THE LAW OF INCITEMENT

United States Holocaust Memorial Museum Symposium
"Speech, Power and Violence"

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I. INTRODUCTION

This essay will explore the origins and development of the crime of direct and public incitement to commit genocide. It will begin with an historical analysis of the epochal Nuremberg decisions regarding Nazi hate-mongers Julius Streicher, Hans Fritzsche and Otto Dietrich. Although these decisions did not deal explicitly with incitement as a separate crime, they laid the groundwork for future development of incitement as a crime in its own right.

The essay will then examine the official birth of the incitement crime with the adoption of the 1948 Convention on the Prevention and Punishment of Genocide ("Genocide Convention"). From that point through the next forty-five years, the crime was not actually applied. But that changed with the creation of the International Criminal Tribunal for Rwanda (ICTR), which vigorously prosecuted incitement to genocide. Through a series of cases that progressively fleshed out elements of the crime, the ICTR jurisprudence set out the materials necessary to construct a legal framework necessary to analyze incitement. That framework was put to good use in the Canadian immigration context in the case of Rwandan politician Leon Mugesera, who delivered an infamous pre-1994 speech calling for genocide through a series of violent and macabre metaphors.

The essay will conclude with an analysis of the most recent ICTR case to apply and develop the incitement framework -- Prosecutor v. Simon Bikindi. Bikindi, a popular songwriter, composed music and lyrics that provoked ethnic hatred toward Tutsis. While the Tribunal's decision in that case is in line with the spirit of its precedents, it fails to apply them in a rigorous, systematic fashion. It does, however, impliedly add two new elements to the framework -- "temporality" and "instrumentality" requirements -- *i.e.*, the

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speech must be contemporaneous with its dissemination and should be disseminated by the speaker himself. This represents incorporation of important collateral speech-protection elements. The decision also makes clear that use of euphemisms (referring to Tutsis as "snakes") and indirect urging (asking questions) can constitute incitement.

The essay will conclude with an assessment of the state of incitement jurisprudence and a forecast of future developments. The law is headed on the right path but a more formal adherence to precedent and a more rigorous application of the elements will be necessary for incitement to avoid becoming an ambiguous crime that could infringe on hallowed free speech rights.

II. THE NUREMBERG PRECEDENTS

After World War II, the victorious Allies opted for justice over vengeance and presided over the historic Nuremberg trial of the major Nazi war criminals. Among the defendants tried before the International Military Tribunal at Nuremberg (IMT) were Julius Streicher, publisher of the weekly anti-Semitic newspaper "*Der Stürmer*" and Hans Fritzsche, head of the Radio Section of the Nazi Propaganda Ministry. The *Streicher* and *Fritzsche* cases are the most significant pre-ICTR international precedents regarding media use of hate speech in connection with massive violations of international humanitarian law. Otto Dietrich, another important Nazi propaganda figure, was prosecuted as part of "the Ministries Case" of the so-called "Subsequent Nuremberg Proceedings."[1] The decision in the *Dietrich* case also serves as an important precursor to and building-block for the law of incitement.

A. The Julius Streicher Case

The ICTR has characterized the Julius Streicher case as the "most famous conviction for incitement."[2] The IMT sentenced Streicher to death for the anti-Semitic articles he published in his weekly newspaper *Der Stürmer*.[3] In its judgment, the IMT quoted numerous instances when *Der Stürmer* called for the extermination of Jews.[4] Although Streicher, commonly referred to as "Jew-Baiter Number One," denied any knowledge of Jewish mass executions, the IMT found he regularly received information on the deportation and killing of Jews in Eastern Europe.[5] Significantly, the judgment does not posit a direct causal link between Streicher's publication and any specific acts of murder.

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[1] The "Subsequent Nuremberg Proceedings" refers to twelve post-IMT trials conducted by the United States pursuant to Control Council Law No. 10. *See* Benjamin B. Ferencz, *Telford Taylor: Pioneer of International Criminal Law*, 37 COLUM. J. TRANSNAT'L L. 661, 662 (1999) ("[T]he twelve subsequent trials at Nuremberg . . . proceeded under Control Council Law No. 10, which clarified and improved the Charter of the International Military Tribunal by, *inter alia*, making explicit the proposition that crimes against humanity could be punishable even if not related to war."). *See also United States v. Ernst von Weizsaecker (Ministries Case)*, XIV TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 314 (1950) [hereinafter Ministries Case].

[2] *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T,¶ 550 (1998).

[3] *See* Judgment of the International Military Tribunal for the Trial of German Major War Criminals (Streicher Case), http://avalon.law.yale.edu/imt/judstrei.asp.

[4] *Id*.

[5] *Id*.

Instead, it refers to his work as a poison "injected in to the minds of thousands of Germans which caused them to follow the [Nazi] policy of Jewish persecution and extermination."[6] Moreover, acknowledging that Streicher was not a Hitler adviser or even connected to Nazi policy formulation, the IMT found that "Streicher's 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 [IMT] Charter, and constitutes a Crime against Humanity."[7]

B. The Hans Fritzsche Case

Also charged with incitement as a crime against humanity, Hans Fritzsche was acquitted by the International Military Tribunal.[8] Head of the Radio Section of the Propaganda Ministry during the war, Fritzsche was well known for his weekly broadcasts.[9] In his defense, Fritzsche asserted that he had refused requests from Nazi Propaganda Minister Joseph Goebbels to incite antagonism and arouse hatred, and that he had never voiced the theory of the "master race."[10] In fact, he claimed, he had expressly prohibited the term from being used by the German press and radio that he controlled[11]. He also testified that he had expressed his concern over the content of Streicher's newspaper, *Der Stürmer*, and that he had tried twice to ban it.[12] In acquitting Fritzsche, the IMT found he had not exercised control over the formulation of propaganda policies and that he had been a mere conduit of directives passed down to him.[13] With regard to the charge that he had incited the commission of war crimes by deliberately falsifying news to arouse passions in the German people, the IMT found no evidence Fritzsche knew any such information was false.[14]

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[6] *Id*.
[7] *Id.*
[8] *See* Judgment of the International Military Tribunal for the Trial of German Major War Criminals (Fritzsche Case), http://avalon.law.yale.edu/imt/judfritz.asp.
[9] *Id*.
[10] *Id*.
[11] *Id.*
[12] *Id*.
[13] *Id.*
[14] *Id*. This decision has been criticized. For example, the IMT prosecution, in its reply to the "Unfounded Acquittal of Defendant Fritzsche," noted that the verdict failed to take into account that Fritzsche was until 1942 "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'." The reply went on: "[f]or the correct definition of the role of defendant Hans Fritzsche it is necessary, firstly, to keep clearly in mind the importance attached by Hitler and his closest associates (as Goering, for example) to propaganda in general and to radio propaganda in particular. This was considered one of the most important and essential factors in the success of conducting an aggressive war…and in training the German populace to accept obediently [Nazi] criminal enterprises…In the propaganda system of the Hitler State it was the daily press and the radio that were the most important weapons." In dissent, the Soviet Judge inveighed: "[i]t is further established that the defendant systematically preached the anti-social theory of race hatred and characterized peoples inhabiting countries victimized by aggression as 'sub-humans'…Fritzsche agitated for all the civilian population of Germany to take active part in the activities of this terroristic Nazi underground organization." *Id*.

