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The Case for Sanctioning State Sponsors of Genocide Incitement

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The Case for Sanctioning State Sponsors of Genocide Incitement

Henry K. Kopel†

“Killing[,] . . . if you are adequately conditioned, . . . [y]ou do it without shame . . . we were efficiently conditioned by radio broadcasts”

- Interview of Rwanda genocide participant¹

“I believed the propaganda that all Jews were criminals and subhumans [T]hat one should disobey or evade the order to participate in the extermination of the Jews did not therefore enter my mind at all.”

- Testimony of German Police Battalion member after World War II²

This Article recommends a policy designed to reduce the incidence of genocide through legislation that would impose sanctions against state sponsors of genocide incitement. The goal of sanctioning state sponsors of such incitement is to prevent genocides proactively, before the mass killing starts. Three prominent twentieth-century genocides—those of the European Jews, the Bosnian Muslims, and the Rwandan Tutsi—were all incited by pervasive and deliberate campaigns of state-sponsored hate. Most, if not all, genocides are preceded by similar patterns of incitement. Historical studies also show that most of the actual killers do not exhibit unusually violent propensities or psychological pathologies, but rather are ordinary people from a cross-section of the population who have been transformed into mass killers. Several psychology experiments confirm that the “perpetrator mindset” is easily triggered in ordinary people through processes that involve dehumanization of the targeted groups. Accordingly, mass hate incitement can create the large pool of perpetrators who are necessary for a major genocide to occur. For drafting incitement sanctions legislation, the 1974 Jackson-Vanik trade sanctions law provides a useful model. A compelling target for such a statute is the prolific genocide incitement of the present Iranian regime. Statistical analyses of sanctions policies yield success rates falling in a range of about one-third to one-half of the pertinent cases studied, numbers which greatly exceed the success rate of existing genocide prevention efforts. As applied, the collateral harms of incitement sanctions would be offset by the benefits of

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1. Jean-Pierre Chrétien, *RTLM Propaganda: The Democratic Alibi*, in *THE MEDIA AND THE RWANDA GENOCIDE* 55, 55 (Allan Thompson ed., 2007).

2. DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 179 (1996) [hereinafter *GOLDHAGEN, HITLER'S WILLING EXECUTIONERS*].

preventing both genocide and the regional geopolitical instability that often follows in genocide's wake.

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Introduction

Genocide has been aptly described as a “problem from hell.”³ It might also be described as a hell of terrible persistence. Since the Nazi Holocaust of the 1940s—by no means the first genocide of the twentieth century—genocides have been perpetrated, among other places, in Bangladesh (1971), Burundi (1972), Cambodia (1975–1979), Guatemala (1978–83), Iraqi Kurdistan (1987–88), Bosnia (1992–95), Rwanda (1994), and Sudan-Darfur (2003–present).⁴ As one scholar concluded, the phrase “never again”—a common refrain in remembrance of the Nazi Holocaust—has come to mean little more than, “Never again will Germans kill Jews in Europe in the 1940s.”⁵ This dispiriting history suggests that ending genocide in the near future is, at best, a remote possibility. However, this invites the question of whether there presently exists any politically feasible policy that could at least reduce the likelihood of future genocides.

This Article argues that such a policy does exist: one that is simple in concept, consistent with existing legal norms, and targeted at one of the major causal triggers of genocides and other mass killings. This policy would target state-sponsored genocide incitement by sanctioning and defunding it. Specifically, this policy will enjoin and inhibit such incitement through federal legislation that conditions American military aid, economic benefits, and bilateral trading rights upon each recipient country’s refraining from funding, facilitating, and encouraging incitement to genocide. The normative legal background for such a policy starts with Article III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide, enacted by the United Nations on December 9, 1948, which specifically criminalized “[d]irect and public incitement to commit genocide.”⁶

Part I of this Article addresses the definitions of genocide and incitement. Part II examines three episodes of genocide in historical context,

3. See generally SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE (2002).

4. ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 142–44 (2d ed. 2011) (Guatemala); *id.* at 178 (Iraqi Kurdistan); *id.* at 293–94 (Cambodia); *id.* at 320–28 (Bosnia); *id.* at 340–43 (Bangladesh); *id.* at 346 (Rwanda); *id.* at 365 n.27 (Burundi); *id.* at 371–75 (Sudan-Darfur); *cf.* Barbara Harff, *No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder Since 1955*, 97 AM. POL. SCI. REV. 57, 59–60 (2003) (documenting thirty-seven genocides occurring between 1955 and 2001).

5. David Rieff, *The Persistence of Genocide*, HOOVER INSTITUTION (Feb. 1, 2011), <http://www.hoover.org/research/persistence-genocide>.

6. Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, *entered into force* Jan. 12, 1951, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277, <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf> [hereinafter Genocide Convention].

focusing on the pervasive media incitement promoted by the leaders responsible for the genocides. These episodes are the Nazi Holocaust of the 1940s, the Bosnia genocide of 1992-1995, and the Rwandan genocide of 1994. Part III discusses historical and social science research that indicates a causal nexus between incitement and genocide. Part IV discusses the legislative sanctions and defunding policy proposal, and provides an example of its possible application against the genocide incitement of the present Iranian regime. Finally, Part V outlines and weighs the implications, both positive and negative, regarding the proposed legislation. This Article concludes that the potential of the proposed legislation to reduce the incidence of genocide incitement, and thereby to reduce the likelihood of genocide in at least some circumstances, substantially outweighs the negative policy outcomes that may result from its adoption.

I. Genocide and Incitement: Definitions

A. Defining Genocide

Under international law, the prevailing definition of genocide is set forth in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, enacted by the United Nations on December 9, 1948 (hereinafter, "UN Genocide Convention"):

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁷

The United States Code's criminal genocide statute, 18 U.S.C. § 1091, uses a virtually identical definition.⁸

Both before and since the adoption of the UN Genocide Convention, the proper scope of Article II's definitional coverage has been subject to debate, specifically in regard to whether entities in addition to "national, ethnical, racial, or religious group[s]" are, or should be, included in its protections.⁹ Among groups not listed within Article II's definition are those defined by political, cultural, economic, or gender characteristics—all

7. *Id.*

8. 18 U.S.C. § 1091 (2009).

9. JONES, *supra* note 4, at 34 ("Huge controversy has attended the Genocide Convention's exclusion of all but . . . national, ethnic, racial, and religious groups . . . [on the] list of protected groups."); STEPHEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 36 (3d ed., 2009) [hereinafter RATNER ET AL.]; Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2263-69 (1997) (detailing debates and compromises underlying the UN's decision to exclude political groups from coverage).

groups which have been targets of mass slaughter, mass sexual assault, or other genocide-type harms over the past century.¹⁰ In addition, Article II's definitional coverage is ambiguous regarding mass atrocities *within* groups, perpetrated by group members against their own. This ambiguity stems from the interpretation of the phrase, "intent to destroy, in whole *or in part*, a . . . group."¹¹ For instance, a strict construction of the definition might preclude the UN Genocide Convention's jurisdiction over the Khmer Rouge's slaughter of more than 1.5 million Cambodians in the 1970s, insofar as the Khmer perpetrators shared the same national, ethnic, racial, and religious affiliations of most of their victims.¹²

Contemporary debates over the UN Genocide Convention's narrow definitional scope tend to cluster around one of three positions: (1) Article II of the UN Genocide Convention should be amended to include a broader definition of groups targeted for genocidal harms;¹³ (2) a formal amendment is not needed because a more inclusive meaning of the word "group" in Article II is already supported by pertinent interpretive sources of international law;¹⁴ and/or (3) expanding Article II's definition of "group"—whether by legislation or judicial interpretation—is not necessary because the infliction of genocide-type harms upon non-covered groups is separately proscribed by international laws governing crimes against humanity.¹⁵

This Article does not seek to resolve these competing positions. Instead, this Article's central concern is a legislative proposal both jurisdictionally and functionally distinct from the UN Genocide Convention. The proposed legislation is not international, but particular to a single nation-

10. See JONES, *supra* note 4, at 28 (referencing Latin American countries' "politicides" of suspected communists in the 1970s and 1980s); *id.* at 191-94 (describing Stalin's mass deportations and starvation of millions of "Kulaks" during forced collectivization of Ukrainian agriculture); *id.* at 464-73 (listing "gendercides," viz., mass killings of men and mass rapes of women).

11. Genocide Convention art. 2, *supra* note 6 (emphasis added).

12. RATNER ET AL., *supra* note 9, at 322; Van Schaack, *supra* note 9, at 2261 ("[A] close reading of the Genocide Convention leads to . . . [the] conclusion [that] . . . it does not cover a significant portion of the deaths in Cambodia."); *id.* at 2271-72.

13. RATNER ET AL., *supra* note 9, at 46 ("[I]t is long overdue for the law of genocide to evolve beyond its 1940s roots . . . to encompass the mass destruction of any human collective based on any core element of human identity . . ."); cf. JONES, *supra* note 4, at 24-29 (endorsing broader definition of covered groups, and listing fifteen target/victim groups recommended for inclusion by genocide scholars).

14. JONES, *supra* note 4, at 14 (noting the position taken by the International Criminal Tribunal for Rwanda, that "any stable and permanent group" is entitled to protection under the UN Genocide Convention); Van Schaack, *supra* note 9, at 2261-62 (arguing that broader definition of protected groups is effectively incorporated in UN Genocide Convention by the international law principle of "jus cogens," viz., "customary and peremptory norm[s] of international law from which no derogation is permitted").

15. JONES, *supra* note 4, at 25 ("[A]t the level of international law, genocide is perhaps being displaced by the framing of 'crimes against humanity,' which is easier to prosecute and imposes much the same punishments as for genocide convictions."); RATNER ET AL., *supra* note 9, at 51 (noting that atrocities in former Yugoslavia, Rwanda, Sierra Leone, and Cambodia all were prosecuted under rubric of crimes against humanity).

state; and its principal function is the proactive prevention of genocide, not after-the-fact prosecution. It nonetheless bears noting that all three positions reflect a growing consensus that the proscription and criminalization of genocide-type harms should include a broader array of protected groups than those presently covered by the UN Genocide Convention.

Accordingly, and mindful of the proposed legislation's purpose, this Article will employ a broad and inclusive definition of genocide. Specifically, genocide will be defined as any of the above-listed genocidal acts of sub-sections II(a) through (e) of the UN Genocide Convention, when committed with intent to destroy, in whole or in part, a "national, ethnic, racial, religious, political, social, gender[, cultural,] or economic group," including such acts perpetrated within groups.¹⁶

Viewed against the UN Genocide Convention's drafting history, this definition and incorporation of a more expansive range of protected groups appears less as a new departure than a return to early aspirations. In 1947, the UN General Assembly initiated the drafting process by passing Resolution 96(I), which defined genocide as "a denial of the right of existence of entire human groups" and declared it a crime "whether . . . committed on religious, racial, political, or *any other* grounds . . ."¹⁷ Later, an early draft of the genocide convention proposed to include "racial, national, linguistic, religious, or political groups . . ."¹⁸ Only in the enacted version of the UN Genocide Convention was the list significantly scaled back.¹⁹

B. Defining Genocide Incitement

In international law, three critical events over the last seventy years exemplify and define the concept of genocide incitement. These events include firstly, the post-World War II Nuremberg prosecutions of German Nazi war criminals in 1945-1946, which conferred legal recognition on the concept of genocide incitement; secondly, the codification of the crime of genocide incitement in the 1948 UN Genocide Convention; and finally, after a decades-long hiatus of legal developments, the prosecutions commenced by the International Criminal Tribunal for Rwanda in the late

16. JONES, *supra* note 4, at 13, 18.

17. Van Schaack, *supra* note 9, at 2263 (emphasis added).

18. *Id.* at 2264.

19. Excluding political groups from the enacted version received especially strong criticism. See JONES, *supra* note 4, at 14-15 ("[T]he exclusion of political groups . . . [i]n the estimation of many genocide scholars . . . is the Convention's greatest oversight."). Transcripts from debates over the UN Genocide Convention reveal several articulated reasons for excluding political groups, including: the lack of "homogeneity" and "stability" of other included groups; the belief that political groups were deemed less vulnerable than the included groups; that including political groups would constrain domestic efforts to deter and prosecute violent "subversive" groups; that the Soviet Union and others would object to constraints on domestic sovereignty by international protections for political groups; and finally, excluding political groups was a *quid pro quo* for including language authorizing international tribunals to prosecute genocide crimes. See JONES, *supra* note 4, at 14-15; POWER, *supra* note 3, at 68-69, 531 n.13-14; RATNER ET AL., *supra* note 9, at 36; Van Schaack, *supra* note 9, at 2264-68.

1990s, which imposed criminal liability for media-based genocide incitement.

1. *The Nuremberg Tribunal*

In the 1945–1946 Nuremberg prosecutions, two of the twenty-four defendants—Julius Streicher and Hans Fritzsche—were charged with crimes against humanity based exclusively on their work directing and producing print and radio propaganda for the Nazi regime. Streicher was convicted and sentenced to death; Fritzsche was acquitted.²⁰ The judgment of the Nuremberg Tribunal characterized Streicher’s activities as “incitement to murder and extermination.”²¹ From 1923 to 1945 Streicher published *Der Sturmer*, an anti-Semitic weekly newspaper, which by 1935 had a circulation of 600,000. The judgment found that:

For his twenty-five years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as “Jew-Baiter Number One.” In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution.²²

The judgment also noted that from 1938, Streicher “began to call for the annihilation of the Jewish race,” with numerous articles in *Der Sturmer* preaching “extermination ‘root and branch.’”²³ It is evident from the judgment that Streicher played no personal role in killing Jews or other Nazi victims, in administering any concentration camps or other killing operations, or in any of the policy decisions of the Nazi regime. The judgment, however, emphasized that it was “[w]ith *knowledge* of the extermination of the Jews” that Streicher “continued to write and publish his propaganda of death.”²⁴

By contrast, in assessing Hans Fritzsche’s roles as a Nazi radio commentator and propaganda ministry official, the Nuremberg Tribunal noted that despite Fritzsche’s anti-Semitic speeches, he “did not urge persecution or extermination of Jews.” Furthermore, the tribunal found “no evidence that he was aware of their extermination in the East,” and also that Fritzsche “twice attempted to have publication of the anti-Semitic *Der Sturmer* suppressed, though unsuccessfully.”²⁵

20. *Nuremberg Trial Proceedings Vol. 1: Indictment*, THE AVALON PROJECT (2008) <http://avalon.law.yale.edu/imt/count.asp>; *Nuremberg Trial Proceedings Vol. 1, Indictment: Appendix*, THE AVALON PROJECT (2008), <http://avalon.law.yale.edu/imt/counta.asp>; *Judgement: Streicher*, THE AVALON PROJECT (2008), <http://avalon.law.yale.edu/imt/judstrei.asp>; *Judgement: Fritzsche*, THE AVALON PROJECT (2008), <http://avalon.law.yale.edu/imt/judfritz.asp>; see also *Incitement to Genocide in International Law*, in UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007839> (last updated Jan. 29, 2016).

21. *Judgement: Streicher*, *supra* note 20.

22. *Id.*

23. *Id.*

24. *Id.* (emphasis added).

25. *Judgement: Fritzsche*, *supra* note 20.

2. *The UN Genocide Convention*

In 1948—only two years after the Nuremberg Judgment—the United Nations adopted the UN Genocide Convention. The law’s passage was largely due to an extraordinary lobbying campaign waged by Raphael Lemkin, a Polish-Jewish émigré and legal scholar who had lost forty-nine family members in the Holocaust.²⁶

As noted above, Article II of the UN Genocide Convention established a definition of genocide.²⁷ Article III then imposed criminal liability for any of the following five acts:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.²⁸

The UN Genocide Convention did not include a definition of “[d]irect and public incitement to commit genocide,” and no further prosecutions involving genocide incitement nor any possible interpretive case law on the subject occurred until the late 1990s.

3. *The Rwanda Genocide Prosecutions*

The elements of genocide incitement were elaborated at considerable length by the International Criminal Tribunal for Rwanda (ICTR) during the early 1990s. The ICTR was established by a resolution of the United Nations Security Council following the 1994 Rwandan genocide.²⁹ Between April and July 1994, leaders of Rwanda’s majority Hutu population, having recruited and armed several groups of Hutu militias, unleashed a mass killing of at least 800,000 members of the minority Tutsi population. Many of the killings were committed by hand-to-hand attacks with machetes and similar tools.³⁰ Before and during the genocide, Rwanda’s leading radio station, Radio Télévision Libre des Mille Collines (RTLM), and one of the leading newspapers, *Kangura*, issued a nearly constant deluge of hate propaganda directed against the Tutsi minority, frequently calling for their extermination.³¹

The ICTR brought multiple prosecutions for media-based genocide incitement. The subject received its most extensive treatment in the December 2003 trial judgment of the joint prosecution of three defendants,

26. POWER, *supra* note 3, at 47-60. It was Lemkin who created the word “genocide,” which first appeared in his 1944 book: *Axis Rule in Occupied Europe*. *Id.* at 38-43.

27. G.A. Res. 260(III)A, Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948), <http://www.un-documents.net/a3r260.htm>.

28. G.A. Res. 260(III)A, *supra* note 27, art. 3.

29. S.C. Res. 955 (Nov. 8, 1994), [http://daccessods.un.org/access.nsf/Get?Open&DS=S/RES/955%20\(1994\)&Lang=E&Area=UNDOC](http://daccessods.un.org/access.nsf/Get?Open&DS=S/RES/955%20(1994)&Lang=E&Area=UNDOC). Article II of the Annex to S.C. Res. 955 incorporated the text of the UN Genocide Convention, including its proscription of “[d]irect and public incitement to commit genocide.” *Id.* at 3-4.

30. JONES, *supra* note 4, at 352, 358; see LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE 56, 250-51 (2004); see also discussion *infra* Section II.C.

