

# The Concept of Genocide in International Criminal Law

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Developments after Lemkin

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## Chapter 12

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**Social media incitement to genocide**

ECHR countries' perspective

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# 12 Social media incitement to genocide

## ECHR countries' perspective

*Piotr Łubiński*

### Introduction

We can observe a revolution in communication within the last decade. One of the most significant aspects of it is the phenomenon of social media. Social media has become an excellent channel to mobilize support, disseminate narratives, wage information operations, or even coordinate military operations in the real world,<sup>1</sup> and has become one of the most powerful tools for coordinating nearly all of the world's political movements. The content on social media can be distributed by means and methods which avoid control or censorship, or even quality control. This leads to an increasing number of problems related to its mass use, particularly in cases when it is used to fuel social unrest. There is no recent or ongoing conflict which is not partly at least a result of the mass use of social media. The “Arab Spring”, or the more current “*Mouvement des gilets*” in France, were powered by the use of social media to organize a massive group of protesters. As a result, larger, more loosely connected groups could conduct coordinated actions that were previously reserved for formal organizations.<sup>2</sup> Social media has also been used to support military operations.<sup>3</sup>

An intrinsic element of the mass use of social media is its vulnerability to manipulation(s). These popular movements are difficult to control, in particular with respect to ensuring that the content distributed amongst followers on the internet is accurate.<sup>4</sup> In recent years social media has not only become a channel for social unrest and data manipulation, but also constitutes a useful channel for spreading hate speech that may amount to behaviour known in the

1 Beata Biały, Social Media: From Social Exchange to Battlefield, *Cyber Defense Review*, Vol. 2(2) (Summer 2017), p. 75.

2 Clay Shirky, The Political Power of Social Media Technology, the Public Sphere, and Political Change, *Foreign Affairs*, Vol. 90, 2011, p. 35.

3 Biały, p. 75.

4 Matthew Mastromauro, Pre-trial Prejudice 2.0: How YouTube Generated News Coverage Is Set to Complicate the Concepts of Pre-trial Prejudice Doctrine and Endanger Sixth Amendment Fair Trial Rights, *Journal of High Technology Law*, Vol. 289, 2010, p. 291.

legal doctrine as “incitement to genocide”. Within the last few years there have been at least two widely discussed examples of using social media with genocidal intent. The first was the case of ISIS and the Yazidi, and the second the case of the Rohingya population in Myanmar.

This article analyses the use of social media by ISIS (or Daesh) against the Yazidi population. In the Yazidi case I try to address the more general question of whether social media activity may, under certain circumstances, fall within the scope of incitement to genocide. This general issue is separated into several elements. It begins by presenting the scale and nature of ISIS activity in social media. Next, overlapping notions and legal regulations are examined, bearing in mind, for example, that the same content may constitute hate speech, incitement to terrorism, and/or incitement to genocide. Subsequently, some concepts in the jurisprudence on incitement will be applied to the new media, particularly from the perspective of the media cases adjudicated by the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the Former Yugoslavia (ICTY) as well as the European Court of Human Rights (ECtHR).

Finally, the question of the criminal responsibility of persons engaged in ISIS’s social media activities will be addressed, with particular attention to the internet genocide inciters supporting ISIS cause in European Convention on Human Rights (ECHR) countries.

### **Prevention of genocide: the legal framework**

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention) provides in Article 1 for general obligations on state parties, declaring that “genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. It creates the *hostis humani generi* character of the crime. It was also confirmed by the ICTR in the case of *Prosecutor v. Ntuyahaga* that universal jurisdiction exists for the crime of genocide. Thus the Convention puts on all state parties a legal obligation to combat genocide in all possible forms. Article 2 defines genocide as:

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

In August 2014 the Yazidi population suffered from acts proscribed by points (a), (b), (c), (d) and (e) of Article 2.<sup>5</sup>

The main question addressed in this chapter is: which acts referred to in Article 2 are punishable? Should just physical extermination be punished? Or should other forms – including incitement to genocide as foreseen in the Article 3 (c) *Direct and public incitement to commit genocide*<sup>6</sup> – which are conducted and executed in the social media realm be punishable? This issue raises important questions as to whether mere social media activity can be considered as acts prohibited by international law, especially taking into consideration the nature and scale of the ISIS internet operation.

## **Incitement to commit genocide: general remarks**

### *Lemkin's views on incitement and propaganda*

When creating the concept of genocide, Raphael Lemkin was fully aware of the notion of incitement. As Irvin-Erickson has noted in his excellent book on Lemkin, in 1932 in the early years of his career Lemkin was collaborating with Professor Emil Rappaport on a new Polish criminal code. Lemkin was an author of, inter alia, Article 113, which criminalized incitement to aggressive war. His position corresponds with a 1927 Hersch Lauterpacht essay declaring that prohibitions on propaganda to incite war could be enshrined in national laws. In his further elaborations Irvin-Erickson mistakenly states that the Lemkin legacy led to the first criminal code which outlawed propaganda to incite violence.<sup>7</sup> It only outlawed incitement to wage an aggressive war.

Lemkin was bitterly aware of the nature of hateful propaganda. It was during the time of the Madrid conference in 1933 that Ukrainians were facing a Soviet-induced Holodomor (great famine; see Chapter 2). In his article “Soviet genocide in the Ukraine”, published in 1953, Lemkin stated in a very direct way that genocide had taken place there. He was also greatly aware of the nature of Nazi propaganda at the time of the Holodomor. Later, his ideas were presented in the trials held by the International Military Tribunal at Nuremberg in 1946. The sentencing of *Der Stürmer* editor Julius Streicher and Hans Fritzsche, Reich Minister of Public Enlightenment and Propaganda, showed to the world the true nature of Goebbels’ Nazi propaganda, with its hateful incitement of Germans to actively persecute and murder their Jewish neighbours.

5 Human Rights Council Report, Thirty-Second Session on Human Rights Situations That Require the Council’s Attention, “They came to destroy”: ISIS Crimes Against the Yazidis, A/HRC/32/CRP.2, 15 June 2016, pp. 21–28.

6 1948 Convention for the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, Art. II, 78 UNTS 277 (entered into force 12 January 1951).

7 Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, University of Pennsylvania Press, 2017, p. 41 (footnote 3).

