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Words Felt Round the World: Searching for a Balance between Free Speech and Genocide Prevention'

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As human capacity for information sharing increases in rapidity and breadth of the target audience, we are confronted with increasingly complex problems from around the world. One of these problems is incitement to violence, and particularly incitement to genocide. Because of our communication abilities the effects of words uttered or written in one corner of the world urging others to violence can, and are, felt throughout nations and around the globe.

Genocide is not a new concept (and certainly history bears evidence to many gruesome events throughout time), but humanity's awareness of its horrors are greater than ever before. Our increased awareness has lead humankind to seek to punish the perpetrators of genocide, as well as take steps to prevent genocide before it begins. To this last end, governments have greater ability to intervene before an individual acts and speech escalates into larger conflict. The idea of government censorship of action and speech necessitates that free societies strike a balance between freedom of expression and freedom from repression.

This article will review the approach taken by the International Criminal Tribunal for Rwanda ("ICTR" or "Tribunal") in the trial of three defendants, each accused of inciting genocide. In evaluating the ICTR's opinion I will examine some of the more significant precedents the Tribunal relied upon in its decision. I will also analyze U.S. jurisprudence on preventing incitement to violence, and briefly compare the international and U.S. approaches to punishing incitement. My analysis of U.S. jurisprudence will

focus mainly on the U.S. Supreme Court case of *Virgina v. Black*[1], as well as a few earlier cases dealing with government prohibitions on hate speech.

I have chosen to examine American jurisprudence on prohibiting hate speech for two reasons: First, because the ICTR's opinion draws many analogies and principles from international cases proscribing hate speech, and thus, a limited examination of U.S. jurisprudence on this subject is a proper comparison. Secondly, the ICTR specifically cited to *Black* in its opinion as an example of how the Tribunal's approach was in accord with U.S. free speech protections[2]. The Tribunal's conclusion is not far off the mark, though there is a key difference in the American approach.

After a short introduction to international genocide prevention law (Part I), I will briefly examine the history of ethnic tension in Rwanda in Part II. Part III(A) of this article will review the international legal standards upon which the ICTR drew throughout its opinion. Part III(B) will then examine the application of these international sources to each of the three defendants. Next, in Part IV, I will briefly resume the current status of U.S. incitement jurisprudence. Part V is a comparison of the two approaches, and is followed by my conclusion in Part VI.

I. Introduction

After the end of the Second World War, one of the challenges facing the new United Nations was how to address the atrocities the world witnessed in the Holocaust. On December 9th, 1948, one day before the adoption of the International Declaration of Human Rights, the United Nations General Assembly acted. It adopted Resolution 260

[1] 538 U.S. 343 (2001).
[2] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶ 1010 (2003) (available online at: http://69.94.11.53/ENGLISH/cases/Ngeze/judgement/Judg&sent.pdf).

(III) A, the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention defined Genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[3]

The Convention further outlined five criminal acts; genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.[4] The Convention did not provide any further guidance on the definition of these crimes.

The United States signed the Convention on December 11th, 1948, the first day the Convention was available for signing.[5] The U.S. Senate, however, did not ratify the Convention until November 25th, 1988, forty years later.[6] While the Senate did provide several "Reservations and Understandings," these shed no light on the definition of "direct and public incitement to genocide." The only related reservation stated: "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."[7]

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[3] *Convention on the Prevention and Punishment of the Crime of Genocide*, Art. 2. Concluded at New York, Dec. 9, 1948. Entered into force Jan. 12, 1951. 78 U.N.T.S. 277. (available online at: http://www2.ohchr.org/english/law/genocide.htm).
[4] *Id*, Art. 3.
[5] *Convention on the Prevention and Punishment of the Crime of Genocide*, Ratifications and Reservations, (available online at: http://www2.ohchr.org/english/bodies/ratification/1.htm, last updated July 18, 2007).
[6] *Id.*
[7] *Id.*