C. The Otto Dietrich Case

Fritzsche's immediate supervisor at the Propaganda Ministry, technically subordinate only to Joseph Goebbels, was Otto Dietrich, Reich Press Chief from 1937 to 1945.[15] In certain respects, though, Dietrich was Goebbels's rival for media control in the Third Reich. In the early days of the Reich, Dietrich formulated the "Editorial Control Law," which, among other things, required all newspaper and periodical editors to be members of the Reich League of the German Press.[16] Dietrich was Chairman of the Reich League, which ran courts that punished and purged editors who did not follow Nazi directives.[17] In this way, Hitler gave Dietrich "responsibility for ideological oversight and direction of editors; furthermore, Dietrich had immediate access to Hitler."[18] As a result, Nuremberg prosecutors described Dietrich "as 'by far the most important' of the Nazi leaders, including Goebbels, involved in propaganda."[19]

Dietrich was indicted in the Subsequent Nuremberg Proceedings in the so-called "Ministries Case."[20] He was charged, *inter alia*, with Crimes against Humanity in connection with the dissemination of antisemitic propaganda.[21] Based largely on the daily press directives issued by Dietrich during the Holocaust, the Tribunal found him guilty of crimes against humanity:

> It is thus clear that a well thought-out, oft-repeated, persistent campaign to arouse the hatred of the German people against Jews was fostered and directed by the press department and its press chief, Dietrich. That part or much of this may have been inspired by Goebbels is undoubtedly true, but Dietrich approved and authorized every release . . . The only reason for this campaign was to blunt the sensibilities of the people regarding the campaign of persecution and murder which was being carried out . . . These press and periodical directives were not mere political polemics, they were not aimless expression of anti-Semitism, and they were not designed only to unite the German people in the war effort . . . Their clear and expressed purpose was to enrage the German people against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected . . . By them Dietrich

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[15] *See* JEFFREY HERF, THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST 22 (Harvard University Press 2006); Allan Ryan, *Judgments on Nuremberg: The Past Half-Century and Beyond -- A Panel Discussion of Nuremberg Prosecutors*, 16 B.C. THIRD WORLD L.J. 193, 213 n.23 (1996) ("Hans Fritzsche was a section chief in the Propaganda Ministry underneath Joseph Goebbels and Otto Dietrich.").

[16] HERF, *supra* note 15, at 18..

[17] *Id*.

[18] RALF GEORG REUTH, GOEBBELS 176 (Harcourt Brace Jonanovich 1993)

[19] HERF, *supra* note 15.

[20] *See* Ministries Case, *supra* note 1.

[21] *Id.* at 565-76 (Dietrich).

> consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews . . .[22]

III. THE GENOCIDE CONVENTION AND THE ICTR STATUTE

Through the advocacy and leadership of Raphael Lemkin, a Holocaust survivor and jurist who formulated the term "genocide,"[23] the United Nations General Assembly brought the Genocide Convention to life with the passage of Resolution 96(1), which outlawed genocide and made individuals responsible for its commission.[24] Completed in 1948, the Convention listed the specific acts (pursuant to Article II) that constitute genocide and then laid out a separate set of sanctionable acts (under Article III). In particular, Article II's acts include killing, causing serious bodily or mental harm, and inflicting on the group conditions of life calculated to bring about its physical destruction—committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such. Article III then criminalizes a number of related acts committed in furtherance of Article II. One such act, set forth at Article III(b), is "direct and public incitement to commit genocide."[25]

As Article II 3(c) of the ICTR Statute[26] essentially mirrors Article III (b) of the Genocide Convention,[27] the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) provides invaluable insights regarding the interpretation of Article III(b). The ICTR has prosecuted and convicted several defendants pursuant to Article II 3(c) of the ICTR statute.[28] Of these, five cases have significantly contributed to the development of incitement law: *Prosecutor v. Akayesu*;[29] *Prosecutor v. Kambanda*;[30] *Prosecutor v. Ruggiu*;[31] and *Prosecutor v. Nahimana, Barayagwiza & Ngeze.*[32] Additionally, a Rwandan incitement case from the Canadian Supreme Court, *Mugesera v. Canada*,[33] serves as an excellent capstone that applies and elucidates the standards established by the ICTR precedents.

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[22] *Id*. at 575-76.

[23] *See* SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 29, 42, 61-63 (Basic Books 2002).

[24] G.A. Res. 96(I), U.N. GAOR, 1st Sess., 55th plen. mtg., at 188-89, U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

[25] G.A. Res. 260(III), U.N. GAOR, 3rd Sess., Part I (A/810), at 174.

[26] *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 Jan. 1994 and 31 Dec. 1994*, Annex to S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

[27] *See* Gregory S. Gordon, "*A War of Media, Words, Newspapers, and Radio Stations*"*: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 150 (2004).

[28] *See* JUSTUS REID WEINER ET AL., JERUSALEM CENTER. FOR PUBLIC AFFAIRS, REFERRAL OF IRANIAN PRESIDENT AHMADINEJAD ON THE CHARGE OF INCITEMENT TO COMMIT GENOCIDE (2006), *available at* http://www.jcpa.org/text/ahmadinejad-incitement, at 29 (indicating that, as of 2006, nine men had been convicted for incitement at the ICTR). This essay will describe the most significant and relevant ICTR incitement cases.

[29] *Akeyesu*, *supra* note 2.

[30] Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998) .

[31] Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 10 (June 1, 2000).

[32] Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003).

[33] Mugesera v. Canada, [2005] 2 S.C.R. 100, 2005 SCC 40 (Can.).

One can glean from the important principles in these cases a set of analytic criteria. To determine if speech amounts to incitement, the judges must evaluate: (1) *where* the utterance was issued (is it sufficiently public?); (2) its *interpretation* by the audience (is it sufficiently direct?); (3) its *content* (is it permissible free speech or criminal incitement?); and (4) the *state of mind* (or *mens rea*) of the person uttering the words (is there sufficient intent?).