31. MELVERN, *supra* note 30, at 49-56, 208-09.

Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze.³² Defendants Nahimana and Barayagwiza were among the founders and directors of RTLM radio, and defendant Ngeze was the founder and Editor-in-Chief of the newspaper *Kangura*.³³ The ICTR found all three guilty of direct and public incitement to commit genocide.³⁴

In discussing the elements of genocide incitement, the ICTR's trial judgment in *Prosecutor v. Nahimana* included the following definitions:

"[I]ncitement" . . . is defined as encouragement or provocation to commit an offence. "[P]ublic" incitement [i]s "a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television."³⁵

The ICTR further identified the elements of the crime of incitement by focusing particularly on the *purpose* of the communications in question, as determined both from the *text* of the communications in question, and from the surrounding *context* in which the communications are delivered.³⁶

The ICTR used the terms "purpose" and "intent" interchangeably: "the importance of intent, that is the purpose of the communications . . . emerges from the jurisprudence [on incitement]."³⁷ In a genocide incitement case, the purpose that must be proved is "the intent to directly prompt or provoke another to commit genocide," demonstrating "a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging."³⁸ Thus "the person who is inciting to commit genocide must have himself the specific intent to commit genocide."³⁹

The text of a statement is one of the two primary determinants of genocidal intent. In scrutinizing a statement's text for evidence of intent, the ICTR drew a distinction between, on the one hand, news reports about both calls for violence and ethnic hatreds intended "to convey information," and on the other hand, statements that endorse violence and

32. See generally *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003), <http://www.refworld.org/docid/404468bc2.html>. The ICTR noted in the judgment it had "first considered the elements of . . . incitement to commit genocide in the prior case of [*Prosecutor v.*] *Akayesu*," but distinguished the incitement in *Akayesu* as limited to the defendant's own spoken words, whereas Nahimana and his co-defendants "used the print and radio media systematically . . . for the mobilization of the population on a grand scale." *Nahimana*, Case No. ICTR-99-52-T at 325 (paras. 978-79). The *Nahimana* judgment included a much more comprehensive discussion of the elements and findings on genocide incitement than did the *Akayesu* judgment, specifically, nineteen pages versus five pages.

33. Case No. ICTR-99-52-T at 1-2 (paras. 5-9), 166-95 (paras. 491-92, 495, 506-07, 571).

34. *Id.* at 356-57 (paras. 1092-94).

35. *Id.* at 337 (para. 1011) (citing *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T (Sept. 2, 1998)).

36. *Id.* at 334-35, 337-38, 340-41 (paras. 1001, 1004, 1012, 1020-24).

37. *Id.* at 334 (para. 1001).

38. *Id.* at 337-38 (para. 1012).

39. *Id.* at 337-38 (para. 1012).

“promot[e] ethnic hatred.”⁴⁰ Both the accuracy and tone of a statement are relevant in making that distinction. “[T]he inaccuracy of the statement might . . . indicat[e] that the intent . . . was not to convey information but rather to promote . . . resentment and inflame ethnic tensions.”⁴¹ “The tone of the statement is as relevant to this determination as is its content”⁴² For example, a statement will be deemed to “constitut[e] ethnic hatred” where it expresses “stereotyping of ethnicity *combined with its denigration*.”⁴³

The second primary determinant of intent is the context in which a statement is made. Specifically, whether, and to what extent, there exists a genocidal environment that is likely to lead to violence:

A statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement.⁴⁴

In this same judgment, the ICTR further clarified its definition by listing two elements that are *not* needed to prove genocide incitement. First, the ICTR held that there need not be proof of a causal link between the statements in question and acts of genocide: a “causal relationship is not requisite to a finding of incitement. It is the *potential* of the communication to cause genocide that makes it incitement.”⁴⁵ Second, there need not be an actual occurrence of genocide to find liability for genocide incitement. Like the crime of conspiracy, “incitement to commit genocide . . . [is] an inchoate offence,” and hence

can be punished even where such incitement was unsuccessful “[G]enocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.”⁴⁶

However, as noted above, regarding the evidentiary significance of a genocidal environment, the occurrence of genocidal acts may serve as evidence that the communications in question were intended to promote genocidal violence.

Synthesizing the foregoing elements and considerations, one can formulate a working definition of direct and public incitement to genocide as follows:

- 1) Communications,
- 2) Conveyed to a large number of individuals

40. *Id.* at 339–41 (paras. 1020, 1024).

41. *Id.* at 340 (para. 1021).

42. *Id.* at 340 (para. 1022).

43. *Id.* at 339 (para. 1021) (emphasis added).

44. *Id.* at 340 (para. 1022).

45. *Id.* at 338 (para. 1015) (emphasis added).

46. *Id.* at 338 (para. 1013) (quoting *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T (Sept. 2, 1998)).

- a. Either gathered physically in a public place,
- b. Or accessed in dispersed locations through mass media,
- 3) Intending to promote genocide (defined in section I.A, above),
- 4) As evidenced primarily by their text and context:
 - a. Text that endorses hatred and/or violence towards one or more groups,
 - b. In a context where such communications are likely to lead to violence against the targeted group(s),
- 5) Irrespective of whether a causal link is shown between the communications and any genocidal acts, and irrespective of whether any genocidal acts occur.

II. Historical Cases

Genocide has occurred throughout recorded human history.⁴⁷ Modern manifestations of genocide and its accompanying incitement are distinguished by, among other things, the availability of mass media and communications technology. Focusing on the latter, this Part draws from the twentieth century to examine three prominent episodes of genocide and corresponding incitement: the Nazi Holocaust of the Jews (1941-1945), the Serb genocide of the Bosnian Muslims (1992-1995), and the Rwandan Hutu genocide of the Rwandan Tutsi (1994). Each case study first summarizes the historical context and subsequent conduct of the genocide in question, then describes in some detail the state-sponsored, “eliminationist” incitement that preceded the genocide.⁴⁸

A. The Nazi Holocaust of the Jews (1941-1945)

1. *Context and Conduct of the Genocide*

In the 1930s, Germany had a Jewish population of 535,000, about one percent of its population of over fifty million.⁴⁹ Over the past century, German-Jewish people had been “emancipated,” that is, granted citizenship rights,⁵⁰ but the often bitter emancipation debates had unleashed a backlash of anti-Semitism.⁵¹ After Germany’s 1918 defeat in World War I, a cascade of events destabilized Germany’s postwar Weimar Republic, which further exacerbated resentments towards Jewish people and other scapegoats.⁵² The Republic’s legitimacy was undermined from the start by the false claim that, but for a “stab in the back” by civilians who had signed

47. See, e.g., JONES, *supra* note 4, at 5-8; STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* 332-33 (2014).

48. As defined by Daniel Jonah Goldhagen, eliminationism is “the desire to *eliminate* peoples or groups,” (emphasis in original) which can involve “extermination,” but also “destruction of . . . group[] identities, [physical] expulsion, [and] prevention of reproduction” DANIEL JONAH GOLDHAGEN, *WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ASSAULT ON HUMANITY* 14 (2009) [hereinafter GOLDHAGEN, *WORSE THAN WAR*].

49. MICHAEL BURLEIGH, *THE THIRD REICH: A NEW HISTORY* 94, 315 (2000); SAUL FRIEDLANDER, *NAZI GERMANY AND THE JEWS, ABRIDGED EDITION* 4 (2009).

50. GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS*, *supra* note 2, at 55-57.

51. *Id.* at 56-62.

52. See *id.* at 82-83.

the 1918 armistice and 1919 Versailles Treaty, Germany would have won the war.⁵³ The Republic was further besieged by several regional revolts and political assassinations.⁵⁴

Then in 1922-1923, Germany defaulted on reparations payments due under the Versailles Treaty, and a Franco-Belgian army occupied Germany's industrial heartland. German resistance and Franco-Belgian financial extractions culminated in a wave of hyperinflation that wiped out the assets and savings of the German middle class.⁵⁵ International loans helped restore stability, but public opinion was left simmering with resentments against Jewish people and others.⁵⁶

From the early 1920s, Adolph Hitler's Nazi party channeled and amplified these popular resentments with devastating political effectiveness.⁵⁷ Promising to undo Versailles, restore German power, and punish Germany's enemies, the Nazi party seized power in March 1933 despite lacking a majority of seats in the Reichstag.⁵⁸ The Nazis immediately launched an escalating series of anti-Jewish policies. The following serves as a cursory summary of their pathway to genocide.

In 1933, the Nazis declared a boycott of Jewish businesses and passed laws barring Jewish people from working in farming, medicine, the law, and the civil service.⁵⁹ The 1935 Nuremberg laws stripped Jewish people of German citizenship, and barred marriage and sexual contact with Germans.⁶⁰ Between 1933 and 1938, Nazi "Aryanization" campaigns forced the sale of virtually all Jewish businesses to Germans at fire sale prices, leaving their former owners impoverished.⁶¹

In November 1938, when a Jewish person murdered a German embassy official in Paris, the Nazis launched a nation-wide pogrom known as "Kristallnacht" ("The night of broken glass"). Nazis destroyed over 260 synagogues and over 7,000 Jewish businesses, and murdered ninety-one Jewish people; mobs across Germany beat up thousands more.⁶² The Nazis fined the dwindling Jewish community one billion Reichmarks for the embassy murder, and seized all Jewish victims' insurance payments.⁶³

53. BURLEIGH, *supra* note 49, at 33, 49-51.

54. *Id.* at 52-53, 58-59.

55. *Id.* at 54-57.

56. GOLDBACH, HITLER'S WILLING EXECUTIONERS, *supra* note 2, at 82 (amidst the privations of the early Weimer years, "government reports from around Germany . . . portray[ed] a virulent hatred of Jews").

57. See IAN KERSHAW, HITLER: A BIOGRAPHY 62-64, 89 (2008).

58. *Id.* at 202-03, 241-42, 253-56; BURLEIGH, *supra* note 49, at 144-53.

59. FRIEDLANDER, *supra* note 49, at 7-15; PHYLLIS GOLDSTEIN, A CONVENIENT HATRED: THE HISTORY OF ANTISEMITISM 266-68 (2011). Initially these laws were only partially enforced, but became fully effective by the late 1930s. FRIEDLANDER, *supra* note 49, at 13, 50.

60. FRIEDLANDER, *supra* note 49, at 45-46, 49-50. Also in November 1935, all Jewish professors, teachers, attorneys, and notaries employed by the Reich were ordered dismissed. *Id.* at 50.

61. *Id.* at 84-85, 118; BURLEIGH, *supra* note 49, at 309-314.

62. BURLEIGH, *supra* note 49, at 323-27; FRIEDLANDER, *supra* note 49, at 111-16.

63. BURLEIGH, *supra* note 49, at 334; FRIEDLANDER, *supra* at note 49, 118.

The Nazi invasion of western Poland in 1939 and of Eastern Europe and Russia in 1941 placed millions of Jewish people under Nazi rule. In Poland, the Nazis herded Jewish people into “ghettos,” walled-off city blocks packed with several Jewish people per room; many died of starvation or disease.⁶⁴ Mass killings escalated in 1941 as the Nazis stormed eastern Poland, Ukraine, the Baltics, and western Russia. Nazi “Einsatzgruppen” and police battalions—killing squads assigned to follow the German army’s front lines—hunted down and murdered up to two million Jewish people between 1941 and 1945. Entire Jewish communities numbering in the thousands were rounded up, forced to dig enormous death pits, then lined up and machine-gunned en masse.⁶⁵

In 1941/1942 the Nazis commenced mass killing of Europe’s Jewish people in gas chambers at several death camps across Central Europe: two million died at Chelmno, Belzec, Sobibor, Treblinka, and Auschwitz-Birkenau.⁶⁶ Still more perished in the Nazis’ slave labor camps.⁶⁷ In 1944/1945, as allied armies surged across Germany’s borders, the Nazis rushed thousands of barely-surviving Jewish people out of the camps on death marches: trudging hundreds of miles in snow without shoes, barely clothed or fed, “sleeping” on frozen ground, and beaten frequently.⁶⁸

Two pertinent observations by Holocaust scholars warrant mention here. The first observation is the extreme cruelty that Nazis inflicted on Jews before they were murdered. For example, during the invasion of Poland, German soldiers took sadistic pleasure in tormenting Orthodox Jewish people:

[T]hey were compelled to smear feces on one another . . . [to] clean excrement with prayer shawls, and dance around . . . burning Torah scrolls. They were whipped, forced to eat pork, or had Jewish stars carved on their foreheads. . . . Beards and sidelocks were . . . set afire [or] hacked off with or without parts of skin, cheeks, or jaws, to the amusement of a usually large audience of cheering soldiers.⁶⁹

Even in a very rare case where supervisory officials directed the guards *not* to harm the Jewish people further—as at the start of the death marches—the guards continued to torment, starve, and beat the helpless Jews remorselessly.⁷⁰

64. FRIEDLANDER, *supra* note 49, at 160–61, 205–10; GOLDHAGEN, HITLER’S WILLING EXECUTIONERS, *supra* note 2, at 145, 289. The Warsaw ghetto had a population density of more than *nine* Jews per room. GOLDHAGEN, HITLER’S WILLING EXECUTIONERS, *supra* note 2, at 289.

65. BURLEIGH, *supra* note 49, at 628–29; GOLDHAGEN, HITLER’S WILLING EXECUTIONERS, *supra* note 2, at 154, 228–30.

66. BURLEIGH, *supra* note 49, at 636, 643–44, 650; GOLDHAGEN, HITLER’S WILLING EXECUTIONERS, *supra* note 2, at 157, 173; GOLDSTEIN, *supra* note 59, at 277–79.

67. GOLDHAGEN, HITLER’S WILLING EXECUTIONERS, *supra* note 2, at 293–302, 312; GOLDSTEIN, *supra* note 59, at 277.

68. FRIEDLANDER, *supra* note 49, at 417; GOLDHAGEN, HITLER’S WILLING EXECUTIONERS, *supra* note 2, at 328–30, 334, 347–51.

69. FRIEDLANDER, *supra* note 49, at 154.

70. GOLDHAGEN, HITLER’S WILLING EXECUTIONERS, *supra* note 2, at 356–57. This unusual order, issued by the Nazi leader Heinrich Himmler, had nothing to do with compas-

The second observation is the sheer number of individuals needed to carry out the vast array of tasks involved in planning and implementing such large-scale mass killings. The Nazi regime established more than 20,000 camps and ghettos to conduct the Holocaust.⁷¹ Goldhagen estimates that at least 100,000, and possibly more than 500,000 people were needed to staff all the work camps, death camps, Einsatzgruppen, police battalions, and ghetto administrations.⁷²

2. The Nazis' Eliminationist Incitement

In 1920s Germany, "virtually every major institution and group . . . was permeated by anti-Semitism."⁷³ A product of his times, the Nazi leader Adolf Hitler declared at a 1920 party meeting the need to "attack the evil [of Jewry] . . . and to exterminate it root and branch."⁷⁴

Hitler's early speeches and 1925 testament *Mein Kampf* ("My Struggle") propagated the genocidal ideology that the Nazi regime later carried out.⁷⁵ This ideology identified "world Jewry" as a nefarious force that controlled both Soviet Bolshevism and "rapacious" Western capitalism—both deemed mortal threats to Germany and the Aryan race.⁷⁶ Nazi party meetings advertised titles like "The Jews as the enemy of man."⁷⁷ Nazi leader Joseph Goebbels denounced his country's role as "an exploitation colony of International Jewry[']s . . . murderous economic war" against Germany.⁷⁸ As Nazis gained votes in the early 1930s, anti-Jewish incitement proliferated.⁷⁹ Nazi agitators denounced the Jewish people as "a murderous plague" which it was "our duty to exterminate," and called for "cleansing . . . the body politic from [Jewish] vermin."⁸⁰

On taking power in 1933, the Nazis promptly seized control of the media. In October 1933 all German newspapers were placed under the direction of Joseph Goebbels's propaganda ministry.⁸¹ Throughout his rule, Hitler met almost daily with Reich press chief Otto Dietrich, resulting in the press office's issuing over 75,000 directives to thousands of German

sion, but with Himmler's concern to avoid harsher terms for Germany's possible surrender in attempted negotiations with American officials. *Id.*

71. 1 THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM ENCYCLOPEDIA OF CAMPS AND GHETTOS, 1933-1945, at xxix (2009).

72. See GOLDHAGEN, HITLER'S WILLING EXECUTIONERS, *supra* note 2, at 166-68 ("[T]he number who became perpetrators of the Holocaust . . . was certainly over one hundred thousand. It would not be surprising if the number turned out to be five hundred thousand or more.").

73. *Id.* at 82.

74. JEFFREY HERF, THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST 3 (2006).

75. *Id.* at 3.

76. *Id.* at 92, 148-50; BURLEIGH, *supra* note 49, at 91; HERF, *supra* note 74, at 37.

77. C.C. ARONSFELD, THE TEXT OF THE HOLOCAUST: A STUDY OF THE NAZIS EXTERMINATION PROPAGANDA, 1919-1945, at 7 (1985).

78. HERF, *supra* note 74, at 37.

79. ARONSFELD, *supra* note 77, at 14.

80. *Id.* at 14, 17.