Rwanda acceded to the Convention on April 16, 1975, entering an exception only to the provision reserving interpretation of the terms of the Convention to the International Court of Justice.[8] In August 1993, a UN Special Rapporteur investigating ethnic killings in Rwanda, noted in his report that the Convention was binding on Rwanda.[9]

The most recent episode of genocide in Rwanda occurred in 1994. The killings lasted for 100 days. The UN Security Council acted quickly, and in November of 1994, established the International Criminal Tribunal for Rwanda to try suspected perpetrators of "genocide and other serious violations of international humanitarian law."[10]

The ICTR has extensively applied the Genocide Convention during its trials. It has convicted several defendants for the charge of direct and public incitement to genocide. This paper will focus on three defendants in particular: Hassan Ngeze, Jean-Bosco Barayagwiza, and Ferdinand Nahimana. The joint trial of these three defendants became known as "the Media Cases."[11]

I have chosen these defendants not only because this was one of the most publicized trials of the ICTR, but also because these three men were convicted of direct and public incitement to genocide for activities connected with print media, broadcast media, and a political party. Two of these areas (print media and political parties) are traditionally given great First Amendment protection in the United States, while broadcast media has been subjected to larger amounts of government regulation. Also, in

[8] *Id.*
[9] Ndiaya, B.W., *Question on the Violation of Human Rights and Fundamental Freedoms…, Report on his Visit to Rwanda from 8 to 17 April 1993*, E/CN.4/1994/7/Add.1 (available online at: http://www.preventgenocide.org/prevent/UNdocs/ndiaye1993.htm).
[10] *United Nations Security Council Resolution 955 of Nov. 8, 1994*, S/Res/955, §1 (1994).
[11] *Prosecutor v. Nahimana et al.*, ICTR-99-52-T (2003).

the Media Cases, all three defendants engaged in political speech, perhaps the most sacred region of protected speech. The defendants were convicted, at least in part, for that same speech.

II. A Brief History of Ethnic Tension in Rwanda

Rwanda has been a turbulent land for many centuries. Indeed, even its history is hotly disputed. Rwandans and scholars differ greatly on the origins of the three groups of people that inhabit the land. The first and numerically largest of these groups is the Hutu, who, in the 1930s, accounted for around 85 percent of the population.[12] The second largest, the Tutsi, accounted for about fourteen percent.[13] The smallest of the groups is the Twa, which constituted only about one percent of the populace.[14]

Two main stories of the origins of Rwanda have emerged through the years. In one telling, all three groups have always lived in and around the area of present-day Rwanda.[15] In this account, the groups established a feudal-style society which eventually evolved into a kingdom. In the second version, the Tutsis came to "the land of one thousand hills," as Rwanda is known, from the North (possibly in the Horn of Africa) and migrated into a region controlled by the Hutu tribe. The Tutsis eventually conquered the Hutu and established a kingdom. [16]

In either case, for many centuries sources agree that both Hutu and Tutsi shared the same language (called Kinyarwanda), practiced the same traditional religions, were loyal to the same king, lived side-by-side on the same lands, and even belonged to the

[12] Lyons and Straus, *Intimate Enemy*, at 26, Zone Books (2006).
[13] *Id*.
[14] *Id*.
[15] Des Forges, *Leave None to Tell the Story*, at 31, Human Rights Watch (1999) (Allison Des Forges also served as a witness during the Media Cases to explain the cultural backdrop and history of Rwanda).
[16] Melvern, *Conspiracy to Murder: the Rwandan Genocide*, rev. ed. at 4, Verso (2004).

same clans.[17] Some recent research also suggests that during the monarchy the terms Tutsi and Hutu were used to denote social status rather than ethnicity.[18] The Tutsi were the cattle-raising rulers, while the Hutu were the common farmers.[19] The Twa were originally a forest-dwelling people who eventually became poor artisans and servants to the rest of Rwandan society.[20] Recent studies suggest that it was possible to change from Hutu to Tutsi through monetary and political success, or even marriage.[21] However, intermarriage with the Twa was very frowned upon by Hutu and Tutsi alike.[22] The term Tutsi originally meant "one rich in cattle" in Kinyarwanda, while Hutu denoted a subordinate or follower of a more powerful person.[23] Additionally, the terms Tutsi and Hutu were not important distinctions in areas on the fringes of the king's control, taking a back seat to clan and other group identifiers.[24]

A final, important distinction among the peoples of Rwanda is geographical. Until the mid to late Nineteenth Century the northwestern region of present-day Rwanda was ruled by a few small Hutu-dominated kingdoms.[25] Among these kingdoms lived a small Tutsi minority, which exercised little or no political power.[26] This area remained Hutu dominated, and the power relationship figures prominently in later Rwandan politics.

