

## Chapter 5

### Speech in Pre- and Post-Genocidal Environments: Strategies for Preventing Critical Mass

Gregory S. Gordon<sup>1</sup>

#### Abstract

The relationship between speech and genocide might be analyzed within a two-axis matrix. The first axis relates to genocide chronology and divides into “process” (referring to the cycle of genocide) and “pre-process” phases. The “pre-process” or “pre-genocide” phase indicates a potential victim group is socially well integrated and not exposed to elevated levels of discrimination that could lead to genocide. The “process” (or genocide cycle) phase consists of three key stages: (1) identification; (2) action; and (3) execution. The second axis—or speech axis—is qualitative and categorizes speech as either “salutary” or “inimical.” Going back to the chronology analysis, during the pre-genocide phase, the emphasis should be on proactive distribution of salutary speech. Proactive salutary speech can be quite effective at limiting the spread of discrimination against potential victim groups. Distribution can be implemented in different ways, including education and public-awareness campaigns. Once the genocide cycle begins, the calculus changes. During the initial “identification” stage—when there are rising levels of prejudice and discrimination – proactive salutary speech may yet help prevent genocide. At some point, however, conditions deteriorate and it becomes less likely that the salutary can neutralize the inimical. However, as the cycle enters the “action” and “execution” stages, salutary speech is without value altogether and punishment becomes the sole mechanism through which to achieve prevention.

#### Introduction

The relationship between speech and genocide might be analyzed within a two-axis matrix. The first axis relates to genocide chronology and divides into “process” (referring to the cycle of genocide) and “pre-process” phases. The “pre-process” or “pre-genocide” phase indicates that a potential victim group is socially well integrated and not exposed to elevated levels of discrimination that could lead to genocide. The “process” (or genocide cycle) phase consists of three key stages: (1) identification; (2) action; and (3) execution. The second axis—or speech axis—is qualitative and categorizes speech as either “salutary” or “inimical.” Going back to the chronology analysis, during the pre-genocide phase, the emphasis should be on proactive distribution of salutary speech. Proactive

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<sup>1</sup>Associate Professor of Law, University of North Dakota (UND) School of Law, Director, UND Center for Human Rights and Genocide Studies. This chapter is based on an article titled *Speech Along the Atrocity Spectrum*, 42 Ga. J. Int'l & Comp. L. \_\_ (forthcoming 2014).

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This paper is divided into four sections. Part Two examines "speech" in the forms of "salutary," "neutral," and "inimical." It also demonstrates that inimical speech comprises more innocuous messages as well as direct language that may constitute calls for exclusion, disenfranchisement or violence.

Part Three considers the chronological axis, which divides into the "pre-process" and "process" stages. The process stage, for its part, breaks down into "identification," "action," and "execution" phases.

Part Four analyzes the relationship between the axes. It shows that, in the pre-process stage, an initial wave of discrimination against the victim group can be effectively dealt with through salutary speech. It also explains that, during the early process stage, more democratically developed polities may exploit salutary speech to neutralize the effects of persecution. However, even in countries where democracy is strong but authoritarian elements manage to engage in discriminatory policies against a victim group, at some point the persecutory campaign, and the rhetoric voiced in support of it, reaches critical mass. At that juncture, the government wholly controls the media and inimical speech cannot be effectively countered. Legal action, this paper proposes, is then called for. In particular, a prosecution on grounds of incitement to genocide is the proper response. Such punishment has deterrence value and carries the additional benefit of expressive condemnation. It may thus make significant contributions toward ending the culture of impunity.

### **Salutary Speech and Inimical Speech Analysis**

#### **Salutary Speech**

Salutary speech is fairly simple. It may be focused or non-focused.

**Non-focused salutary speech.** Non-focused salutary speech consists of expression that generally advances policies of tolerance, pluralism, or inclusion vis-à-vis potential target groups. It is thus speech not specifically uttered in response to inimical speech.

**Focused salutary speech.** In contrast, focused salutary speech responds directly to inimical speech. Thus, this category of speech counters the discriminatory speech and thereby exposes it as problematic. This, in turn, helps marginalize the inimical speech (Gelber, 2012, p. 206).

## Inimical Speech

Inimical speech breaks down into the following categories: (1) general statements; (2) harassment; and (3) incitement. Each of these shall be considered.