81. See *id.* at 18-22.

news outlets between 1933 and 1945.⁸²

The subsequent onslaught of state-sponsored Jew-hatred across Germany was unprecedented in history; only representative examples can be cited here. The Nazis held mass rallies in Nuremberg before cheering crowds—replayed in weekly newsreels—where Hitler denounced Jewish people as “Bolsheviks” and “parasitic world intellectuals.”⁸³ In 1933, Hitler called for a boycott of Jewish businesses, and the Nazis blanketed the streets with posters declaring the Jews “the enemy of the German people.”⁸⁴ In 1934, Julius Streicher’s *Der Sturmer* newspaper devoted an entire issue to “ritual murder,” which claimed that Jewish people abducted and murdered Christian children to use their blood in religious rituals.⁸⁵ In German schools, “teachers denounced all the Jews, without exception, as . . . the most destructive force in every country where they were living.”⁸⁶ Schools were directed to teach “[t]he Protocols of the Elders of Zion,” a pamphlet falsely describing a secret Jewish plan to take over the world.⁸⁷

As Hitler prepared to invade Poland, Nazi propaganda preemptively accused “world Jewry” of instigating the coming war, and promised to exterminate them for doing so. Speaking in January 1939, Hitler blamed the Jewish people for World War I and Germany’s economic collapse, pledging that “if international finance Jewry should succeed in plunging the nations once more into a world war, the result will be . . . the annihilation of the Jewish race in Europe.”⁸⁸

A year later, after the invasion of Poland started World War II, Hitler declared that “[t]he Jewish-capitalist world enemy . . . has only one goal: to exterminate Germany and the German people.”⁸⁹ In 1940 the Nazis released anti-Semitic propaganda films showing Jews seducing German maidens, profiting from Germans’ miseries, and superimposing images of Jewish “hordes” with swarms of sewer rats.⁹⁰ By 1941, the Nazi propaganda apparatus was posting 125,000 outdoor wall newspapers across Germany every week, many of them attacking the Jewish people: the July 23 and July 30, 1941 issues denounced “Jewish-Bolsheviks” for “horrible atrocities” alongside photos of corpses.⁹¹ In July 1941, a Goebbels editorial announced “[t]he Jews are guilty!” and praised “the fist of an awakened Germany” for having “slammed down on this racial rubbish . . .” Hitler kept repeating his genocidal 1939 pledge, declaring “[t]he struggle will . . . end . . . with the extermination of Jewry in Europe.”⁹²

82. HERF, *supra* note 74, at 24–25.

83. HERF, *supra* note 74, at 42–43.

84. GOLDSTEIN, *supra* note 59, at 266.

85. ARONSFELD, *supra* note 77, at 26; GOLDSTEIN, *supra* note 59, at 83–85.

86. GOLDSTEIN, *supra* note 59, at 267.

87. NORMAN COHN, WARRANT FOR GENOCIDE: THE MYTH OF THE JEWISH WORLD CONSPIRACY AND THE PROTOCOLS OF THE ELDERS OF ZION 221–22 (2005).

88. HERF, *supra* note 74, at 52.

89. *Id.* at 64.

90. FRIEDLANDER, *supra* note 49, at 187–89.

91. *Id.* at 102.

92. ARONSFELD, *supra* note 77, at 35–36.

In 1942, a German-Jewish diarist wrote, “[F]or nearly ten years the inferiority and harmfulness of the Jews has been emphasized in every newspaper, . . . every radio broadcast and on many posters, . . . without a voice in favor of the Jews being . . . permitted to be raised.”⁹³ During the war years, the “daily experience of all Germans included . . . radical anti-Semitic propaganda whose unambiguous intent was to justify mass murder of Jews.”⁹⁴

B. The Serbian Genocide of the Bosnian Muslims (1992-1995)

1. Context and Conduct of the Genocide

In 1992, on the eve of genocide, Bosnia’s religious/ethnic population was forty-four percent Muslim, thirty-one percent Eastern Orthodox Serb, and seventeen percent Catholic Croat.⁹⁵ Those numbers were a legacy of the Roman and Ottoman empires. In 395 C.E., when the Roman Empire split into eastern and western halves, the boundary left what later became Serbia in the East, Croatia in the West, and Bosnia in the middle.⁹⁶ The East/West schism of the medieval Church mirrored this split, leaving Serbia Eastern Orthodox and Croatia Roman Catholic, with Bosnia home to both faiths.⁹⁷

In the fourteenth century, the Ottoman Muslims conquered southeastern Europe, including Serbia.⁹⁸ Muslim law deemed Christians second-class “dhimmis” subject to punitive taxes, economic barriers, and limited religious rights, with every fifth Christian child conscripted as a slave to serve the empire.⁹⁹ Despite this, the region experienced minimal ethnic conflict until the nineteenth century.¹⁰⁰ Amidst a rising nationalist tide, Serbia won independence in 1878. The Serbs then forced all Muslims within their borders to leave or convert to Christianity.¹⁰¹

After World War I, the peace conferees combined Serbia, Croatia, and Slovenia into a new, Serb-dominated nation of Yugoslavia.¹⁰² During World War II, the Axis armies installed fascist regimes in Serbia and Croa-

93. GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS*, *supra* note 2, at 449.

94. HERF, *supra* note 74, at 12.

95. *Push for national census reveals scars of Bosnia’s painful past*, PBS NEWSHOUR (Oct. 10, 2013) (transcript), http://www.pbs.org/newshour/bb/world-july-dec13-bosnia_10-10/.

96. Stephen Schwartz, *Beyond “Ancient Hatreds”: What Really Happened to Yugoslavia*, POL’Y REV. (Oct. 1, 1999), <http://www.hoover.org/research/persistence-genocide>.

97. NORMAN DAVIES, *EUROPE: A HISTORY* 18, 239, 246, 380 (1998); BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* 588 (2007); ANTHONY PAGDEN, *WORLDS AT WAR: THE 2,500-YEAR STRUGGLE BETWEEN EAST AND WEST* 142-43, 254-55 (2009).

98. See PAGDEN, *supra* note 97, at 252-53, 256-57; DAVIES, *supra* note 97, at 386, 388-89.

99. EFRIM KARSH, *ISLAMIC IMPERIALISM: A HISTORY* 25-26 (2006); BAT YE’OR, *ISLAM AND DHIMMITUDE: WHERE CIVILIZATIONS COLLIDE* 50-52, 56-59, 62 (2002).

100. MARK MAZOWER, *THE BALKANS: A SHORT HISTORY*, at xlii-xliii, 58-64 (2002).

101. NORMAN CIGAR, *GENOCIDE IN BOSNIA: THE POLICY OF “ETHNIC CLEANSING”* 16-17 (1995); DAVIES, *supra* note 97, at 834; MAZOWER, *supra* note 100, at 79.

102. CIGAR, *supra* note 101, at 17-18; WARREN ZIMMERMANN, *ORIGINS OF A CATASTROPHE* 5 (1999).

tia, both of which commenced ethnic cleansing.¹⁰³ After the war, Yugoslavia returned under the rule of independent Communist leader Joseph Tito, whose strict rule suppressed ethnic conflict.¹⁰⁴ After Tito died in 1980 separatist movements re-emerged.¹⁰⁵ In 1990, skirmishes broke out between Serb and Croatian armed forces.¹⁰⁶ In the spring of 1991, however, Serbian President Slobodan Milosevic secretly met and agreed with the Croatian president that each would secede from Yugoslavia, and both would carve up and annex parts of Bosnia.¹⁰⁷

Over the next eight months, Bosnia's multi-ethnic Parliament split into two separate assemblies—Serbian, and Muslim/Croat—each claiming to rule Bosnia.¹⁰⁸ Preparing for war, Serbia's leaders deployed soldiers across Bosnia.¹⁰⁹ In April 1992, they launched the genocide, shelling the Muslim-majority town of Zvornick and sending in a Serb paramilitary force that sent thousands of Muslims fleeing.¹¹⁰ From then on, "Serb paramilitary hit-squads swept through northern and eastern Bosnia," expelling and murdering Muslims.¹¹¹

Serb paramilitaries rounded up Muslim men, women, and children and either killed them immediately, or beat them with weapons and marched them to concentration camps.¹¹² Like the Nazis, the Serbs cruelly tormented their Muslim victims:

They were forced to sing Serb nationalist songs to entertain their jeering tormentors . . . [and] avoid being beaten. They were told . . . their wives had been raped and . . . killed They were forced, on pain of death, to perform atrocities against each other: mutilation, physical and sexual, and . . . mutual killing.¹¹³

In the ethnically mixed cities, the Serbs used Nazi tactics to drive out the Muslims: "They were fired from their jobs. . . . [H]arassed in the street. Their homes . . . attacked and their businesses blown up at night."¹¹⁴ By December 2002 almost two million Bosnians—"nearly half the population"—had been forced to flee their homes.¹¹⁵

The Serbs herded Muslims and Croats into concentration camps, under inhuman conditions akin to the Holocaust. In one of the largest camps, known as Omarska, a survivor reported being locked with three hundred men "inside a cage roughly 700 square feet [With cages] stacked four high 'There were no toilets and the prisoners . . . live[d]

103. CIGAR, *supra* note 101, at 18-19, 34; JONES, *supra* note 4, at 317.

104. LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* 28-29 (1997).

105. *Id.* at 31-32, 34, 49, 83-84.

106. *Id.* at 100-03, 134-35, 140-43.

107. *Id.* at 144, 185, 212.

108. *Id.* at 216-18.

109. *Id.* at 217-18, 242-43.

110. *Id.* at 222-24.

111. *Id.* at 244.

112. *Id.* at 245.

113. *Id.*

114. *Id.* at 246.

115. *Id.* at 252.

in their own filth, which dripped through the grates.’”¹¹⁶ The 11,000 camp prisoners suffered “every conceivable torture. Throats were slit. Guards forced prisoners to eat feces, to perform oral sex on other prisoners. Men were castrated.”¹¹⁷ Bosnia’s women also suffered terribly: Serb soldiers and paramilitaries raped an estimated 20,000, some in front of their families. Others held captive were raped daily by gangs of soldiers.¹¹⁸

By the late summer of 1992, the Serbs had “ethnically cleansed” and taken control of about two-thirds of Bosnia.¹¹⁹ The genocide continued for more than two years and included sieges, starvation, and shelling across the major Bosnian cities of Sarajevo, Srebrenica, Gorazde, and Tuzla.¹²⁰ Western sanctions and NATO airstrikes finally forced the Serbs to the negotiating table. The resulting 1995 Dayton Accords left the Serbs in control of half of Bosnia, and a shrunken Muslim enclave surrounded by its enemies from the just-finished war.¹²¹

2. Serbia’s Eliminationist Incitement

America’s ambassador to Yugoslavia from 1989 to 1992 has written, “those who argue that ‘ancient Balkan hostilities’ account for the violence that . . . destroyed Yugoslavia ignore the power of television in the service of officially provoked racism.”¹²² Contrary to the reality that Balkan Muslims were predominantly moderate and integrationist,¹²³ “influential . . . Serbia[ns] . . . shape[d] a stereotypical image of Muslims as alien, inferior, and a threat to all that the Serbs held dear.”¹²⁴

Serbian intellectuals promoted anti-Muslim stereotypes in such works as the best-selling 1982 novel *Nož* (Knife), set in World War II and portraying Muslims as “treacherous, cold-blooded murderers.”¹²⁵ Through the 1980s, Serbian news outlets and conference speakers denounced Balkan Muslims with such pejoratives as “offensive[,] . . . intolerant[,] . . . vampire like”; “nomadic robber barons”; “fundamentalists”; “not capable of . . . personal freedom”; practitioners of “Serbophobia”; and the “most significant

116. *Id.* at 250.

117. NEIL KRESSEL, *MASS HATE: THE GLOBAL RISE OF GENOCIDE AND TERROR* 13 (2002).

118. *Id.* at 2-3; WARBURTON MISSION, *WARBURTON MISSION II REPORT: EUROPEAN COMMUNITY INVESTIGATIVE MISSION INTO THE TREATMENT OF MUSLIM WOMEN IN THE FORMER YUGOSLAVIA* ¶ 22 (1993), <http://www.womenaid.org/press/info/humanrights/warburtonfull.htm#>.

119. See SILBER & LITTLE, *supra* note 104, at 244-57.

120. See *id.* at 257-352.

121. *Id.* at 377.

122. ZIMMERMANN, *supra* note 102, at 120; see also CIGAR, *supra* note 101, at 6, 13; Schwartz, *supra* note 96 (“[A]ncient hatreds’ could not and did not combust spontaneously. The blaze was prepared, lit, and stoked by the Serbian political leadership . . .”); SILBER & LITTLE, *supra* note 104, at 25.

123. ANGEL RABASA ET AL., *RAND CENTER FOR MIDDLE EAST PUBLIC POLICY, BUILDING MODERATE MUSLIM NETWORKS* 102 (2007), <http://www.rand.org/pubs/monographs/MG574.html>; Michael J. Totten, *The (Really) Moderate Muslims of Kosovo*, CITY J. (Fall 2008), http://www.city-journal.org/2008/18_4_kosovo_muslims.html.

124. CIGAR, *supra* note 101, at 24.

125. *Id.* at 104, at 25. See generally VUK DRASKOVIC, *KNIFE* (1982).

threat to Yugoslavia.”¹²⁶

In September 1986, a document titled the “Memorandum of the Serbian Academy of Arts and Sciences” (“Serbian Memorandum”) was leaked to the public.¹²⁷ The document attained notoriety for its false claims that “the Serbs faced total genocide” in Kosovo and Croatia,¹²⁸ and that their survival required a wholesale redrawing of the Yugoslav map to provide “territorial unity of the Serbian people.”¹²⁹ As one scholar summarized,

In this document, Serbia’s intellectual elite signed on to the theory that Serbia, which had ruled over Yugoslavia for [seventy] years, was actually an eternal victim of the more sophisticated Westernized nations within Yugoslavia. The Belgrade press . . . became filled with paranoid propaganda about the threat [to Serbia] of Muslim fundamentalists, Albanian gangsters, and . . . Croat fascists . . .¹³⁰

After the Serbian Memorandum’s disclosure, communist leaders and the Yugoslav media denounced it—except for Serbian Communist Party chief Slobodan Milosevic.¹³¹ Milosevic publicly adopted a militant, Serbian nationalist agenda, which he leveraged into a takeover of the non-elective Serbian presidency in 1987.¹³²

Once in command, Milosevic seized control of the Serbian media. Journalists who resisted Milosevic’s ethnic incitement campaign were fired or prosecuted.¹³³ Opposing politicians were purged.¹³⁴ Over the next four years, Milosevic’s government snuffed out resistance by taking over broadcast frequencies, imposing broadcast blackouts, monopolizing the newsprint supply, closing dissident media outlets, and deploying the police and army to administer violence.¹³⁵

As a result, from 1987, “Serbia’s state run media . . . unleash[ed] an unprecedented barrage of attacks against other communities . . . highlighting massacres of Serbs by Muslim[s] . . . during World War II and . . . suggest[ing] that the same threat had reemerged.”¹³⁶ The Milosevic regime’s first propaganda target was the Muslims of neighboring Kosovo:

[N]ovelists, the Orthodox Church, philosophers, . . . University Professors, party apparatchiks, slogans at public rallies, tabloid newspapers and television news all insisted that Kosovo Serbs faced genocide from Albanian ‘terrorist-separatists’, and that mere justice demanded the province be reabsorbed into Serbia . . .¹³⁷

126. CIGAR, *supra* note 101, at 24-30.

127. CIGAR, *supra* note 101, at 24-30; SILBER & LITTLE, *supra* note 104, at 31.

128. SILBER & LITTLE, *supra* note 104, at 31.

129. CIGAR, *supra* note 101, at 23.

130. Schwartz, *supra* note 96.

131. SILBER & LITTLE, *supra* note 104, at 32-33.

132. *Id.* at 37-47; CIGAR, *supra* note 101, at 32-33.

133. SILBER & LITTLE, *supra* note 104, at 42; MARK THOMPSON, *FORGING WAR: THE MEDIA IN SERBIA, CROATIA, AND BOSNIA-HERCEGOVINA* 56-57, 59-60 (1994).

134. SILBER & LITTLE, *supra* note 104, at 40, 43-47, 56-57, 62, 120-21.

135. SILBER & LITTLE, *supra* note 104, at 120-21; THOMPSON, *supra* note 133, at 56-63, 86-93.

136. CIGAR, *supra* note 101, at 34; THOMPSON, *supra* note 133, at 55.

137. THOMPSON, *supra* note 133, at 55-56.

Like the Nazis' Nuremberg spectacles, Milosevic's rallies included chants like, "We love you Slobodan because you hate the Muslims" and "I'll be first, who'll be second, to drink some Turkish [Muslim] blood?"¹³⁸

The incitement continued through 1990 and 1991, when Serbia fought to annex Serb regions of Croatia, and throughout the 1992 genocide in Bosnia. Serb television called Muslims and Croats "evil-doers," "cut-throats," and "wanton hordes," and accused both of seeking "to destroy everything Serbian" via "physical and spiritual genocide."¹³⁹ In October 1991, Bosnian Serb leader Radovan Karadzic declared that if Bosnian Muslims "opt for war," they would "disappear from the face of the Earth."¹⁴⁰ Throughout the genocide, the Serb media portrayed an inverted reality: no ethnic cleansing, but rather "Serb forces push[ing] back the [Muslim] aggressors."¹⁴¹

C. The Rwandan Hutu Genocide of the Rwandan Tutsi (1994)

1. Context and Conduct of the Genocide

Rwanda, located in East-Central Africa, is populated mostly by majority Hutu and minority Tutsi tribes, all speaking the Kinyarwanda language.¹⁴² Before colonization, a Tutsi monarchy governed the national and provincial governments; Hutus governed locally.¹⁴³ From the late nineteenth century, Germany and then Belgium colonized Rwanda.¹⁴⁴ In 1933, the Belgians hardened the Hutu/Tutsi division by issuing tribal identity cards.¹⁴⁵

By the 1950s, with Hutus demanding majority rule and Tutsis agitating for independence, the Belgians dismissed the Tutsi chiefs en masse and installed a Hutu regime. A Hutu-dominated Rwanda gained independence in 1962.¹⁴⁶ By then, a quarter million Rwandan Tutsis had fled and lived in refugee camps outside Uganda.¹⁴⁷ The next year, about 1,500 of those refugees entered Rwanda in a failed attempt to depose the Hutu regime. The government responded by killing between 10,000 and 14,000 Rwandan Tutsi, and imposing strict employment and educational quotas on Tutsi.¹⁴⁸

In 1989, plunging world coffee prices and a resulting recession sparked opposition to the Hutu regime.¹⁴⁹ In October 1990, a Tutsi refugee army—the "Rwanda Patriotic Front" or "RPF"—attempted another

138. CIGAR, *supra* note 101, at 34.

139. THOMPSON, *supra* note 133, at 102.

140. CIGAR, *supra* note 101, at 37.

141. THOMPSON, *supra* note 133, at 104.

142. MELVERN, *supra* note 30, at 3-5.

143. *Id.* at 5.