At the end of the Nineteenth Century, what some label the "fourth group" or *Bazungu* arrived. Today this term is used to refer generally to whites, but at its origins it

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[17] Lyons and Straus, *Intimate Enemy*, at 26.
[18] Uvin, *Aiding Violence: The Development Enterprise in Rwanda*, at 14-15, Kumarian Press (1998).
[19] Des Forges, *Leave None to Tell the Story*, at 33.
[20] *Id*, at 33-34.
[21] Lyons and Straus, *Intimate Enemy*, at 26, and Des Forges, *Leave None to Tell the Story*, at 33, 37.
[22] Des Forges, *Leave None to Tell the Story*, at 34.
[23] *Id*, at 32.
[24] Lyons and Straus, *Intimate Enemy*, at 26.
[25] Uvin, *Aiding Violence: The Development Enterprise in Rwanda*, at 15.
[26] *Id*.

referred to people who live a particularly luxurious and exclusive lifestyle.[27] The Bazungu influence manifested itself first as German and then, in 1917, Belgian control. In the early 1930's the Belgians introduced identity cards, stating the name and ethnicity of each Rwandan.[28] The taller, lighter-skinned Rwandans were defined as Tutsi, the shorter darker-skinned Rwandans were Hutu.[29]

The Europeans had a definite sense of ethnic hierarchy: Bazungu to Tutsi to Hutu to Twa.[30] Consequently, the Tutsi enjoyed special social, economic, and political rights, while the Hutu did not.[31] The Belgians introduced European-style bureaucracy to the already complex Rwandan royal administration.[32] This bureaucracy also included installing Tutsi administrators in the more independent and heavily Hutu Northwest.[33] Tensions rose between Hutu and Tutsi as international pressure grew for European countries to give up their colonial holdings.[34] Many Hutus wanted to install majority-rule before the Belgians departed, while the Tutsi wanted to preserve the current Tutsi-dominated state.[35] The Belgians eventually installed more Hutu in the government and allowed them to run in local elections, and Hutus started to gain equal civil status.[36] The Belgian view was to retain power, grooming the people for eventual independence.

As the country moved toward independence the political parties were organized along ethnic lines. The Parmehutu (Parti du mouvement de l'émancipation des Bahutu),

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[27] *Id*, at 16.
[28] Des Forges, *Leave None to Tell the Story*, at 37.
[29] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶¶ 105-109 (citing *Prosecutor v. Akayesu*, ICTR 96-4-I, ¶¶ 80-111).
[30] Uvin, *Aiding Violence: The Development Enterprise in Rwanda*, at 17.
[31] Des Forges, *Leave None to Tell the Story*, at 37, and Uvin, *Aiding Violence: The Development Enterprise in Rwanda*, at 16.
[32] Des Forges, *Leave None to Tell the Story*, at 34-35.
[33] Uvin, *Aiding Violence: The Development Enterprise in Rwanda*, at 15-16, and Des Forges, *Leave None to Tell the Story*, at 39.
[34] Des Forges, *Leave None to Tell the Story*, at 38.
[35] *Id*.
[36] *Id*.