These precedents also confirm certain significant collateral points (a) the speaker's official position will not absolve him from liability; (b) inciting through euphemisms does not necessarily impact the directness analysis; and (c) whether the incitement is in fact followed by a genocide does not matter—causation is not an incitement crime element.

IV. THE ICTR CASES AND MUGESERA

A. The *Akayesu* Case: The *Mens Rea*, Direct, and Public Elements

The *Akayesu* judgment laid the cornerstone for the construction of an incitement legal framework by focusing on the following essential elements—the *mens rea*, "direct," and "public" criteria. On September 2, 1998, the ICTR announced history's first ever conviction for genocide after trial before an international court. In convicting Taba Commune burgomaster Jean-Paul Akayesu, the Tribunal set down the foundational elements of the crime of direct and public incitement to commit genocide.[34] In particular, the Tribunal elucidated the *mens rea*, "direct," and "public" elements of the crime.

The incitement charge arose from Akayesu's speech to a crowd in Taba on April 19, 1994. He asked Taba's citizens to unite in order to eliminate what he referred to as the sole enemy: the accomplices of the "Inkotanyi" -- a derogatory reference to Tutsis.[35] This was understood to be a call to kill the Tutsis in general,[36] and Tutsis were in fact massacred in Taba soon after the speech.[37]

In its opinion finding Akayesu guilty, the Tribunal fleshed out three important aspects of the crime: (1) *mens rea*; (2) the "public" element; and (3) the "direct" element.[38] With respect to *mens rea*, the Tribunal held that the requisite mental state lies in the intent directly to prompt or provoke another to commit genocide. The person who incites others to commit genocide must himself have the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnic, racial, or religious group.[39] Based on the circumstances surrounding Akayesu's conduct, the Tribunal found he had the necessary *mens rea*.[40] Additionally, Akayesu's incitement was "public" because it constituted "a call for criminal action to a number of individuals in a public place" or to

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[34] *Akayesu*, *supra* note 2.
[35] *Id.* ¶ 673.
[36] *Id.*
[37] *Id.*
[38] The Tribunal also addressed the issue of causation—whether Akayesu's incitement caused the massacres that followed. However, the Tribunal's holding was vague; it held that causation was not an element of the crime, but analyzed whether causation was present nonetheless. *Id.* ¶¶ 348-57, 673(vii).
[39] *Id.* ¶ 560.
[40] *Id.* ¶ 674.

"members of the general public at large by such means as the mass media, for example, radio or television."[41]

Finally, the Tribunal held that the "direct" element of incitement should be viewed "in the light of its cultural and linguistic content."[42] Thus, while a particular speech may be perceived as "direct" in one country, it would not be considered as such in another country.[43] So it would be necessary to conduct a case-by-case factual inquiry to determine "whether the persons for whom the message was intended immediately grasped the implication thereof."[44]

The Tribunal relied on both expert and fact witness testimony to conduct this inquiry. In particular, the Tribunal considered the testimony of Dr. Mathias Ruzindana, Professor of Linguistics at the University of Rwanda.[45] In his speech, Akayesu insisted that his listeners kill the "*Inkotanyi*." Dr. Ruzindana reviewed several Rwandan publications and broadcasts by RTLM (Radio Télévision Libre des Milles Collines), which encouraged the extermination of Tutsis, and concluded that, at the time of the events in question, the term *Inkotanyi* was equivalent to RPF sympathizer[46] or Tutsi. This testimony, corroborated by fact witnesses who testified to their understanding of the words, convinced the Tribunal that in the context of the time, place, and circumstances of Akayesu's speech, *Inkotanyi* meant Tutsi.[47]

B. The *Kambanda* Case: State Leaders and Euphemisms

The ICTR soon added two additional components to incitement's emerging analytical framework -- the role of state leaders and the significance of euphemisms. Two days after Akayesu's conviction, the Tribunal made history again by becoming the first international court to convict a head of state for genocide and crimes against humanity.[48] As the result of a guilty plea, the Tribunal convicted Jean Kambanda, the Prime Minister of Rwanda's rump government during the genocide, for, *inter alia*, direct and public incitement to commit genocide and crimes against humanity.[49] Although Kambanda's leadership position did not factor directly into the Tribunal's legal analysis, the decision nevertheless established that heads of state could be convicted for incitement crimes. The factual basis for the guilty plea to incitement was Kambanda's statement on RTLM that the radio station should continue to encourage the massacres of the Tutsi civilian

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[41] *Id.* ¶ 556.
[42] *Id.* ¶ 557.
[43] *Id.*
[44] *Id.* ¶ 558.
[45] *Id.* ¶¶ 340, 673 (iv).
[46] RPF stands for the Rwandan Patriotic Front, a group of primarily Ugandan Tutsi exiles who launched an armed invasion of Rwanda after the genocide began. *Id.* ¶¶ 93, 111. *Inkotanyi* translates roughly as warrior. *Id.* ¶ 147. *Inyenzi* means cockroach. *Id.* ¶ 90.
[47] *Id.* ¶¶ 361, 709.
[48] *See* Jeremy Greenstock, *International Human Rights and Standards*, 23 FORDHAM INT'L L.J. 398, 400 (1999); Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 37 n.40 (2002).
[49] Prosecutor v. Kambanda, *supra* note 30.

population, announcing in particular that this radio station was "an indispensable weapon in the fight against the enemy."[50]

Kambanda further conceded that during the genocide he verbally encouraged both local government officials and members of the population to massacre civilian Tutsis and moderate Hutus.[51] He admitted visiting several prefectures during this time to incite and encourage the population to kill.[52] This included congratulating the people who had already committed mass murder.[53] Kambanda's incitement also consisted of uttering the following incendiary phrase, which was repeatedly broadcast: "[Y]ou refuse to give your blood to your country and the dogs drink it for nothing."[54]

C. The *Ruggiu* Case: More on the Role of Euphemisms

Less than two years later, the ICTR analyzed in greater depth the pivotal role played by euphemisms in relation to the crime of direct and public incitement to commit genocide. On June 1, 2000, Belgian national Georges Ruggiu pled guilty to, among other crimes, one count of direct and public incitement to commit genocide related to Tutsi hate diatribes he aired on RTLM during the 1994 massacres.[55] In sentencing Ruggiu, the Tribunal observed that his broadcasts, in a superficially harmless manner, urged the population to finish off "the 1959 revolution."[56] In fact, as the Tribunal explained, these were code words inciting Hutus to murder the entire Tutsi population.[57] The Tribunal pointed out that in the context of the 1994 civil war, the term *Inyenzi*, which Ruggiu used frequently, actually meant *Tutsi*. Ruggiu acknowledged that the word *Inyenzi*,[58] as employed in the socio-political context of the genocide, had the effect of marking Tutsis as "persons to be killed."[59] He also conceded that, as part of encouraging "civil defense," he announced to the population over the airwaves on several occasions to "go to work."[60] Once again, the expression was contextually understood by listeners to signify "go kill the Tutsis and Hutu political opponents of the interim government."[61] The conduct that formed the basis of the incitement charge against Ruggiu included his congratulating perpetrators of Tutsi massacres,[62] and his warning Hutus to be vigilant against supposed attacks by Tutsi infiltrators.[63]

