

Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law

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I. INTRODUCTION

Hate speech as a war crime first arose before the International Military Tribunal at Nuremberg with regard to Nazi propaganda advocating the “final solution.”¹ The Tribunal described the Nazi’s systematic use of propaganda and hate speech as a form of “poison . . . injected into the minds” of the German people.² In recent years, the International Criminal Tribunal for Rwanda (ICTR) has addressed the

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1. OFFICE OF THE UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 130 (Roger W. Barrett & William E. Jackson eds., GPO 1947) [hereinafter NAZI CONSPIRACY AND AGGRESSION].

2. *Id.*

issue in greater detail. In *Prosecutor v. Nahimana*, the ICTR characterized hate speech as

a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.³

Hate speech has taken on a greater importance over the past decade in light of the genocides in Rwanda, the former Yugoslavia, and Darfur.⁴ Hate speech has also been an increasingly important aspect of the War on Terror.⁵ For example, in the United Kingdom, Muslim cleric Abu Hamza al-Masri, an Imam at London's Finsbury Park Mosque, was arrested and convicted of incitement to murder due to his continuous urging of Muslims to kill non-Muslims.⁶ The European Union is taking steps to replace terms such as "Islamic terrorism" in dictionaries with "terrorism that abusively invokes Islam" to alleviate concerns over the characterization of Islam in a multiethnic society.⁷

Incitement to genocide is a crime under international law. Several international conventions directly address this issue: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the European Convention on Human Rights (ECHR) with the accompanying jurisprudence of the European Court of Human Rights.⁸ In addition, many nations' domestic laws prohibit incitement generally: Criminal Code of Germany,⁹ Russian

3. *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgement and Sentence, ¶ 1072 (Dec. 3, 2003).

4. See Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES, Apr. 2, 2006 (Magazine), available at <http://www.nytimes.com/2006/04/02/magazine/02darfur.html>.

5. Sebnem Arsu, *Turks Angry over House Armenian Genocide Vote*, N.Y. TIMES, Oct. 12, 2007, available at <http://www.nytimes.com/2007/10/12/world/europe/12turkey.html>.

6. *U.K. Jury Sentences Radical Cleric Abu Hamza to 7 Years in Jail*, NEWS AGENCIES, July 2, 2006, <http://www.haaretz.com/hatem/objects/pages/PrintArticleEnjhtml?itemNo=679965>.

7. Peter Ford, *Fighting Terrorism One Word at a Time*, CHRISTIAN SCI. MONITOR, Apr. 24, 2006, available at <http://www.csmonitor.com/2006/0424/p04sol-woeu.html>.

8. See generally Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; International Convention on the Elimination of All Forms of Racial Discrimination art. 4, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

9. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Fed. Law Gazette I, § 26 (F.R.G.).

Criminal Code,¹⁰ Criminal Code of Finland,¹¹ Ireland,¹² and Criminal Code of Slovenia.¹³

The ICTR addressed incitement to genocide in two cases:¹⁴ *Prosecutor v. Akayesu* took up the issue of whether public speech could result in criminal liability for the speaker.¹⁵ *Prosecutor v. Nahimana* addressed the role of the media, specifically what constitutes individual criminal responsibility.¹⁶ Through these decisions, the ICTR has strengthened the law, making hate speech a war crime. The ICTR has played a large role in defining hate speech and when it constitutes a war crime. Hate speech may be elusive because it often is relayed to a willing audience in the form of allegories, euphemisms, or even code words that have as great an effect on the target as the explicit call to commit genocide.¹⁷ The ICTR has addressed this in its decisions.¹⁸

This Article will: (1) discuss the relevant international treaties and case law leading up to the ICTR's decisions in *Akayesu* and *Nahimana*; (2) discuss the ICTR decisions in *Akayesu* and *Nahimana*; and (3) in light of the ICTR's rulings, discuss the legal criteria for what type of hate speech constitutes the crime of direct and public incitement to genocide.

II. INTERNATIONAL TREATIES

There are several international treaties that explicitly address propaganda and hate speech. Article 7 of the Universal Declaration of Human Rights states: "All are entitled to equal protection against any discrimination . . . and against any incitement to such discrimination."¹⁹ Article 19 articulates, "Everyone has the right to freedom of opinion and expression."²⁰

Next, article 19(2) of the International Covenant on Civil and Political Rights states: "Everyone shall have the right to freedom of

10. Ugolovnyi Kodeks [UK] [Criminal Code] art. 357 (Russ.).

11. Penal Code of Finland, ch. 5, On Attempt and Complicity 515/2003, § 5 (Jan. 4, 2004).

12. Prohibition of Incitement to Hatred Act, 1989 (Act No. 19/1989) (Ir.), available at <http://www.irishstatutebook.ie/1989/en/act/pub/0019/index.html> (last visited Sept. 25, 2008).

13. Kazenskizakonik [KZ] [Criminal Code] June 15, 2005, Off. Gazette of the Rep. of Slovenia, art. 299(1).

14. *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgement & Sentence (Dec. 3, 2003); *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgement (Sept. 2, 1998).

15. *Akayesu*, Case No. ICTR 96-4-T.

16. See, e.g., *Nahimana*, Case No. ICTR 99-52-T, ¶ 1072.

17. See *id.*; *Akayesu*, Case No. ICTR 96-4-T.

18. See *Nahimana*, Case No. ICTR 99-52-T; *Akayesu*, Case No. ICTR 96-4-T.

19. Universal Declaration of Human Rights, *supra* note 8, art. 7.

20. *Id.* art. 19.

expression.”²¹ In article 19(3), the right “carries with it special duties and responsibilities” and may be subject to restrictions “[f]or respect of the rights or reputations of others” and “[f]or the protection of national security or of public order (ordre public), or of public health or morals.”²² The General Comment on article 19 by the United Nations Human Rights Committee states, “It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.”²³ Article 20(2) of the ECHR also says, “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”²⁴

The ECHR also prohibits hate speech. It states in article 10:

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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²⁵

Finally, articles 4 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination states:

Article 4: States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the

21. ICCPR, *supra* note 8, art. 19(2).

22. *Id.* art. 19(3).

23. Office of the High Commissioner for Human Rights, General Comment No. 10: Freedom of Expression (art. 19) (June 29, 1983), *available at* <http://www2.ohchr.org/english/bodies/treaty/Comments.htm>.

24. ECHR, *supra* note 8, art. 20(2).

25. *Id.* art. 10.

principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

Article 5:

In compliance with the fundamental obligation laid down in . . . this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (d) (viii). The right to freedom of opinion and expression;²⁶

In sum, the international community recognizes and has acted to prohibit the use of organized propaganda aimed at inciting genocide.

A. *The International Military Tribunal at Nuremberg: Streicher*

The Nuremberg Tribunal tried Julius Streicher for his Nazi propaganda activities that resulted in genocide.²⁷ In that case, Hitler's policies aimed at a "final solution."²⁸ Streicher, a Nazi and ardent supporter of Adolf Hitler and his policies and publisher of the German newspaper *Der Sturmer*, was found by the Tribunal to have a connection to the Nazi conspiracy to wage war.²⁹ Streicher was referred to as "Jew-Baiter Number One"³⁰ due to his twenty-five years spent preaching and writing anti-Semitic material. Through his speeches and articles in *Der Sturmer*, Streicher "infected the German mind with the virus of anti-Semitism."³¹ *Der Sturmer* had "circulation of 600,000 in 1935," and its articles were "often lewd and disgusting."³²

Streicher was responsible for the Jewish boycott of April 1, 1933; advocated the Nuremberg Decrees of 1935; was in charge of the demolition on August 10, 1938, of the Synagogue in Nuremberg; and, on November 10, 1938, publicly lent his support to the Jewish pogrom.³³

26. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 8, arts. 4-5.

27. NAZI CONSPIRACY AND AGGRESSION, *supra* note 1, at 129-31.

28. *Id.*

29. *Id.*

30. *Id.* at 129.