fought for majority Hutu rule, while UNAR (Union Nationale Rwandaise) fought to retain the Tutsi-lead monarchy.[37] In November of 1959 a few Tutsi attacked a local Hutu leader.[38] News of this attack quickly spread, and many Tutsi were slain in reprisal before Belgian forces re-established order.[39] Later UN estimates projected the number of Tutsi dead at 2,000.[40] In response to the violence Belgian authorities ousted many Tutsi from local government posts and replaced them with Hutus.[41] These new bureaucrats helped the Parmehutu party win the first elections, and in January 1961, the Hutu-controlled government declared independence from Belgium. This call for independence was later ratified by a plebiscite, and Rwanda gained full independence on July 1, 1962, with the Parmehutu in power.[42]

Over 250,000 Tutsi fled the country in anticipation of government reprisals during this time.[43] These refugees settled in neighboring Burundi and Uganda.[44] By 1963 many of these refugees had organized themselves into paramilitary groups. These groups launched a small-scale invasion of 1500 men into Rwanda to oust the new Hutu president, Gregoire Kayibanda.[45] The invasion was easily repelled by the Parmehutu forces. However, in response Kayibanda instigated widespread killing of Tutsi remaining in Rwanda. Among the first victims of this genocide were the Tutsi political opposition leaders. The violence, however, soon spread throughout the country. President Kayibanda appointed a minister in each of the prefectures (the largest administrative region in

[37] Des Forges, *Leave None to Tell the Story*, at 38.
[38] Melvern, *Conspiracy to Murder: the Rwandan Genocide*, at 6.
[39] Des Forges, *Leave None to Tell the Story*, at 39.
[40] Melvern, *Conspiracy to Murder: the Rwandan Genocide*, at 7.
[41] *Id*.
[42] Des Forges, *Leave None to Tell the Story*, at 39, and *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶¶ 105-109 (citing *Prosecutor v. Akayesu*, ICTR 96-4-I, ¶¶ 80-111).
[43] Melvern, *Conspiracy to Murder: the Rwandan Genocide*, at 8.
[44] *Id*, at 7.
[45] *Id*, at 8.

Rwanda) to supervise the elimination of Tutsi.[46] Roving death squads accompanied by government propagandists carried out the attacks. These groups established road-blocks to prevent Tutsi from escaping into the countryside. Most of the killing was done by hand with Hutu commonly using farm implements, including the *panga*, a machete used for cutting wild grasses.[47] In the end, it is estimated that 10,000-14,000 Tutsi were killed during this time.[48] By the end of the 1960's over 20,000 Tutsi died in ethnic violence and over seventy percent of the original Tutsi population had fled to neighboring countries.[49] By 1991, Tutsis constituted only about 8.4 percent of all Rwandans.[50]

In 1972 a second genocide occurred in the region, this time in Burundi. Here, the Tutsi had managed to retain power after independence. After a group of Hutu tried to seize power in a coup, reprisals against Hutus were swift and terrible. The systematic slaughter claimed the lives of over 200,000 Hutu in Burundi.[51]

President Kayibanda used these killings as an excuse to "purify" Rwanda of Tutsi, and more killing ensued. In July of 1973, however, Kayibanda was ousted from power by another Hutu, Juvenal Habyarimana.[52] Kayibanda was from the South, and as such favored southern Hutu. Resent of this arrangement grew in the North, as northern Hutu felt excluded from the benefits of power. The Habyarimana government reversed the situation, with the new president favoring his native north, while southern Hutu were relegated to the fringes of governmental power.[53]

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[46] Melvern, *Conspiracy to Murder: the Rwandan Genocide*, at 9.
[47] *Id*.
[48] *Id*.
[49] Uvin, *Aiding Violence: The Development Enterprise in Rwanda*, at 20.
[50] Des Forges, *Leave None to Tell the Story*, at 40.
[51] Melvern, *Conspiracy to Murder: the Rwandan Genocide*, at 9-10.
[52] *Id*, at 10.
[53] *Id*, at 12-13.

Habyarimana also instituted a one-party state, with the MRND (Mouvement Révolutionnaire Nationale pour le Devéloppement) in sole control of political power. Soon there was no difference between the state and party, with Habyarimana head of both.[54]

Habyarimana's favoritism for his inner circle in his spoils system, as well as increased evidence of rampant governmental corruption, eventually led to much dissent throughout the country.[55] By 1990, with the economy in sharp decline Habyarimana was forced to end his single-party state.[56] However, he made one last bid to retain absolute control.