**General statements.** Inimical speech consists of three major points along a spectrum. On one end, one would find its mildest forms — general statements casting aspersions on a target group (Gerstenfeld, 2010, p. 35.) Such speech could perhaps be considered borderline neutral (i.e. not salutary or inimical.) For example, statements suggesting that a group makes less of a contribution to the health of a country's economy than other groups in the country (e.g., "The Tutsis engage in far less research and development activity than the Hutus".)

Other statements within this rubric can be more easily classified as inimical. For example, such statements could consist of the republication of explicitly negative racial, ethnic or religious stereotypes. This may be referred to as "group libel," which entails attacking or defaming a group that suffers from social prejudice and creating a general climate more receptive to animosity toward and violence against the group (Greenfield, 2003). These are general statements not necessarily directed at any person in particular.

Such statements may include efforts to ascribe to the group overall negative qualities such as greed, laziness, poor hygiene, criminal propensity and mendacity. More seriously, they could comprise statements dehumanizing the victim group through techniques of "verminization" (equating the group with parasitic, pestilent sub-human creatures such as lice or locusts), "pathologization" (analogizing the group with disease), and/or "demonization" (ascribing to the group satanic or other comparable evil qualities) (Gordon, 2010, pp. 639-641).<sup>2</sup>

**Harassment.** Moving further along toward the other end of the spectrum, in the middle, statements voiced directly at the victims can be categorized as "harassment" (Bowie & Simon, 1998, p. 136). Such statements would be addressed to the collective group (e.g. "You do not belong here" or "You are parasites") or to particular individuals (e.g., "You filthy residents of the Biryogo are making the rest of society dirty and disease-infested. You are destroying our country.").<sup>3</sup>

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<sup>2</sup>The cited passage in this Article refers to dehumanization as a method of incitement. This is a matter of degree. Less virulent forms of dehumanization may not amount to calls for action and can therefore be categorized as general hate speech. The language must be parsed on a case-by-case basis to determine the proper category.

<sup>3</sup> The United States, which is extremely speech-protective, might consider such speech as "fighting words," (*Beauharnais v. Illinois*, 1952, 255-257) not meriting constitutional protection. For example, in *Beauharnais v. Illinois* (1952) it was determined that "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems. These include . . . the insulting or 'fighting' words . . . it has been well observed that such utterances are not essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"(255-57). Similarly, *Brandenburg v. Ohio* (1969) held that speech advocating lawless action is protected unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (p. 447). Accordingly, within this context, it is logical that incitement, which follows harassment on the spectrum, would likewise be deemed more serious than general hate speech.

**Incitement.** The final point in this direction along the spectrum, “incitement” entails advocacy directed toward third persons (Leigh, 2010, p. 379). Such messages are designed to provoke action vis-à-vis the victim group (Leigh, 2010). This kind of incitement bifurcates into two forms: (1) incitement toward non-violent action; and (2) incitement toward violent action (Leigh, 2010). Regarding the former, one can discern three general relevant non-violence categories: (1) incitement to hatred; (2) incitement to discrimination; and (3) incitement to persecution (Leigh, 2010).<sup>4</sup>

Incitement to hatred urges the majority group to develop general feelings of animosity toward the victim group (Timmerman, 2005, p. 382). It is similar to group libel but takes a more active tone in encouraging the majority group to despise the minority (Timmerman, 2005). For example, the Rwandan pop singer Simon Bikindi's pre-Genocide against the Tutsi song *Njyewe nanga Abahutu* ("I Hate the Hutu") actively encouraged extremist Hutus to develop feelings of contempt for moderate Hutus who were supporting Tutsis in the period leading up to the genocide (both moderate Hutus and Tutsis were victim groups during this time) (Gordon, 2010, p. 618).

Incitement to discrimination urges the majority group to mistreat the victim group in particular non-violent ways. It could be a call to the majority group to refuse medical treatment or service in restaurants or discourage marriage with members of the victim group. For example, a Nazi pamphlet distributed to German teenagers warned them not to "mix" with Jewish people or marry them for fear of race "defilement" ("You and Your People," 1940).