31. *Id.*

32. *Id.*

33. *Id.*

The Tribunal noted that twenty-three articles appearing in *Der Sturmer* between 1938 and 1941 called for the extermination of the Jewish people “root and branch.”³⁴ For example, in one article in May 1939, Streicher wrote:

A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.³⁵

In another article appearing in September 1938, Streicher “termed the Jew a germ and a pest, not a human being, but ‘a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind.’”³⁶ *Der Sturmer* also said that “only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that 50 years hence the Jewish graves ‘will proclaim that this people of murderers and criminals has after all met its deserved fate.’”³⁷ The Tribunal considered Streicher’s writing to be “poison [he] injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination.”³⁸

The Tribunal also observed that as the Germans gained ground in the war, twenty-six articles from *Der Sturmer*, published between August 1941 and September 1944, twelve that Streicher wrote personally, “demanded annihilation and extermination in unequivocal terms.”³⁹ In the December 25, 1941 issue Streicher wrote: “If the danger of the reproduction of that curse of God in the Jewish blood is finally come to an end, then there is only one way—the extermination of that people whose father is the devil.”⁴⁰ And in February 1944, Streicher wrote: “Whoever does what a Jew does is a scoundrel, a criminal. And he who repeats and wishes to copy him deserves the same fate—annihilation, death.”⁴¹

Streicher had full knowledge of the atrocities being conducted against the Jewish people and continued his advocacy of persecution and death.⁴² Although Streicher testified that he had no knowledge of the

34. *Id.*

35. *Id.* at 130 (quoting Streicher’s article published in *Der Sturmer*).

36. *Id.* at 129 (quoting Streicher’s article published in *Der Sturmer*).

37. *Id.* at 129-30 (quoting Streicher’s article published in *Der Sturmer*).

38. *Id.* at 130 (quoting Streicher’s article published in *Der Sturmer*).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 130-31.

deaths of millions of Jews, the evidence in the record showed otherwise.⁴³ Streicher was kept abreast of the Nazis' progress toward the "final solution."⁴⁴ In January 1943, Streicher wrote an article which the Tribunal described as saying "that Hitler's prophecy was being fulfilled, that world Jewry was being extirpated, and that it was wonderful to know that Hitler was freeing the world of its Jewish tormentors."⁴⁵

The Tribunal found Streicher guilty, noting that his

incitement to murder and extermination at the time when Jews in the east were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the [London Charter of the International Military Tribunal], and constitutes a crime against humanity.⁴⁶

The importance of this case was, like in the ICTR cases, that the explicit remarks made by the defendant provided an illustration of what constitutes hate speech and created a criminal nexus between the speech and the resulting genocide.

B. The International Military Tribunal at Nuremberg: Fritzsche

Unlike Streicher, Fritzsche was not convicted of war crimes. However, the dissenting opinion in this case is more revealing about criminal liability for hate speech than the majority, which took a more restrictive approach to Fritzsche's criminal culpability.⁴⁷ Fritzsche was in charge of the Home Press Division, and later the Radio Division, of the Propaganda Ministry, which oversaw 2300 German newspapers.⁴⁸ The Tribunal found him innocent of war crimes because "[h]is position and official duties were not sufficiently important . . . to infer that he took part in originating or formulating propaganda campaigns."⁴⁹ Fritzsche was not involved in the actual formulation of the Third Reich's propaganda campaign.⁵⁰ Instead, he was a liaison between the media and higher-ranking Nazi officials.⁵¹

It was important to the Tribunal that Fritzsche had never met Adolf Hitler.⁵² However, as demonstrated by his public speeches, Fritzsche was

43. *Id.*

44. *Id.* at 130.

45. *Id.* at 131.

46. *Id.*

47. *See id.* at 162-63, 176-77.

48. *Id.* at 162.

49. *Id.* at 163.

50. *Id.* at 162.

51. *Id.* at 162-63.

52. *Id.* at 163.

an anti-Semite.⁵³ He publicly spoke on radio about how the war was becoming “as unpleasant [for the Jews] as the Fuehrer predicted.”⁵⁴ However, the Tribunal observed that “these speeches did not urge persecution or extermination of Jews.”⁵⁵

The dissenting member argued that the majority did not take into account in its acquittal that “until 1942 [Fritzsche] was the Director de facto of the Reich press and that, according to himself, subsequent to 1942 he became the ‘commander in chief of the German radio.’”⁵⁶

Hitler’s use of propaganda was as important in the Third Reich’s overarching strategy as armaments and military planning.⁵⁷ Propaganda Ministry newspapers and radio, of which Fritzsche was in charge, played a vital role in German propaganda policies.⁵⁸ The dissent relied on Fritzsche’s extensive résumé in support of his guilt of war crimes.⁵⁹ Fritzsche served as Chief of the Radio Department of the Reich Ministry of Propaganda, Plenipotentiary for the Political Organisation of Radio in Greater Germany, and Political Director of the German Radio.⁶⁰ The dissenter believed that because of this extensive role, Fritzsche bore “responsibility for the false and provocative broadcasts of the German radio during the years of the war.”⁶¹

The evidence in record also demonstrated that, contrary to his assertions, Fritzsche was aware of the Nazi atrocities being committed against the Jews in Europe.⁶² In response to Adolf Hitler’s comment that “among results of the war there will be the annihilation of the Jewish race in Europe,” Fritzsche said, “As Fuehrer predicted it will occur in the event of war in Europe, the fate of the European Jewry turned out to be quite sad. . . .”⁶³ Thus, as the dissent noted, Fritzsche took an active approach in his speech, and possessed a position of authority significant enough to have affected the outcome of Hitler’s deranged policies.⁶⁴ The ICTR would later take an approach more like the dissent in its cases.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 175 (citation omitted).

57. *Id.*

58. *Id.*

59. *Id.* at 176-77.

60. *Id.*

61. *Id.* at 176.

62. *Id.* at 177.

63. *Id.* (quoting Fritzsche’s testimony) (citations omitted).

64. *Id.* at 177-78.

C. European Court of Human Rights: Jersild v. Denmark

The European Court of Human Rights has addressed whether objective journalism that attempts to shed light on racial hatred can be a war crime.⁶⁵ Jens Olaf Jersild worked for the Danish radio program Sunday News Magazine which focused on a “wide range of social and political issues, including xenophobia, immigration and refugees.”⁶⁶ Jersild made a documentary about the Greenjackets, a racist gang based in Studsgordsgade public housing, in Copenhagen.⁶⁷ The Greenjackets subscribe to a racist ideology that venerates the American Ku Klux Klan and focuses their venom on immigrants who they refer to as *Perkere* (a derogatory word in Danish meaning “immigrant”).⁶⁸ Pursuant to his documentary, Jersild interviewed three members of the gang. In a transcript of the program, they say that “[they] believe Denmark is for the Danes.”⁶⁹ They also state:

The Ku Klux Klan, that’s something that comes from the States in the old days during—you know—the civil war and things like that, because the Northern States wanted that the niggers should be free human beings, man, they are not human beings, they are animals, right, it’s completely wrong, man, the things that happened. People should be allowed to keep slaves, I think so anyway.⁷⁰

They go on to say, “Just take a picture of a gorilla, man, and then look at a nigger, it’s the same body structure and everything, man, flat forehead and all kinds of things.”⁷¹ Further, “A nigger is not a human being, it’s an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called.”⁷² Finally, they state:

They come up here, man, and sponge on our society [W]e can argue with those idiots up there at the social benefit office to get our money, man, they just get it, man, they are the first on the housing list, they get better flats than us, man, and some of our friends who have children, man, they are living in the worst slum⁷³

The Public Prosecutor brought criminal charges against Jersild and convicted him of aiding and abetting the Greenjackets in violation of

65. See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) 1 (1995).

66. *Id.* at 9.

67. *Id.* at 10.

