror communication via the Internet. The suggestions in this paper seek to achieve that goal: treating the select and limited factor as a defense, and elevating the medium factor to primary status alongside and instead of the place factor. Under such circumstances, public incitement to genocide would

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*Article 25 ICC Statute*, 5 J. Int'l Crim. Just. 953, 956 (2007) ("While Article 25(3)(a) to (d) addresses modes of criminal participation, subparagraphs (e) and (f) deal with incitement to genocide and with attempt and abandonment; this might be seen as misleading from a structural point of view, because neither incitement to genocide nor attempt can be classified as modes of participation, but should rather be classified as inchoate crimes."). MICHAEL VAGIAS, *THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* 155 (2014) ("[T]he prevailing view is that [direct and public incitement to commit genocide] is also an inchoate crime as regards the Rome Statute, on the basis of the relationship of incitement to the other modes of responsibility in Article 25(3) and the preparatory works of the Statute."). *But see* Davies, *supra* note 7, at 246 ("The Rome Statute, by listing incitement as a mode of participation rather than as a crime in itself, and by not including incitement in the list of crimes over which the ICC has jurisdiction, renders the prohibition on incitement far less effective than it has been in the jurisprudence of the ICTR.").

159. *See* VAGIAS, *supra* note 158, at 155 ("the prevailing view is that [incitement to commit genocide] is also an inchoate crime as regards the Rome Statute"); SCHABAS, *supra* note 16, at 325 ("The Rome Statute provides for the inchoate crime of direct and public incitement to commit genocide, faithfully reflecting the Convention on this point.").

160. The ICC has only issued one arrest warrant for genocide, and none for incitement to commit genocide. *See Sudan: ICC Warrant for Al-Bashir on Genocide*, HUM. RTS. WATCH (July 13, 2010), available at <http://www.hrw.org/news/2010/07/13/sudan-icc-warrant-al-bashir-genocide> [<https://perma.cc/Z4RT-3375>]. Al-Bashir's case was suspended in December 2014. *Sudan President Bashir Hails 'Victory' Over ICC Charges*, BBC (Dec. 13, 2014) <http://www.bbc.com/news/world-africa-30467167> [<http://perma.cc/CLJ4-PUCV>].

161. *See supra* Section II.

remain relevant and prevent inciting speech from contributing to genocide in the future.