Incitement to persecution is incitement to discrimination on a broader and more systematic scale (Neressian, 2007, p. 263). This is advocacy to exclude the victim group from participation in society and enjoyment of civil rights in a comprehensive way (Neressian, 2007). In pre-genocide Rwanda, for example, Hassan Ngeze published the infamous *Ten Commandments of the Hutu* in a 1990 issue of *Kangura*. One commentator has described this document as an appeal to "Hutus to separate themselves from the Tutsis" ("The Path to Genocide," 2005). In fact, it was a call for comprehensive exclusion of Tutsis from society: (1) Hutu males must not have close personal or work relations with Tutsi women; (2) Hutu women are superior to Tutsi women; (3) Hutu women must fraternize only with Hutu men; (4) Tutsis are dishonest and no Tutsi should conduct business with them; (5) all high-level positions in society should be occupied by Hutus only; (6) the education sector should be majority Hutu; (7) the military must be exclusively Hutu; (8) The Hutu should stop having mercy on the Tutsi; (9) all Hutus must have unity and solidarity; and (10) the ideology of the 1959 and 1961 revolution (when many Tutsis were disenfranchised, forced to leave Rwanda or massacred) must be taught to Hutu at all levels (Totten et al., 2008).

The other major form of incitement is to violence. There are two varieties—explicit and non-explicit (Gordon, 2010, pp. 638-639). Since incitement to violence is often effectuated via code, non-explicit calls are quite common (Gordon, 2010). William Schabas has observed that those who incite to genocide "speak in euphemisms" (Schabas, 1999, p. 530).<sup>5</sup>

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<sup>4</sup> Leigh (2010) discusses the breakdown of incitement in the context of the Netherland's Criminal Code. It is possible persecution could entail violence but incitement to persecution generally is not an explicit call for violence.

<sup>43</sup> Schabas (1999) was speaking of incitement to genocide.

Such non-explicit methods can be myriad in form and include: (1) predictions of destruction (in the Media Case Trial Chamber Judgment, for instance, certain RTLM emissions that predicted liquidation of the Tutsis were among those broadcasts deemed to constitute incitement)<sup>6</sup>; (2) so-called "accusation in a mirror" (which consists of imputing to the victim the intention of committing the same crimes that the actual perpetrator is committing, as in Leon Mugesera's November 1992 speech from *Mugesera v. Canada* (2005): "These people called *Inyenzis* are now on their way to attack us . . . they only want to exterminate us" (para. 405; see also Gordon, 2010, p. 641-642; Marcus, 2012, p. 359); (3) euphemisms and metaphors (in the Rwandan Genocide, for instance, "go to work," a common mass slaughter directive, meant "kill Tutsis") (*Prosecutor v. Ruggiu*, 2000, para. 44; see also Gordon, 2010, p. 642); (4) justification during contemporaneous violence (this amounts to describing genocide already taking place in a manner that convinces the audience its violence is morally justified -- Nazi leaders, for example, described to potentially complicit Germans the "humaneness" of their massacres, torture, death marches, slavery and other atrocities.) (Hilberg, 1961, 1010; see also Gordon, 2010, p. 642); (5) condoning and congratulating past violence (RTLM announcers, such as Georges Ruggiu, would congratulate the "valiant combatants" who engaged in a "battle" against Tutsi civilians (Gordon, 2010, pp. 642-643; see also *Prosecutor v. Niyitegeka*, 2003, para. 142; *Prosecutor v. Ruggiu*, 2000, para. 44(v)); (6) asking questions about violence (for example, in *Prosecutor v. Bikindi* (2008), Simon Bikindi asked Hutu militia over a truck loudspeaker "have you killed the Tutsis here?" (para. 423) and he further asked whether they had killed the "snakes") (Gordon, 2010, p. 643); and (7) more virulent forms of verminization, pathologization, and demonization (RTLM announcer Georges Ruggiu admitted that the word *Inyenzi*, as used in the socio-political context of the time of the Rwandan Genocide, came to designate the Tutsis as "persons to be killed") (*Prosecutor v. Ruggiu*, 2000, para. 44 (iii); see also Gordon, 2010, pp. 639-641.)