68. *Id.*

69. *Id.* at 11.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 11-12.

article 266(b) of the Danish Penal Code based on the program.⁷⁴ Article 266(b) states: “Any person, who, publicly or with the intention of disseminating it to a wide circle (“videre kreds”) of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable”⁷⁵ The Supreme Court upheld Jersild’s conviction, stating:

The defendants have caused the publication of the racist statements made by a narrow circle of persons and thereby made those persons liable to punishment and have thus, as held by the City Court and the High Court, violated Article 266(b) in conjunction with Article 23 of the Penal Code. [We] do not find that an acquittal of the defendants could be justified on the ground of freedom of expression in matters of public interest as opposed to the interest in the protection against racial discrimination. [We] therefore vote in favour of confirming the judgment.⁷⁶

The case was appealed to the European Court of Human Rights to have the conviction overturned as a national violation of the ECHR. The Court found that article 23 clearly criminalized the distribution of certain forms of prohibited speech.⁷⁷ At issue was the phrase in the Convention “necessary in a democratic society.”⁷⁸

The Court stated, “[I]t is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations.”⁷⁹ Important to the Court was the fact that “[Jersild] did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist.”⁸⁰ In other words, journalism that seeks to condemn these groups through publicity, as opposed to propaganda, is protected speech.

D. *United States Supreme Court: Virginia v. Black*

In *Virginia v. Black*, the United States Supreme Court took a different approach to hate speech than that of the international courts discussed earlier.⁸¹ This decision found the actual intent behind the words and deeds important, not how that speech was interpreted.⁸² Justice

74. *Id.* at 14-15.

75. *Id.* at 19.

76. *Id.* at 17.

77. *Id.* at 20.

78. *Id.* at 21.

79. *Id.* at 30.

80. *Id.* at 23.

81. 538 U.S. 343 (2003).

82. *Id.* at 347-48.

O'Connor, writing for the majority, held that “[w]hile a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.”⁸³

On August 22, 1998, Barry Black held a Ku Klux Klan rally of twenty-five to thirty-five people on a private residence in Carroll County, Virginia.⁸⁴ At the rally, one Klansman said that “he would love to take a .30/.30 and just randomly shoot the blacks.”⁸⁵ Charges were brought against Black because a cross was set ablaze at the rally’s conclusion; prosecutors alleged that it was set with the intent to intimidate a class of persons, i.e., African Americans.⁸⁶

In a separate case, joined on appeal, Richard Elliott and Jonathan O’Mara were charged with burning a cross in the yard of Virginia Beach resident James Jubilee, an African American.⁸⁷ Jubilee testified that the site of the burning cross made him “‘very nervous’ because he ‘didn’t know what would be the next phase,’ and because ‘a cross burned in your yard . . . tells you that it’s just the first round.’”⁸⁸

The First Amendment is intended to protect the “‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomfoting.”⁸⁹ However, these protections are not absolute.⁹⁰ A state may prohibit the speaking of words “‘which by their very utterance inflict injury or tend to incite an immediate breach of the peace.’”⁹¹

In the United States, for the states to be able to proscribe such speech, the speech must advocate imminent lawless action.⁹² In other

83. *Id.*

84. *Id.* at 348.

85. *Id.* at 349.

86. *Id.*

87. *Id.* at 350.

88. *Id.*

89. *Id.* at 358 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

90. *Id.* (“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 problem.” (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942))).

91. *Id.* at 359 (citing *Chaplinsky*, 315 U.S. at 572; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992)).

92. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (“The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”)).

words, states may bar speech that constitutes a “true threat.”⁹³ The Court, in *Virginia v. Black*, defined “[t]rue threats” as those which “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁹⁴ In these cases, the speaker “directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”⁹⁵ Such threats of violence fall outside the protections of the First Amendment.⁹⁶

When it comes to weighing a “true threat,” the “speaker need not actually intend to carry out the threat.”⁹⁷ The prohibition is intended to protect against intimidation and the threat of potential violence associated with the speech.⁹⁸ The act of cross burning, as practiced historically by the Ku Klux Klan, is a form of speech intended to intimidate a class of persons through the threat of imminent violence.⁹⁹ The majority noted:

[R]egardless of whether the message is a political one or . . . is also meant to intimidate, the burning of a cross is a “symbol of hate.” . . . [T]he history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. . . . And when a cross burning is used to intimidate, few if any messages are more powerful.¹⁰⁰

The fact that casual observers would consider cross burning to be hate speech did not resolve the constitutional question for the Court.¹⁰¹

The Court found that with regard to Elliot and O’Mara the evidence in the record did not show that they intended to burn the cross as a message of racial hatred.¹⁰² They testified that the cross was burned because Jubilee had complained to the authorities about a firing range in Elliott’s backyard.¹⁰³ The Court did not approve of the Virginia statute which provided for prima facie evidence.¹⁰⁴ The prima facie evidence

93. *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam)).

94. *Id.* (citing *Watts*, 394 U.S. at 708 (finding that “political hyperbole” is not a true threat)).

95. *Id.* at 360.

96. *Id.* (citing *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 774 (1994) (“[T]hreats of violence are outside the First Amendment.”)).

97. *Id.* at 359-60.

98. *Id.* at 360 (citing *Watts*, 394 U.S. at 708).

99. *Id.*

100. *Id.* at 357.

101. *Id.* at 361.

102. *Id.* at 363.

103. *Id.*

104. *Id.* at 365.

provision “makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case.”¹⁰⁵

The Court observed that a cross may be burnt as a form of political expression.¹⁰⁶ In contrast to its earlier description, the majority stated:

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, “burning a cross at a political rally would almost certainly be protected expression.” Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as *Mississippi Burning*. . . .¹⁰⁷

The Court went on to strike the statute down because “the provision as so interpreted ‘would create an unacceptable risk of the suppression of ideas.’”¹⁰⁸

Justice Thomas dissented from the majority’s view of cross burning as having a purpose other than as a symbol of racial hatred, violence, and intimidation, emphasizing the “common understanding of the Klan as a terrorist organization.”¹⁰⁹ His dissent also disputed the Court’s understanding of cross burning.¹¹⁰ He wrote, “In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.”¹¹¹ Finally, Justice Thomas stated:

And, just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. . . . [T]he fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems.¹¹²

This dissent is more in line with the holdings of international courts. In this case, the symbol of the burning cross clearly conveys a racist threat. The majority’s rejection of symbolic hate speech, without a clear demonstration of intent, weakens the prohibition. However, international

105. *Id.*

106. *Id.* at 365-66.

107. *Id.* (internal citations omitted).

108. *Id.* at 365 (citing *Sec’y of State of Md. v. Joseph H. Muson Co.*, 467 U.S. 947, 965 n.13 (1984) (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984))).

109. *Id.* at 389 (Thomas, J., dissenting).

110. *Id.* at 391 (Thomas, J., dissenting).

111. *Id.*

112. *Id.* at 394-95.

courts, such as the ICTR, find intent through the plain meaning of the words and actions.

III. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

A. *Historical Background*

President Juvénal Habyarimana came to power on July 5, 1973.¹¹³ Then Army Chief of Staff General Habyarimana seized control of the Rwandan Government via a military coup establishing the Second Republic.¹¹⁴ In 1975, Habyarimana instituted rule by one party, of which all Rwandans were declared members, including newborn infants.¹¹⁵ In 1978, a law was enacted instituting the Mouvement révolutionnaire national pour le développement (MRND) as a state party.¹¹⁶ Habyarimana intensified discrimination against the Tutsi population through quotas in universities and public services.¹¹⁷ “Tutsi exiles, particularly those in Uganda[,] organized themselves not only to launch incursions into Rwandan territory but also to form a political organization, the Rwandese Patriotic Front (RPF), with a military wing called the Rwandan Patriotic Army (RPA).”¹¹⁸ Its forebear, the Alliance rwandaise pour l’unité nationale (ARUN) was formed in Uganda in 1979.¹¹⁹ On October 1, 1990, the RPF launched an attack on the Rwandan Government from bases in Uganda.¹²⁰ Under pressure from foreign donors and domestic opposition, Habyarimana acceded to the establishment of a multiparty system and a new constitution on June 10, 1991, followed by a law on political parties on June 18, 1991.¹²¹ The RPF continued its attacks on Rwandan soil including a large assault on February 8, 1993.¹²² In March 1992, the Coalition pour la défense de la république (CDR) was formed by radical Hutus.¹²³

On August 4, 1993, the Arusha Accords were signed by the RPF and the Government ending the war commenced in 1990.¹²⁴ The Accords

113. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgement & Sentence, ¶ 91 (Dec. 3, 2003).