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[50] *Id.* ¶ 39(vii).
[51] *Id.* ¶ 39(viii).
[52] *Id.*
[53] *Id.*
[54] *Id.* ¶ 39 (x).
[55] Prosecutor v. Ruggiu, *supra* note 31.
[56] *Id.* ¶¶ 44(iii), 50.
[57] *Id.* ¶ 44 (vii).
[58] *Id.* ¶ 44 (iii).
[59] *Id.*
[60] *Id.* ¶ 44(iv).
[61] *Id.*
[62] *Id.* ¶ 50.
[63] *Id.* ¶ 44(v).

D. The ICTR *Media Case*: Content and Causation

Although the *Akayesu*, *Kambanda*, and *Ruggiu* judgments laid a considerable groundwork for incitement analysis, two important elements of the crime still needed fleshing out: (1) content and (2) causation. The Tribunal addressed those features of incitement in its watershed December 2003 opinion in *Prosecutor v. Nahimana* -- the commonly referred to as "the *Media Case*."[64] The three defendants in that case, RTLM founders Ferdinand Nahimana and Jean Bosco Barayagwiza, and Hassan Ngeze, editor-in-chief of the extremist Hutu newspaper *Kangura*, were convicted of, *inter alia*, direct and public incitement to commit genocide.[65] *Kangura*, like RTLM, had exhorted Rwanda's Hutus to exterminate its Tutsis.[66]

One of the main issues the Tribunal grappled with was whether, in broadcasting the content of the communications, the defendants had exercised a legitimate free speech prerogative or rather engaged in illegal hate advocacy. By analyzing existing international legal precedent, the Tribunal distilled four criteria through which language touching on race or ethnicity could be classified as either permissible speech or illegal advocacy: (1) purpose; (2) text; (3) context; and (4) the relationship between speaker and subject.[67]

Regarding the purpose criterion, the Tribunal provided examples of legitimate objectives: historical research, dissemination of news and information, and public accountability of government authorities.[68] At the other end of the gamut, explicit calls for violence would evince a clearly improper purpose.

The Tribunal then focused on the text criterion, a crucial part of divining the purpose of the speech. It began by parsing the decision in *Robert Faurisson v. France*.[69] In that case, the United Nations Human Rights Committee (HRC) had to reconcile Article 19 of the International Covenant for Civil and Political Rights (ICCPR), protecting freedom of expression, with Article 20, forbidding incitement to national, racial, or religious discrimination.[70] Faurisson's Complaint had challenged his French conviction for publishing his view doubting the existence of gas chambers at Nazi concentration camps

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[64] Prosecutor v. Nahimana, Barayagwiza & Ngeze, *supra* note 32.

[65] *See* Gordon, *supra* note 27, at 141.

[66] *Id.* For their crimes, Nahimana and Ngeze were sentenced to life imprisonment, while Barayagwiza was sentenced to thirty-five years imprisonment. *Id.* (citations omitted).

[67] The first two criteria, purpose and text, are lumped together by the Tribunal, but I have argued elsewhere that they should be considered separately. *See id.* at 172. Moreover, the Tribunal did not explicitly characterize as a separate criterion the relationship between the speaker and the subject. I have also demonstrated that this should be considered as a distinct point of analysis given a close reading of the *Nahimana* judgment. *See id.* at 173-74; *see also* Robert H. Snyder, *"Disillusioned Words Like Bullets Bark": Incitement to Genocide, Music, and the Trial of Simon Bikindi*, 35 GA. J. INT'L & COMP. L. 645, 666 (2007) (adopting this analysis). *But see* Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 489 n.17 (contending that the Tribunal was not precise in its formulation of the test and finding it deficient).

[68] *Nahimana*, *supra* note 32, ¶¶ 1000-06.

[69] International Covenant on Civil and Political Rights, Communication No. 550/1993: France (Jurisprudence) P 7.5, U.N Docs. CCPR/C/58/D/550/1993 (1996) (Robert Faurisson v. France).

[70] *Id.* ¶ 1001.

(he referred to them as "magic gas chambers" in the Complaint).[71] The Tribunal found significant the HRC's conclusion that the term *magic gas chamber* suggested the author was motivated by anti-Semitism rather than the pursuit of historical truth.[72]

The Tribunal then contrasted *Faurisson* with *Jersild v. Denmark*, a case decided under the European Convention on Human Rights (ECHR). *Jersild* overturned the incitement conviction of a journalist who interviewed members of a racist group but did not condemn them.[73] The Tribunal observed that Jersild distanced himself from the message of ethnic hatred by describing his interview subjects as "racist" and "extremist youths."[74] The Tribunal noted that this textual analysis allowed the ECHR to conclude that Jersild's objective was news dissemination, not promotion of racist views.[75]

For the "context" criterion, two subdivisions can be discerned through the Tribunal's analysis: external and internal.[76] With respect to external, the Tribunal stressed that circumstances exterior to and surrounding the text must be considered to grasp the text's significance. As before, the Tribunal looked to the *Faurisson* case, where the HRC held that, in context, challenging the well-documented historical existence of Holocaust gas chambers would promote anti-Semitism.

The Tribunal also examined the case of *Zana v. Turkey*.[77] There, the ECHR considered, in the context of violent clashes between government and Kurdish separatist forces, a former regional mayor's statement seemingly condoning Kurdish massacres by saying "anyone can make mistakes."[78] The Tribunal reasoned that the ECHR had upheld the underlying conviction because, given the massacres taking place at the time, the statement was "likely to exacerbate an already explosive situation . . . ."[79]

With respect to the "internal" context, the Tribunal indicated the fact finder should consider the tone of the speaker in uttering the words at issue.[80] Although not discussed by the Tribunal, it seems logical as well to consider the personal history of the speaker to further flesh out the internal context. Does the speaker have a history of engaging in

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[71] *Id*.

[72] *Nahimana, supra* note 32, ¶ 1001.