144. *Id.* at 4-5.

145. *Id.* at 5-6.

146. JONES, *supra* note 4, at 350; MELVERN, *supra* note 30, at 6-8.

147. MELVERN, *supra* note 30, at 8.

148. *Id.* at 8-9.

149. *Id.* at 13.

failed invasion.¹⁵⁰ The next four years witnessed growing anti-Tutsi extremism in the government and military, paralleled by negotiations for a more inclusive government in response to domestic unrest, Western diplomatic pressure, and a resurgent RPF.¹⁵¹ This culminated in the August 1993 Arusha Accords, a peace agreement proposing a multi-ethnic power structure.¹⁵² But on April 6, 1994, after eight months of violent, Hutu resistance to the Accords, the Hutu President's airplane was shot down over Kigali, the nation's capital, by assassins whose identity and affiliation still remain unknown.¹⁵³

The genocide of the Tutsi commenced within hours of the crash. As with Bosnia, Western media coverage blamed the genocide on "ancient tribal hatreds," suggesting its inevitability, when "in reality, a planned annihilation was taking place."¹⁵⁴ Since 1991, the Hutu-controlled army had enlarged its civil defense forces in all ten Rwanda prefectures, declaring "the principal enemy is the Tutsi, inside or outside the country . . ."¹⁵⁵ During that same time the President's political party recruited a nationwide paramilitary youth group—the "Interhamwe"—trained them "to handle weapons and use explosives" and to kill "at speed," and taught them to immobilize victims for mass killing "by having their Achilles heel cut."¹⁵⁶

On April 6th, hours after the President's plane crash, the Hutu military mobilized and ordered soldiers to start killing Tutsi.¹⁵⁷ The Interhamwe paramilitaries also were given arms and told to "hunt the Tutsi" down.¹⁵⁸ Killings immediately spread across the capital and other prefectures.¹⁵⁹ Within the week, ten thousand people were being murdered each day in Kigali.¹⁶⁰ In Butere prefecture, which includes Rwanda's second largest city and the national university, tens of thousands were massacred by killing squads. At a church compound, an estimated twenty thousand were murdered in just three days. At the university, soldiers rounded up and shot all Tutsi students. At another church compound, tens of thousands of Tutsi were surrounded by continuous gunfire for over six hours, leaving "children crying over the bodies of their parents . . . thousands . . . crying out in pain [who] could not move," and death pits filled with "mothers with their children still strapped at their backs."¹⁶¹

As in the Nazi and Serbian genocides, the Hutu often tormented their victims before killing them. In Kibuye prefecture, the Hutu leadership lured twenty thousand fleeing Tutsi to a stadium, shut the water supply,

150. *Id.* at 13-16.

151. *Id.* at 16-17, 22-24, 33-36.

152. *Id.* at 38-39, 59-60.

153. *Id.* at 72, 94, 101, 105-07, 110-13, 132-34; JONES, *supra* note 4, at 351-52.

154. Linda Melvern, *Missing the Story: The Media and the Rwanda Genocide*, in *THE MEDIA AND THE RWANDA GENOCIDE* 198, 198 (2006).

155. MELVERN, *supra* note 30, at 21-23.

156. *Id.* at 26.

157. *Id.*

158. *Id.*

159. *Id.* at 167-71.

160. *Id.* at 207.

161. *Id.* at 212-14.

prevented food deliveries, and killed anyone emerging to look for nourishment. Days later, with children dying of hunger, the army and Interhamwe threw grenades into the stadium and commenced mass shooting from atop an adjacent hill.¹⁶²

Under pressure from the United States, England, and France, the United Nations withdrew its peacekeeping force in Rwanda, over its commander's objections.¹⁶³ The genocide stopped only when the RPF—the army of Tutsi refugees—fought its way back into the country, taking Kigali on July 4th.¹⁶⁴ Experts from the Red Cross, United Nations, and Rwanda who witnessed the slaughter count approximately one million killed.¹⁶⁵ Most were Tutsi, but many were Hutu who opposed the genocide.¹⁶⁶ Most killings were done with crude weapons or by hand:

Most victims were killed by machete (37.9%), followed by clubs (16.8%) and firearms (14.8%). Some 0.5% of the victims were women who had been raped or cut open. Other victims were forced to commit suicide, beaten to death, thrown alive into rivers or lakes, or burned alive. Infants and babies were thrown against walls or crushed to death.¹⁶⁷

Years later, the former interim President Jean Kambanda—who pled guilty to genocide—recalled that “not one person in the country denounced the massacres. No one had the courage to do it.”¹⁶⁸ This was genocide by mass participation: “the civilian Hutu population—men, women, and even children . . . comprised the bulk of *génocidaires* . . . hundreds of thousands of Hutus participated eagerly.”¹⁶⁹ Post-genocide, at least 100,000 Rwandans were charged and detained pending trial for participating in the killings.¹⁷⁰

2. *The Hutus' Eliminationist Incitement*

Despite ethnic tensions, the Rwandan media displayed minimal ethnic incitement from 1970 to 1990.¹⁷¹ This dramatically changed in the four years before the 1994 genocide, owing primarily to two media outlets allied with and influenced by the regime: the newspaper *Kangura*, and the radio station Radio-Television Libre des Mille Collines, or “RTLM.”

The newspaper *Kangura* published its first issue in May 1990, and promptly became the most influential print medium in Rwanda.¹⁷² As *Kangura* rose to prominence, the Hutu regime persecuted opposition news-

162. *Id.* at 227.

163. *Id.* at 202-06, 218-19, 222.

164. *Id.* at 248.

165. *Id.* at 253.

166. *Id.* at 194-95.

167. *Id.* at 253.

168. *Id.* at 1, 192.

169. JONES, *supra* note 4, at 346, 358.

170. MELVERN, *supra* note 30, at 252.

171. Darryl Li, *Echoes of Violence: Considerations on Radio and Genocide in Rwanda*, in THE MEDIA AND THE RWANDA GENOCIDE, *supra* note 1, at 90, 93.

172. *Nahimana*, Case No. ICTR-99-52-T at 39-40 (para. 122); Marcel Kabanda, in THE MEDIA AND THE RWANDA GENOCIDE, *supra* note 1, at 62.

papers, subjecting editors to interrogations, beatings, and lock-ups.¹⁷³ From its dominant position, *Kangura* was found by the International Criminal Tribunal for Rwanda (ICTR) to have “promot[ed] . . . fear and hatred . . . of the Tutsi minority . . . in every issue . . . from February 1991 to March 1994 . . . in language clearly intended to fan the flames of resentment and anger”¹⁷⁴

For example, *Kangura*’s December 1990 issue published “The Ten Commandments” of the Hutu, in an article describing the Tutsi as “blood-thirsty,” “dishonest in their business dealings,” and “seeking ethnic supremacy.”¹⁷⁵ The article labeled as a traitor any Hutu who does business with a Tutsi or Tutsi company, or who “befriends, employs, or marries a Tutsi.” It also called for teaching “the Hutu ideology . . . to Hutus at all levels,” and directed the Hutu to “cease feeling pity for the Tutsi” and to “prepare[] to defend themselves against this scourge.”¹⁷⁶

Articles in *Kangura* frequently referred to Tutsi as “Inyenzi”—Kinyarwanda for cockroaches.¹⁷⁷ The cover of *Kangura*’s November 1991 issue effectively called for genocide, posting in large print, “What arms shall we use to conquer the Inyenzi once and for all?” adjacent to a large drawing of a machete. The same issue called the Tutsi “hypocrites, thieves and killers.”¹⁷⁸ Editorials in other *Kangura* issues denounced the “Inyenzi” for “killing, looting, [and] raping young girls and women,” and compared the Tutsi to a “snake whose venom is extremely poisonous,” and “whose wickedness is indescribable.”¹⁷⁹ *Kangura* published false stories of Tutsi depravity; in February 1993, it claimed that a group of Tutsi “caught a Hutu, cut his genitals and requested the wife to carry them and . . . to eat them.”¹⁸⁰

In January 1994, on the eve of the genocide, *Kangura* echoed the Nazi and the Serbian regimes with this chilling warning:

Let’s hope the Inyenzi will have the courage to understand . . . that if they make a small mistake, they will be exterminated; if they make the mistake of attacking again, there will be none of them left in Rwanda, not even a single accomplice. All the Hutus are united¹⁸¹

Following in *Kangura*’s wake, RTLM made its first radio broadcast in July 1993 on the eve of the signing of the Arusha Accords—which called for power-sharing with the Tutsi. RTLM became “the medium of mass commu-

173. Jean-Marie Vianney Higiro, *Rwandan Private Print Media on the Eve of the Genocide*, in *THE MEDIA AND THE RWANDA GENOCIDE*, *supra* note 1, at 83. However, some opposition newspapers continued to function. *Id.* at 83.

174. *Nahimana*, Case No. ICTR-99-52-T at 80 (paras. 245-46) (emphasis added).

175. *Id.* at 45-46 (paras. 138-39).

176. *Id.* at 46-47 (para. 139); MELVERN, *supra* note 30, at 50.

177. Jean-Marie Vianney Higiro, *supra* note 173, at 84-85.

178. Charity Kagwi-Ndungu, *The Challenges in Prosecuting Print Media for Incitement to Genocide*, in *THE MEDIA AND THE RWANDA GENOCIDE*, *supra* note 1, at 330, 335.

179. *Nahimana*, Case No. ICTR-99-52-T at 60 (para. 179).

180. *Id.* at 61 (para. 182).

181. *Id.* at 70 (para. 215).

nication with the broadest reach in Rwanda.”¹⁸² RTLM was financed and supported by the Hutu President and ruling elite.¹⁸³ From October 1993, when the first Hutu President of neighboring Burundi was assassinated, RTLM’s anti-Tutsi broadcasts became especially virulent.¹⁸⁴ The ICTR found that

RTLM broadcasts . . . promoted contempt and hatred for the Tutsi population . . . [and] exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence . . . against the Tutsi ethnic group.¹⁸⁵

Like *Kangura*, RTLM repeatedly denounced the Tutsi as Inyenzi (cockroaches). It called them “treacherous people” who were planning to return the Hutus to a state of “slavery.”¹⁸⁶

When the genocide began on April 6, 1994, RTLM’s broadcasts “turned into a seemingly non-stop call for the extermination of the Tutsi.”¹⁸⁷ Praised by the new Hutu Prime Minister as “one of the key weapons in the [anti-Tutsi] war,” RTLM declared that “killing the enemy was the duty of every Rwandan.”¹⁸⁸ On April 16th, RTLM broadcasted a government call “for citizens to take up arms nationwide and mount roadblocks”—where Tutsis were identified and killed on the spot.¹⁸⁹ A study later found that over nine percent of all RTLM broadcasts constituted either “direct calls for exterminating” members of the Rwanda Patriotic Army and its supporters, or “congratulatory messages” after such exterminations were carried out.¹⁹⁰

RTLM also helped to identify and target specific Tutsis for killing. As the ICTR later found, “[b]oth before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, . . . [and] Hutu political opponents,” many of whom were later killed.¹⁹¹ RTLM ordered Tutsi civilians “to come out of hiding and to return home or to go to the roadblocks, where they were . . . killed in accordance with . . . subsequent RTLM broadcasts tracking their movement.”¹⁹²

182. *Id.* at 117 (para. 342); *id.* at 166 (para. 488).

183. Alison des Forges, *Call to Genocide: Radio in Rwanda, 1994*, in *THE MEDIA AND THE RWANDA GENOCIDE*, *supra* note 2, at 44.

184. *Id.* at 45.

185. *Nahimana*, Case No. ICTR-99-52-T at 165–66 (paras. 486–88).

186. Mary Kimani, *RTLM: The Medium that Became a Tool for Mass Murder*, in *THE MEDIA AND THE RWANDA GENOCIDE*, *supra* note 1, at 110, 112.

187. *Nahimana*, Case No. ICTR-99-52-T at 165 (para. 485).

188. Kimani, *supra* note 186, at 113.

189. MELVERN, *supra* note 30, at 201, 205.

190. Kimani, *supra* note 186, at 119.

191. *Nahimana*, Case No. ICTR-99-52-T at 165 (para. 487).

192. *Id.*

III. Incitement as a Contributing Cause of Genocide: Theory and Evidence

In all three of the preceding historical accounts, extensive genocide incitement filled the print and broadcast media prior to the actual genocides. By seizing control of the media and unleashing this rhetorical flood, the leaders who planned and directed the genocides manifested the belief that incitement was a critical tool in achieving their goals.¹⁹³ But were they correct? This Part seeks to address that question, both through the work of genocide scholars and historians, and from an array of social psychology experiments.

The discussion that follows is structured around three implications of the several cited studies: (1) large-scale, dehumanizing hate propaganda is a common occurrence preceding genocides; (2) most perpetrators of genocidal mass killings do not manifest pre-existing psychopathologies or violent inclinations, but rather are drawn from the ranks of ordinary people; and (3) triggering the “perpetrator mindset” in ordinary people has proven to be remarkably easy, and dehumanization plays a significant role in that psychological transformation.

A. The Recurring Pattern of Dehumanizing Hate Language

Genocide scholars regularly identify media incitement as one of the common steps along the pathway to genocide. In an especially comprehensive study of genocides throughout history, Prof. Adam Jones concluded that:

A standard feature of genocidal mobilization is hate propaganda, including in mass media, public political speech, websites, graffiti, and more diffuse discourse strategies, such as rumor and gossip Hate speech underpins “exclusionary ideologies . . . that define target groups as expendable.”¹⁹⁴

In an extensive discussion of twentieth-century mass killings, Prof. Daniel Jonah Goldhagen found an association between such events and “the sway of ideologies” that portray others “as deserving death or elimination.”¹⁹⁵ This “ideologizing of a society” often follows an undemocratic

193. A noteworthy example of this was a mimeographed document found in Rwanda’s Butere prefecture after the genocide, captioned “Note Relative à la Propagande D’Expansion et de Recrutement.” Citing Lenin and Joseph Goebbels, the anonymous author described how propaganda can influence the public, and endorsed the use of “lies, exaggeration, ridicule, and innuendo to attack the opponent.” The author advocated a tactic called “accusation in the mirror,” whereby “the party which is using terror will accuse the enemy of using terror’ . . . [thereby] persuad[ing] listeners and ‘honest people’ that they are being attacked and are justified in taking whatever measures are necessary ‘for legitimate [self-]defense.’” ALLISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 75–76 (1999), <http://www.hrw.org/reports/pdfs/r/rwanda/rwanda993.pdf>. The above histories make clear that this tactic was broadly employed by the Nazi, Serb, and Rwandan Hutu regimes to incite exaggerated fears of the groups they targeted for genocide.

194. JONES, *supra* note 4, at 570 (quoting TED GURR & BARBARA HARFF, *ETHNIC CONFLICT IN WORLD POLITICS* 80 (1994)).

195. GOLDHAGEN, *supra* note 2, at 204.

power seizure, “usually through revolution or coup.”¹⁹⁶ The new leaders then “educate the young in their creed,” creating over time “an ever growing reservoir of people [who adopt] beliefs that make them willing to eliminate enemies, including by lethal means.”¹⁹⁷

The centrality of media incitement also appears in the genocide model developed by Prof. Gregory Stanton, founder and President of the non-profit organization Genocide Watch. Stanton identifies ten stages through which genocides ordinarily come to happen:

- (1) Classification: “categories to distinguish people into ‘us and them’”;
- (2) Symbolization: “giv[ing] names or other symbols to the classifications”;
- (3) Discrimination: “a dominant group us[ing] law, custom, and political power to deny the rights of other groups”;
- (4) Dehumanization: “[o]ne group den[ying] the humanity of the other group . . . equat[ing] the latter] with animals, vermin, insects or diseases”;
- (5) Organization “usually by the state, often using militias,” planning “for genocidal killings”;
- (6) Polarization: “[e]xtremists driv[ing] the groups apart”;
- (7) Preparation: “perpetrator group leaders plan[ning] the ‘Final Solution’ to the . . . targeted group . . . often us[ing] euphemisms to cloak their intentions”;
- (8) Persecution: “identif[y]ing and separat[ing victims] because of their ethnic or religious identity” with “[d]eath lists . . . drawn up”;
- (9) Extermination: the “mass killing”; and
- (10) Denial: the aftermath, when perpetrators “deny . . . any crimes . . . blame what happened on the victims . . . [and] block investigations of the crimes.”¹⁹⁸

At least three of those ten stages involve media incitement, viz.: (4) Dehumanization, where “hate propaganda in print and on hate radios is used to vilify the victim group”; (6) Polarization, where “[h]ate groups broadcast polarizing propaganda”; and (7) Preparation, where the perpetrator group “indoctrinate[s] the populace with fear of the victim group.”¹⁹⁹

Scholars at the Genocide Prevention Program of Hebrew University, Israel, conclude from the evidence of several twentieth-century genocides, that “[h]ate language and incitement together increase risks for genocide, especially when they come from the top down in authoritarian regimes with their environments of coercion, direction[,] and instruction.”²⁰⁰ While acknowledging that “not all incitement leads to genocide,” and that

196. *Id.*

197. GOLDHAGEN, WORSE THAN WAR, *supra* note 48, at 204-05.

198. Gregory H. Stanton, *The Ten Stages of Genocide*, GENOCIDE WATCH, <http://www.genocidewatch.org/genocide/tenstagesofgenocide.html> (last visited Sept. 15, 2016).