114. *Id.*

115. *Id.* ¶ 92.

116. *Id.*

117. *Id.* ¶ 93.

118. *Id.* ¶ 95.

119. *Id.* ¶ 93.

120. *Id.*

121. *Id.* ¶ 94.

122. *Id.* ¶ 97.

123. *Id.* ¶ 98.

124. *Id.* ¶ 102.

included provisions for establishing a transitional government including the RPF and the deployment of a U.N. peacekeeping force.¹²⁵ After a spate of political violence including the assassination of the Hutu President of Burundi by Burundi Tutsi soldiers, the Arusha Accords, for all practical purposes, were disregarded.¹²⁶ On April 6, 1994, Habyarimana's plane was shot down¹²⁷ while returning from a meeting with other regional heads of state in Tanzania to discuss how to save the Accords.¹²⁸ All were killed.¹²⁹

Within hours of the crash, the Rwandan military and militia began massacring the Tutsi population.¹³⁰ The following day, the RPF renewed attacks on Rwandan forces.¹³¹ During the melee, U.N. forces withdrew at the behest of U.N. headquarters.¹³² Initially, Tutsi and Hutu opponents in the Government were targeted.¹³³ As the days passed roadblocks were set up and the Tutsi were driven to public sites where mass slaughter ensued.¹³⁴

B. Prosecutor v. Akayesu

In *Prosecutor v. Akayesu*, the ICTR convicted Jean-Paul Akayesu of incitement to commit genocide for public speeches he made at a meeting in Gishyeshye.¹³⁵ Jean-Paul Akayesu, a former schoolteacher, was the *bourgmestre* of his commune during the Tutsi massacres.¹³⁶ The *bourgmestre* governs the commune along with a communal council.¹³⁷ The main job of the *bourgmestre* is to administer and enforce the laws enacted by the council.¹³⁸ The position itself is one of reverence; the *bourgmestre* "embodies the communal authority."¹³⁹ In his position, he was seen by the citizens of his commune "as the 'parent' of all the population whose every order would be respected."¹⁴⁰ The record showed

125. *Id.*

126. *Id.* ¶¶ 103-104.

127. *Id.* ¶ 114.

128. *Id.* ¶ 106.

129. *Id.*

130. *Id.* ¶ 114.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶¶ 673-674 (Sept. 2, 1998).

136. *Id.* ¶¶ 48-49.

137. *Id.* ¶ 58.

138. *Id.* ¶ 61.

139. *Id.*

140. *Id.* ¶ 74.

that “people would normally follow the orders of the administrative authority, i.e. the bourgmestre, even if those orders were illegal or wrongful.”¹⁴¹ Citizens would never think to disobey the commands of the *bourgmestre*.¹⁴²

On April 19, 1994, Akayesu, as *bourgmestre*, gave a public speech to over 100 people in Gishyeshye.¹⁴³ Akayesu advocated the killing of the *Inkotanyi*.¹⁴⁴ The ICTR looked past his rhetoric to conclude that Akayesu’s words were a call to kill Tutsis.¹⁴⁵ According to the ICTR, Akayesu was “fully aware of the impact of his statement on the crowd and of the fact that his call to wage war against Inkotanyi accomplices could be construed as one to kill the Tutsi in general.”¹⁴⁶ The ICTR found that a causal link existed between Akayesu’s April 19th speech and the mass murder of Tutsis in Taba.¹⁴⁷ Akayesu had the intent to persuade his audience to kill the Tutsis.¹⁴⁸

Akayesu was on trial for the “crime of direct and public incitement to commit genocide, a crime punishable under Article 2(3)(c) of the Statute.”¹⁴⁹ The Trial Chamber found:

- (i) Akayesu, in the early hours of 19 April 1994, joined a crowd of over 100 people which had gathered around the body of a young member of the Interahamwe in Gishyeshye.
- (ii) He seized that opportunity to address the people and, owing, particularly, to his functions as bourgmestre and his authority over the population, he led the gathering and the proceedings.
- (iii) It has been established that Akayesu then clearly urged the population to unite in order to eliminate what he termed the sole enemy: the accomplices of the Inkotanyi.
- (iv) On the basis of consistent testimonies heard throughout the proceedings and the evidence of Dr. Ruzindana, appearing as expert witness on linguistic matters, the Chamber is satisfied beyond a reasonable doubt that the population understood Akayesu’s call as one to kill the Tutsi. Akayesu himself was fully aware of the impact of his speech on the crowd and of the fact that his call to fight against the accomplices of the Inkotanyi would be construed as a call to kill the Tutsi in general.

141. *Id.*

142. *Id.*

143. *Id.* ¶ 673.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* ¶ 674.

149. *Id.* ¶ 672.

- (v) During the said meeting, Akayesu received from the Interahamwe documents which included lists of names, and read from the lists to the crowd by stating, in particular, that the names were those of RPF accomplices.
- (vi) Akayesu testified that the lists contained, especially, the name of Ephrem Karangwa, whom he named specifically, while being fully aware of the consequences of doing so. Indeed, he admitted before the Chamber that, at the time of the events alleged in the Indictment, to label anyone in public as an accomplice of the RPF would put such a person in danger.
- (vii) The Chamber is of the opinion that there is a causal relationship between Akayesu's speeches at the gathering of 19 April 1994 and the ensuing widespread massacres of Tutsi in Taba.¹⁵⁰

He was convicted based on the fact that by his "speeches made in public and in a public place, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group."¹⁵¹

C. Prosecutor v. Nahimana

1. Factual Background

Hassan Ngeze was the owner and editor of the popular newspaper *Kangura*.¹⁵² In December 1990, *Kangura* ran an "Appeal to the Conscience of the Hutu."¹⁵³ The article stated: "The enemy is still there, among us, and is biding his time to try again, at a more propitious moment, to decimate us. Therefore, Hutu, wherever you may be, wake up! Be firm and vigilant. Take all necessary measures to deter the enemy from launching a fresh attack."¹⁵⁴

In the same issue Ngeze "described the Tutsi as 'bloodthirsty'" with the "permanent dream" of a return to domination over the Hutu.¹⁵⁵ This ambition was extended over the whole of Central Africa, not just Rwanda.¹⁵⁶ The article proceeded to set forth "The Ten Commandments" of the Hutu:

150. *Id.* ¶ 673.

151. *Id.* ¶ 674.

152. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgement & Sentence, ¶¶ 122-135 (Dec. 3, 2003).

153. *Id.* ¶ 138.

154. *Id.*

155. *Id.* ¶ 139.