[73] *Jersild v. Denmark*, 19 Eur. Ct. H.R. 1, 27 (1994). The ECHR has developed jurisprudence balancing the right to freedom of expression, Article 10(1) of the Convention, with the right to restrict expression for national security or protection of the rights and reputations of others, Article 10(2) of the Convention. *See* Gordon, *supra* note 27, at 146.

[74] *Nahimana,supra* note 32 , ¶¶ 993, 1001.

[75] *Id.*

[76] The Tribunal did not explicitly subdivide this criterion but its decision implicitly makes the distinction.

[77] *Zana v. Turkey*, 27 Eur. Ct. H.R. 667, 670 (1997).

[78] *Nahimana, supra* note 32, ¶ 1001.

[79] *Id.*

[80] *Id.* ¶ 1022. Some commentators have criticized the ICTR's analysis because it looked to international law on discrimination and hate speech for guidance. *See, e.g.*, Benesch, *supra* note 67, at 515 (complaining that the ICTR "mixed legal standards"). However, as suggested by the ICTR Appeals Chamber in the *Media Case* decision, such a general reference point is not entirely unreasonable: "[i]n most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech [but indicating they are ultimately different]." *See Nahimana*, Case No. ICTR 99-52-A ¶ 692. Still, the Appeals Chamber noted that it could not conclude that the Trial Chamber referred to this jurisprudence to "defin[e]" direct and public incitement to commit genocide. *Id.* ¶ 693.

similar speech? Is there something about the speaker's background that provides helpful information regarding personal contextual motive? [81]

Finally, the Tribunal indicated the finder of fact should examine the relationship between the speaker and the subject.[82] The analysis should be more speech-protective when the speaker is part of a minority criticizing either the government or the country's majority population.[83]

This analysis allowed the Tribunal to "distinguish between permissible speech and illegal incitement in the cases of *Kangura* and RTLM."[84] In particular, "[t]he Tribunal noted . . . that some of the articles and broadcasts offered into evidence . . . conveyed historical information, political analysis, or advocacy of ethnic consciousness regarding the inequitable distribution of privilege [between Hutus and Tutsis] in Rwanda."[85]

For example, the Tribunal discussed a December 1993 broadcast made by Barayagwiza in which he alluded to the discrimination he experienced as a Hutu child.[86] Using the Tribunal's analytic criteria, the purpose of the speech appeared to be advocacy of ethnic consciousness. The text itself used language conveying historical inequities and not incitement. Moreover, the context at that point was not that of widespread genocide, as would be the case after April 6, 1994, but a period of social instability and political debate. Finally, the speaker described his experience as a member of the politically dispossessed criticizing the establishment of that era. In characterizing Barayagwiza's broadcast as a permissible exercise of free speech, the Tribunal described it as "a moving personal account of his experience of discrimination as a Hutu."[87]

At the opposite end of this continuum was a June 4, 1994, broadcast by Kantano Habimana calling on listeners to exterminate the "*Inkotanyi*," or Tutsis, who would be known by height and physical appearance.[88] Habimana concluded: "[j]ust look at his small nose and then break it."[89] The purpose and text of this broadcast clearly constituted impermissible incitement to ethnic violence. Habimana "in no way attempted to distance himself from his message."[90] Moreover, the external context was one of an ongoing

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[81] Again, this subdivision of context, as well as the inquiries, are not mentioned in the Tribunal's decision -- they are refinements suggested by this author.

[82] *Nahimana*, *supra* note 32, ¶ 1006.

[83] *Id.* According to the Tribunal:

> The dangers of censorship have often been associated in particular with the suppression of political or other minorities, or opposition to the government. The special protections developed by the jurisprudence for speech of this kind, in international law and more particularly in the American legal tradition of free speech, recognize the power dynamic inherent in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government . . . . The special protections for this kind of speech should accordingly be adapted, in the Chamber's view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered. *Id.* ¶ 712. *See also* Gordon, *supra* note 25, at 173-74.

[84] Gordon, *supra* note 27, at 174.

[85] *Id.*

[86] *Nahimana, supra* note 32, ¶ 368.

[87] *Id.* ¶ 1019.

[88] *Id.* ¶ 396.

[89] *Id.*

[90] *Id.* ¶ 1024. *See also* Gordon, *supra* note 27, at 175-76.

genocide. Finally, the speaker was part of the majority ethnic group, supporting government policies, and attacking the minority.

The other important aspect of incitement addressed in the *Nahimana* judgment was the question of causation. Did the crime of direct and public incitement to commit genocide require a showing of violence occasioned by the incitement? The Tribunal's answer was definitively no. "The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement."[91]

E. *Mugesera v. Canada*: The Capstone

Not long after *Nahimana*, another significant Rwandan genocide incitement decision was handed down by a different adjudicatory body -- the Canadian Supreme Court. In *Mugesera v. Canada*, issued on June 28, 2005,[92] the Canadian high court took all the strands of analysis from the ICTR incitement cases, re-examined them, and then wove them into an integrated conceptual fabric.

Leon Mugesera had been Vice President of the Gisenyi Province branch of the governing Rwandan hard-line Hutu MRND party.[93] In November 1992, during a wave of anti-Tutsi violence that would ultimately culminate in genocide,[94] Mugesera made a notorious speech, laced with violent innuendo and widely interpreted by Rwandans at the time as exhorting the murder of the entire Tutsi population.[95] The following are relevant portions

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[91] *Nahimana*, supra note 32. On November 28, 2007, the ICTR Appeals Chamber issued its decision in the *Media Case* and left undisturbed those portions of the judgment analyzing the elements of direct and public incitement to genocide. *See* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-A, ¶ 695 (Nov. 28, 2007) ("The Appeals Chamber considers that the Trial Chamber did not alter the constituent elements of the crime of direct and public incitement to commit genocide in the media context (which would have constituted an error)."); *id.* ¶ 696 ("Furthermore, the Appeals Chamber notes that several extracts from the [Trial Chamber] Judgement demonstrate that the Trial Chamber" did a good job of distinguishing "between hate speech and direct and public incitement to commit genocide . . ."); *id.* ¶ 697 ("The Appeals Chamber will now turn to the Appellants' submissions that the Trial Chamber erred (1) in considering that a speech in ambiguous terms, open to a variety of interpretations, can constitute direct incitement to commit genocide, and (2) in relying on the presumed intent of the author of the speech, on its potential dangers, and on the author's political and community affiliation, in order to determine whether it was of a criminal nature. The Appellants' position is in effect that incitement to commit genocide is direct only when it is explicit and that under no circumstances can the Chamber consider contextual elements in determining whether a speech constitutes direct incitement to commit genocide. For the reasons given below, the Appeals Chamber considers this approach overly restrictive.") Although the Appeals Chamber found that, based on the evidence, certain pre-genocide speech could not be considered incitement beyond a reasonable doubt, *see, e.g.*, *id.* ¶¶ 740-51, and that the pre-1994 conduct of the defendants, which the Trial Chamber considered part of the incitement crimes at issue, was outside the ICTR's temporal jurisdiction--and this resulted in a reduction of the defendants' respective sentences, *see, e.g.*, *id.* ¶ 314--the elements of incitement and their analysis, as set forth by the Trial Chamber, were upheld. Professor Susan Benesch states that the Appeals Chamber "rebuked" the Trial Chamber for "not drawing a clear line between hate speech and incitement to genocide." *See* Benesch, *supra* note 67, at 489. As indicated clearly by ¶ 696, however, her statement is simply not supported by the actual text of the decision.