Of course, the most serious form of incitement consists of explicit calls for violence. These are relatively rare in genocide cases but certainly the most chilling and evocative of the horrors surrounding the speech.<sup>7</sup> A prominent example is Kantano Habimana's June 4, 1994 broadcast in which he asked listeners to exterminate the "Inkotanyi," or Tutsis, who would be known by height and physical appearance (*Prosecutor v. Nahimana*, 2003, para. 396). Habimana then added: "Just look at his small nose and then break it" (*Prosecutor v. Nahimana*, 2003, para. 396). Another disturbing example comes from Iranian President Mahmoud Ahmadinejad, who urged Israel's destruction when he told the Iranian people in October 2005 that Israel "must be wiped off the map" (Fathi, 2005, p. A8).<sup>8</sup>

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<sup>6</sup> An example of such an announcement can be found in *Prosecutor v. Nahimana*, (2003) where a broadcast included the following: "thus when day breaks, when that day comes, we will be heading for a brighter future, for the day when we will be able to say 'There isn't a single *Inyenzi* left in the country'"(para. 405).

<sup>7</sup> It should be noted that general hate speech not calling for violence can be transformed into incitement when closely anchored to speech calling for violence (Marcus, 2012, p. 391 n. 200).

<sup>8</sup>Certain commentators such as *Benesch* (2008) dispute that this statement constitutes direct and public incitement to genocide: "Ahmadinejad's speech was reprehensible and perhaps even dangerous, but did not constitute incitement to genocide, in my view" (pp. 490-491). But, even if this were true, given Iran's support of terrorist attacks against Israel, it may have constituted crimes against humanity (CAH) or persecution (Gordon, 2008a, pp. 880-882).

## Pre-Process and Process Analysis

The timing and context of the speech is central to determining how it should be treated. Timing and context bifurcate into two phases — "pre-process" and "process." While the "process" phase represents the period of genocide, during which salutary speech is likely of limited value, the pre-process phase focuses uniquely on the countering effects of salutary speech.

### The Pre-Process Phase

In general, the pre-process phase does not entail discernible degrees of discrimination or persecution for any target group. The target group, then, participates in the country's civic, social, cultural and economic life and enjoys its legal protections. This assumes that the group's members may exercise free-speech rights, participate in commercial activity, obtain employment and employment benefits in all sectors of the economy, have access to decent educational opportunities, housing, and health care, vote for, seek and hold public office, enjoy the protections of due process and the fundamental freedoms and rights recognized by the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (ICCPR) (1966), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966). In general, these countries exhibit core rule-of-law characteristics, including, among others, a distinction between civilian and military functions, a competitive, vital media sector and a citizen's right to use diverse public-speaking channels (Appicciafuoco, 2010).

Nevertheless, in even the strongest democracies this scenario may vary. For instance, equal protection or due process may be compromised to a greater or lesser extent. And the majority population may persecute victim groups in various ways, including subjecting them to inimical speech. In those cases, extremist groups may flourish and successfully undertake a discriminatory campaign (Dalacoura, 2006, pp. 508-525). Still, even in those cases, if members of victim groups largely continue to have access to the courts and enjoy free expression rights, salutary speech ought to neutralize inimical speech (Franzese et al., 1995). Franzese et al. note that good speech is effective in countering bad speech, as long as there is sufficient time for the good speech to have its effect (p. 323).

However, in some cases, democratic institutions may be more severely compromised. Salutary speech, in other words, may no longer protect victim groups from poisonous rhetoric. Knowing when this takes place may often be difficult since societies losing their democratic moorings can often be caught in limbo between enforcement and non-enforcement of laws for the benefit of target groups. At some point, though, the scales will tip and a society will enter the early stages of the "process" phase.

### The Process Phase

For genocide to be perpetrated, it takes time for the necessary groundwork to be laid. In particular, this is a complex phenomenon involving different stages that eventually culminate in mass violence. In effect, these stages constitute a "process" that subdivides into three phases: (1) identification; (2) action; and (3) execution.

This analysis is largely informed by Professor Gregory Stanton's (1998) genocide prognosis model referred to as "The 8 Stages of Genocide." This model posits that the chronology of genocide breaks down as follows: (1) classification (use of categories to distinguish those discriminating and

those discriminated against (target group) into “us and them” by ethnicity, race, religion, or nationality—*e.g.*, German and Jew, Hutu and Tutsi); (2) symbolization (assigning symbols to the classification—*i.e.*, associating with or foisting upon a target group certain colors or apparel, such as the golden Star of David patch for Jews in Nazi Germany or the blue scarf for Eastern Zone residents in Khmer Rouge Cambodia); (3) dehumanization (equating the target group with animals, vermin, insects or diseases); (4) organization (*e.g.*, establishing militia and drawing up lists); (5) polarization (*e.g.*, broadcasting hate propaganda or forbidding social, civic or economic interaction with the target group); (6) preparation (the target group is segregated, its property expropriated and death lists are drawn up); (7) extermination (the actual killing of the dehumanized victims begins); and (8) denial (it always follows a genocide and is a signal that additional killings of the victim group are intended) (Stanton, 1998).