199. *Id.* The Rwanda experience showed how the incitement media also could be used to target particular individuals and locations, thereby materially assisting the implementation of stages (8) and (9), Persecution and Extermination. See discussion *supra* Section II.C.

200. ELIHU RICHTER ET AL., CAN WE PREVENT GENOCIDE BY PREVENTING INCITEMENT? 7 (2009), http://www.genocidewatch.org/images/Articles_Can_we_prevent_genocide_by_preventing_incitement.pdf.

“genocide may occur without evidence of . . . incitement,” they advise that when political leaders “use explicit pseudo medical and epidemiologic metaphors, such as microbes, filth, cancer, typhoid, and rats, to dehumanize victim groups, it is prudent to regard such language as an urgent warning sign of imminent genocide”²⁰¹

Drawing upon concepts from epidemiology, the Hebrew University authors suggest that genocide perpetrators are most effectively shaped and activated by “massive population-wide exposure to hate language and incitement,” which “shift[s] the distribution curve for the level of hate to . . . produce [] a pool of potential perpetrators and complicit bystanders.” The authors propose this epidemiological model to explain “why architects of genocide find it useful to direct their messages of hate at the *total* population.”²⁰²

That last observation is corroborated by a significant and perhaps counterintuitive finding discussed below, namely, that the perpetrators who carry out genocides are rarely distinguishable by any evident psychopathologies or pre-existing propensities for violence, but rather are drawn from the ranks of ordinary people, and reflect a broad cross-section of their societies.

B. Most Perpetrators are Ordinary People, not Psychopaths

Prior to the 1945, war crimes prosecutions of the Nazi high command in Nuremberg, Germany, the United States Army assigned a psychiatrist and a psychologist to administer psychological tests to the more than twenty Nazi leaders awaiting trial.²⁰³ Twenty-one of the defendants were given IQ tests, which generated a range of 106 to 143 and an average of 128, which fell “in the superior to very superior range of intellectual abilities.”²⁰⁴

Nineteen of the Nuremberg defendants also were given Rorschach personality tests, in which the subjects are presented with a series of symmetrical inkblots, asked what each one might represent, and then are assessed for the method and substance of their answers.²⁰⁵ Following disputes over the interpretations of the tests among the two examiners, the raw test responses remained unpublished for three decades.²⁰⁶ But after their publication in the 1970s, and further debates over interpretation, the “definitive study” of the responses concluded that “[t]he leaders of Nazi Germany . . . were, for the most part, extremely able, intelligent, high-functioning people. They were average German citizens There was no evidence of thought disorder or psychiatric conditions in most of these

201. *Id.* at 7-8.

202. *Id.* at 16-17.

203. JAMES WALLER, *BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLING* 63 (2d ed. 2007).

204. *Id.*

205. *Id.* at 63-64.

206. *Id.* at 64-68.

men.”²⁰⁷

A similar set of Rorschach tests was administered in 1946 to almost 200 rank-and-file Nazis and Nazi collaborators who were awaiting war crimes trials in Copenhagen.²⁰⁸ Although the tests “showed some unusual thought patterns (for example, rigid and pessimistic thinking),” the deviations were “not enough to indicate grossly disturbed thinking. Neither did the perpetrators’ responses demonstrate any particular inclination toward violence.”²⁰⁹

Studies of the Nazis’ killing squads reveal that their members were *not* selected for any evident ability or desire to conduct mass killing, but rather were indistinguishable from the general population. In what is deemed the most thorough study to date, Prof. Christopher Browning reviewed and analyzed the post-war interrogation transcripts of 210 members of Police Battalion 101 (PB 101), a unit of approximately five hundred men deployed from Germany into Poland to carry out mass killings of Jewish civilians.²¹⁰ Between June 1942 and May 1943, PB 101 executed at least 38,000 Jews and deported another 45,000 to certain death at the Treblinka extermination camp.²¹¹

Most of PB 101’s members came from the city of Hamburg, “by reputation one of the *least* Nazified cities in Germany”²¹² Of the rank-and-file, sixty-three percent had working class backgrounds, e.g., dock workers, truck drivers, construction workers, and machine operators; thirty-five percent had lower middle class backgrounds, e.g., sales and office work; and two percent had professional backgrounds, e.g., pharmacists and teachers. Their average age was thirty-nine, and only twenty-five percent were Nazi party members.²¹³ Browning’s assessment of the “selection for killing” question merits quoting at length:

Did any . . . policy of selection . . . of personnel particularly suited for mass murder, determine the makeup of Reserve Police Battalion 101?

Concerning the rank and file, the answer is a qualified no. By most criteria, just the opposite was the case. By age, geographical origin, and social background, the men of Police Battalion 101 were least likely to be considered apt material out of which to mold future mass killers [T]he rank and file—middle-aged, mostly working-class, from Hamburg—did not represent special selection or even random selection but for all practical purposes negative selection for the task at hand.

In short, [PB 101] was not sent to Lublin to murder Jews because it was composed of men specially selected or deemed particularly suited for the task. On the contrary, the battalion was the “dregs” of the manpower pool

207. *Id.* at 69.

208. *Id.* at 70.

209. WALLER, *supra* note 203, at 70.

210. CHRISTOPHER BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND*, at xvii (1992).

211. *Id.* at 142.

212. *Id.* at 48 (emphasis added).

213. *Id.* at 47-48.

available . . . for such behind-the-lines [killing] duties.²¹⁴

And yet, nearly all of PB 101's members quickly became mass killers of unarmed men, women, and children, together murdering tens of thousands in a year. In this regard, perhaps Browning's most significant finding is that what transformed these men into mass murderers was *not* coercion and duress. Before the first mass killing operation, in the Polish town of Josefow, PB 101's commander declared to the assembled troops that "if any of the older men among them did not feel up to the task that lay before them, he could step out." About a dozen men accepted the offer, and after the day's killing commenced, several more officers asked and obtained permission not to participate in the slaughter.²¹⁵ Far from being punished, the objectors were given alternate duties, such as guarding the marketplace where the Jews had been rounded up, and in subsequent months, objectors received transfers to other squads and localities.²¹⁶

Other studies have yielded similar conclusions. As Prof. Daniel Jonah Goldhagen summed up the evidence, "The study of police battalions, finally, yields two fundamental facts: First, ordinary Germans easily became genocidal killers. Second, they did so even though they did not have to."²¹⁷ As for what did turn them into killers, Browning refrains from any single answer, instead suggesting several possible causes. One of which was that

the men of Reserve Police Battalion 101, like the rest of German society, were immersed in a deluge of racist and anti-Semitic propaganda. Furthermore, the Order Police provided for indoctrination both in basic training and as an ongoing practice within each unit. Such incessant propagandizing must have had a considerable effect²¹⁸

To examine what effects "incessant propagandizing must have had,"²¹⁹ this Article turns to the social psychology laboratory for further evidence.

C. Experimental Proof that the Perpetrator Mindset is Easily Activated

In recent decades, experiments by social psychologists have illuminated an array of latent predispositions that replicate various aspects of what may be called the "perpetrator mindset." As the following descriptions indicate, the experiments "activated" the predispositions by exposing people to circumstances that briefly replicate small parts of mass hate campaigns similar to those reported in Part II. For example, the experiments assigned people to in-groups and out-groups; surrounded people with false information; publicly mistreated innocent persons; directed people to punish strangers; and assigned demeaning labels to "others."

214. *Id.* at 164-65; see also WALLER, *supra* note 203, at 91 ("The truth seems to be . . . that the most outstanding common characteristic of perpetrators of extraordinary evil is their normality, not their abnormality.").

215. BROWNING, *supra* note 210, at 2, 57.

216. *Id.* at 62-63, 68, 73-76, 170-71.

217. GOLDHAGEN, *supra* note 2, at 277.

218. BROWNING, *supra* note 210, at 184.

219. *Id.*

By showing how easily the predispositions are activated, the experiments help explain why, for instance, the “ordinary people” who comprised the membership of PB 101 studied by Browning willingly conducted acts of genocide—even when given the opportunity to decline. As discussed below, these predispositions include: in-group bias; conformity to majorities; weakness of altruism towards strangers; blaming of innocent victims; readiness to demean and torment subordinate “others”; the powerful influence of authority structures; and the powerful influence of negative labels and dehumanization. After reviewing the experimental evidence, two studies of real-world hate incitement are discussed, which corroborate the laboratory findings.

1. *In-Group Bias*

Evolutionary psychologists maintain that humans “evolved to live in groups” because the social adaptations required to “unite with those in our group” conferred the survival advantage of “win[ning] competitions across groups.”²²⁰ One consequence of this group selection process is a dual psychological predisposition that “favors within-group niceness *and* between-group nastiness.”²²¹ Two experiments illustrate the power of in-group bias, in both adults and children.

A British researcher, Henry Tajfel, designed a study which assigned strangers to one of two groups, “using the most . . . trivial criteria imaginable.”²²² In some iterations of the experiment, the group assignment criteria were: a coin toss; expressed musical preferences; estimates of the number of dots on a screen; and expressed preferences for one of two abstract artists. To minimize group attachments, each group’s members remained anonymous to each other and had no social interactions; they also had no interactions with the other group.²²³ Even across these minimalist divisions—and absent any social bonding—the subjects displayed clear in-group bias: “they rated members of their own group as more pleasant and better workers . . . liked the members of their own group better,” and when given a choice, “allocated more money” to their own group members. This experiment has been replicated more than twenty times in several countries.²²⁴

In 1954, Prof. Muzafar Sherif demonstrated the violent potential of in-group bias with a group of eleven and twelve-year-old boys in the “Robbers Cave” experiment. In a state park bearing that name, the boys separately arrived in two groups of eleven, and were assigned to cabins in different locations; each group remained unaware of the other.²²⁵ For six days the groups stayed apart, each one bonding over sports and outdoor activities.

220. JONATHAN HAIDT, *THE RIGHTEOUS MIND* 244 (2012).

221. WALLER, *supra* note 204, at 158 (emphasis in original).

222. *Id.* at 175.

223. *Id.* at 175-76.

224. *Id.* at 176.

225. HAIDT, *supra* note 220, at 138-39.

Then the experimenters staged a week of sports and camping contests between the groups. Almost immediately,

[t]ribal behavior increased dramatically. Both sides created flags and hung them in contested territory. They destroyed each other's flags, raided and vandalized each other's bunks, called each other nasty names, made weapons (socks filled with rocks), and would often have come to blows had the counselors not intervened.²²⁶

This experiment highlighted the fact that “whenever groups form, their members sense the existence of boundaries that divide them from other groups—even when there is no blood relation, common history, or prior similarity.”²²⁷

2. *Conformity to Majorities*

Conformity is deemed another evolutionary adaptation that confers survival advantages through group success.²²⁸ In 1955, Prof. Solomon Asch demonstrated the power of conformity to override rational judgment in a series of “line matching” experiments. Each subject was shown a set of three lines of different lengths, and a card displaying a single line that matched one of the other three lines. The subjects were asked which of the three lines matched the latter card's line.²²⁹ When tested separately, each of the subjects gave the correct answer at least ninety-nine percent of the time—indicating that the correct answers were rather obvious.²³⁰ Then Asch had each subject take the test together with seven other “subjects,” all of whom had been instructed to give the same wrong answer on certain designated tests. Seventy percent of the actual subjects conformed to the crowd's wrong answer on at least some of those staged tests, and thirty percent conformed on a majority of the staged tests.²³¹ Asked later how often they had erroneously conformed, the subjects gave incorrectly low numbers: “[t]hey remained independent—in their minds but not in their actions.”²³² These results have been replicated in dozens of variations around the world.²³³

The same tendency to conform appears even in matters of urgent safety. A Columbia University researcher arranged for student subjects to sit in a room filling out a questionnaire, during which smoke began flowing into the room from a vent; eventually it filled the room.²³⁴ When subjects were alone in the room, seventy-five percent got up to report the smoke. When subjects were in the room with two others, however, the latter having been instructed to remain passively in their seats, only ten

226. *Id.*

227. WALLER, *supra* note 204, at 198.

228. *Id.* at 261.

229. PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 263 (2007).

230. *Id.*

231. *Id.*

232. *Id.*

233. KRESSEL, *supra* note 117, at 150.

234. *Id.*

percent of the actual subjects got up to report the smoke.²³⁵

3. Weakness of Altruism Towards Strangers

Kin selection—the favoring of relatives over non-kin, and of close relatives over more distant ones—is an evolutionary legacy that renders altruism towards strangers a comparatively weak instinct.²³⁶ A corollary theory, the “bystander effect,” holds that one’s likelihood of intervening to aid a stranger in harm’s way decreases the more one perceives the presence of other bystanders.²³⁷ The latter was demonstrated in an experiment that placed a subject in a conversation with another person over an intercom, during which the second person pretended to suffer an epileptic seizure.²³⁸ When the subjects were led to believe that no one else was listening, eighty-five percent of them intervened to try to assist the second person, but when the subjects were led to believe that another person was listening, the intervention rate dropped to sixty-two percent. When the subjects were led to believe that five others were listening, the rate dropped to thirty-one percent.²³⁹

Another study arranged for a series of seminary students to agree to give a lecture to a class of high school students. Some were led to believe that they had ample time to get to the class, while others were led to believe that they had no time to spare. As each seminarian walked to the class, the experimenters arranged for a young man to collapse in front of the subject. Those with ample time intervened to assist; those short of time did not.²⁴⁰ In a variation of the experiment, the seminarians were asked to focus their lectures on the parable of the Good Samaritan helping strangers. Being mindful of the Good Samaritan hardly made a difference: ninety percent of the time-constrained seminarians still failed to intervene.²⁴¹

4. Blaming of Innocent Victims

Social psychologist Melvin Lerner identifies “the just-world phenomenon” as “the tendency of people to believe that the world is just and . . . therefore people get what they deserve and deserve what they get.”²⁴² Lerner documented this phenomenon in an experiment where two people were shown to be “working equally hard on the same task,” but then

235. *Id.*

236. See, e.g., ROBERT WRIGHT, *THE MORAL ANIMAL* 160 (1995).

237. Nicholas Lemann, *A Call for Help: What the Kitty Genovese story really means*, *NEW YORKER* (March 2014), <http://www.newyorker.com/magazine/2014/03/10/a-call-for-help>. The Kitty Genovese story—which is about the failure of most neighbors in an apartment building to call police in response to the screams of a murder victim—is often cited as an egregious example of the bystander effect; but subsequent reassessments have found the neighbors’ willful passivity less pronounced than initially reported. See *id.*

238. KRESSEL, *supra* note 117, at 151.

239. *Id.*

240. *Id.*

241. *Id.*; ZIMBARDO, *supra* note 229, at 317.

242. WALLER, *supra* note 203, at 213.

received highly differential rewards based on a random coin flip.²⁴³ Observers who were asked to explain what happened—and who had just seen the coin flip determine the rewards—“convinced themselves that the unlucky person who had lost the coin flip must have worked less hard.”²⁴⁴

Other experiments, including ones involving the apparent infliction of pain on innocent victims, also yielded rationalizations by observers that the victims must have done something to deserve punishment.²⁴⁵ In real life, post-Holocaust interviews of Germans—both perpetrators and non-perpetrators—regularly found them to be assigning fault to Jewish victims, and suggesting that the Jews shared in the blame for their fate.²⁴⁶

5. *Readiness to Demean and Torment Subordinate “Others”*

In 1971, in what became known as the Stanford Prison Experiment (SPE), a research team led by psychology Professor Phillip Zimbardo set up a mock prison with “guards” and “prisoners” consisting of pre-screened, psychologically well-adjusted students.²⁴⁷ The SPE team advertised for subject-volunteers, offering \$15 daily pay. The research team screened out from the volunteers anyone with a prior arrest, and anyone with “medical or mental problems.”²⁴⁸ Psychological assessments and in-depth interviews then pared the group to about two dozen young men, all of whom “seemed . . . normal, healthy, and average on all . . . psychological dimensions . . . representative of middle class, educated youth.”²⁴⁹ When asked their role preferences, *none* wanted to be a guard; all wished to be prisoners.²⁵⁰

The SPE team randomly selected nine subjects to be prisoners, with the remainder assigned to one of three daily, eight-hour guard shifts. Guards received a “brief orientation” before the prisoners were brought in and were told “to maintain law and order, no violence against prisoners, and not allow any escapes.”²⁵¹ The experiment was supposed to last two weeks.²⁵²

From the first day’s cycle, the guards became abusive and demeaning, imposing long, repeated “prisoner counts,” forcing the prisoners to call or sing out their numbers according to arbitrary commands, and punishing them repeatedly with push-ups and verbal abuse.²⁵³ This soon escalated into restricting food and toilet access, multiple sleep interruptions, shoving

243. *Id.*

244. *Id.*

245. *Id.* at 214.

246. *Id.* at 215.

247. ZIMBARDO, *supra* note 229, at 6, 30–31.

248. *Id.* at 30.

249. *Id.* at 32–33.

250. *Id.* at 30.

251. *Id.* at 31. Zimbardo also “tried to convey to them the kind of psychological mind-set of prisoners being powerless that [the SPE team] want[ed] to create” in the mock prison. *Id.*

252. *Id.* at 30.