[92] Mugesera v. Canada, *supra* note 33.

[93] *See* Joseph Rikhof, *Hate Speech and International Criminal Law: The* Mugesera *Decision by the Supreme Court of Canada*, 3 J. INT'L CRIM. JUST. 1121, 1121-22 (2005).

[94] *Id.*

[95] *Id.*

of that address, delivered to approximately 1,000 people at a political meeting in Kabaya, in Rwanda's Gisenyi province:

> You know there are 'Inyenzis' [cockroaches] in the country who have taken the opportunity of sending their children to the front, to go and help the 'Inkotanyis'. . . . Why do they not arrest these parents who have sent away their children and why do they not exterminate them? Why do they not arrest the people taking them away and why do they not exterminate all of them? . . . . [We] must do something ourselves to exterminate this rabble . . . . I asked if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! . . . I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly. . . . Another important point is that we must all rise, we must rise as one man . . . if anyone touches one of ours, he must find nowhere to go.[96]

Less than a week later, based on the content of his oration, Rwandan authorities issued what was tantamount to an arrest warrant against Mugesera, who escaped and eventually ended up in Canada.[97] By 1995, though, Canadian officials had learned of Mugesera's background and his November 1992 speech, and they brought a legal action under their immigration laws remove him from the country as having entered illegally, due to his human rights violations and misrepresentations.[98] The charges against Mugesera included incitement to genocide.[99]

After nearly a decade of working its way through a Byzantine appeals process, the Canadian Supreme Court's 2005 decision finally upheld a 1996 lower court judgment ruling that Mugesera should be removed from Canada.[100] In so doing, the Court had occasion to examine the elements of incitement to genocide. The Canadian statute criminalizing genocide was based directly on Article II of the Genocide Convention. Consequently, the Supreme Court looked to international law to help interpret the elements of incitement to genocide.[101]

Regarding *mens rea* and the direct and public portions of the crime, the Supreme Court's decision was consistent with the *Akayesu* and *Nahimana* decisions.[102] To constitute direct incitement, the Court held that a speech's words, in light of their cultural and linguistic setting, must be so clear as to be immediately understood by the intended audience.[103] Scienter bifurcates: (1) the intent directly to prompt or provoke another to commit genocide; and (2) the specific intent to commit genocide.[104]

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[96] *Mugesera*, supra note 33, ¶¶ 15-23.

[97] *Id.* ¶ 3; *see also* GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 171-72 (C. Hurst & Co. Publishers Ltd. 1995).

[98] Rikhof, *supra* note 93, at 1123.

[99] *Id.* The allegations were fivefold: (1) "counseling" to commit murder; (2) advocating or promoting genocide (equivalent to incitement to genocide); (3) public incitement of hatred; (4) committing a crime against humanity; and (5) misrepresenting his background when applying for permanent residence. *Id.*

[100] *Id.*

[101] *Mugesera*, *supra* note 33.

[102] *Id.* ¶¶ 86-89.

[103] *Id.* ¶ 87.

[104] *Id.* ¶ 88.

The Court ruled that intent can be gleaned from the circumstances.[105] Thus, for instance, genocidal intent of a particular act can be inferred from: (1) the systematic perpetration of other culpable acts against the group; (2) the scale of any atrocities that are committed and their general nature in a region or a country; or (3) the fact that victims are deliberately and systematically targeted on account of their membership in a particular group while the members of other groups are left alone.[106] The Court noted as well that an address made in the context of a genocidal environment will have a heightened impact, and for this reason the circumstances under which words are uttered can go a long way toward illuminating the speaker's intent.[107]

In Mugesera's case, the Court found solid support for the incitement charge and backed it up with detailed analysis.[108] First, Mugesera's exhortations were vocalized in a public place (a political rally) and their meaning would have been clearly grasped by those in attendance.[109] The individual Mugesera was addressing in his speech (where he refers to the "Falashas") was a Tutsi.[110] He referred specifically to the events of 1959 when many Tutsi were massacred or went into exile, and he mentioned Ethiopia.[111] It is common lore in Rwanda that the Tutsi originated in Ethiopia. This belief was even taught in public schools.[112]

Additionally the Court found that Mugesera's reference to the "Nyabarongo River" was coded advocacy for sending Tutsi corpses back to Ethiopia.[113] Mugesera countered that he was merely explaining to his audience that, just as the Falasha had left Ethiopia to return to Israel, their place of origin, so should the Tutsi return to Ethiopia.[114] In their case, the return trip would be by way of the Nyabarongo River, which runs through Rwanda toward Ethiopia.[115] This river is not navigable, however, so the return could not be by boat. In earlier massacres, Tutsi bodies had been thrown into the Nyabarongo.[116]

The Court also found significant the reference to the year "1959" because the group that was exiled then was essentially Tutsi. The Court found that the speech clearly advocated that these "invaders" and "accomplices" should not be allowed to "get out," suggesting that the mistake made in 1959 was to send the Tutsis into exile abroad, rather than kill them, with the result that they were now attacking the country.[117] In this context, it was clear that Mugesera was recounting a discussion he supposedly had with a Tutsi and that when he said "we will send you down the Nyabarongo," *you* meant the Tutsi and *we*

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[105] *Id.* ¶ 89.
[106] *Id.*
[107] *Id.* ¶ 89.
[108] *Id.* ¶ 98.
[109] *Id.* ¶ 94.
[110] *Id.* ¶ 91.
[111] *Id.*
[112] *Id.* ¶ 91.
[113] *Id.* ¶ 92.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* ¶ 93.

meant the Hutu.[118] Finally, although it was not equally clear to the Court that Mugesera was suggesting that Tutsi *corpses* be sent back to Ethiopia via the Nyabarongo River, the content of the rest of the speech, and the context in which it was delivered, demonstrated a call for mass murder of Rwanda's Tutsis.[119]