In terms of speech analysis, these eight stages should be combined into the identification, action and execution groupings as noted previously. "Identification" encompasses "classification," "symbolization" and "dehumanization." "Action" covers "polarization" and "preparation." And "execution" comprises "extermination" and "denial."

### **Speech and the Genocide Cycle**

Having set out and explored separately the speech and chronology axes, analysis of their interaction may now be conducted. It can be assumed, for this purpose, that speech is bisected along the chronological axis in terms of "pre-process" and "process."

#### **Pre-Genocidal Speech**

As previously noted, in the "pre-process" phase the target group experiences limited degrees of discrimination. But discrimination may be on the rise. And this is when salutary speech may be most effective as a neutralizing agent.

**Proactive (non-focused) speech.** "Non-focused" salutary speech can be strategically utilized in advance of extremist groups achieving their objectives. The role played by civil society is crucial in this regard.

What is "civil society"? One expert describes it as "a public space between the state, the market and the ordinary household, in which people can debate and tackle action" ("What Is Civil Society," 2001, para. 17). Robert Pekkanen (2006) more succinctly defines civil society as the "organized, non-state, non-market sector" (p. 3). That may comprehend any charitable activity in which citizens work together to effect change on certain issues, but this does not include political parties, despite civil society's political dimensions ("What Is Civil Society," 2001). Thus, civil society could encompass neighborhood self-help groups, social activity clubs, and non-governmental organizations. These actors can disseminate "non-focused" salutary speech in various ways, including public discussion forums, social media blasts, and tolerance awareness drives.

Schools may serve an important function in this process too. Curricula can imbue pluralistic values and appreciation for tolerance. Course selection and design, lesson-plan development, and class-material selection may all play crucial roles in this regard.

Governments and international organizations may also be essential agents for promulgation and institutionalization of salutary speech. In addition to directly establishing agencies or creating funding mechanisms for civil society groups and schools, these actors can help protect diverse and widespread political participation and freedom of expression and press.

By providing coverage with respect to the above activities, the press itself can also play a pivotal role. Furnishing space for commentary and op-eds that promote non-discrimination represents another significant contribution the press can make in this regard.

**Reactive (focused salutary) speech.** During the end-stages of this phase, focused salutary speech becomes yet more important. For even in the most ideal pre-process scenario, where non-focused salutary speech still thrives, inimical speech will continue to be present in various degrees. For such discriminatory communications, focused salutary speech may still act as an effective remedy.

As demonstrated above, focused salutary speech involves a direct opposition to inimical speech. And it is a mainstay of the "marketplace of ideas" metaphor, which plays a central role in the jurisprudence of the United States, generally deemed the most speech-protective country in the world (Pati, 2005). Implicit in the American commerce-oriented notion of "free trade in ideas" is that focused salutary speech will challenge inimical speech head on, marginalize it, and ultimately triumph in the encounter. When, however, the marketplace is not functioning properly and the inimical overwhelms the salutary, the pre-process phase will have come to an end and the "process" phase will have begun.

### **Genocidal Speech**

As mentioned previously, the "process" phase consists of three stages: identification, action and execution.

**The identification stage.** Use of salutary speech to combat inimical speech might still be useful during the identification stage, which subdivides into Stanton's "classification," "symbolization," and "dehumanization" segments. This is the twilight zone in the analysis, where reference to other factors, such as media environment, political context, audience characteristics, the authority of the message source, the proliferation of prior similar messages, the channel of communication (print media versus social media, for example), and message content itself may be helpful in discerning the value or not of salutary speech (Benesch, 2008; Pauli, 2010).

Also, the nature and quantity of inimical speech during this stage must be taken into account. If it consists primarily of "general statements," then salutary speech may yet provide an effective remedy. In other words, the "marketplace of ideas" may still be functioning effectively.