253. *See, e.g., id.* at 172.

prisoners up and down stairs or into urinals, forcing them into sexually degrading poses, and locking them in an isolation cell.²⁵⁴ With some prisoners mentally breaking down and needing to be released, the SPE team aborted the experiment on the sixth day.²⁵⁵ Waller sums up the results as follows:

Despite their knowledge that they might just as easily have been randomly assigned as prisoners, about a third of the eleven guards took on cruel, . . . sadistic, dominating, . . . tyrannical, coercive, and aggressive roles. These guards became extremely hostile, arbitrary, and inventive in their forms of degradation and humiliation, and they appeared to thoroughly enjoy the power that they wielded²⁵⁶

In subsequent interviews, the prisoner-subjects identified five sadistic guards, two good guards who avoided abuse and did small favors, and three to four in the middle who imposed the rules but went “by the book.”²⁵⁷ This result later evoked an eerie parallel from Christopher Browning:

Zimbardo’s spectrum of guard behavior bears an uncanny resemblance to the groupings that emerged within Reserve Police Battalion 101: a nucleus of increasingly enthusiastic killers [A] larger group of policemen who performed as shooters . . . but who did not seek opportunities to kill . . . and a small group . . . of refusers and evaders.²⁵⁸

In this respect, the laboratory replicated the Nazi foot soldiers’ descent from ordinary, well-adjusted lives into perpetrators of sadistic cruelty—but in the SPE, this happened with minimal prompting by those having authority over the prison guards.

6. *The Powerful Influence of Authority Structures*

By contrast, the power of authority structures to compel sadistic behavior was vividly demonstrated by the famous “obedience to authority” experiments conducted by Yale Professor Stanley Milgram in the years 1960–1963.²⁵⁹ The set-up of each experiment involved a “teacher” and a “learner,” both guided by an “experimenter.” In fact, both the learner and experimenter were acting out scripted roles; the only experimental subject was the “teacher.”²⁶⁰

Each teacher-subject was told that the experiment was a study of the effects of punishment on learning. With the teacher-subject watching, the experimenter strapped the learner into a chair and attached an electrode to his arm. The experimenter explained that the teacher would read to the learner a series of word pairs and then quiz him on them, giving shocks for wrong answers. The teacher was seated at a “shock generator,” displaying

254. See generally *id.* at 40–176.

255. *Id.* at 171–72.

256. WALLER, *supra* note 203, at 237.

257. ZIMBARDO, *supra* note 229, at 182–83.

258. BROWNING, *supra* note 210, at 168.

259. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY*, at xi–xvii (1973).

260. *Id.* at 3.

thirty switches from fifteen to 450 volts and labels from “SLIGHT SHOCK” to “DANGER-SEVERE SHOCK.” The experimenter directed that with each wrong answer by the learner, the teacher should administer a progressively higher shock.²⁶¹ Before starting, the teacher was given a sample forty-five volt shock.²⁶²

Although the learner was never really shocked, he had a standard script for responding to the different “shock” levels, escalating upward through grunting, pained groaning, begging to be released, screaming in agony, and eventually, silence.²⁶³ The experimenter had a standard sequence of commands for prodding the teacher to continue giving shocks, such as “please go on,” “the experiment requires that you continue,” and “it is absolutely essential that you continue.”²⁶⁴ Subjects were recruited from New Haven, Connecticut for a “memory and learning” experiment via newspaper ads and mass mailings, generating a mix of forty percent skilled and unskilled workers, forty percent sales and business employees, and twenty percent professionals.²⁶⁵

Milgram canvassed a group of psychiatrists about how they expected the teacher-subjects would perform: they predicted that most “would not go beyond the [tenth of thirty] levels . . . when the victim makes his first explicit demand to be freed[]; about four percent would reach the twentieth shock level, and about one . . . in a thousand would administer the highest shock [level].”²⁶⁶ In fact, those experts grossly underestimated the pain levels that a large majority of subjects administered. Out of forty subjects, thirty-nine of them—over ninety-seven percent—reached or exceeded the tenth shock level, where the learner is begging to be released; thirty-one of the forty—over seventy percent—reached or exceeded the twentieth shock level, where the learner is screaming in agony; and twenty-five of forty—over sixty-two percent—administered the highest shock level, labeled “DANGER-SEVERE SHOCK,” where the learner apparently has collapsed into unconsciousness, or worse.²⁶⁷

Milgram conducted several permutations of the experiment, yielding some changes in the results, but with most still showing a large majority of subjects administering very severe shocks. Blocking out the groans and screams of the learner somewhat increased the number of subjects delivering high shock levels; whereas placing the subject alongside the evidently agonized learner reduced by about half, the number who continued on to the highest shock level. But even then, ninety-seven percent reached or exceeded the tenth level (“strong shock”), and forty percent reached or exceeded the twentieth level (“intense shock”).²⁶⁸ Running the experiment with female subjects generated results “virtually identical to the perform-

261. *Id.*

262. *Id.* at 20.

263. *Id.* at 22-23.

264. *Id.* at 21.

265. *Id.* at 15-16.

266. *Id.* at 31; *see also id.* at 4, 28 (regarding shock levels and learner’s responses).

267. *Id.* at 34-35; *see also id.* at 4, 28 (regarding shock levels and learner’s responses).

268. *Id.* at 35.

ance of men.”²⁶⁹

Milgram’s results have been replicated at least forty times across several countries.²⁷⁰ It appears to be a human universal that, when instructed by authority figures perceived as legitimate, people can readily inflict extraordinary pain on strangers. This is consistent with all three case studies discussed in Part II, above. As Professor Steven Pinker has observed, “genocides sear the moral imagination by the gratuitous sadism indulged in by the perpetrators.”²⁷¹

7. *The Powerful Influence of Negative Labels and Dehumanization*

In a variation of the Milgram experiments, a Stanford research team led by Professor Albert Bandura examined whether the willingness to inflict painful shocks on “learners” would be affected by dehumanizing descriptions of them. Each teacher-subject was seated in a cubicle facing a “shock generator” displaying ten escalating shock levels. The “learners” were said to be a small group solving a series of decision-making problems; when the group failed to provide an adequate solution, a red light would flash in the cubicle, and the teacher was supposed to “punish th[e] learners] by administering a shock in any intensity they saw fit.”²⁷² Thus, unlike the Milgram scenario, the teacher-subjects were given free discretion to choose the shock levels.

The experimenters added a “dehumanization variable” by playing one of three alternative recordings over an intercom in the cubicles, made to sound as if the experimenters had “inadvertently” left a microphone on. The teacher-subjects “overheard” the experimenters in one of the following conversational variations: (1) describing the learners as an animalistic, rotten bunch (the dehumanized condition); (2) describing the learners as a perceptive, understanding group (the humanized condition); and (3) not referring to the learners at all (the neutral condition).²⁷³ The experiment then commenced through a series of ten decision-making tests of the learners. In fact, there were neither “learners” nor actual shocks, but the teachers were led to believe that they were administering shocks when the red light flashed.

The results showed a significant contrast in punishment severity between the dehumanized and humanized conditions. “Dehumanized [learners] were treated most punitively, humanized ones were spared painful shocks, while neutral ones [received] an intermediate level of punish-

269. *Id.* at 63. One of the strongest factors reducing obedience occurred when Milgram inserted a second “teacher,” whose pre-arranged role was to rebel against the experimenter and refuse to give more shocks: several actual subject-teachers rebelled at that point. *Id.* at 117-21.

270. WALLER, *supra* note 203, at 110.

271. PINKER, *supra* note 47, at 322.

272. Albert Bandura, Bill Underwood & Michael E. Fromson, *Disinhibition of Aggression through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. RES. PERSONALITY 253, 257 (1975).

273. *Id.* at 257-58.

ment.”²⁷⁴ By the last of ten tests, the subjects delivered shock levels of between six and seven (out of ten) to the dehumanized learners, versus between two and three to the humanized learners—a two- to three-fold difference of severity.²⁷⁵ Perhaps most significant, this difference followed from just a few overheard comments on a single occasion—far from the pervasive and protracted deluge of hate incitement described in the genocide case studies from Part II, above.

8. *Hate Incitement in Practice*

The above experiments received a measure of real-world corroboration in a study of the effects on children of “martyrdom incitement” in contemporary Palestinian society, authored by Dr. Daphne Burdman.²⁷⁶ Burdman documented a pervasive “indoctrination to martyrdom” campaign in the years 1993–2003, targeting children through the Palestinian Authority’s school textbooks, teachers’ guides, militarized summer camps, and television programming.²⁷⁷ The study revealed extensive, dehumanizing characterizations of Israelis and Jews in Palestinian schools and media, alongside glorification of suicide bombers and calls to *jihad*.²⁷⁸

Many young Palestinians responded to the campaign, with fatal consequences. Over a twenty-five-day period in 2000, 207 Palestinian deaths were attributed to “insurgency” actions taken against Israeli forces (rock-throwing, etc.). Ninety-five deaths, or forty-six percent were of children below age eighteen. Of 350 insurgents’ deaths from a three-month period in the same year, thirty percent were under eighteen, and almost twenty-five percent were under age twelve.²⁷⁹ For the twelve-month period ending August 31, 2001, Israel was able to identify the ages of fifty-one Palestinian suicide bombers: “most . . . were between . . . eighteen to twenty-four,” that is, very young adults.²⁸⁰ Large numbers of Palestinian children acted as stone-throwers against Israelis and as human shields for older gunmen.²⁸¹ Burdman cited a Palestinian psychologist’s study of very young children, ages six to eleven, finding that “over [fifty] percent dream of becoming suicide bombers wearing explosive belts.”²⁸² Burdman concluded, “[m]ass indoctrination of children and young adults . . . emanating from media, schools, pulpit, and street has been eminently successful in helping to generate [an] abundance of suicide bombers”²⁸³

Another study, which focused on anti-Semitic beliefs in Germany, compared different birth cohorts sorted by decade; it revealed a significant,

274. *Id.* at 259.

275. *Id.* at 260.

276. Daphne Burdman, *Education, Indoctrination, and Incitement: Palestinian Children on Their Way to Martyrdom*, 15 *TERRORISM & POL. VIOLENCE* 96, 96 (2003).

277. *Id.* at 96–105.

278. *Id.*

279. *Id.* at 105.

280. *Id.* at 106.

281. *Id.*

282. *Id.* at 107.

283. *Id.*

enduring impact of the Nazis' mass hate incitement from between seventy and eighty-five years ago.²⁸⁴ The study used a standardized survey conducted across Germany in 1996 and 2006, which asked a series of seven questions generating a ranked assessment of anti-Semitic beliefs. The data set included responses from 5,300 persons in 264 German cities.²⁸⁵ The share of individuals holding anti-Semitic beliefs in the 1930s birth cohort—the generation that would have been five to fifteen years old when the Nazi regime was defeated—was almost three times that of those born after 1950, and more than double the percentage of the prior and subsequent birth cohorts.²⁸⁶ The study concluded that:

Nazi indoctrination—in school, through propaganda, and in youth organizations—successfully instilled strongly anti-Semitic attitudes in the cohorts that grew up under the Nazi regime . . . the differential effect is still visible today, more than half a century after the fall of the Third Reich.²⁸⁷

9. Summary and Conclusions

Taken together, the studies discussed above appear to validate the belief manifested by genocidal leaders—that hate incitement is an essential tool for recruiting the large numbers needed to perpetrate mass atrocities. The experiments are consistent with, and help explain, the historically documented facts that (1) pervasive hate incitement regularly precedes genocides, (2) genocides are not carried out by a select group of pre-identified killers, but rather by large numbers of ordinary people who have been transformed into mass killers, and (3) such transformations can be effected by forces other than explicit coercion, including messages, imagery, and power relationships that dehumanize the intended targets.

Specifically, the predispositions of in-group bias and weak altruism towards strangers, along with Zimbardo's prison experiment reveal how easily—even absent significant pressure from authority figures—ordinary, psychologically healthy people can form an exclusive group identity, disregard the visible suffering of strangers, and inflict painful punishment upon innocent "others." The experiments on conforming to majorities reveal how quickly rational judgment can be subordinated to contrary peer opinions. Lerner's "just world phenomenon" shows how easily people can rationalize blatantly arbitrary, unfair treatment of strangers as "getting what they deserve." Finally, Milgram's and Bandura's punishment experiments demonstrate how little effort is needed for authority figures to persuade individuals to inflict excruciating pain on strangers, and how—even absent prodding from the authorities—dehumanized images of strangers powerfully increase the willingness to inflict such suffering. Studies showing the effects of hate indoctrination on children in both the Palestinian

284. See Nico Voigtländer & Hans-Joachim Voth, *Nazi Indoctrination and Anti-Semitic Beliefs in Germany*, 112 *PROC. NAT'L ACAD. SCI.* 7931, 7931 (2015), www.pnas.org/cgi/doi/10.1073/pnas.1414822112.

285. *Id.* at 7931.

286. *Id.* at 7932.

287. *Id.* at 7933.

territories and Nazi Germany lend a chilling note of corroborative reality to those laboratory findings.

Regarding the transferability of these controlled experimental findings to an environment of mass genocide incitement, it can be observed that the latter settings present similar “triggers” as the experiments, but with much greater force and duration. As demonstrated by the case studies in Part II, above, real-world incitement campaigns: (1) impose strongly defined boundaries between “in-group” and “out-group” members; (2) ratify those boundaries by extensive state-sanctioned discrimination and exclusion of the out-groups; (3) are conveyed by a closed, state-controlled media that propagates dehumanized images of the out-groups; (4) are reinforced by explicit messages that genocide of the out-groups is no less than what they deserve; and (5) includes explicit instruction from the heights of the political authority structures to join the mass violence, e.g., Nazi citizens’ “duty to exterminate” the Jewish vermin²⁸⁸, and Hutus’ duty to “cease feeling pity for the Tutsi” and “prepare[] to defend themselves against this scourge.”²⁸⁹ Unlike the laboratory setting, these real-world triggers are delivered with far greater *intensity* than a controlled experiment, are experienced *in combination* rather than as one trigger in isolation, and persist over a period of *years*, rather than at most a few days.

In sum, the historical and psychological evidence establishes a convincing case that mass hate incitement is a substantial cause of genocide. This is especially true in light of the large numbers of perpetrators needed to effectuate such mass killing. Without the incitement, the number of willing perpetrators would likely be much smaller, and the ability of a regime to perpetrate genocide would correspondingly be much lower. Accordingly, policies that can effect reductions in hate incitement would appear to be among the more useful components of an effective genocide prevention strategy.

IV. Proposed Legislation and Example of its Application

As previously noted, this Article purports to fashion a *politically feasible* policy capable of reducing the likelihood of future genocides, and proposes to that end, federal legislation to condition American military and economic benefits and bilateral trading rights upon each recipient country’s refraining from funding, facilitating, and encouraging incitement to genocide. Accordingly, this Part first presents the core components of a legislative proposal, then discusses its potential applicability to the government of Iran, which is presently one of the world’s leading state sponsors of genocide incitement.

288. ARONSFELD, *supra* note 77, at 14, 17.

289. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, paras. 138-39 (Dec. 3, 2003), <http://www.refworld.org/docid/404468bc2.html>; MELVERN, *supra* note 30, at 50.

A. The Proposed Legislation

A useful model for the proposed legislation is the so-called Jackson-Vanik amendment, adopted in 1974 and, until its December 2012 repeal, codified at 19 U.S.C. § 2432.²⁹⁰ Enacted as part of the Trade Act of 1974, the amendment targeted nonmarket economy countries, and conditioned such countries' receipt of certain U.S. trade benefits on their allowing free emigration of their citizens. The conditional trade benefits included: (1) granting "most-favored-nation" tariff status for exports to the United States; (2) access to "U.S. government financial facilities," e.g., export credits and credit guarantees; and (3) opportunities to enter trade agreements with the United States.²⁹¹ The principal aim of the amendment's sponsors, Sen. Henry Jackson and Rep. Charles Vanik, was to pressure the Soviet Union to loosen its strict and punitive policies that prevented Soviet citizens, primarily Soviet Jews, seeking to emigrate.²⁹²

The Jackson-Vanik amendment contained four components that, in modified form, would comprise the core of the proposed law: (1) a policy condition required of the covered countries (free emigration); (2) sanctions for failure to meet the condition (denial of specified U.S. trade benefits); (3) a requirement of annual Presidential reports to Congress, certifying whether each country satisfies the policy condition; and (4) Presidential authority to waive sanctions on non-compliant countries, upon a Presidential finding that waiver nonetheless will advance the law's objectives, subject to override by joint Congressional resolution.

In this case, the desired policy condition is refraining from funding, facilitating, or otherwise encouraging genocide incitement, as defined in Part I, above. The proposed sanctions include the denial of all U.S. economic and military assistance and benefits, and all bilateral trading rights. Barring the latter could be accomplished by cross-referencing in the proposed statute, the Trading with the Enemy Act of 1917, 50 U.S.C. Appx. §§ 1, *et seq.*, which imposes trade embargos on designated countries.

Because the law's execution would require annual, labor-intensive assessments of whether any country or equivalent state actor is sponsoring genocide incitement, a sufficiently staffed and funded entity is needed to conduct such research. In fact, such an entity already exists, although the annual assessments would likely require more staffing. That entity is the interagency Atrocities Prevention Board, established by an August 2011 Presidential Directive, and tasked with the missions of ensuring:

- (1) [T]hat our national security apparatus recognizes and is responsive to early indicators of potential atrocities;
- (2) that departments and agencies develop and implement comprehensive atrocity prevention and response strategies in a manner that allows "red flags" and dissent to be raised to

290. Office of the Press Secretary, *Statement by the Press Secretary on H.R. 6156*, WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2012/12/14/statement-press-secretary-hr-6156>.

291. VLADIMIR N. PREGELJ, CONG. RES. SERV., *THE JACKSON-VANIK AMENDMENT: A SURVEY* 2-3 (2005).

292. *Id.* at 1.

decision makers; [and] (3) that we increase the capacity and develop doctrine for our foreign service, armed services, development professionals, and other actors to engage in the full spectrum of smart [atrocities] prevention activities²⁹³

Finally, to mitigate the privations that sanctions may impose on innocent civilians, the law should incorporate a carve-out for humanitarian assistance and communications, similar to those in the International Emergency Economic Powers Act (“IEEPA”), at 50 U.S.C. §§ 1701–1702 *et seq.*

The following proposal incorporates the several foregoing considerations, drawing heavily from the Jackson-Vanik amendment and IEEPA:

Sanctions Against State-Sponsored Genocide Incitement

(a) Findings and purpose.