Lemkin's approach is reflected in Article 3 of the Genocide Convention, which prohibits direct and public incitement to genocide as well as all forms of complicity.<sup>8</sup> In order to maintain the preventive character of the prohibition of genocide, this inchoate crime concept – i.e. of direct and public incitement – became a punishable offence.<sup>9</sup>

### ***Incitement to genocide and freedom of speech under international criminal tribunals and the ECHR***

When discussing the issue of incitement in the new media age one may argue that it is protected by freedom of speech and that everything is blurred and it is very difficult to govern, and that for the sake of protecting a cornerstone of democracy, we should take a more lenient approach.

Freedom of speech is indeed truly one of the most fundamental rights in a democratic society. However, it is not unlimited. A lack of limits on freedom of speech easily leads to violation of the rights of others. Freedom of speech has been meticulously shaped by international law and courts. The International Covenant on Civil and Political Rights provides that “Any propaganda for war shall be prohibited by law” and “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>10</sup>

Similar language is used in the International Convention on the Elimination of All Forms of Racial Discrimination. Article 4(a) declares that state parties

[s]hall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin and the provision of any assistance to racist activities, including the financing thereof.

The European Convention of Human Rights also protects freedom of expression. In the *Handyside* case the Court, then referred to as “the Commission”, explained righteously that this right may be “favourably received or regarded as inoffensive or as a matter of indifference, but also [...] those that offend, shock or disturb”.<sup>11</sup> But freedom of expression is not unlimited. Article 10.2 of the ECHR provides that

8 Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, *Treaty Series*, Vol. 78, p. 277. <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf/>

9 William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Cambridge: Cambridge University Press, 2006 p.181

10 International Covenant on Civil and Political Rights 1966, 999 UNTS 171, (1966) 6 ILM 368; available at: <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

11 *Handyside v UK* (1976) Series A No 24, para 49.

the exercise of these freedoms [...] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, [...] for the prevention of disorder or crime.<sup>12</sup>

In this regard two values must be balanced: freedom of speech and the prevention of genocide as broadly construed. The prevention of genocide, or specifically the exclusion of incitement to genocide from the protections of freedom of speech, should be interpreted in conjunction with Article 17 of the ECHR, which says that groups and individuals should not “engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”. The Court has applied Article 17 in cases of Holocaust revisionism and forms of anti-Semitism.<sup>13</sup>

The ECtHR has several times strongly opposed incitement to violence. In *Hizb ut-Tahrir and Others v. Germany*, the ECtHR referred to the ban on activities of an Islamist association for advocating the use of violence (active jihad, suicide attacks in Israel) in order to destroy Israel. The association was calling for the banishment or killing of Israeli inhabitants and for the overthrow of the governments of the Israeli state. In the Court’s view, the association’s approach, by “employing this right for ends which are clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life”<sup>14</sup> was not nor should be protected by the Convention.

The Court’s finding was confirmed in the case of *Kasymakhunov and Saybatalov v. Russia*.<sup>15</sup> The applicant was convicted for spreading the ideology of Hizb ut-Tahrir al-Islami, banned as a terrorist organisation in Russia, and for

12 Article 10 reads in full: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: [www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [accessed 11 July 2019].

13 Antoine Buyse, *Dangerous Expressions: The ECHR, Violence and Free Speech*, *International and Comparative Law Quarterly*, Vol. 63(2), April 2014, p. 494.

14 Case of *Hizb Ut-Tahrir and others v. Germany* (App No 31098/08, 12 June 2012) para 74, available at: <http://hudoc.echr.coe.int/eng?i=001-111532> [accessed 10.07.2019].

15 Case of *Kasymakhunov and Saybatalov v. Russia* (Applications No 26261/05 and 26377/06), available at: <http://hudoc.echr.coe.int/eng?i=001-117127> [accessed 10.07.2019].

recruiting new members. The organization was glorifying warfare and Islamic rule based on the Sharia (religious law). According to the ECtHR, the dissemination of these kinds of political ideas fell within the scope of the Article 17 prohibition.

A very similar line was confirmed in the ECtHR decision in *Belkacem v. Belgium*.<sup>16</sup> In this case the Court declared that the applicant's claim that he was unjustly sentenced to a fine and prison was inadmissible. The applicant, the leader and spokesperson of the organisation Sharia4Belgium, was sentenced for incitement to discrimination, hatred, and violence on account of remarks he made in YouTube videos concerning non-Muslim groups. In the Court's view, the hateful attack was incompatible with the values of tolerance, social peace, and non-discrimination.<sup>17</sup> Moreover, in the Court's opinion his remarks advocating jihad and defending Sharia and calling for violence to establish it could be regarded as "hate speech".<sup>18</sup>

In the light of the judgments of international courts as well as the opinions of a number of legal scholars, incitement to genocide is prohibited. It is prohibited not only in ICTR judgments but also constitutes an *ius cogens* norm.<sup>19</sup>

This approach is supported by the ECHR, which prohibits the abuse of rights and freedoms. The ECtHR has in several cases admitted that freedom of expression is not unlimited and that Article 17 provides a reasonable tool for fighting against the abuse of basic freedoms. The ECtHR has mostly dealt with hate speech, but referring to *argumentum a maiori ad minus* has clearly indicated that incitement to genocide is a form of hate speech and is not protected by the freedom of expression under the ECHR.

### *Incitement to genocide and genocide: a causal link*

The issue of incitement raises a question regarding causality of the crime. Should incitement be punishable only when the incited crime took place? This is of particular importance when we are speaking about social media. Very often, due to the nature of incitement in cyberspace there is little or no territorial link with a crime in question. But from the perspective of crime prevention, the simple fact of incitement should be punished.

16 Press Release – Registrar of the Court ECHR 253 (2017) 20.07.2017, available at: <https://hudoc.echr.coe.int/app/conversion/pdf/library=ECHR&cid=003-5795519-7372789&filename=Decision%20Belkacem%20v.%20Belgium%20-%20hate%20speech%20by%20the%20leader%20of%20a%20radical%20Salafist%20organisation.pdf>.

17 Ibid.

18 For more, see Guide on Article 17 of the Convention – Prohibition of Abuse of Rights, March 2019, available at: [www.echr.coe.int/Documents/Guide\\_Art\\_17\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf) [accessed 10.07.2019].