However, salutary speech's remedial power will be reduced if the predominant category of speech is "harassment." It will be even less effective when the inimical speech consists mostly of "incitement." And it certainly becomes irrelevant when the incitement is directed toward violence. Of course, different degrees of inimical speech may be present all at once. The key is to parse each category of inimical speech and then engage in holistic analysis regarding any potential counter-effects of salutary speech. In such analysis, the litmus test should be whether, and to what extent, the marketplace of ideas is still operational.



**The action and execution stages.** The action and execution stages encompass Stanton's (1998) organization, polarization, preparation, extermination, and denial categories. It is during these stages that genocide has become inevitable and salutary speech is divested of its remedial power. A full-blown group-elimination campaign is more or less underway and speech is reduced to merely serving that campaign. So the goal at this juncture becomes enjoining and punishing that speech through prosecuting the crime of direct and public incitement to commit genocide.

But what are the elements of the incitement crime? In *Prosecutor v. Akayesu* (1998), the ICTR found that speech could be considered "public" if addressed to "a number of individuals in a public place" or to "members of the general public at large by such means as the mass media, for example, radio or television" (para. 556). And the message could be deemed "direct" if, when viewing the language "in the light of its cultural and linguistic content, the persons for whom the message was intended immediately grasped the implication thereof" (*Prosecutor v. Akayesu*, 1998, para. 557). *Mens rea* consists of a dual intent: (1) to provoke another to commit genocide; and (2) to commit the underlying genocide itself. (*Prosecutor v. Akayesu*, 1998, para. 560). Significantly, causation is not an element; in other words, to establish liability, it is not necessary for the advocacy to result in genocide (*Prosecutor v. Akayesu*, 1998, para. 553; see also *Prosecutor v. Nahimana*, 2003, para. 1015).

The most complex, and controversial, aspect of the crime centers on its key descriptor—"incitement." In defining it, the ICTR has grappled with distinguishing between free exercise of legitimate speech (regardless of how offensive) and corrosion of such speech into criminal advocacy. The *Nahimana* Trial Chamber explicitly identified two analytic criteria to determine whether discourse could be categorized as either legitimate expression or criminal advocacy: its purpose (encompassing, on one end of the continuum, patently legitimate objectives, such as historical research or dissemination of news, and, on the other end, clearly criminal ends such as explicit pleas for violence) (paras. 1004-1006)<sup>9</sup> and its context (circumstances surrounding the speaker's text, such as contemporaneous large-scale interethnic violence, and the speaker's tone of voice) (para. 1022).

My scholarship has identified two additional criteria implicitly used by the *Nahimana* Trial Chamber in formulating its analysis: text and the relationship between speaker and subject. (Gordon, 2004; Gordon, 2008b). The Trial Chamber's discussion of the "text" element was an implicit part of its "purpose" subheading analysis. Applying this element involved a parsing and exegetical interpretation of the key words in the speech (*Prosecutor v. Nahimana*, 2003, para. 1001). With respect to speaker and subject, the Tribunal revealed that the analysis should be more speech-protective when the speaker is part of a minority criticizing either the government or the country's majority population (and less so in other situations) (*Prosecutor v. Nahimana*, 2003, para. 1001).

My scholarship has also advocated bifurcating the context criterion into "internal" and "external" components (Gordon, 2010, p. 637). Internal context refers to characteristics that belong to the speaker, such as background and professional profile, previous publication/broadcast history, and personal manner of transmitting the message (including tone of voice) (Gordon, 2010, p. 637). External context examines the circumstances surrounding the speech, which could include recent

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<sup>9</sup> The space between these two ends of the spectrum clearly invites contextual analysis. And the Tribunal has proposed certain evaluative factors such as surrounding violence, and previous rhetoric. *Prosecutor v. Nahimana* speaks of massacres taking place surrounding the speakers utterance; 1005 focuses on previous conduct to reveal purpose of text (paras. 1004-1005).

incidents of mass violence or the outbreak or imminent outbreak of war (empirically an indicator of a genocidal environment) (Gordon, 2010, p. 637).

**Denial: a unique stage.** "Denial," the final stage of the "execution" phase, can be bifurcated into two categories: (1) contemporaneous denial (related to a conspiratorial cover-up); and (2) subsequent denial (which entails historical revisionism post-genocide).