The Court therefore concluded that the overall message satisfied both the "public" criterion, as it was delivered in a public place at a public meeting, and the "direct" criterion since, based on Rwandan language, history, and culture, it would have been clearly understood by the audience as advocating the genocide of the Tutsis.[120]

The Court also ruled that Mugesera had the requisite mental intent. It reasoned that since he knew approximately 2,000 Tutsis had been killed since October 1, 1990, the context left no doubt as to his intent. He intended specifically to provoke Hutu citizens to act violently against Tutsi citizens.[121]

Causation was also considered. Given the absence of proof that the speech directly resulted in ethnic massacres, and in light of the large gap in time between the speech and the Rwandan genocide, causation would be difficult, if not impossible, to prove.[122] Significantly, the Court found that the prosecution need not establish a direct causal link between the speech and any acts of murder or violence.[123] Because of its inchoate nature, incitement is punishable by virtue of the criminal act alone—irrespective of the result.[124] In fact, per the Court, the government is not even required to prove that genocide actually took place.[125]

V. THE BIKINDI CASE

On June 15, 2005, the ICTR indicted popular Rwandan singer Simon Bikindi on six counts for crimes perpetrated in 1994, including one count of direct and public incitement to commit genocide pursuant to Articles 2(3)(c) and 6(1) of the ICTR Statute.[126] The incitement charge was based on the playing and dissemination of Bikindi's extremist Hutu songs (both at political rallies, during radio broadcasts, and at pre-killing meetings) and his speeches exhorting extremist Hutu party activists and militia to exterminate the Tutsi population.[127]

In the media buzz and academic discourse surrounding the case, much attention was focused on the songs. Bikindi was a well-known composer of popular music and director

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[118] *Id.* ¶ 94.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *See* Rikhof, *supra* note 93, at 1125.
[123] Mugesera v. Canada, *supra* note 33.
[124] *Id.*
[125] *Id.* ¶ 84.
[126] Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment and Sentence, ¶ 5 (Dec. 2, 2008) [hereinafter Bikindi Judgment].
[127] Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Amended Indictment, ¶¶ 31-41 (June 15, 2005) [hereinafter Bikindi Indictment].

of the *Irindiro Ballet*, a dance company choreographed to traditional Rwandan rhythms.[128] Bikindi was also an official in the Ministry of Youth and Sports of the Government of Rwanda and a member of President Habyarimana's MRND political party.[129] But it was primarily as a tunesmith that Bikindi attained great fame in Rwanda before the genocide. His songs were aired in bars, buses, salons and even offices.[130] Wealthy families would hire his band for their children's wedding ceremonies.[131] During this period, Bikindi composed the infamous "*Njyewe nanga Abahutu*" ("I Hate the Hutu") as well as other songs including "*Bene Sebahinzi*" ("Descendants of the Father of Farmers") and "*Twasezereye ingoma ya cyami*" ("We Said Goodbye to the Monarchy").[132] These songs were alleged to have characterized

> Tutsi as Hutu enslavers, enemies or enemy accomplices by blaming the enemy for the problems of Rwanda, by continuously making references to the 1959 Revolution and its gains by the *rubanda ngamwinshi* [Hutu] and by supporting the Bahutu Ten Commandments, and inciting ethnic hatred and people to attack and kill Tutsi.[133]

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Experts on incitement law eagerly anticipated the Tribunal's judgment given the free-speech implications of criminalizing artistic expression (in this case songs) in a genocidal context. John Floyd, Hassan Ngeze's Media Case attorney, expressed particular concern over Simon Bikindi's indictment for inciting genocide through his lyrics. Floyd compared prosecuting Bikindi to "putting Bob Dylan on trial for protest songs."[134] Robert Snyder pointed out that Bikindi's indictment

> could lead to a backlash against musicians who arguably support one ethnic, political, or social group over another. Considering that Bikindi's songs are characterized by the prosecution as only songs of Hutu solidarity and not direct calls for the killing of Tutsis, a large range of potential music could be affected.[135]

However, Snyder also noted the case's potential for strengthening freedom of expression:

> By stressing the context in which Bikindi wrote and performed these songs and his position of influence with Rwandans, the Tribunal can limit the potential impact of any conviction. It was not the fact that Bikindi merely wrote and performed this music that made his actions potentially criminal. Rather, it was the message of the songs, combined with their presentation amidst calls for outright genocide on the airwaves of RTLM

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[128] *Id.*

[129] *Id.*

[130] *See Singer Bikindi: From Defence Witness to the Dock over "Genocide Music"*, Rwanda News Agency, Sept. 18, 2006, *available at* http://www.rwandagateway.org/article.php3?id_article=2947.

[131] *Id.*

[132] Bikindi Judgment, *supra* note 126, ¶ 187.

[133] *Id.*

[134] Dina Temple-Raston, *Radio Hate*, Legal Affairs, September/October 2002, *available at* http://www.legalaffairs.org/issues/September-October-2002/feature_raston_sepoct2002.html.

[135] Snyder, *supra* note 67, at 673-74.

> and at gatherings of the Interahamwe that made Bikindi's music so deadly.[136]

In the end, for incitement experts, the Bikindi judgment was cause for neither despair nor rejoicing. In effect, the Tribunal punted. Although it ruled that Bikindi's songs "advocated Hutu unity against a common foe and incited ethnic hatred"[137] and that they were "deployed in a propaganda campaign in 1994 in Rwanda to incite people to attack and kill Tutsi,"[138] the Tribunal found insufficient evidence to conclude beyond a reasonable doubt "that Bikindi composed these songs with the specific intention to incite such attacks and killings, even if they were used to that effect in 1994."[139] Moreover, the Tribunal held there was insufficient evidence proving Bikindi "played a role in the dissemination or deployment of his . . . songs in 1994."[140]

In reaching this conclusion, the Tribunal did not include in its analysis an explicit consideration of purpose, text, context, and the relationship between speaker and subject. It paid minimal lip service to context only holding that

> to determine whether a speech rises to the level of direct and public incitement to commit genocide, context is the principal consideration, specifically: the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience, *i.e.* whether the members of the audience to whom the message was directed understood its implication.[141]

And it acknowledged that a "direct appeal to genocide may be implicit; it need not explicitly call for extermination, but could nonetheless constitute direct and public incitement to commit genocide in a particular context."[142] Based on this, it found that, "depending on the nature of the message conveyed and the circumstances," it could not exclude the possibility that songs may constitute direct and public incitement to commit genocide."[143]