19 More on Report of the International Law Commission Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014) (A/69/10) vide Tladi annex, available at: <https://legal.un.org/docs/?path=/.ilc/reports/2014/english/annex.pdf&lang=EFSSRAC>.

This line of reasoning has been confirmed by international courts prohibiting public and direct incitement towards genocide. As was pointed out in the *Akayesu* case, the incitement to commit genocide should be punished whether or not it was successful.<sup>20</sup> A similar reasoning was confirmed in the *Nahimana* case, where the Court ruled that no causal link between the words and the act was necessary for the crime of incitement to have occurred.<sup>21</sup> It underlined that there is no need for evidence that genocide was committed as a result of the incitement.<sup>22</sup>

The legal nature of incitement to genocide was confirmed by the *Media Case* Appeals Chamber.<sup>23</sup> Incitement crimes are known as “inchoate” offenses. In other words, the crime is committed when the words are uttered in the proper context. There need be no results in terms of violence.<sup>24</sup> Causation is not an element of the crime of incitement to genocide.<sup>25</sup>

### *Incitement to genocide: direct and public*

In order to fulfil the liability requirements of the Genocide Convention one has to have a specific intent to cause genocide, and the incitement must be *direct* and *public*.<sup>26</sup> As regards the term “incitement”, according to the Cambridge dictionary it means “to encourage someone to do or feel something unpleasant or violent”.<sup>27</sup> The meaning of the term “incitement” was explained in the *Kajelijeli* judgment as follows:

In the common law jurisdictions, incitement to commit a crime is defined as encouraging or persuading another to commit the crime, including by

20 Wibke Kristin Timmerman, *The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?* *Leiden Journal of International Law*, Vol. 18, 2005, p. 267.

21 *Ibid.*, p. 267.

22 *Nahimana et. al.* (ICTR-99-52-T) in Schabas, p. 181.

23 Shannon Fyfe, *Tracking Hate Speech Acts as Incitement to Genocide in International Criminal Law*, *Leiden Journal of International Law*, Vol. 30(2), 2017, p. 538.

24 Elizabeth M. Renieris, *Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and the United Kingdom and the Need for International Solution*, *11 Vand J. Ent. & Tech. L.* 673, 682 (2009) (with reference to incitement to terrorism); Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, *48 Va. J. Int'l L.* 485, 494 (2008) (with reference to incitement to genocide).

25 For more on that see Gregory S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation Fruition*, Oxford University Press, 2017 (noting that causation is not a required element and specifying that “to make out a prima facie case, the prosecutor need not prove the incitement resulted in genocide”); and Gregory S. Gordon, “Freedom of Expression, Hate Speech, and Incitement to Terrorism and Genocide: Resonances and Tensions,” in Anne F. Bayefsky and Laurie R. Blank (eds), *Incitement to Terrorism*, Brill Nijhoff, 2018, p. 16.

26 Benesch, p. 493.

27 Collins Cobuild online dictionary <https://dictionary.cambridge.org/pl/dictionary/english/incite>.

use of threats or other forms of pressure, whether or not the crime is actually committed. [...] Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended directly to provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audio-visual communication.<sup>28</sup>

The meaning of the term “direct and public” was later developed by the international criminal courts, particularly by the ICTR and ICTY. In the *Akayesu* case, the Court stated that:

The ‘direct’ element of incitement implies that the incitement assumes a direct form and specifically provokes another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement.<sup>29</sup>

Furthermore, in the *Nyiramasubuko* case the Court stated:

‘Direct’ incitement to commit genocide requires that the speech is a direct appeal to commit an act referred to in Article 2 (2) of the Statute. It must be more than a vague or indirect suggestion, and an accused cannot be held accountable for this crime based on hate speech that does not directly call for the commission of genocide. However, even when a speech contains no explicit appeal to commit genocide, it may still constitute direct incitement to commit genocide in a particular context, so long as the speech is not considered ambiguous within that context. In order to determine the speech’s true meaning, it may be helpful to examine how it was understood by the intended audience. In the context of Rwanda, the culture and nuances of the Kinyarwanda language should be considered when determining what constitutes direct incitement to commit genocide.<sup>30</sup>

The public element was deliberated upon in the *Kajelijeli* case, where the Court stated that:

28 The *Prosecutor v Kajelijeli* Judgment, 1 December 2003, para. 850, available at: <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-44a/trial-judgements/en/031201.pdf>; see also footnote 1060 of the case and reference to Ashworth, *Principles of Criminal Law*, p. 462, cited in *Akayesu*, Judgment (TC), para. 555.

29 The *Prosecutor v Akayesu*, Judgment (ICTR-96-4-T) 1998, para. 557, in Schabas, p. 182, available at: <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

30 *The Prosecutor v. Pauline Nyiramasubuko et al.*, Trial Judgment, 24 June 2011, para. 5986, available at: <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-98-42/trial-judgements/en/110624.pdf>.

The ‘public’ element of incitement to commit genocide is appreciated by looking at the circumstances of the incitement – such as where the incitement occurred and whether or not the audience was select or limited. As in *Akayesu* the 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.<sup>31</sup>

The nature and scope of public incitement was also clarified in the *Nyiramasuhuko* case, as follows:

In discussing the ‘public’ element of this crime, the Appeals Chamber has noted that ‘all convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area’.

Moreover, the Appeals Chamber has taken into account the travaux préparatoires of the Genocide Convention, which confirm that ‘public’ incitement to genocide pertains to mass communications. Conversely, the travaux préparatoires indicate that ‘private’ incitement – understood as more subtle forms of communication such as conversations, private meetings, or messages – was specifically removed from the Convention.<sup>32</sup>

This last sentence seems to be of particular importance. Current online communication is often not private or “subtle”; i.e. resulting in “private incitement”. Social media posts, shares, and likes can reach thousands or even millions of people, not to mention the almost unlimited number of followers on a platform such as Twitter or Facebook. Seen in this perspective, information provided through social media channels can certainly be considered as “direct and public”.