**Contemporaneous denial.** Denial by direct perpetrators or their confederates as the end-phase of a genocidal cabal must be analyzed as a function of conspiracy law, rather than in terms of ordinary hate speech regulation. As Gregory Stanton (1998) observes

The perpetrators of genocide dig up the mass graves, burn the bodies, try to cover up the evidence and intimidate the witnesses. They deny that they committed any crimes, and often blame what happened on the victims. They block investigations of the crimes, and continue to govern until driven from power by force, when they flee into exile. There they remain with impunity, like Pol Pot or Idi Amin, unless they are captured and a tribunal is established to try them (para. 8).

**Subsequent denial.** In contrast, once the underlying criminal case has concluded, denial discourse must be analyzed as an historical revisionism phenomenon. Since such speech is not part of a cover-up and likely will not result in new violence in the short term, those who zealously protect free-expression prerogatives are against criminal prohibitions for this other form of denial.

And that stance may be justified. In particular, permitting deniers to publish their inaccuracies reveals them as preposterous. It also furnishes the legitimate genocide chronicler with a chance to emphasize to the public how the actual events unfolded, and in this way actually reinforces the truth.

Further, aspects of the genocide previously unexplored, or insufficiently probed, may be brought to light in the confrontations with deniers. In addition, allowing deniers to air their views, however ridiculous, strengthens democracy by bolstering the notion that citizens are self-directed and can exercise significant expressive and personal choice prerogatives. Finally, a permissive legal regime for deniers allows society to hold up a mirror to itself and thereby grasp whether, and to what degree, genocide historical literacy may be lacking or genocidal propaganda that needs countering may be emerging or flourishing. Such awareness is crucial in working toward prevention of future genocides.

That said, context is crucial. Past events in some countries may dictate a different approach. After the Holocaust, for instance, Germany was justified in not giving free rein to Holocaust deniers and thus its anti-denial laws were appropriate. Likewise, in the wake of the 1994 planned destruction of Rwanda's Tutsi population, the new post-genocidal government of Rwanda was justified in criminalizing its denial. In these situations, when the survivor population is still vulnerable and the spectre of mass violence still looms, the post-genocide government is given a case-specific mandate to outlaw historical fabrication.

Even the staunchest free speech advocates support anti-denial laws in post-genocidal countries (Abrams, 2012). But that is as far as they are willing to go. American lawyer Floyd Abrams (2012), for example, rejects the prospect of Holocaust denial regulation in places such as the United States and Canada because neither was the destruction site of European Jewry. Nevertheless, in light

of sizeable American and Canadian Holocaust victim populations, which may be vilified and denigrated by the denial, criminalization may be called for in those nations.

But even in those situations and the others discussed above, criminalization may still be problematic. In particular, while denial laws may seem rational when survivors are still among the living, a time may come when those laws no longer serve their purpose. The difficult part is to know when that time may come. Also, even if denial laws are otherwise still justified, there is always the risk that they will not be enforced fairly or effectively. In those cases, enforcement issues, especially on a systematic scale, could warrant abolishing such laws.

Looking forward, though, if lack of criminal enforcement ultimately permits denial to gain traction in the future, then the stage may be set for genocide to rear its abominable head once again. Gregory Stanton (1998) observes that denial "is among the surest indicators of future genocidal massacres" (para. 8). And even if denial alone is insufficiently causal, it can be combined with more direct methods of incitement to bring about the desired result. Dealing effectively with denial thus defies easy solutions.

### **Conclusion**

Countering genocidal campaigns, even at the most incipient stages, is a complex endeavor. This paper has focused on speech, which is only one aspect of such campaigns. But this is an extremely significant aspect since genocide is not possible without inimical speech. In fact, such toxic communication is relevant at every stage of the genocide cycle and is inexorably bound with genocide prevention. This paper posits that salutary speech's remedial powers can neutralize inimical speech through much of the "process" phase and all of the "pre-process" phase.

Nevertheless, in the later stages of the genocide cycle, salutary speech's power wanes. Punishment, at that point, must be the remedy. Whether that is true with respect to the special phenomenon of denial, is difficult to determine. But denial in the victim country in the immediate aftermath of genocide must be outlawed.

The degradation of democratic institutions combined with the flourishing of inimical speech, if left unchecked, may lead to genocide. Speech can serve as the needed check with respect to each step on the genocidal continuum. But it can also reinforce the eliminationist campaign. With an appreciation of the policy issues considered in this paper, nations should be able to calibrate speech use, regulation and punishment to strike the proper balance between genocide prevention and liberty preservation.

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