Finding that genocide incitement as defined herein has been and remains a substantial cause of genocide, and finding that prevention of genocide implicates important humanitarian and national security interests of the United States, Congress hereby imposes the following conditional sanctions against all state sponsors of genocide incitement.

(b) Conditional sanctions.

Any country or equivalent state actor that funds, facilitates, or otherwise encourages incitement to genocide as defined herein shall: (i) be barred from participation in any and all U.S. government programs that involve international economic or military assistance or that provide international economic or military benefits; and (ii) be designated as a country subject to the provisions of the Trading with the Enemy Act, 50 U.S.C. Appx. §§ 1 *et seq.* These sanctions shall become effective after the Presidential reporting deadline in section (c). All such sanctions against a country or equivalent state actor shall be lifted as of the date on which the President conveys to Congress a Presidential determination that such country or equivalent state actor is no longer funding, facilitating, or otherwise encouraging incitement to genocide as defined herein.

(c) Presidential determination and report to Congress whether countries or equivalent state actors are funding, facilitating, or otherwise encouraging incitement to genocide.

On or before December 31 of each year, the President shall submit a report to Congress that: (i) certifies which, if any, countries or equivalent state actors are engaged in funding, facilitating, or otherwise encouraging incitement to genocide as defined herein; and (ii) certifies with respect to all other countries or equivalent state actors that such country or equivalent state actor has been assessed during the year in question and found to be not engaged in such prohibited acts of genocide incitement. The conditional sanctions described in section (b), above, shall be imposed and applied with respect to all countries or equivalent state actors identified in the President’s annual report as engaged in prohibited acts of genocide incitement.

(d) Monitoring and assessment to assist Presidential determinations.

To assist in the President’s assessment and reporting obligations under subsection (c), above, the interagency Atrocities Prevention Board

293. Office of the Press Secretary, *Presidential Study Directive on Mass Atrocities*, WHITE HOUSE, <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>.

(“APB”) shall monitor and assess all countries and equivalent state actors for evidence of genocide incitement, as defined herein, and Congress shall appropriate funds sufficient to staff the APB to conduct such monitoring and assessment.

(e) Presidential waiver authority; Congressional override.

(1) For some or all of the year following the December 31 reporting deadline, the President is authorized to waive, by Executive order, the application of subsections (b) and (c) with respect to any country or equivalent state actor deemed under section (c)(1) to be subject to sanctions, upon the President’s reporting to the Congress that:

(i) The President has determined that such waiver will substantially promote the objectives of this statute; and

(ii) The President has received assurances that the country or equivalent state actor in question is taking steps that will lead substantially to the achievement of the objectives of this statute.

(2) Any Presidential waiver, and any Presidential finding that a country or equivalent state actor is no longer funding, facilitating, or otherwise encouraging incitement to genocide, shall be subject to override upon Congress’s enacting a joint resolution, in which Congress finds that:

(i) The country or equivalent state actor in question is funding, facilitating, or otherwise encouraging incitement to genocide as defined herein;

(ii) The country or equivalent state actor in question is not taking steps sufficient to lead substantially to the achievement of the objectives of this statute; and

(iii) A waiver of the application of subsections (b) and (c) will not substantially promote the objectives of this statute.

Any such override shall be subject to Presidential veto; and any such veto shall be subject to Congressional override by a two-thirds majority vote of both houses of Congress.

(f) Humanitarian exceptions; applicable except where U.S. armed forces in danger.

Any sanctions imposed under this statute shall not include the regulation or prohibition, directly or indirectly, of:

(1) Any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value; and

(2) Donations, by persons subject to the jurisdiction of the United States, of articles such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances.

The statute would also have a definitions section, which would incorporate the definitions of genocide and genocide incitement set forth in sections I.A and I.B, above.

It could be argued that the Presidential waiver authority in the proposed statute is too narrow, in a sense that threats to national security outside the genocide context also may require waivers. In particular, America’s counter-terrorism policies since the September 11, 2001 attacks

have included military and other cooperation with regimes that might qualify for anti-incitement sanctions under the statute. But granting waivers for such regimes risks eviscerating the statute's operation in the very places where it is most needed.

Moreover, the same state-sponsored incitement that promotes genocide also very likely promotes terrorism, for reasons discussed in Part III, above.²⁹⁴ While a thorough assessment of that claim is beyond the scope of this Article, it serves as a reminder that anti-incitement sanctions and counter-terrorism policies probably share some common ground, where the sanctions reinforce rather than conflict with counter-terrorism objectives. An issue for future consideration, therefore, is whether a national security waiver could be narrowly tailored to accommodate counter-terrorism initiatives, while leaving intact an effective sanctions policy against state-sponsored genocide incitement.

B. Potential Application of the Law: Sanctions Against Iran

A strong case can be made, and has been made by genocide scholars, that the present Iranian regime's public diplomacy, along with its support of genocidal terror groups and pursuit of nuclear weapons, furnishes conclusive evidence of genocide incitement as defined by the UN Genocide Convention.²⁹⁵ As discussed below, the regime's conduct also falls within the genocide incitement definition from section I.B, above, specifically: (1) communications; (2) conveyed to a large number of individuals; (3) intending to promote genocide . . . ; (4) as evidenced primarily by (a) text endorsing hatred and/or violence towards one or more groups and (b) in a context wherein such communications would likely lead to violence against the targeted group(s).

By itself, the cumulative text of the Iranian regime's public rhetoric likely satisfies the latter definition, viz., (1) communications (2) conveyed to a large number of individuals (3) intending to promote genocide. Elihu Richter's and Alex Barnea's 2009 study of the regime's rhetoric documented more than twenty declarations from top political and clerical lead-

294. See also, e.g., ALAN BAKER, INTRODUCTION TO THE CHANGING FORMS OF INCITEMENT TO TERROR AND VIOLENCE: THE NEED FOR A NEW INTERNATIONAL RESPONSE 5 (Alan Baker ed., 2012) ("Perhaps the most neglected, yet the most central component of international terror is the element of incitement. Incitement is the medium through which the ideology of terror actually materializes into the act of terror itself. Without circulation of the ideology and the recruitment of support as a result of incitement, there would be no act of terror.").

295. See, e.g., Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853, 857 (2008); Elihu D. Richter & Alex Barnea, *Tehran's Genocidal Incitement Against Israel*, MIDDLE E.A. 45, 45 (2009), <http://www.meforum.org/2167/iran-genocidal-incitement-israel>; Irwin Cotler, *State-Sanctioned Incitement to Genocide in Ahmadinejad's Iran: The Responsibility to Prevent*, GENOCIDE PREVENTION NOW, Winter 2010, <http://www.genocidepreventionnow.org/Home/GPNISSUES/Issue1Winter2010/tabid/72/ctl/DisplayArticle/mid/525/aid/49/Default.aspx> ("Today, the epicentre of state-sanctioned incitement to genocide is President Mahmoud Ahmadinejad's Iran.").

ers in the prior five years, all endorsing the destruction of the state of Israel. Some representative examples convey the genocidal intent:

October 2005: “We will be satisfied with nothing less than the complete obliteration of the Zionist regime from the political map of the world.”

October 2006: “The nation of Muslims must prepare for the great war, so as to completely wipe out the Zionist dream, and remove this cancerous growth.”

December 2006: “[T]he Zionist regime will be wiped out, and humanity will be liberated.”

October 2007: “Death to America and death to Israel . . . reflects the desire of all the Muslim nations.”

February 2008: “In the near future, we will witness the destruction of the cancerous microbe Israel by the strong and capable hands of . . . [Iran-supported terror group] Hezbollah.”

February 2008: “[W]ith God’s help, the time has come for the Zionist’s regime death sentence.”

July 2008: “Thanks to God, your wish will soon be realized, and this germ of corruption will be wiped off the face of the world.”²⁹⁶

For the year 2013 alone, the Jerusalem Center for Public Affairs documented twenty similar, public threats to destroy Israel issued by the Iranian government.²⁹⁷ Iran’s leaders also sponsor mass rallies in its largest cities every year, at which hundreds of thousands shout, “Death to Israel” and “Death to America!”²⁹⁸—clearly satisfying the elements of genocidal (1) communications; (2) conveyed to a large number of individuals.

Beyond its direct genocidal threats, the Iranian regime regularly mimics the Nazi, Serb, and Hutu genocidaires by promoting “*dehumanization* of Israelis and Jews through the use of epidemiological metaphors.” Examples include: “filthy germ”; “savage beast”; “cancerous tumour”; “stinking corpse”; “unclean regime”; “cancerous bacterium”; and a “cess-pool created by itself and its supporters.”²⁹⁹ The regime also *demonizes* its genocidal targets as, e.g., “the true manifestation of Satan”; “bloodthirsty barbarians” having “no boundaries, limits, or taboos when it comes to killing human beings”; perpetrators of a “war against humanity”; and “a small but deceitful number of people called Zionists . . . dominating . . . the financial and monetary centers [and] . . . political decision-making centers”³⁰⁰

296. ELIHU D. RICHTER & ALEX BARNEA, *supra* note 295, at tbl. 1.

297. Daniel Rubenstein, *Sworn to Destruction: What Iranian Leaders Continue to Say About Israel in the Rouhani Era*, JERUSALEM CTR. FOR PUB. AFF. (Jan. 7, 2014), <http://jcpa.org/article/20-threats-iranian-leaders-made-in-2013/>.

298. See, e.g., Majid Rafizadeh, *Iran still shouts ‘death to America and Israel,’* AL ARABIYA NEWS (Nov. 8, 2013), <http://english.alarabiya.net/en/views/news/middle-east/2013/11/08/Death-to-America-and-Israel-Iran-s-day-against-global-arrogance.html>; Reuters, *Iranians push for Palestinian resistance at Jerusalem Day rally in Tehran*, JERUSALEM POST (July 25, 2014), <http://www.jpost.com/Iranian-Threat/News/Iranians-push-for-Palestinian-resistance-at-Jerusalem-Day-rally-in-Tehran-368918>.

299. COTLER, *supra* note 295 (emphasis added).

300. *Id.*

Further evidencing genocide incitement is the *context* of Iran's public diplomacy, in which Iran has taken steps to guarantee that its genocidal communications not only are *likely* to cause violence against the targeted group, but actually are capable of doing so. From the early 1980s, Iran created, recruited, financed, and trained the terrorist group Hizbollah in south Lebanon, whose founding manifesto calls for destroying Israel. Hizbollah has kidnapped Israeli soldiers, launched missiles into Israel, and presently controls an estimated one hundred thousand Iran-supplied rockets targeting Israel.³⁰¹ Iran also has supported and supplied the terrorist group Hamas in the Gaza Strip, whose covenant similarly calls for destroying Israel, and which has fired over eleven thousand rockets into southern Israel from 2005 through 2014.³⁰² Having also established a Hizbollah force inside Syria, Iran has now surrounded Israel with genocidal forces on its northeast, north, and southwest borders.³⁰³

Lest any doubt remain, the Iranian regime's well-documented pursuit of nuclear weapons, along with its boast that "the use of even one nuclear bomb inside Israel will destroy everything. However, it will only harm the Islamic world," conclusively demonstrates its genocidal intent.³⁰⁴ However, the foregoing facts make clear that, even absent Iran's quest for nuclear weapons, the case for sanctioning its incitement would remain most compelling.

V. Policy Assessment: Weighing the Costs and Benefits

While one can imagine several objections to the proposed legislation, among the more salient are those derived from the general critiques of sanctions policies. These include: (1) sanctions do not work; (2) sanctions harm the wrong people; and (3) mandatory sanctions overly constrain the conduct of foreign policy. This Part seeks to address the primary considerations relevant to each objection.

301. KENNETH M. POLLACK, *THE PERSIAN PUZZLE: THE CONFLICT BETWEEN IRAN AND AMERICA* 200-01 (2004) (Iran's creation, financing, and training of Hizbollah); Adam Entous, Charles Levinson & Julian E. Barnes, *Hezbollah Upgrades Missile Threat to Israel*, WALL ST. J. (Jan. 2, 2014), <http://online.wsj.com/articles/com/articles/SB1000142405270230436160457929061392054238>; *An Open Letter: The Hizballah Program*, COUNCIL ON FOREIGN REL. PRIMARY SOURCES (Jan. 1, 1988), <http://www.cfr.org/terrorist-organizations-and-networks/open-letter-hizballah-program/p30967>; *Hezbollah seizes Israel soldiers*, BBC (July 12, 2006), http://news.bbc.co.uk/2/hi/middle_east/5171616.stm.

302. *Hamas Covenant* 1988, Aug. 18, 1998, http://avalon.law.yale.edu/20th_century/hamas.asp; Elad Benari & AFP, *Iran: We Provided Hamas with Rocket Technology*, ISR. NAT'L NEWS (July 25, 2014), <http://www.israelnationalnews.com/News/News.aspx/183332#!>; *Rocket Attacks on Israel From Gaza*, ISR. DEF. FORCES BLOG, <http://www.idfblog.com/facts-figures/rocket-attacks-toward-israel/> (last visited Sept. 15, 2016).

303. Michael Segall & Shimon Shapira, *Iran Launches "Hizbullah Syria" to Open a New Front Against Israel on the Golan Heights*, JERUSALEM CTR. FOR PUB. AFF. (June 2, 2014), <http://jcpa.org/article/iran-hizbullah-syria-front/>.

304. See Noah Beck, *A nuclear Middle East is doomsday*, COMMENTATOR (May 28, 2013), http://www.thecommentator.com/article/3633/a_nuclear_middle_east_is_doomsday.

A. First Objection: Sanctions Do Not Work

With economic sanctions “increasingly being used to promote . . . American foreign policy objectives,” some policy scholars contend that they are “rarely effective,” at least when imposed unilaterally, and criticize sanctions as “blunt instruments that often produce unintended and undesirable consequences.”³⁰⁵

Empirical data paint a much less bleak picture. In what appears to be the most comprehensive assessment of the subject yet attempted, researchers examined 204 instances of economic sanctions imposed by nation-states in the twentieth century, and “found sanctions to be at least partially successful in [thirty-four] percent of the cases that we documented.”³⁰⁶ The success rate varied with the sanctions’ desired behavior change: a twenty-one percent success rate in disrupting military adventures; thirty-one percent each in “military impairment” and in regime change and democratization; fifty-one percent in “modest” policy changes; and thirty percent in “other” major policy changes.³⁰⁷ Insofar as the desired behavior change here does not involve “disrupting military adventures,” the pertinent comparison categories manifest a success rate of between approximately one-third to one-half.³⁰⁸ In sum, “the bald statement ‘sanctions never work’ is demonstrably wrong.”³⁰⁹

A one-third to one-half success rate of international sanctions may seem underwhelming, but this invites the following question: compared to what else? Two comparison contexts come readily to mind: (1) other genocide prevention strategies; and (2) other categories of public policy altogether. Both contexts shine a comparatively favorable light on the sanctions option.

With respect to other genocide prevention strategies, the record is far from encouraging. As noted at the start of this Article, Professor Barbara Harff has documented a total of thirty-seven genocide episodes from 1955 to 2001—an average of almost one new genocide per year, which no nation or coalition found the wherewithal to prevent.³¹⁰ Professor Samantha Power has thoroughly documented the United States and its allies’ failures to respond effectively to the late-twentieth-century genocides in Cambodia, Iraq, Bosnia, Rwanda, Srebrenica, and Kosovo, concluding:

305. See Richard N. Haass, *Economic Sanctions: Too Much of a Bad Thing*, BROOKINGS (July 1998), <http://www.brookings.edu/research/papers/1998/06/sanctions-haass>; see also Robert P. O’Quinn, *A User’s Guide to Economic Sanctions*, HERITAGE FOUND. BACKGROUNDER, June 25, 1997, at 1-2, 6, thf_media.s3.amazonaws.com/1997/pdf/bg1126.pdf.

306. GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 158-59 (3d ed. 2009).

307. *Id.* at 159.

308. The study also found that multilateral sanctions may be less effective than unilateral sanctions, particularly if reaching consensus on multilateral sanctions requires dilution of the sanctions’ forcefulness. *Id.* at 172-75.

309. *Id.* at 159.

310. See HARFF, *supra* note 4, at 59-60.

[T]he United States has consistently refused to take risks in order to suppress genocide The states bordering genocidal societies and the European powers have looked away as well. Despite broad public concerns that genocide should “never again” be allowed . . . the last decade of the twentieth century was one of the most deadly in the grimmest century on record.³¹¹

For the most part, therefore, the only other *existing* genocide prevention strategy is verbal condemnation. Proactive intervention is very rare, and even then—as in the case of the Bosnian Muslims—it happens long after the genocide has commenced and largely run its course. By comparison, an actual reduction of occurrence of genocide by one-third to one-half, while still insufficient, would be a tremendous improvement beyond the status quo.