### *Incitement to genocide and hate speech*

There is a distinction between hate speech and incitement to genocide. This was noted in the *Media Case* by the ICTR.<sup>33</sup> At the same time, incitement to

31 *The Prosecutor v Kajelijeli* Judgment, 1 December 2003, para. 850; and *The Prosecutor v Akayesu* Judgment 2 September 1998, para. 851, available at: <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-98-44a/trial-judgments/en/031201.pdf>.

32 *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Trial Judgment, 24 June 2011, para. 5986, available at: <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-98-42/trial-judgements/en/110624.pdf>.

33 *The Prosecutor v Nahimana et al.*, ICTR-99-52-A, A Ch (28 November 2007), para 986.

genocide certainly often overlaps with hate speech. Since the same wording may be attributed to both forms of offensive language, here I refer to the broadly discussed Susan Benesch test, proposed in her article “Vile Crime or Inalienable Right: Defining Incitement to Genocide”. According to Benesch, hate speech may be considered as an incitement to genocide when:

- 1 The speech (was) understood by the audience as a call to genocide;
- 2 The speaker has authority or influence over the audience and the audience has the capacity to commit genocide.

She also poses additional questions:

- 3 Have the victims-to-be already suffered an outbreak of recent violence?
- 4 Were contrasting views still available at the time of the speech? Was it still safe to express them publicly?
- 5 Did the speaker describe the victims-to-be as subhuman, or accuse them of plotting genocide of their own?
- 6 Had the audience received similar messages before the speech?<sup>34</sup>

All these elements provide a solid ground to consider certain acts of speech not only as hate speech, but also – or maybe first and foremost – as incitement to genocide. However, one comment needs to be made. Benesch’s conditions were crafted to be applied to the traditional media environment. For this reason some modifications may be proposed. For example point 2 – “The speaker has authority or influence over the audience and the audience has the capacity to commit genocide” – is based on the history of popular and influential singer Simon Bikindi, whose talent, popularity, and recognition were used by the Hutu genocidal enterprise.<sup>35</sup> In modern days, especially in the realm of social media, this issue of authority or influence on the audience may have a different meaning. It is not necessarily the result of mass popularity of a singer such as Simon Bikindi, but rather may arise because of a personal individual connection between *incitee* and the *incitor*, who may be someone not influential like Bikindi but known only as an influencer on a particular forum. All the other Benesch points can be easily adapted to the reality of the social media environment.

### *Genocide incitement techniques*

Using traditional, conventional words, Shannon Fyfe made several observations regarding verbal oppression as an example of genocide incitement techniques.<sup>36</sup>

34 Benesch, p. 498.

35 *The Prosecutor v Simon Bikindi*, ICTR-01-72-A, available at: <https://unictr.irmct.org/sites/unictr.org/files/cases/ict-01-72/public-information/en/profile-bikindi.pdf>.

36 Fyfe, p. 531.

Also, Richter points out in a more detailed way different forms of incitement techniques:

- 1 Dehumanization – a method used by perpetrators to evoke feelings of loathing, contempt, and revulsion.<sup>37</sup>
- 2 Demonization – blaming the target for the perpetrators’ personal misfortunes or those of his/her group and/or provoking feelings of fear towards a specific group.
- 3 Delegitimization – denying the existence or history of the other group, and/or accusing the target of extreme criminal acts.
- 4 Disinformation – presenting false or partial information with the intent to malign.
- 5 Denial – negating historical facts or denying past atrocities.
- 6 Threats – statements of intent to inflict pain, injury, damage, or other hostile action on groups or individuals.
- 7 Glorification<sup>38</sup> of terror by invoking well-known perpetrators of genocidal violence as role models (such as memorializing the “martyrs” or financial compensation for families of “martyrs” or terrorists).<sup>39</sup>

Both offenses – incitement to genocide or hate crimes – employ a technique known as “accusation in a mirror”, which occurs when the perpetrator of the crime tries to accuse the victims of the very thing that the perpetrator is doing. This insidious technique was used to great effect in the Rwandan

37 “Dehumanization: After all, what does it take to treat fellow human beings as though they are not human beings? And the answer is this: dehumanization technique. In genocidal Rwanda, extremist Hutus routinely dehumanized Tutsis by referring to them in their incitement as snakes, cockroaches, and rats. Similarly, consider *Der Stuermer*, which was the viciously anti-Semitic paper edited by Julius Streicher. Based on the content of his newspaper, Streicher was prosecuted for crimes against humanity and found guilty at Nuremberg. The Palestinian Authority’s outlets – and even children’s shows and school curricula – have long called Jews snakes, monkeys, and pigs and called for the annihilation of Israel.” Gordon, *Freedom of Expression*, p. 20.

38 “Glorification [...] Both incitement to genocide and terrorism tend to glorify past violence. For example, glorification of terrorism is currently taking place in the Palestinian Authority (PA). A recent example would be Jabril Raboul, a PA official, possibly a successor to PA leader Mahmoud Abbas. In 2015, he called a shooting attack in Beer-sheba that killed two and injured eleven an act of heroism. This incitement technique has resonances with the Rwandan Genocide. In addressing the population on Radio Television Libre des Mille Collines, RTL, the infamous ‘Radio Machete’, announcer Georges Ruggiu congratulated the ‘valiant combatants’ who engaged in a ‘battle’ against innocent Tutsi civilians. This was a glorification of genocidal violence.” Gordon, *Freedom of Expression*, p. 18.

39 See Elihu D. Richter, *Incitement, Genocide, Genocidal Terror, and the Upstream Role of Indoctrination: Can Epidemiologic Models Predict and Prevent?* *Public Health Reviews*, December 2018, p. 14, available at: <https://link.springer.com/article/10.1186/s40985-018-0106-7>.

Genocide.<sup>40</sup> For example, in an infamous speech in the lead-up to the Rwandan Genocide, Hutu extremist politician Leon Mugesera declared:

These people called ‘*inyenzi*’ [which means “cockroaches”, thus also representing dehumanization] are now on their way to attack us. I am telling you, and I am not lying, it is they who want to exterminate us. They only want to exterminate us. They have no other aim. Are we really going to wait until they come to exterminate us?<sup>41</sup>

This speech was delivered by a person whose organization was planning genocide. So this is a classic “accusation in a mirror”. This method can easily be discovered in ISIS’s direct and public incitements to genocide, examined below.