In the early 1990s, as ill-sentiment between the two groups continued to build, a Tutsi militia was founded in neighboring Uganda. It called itself the Rwandan Patriotic Front (RPF), and on October 1, 1990 attacked Rwanda. Habyarimana now saw his chance to end political dissent. With RPF forces still days away from reaching the capital, the residents of Kigali endured a night of explosions and gunfire. The next day government officials announced that the "attack" was the result of RPF infiltrators, and their Hutu accomplices. Using this staged attack as a pretext, Habyarimana's supporters imprisoned thousands of Tutsi and Hutu dissenters.[57]

The government also used this staged event and further real RPF attacks to justify forming local Hutu militias. Originally formed as the military wing of the MRND, these militias were called *Interhamwe*, meaning "those who work closely together and who are

[54] Des Forges, *Leave None to Tell the Story*, at 40.
[55] *Id*, at 47.
[56] Melvern, *Conspiracy to Murder: the Rwandan Genocide*, at 24.
[57] Des Forges, *Leave None to Tell the Story*, at 49-50.

united."[58] Violence escalated as RPF, *Interhamwe* forces, and regular Rwandan Army troops increasingly clashed in the countryside. The international community intervened, however, and the two sides hammered out several peace agreements, each of which was in turn broken. One report estimated that 2,000 Tutsi were killed from 1990 to early 1993.[59]

Finally, some amount of stability was attained under the Arusha Accords, signed in 1993. The Accords were a series of agreements between the Habyarimana-lead Rwandese government and the RPF ending the war of the past three years. These agreements were signed in Arusha, Tanzania on August 4, 1993.[60] Under the agreements, more Tutsis were appointed to government posts. To protect these new bureaucrats the RPF was allowed to station 600 troops in the capital, Kigali. The presence of RPF troops in the capital did little to allay fears on either side.[61]

Even with the staged attack and imprisonment, torture, and killing of 13,000 dissenters three opposition parties formed in August, 1991.[62] Among these was the Parti Libéral (PL), which stated that one of its goals was to bridge the divide between Hutu and Tutsi.[63] In sharp contrast a bitterly anti-Tutsi party was formed, the Coalition pour la Défence de la République (CDR). The CDR's goal was to represent the interests "of the majority." While it openly criticized Habyrimana and the MRND, the CRD also cooperated frequently with the MRND. This collaboration lead many observers to

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[58] Melvern, *Conspiracy to Murder: the Rwandan Genocide*, at 26.
[59] *Id*, at 341.
[60] United Nations Security Council Resolution 872, S/RES/872 (1993) ("Welcoming" the signing of the Arusha Accords).
[61] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶¶ 105-109 (citing *Prosecutor v. Akayesu*, ICTR 96-4-I, ¶¶ 80-111).
[62] Des Forges, *Leave None to Tell the Story*, at 49.
[63] Melvern, *Conspiracy to Murder: the Rwandan Genocide*, at 24.

conclude that the CRD was simply the mouthpiece for the more radical views which were too politically sensitive for the MRND or the president to express directly.[64]

On April 6th, 1994 an airplane carrying President Habyarimana crashed near Kigali airport. Immediately, Hutu extremists blamed Tutsi rebels for the loss of the president.[65] This allegation later proved unfounded, but that was of little consequence at the time. The reports of RPF responsibility set off a firestorm of speculation that RPF was going to invade to take over the government. These rumors provoked mass killings of Tutsis and moderate Hutus throughout the country. The violence finally ended when the RPF actually did invade the country, and seized the capital. [66]

Analysis after the violence ended suggests that ten percent of the population was killed in one hundred days of slaughter. This amounts to approximately one million dead. Roughly 250,000 Tutsi lived in the city of Kibuye before the genocide. Afterward, authorities could locate only 8,000.[67]

In November of 1994, the U.N. Security Council established the International Criminal Tribunal for Rwanda to try the alleged leaders of the genocide.[68] Since its inception the ICTR has completed thirty-five trials, with twenty-seven more in progress, and seven defendants still awaiting their day in court.[69] All of these trials involved charges of genocide and crimes against humanity. However, the Media Cases are one of only a handful of trials where the crime of incitement figured prominently.