At the same time, the Tribunal attributed Bikindi's liability for incitement uniquely to an incident that occurred in late June 1994 on a road between the Rwandan towns of Kivumu and Kayove, where Tutsi were being murdered. One witness testified that, during his outbound travel to Kivumu, Bikindi, riding in a truck with a loudspeaker, addressed himself to the militias doing the killing.[144] He said: "You sons of *Sebahinzi*, who are the majority, I am speaking to you, you know that the Tutsi are minority. Rise

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[136] *Id*. at 674.
[137] Bikindi Judgment, *supra* note 126, ¶ 249.
[138] *Id*. ¶ 255.
[139] *Id*.
[140] *Id*. ¶ 263.
[141] *Id*. ¶ 387.
[142] *Id*.
[143] *Id*. ¶ 389.
[144] *Id*. ¶ 268.

up and look everywhere possible and do not spare anybody."[145] The witness interpreted this to mean that although some Tutsi had already been killed, others were hiding and Bikindi was calling on people to do all that was necessary to eliminate the Tutsi.[146] The witness also testified that on the way back from Kayove, Bikindi stopped at a roadblock and met with leaders of the local *Interahamwe* where he insisted, "you see, when you hide a snake in your house, you can expect to face the consequences."[147] After Bikindi left the roadblock, members of the surrounding population and the *Interahamwe* intensified their search for Tutsi, using the assistance of dogs and going into homes to flush out those still hiding.[148] The witness stated that a number of people were subsequently killed.[149]

Another witness testified that, on Bikindi's return trip from Kayove, he heard Bikindi ask over a truck loudspeaker "[h]ave you killed the Tutsis here?" and he further asked whether they had killed the "snakes."[150] He also heard Bikindi's songs being played as the vehicles moved on.[151]

Based on these statements, the Tribunal found:

> Bikindi's call on "the majority" to "rise up and look everywhere possible" and not to "spare anybody" immediately referring to the Tutsi as the minority unequivocally constitutes a direct call to destroy the Tutsi ethnic group. Similarly, the Chamber considers that Bikindi's address to the population on his way back from Kayove, asking "Have you killed the Tutsis here?" and whether they had killed the "snakes" is a direct call to kill Tutsi, pejoratively referred to as snakes. In the Chamber's view, it is inconceivable that, in the context of widespread killings of the Tutsi population that prevailed in June 1994 in Rwanda, the audience to whom the message was directed, namely those standing on the road, could not have immediately understood its meaning and implication. The Chamber therefore finds that Bikindi's statements through loudspeakers on the main road between Kivumu and Kayove constitute direct and public incitement to commit genocide.[152]

What can we conclude from this decision? First of all, the Tribunal squandered a golden opportunity to both solidify and flesh out the new analytic incitement law structure set forth in previous Rwandan decisions. Its failure to explicitly ground itself and build on existing precedent could ultimately jeopardize the jurisprudential gains in incitement law and leave it open to attacks that it is capricious and inimical to healthy free expression. Bikindi's lyrics should have been systematically filtered through the purpose, text,

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[145] *Id*.
[146] *Id*.
[147] *Id*.
[148] *Id*.
[149] *Id*.
[150] *Id*. ¶ 269.
[151] *Id*.
[152] *Id*. ¶ 423.

context, and speaker-subject crucible. That exercise would have bestowed the test with superior interpretive power and greater normative coherence. And the Tribunal's conclusions might have been perceived as resting on less slender of a reed.

But it is important to note that the result would not likely have changed. Because, in another sense, the Tribunal got it right. And while the journey may in some respects be more important than the destination, the Tribunal's doctrinal instincts were no doubt tempered by strains of *stare decisis* emanating from *Akayesu* and its prodigy. Detailed consideration of Bikindi's lyrical objectives and the words he used to attain them, in light of their context and notwithstanding their being voiced by a member of the majority attacking the minority, in all likelihood would have exonerated the tunesmith. So the Tribunal's jurisprudential incitement compass appears well aligned even if its precise reading remains obscure.

Moreover, even had the results of the existing test itself not been exculpatory, the Tribunal seems to offer two new analytic criteria to determine whether a speaker has engaged in genocidal incitement. First, in light of its finding that Bikindi wrote the songs long before they were disseminated during the genocide, the Tribunal noted that Bikindi could not have had the requisite genocidal intent. In effect, the Tribunal impliedly incorporated a "temporality" criterion -- the offensive words must have been uttered at or near the time of the contextual violence that renders them genocidal. In this case, Bikindi composed his songs long before the 1994 mass murders.

Similarly, the Tribunal appears to find significance in the manner of the songs' dissemination in relation to the violence. While recordings of the songs might have been played as a prelude to and in chorus with the massacres, those electronic reproductions were not within Bikindi's control. And so an implied "instrumentality" criterion can be gleaned from the judgment as well. In other words, when recordings are involved, the recorded would-be inciter must be responsible for actual contemporaneous dissemination of the criminal speech (*i.e.*, the playing of the recording) that is charged.

Finally, even absent these implied doctrinal advances, the judgment does help affirm important ancillary points made in previous cases. In referring to Bikindi's use of code words such as "snakes" and "work" as part of the incitement, the Tribunal reaffirms the central role played by euphemisms and metaphors. Moreover, given that it characterizes as incitement Bikindi's roadside inquiry as to whether Tutsi had been killed, it is now quite clear that questions can be a form of incitement.

This represents a salutary expansion of what may be considered potential indirect incitement techniques. Further, the decision can be lauded for reaffirming the irrelevance of causation in incitement law: "[a]s an inchoate crime, public and direct incitement to commit genocide is punishable even if no act of genocide has resulted therefrom."[153]

[153] *Id.* ¶ 419.

VI. CONCLUSION

Incitement law appears to be at a crossroads. A number of decisions have turned Raphael Lemkin's bare-bones definition into a fully fleshed-out inchoate crime with potential to *prevent* genocide, rather than merely punish it. But if the crime, despite its doctrinal maturation, is applied with only barebones analysis, the law's development will have been for naught. Incitement cannot be treated along the lines of U.S. Supreme Justice Potter Stewart's oft-quoted approach toward pornography: "I know it when I see it."[154] If so, the risk that exercise of free speech will be chilled becomes all too real. As this essay has demonstrated, an important edifice for prosecuting calls to mass murder has been erected. So we should not subscribe to Susan Benesch's dire assessment that "recent decisions have [been] confusing incitement to genocide with protected speech."[155] But if incitement decisions are cursory and sloppy in their exegetical task, this body of law could, as Benesch fears, "encourage the repression of legitimate speech."[156] Incitement law has given us the tools to prevent that outcome. Now we must use them.

[154] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[155] Benesch, *supra* note 67, at 488.
[156] *Id.*