### **Social media activity of ISIS: global and European aspects**

There are a number of organizations which use social media for propaganda, recruitment, fundraising, data mining, and – what is most important – for indoctrination and incitement to criminal acts.<sup>42</sup> Al-Shabaab used Twitter during its attacks on a shopping mall in Nairobi in 2013. Lashkar-e-Taiba even coordinated its operation in Mumbai using data from Google Earth and other apps to hit the most crowded places.<sup>43</sup> A number of other examples are also well known.

There are several ways of exploiting social media to support military objectives. Tomas Elkjer Nissen identifies six of them: intelligence collection; (geo-)targeting; cyber operations; command and control; defence; and psychological warfare (informing and influencing).<sup>44</sup> This chapter analyses the most prominent, the so-called PSYOPS element.

In its psychological warfare ISIS has constructed a “state of the art” social media presence. It has underlined the notion of “information warfare” on several occasions. For example, Abu Hamza al-Muhajir, formerly War Minister and Prime Minister in the Islamic State of Iraq, contended that: “The Messenger of Allah (peace be upon Him) used to employ the most influential type of media

40 See Kenneth L. Marcus, *Accusation in a Mirror*, 43 *Loy. U. Chi. L.J.* 357, 358 (2012) (“In other words, AiM [Accusation in a Mirror] is a rhetorical practice in which one falsely accuses one’s enemies of conducting, plotting, or desiring to commit precisely the same transgressions that one plans to commit against them.”).

41 *Mugesera v. Canada* [2005] 2 s.c.R. 100, 2005 scc 40 app. ill, [i8]. Cited in Gordon, *Freedom of Expression*.

42 Alexander Tsesis, *Terrorist Speech on Social Media*, *Vanderbilt Law Review*, Vol. 70, 2017, p. 655.

43 James P. Farwell, *The Media Strategy of ISIS*, *Survival, Global Politics and Strategy*, Vol. 56(6), 2014.

44 Tomas Elkjer Nissen, *Social Media as a Tool of Hybrid Warfare*, NATO Strategic Communications Centre of Excellence, 2016, p. 11, cited in Bialy, p. 76.

in His time that had the greatest impact on the spirits of His enemies, which is poetry.”<sup>45</sup> Using Twitter,<sup>46</sup> Facebook, and Snapchat it managed to influence thousands of followers.<sup>47</sup> At the peak of its activity, ISIS and its supporters were producing 90,000 tweets and other social media responses every day.<sup>48</sup> Their social media activity was linked with so-called anonymous sharing portals such as JustPaste.it, Sendvid.com, and Dump.to, which protect user anonymity.<sup>49</sup> ISIS achieved mastery in publicly presenting its actions, with its heinous acts meticulously directed, staged, and streamed all around the world.

ISIS used social media to try and achieve several goals. Its strategy was presented in a document called “Media Operative, You Are a Mujahid, Too”, which was published online by ISIS in April 2016 on the its official propaganda channel on the social platform Telegram.<sup>50</sup> ISIS directly empowered its followers, saying “that participant[s] in the production and delivery” of propaganda should be regarded as one of ISIS’ “media mujahidin”.<sup>51</sup> This particular notion is of great importance. It makes it possible to classify ISIS social media followers not as bystanders, but as conscious individuals fully aware of their role in the military and genocidal efforts of ISIS.

There is no doubt that an intentional concept of incitement through social media was spread by ISIS. Winter quotes *Media Operative*, which says, “Inciting others to join the *jihad* is tantamount to engaging in the *jihad* oneself, as is steering others towards it and opening their eyes to it. The one who incites is a *mujahid* in the way of Allah the Almighty”.<sup>52</sup>

Regardless of whether it was fully intentional or not, it certainly created a grey area of complicity. Especially from the ISIS perspective, the social media mujahidin operation was highly successful because it blurred the line between curious onlookers, supporters, and members of ISIS.<sup>53</sup>

ISIS not only mastered its propaganda, it also created a tailored narrative – both a positive and negative one. The positive one was oriented toward creating

45 Charlie Winter, *Media Jihad: The Islamic State’s Doctrine for Information Warfare*, ICSR King’s College London, available at: <https://icsr.info/wp-content/uploads/2017/02/ICSR-Report-Media-Jihad-The-Islamic-State%E2%80%99s-Doctrine-for-Information-Warfare.pdf> (12.04.2019), p. 12.

46 Tsesis, p. 655.

47 Joseph Shaheen, *Network of Terror: How Daesh Uses Adaptive Social Networks to Spread its Message*, NATO Strategic Communications Centre of Excellence, 2015, available at: [www.stratcomcoe.org/network-terror-how-daesh-uses-adaptive-social-networks-spread-its-message](http://www.stratcomcoe.org/network-terror-how-daesh-uses-adaptive-social-networks-spread-its-message).

48 Ahmad Shehabat and Teodor Mitew, *Black-boxing the Black Flag: Anonymous Sharing Platforms and ISIS Content Distribution Tactics*, *Perspectives on Terrorism*, Vol. 12(1), 2018, p. 83.

49 *Ibid.*, p. 81.

50 Winter, p. 8.

51 *Ibid.*, p. 9.

52 *Ibid.*, p. 14.

53 *Ibid.*, p. 9.

an alternative to the existing status quo.<sup>54</sup> Not only did it involve breaking “crusaders” dirty deals, such as the Sykes–Picot agreement or fighting post-colonial injustice, but also spreading the Truth.<sup>55</sup> This positive message was strengthened by images of ISIS warriors in long lines of Hilux pickups sporting heavy equipment and weaponry, which were meant to convince jihadists to join the cause. As regards how successful it was, the numbers speak for themselves – by the end of 2016 ISIS managed to recruit over 30,000 fighters.<sup>56</sup> Thousands of Western European ISIS followers were encouraged by social media. It is assumed that nearly 5,000 ISIS fighters were recruited from Europe alone.<sup>57</sup> ISIS’s positive narrative was definitely successful in building support and recruiting new members.<sup>58</sup>

The negative narrative was much more straightforward. The message was clear: there is a need to kill all opponents and enemies of holy jihad. Taking into consideration the size of the conquered territory, the mere killing of civilians, journalists, and opponents<sup>59</sup> was not enough. To subdue such a large Iraqi and Syrian territory required visual manifestations of its gory action, beheadings, and executions. The aim was clear – intimidation. The same role was played by the corporal punishments, imposed during public events with the aim to spread terror amongst the civilian population,<sup>60</sup> punishments which were also streamed live through various platforms.