That estimated success rate also fares well when compared with the other major public policy context, namely, domestic policy. In 2012, Yale Law School Professor Peter Shuck led a meta-analysis of domestic United States government program assessments. As he explained:

[We] canvassed all of the assessments published since 2000 by the Government Accountability Office, the Office of Management and Budget, the center-left Brookings Institution, the center-right American Enterprise Institute, and two conservative think tanks The results were stunning. We found more than 270 such assessments Only a small number of these assessments could be considered positive; the vast majority were either clearly negative or showed mixed results.³¹²

In sum, reducing the incidence of genocide by one-third to one-half would exceed the success rate not only of existing genocide prevention efforts, but also that of many domestic policy programs, and likely at a lower cost than many such initiatives.³¹³

In weighing the significance of that success rate, it is important to take full account of what is prevented when sanctions have their desired effect. When the genocide stops, the destructive consequences rarely end. Like the mythical genie let out of the bottle, genocidal regimes often trigger a cascade of secondary, destructive effects, resulting in further geopolitical destabilization. The secondary effects can include counter-killings by victim groups, power struggles amidst impaired national sovereignties, and waves of terrorism encouraged by the incitement and facilitated by the disorder. Although a thorough discussion of this topic lies beyond the scope

311. POWER, *supra* note 3, at 503.

312. PETER H. SHUCK, WHY GOVERNMENT FAILS SO OFTEN: AND HOW IT CAN DO BETTER 23 (2014).

313. This “success rate” analysis has further layers. One is the distinction between success in thwarting incitement versus success in preventing genocide. Quite possibly, success in the former would not correlate one hundred percent with success in the latter. On the other hand, once the President has made a commitment to impose sanctions, the incipient genocide will be more visibly situated in both the public debate and the government’s foreign policy agenda, which raises the likelihood of further preventive action being taken. This “visibility/action” effect may be among the more salutary by-products of the proposed legislation, given the United States’ historical reluctance to intervene while genocides are happening, as noted above. See *supra* text accompanying notes 306–12.

of this Article, a textbook case of such a “genocide event cascade” is the long war of the Congo, which followed the 1994 Rwanda genocide.

Around the Congo in south-central Africa, an almost constant state of war since 1996 has claimed the lives of over *five million* people.³¹⁴ One of the war’s leading historians, Jason Stearns, characterized the 1994 Rwanda genocide as “the trigger” for the instability and bloodshed that followed.³¹⁵ As described in Section II.C.1 above, Rwanda’s 1994 genocide of the Tutsi stopped only when a Tutsi refugee army re-conquered the country. Over a million Hutu then fled into neighboring Congo, from which they launched attacks against Rwanda, tacitly approved by the Congolese regime. In 1996, the Rwandan Tutsi leadership responded by leading a multinational invasion to install a new Congolese regime, but that regime later switched sides to support the refugee Hutu militias. Then and since, a plethora of mutually hostile militias have ravaged the Congo with genocide-like massacres, mass rapes, and revenge killings.³¹⁶

One can only speculate what might have happened in Rwanda if robust pressures had been brought to bear against the Hutus’ genocidal 1990–1994 incitement campaign. It is at least possible that such pressures could have tipped the balance away from genocide and towards a successful implementation of the Arusha Peace Accords.³¹⁷ Moreover, absent the genocide, it is likely that the mass displacements that gave rise to the horrific Congo war would not have happened, and that millions of Congolese killed in the war would still be alive today.

B. Second Objection: Sanctions Harm the Wrong People

Some critics maintain that comprehensive sanctions inflict so much harm on the target country’s citizens as to preclude their use as legitimate tools of foreign policy.³¹⁸ Others reply that such critiques “do not take sufficiently into account” the positive effects of humanitarian assistance exceptions, by which “the negative impact of sanctions on the civilian population could be mitigated at least to some extent.”³¹⁹ The sanctions legislation proposed in this Article includes a humanitarian assistance exception.

314. JASON K. STEARNS, *DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA* 4 (2011).

315. *Id.* at 8.

316. *See generally* STEARNS, *supra* note 314.

317. One significant point of leverage would have been the \$216 million in loans to the Hutu regime approved by the World Bank in 1990, of which \$112 million was later found to have been diverted for weapons purchases. The United States was a major contributor to those loans. MELVERN, *supra* note 30, at 57. Shutting down those loans and the resulting arms purchases, while pressuring the regime to end its incitement, would have landed a double blow against the regime’s ability to carry out genocide.

318. *See, e.g.*, Hans-Peter Gasser, *International Review of the Red Cross*, INT’L COMM. OF THE RED CROSS (June 30, 1998), <https://www.icrc.org/eng/resources/documents/misc/57jpcs.htm>. Some critics of comprehensive sanctions endorse only partial, or so-called “smart,” sanctions. *Id.*

319. *Id.*

Nonetheless, the reality of harm to innocent civilians is a fact that must be acknowledged. Logically, for sanctions to succeed in changing policy, their impact must be sufficient to alter a regime's risk-benefit calculus—i.e., capable of inflicting hardships. Also, insofar as sanctions often target non-democratic countries, the targeted regime is likely to be one that can shift at least part of the sanctions' impact onto those who have no power or influence, while mitigating the impacts upon the leadership class, its allies among the military, and critical economic sectors.

At the same time, the purpose and anticipated effect of the sanctions recommended here make for a very atypical balancing of relative harms. Namely, the balance here is between harms to innocent civilians caused by imposing sanctions and harms to innocent civilians caused by the possible failure to prevent an imminent genocide. In other words, the relative harms are moderate to significant privation endured by a substantial share of a nation's people, versus the possibly avoidable tortures and deaths of a very large number of people—at least tens of thousands and possibly many more.³²⁰

Yet even that phrasing misses an important consideration that tips the balance more favorably towards sanctions, at least in an *intra*-national genocide risk environment. In that setting, where a state actor threatens genocide against an indigenous population, the category of people adversely affected by the sanctions are in the *same* category of people from which would be drawn most of the perpetrators and victims of the genocide sought to be avoided. As to both potential perpetrators and victims, this effectively cancels out the comparative harms caused by sanctions. Specifically, for potential perpetrators, the lesser harm involves endurance of the hardships of sanctions, rather than inaction that raises the likelihood that they will become mass murderers. For potential victims, the lesser harm is also the hardships of sanctions, rather than likely torture and death in the event of genocide.

This reasoning is less applicable in a transnational genocide risk environment, where a state actor threatens genocide against another state's population. Nonetheless this scenario carries a high risk of unleashing protracted, post-genocide violence, to include retaliatory violence against citizens of the perpetrator nation and its regional proxies. Such violence was a widespread, albeit underreported, occurrence in post-World War II Europe.³²¹ Eliminating the future risk of retaliatory violence would offset

320. Because the best estimate of the sanctions' likely success rate is one-third to one-half, see *supra* Section V.A, the effort to quantify the relative harms would need to discount the avoidable harms of genocide by a factor of between one-half to two-thirds, before comparing them against the harms imposed by sanctions. On the other hand, before applying that "success rate discount," the initial quantification of genocidal harms also should include the collateral harms of a possible "genocide event cascade," as discussed in Section V.A.

321. See generally KEITH LOWE, *SAVAGE CONTINENT: EUROPE IN THE AFTERMATH OF WORLD WAR II* (2013). "[V]engeance and retribution washed over every sphere of European life. . . . German civilians all over Europe were beaten, arrested, used as slave labour or simply murdered." *Id.* at xv.

the harms of sanctions in a manner similar to the balance of harms assessment applicable to intra-national genocide risks.

A more empirical assessment of those comparative harms does not appear to be available at this time. However, there is at least one historical example of sanctions triggering substantial short-term harms to their intended beneficiaries, where the latter subsequently expressed their own opinions about the balance of harms—and they resoundingly favored sanctions.

As discussed in section IV.A, above, the 1974 Jackson-Vanik amendment imposed trade sanctions intended to pressure the Soviet Union to loosen its strict, punitive policies preventing Soviet Jews from emigrating. In the years immediately after its enactment, the Soviets retaliated by further restricting Jewish emigration and ramping up prosecutions and imprisonment of Jews who sought to teach their religion and culture (which the Soviets had effectively banned) and for speaking out against human rights abuses.³²²

Then-Secretary of State Henry Kissinger vehemently opposed the Jackson-Vanik amendment as an obstacle to U.S.-Soviet cooperation, insisting that such cooperation would better assist Soviet Jews.³²³ But despite the Soviets' draconian suppression of Jewish "refuseniks"³²⁴ after the law's passage, the refusenik leaders who bore the brunt of the retribution strongly supported the amendment, as the then-jailed Natan Sharansky made clear:

When the gates closed on Soviet Jewry (from 35,000 [emigrants] in 1973, . . . to just a few thousand in the years that followed), Kissinger pointed to it as proof that Jackson's confrontational approach was ill-advised But those of us in whose name Kissinger was criticizing Jackson saw things differently. We refuseniks knew that the Soviets had no intention of allowing masses of Jews to leave, and we saw the amendment as putting our plight on the international agenda [W]ith pressure building from the West, we were convinced that the regime could not act toward us with impunity³²⁵

Similarly, amidst the later Soviet reforms under Mikhail Gorbachev, which included some loosening of emigration and cultural restrictions on Jews, a delegation of American Jewish leaders convinced the Soviets to permit further emigration and freedom for Soviet Jews, in exchange for repeal of the Jackson-Vanik sanctions. Again the refuseniks, who bore the brunt of retribution for the sanctions, strongly opposed the proposed deal.³²⁶

322. GAL BECKERMAN, WHEN THEY COME FOR US, WE'LL BE GONE: THE EPIC STRUGGLE TO SAVE SOVIET JEWRY 373-446 (2010).

323. *Id.* at 288.

324. "Refuseniks" refers to the large number of Soviet Jews who applied for permission to emigrate, had their applications refused, then were fired from their jobs and thrust into a desperate, years-long struggle to survive. BECKERMAN, *supra* note 322, at 245.

325. NATAN SHARANSKY & RON DERMER, THE CASE FOR DEMOCRACY: THE POWER OF FREEDOM TO OVERCOME TYRANNY & TERROR 119-20 (2004).

326. BECKERMAN, *supra* note 322, at 513-15.

Although the suffering experienced by the refuseniks cannot guarantee the accuracy of their assessment of the sanctions' effectiveness, their continued support of sanctions through years of oppression does confer a certain credibility and moral stature to their perspective.³²⁷ Along with the other considerations discussed here, it further undermines the claim that the hardships imposed by sanctions outweigh their potential benefits.

C. Third Objection: Mandatory Sanctions Overly Constrain the Conduct of Foreign Policy

Lastly, some oppose sanctions because they believe such sanctions overly constrain the executive branch's conduct of an effective foreign policy. Automatic, mandatory sanctions are especially disfavored:

[U]ltimately only the President can weigh all the foreign policy issues at stake . . . and tailor our response to a specific situation [L]egislation that empowers the President to impose economic sanctions should also empower him not to act and to waive or suspend measures already in place if it is in the national interest.³²⁸

The legislation proposed in this Article does include a Presidential waiver provision, but one that is more limited than the above recommendation in two critical ways: (1) the proposed waiver cannot be invoked on broad grounds of "national interest," but only where the waiver is deemed to "substantially promote the objectives" of the anti-incitement sanctions statute; and (2) the President's waiver authority is not unilateral, but rather may be subject to override by joint Congressional resolution.³²⁹

As discussed in Section IV.A, above, there is an open question whether the statute also should authorize waivers to facilitate trans-national cooperation in counter-terrorism operations; the challenge then being, to fashion such authority in a manner that does not eviscerate the statute's effectiveness in confronting genocide incitement. Apart from that question—which could be addressed by adding counter-terrorism waiver authority—there is a strong argument that incitement sanctions will not overly constrain the executive's conduct of foreign policy. Addressing that concern requires an assessment of the particular circumstances where incitement sanctions are likely to be imposed over Presidential opposition, and a further assessment of the net harms, if any, resulting from such conflicts between Congress and the President.

327. The supporters of sanctions received a measure of vindication when, three years after the American Jewish delegation unsuccessfully urged repeal of Jackson-Vanik, the Soviets reversed their policies, resulting in the eventual emigration of over 1.7 million Jews. *Id.* at 528.

328. Stuart E. Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs, Testimony Before the Lott Bipartisan Senate Task Force on Sanctions (Sept. 8, 1998), http://www.state.gov/1997-2001-NOPDFS/issues/economic/econ_sanctions.html.

329. Similarly, the proposed statute authorizes the President to veto a Congressional override, but the veto can be set aside by a two-thirds majority vote of both houses of Congress. See discussion *supra* Section IV.A.

Perhaps most importantly, such conflicts would have no direct effect on relations with America's primary, democratic allies because those nations do not engage in state-sponsored genocide incitement and hence, they are not potential targets of the sanctions in question. "[R]egimes with strong tendencies to practice eliminationist politics" generally are "nondemocratic regimes," because democratic polities lack "the ready institutional and cultural means to initiate domestic slaughters or eliminations."³³⁰ In a comprehensive statistical analysis of twentieth-century genocides, Professor Barbara Harff of the U.S. Naval Academy concluded that "[d]emocratic and quasi-democratic regimes have institutional checks on executive power that constrain elites from carrying out deadly attacks on citizens Full democracies . . . have virtually no risk of geno/politicide."³³¹

Also relevant to this analysis is the fact that "[t]he countries perpetrating mass murder and eliminationist politics, or tempted to do so, are overwhelmingly poor and weak"³³² Accordingly political battles over the imposition of anti-incitement sanctions will not generally involve major U.S. trading partners. There is, however, one notable exception to that conclusion, namely, the oil-rich countries of the Middle East: many such countries beyond Iran promote virulent anti-Semitic propaganda in their state-controlled media.³³³ Accordingly, the major Middle Eastern oil exporters would likely implicate the most difficult and contentious foreign policy debates over the application of anti-incitement sanctions.

Two considerations would at least partially mitigate those difficulties in the Middle Eastern context. First, the limited waiver authority of the proposed statute allows for some selectivity in deciding where to impose sanctions among multiple regional sponsors of genocide incitement. As noted in Section IV.A, above, sanctions may be waived when the President determines "that such waiver will substantially promote the objectives of this statute."³³⁴ One conceivable basis for such waiver is the distinction between more imminent and less imminent threats of genocide, and the need to assemble coalitions against the more imminent threat.

Returning to the example of section IV.B, above, if Iran presents a more imminent threat of genocide than any of its neighbors, then the objectives of the statute may best be served by leveraging the influence of neighboring countries in a coalition to check Iran's genocidal aspirations.

330. GOLDHAGEN, *WORSE THAN WAR*, *supra* note 48, at 590-91.

331. Harff, *supra* note 4, at 63; see also R.J. Rummel, *Democracy Power, Genocide, and Mass Murder*, 39 J. CONFLICT RESOL. 3, 25 (1995) ("[T]he best way to account for and predict [genocide and other mass killings] is by the degree to which a regime is totalitarian along a democratic-totalitarian scale.").

332. GOLDHAGEN, *WORSE THAN WAR*, *supra* note 48, at 558.

333. See generally *Antisemitism and Holocaust Denial Documentation Project*, MIDDLE E. MEDIA RES. INST., <http://www.thememriblog.org/antisemitism> (last visited Sept. 15, 2016).

334. The President must also be in receipt of some assurance that the country receiving the waiver is "taking steps that will henceforth lead substantially to the achievement of the objectives of this statute." See discussion *supra* Section IV.A.

Assembling such a coalition may require waiving sanctions with respect to one or more countries that also engage in some degree of genocide incitement. By authorizing waivers that “substantially promote the objectives of th[e] statute,” the proposed law accommodates the choice of working with “the lesser evil” to wage effective combat against the greater one.³³⁵

The second consideration is the changing balance of global energy supplies. In sum, technological advances in the extraction of oil and natural gas are greatly reducing the United States’s dependence on Middle Eastern oil imports. According to global energy consultant Daniel Yergin, “petroleum imports have fallen from their high of [sixty] percent in 2005 to [thirty-five] percent today,” which is where they stood on the eve of the 1973 Arab oil embargo.³³⁶ The chief economist of the International Energy Agency has predicted that “[b]y around 2020, the United States [will] become the largest global oil producer The result is a continued fall in [U.S.] oil imports, to the extent that North America becomes a net oil exporter around 2030.”³³⁷

This tectonic shift in the global energy balance means that American dependence on Middle Eastern oil is steadily receding over time. Accordingly, the difficulties of integrating anti-incitement legislation into the broader framework of Middle Eastern foreign policy is growing ever less problematic.

In sum, while anti-incitement legislation may add an element of complexity to certain foreign policy issues, it presents a far from insuperable burden. Such burdens may appear relatively modest when weighed against the benefits of both reducing the incidence of genocide, and preventing the murderous geopolitical upheavals that often follow in genocide’s wake.

Conclusion

The case studies, historical assessments, and social psychology experiments recounted in this Article compellingly validate the hypothesis that persistent, widespread genocide incitement can readily create a large pool of individuals capable of mass killing. State sponsors of genocide incitement therefore play a critical role in making genocides possible, both by popularizing and legitimating genocidal ideologies, and by transforming such ideologies into engines of mass slaughter.

It logically follows that, in seeking a politically feasible policy capable of reducing the incidence of genocide, an especially worthy approach is legislation that imposes comprehensive sanctions against state actors who promote genocide incitement. While far from a complete solution, the evi-

335. See generally MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2005).

336. See Daniel Yergin, *Congratulations, America. You’re (Almost) Energy Independent. Now What?* POLITICO MAG. (Nov. 2013), <http://www.politico.com/magazine/story/2013/11/congratulations-america-youre-almost-energy-independent-now-what-98985.html>.

337. See Richard Spencer, *Fracking Boom Frees the U.S. from Old Oil Alliances*, TELEGRAPH (Dec. 13, 2013), <http://www.telegraph.co.uk/earth/energy/oil/10476647/Fracking-boom-frees-thie-US-from-old-oil-alliances.html>.

dence indicates that sanctions ordinarily have a success rate of between one-third to one-half in the pertinent cases studied, a much higher success rate than other existing genocide prevention efforts, and significantly higher than many domestic policy initiatives. Moreover, the preliminary assessment set forth in this Article strongly suggests that the likely benefits of genocide sanctions legislation substantially exceed its probable costs and collateral harms.

Uniquely, the U.S. economy has the depth and breadth to support an especially robust sanctions policy, and the global influence for sanctions to make a meaningful difference in at least some genocidal risk environments. Given both the sheer magnitude of human suffering involved in genocide and the destructive geopolitical instability that often follows in its wake, genocide prevention warrants a high priority on the foreign policy agenda. Based on the evidence discussed in this Article, incitement sanctions legislation would be a valuable first step.