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[64] Des Forges, *Leave None to Tell the Story*, at 52-53.
[65] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶ 114
[66] *Id*, ¶¶ 105-109 (citing *Prosecutor v. Akayesu*, ICTR 96-4-I, ¶¶ 80-111).
[67] *Id*.
[68] *United Nations Security Council Resolution 955*, S/RES/955 (Nov. 8, 1994).
[69] ICTR website, http://69.94.11.53/default.htm (accessed, Feb. 26, 2008)

III. International Law of Incitement: The Media Case

A. International Framework for Analyzing the Crime of Incitement

During the drafting of the Convention on Genocide one delegate remarked, "It [is] impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so….how in these circumstances, the inciters and organizers of the crime should be allowed to escape punishment, when they were the ones really responsible for the atrocities committed."[70] It is this sentiment that drove the Prosecutor throughout "the Media Cases." The three defendants were; Hassan Ngeze, a newspaper editor; Jean-Bosco Barayagwiza, a political party leader; and Ferdinand Nahimana, a radio executive. Each of them was tried for direct and public incitement to genocide, in addition to genocide, other inchoate genocide charges, and various crimes against humanity.

One difficulty facing the Tribunal in these cases was defining "direct and public incitement to genocide." Genocide, of course has a statutory definition (found in the Convention on the Prevention and Punishment for the Crime of Genocide, and cited above in footnote 3 and related text), the application of which the world has become familiar since its drafting in 1948. It is the particularized crime of "direct and public incitement" that has eluded development, despite its inclusion in the original text of the Convention. The ICTR statute adopted the Convention's elemental definition of "genocide," as well as its blanket language referencing "direct and public incitement to genocide" verbatim.[71] There was little alternative, however, as no other international

[70] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶¶ 978, (*citing Akayesu* (TC), ¶ 551).
[71] *Statute of the ICTR*, Art. 2, (available online at: http://69.94.11.53/ENGLISH/basicdocs/statute/2004.pdf) (the Statute also does not set out the elements of individual Crimes Against Humanity in Article 3, among which are murder, rape, deportation, and torture.)

document sets out the elements of "direct and public incitement." Neither the European Court of Human Rights (ECHR) or the Inter-American Court of Human Rights (IACHR) have genocide as one of the crimes enumerated within their jurisdiction. The International Criminal Court has jurisdiction to hear genocide cases, but its statute leaves out the incitement offence.[72]

In determining the judicial standards applicable in the Media Cases the Tribunal turned to past decisions of other international courts as well as international treaties. From these decisions and conventions the Tribunal extrapolated several points of law. First, the Tribunal identified the tension between preventing speech which incites violence, and preserving individual freedom of expression. Secondly, it recognized three factors by which to evaluate the intent of alleged incitement speech: the content, the context, including the medium chosen; and the causal link between the speech and ensuing violence, if any.

i. The tension between preventing incitement and individual rights

Article 7 of the Universal Declaration of Human Rights states that, "All are entitled to equal protection against any discrimination…and against any incitement to such discrimination."[73] Article 19 declares, "Everyone has the right to freedom of opinion and expression."[74] Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) echoes this latter sentiment, while Article 19(3) of the ICCPR qualifies this. It states that the right to freedom of expression, "carries with it special

[72] *Rome Statute of the International Criminal Court*, A/CONF.183/9, Art. 6 (2002) (available online at: http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf).
[73] *Universal Declaration of Human Rights*, Art. 7, Adopted by the UN General Assembly, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Pt. I, at 71, U.N. Doc. A/810 (1948).
[74] *Id*, Art. 19.