All this – namely propaganda and its own story-telling – was streamed and published in social media and in traditional media outlets. Media supporting ISIS were not only located in the Middle East but also in Europe. Media such as Amaq News Agency, the Al-Bayan radio station, and the Halumu and Nashir news outlets serve as good examples.<sup>61</sup>

54 Ibid., p. 15.

55 Opposition to the colonial rule can be found in other sources; for example, a video streamed by ISIS, “There is No Life Without Jihad”, featuring testimonials from self-identified Britons and Australians rejecting the current borders of the Middle East as drawn up by the foreign powers after the First World War. For more on this, see Farwell, p. 50.

56 Thomas Zeitzoff, How Social Media Is Changing Conflict, *Journal of Conflict Resolution*, Vol. 61(9), 2017, 1970–1991.

57 Radicalisation Awareness Network, Responses to Returnees: Foreign Terrorist Fighters and Their Families, July 2017, available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran\\_br\\_a4\\_m10\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran_br_a4_m10_en.pdf) p. 6 [accessed 20.10.2019].

58 Farwell, p. 50.

59 Human Rights Council Report, Twenty-Seventh Session on Human Rights Situations That Require the Council’s Attention (A/HRC/27/CRP.3) on the Syrian Arab Republic, *Rule of Terror: Living under ISIS in Syria*, pt. 19. p. 4, available at: [www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/HRC\\_CRP\\_ISIS\\_14Nov2014.doc](http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/HRC_CRP_ISIS_14Nov2014.doc) [accessed 20.10.2019].

60 Ibid., p. 4.

61 In 2018, according to a Europol press release, the European Union, Canada and United States conducted a successful joint operation against the Amaq News Agency media outlet affiliated with ISIS. The operation was coordinated by the European Union Internet Referral Unit within the European Counter Terrorism Centre at Europol and involved authorities from Belgium, Bulgaria, Canada, France, the Netherlands, Romania, the United Kingdom and the United States. A seizure of digital evidence and ISIS servers took place on April 25 and 26, which helped identify both the administrators of ISIS websites and “potentially radicalized individuals on European soil and beyond”, the agency said. Available at: [www.europol.europa.eu/newsroom/news/islamic-state-propaganda-machine-hit-law-enforcement-in-coordinated-takedown-action](http://www.europol.europa.eu/newsroom/news/islamic-state-propaganda-machine-hit-law-enforcement-in-coordinated-takedown-action) [accessed 29.03.2019].

A pivotal element hooking ISIS social media and media outlet activities involved the anonymous sharing portals such as JustPaste.it.<sup>62</sup> This platform activity also garnered broad attention amongst government and intelligence bodies. It is/was owned by a Polish citizen, Mariusz Żurawek.<sup>63</sup> In 2014 ISIS began using this website to disseminate its online videos, images of beheadings, and what is particularly important, its digital edition of the ISIS online magazine *Dabiq*.<sup>64</sup> As Shehabat and Mitew assert, during the site's peak 70 per cent of its website content was ISIS.<sup>65</sup> So while formally the website was neutral, it was used to carry out the massive dissemination of ISIS content.

***ISIS propaganda as “direct and public” incitement to genocide in traditional and social media***

Nowadays it is rather difficult to distinguish between traditional and social media. They are highly interconnected. One of the most “popular” propaganda ISIS magazines, *Dabiq*, was published in PDF format and then disseminated through several information channels and methods. Its popularity was particularly enhanced using social media platforms. The question to be discussed here is whether ISIS propaganda and social media activity can or should be considered as “direct and public” indictment to genocide.

ISIS's origins can be traced back to Jordanian jihadist Abu Mus'ab al-Zarqawi. In the late 1990s, he travelled to Afghanistan, where he met the leaders of al-Qaeda. After the US invasion, al-Zarqawi fled to Iraq, where he became a well-known jihadist commander. His trademark was attacks against non-combatants, particularly targeting Shia places of worship.<sup>66</sup> Organizations under the command of Abu Omar al-Baghdadi also continued attacks against other religious groups, such as the Yazidis. An auger of the future ISIS attitude toward the Yazidis was the joint car bomb attacks which killed nearly 800 Yazidis in northern Iraq in 2007.<sup>67</sup> ISIS is/was an organization which identifies with a movement in Islamic political thought known as Jihadi-Salafism. Adherence to this ideology was explicitly advanced several times; for example, when ISIS leader Abu 'Umar al-Baghdadi appealed “to all Sunnis, and to the

62 O. Wasiuta, S. Wasiuta, P. Mazur, Państwo Islamskie ISIS: nowa twarz ekstremizmu - The Islamic State ISIS: a new face of extremism, Difin, Warszawa p. 182, 2018.

63 His biography is available at [www.linkedin.com/in/zurawek/?originalSubdomain=pl](http://www.linkedin.com/in/zurawek/?originalSubdomain=pl).

64 Shehabat and Mitew, p. 88.

65 Ibid., p. 91.

66 National Center of Excellence for Islamic Studies, University of Melbourne, *ISIS (Islamic State of Iraq and Syria): Origins, Ideology, and Responses by Mainstream Muslim Scholars – A Resource for Community Leaders*, 2016, p. 1, available at: [https://static1.squarespace.com/static/55120ecae4b01593abadc441/t/58fc89feff7c5003d9acbd86/1493076481168/ISIS\\_Origins%2C-Ideology%2C-and-Responses-by-Mainstream-Muslim-Scholars.pdf](https://static1.squarespace.com/static/55120ecae4b01593abadc441/t/58fc89feff7c5003d9acbd86/1493076481168/ISIS_Origins%2C-Ideology%2C-and-Responses-by-Mainstream-Muslim-Scholars.pdf).