156. *Id.*

1. Every Hutu male should know that Tutsi women, wherever they may be, are working in the pay of their Tutsi ethnic group. Consequently, shall be deemed a traitor:
 - Any Hutu male who marries a Tutsi woman;
 - Any Hutu male who keeps a Tutsi concubine;
 - Any Hutu male who makes a Tutsi woman his secretary or protégée.
 2. Every Hutu male must know that our Hutu daughters are more dignified and conscientious in their role of woman, wife and mother. Are they not pretty, good secretaries and more honest!
 3. Hutu woman, be vigilant and bring your husbands, brothers and sons back to their senses.
 4. Every Hutu male must know that all Tutsis are dishonest in their business dealings. They are only seeking ethnic supremacy.
- “RIZABARA UWARIRAYE”¹⁵⁷
- Shall be consequently considered a traitor, any Hutu male:
- who enters into a business partnership with Tutsis;
 - who invests his money or State money in a Tutsi company;
 - who lends to, or borrows from, a Tutsi;
 - who grants business favours to Tutsis [granting of import licenses, bank loans, building plots, public tenders. . .]
5. Strategic positions in the political, administrative, economic, military and security domain should, to a large extent, be entrusted to Hutus.
 6. In the Education sector, (pupils, students, teachers) must be in the majority Hutu.
 7. The Rwandan Armed Forces should be exclusively Hutu. That is the lesson we learned from the October 1990 war. No soldier must marry a Tutsi woman.
 8. Hutus must cease having any pity for the Tutsi.
 9.
 - The Hutu male, wherever he may be, should be united, in solidarity and be concerned about the fate of their Hutu brothers.
 - The Hutus at home and abroad must constantly seek friends and allies for the Hutu Cause, beginning with their Bantu brothers.
 - They must constantly counteract Tutsi propaganda.
 - The Hutu must be firm and vigilant towards their common Tutsi enemy.
 10. The 1959 social revolution, the 1961 referendum and the Hutu ideology must be taught to Hutus at all levels. Every Hutu must propagate the present ideology widely. Any Hutu who persecutes his

157. *Id.* ¶ 139 n.56 (“Only he who spent a sleepless night can talk about the night.” (footnote omitted)).

brother for having read, disseminated and taught this ideology shall be deemed a traitor.¹⁵⁸

An editorial published in February 1993 called upon the Hutu to follow these “*Ten Commandments*.”¹⁵⁹ On the cover of every issue commencing with February 1991, the paper was subtitled “The Voice that Awakens and Defends the Majority People.”¹⁶⁰

On the November 1991 cover, *Kangura* had a large photograph of former President Gregoire Kayibanda with the word “SPECIAL” followed by the headlines “THE BATUTSI, GOD’S RACE!”, “How about re-launching the 1959 Bahutu revolution so that we can conquer the *Inyenzi-Ntutsi*” and “WHAT WEAPONS SHALL WE USE TO CONQUER THE *INYENZI* ONCE AND FOR ALL??”¹⁶¹ next to a drawing of a machete.¹⁶² The article “described Tutsis as hypocrites, thieves, and killers” whose very nature is malicious and dishonest.¹⁶³ An article entitled “The Triangle that is Disturbing Peace” stated:

People in this ethnic group [the Tutsis], which came to Rwanda last, say that the Tutsi ethnic group—the Tutsis live like cats. When you have milk, they will come to you. The only thing that makes them better than cats—or, rather, their difference with cats is that once they’ve already drunk the milk, they’ll try to find ways and means of taking the milk away from you or even to harm you or they will also try to rule you. So Hutus got close to the Tutsis, welcomed them as visitors, but instead of sleeping like visitors would do, the bad—his bad—or their bad habits got the better of them. So the Tutsis ended up by taking over power, and the Hutus were made subservient and were used as servants, and Hutus were made subservient by the people the Hutus had welcomed to their land.¹⁶⁴

An editorial entitled “Hutus Should Help Kangura Defend the Hutus” published in July 1991 stated:

We all know that with the exception of a few Hutus such as Kanyarengwe and Bizimungu, the refugees who have become *Inyenzi-Inkotanyi* are all descendants of the Tutsis. We dare say that when they came, shooting at us at the borders, they made no ethnic distinction. . . . There were indeed numerous Hutus in the country and army who didn’t succumb on the battlefield, some of them fell into the trap of worldly women. So far, many have fallen into the trap. They include figures of authority, who consort

158. *Id.* ¶ 139.

159. *Id.* ¶ 156.

160. *Id.* ¶ 136.

161. The literal translation of “*Inyenzi*” is “cockroach.” *Id.* ¶ 179.

162. *Id.* ¶ 160.

163. *Id.* ¶ 172.

164. *Id.* ¶ 175.

with them even now, although they know perfectly well, and it has been proven, that when it comes to spying, the *Inkotanyi* enlist the help of their worldly sisters and daughters. You find them everywhere in all the institutions, in the Ministries, in the private sector, in legal and illegal drinking-places, as well as in our own houses, which many of them have managed to infiltrate through marriage. Having husbands does not prevent them from being accomplices and extracting secrets from people by using their worldly wiles. Hutus do not abuse others they are taken advantage of. The Hutus must understand that they are not all waging the war as the Tutsis, because everyone can see that, the Tutsis want to regain the power that was taken from them by the Hutus. If you look closely, you will see that 85% of the Tutsis who live in the country are somehow linked with the refugees from which come the *Inyenzi-Inkotanyi* who attack us. . . .¹⁶⁵

The ICTR noted that this editorial emphasized “the divide between the wily, devious Tutsi and the innocent, vulnerable Hutu, and the association of the Tutsi population with the *Inyenzi-Inkotanyi*.”¹⁶⁶ Furthermore, the ICTR also observed that the editorial “suggested that Tutsi women intentionally use their sexuality to lure Hutu men into liaisons in order to promote . . . ethnic dominance.”¹⁶⁷

Another article, published in November 1991, “If One Asks Generals Why They’re Favoring Tutsis,” stated:

Fifty per cent of staff in government, of the staff core in government is made up of Tutsi. In private companies and bodies, they are more than 70 percent; whereas in the international organizations and in embassies, they are more than 90 percent and in important positions, whereas they do not make up more than 10 per cent—whereas in the general population, these people are fewer than 10 percent.¹⁶⁸

In an infamous article published in February 1993 called “A Cockroach Cannot Give Birth to a Butterfly,” *Kangura* stated:

Experts on human genetics inform us that the demographic weakness of Tutsis is due to the fact that they marry among themselves. People from the same family marry and procreate among themselves. If they are not careful, this search for purity may lead to their disappearance from the earth. If that occurs (and it will happen), they will be solely responsible for their demise and no one else. Will people say that Hutus decimated them? That is the message they spread everywhere, that they are few because the Hutus had decimated them with machetes. . . .¹⁶⁹ We have stated that a cockroach cannot give birth to a butterfly. This is true. A cockroach gives

165. *Id.* ¶ 177.

166. *Id.* ¶ 178.

167. *Id.*

168. *Id.* ¶ 185.

birth to another cockroach. If there is someone contesting this fact, I am not the one. The history of Rwanda clearly depicts that a MaTutsi has remained the same; he has never changed. The history of our country has been characterized by their malice and wickedness. When Tutsis were still on the throne, they governed with two weapons: women and cows. These two weapons ruled Hutus [for] over 400 years. When the Tutsis were overthrown by the people's revolution in 1959, they have never slept again on their laurels. They have been doing their utmost to restore the monarchy by using their women *Bizungerezi* and money which seems to have replaced cows. In the past, cows were symbols of richness.

We are not mistaken in stating that a cockroach can only give birth to another cockroach. Who can establish the difference between the *Inyenzi* who attacked in October 1990 and those of the 1960s? They are all the same. The former are the offspring of the latter. Their wickedness is the same. All these attacks sought to restore the monarchy and the feudality [*Ubuhake*]. The abominable crimes committed by the present *Inyenzi* against the citizens are a reminder of those committed by their peers: killing, looting, raping young girls and women. . . . The fact that in our language, they are referred to as snakes is self-explanatory. This implies much. A Tutsi is someone who has a sweet tongue but whose wickedness is indescribable. A Tutsi is someone whose desire for revenge is insatiable; someone who is unpredictable, someone who laughs whereas he is suffering. In our language, a Tutsi is called cockroach because he takes advantage of the night to achieve his objectives. The word *Inyenzi* is a reminder of the redoubtable snake whose venom is extremely poisonous. The fact that the Tutsi chose such names is very significant to those who want to understand.¹⁶⁹

Another article stated:

When Ruhengeri was attacked, all the Tutsis and, particularly, those who were in Kigali became famous for their arrogance and took "champagne" on grounds that their kinsmen had returned to the fold. They no longer conceal the fact that this war pits the Hutus against the Tutsis. . . .¹⁷⁰

In an article published in July 1993, Tutsis are again derided:

We are trying to discover the wickedness and malice of Tutsis. When you cure the eye of a Tutsi, you will be the first to be glanced at with envy. We have started with this proverb so as to warn and awaken those who are not aware of the sadism, wickedness, malice and ingratitude of Tutsis. Tutsis think they are more intelligent than whosoever is but after analysis, it is discovered that their pretentiousness conceals their wickedness.