duties and responsibilities."[75] Article 20(2) goes on to outlaw "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence."[76] Article 4(a) of the International Covenant on the Elimination of all Forms of Racial Discrimination (CERD) has similar provisions banning speech which is based upon racial hatred or inciting listeners to violence against a racial or ethnic group.[77] CERD Article 4(b) prohibits all organizations and propaganda activities which "promote and incite racial discrimination."[78]

These treaty provisions demonstrate an international willingness to limit speech in favor of protecting other rights. One particular case before the UN Human Rights Committee is illustrative of this point.[79] In this case a group of Canadian citizens petitioned the Committee to reverse the Canadian Government's ban of their use of the public telephone utility. This ban was imposed after the group had used the telephone service to disseminate blatantly anti-semitic messages. The Committee refused to review the case stating that the group members' actions "clearly constitute[d] the advocacy of racial or religious hatred," which the Canadian government not only had a right to restrict, but also an affirmative duty to prohibit under Article 20(2) of the ICCPR.[80]

Once the Tribunal established the right and necessity of governments to prevent incitement offences, it turned to the intent requirement of the offense. Here the ICTR encountered the problem all courts face: How does one determine another's intent?

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[75] *International Covenant on Civil and Political Rights (ICCPR)*, Concluded at New York, Dec. 16, 1966, Entered into force, Mar. 23 1976. 999 U.N.T.S. 171, Art. 19(2) – (3).
[76] *ICCPR*, 999 U.N.T.S. 171, Art. 20(2).
[77] *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, Concluded at New York, Mar. 7, 1966, Entered into force, Jan. 4 1969, 660 U.N.T.S. 195, Art. 4(a).
[78] *CERD*, 660 U.N.T.S. 195, Art. 4(b).
[79] *J.R.T. and the W.G. Party v. Canada*, Case No. 104/1981 (declared inadmissible 6 April 1983) (available online at: http://www1.umn.edu/humanrts/undocs/html/104-1981.htm).
[80] *Id*, ¶ 8(b).

ii. The Content of the Speech

"The actual language used in the media has often been cited as an indicator of intent."[81] Thus, the Trial Chamber found it important to address the content of the questionable speech.

In its opinion the Chamber reviewed a judgment of the European Court of Human Rights (ECHR) reviewing the conviction of a Danish journalist for inciting hatred of minority groups. The charge stemmed from the journalist's interview and his own subsequent editing of that interview for a report which aired during a television news program.[82] During the program the journalist interviewed members of a racist youth group. The members made many racist remarks against blacks and foreigners which were aired on the program.

The Court found that the journalist's conviction was a violation of his right to free expression, and that the journalist did not incite or promote racial hatred.[83] The Trial Chamber pointed to two facts critical to the ECHR's findings. First, during the interview the journalist posed a few questions suggesting there were very accomplished black people in the world, contrary to the youth group members' statements. Secondly, when aired, the program was presented as a demonstration of the background and thinking of extreme racist groups.

The ECHR identified some of the same tensions in preventing racist speech as the Rwanda Tribunal did. Notably the ECHR points out in its reasoning that "combating

[81] *Prosecutor v. Nahimana et al.* ICTR-99-52-T, ¶ 1001.
[82] *Jersild v. Denmark, Application No. 15890/89,* European Court of Human Rights (ECHR), Judgment of 23 September 1994 (available online at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=jersild&sessionid=5019314&skin=hudoc-en).
[83] *Jersild v. Denmark*, ¶37 (ECHR 1994).

racial discrimination in all its forms and manifestations" is of "vital importance" in modern society.[84] The opinion goes on to state that, "the freedom of expression constitutes one of the essential foundations of a democratic society" and that the press plays an important role in this.[85] The ECHR opinion announced that the Court would look to "whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas."[86] This is exactly the principle the Rwanda Tribunal takes from *Jersild*, and later applies in the Media Cases.[87]

The Tribunal examined another case before the UN Human Rights Committee where a French author appealed a criminal conviction for hate speech.[88] This speech arose from an interview in a French magazine. During the interview the author discussed his views which deny the use of gas chambers by the Nazis as methods of extermination. During the interview, the author stated several times that the gas chambers were a "myth" or "fabrication." In examining the content of the article the Committee concluded that the author's words demonstrated an intent to inflame rather than inform, stating, "[s]ince the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction [on his speech] served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism."[89] The Committee pointed out that there is room for scholarly writing that in challenging accepted history, offends people. However, the article in question clearly demonstrated