67 Ibid., p. 2.

young men of Jihadi-Salafism (*al-Salafiyya al-Jihadiyya*).<sup>68</sup> According to Bunzel, Salafism offers fertile ground for the elimination of different forms of idolatry (*shirk*) and affirming God's Oneness (*tawhid*). As a part of Salafi propaganda/beliefs they consider themselves to be the only true Muslims, and find those who practice a so-called "major idolatry" to be outside Islam. ISIS was particularly hostile toward Yazidis, as they were perceived to be worshipping stones, saints, tombs, etc., and are considered apostates and deserters of the true religion.<sup>69</sup> ISIS's justification for the persecution of Yazidis was thus of a religious character.

ISIS ideology was spread through a blend of traditional and social media comments and also involved the use of video clips and movies. Before Tikrit was captured in 2014, ISIS released a movie, called *New*, which was disseminated both conventionally and unconventionally. Apart from the mass killing of Iraqi soldiers it also pictures the destruction of Shia mosques and religious objects.<sup>70</sup>

Direct and public incitement to Yazidi genocide may be found in *Dabiq*. An article entitled "The Revival of Slavery Before the Hour"<sup>71</sup> fulfilled several of the above-mentioned Richter categories. The article calls the enemy "Satanist and devil worshippers", which constitutes dehumanization (1); delegitimization (3); and disinformation (4).<sup>72</sup> It also contains direct and public threats (6) against the Yazidis. By stating that "Unlike the Jews and the Christians, there was no room for the jizyah payment [a tax to be paid to avoid conversion or death]", it was calling for the direct killing of Yazidi males, while another paragraph called for the enslavement of Yazidi females. This call for enslavement and calling persons spoils of war objectified and dehumanized Yazidi women (1).

After capture, the Yazidi women and children were then divided according to the Shariah amongst the fighters of the Islamic State who participated in the Sinjar operations, after one fifth of the slaves were transferred to the Islamic State's authority to be divided as khums [spoils of war].<sup>73</sup>

It is difficult to precisely determine the number of social media tweets, links, and other data related to the dissemination of propaganda on the various forums. However, just one website – JustPaste.it – which harboured the full panoply of ISIS content (from incitement to pictures of hundreds of executions

68 Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*. Brookings Project on U.S. Relations with the Islamic World Analysis, Paper No. 19, 2015, p. 7.

69 Bunzel, p. 8.

70 G. Klein, *Propaganda Daesh, Akademia Sztuki Wojennej-Academy of National Defence, Przegląd Strategiczny – Strategic Review 2016 nr 9, Warszawa, p. 187, 2016.*

71 *Dabiq*, *The Revival of Slavery Before the Hour*, Issue 4, 2014, pp. 14–16, available at <https://clarionproject.org/docs/islamic-state-isis-magazine-Issue-4-the-failed-crusade.pdf> [accessed 03.07.2019].

72 *Ibid.*, p. 14.

73 *Ibid.*, p. 15.

of Yazidi men and boys) in 2014 had about 2.5 million unique users a month, which works out to about 6 million sessions every month.<sup>74</sup> This clearly made the ISIS propaganda very public. Furthermore, the ISIS incitement was direct and the audience grasped the meaning.<sup>75</sup>

### The penalization of ISIS-related incitement

The penalization of incitement refers to the general criminalization concept based on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Genocide, and the prohibition of genocide, have obtained an *ius cogens* character. The preventive nature of the prohibition of genocide requires punishing all the acts foreseen by Article 3 of the Convention.

Penalization of incitement requires a mental element. That is, a person convicted of direct and public incitement to commit genocide must have had the intent to cause the destruction, in whole or in part, of a national, ethnical, racial, or religious group. This intent fulfils the *mens rea* requirement of *dolus specialis*.<sup>76</sup> According to Gordon, in cases of incitement to genocide the mental element (*mens rea*) is of a dual nature: the first is the intent to incite, and the second the intent to commit the genocide itself.<sup>77</sup> However, taking into consideration the already-discussed issue of causation in cases of the crime of genocide, even incitement without the (personal) intent to commit the genocide gives grounds for penalization. In this regard the decisive factor is that the intended recipients of the message belonged to the general public, which requires an appeal to an indeterminate group of people (a fact that is indisputable in the social media and internet environment). As for the *mens rea*, the perpetrator must act with the intent to directly and publicly incite others to commit genocide, which presupposes genocidal intent on his/her part.<sup>78</sup>

The ICTR held that the crime is inchoate in nature, meaning that it is punishable even if no act of genocide resulted therefrom. So from the penalization perspective, a conviction for direct and public incitement to commit genocide does not require proof of a link between the incitement and any subsequent crime (a causal link). According to Peterson and Timmermann, this goes beyond what the drafters of the Genocide Convention could agree on. The Convention's *travaux préparatoires* demonstrate that the initial proposition that incitement to genocide should be criminalized regardless of whether or not it

74 Carmen Fishwick, How a Polish Student's Website Became an Isis Propaganda Tool, *The Guardian*, August 15, 2014, available at: [www.theguardian.com/world/2014/aug/15/-sp-polish-man-website-isis-propaganda-tool](http://www.theguardian.com/world/2014/aug/15/-sp-polish-man-website-isis-propaganda-tool).

75 Gordon, p. 16.

76 Fyfe, p. 536.

77 Gordon, p. 16.

78 Ines Peterson, International Criminal Liability for Incitement and Hate Speech, in Martin Böse, Michael Bohlander, André Klip, and Otto Lagodny, *Justice Without Borders: Essays in Honour of Wolfgang Schomburg*, Brill/Nijhoff, 2018, p. 337.

was successful was eventually dropped.<sup>79</sup> However, in light of the rulings of international criminal courts regarding the development and prevention of genocide, this strict approach taken by the Convention drafters no longer holds. Not to mention that this book is devoted to Raphael Lemkin, the founder of the concept of genocide. His works had a great impact on the mindset of the Polish delegation (Juliusz Katz-Suchy, Manfred Lachs, Aleksander Bramson, and Aleksander Rudziński). During the Sixth Committee meeting, the Polish delegation insisted that a vital element in incitement is the creation of “an atmosphere favourable to the perpetration of the crime”.<sup>80</sup> And penalization of even an unsuccessful incitement clearly prevents the creation of such an atmosphere. This position was surprisingly supported by the Soviets,<sup>81</sup> who felt that the “repression of genocide should include prohibition of incitement to racial hatred as well as various preparatory or preliminary acts, such as study and research aimed at developing techniques of genocide”.<sup>82</sup>

The language of ISIS propaganda is clear. Its very strong wording, calling for the extermination of Yazidis, leaves little room for reasonable doubts. Such wording makes it possible to attribute to ISIS the mental element of a culprit, which is relevant to the requisite *mens rea*. Article 30 of the International Criminal Court Statute provides that

[f]or the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. [ ... ] For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.<sup>83</sup>

This fulfils what is known under civil law as *dolus directus* (the perpetrator foresees the harmful consequences of the criminal act and wants to bring about those consequences), and *dolus indirectus* (the perpetrator foresees certain additional consequences of the criminal act as a likelihood or merely a possibility and brings about those consequences even though that is not what he wanted or desired to bring about), with the exception of *dolus eventualis*.<sup>84</sup>

79 Ibid., p. 337.

80 *Akayesu*, *supra* note 68, para. 557, in Timmerman, p. 269.