169. *Id.* ¶ 179.

170. *Id.* ¶ 181.

It is with malice or interest that a Tutsi establishes a relation with the majority people. When a Tutsi is in need of something from a Hutu, he is ready to sacrifice by using all the means including money, his sisters or his wife. . . . Immediately a Tutsi gets what he wants from a Hutu, he turns his back and hurts him as if they have never had anything in common. Anyone who had any relation with a Tutsi can recall this fact and can support what I am saying. . . . [.] In *Kiswahili*, it is stated that a small snake is a snake. So, MDR cannot convince us that the *Inyenzi* who have transformed into *Inkotanyi* are our brothers whereas they have come to exterminate us with machetes. The Hutu has been patient and now it is time for the situation to be clarified. . . . [.] We know that they attacked us so as to exterminate 4.5 million Hutus[,] particularly the literate ones as was the case in Burundi[,] but God foiled their plans. This wickedness was obvious during the attack of 8 February 1993. They caught a Hutu, cut his genitals and requested the wife to carry them and at times asked her to eat them. Their newspapers in Kigali claimed that these crimes were committed by the national army that *Inyenzi* could not carry out such atrocities. They turn to ignore the fact that escapees shall never forget the scenes of horror which they witnessed. . . .¹⁷¹

In all of these and other articles, it is conveyed clearly through the use of “vitriolic language” that the Hutus must rise against the Tutsi.¹⁷² “In articles such as ‘A Cockroach Cannot Give Birth to a Butterfly,’ the Tutsi were portrayed as innately evil.”¹⁷³ “The presentation of Tutsi women as *femmes fatales* focused particular attention on Tutsi women and the danger they represented” to Hutu men.¹⁷⁴ “This danger was explicitly associated with sexuality.”¹⁷⁵ “By defining the Tutsi woman as an enemy in this way, *Kangura* articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.”¹⁷⁶

The ICTR recognized that some of the lists reprinted in *Kangura* were official lists of government targets.¹⁷⁷ For example, “the letter by Tharcisse Renzaho published in *Kangura* No. 7 effectively named the people listed in it as suspects and called on the government to prosecute them.”¹⁷⁸ “Readers were urged to organize self-defence, with the clear implication that they should take action against those named, to save themselves from extermination. By generating fear, providing names,

171. *Id.* ¶ 182.

172. *Id.* ¶ 187.

173. *Id.*

174. *Id.* ¶ 188.

175. *Id.*

176. *Id.*

177. *Id.* ¶ 204.

178. *Id.* ¶ 205.

and advocating this kind of pre-emptive strike, *Kangura* clearly intended to mobilize its readers against the individuals named on the list.¹⁷⁹ Many were subsequently killed during the genocide, but the ICTR did not find any evidence to establish a nexus between the publication of their names in *Kangura* and their subsequent deaths.¹⁸⁰

A number of cartoons appeared in *Kangura* targeting the Tutsi.¹⁸¹ One cartoon showed “Agathe Uwilingiyimana, the Prime Minister, and Faustin Twagiramungu, the designated Prime Minister of the transitional government [that never materialized], naked in bed together, which [a witness] said was intended to defame these two.”¹⁸² In another, Uwilingiyimana was caricatured naked in a manner intended to denigrate her.¹⁸³ She is portrayed naked in several other cartoons with one in particular picturing her with snakes coming from her breasts.¹⁸⁴

Five issues of *Kangura* were published in 1994, the year of the massacres.¹⁸⁵ In “As a Result of Their Politics of Lies, the Inkotanyi Regret Having Started the War,” the *Inkotanyi* were “told that there were no soldiers to defend the country, which led them to believe they could take Rwanda in three days.”¹⁸⁶ “The second ‘lie’ was that the *Inyenzi* were ‘really needed in the country and that if they came, there would be no problems, that we would have forgotten our loved ones who were mercilessly killed, that there were no Hutus in Rwanda’.”¹⁸⁷ “The third ‘lie’ was that the *Inyenzi* would seize power immediately in a *coup d’etat*.”¹⁸⁸

[Ngeze] wrote that if the *Inyenzi* ‘raise their heads again, it will no longer be necessary to go and fight the enemy who remained in the bush but rather, people will start by eliminating the enemy who remained in the country’, starting with these prisoners. He stated that the *Inyenzi* accomplices had a list of 1,600 opponents who would be killed during a transition period, in order to instill fear and intimidate the population into following the *Inyenzi*, a plan which he said was referred to as the ‘Final Plan’.¹⁸⁹

179. *Id.* ¶ 206.

180. *Id.* ¶ 204.

181. *Id.* ¶ 207.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* ¶ 212.

186. *Id.* ¶ 213.

187. *Id.* ¶ 214 (quoting Hassan Ngeze, *As a Result of Their Politics of Lies, the Inkotanyi Regret Having Started the War*, KANGURA, Jan. 1994).

188. *Id.* ¶ 215.

189. *Id.*

The article proceeded to state:

Let's hope the *Inyenzi* will have the courage to understand what is going to happen and realize that if they make a small mistake, they will be exterminated; if they make the mistake of attacking again, there will be none of them left in Rwanda, not even a single accomplice. All the Hutus are united.¹⁹⁰

In the same issue, Ngeze wrote in an editorial "The Role of *Kangura* in the Salvation of Rwanda":

Before Rwanda was attacked, *Kangura* revealed the plan. We started urging the Hutus to unite, not to listen to what the enemy was asking them to do, especially as the enemy was the cause of the war amongst them. From that time, the truth preached by *KANGURA* has played a remarkable role in the reconciliation of Hutus and the return of those who had been misled. Today, Hutus from different parties meet, discuss and share a drink. The irrefutable proof of this is the speech Justin MUGENZI delivered during the MRND meeting the day before yesterday in Nyamirambo. Who could have thought that MUGENZI will one day become an *Interahamwe*? *Kangura's* role will be studied in the history of Rwanda and that of the region we live in where a lot of Tutsis reside: Besides, *Kangura* has revealed to the coming generation who the Tutsi is.¹⁹¹

In an editorial published in February 1994, entitled "How Will the UN Troops Perish?," *Kangura* stated:

As it happened in Somalia where about two hundred UN soldiers were killed because of their partisan stance, in Rwanda, the government will soon be formed and those who will be left out will fight against it, and so will those participating in the government but without recognizing it. The country will be teeming with opponents. The United Nations troops will continue supporting the Arusha Accords because they justify their presence here. Those who reject the Accords will take it out on those soldiers and will massacre them; they will throw grenades at them and they will die each day. A time will come when those soldiers would grow weary and leave. And it is after their departure that blood will really flow. All the Tutsis and the cowardly Hutus will be exterminated. The *Inyenzi* would once more enlist MUSEVENI's support in attacking the Hutus, who will be tortured to death. The tragedy would be as a result of the ill-conceived accords.¹⁹²

Based on the evidence provided by witnesses, "*Kangura* conveyed its message effectively. *Kangura* was seen as an anti-Tutsi publication

190. *Id.* (citing Ngeze, *supra* note 187).

191. *Id.* ¶ 218.

