

Trying Inciters Early Could Be One of the Strongest Antidotes to Genocidal Violence

Comment on Sheri Rosenberg's "The Relationship between the International Criminal Court and the Prevention of Mass Atrocities"

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Sheri Rosenberg¹, in the synopsis of her paper observes, "Since Nuremberg there has been an ex-post punishment approach toward mass atrocity, instead of an ex ante effective policy of prevention. And while relevant actors have made some steps in the direction of direct mass atrocity prevention, energized by the Responsibility to Protect Principle, our continued focus on trials has the potential to circumscribe and short-circuit our understanding of the particular prevention tools that should be utilized in a specific situation. The central goal of prevention remains to identify situations where there are real risks of genocide and to intervene at an early stage before they devolve in mass atrocities. While the ICC may ultimately contribute to the development of a normative environment where genocide is no longer tolerated, mass atrocities continue unabated, and the prevention agenda must expand to meet this reality."

I want to suggest ways to make national and international courts venues to prosecute those who would directly and publicly incite genocide, among the surest early warning signs of potential genocide and mass murder, and to arrest such persons and take them to trial.

Most strategies for prevention focus on Genocide Convention Article 2, defined as any of five enumerated acts, including: "(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 it physical destruction in whole or in part;" "(d) imposing measures intended to prevent births within the group;" or "(e) forcibly transferring children of the group to another group."

What has often been ignored is that if they have the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, perpetrators may also be prosecuted *directly* for the acts enumerated in Article 3 of the convention: "(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; or (e) Complicity in genocide."

Two of these crimes are especially relevant to prevention of genocide:

Article 3(b) Conspiracy to commit genocide; and 3(c) Direct and public incitement to commit genocide.

Although lawyers from civil law countries have no direct legal equivalent to conspiracy, the ICTY, ICTR, ICC, KRT, and other international tribunals have substituted “joint criminal enterprise.” Because gathering evidence before actual killing begins can be difficult, conspiracy is a harder crime to prove than direct and public incitement. Yet it could be grounds for prosecution if evidence could be found that perpetrators are planning genocide.

For the prevention of genocide, I have a specific proposal: that policy makers judging risk, planning when and how to prevent genocide, and when to punish genocide should focus on the clearest warning sign of genocidal violence: public incitement to commit genocide. Planners of genocide who publicly incite their followers to commit genocide should be tried for hate crimes if their countries have independent courts where such trials can be held. If their countries are states-parties to the Rome Statute of the International Criminal Court, and their own courts do not try such inciters to genocide, the ICC should investigate these crimes and seek to arrest and try them in the Hague.

The history of genocide shows that direct and public incitement to commit genocide is one of the surest warning signs of both the intent and the planning to commit actual genocide. Trying inciters early could be one of the strongest antidotes to genocidal violence.

The crime of direct and public incitement to genocide was a common element in the Holocaust, the Herero genocide, Armenia, Cambodia, Bosnia, Rwanda, and Darfur. Actual genocide need not be completed for an inciter to be tried for the crime.

Julius Streicher, publisher of *Der Sturmer*, the Nazi propaganda newspaper, was hanged for crimes against humanity, even though he himself had committed no murders. Streicher published *Der Sturmer*, which was filled with Nazi vilification of Jews and portrayed them as devils, rats, vampires, and other symbols of evil.

In the Media Case at the ICTR, three defendants were convicted of incitement to commit genocide:

Hassan Ngeze published *Kangura*, a virulently anti-Tutsi newspaper that called Tutsis “cockroaches” and included one front page that said simply “the final solution to the Tutsi problem” beside a picture of a Tutsi and a machete. Ferdinand Nahimana was a founder of the notorious Radio Television Libre des Mille Collines (RTLM), which began broadcasting anti-Tutsi propaganda in July 1993.

All Tutsis were “inyenzi” (cockroaches) and the RPF and their “inkotanyi” (accomplices) “should all stand up so that we kill the Inkotanyi and exterminate them...the reason we will exterminate them is that they belong to one ethnic group.”

I make two concrete proposals to supplement Sheri Rosenberg’s brilliant presentation.

1. I propose that the International Criminal Court (ICC) and other courts, national and international, focus more efforts on prosecution of persons directly and publicly inciting other people to commit genocide. By doing so, they will re-focus prosecutions much earlier in the genocidal process. They could actually prevent genocides in the making.

2. The International Criminal Court (ICC) needs an International Police Force to enforce its arrest warrants.

As Rosenberg observes, the “Responsibility to Protect Principle” (R 2 P) has not yet become established international law. Despite its consensus adoption at the 2005 UN Millennium Summit, and its invocation in two UN Security Council Resolutions since then, neither Russia nor China, two Perm-5 members of the UN Security Council, nor many nations in the Non-Aligned Movement have truly adopted R 2 P as obligatory, a requirement of all law. At best, R 2 P is still an emerging norm of international law. It will become law the more often it is invoked in UNSC Resolutions and actual state practice.

Rosenberg also observes that the International Criminal Court (ICC) has had serious problems getting its arrest warrants enforced, notably its warrant against Joseph Kony, and its warrants against Sudan’s Omar al-Bashir, Ahmed Harun, and Abdelrahim Mohamed Hussein.

Leo Pospisil in his *Anthropology of Law*² states that to be considered law, principles of social control must have four characteristics: 1. They must be passed by authoritative decision (i.e., by a legislature, executive decree, the UN Security Council, or a court); 2. They must be intended to be universally or generally applicable; 3. They must be obligatory or binding; and 4. they must be enforced by sanction of a physical or non-physical nature.

Failure to enforce arrest warrants means that they lack element four, enforcement. Most frequently, national police forces are not permitted to enforce them by national government authorities. The UN Security Council could order UN Peacekeepers to enforce arrest warrants issued by the ICC. But that could be blocked by a Perm-5 veto.

The ICC needs an International Police Force (IPF) with the sole mandate to enforce arrest warrants issued by the Prosecutor and Pre-Trial Chamber of the ICC. Such a Police Force could be created by an Optional Protocol to the

Rome Treaty negotiated by the members of the Assembly of States Parties of the ICC. Such a treaty would not require approval by the United Nations. The International Police Force would be limited in its authority – it could only arrest persons charged by the ICC with war crimes, genocide, or crimes against humanity. It could not become a rogue “black helicopter” international police force with power to arrest anyone for ordinary crimes.

The IPF would finally give the ICC the effective teeth it needs to enforce its arrest warrants, and bring persons charged by the ICC to the Hague to stand trial. The International Police Force should be well trained and well armed, equipped with its own transportation and communication facilities. It should work with national police, governments, diplomats, and the UN, intelligence services and Interpol.

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¹ Rosenberg, Sheri P. The Relationship between the International Criminal Court and the Prevention of Mass Atrocities. *GPN Genocide Prevention Now*, Issue 12, Winter 2012

²Pospisil, Leo. *Anthropology of Law*, 1974. New Haven: HRAF Press. 95.