81 Taking into consideration the nature and scope of Soviet-era propaganda.

82 William Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edition, Cambridge University Press, 2009, p. 72.

83 Rome Statute of the International Criminal Court 17 July 1998, 2187 UNTS 90 (last amended 2010).

84 Johan Van der Vyver, The International Criminal Court and the Concept of Mens Rea in International Criminal Law, *University of Miami International & Comparative Law Review*, Vol. 12, 2004, pp. 63–64, Emory Public Law Research Paper.

These words cover the situation, as noted by the ICTR in *Nahimana*, where explicit calls for violence were made by the accused, as members of the Coalition pour la Defense de la Republique (CDR) were chanting “*tubatsembatsembe*” (or “let’s exterminate them”).<sup>85</sup> Thus the similar appeals made by ISIS should not only be prohibited, but also criminalized.

***Other social media activity: copy-pasting, sharing, or liking as a form of incitement***

*Posting by a user* means creating a story, making a comment, linking a content, or simply putting a picture online. Usually, the legal status of the post is similar amongst different social media platforms. The social media user is the owner of the content (he/she can remove it at will). From the criminal law point of view, the posting of specific content is attributable to the physical person. Unless a post is posted by computers or bots, this requires a mental element which can be further penalized. Amongst volunteers joining ISIS there were a significant number of females (around 550). Many unsuccessful ISIS brides were caught because of posting their willingness to make *hijra*<sup>86</sup> on their social media accounts.<sup>87</sup>

All forms of communicating via social media seem to satisfy the mental element of the crime, whether it is sharing, liking, or following. In all these forms the user publicly announces his or her views or beliefs. Liking ISIS content that will be visible to an unspecified group of people is very public. Not only so-called Facebook friends, but also the poster’s friends’ friends can see his likes, comment on them, or share them. This basically means that content containing a hateful comment or an incitement to genocide is broadcast to the public in a way which is not much different from, for example, radio or TV. Thus such action satisfies the requirements of public and direct action as foreseen by Article 2 of the Genocide Convention.

Naturally the question of criminal responsibility of the social media platforms themselves as an accomplice to genocide is also very interesting. However, it is beyond the scope of this chapter.

These forms of sharing views can be analysed using the already-mentioned Benesch test. It is possible to imagine that a person of great influence – a Simon Bikindi-type personality – shares or likes posts or movies with a genocidal

85 Timmerman, p. 269.

86 “Hijra” is an Arabic word meaning “emigration”, evoking the Prophet Muhammad’s escape from Mecca to Medina. Abdullah Azzam defined “hijra” as departing from a land of fear to a land of safety, a definition he later amplified to include the act of leaving one’s land and family to take up jihad in the name of establishing an “Islamic State”. For more on it see Anita Perešin, Fatal Attraction: Western Muslimas and ISIS, *Perspectives on Terrorism*, Vol. 9(3), 2015, p. 34, Footnote 4, SN 2334–3745, available at: [www.researchgate.net/publication/301748250\\_Fatal\\_Attraction\\_Western\\_Muslimas\\_and\\_ISIS](http://www.researchgate.net/publication/301748250_Fatal_Attraction_Western_Muslimas_and_ISIS).

87 Perešin, p. 22.

content. In such a scenario it would seem to be reasonable to consider such actions as an intentional form of incitement to genocide, punishable under international and/or domestic law.

Currently, instead of a person of great influence we simply have influencers. This category of persons mirrors the category recognized by the ICTR. As a result, in my opinion a person does not need to be particularly famous (i.e. a Simon Bikindi type of popularity). It is enough if he or she has an impact on the lives of followers. In such a case one may be not only an *internet mujahidin*, but also an inciter to genocide, and as such responsible for violation of the 1948 Genocide Convention.

## Conclusions

While it is obvious that the world has changed, in the realm of communication we are facing a real revolution. A vital element of this revolution is social media, which was born out of the desire for free and undisturbed communication. However, the lack of control over social media has become its greatest sin. Persons who operate without any real control create space for hate speech and other forms of lawlessness. The lack of a truly efficient means of legal procedure against lawbreakers has created unprecedented safe havens for any person who wishes to use social media not as a peaceful Mr Jekyll in Hyde Park but as nasty Mr Hyde.

There are, however, legal means to prosecute incitement to genocide committed on social media, or more generally in cyberspace. As was discussed above, incitement on the internet may fulfil all the requirements provided by the Genocide Convention, relevant treaties, and customary law. The major challenges are still the uncontrolled nature of Facebook and other social media platforms. The complex jurisdictional issues, combined with a lack of domestic regulation of social media, result in unprecedented impunity. However, the existing domestic legal mechanisms may, with the support of universal jurisdiction, provide a solution.

Incitement with the use of social media will be most likely a growing phenomenon. There is a definite need for stricter policies. There is a need to provide a relevant, cross-culture-sensitive protection, based on local legal regimes, in order to protect against incitement to genocide. Pressure has to be put on communication platform operators worldwide, such as Facebook or Twitter, and local ones such as JustPaste.it. A lack of efficient prevention may lead to further degeneration of freedom of speech (and its limits). Subsequently genocides may be sparked and orchestrated using social media.

As author I have made all efforts to prove in this chapter that all the elements of incitement to genocide, such as incitement *per se*, *direct* and *public*, and with a *special intent* may be fulfilled in cases of inciting genocide by using the social media realm.