192. *Id.* ¶ 225.

with much power to affect the lives of the individuals mentioned in it.”¹⁹³ For example, one witness “acknowledged that Prime Minister Agathe Uwilingiyimana was killed by the Presidential Guard on the order of Habyarimana’s widow.”¹⁹⁴ However, he perceived the way the Prime Minister was depicted in *Kangura* as making her a target and subsequently leading to her assassination.¹⁹⁵ “The ethnic hatred that permeates *Kangura* had the effect of poison, as evidenced by the testimony of the witnesses. At times *Kangura* called explicitly on its readers to take action. More generally, its message of prejudice and fear paved the way for massacres of the Tutsi population.”¹⁹⁶

In March 1994, *Kangura* ran a competition consisting of eleven questions which could be answered by reading previous issues, most of which related to a particular text.¹⁹⁷ This competition was a joint enterprise of *Kangura* and Radio Télévision Libre des Mille Collines (RTL).¹⁹⁸ This demonstrated that the two effectively coordinated activities.¹⁹⁹ The exercise was designed to familiarize readers with the ideas of *Kangura* published over the preceding three years.²⁰⁰

2. RTLM

“Many witnesses testified that radio [programming also] played a significant role in the lives of Rwandans” leading up to the 1994 genocide.²⁰¹ “[I]n the 1980s, the MRND government subsidized the production of radios, which were sold at a reduced price or even given away to those in the administrative structure of the party. . . . [R]adio was increasingly important as a source of information as well as entertainment.”²⁰² RTLM began to broadcast in July 1993.²⁰³

In a November 20, 1993, interview with Ferdinand Nahimana broadcast on RTLM, Nahimana, a radio host, said:

There is no difference between the RPF and the *Inyenzi* because the *Inyenzi* are refugees who fled Rwanda after the mass majority Revolution of 1959, the fall of the monarchy and the establishment of a democratic

193. *Id.* ¶ 242.

194. *Id.*

195. *Id.*

196. *Id.* ¶ 243.

197. *Id.* ¶ 247.

198. *Id.* ¶ 255.

199. *Id.*

200. *Id.* ¶ 256.

201. *Id.* ¶ 342.

202. *Id.*

203. *Id.*

Republic. Those who refused the Republic and the democracy went into self-imposed exile. Not long after, between 1962 and 1967, those refugees tried to replace the new Republic by the former monarchy. They launched attacks that killed people. However, Rwanda had then a national army, the national guard. Those sons of the nation did their best and drove those attacks out and in 1967, the *Inyenzi* stopped their attacks. . . [.] You understand that the RPF that attacked us is made of those people, has its origin in those Tutsis who fled in 1959, those who attacked us until 1967. So, they got organized and named themselves RPF. At the beginning of the war in 1990, we used to say: "The *Inyenzi* have attacked us." The word "*Inyenzi*" was abandoned not long ago when we started negotiating. Kanyarengwe and his people said: "We do not want to be called *Inyenzi*. . . [.] Both the *Inyenzi* and the *Inkotanyi* are people who attack and kill."²⁰⁴

On October 25, 1993, he broadcast:

This man told me that the problem that exists is a known problem that many people neglect: it is the Hutu-Tutsi problem. Why can the Hutu and Tutsi not agree so that each one knows who he is. I am going to tell you a mere nothing which worries people. [A woman who telephoned me] asked me not to say to our radio RTL M that the Tutsi who own taxis are 70% of all who own taxis in this country. . . [.] I responded to her that no one can prevent these statistics from being known where they exist in the world. The richest in the world are written of in books and the world knows them while one mentions the poorest of the world and calls them tramps. This can be found in Paris or in Kigali. So I don't see the problem if we say that the people own such riches.²⁰⁵

On December 9, 1993, he stereotyped Tutsis by their physical characteristics:

Not all Tutsis are wicked; some of them are wicked. Not all Hutus are good, some of them are wicked. Of the ethnic groups, there are some wicked Twas. . . [.] This shows that human nature remains the same among all the ethnic groups in Rwanda, among them all the men in Rwanda. But what type of person got it into his head that the RTL M hates the Tutsis? What have the Tutsis done to incur our hatred? A Tutsi, (he smiles) who . . . and which way are the Tutsis hated? The mere fact of seeing a Tutsi strolling about forces you to say he has a beautiful nose, that he is tall and slim, and what not. And you grudge him for that? If he has a beautiful, aquiline nose, you also have your own nose that is fat and which allows you to breathe enough air to ventilate your lungs.²⁰⁶

204. *Id.* ¶ 357.

205. *Id.* ¶ 363.

206. *Id.* ¶ 368.

Again, on March 16, 1994, RTLM broadcast a call to arms to Hutus:

We know the wisdom of our armed forces. They are careful. They are prudent. What we can do is to help them whole-heartedly. A short while ago, some listeners called to confirm it to me saying: ‘We shall be behind our army and, if need be, we shall take up any weapon, spears, bows. . . . Traditionally, every man has one at home, however, we shall also rise up. Our thinking is that the *Inkotanyi* must know that whatever they do, destruction of infrastructure, killing of innocent people, they will not be able to seize power in Rwanda. Let them know that it is impossible. They should know, however, that they are doing harm to their children and grand-children because they might one day have to account for those actions.’²⁰⁷

In another RTLM broadcast on May 15, 1994, the editor Gaspard Gahigi said, “I would like to tell you . . . that the war we are waging is actually between these two ethnic groups, the Hutu and the Tutsi.”²⁰⁸

In a follow up on June 4, 1994, RTLM broadcast:

One hundred thousand young men must be recruited rapidly. They should all stand so that we kill the *Inkotanyi* and exterminate them, all the easier that . . . the reason we will exterminate them is that they belong to one ethnic group. Look at the person’s height and his physical appearance. Just look at his small nose and then break it. Then we will go on to Kibungo, Rusumo, Ruhengeri, Byumba, everywhere. We will rest after liberating our country.²⁰⁹

On May 13, 1994, RTLM stated:

Someone must have signed the contract to exterminate the *Inkotanyi* . . . to make them disappear for good . . . to wipe them from human memory . . . to exterminate the Tutsi from the surface of the earth . . . to make them disappear for good. . . [.]²¹⁰

July 2, 1994, Kantano Habimana said on RTLM:

So, where did all the *Inkotanyi* who used to telephone me go, eh? They must have been exterminated. . . . Let us sing: “Come, let us rejoice: the *Inkotanyi* have been exterminated! Come dear friends, let us rejoice, the Good Lord is just.” The Good Lord is really just, these evildoers, these terrorists, these people with suicidal tendencies will end up being exterminated.²¹¹

And again, Habimana broadcast on May 23, 1994:

207. *Id.* ¶ 371.

208. *Id.* ¶ 392.

209. *Id.* ¶ 396.

210. *Id.* ¶ 397.

211. *Id.* ¶ 403.

Let me congratulate thousands and thousands of young men I've seen this morning on the road to Kigali doing their military training to fight the *Inkotanyi*. . . [.] At all costs, all *Inkotanyi* have to be exterminated, in all areas of our country. Whether they reach at the airport or somewhere else, but they should leave their lives on the spot. That's the way things should be. . . [.] Some (passengers) may pretext that they are refugees, others act like patients and other like sick-nurses. Watch them closely, because *Inkotanyi's* tricks are so many. . . [.] Does it mean that we have to go in refugee camps to look for people whose children joined the RPA and kill them? I think we should do it like that. We should also go in refugee camps in the neighbouring countries and kill those who sent their children within the RPA. I think it's not possible to do that. However, if the *Inkotanyi* keep on acting like that, we will ask for those whose children joined the RPA among those who will have come from exile and kill them. Because if we have to follow the principle of an eye for an eye, we'll react. It can't be otherwise.²¹²

RTLTM broadcasts, like *Kangura*, provided the names of individuals to be targeted by the Hutus.²¹³ Habimana, in particular, encouraged those manning roadblocks to take drugs:

I would like at this time to salute those young people near the slaughterhouse, the one near Kimisagara. . . [.] Yesterday I found them dancing zouk. They had even killed a small pig. I would like to tell you that. . . . Oh no! The thing you gave me to smoke . . . it had a bad effect on me. I took three puffs. It is strong, very strong, but it appears to make you quite courageous. So guard the trench well so to prevent any cockroach passing there tomorrow. Smoke that little thing, and give them hell.²¹⁴

The articles and broadcast by *Kangura* and RTLTM showed a clear intent and pattern to incite the Hutu population to rise up and commit genocide against the Tutsis.

3. Holding

The ICTR noted that, pursuant to article 6(1) of its statute, incitement is a broad term and does not require a "public call to commit genocide, an element at the core of the crime of public and direct incitement to genocide."²¹⁵ The Tribunal defined hate speech as

a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the

212. *Id.* ¶ 425.

213. *Id.* ¶ 431.

214. *Id.* ¶ 433.

215. *Id.* ¶ 1030.

group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.²¹⁶

There is not a causation requirement in international law with regard to hate speech.²¹⁷ “Rather, the question considered is what the likely impact might be, recognizing that causation in this context might be relatively indirect.”²¹⁸ The element of causation with regard to the media “is such that causation of killing and other acts of genocide will necessarily be effected by an immediate proximate cause in addition to the communication itself.”²¹⁹ The massacres of the Tutsi populace occurred when the President died in a plane crash, but, the ICTR observed, “if the downing of the plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded.”²²⁰ The Tribunal found that causation existed through the dissemination of hate speech by RTLM and *Kangura* before and after the massacres began on April 6, 1994.²²¹ In finding an intent to commit genocide, the Tribunal looked at individual writings and broadcasts and the messages they conveyed.²²²

Newspaper editors, publishers, and broadcasters are generally considered responsible for the media which they control.²²³ Proving the element of intent in these cases is important.²²⁴ The words and expressions used in the media are indicators of intent.²²⁵ The Tribunal also looked to the accuracy of the statements disseminated through the media as a factor.²²⁶ The tone is as important as the speech itself.²²⁷ It is also important to take the context of the speech into account when looking for intent in order to protect legitimate political speech.²²⁸ And, “it is critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred.”²²⁹

216. *Id.* ¶ 1072.

217. *Id.* ¶ 1007.

218. *Id.*

219. *Id.* ¶ 952.

220. *Id.* ¶ 953.

221. *Id.*

222. *Id.* ¶ 957.

223. *Id.* ¶ 1001.

224. *Id.*

225. *Id.*

226. *Id.* ¶ 1021.

227. *Id.* ¶ 1022.

228. *Id.* ¶ 1004.

229. *Id.* ¶ 1020.

In instances where the media are broadcasting words of hatred a distancing between the broadcasting and the speech must take place to repudiate the message.²³⁰ The way the media handle the message indicates not only intent, but the real meaning of the message itself.²³¹ Those working for *Kangura* and RTLM made no effort to distance themselves from their messages.²³²

The Tribunal noted that “RTLM broadcasting was a drumbeat, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population.”²³³ RTLM was dubbed “Radio Machete.”²³⁴ The racial animosity against the Tutsis was “augmented by the visceral scorn coming out of the airwaves—the ridiculing laugh and the nasty sneer.”²³⁵ As a result, the broadcasts increased the impact of the massacre.²³⁶ The parties were convicted of direct and public incitement to genocide under article 2(3)(c) pursuant to article 6(3) of the ICTR statute.²³⁷

IV. INTENT ANALYSIS

According to the case law discussed earlier, the elements of public and direct incitement to genocide in international law are: (1) there must be intent on the part of the speaker, (2) there need not be causation, and (3) genocide does not have to take place. These elements were heard in RTLM radio broadcasts advocating the massacres of the Tutsi. A May 15, 1994, broadcast says, “I would like to tell you . . . that the war we are waging is actually between these two ethnic groups, the Hutu and the Tutsi.”²³⁸ Another says that the Tutsi “should all stand up so that we kill the *Inkotanyi* and exterminate them.”²³⁹ It goes on, “[T]he reason we will exterminate them is that they belong to one ethnic group.”²⁴⁰ *Kangura* published articles describing the Tutsi in extreme terms: “We are not mistaken in stating that a cockroach can only give birth to another cockroach.”²⁴¹

230. *Id.* ¶ 1024.

231. *Id.*

232. *Id.*

233. *Id.* ¶ 1031.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* ¶¶ 1033-1034.

238. *Id.* ¶ 392.

239. *Id.* ¶ 396.

240. *Id.*

241. *Id.* ¶ 179.

Based on the pattern of conduct and the content of their messages, the ICTR found RTLM and *Kangura* to be tools in the massacre of the Tutsi.²⁴² Both strongly advocated the murder of Tutsi civilians.²⁴³ The ICTR found a higher standard for the media when advocating hate speech.²⁴⁴ The *Kangura* articles and RTLM broadcasts demonstrated a clear intent to advocate genocide.²⁴⁵

The intent in this case was clearly derived from the words and expressions themselves. The ICTR looked not just at the plain meaning of the words but the message they conveyed. Despite the use of buzzwords and euphemisms, in *Nahimana*, RTLM radio regularly broadcast calls to its listeners to take action against what RTLM described as the “enemy” or the “cockroach” and their moderate Hutu supporters.²⁴⁶ The terms were code words to RTLM listeners used to refer to the Tutsi.²⁴⁷ In *Akayesu*, the population clearly understood Akayesu’s call as one to kill the Tutsi.²⁴⁸ Akayesu himself was fully aware of the impact of his speech on the crowd and of the fact that his call to fight against the accomplices of the *Inkotanyi* would be construed as a call to kill the Tutsi in general.²⁴⁹ Once the message is derived from the speech, intent follows on an almost prima facie basis.

In contrast, in *Virginia v. Black*, the United States Supreme Court rejected intent as demonstrated by prima facie evidence.²⁵⁰ The Court said that the prosecution must look at the actual intent behind the act.²⁵¹ Interestingly, the Court did not focus much on Black’s rally, where things were said that arguably would indicate such intent, such as one speaker stating that he would “love to take a .30/.30 and just randomly shoot the blacks.”²⁵² Rather the Court looked at Elliot O’Mara and his codefendant who testified that the cross was burned because Jubilee had complained to the authorities about a firing range in Elliott’s backyard, not due to any racial motivation.²⁵³ Justice Thomas, in his dissent, rejected that reasoning, noting that “[i]n our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims

242. *Id.* ¶ 1058.

243. *Id.* ¶ 1062.

244. *Id.*

245. *Id.* ¶ 1017.

246. *Id.* ¶ 439.

247. *Id.* ¶¶ 372, 407, 437, 473.

248. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 673 (Sept. 2, 1998).

249. *Id.* ¶ 361.

250. 538 U.S. 343, 347-48 (2003).

251. *Id.*

252. *Id.* at 349.

253. *Id.* at 350.

well-grounded fear of physical violence.”²⁵⁴ However, this clearly is a minority position among courts, and the ICTR actually cited it in support of its arguments. Accordingly, to convict an individual of direct and public incitement to genocide, a court need only show that there was a clear intent to incite genocide on the part of the speaker.

V. CONCLUSION

The Nuremberg Trials for Nazi war criminals first established the connection between speech and the actions of the populations. In other words, articles and broadcasts of propaganda aimed at the incitement of genocide laid the groundwork for the subsequent murders. Taken to its logical conclusion, those who created the conditions in which members of a population will commit genocide are as guilty as the perpetrators. Following this, other international courts as well as treaties have made incitement to genocide a war crime. The ICTR has elaborated upon these to provide a clear basis for what constitutes hate speech as a war crime. The deciding factor is that there must be intent, but there does not need to be causation or even an actual attempt at genocide.

254. *Id.* at 391.