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[84] *Jersild v. Denmark*, ¶30 (ECHR 1994).
[85] *Id*, ¶31.
[86] *Id*.
[87] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶ 993.
[88] *Robert Faurisson v. France*, Communication No. 550/1993, (U.N. Human Rights Committee, 1996) (available online at: http://www1.umn.edu/humanrts/undocs/html/VWS55058.htm).
[89] *Id*, ¶ 9.6.

its intent to incite racism or anti-semitism, and, accordingly, the Committee upheld the conviction.[90]

iii. Context

The ICTR also reviewed cases in which the context of the statement provided the court with insight into the speaker's intent. In one case, the ECHR examined the statements of a former mayor of a town in south-east Turkey. The former mayor made these statements in a nationally circulated newspaper. During his interview the ex-official declared his support for the Kurdistan Workers' Party (PKK), while also disavowing the use of violence struggles for independence. The former mayor was asked about recent massacres of women and children by the PKK. In response the mayor said, "Anyone can make mistakes, and the PKK kill women and children by mistake."[91] The statement was made at a time of daily attacks by the separatist group. The ECHR looked to the full context in which the statement occurred stating: "The statement cannot, however, be looked at in isolation. It had special significance in the circumstances of the case."[92] The ECHR looked to the combined factors of the speaker's stature as a former mayor, the fact the statement was made during a time of attacks, and that these statements were made in a national daily newspaper. The Court ultimately held that the mayor's comments amounted to incitement, and that his conviction was a proper exercise of the state's

[90] *Robert Faurisson v. France*, Communication No. 550/1993, ¶ 9.6.
[91] *Zana v. Turkey*, Application No. 18954/91, ¶57 (European Court of Human Rights 1997) (Available online at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Zana&sessionid=5307679&skin=hudoc-en).
[92] *Zana v. Turkey*, Application No. 18954/91, ¶ 59.

power due to this context.[93] From this case the ICTR drew the conclusion that speech which "is likely to exacerbate an already explosive situation" constitutes incitement.[94]

In another case before the ECHR, a Turkish leaflet distributor appealed his conviction for attempting to publicly distribute leaflets.[95] The leaflets argued that recent government efforts to "clean up" the defendant's city and "improve traffic flow" were actually designed to repress the city's Kurdish and impoverished Turkish residents. The ICTR's opinion singled out the European Court's language which noted that a leaflet, in general, could "conceal objectives and intentions different from the ones it proclaims."[96] The ECHR eventually concluded that the leaflet in question was not inciting the citizenry to violence when read in the context of the writing as a whole and in light of the broader social situation.[97] Additionally, the European Court noted that opposition viewpoints should enjoy special protections due to their minority status, particularly voicing government criticism.[98] The ICTR's opinion also picked up this line of reasoning, stating that it is important to protect political speech, "particularly the expression of opposition views and criticism of the government."[99]

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[93] *Zana v. Turkey,* Application No. 18954/91, ¶ 62 (the opinion later overturns the defendant's conviction on the grounds he was denied his right to speedy judicial processes, and the right to be present at his own trial in contravention of Art. 6 § 1 and Art. 6 § 3(c) of the European Convention on Human Rights).
[94] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶ 1004.
[95] *Incal v. Turkey,* Application No. 22678/93, (European Court of Human Rights, 1998) (available online at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Incal&sessionid=5314133&skin=hudoc-en) (An interesting fact which does not find its way into the ICTR opinion is that the defendant was arrested and his leaflets seized when he applied for permission from local authorities to distribute the leaflets. Thus, no member of the public actually saw the "separatist propaganda" in question).
[96] *Id,* ¶ 51.
[97] *Id,* ¶ 50 .
[98] *Id,* ¶ 54.
[99] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶ 1006.

In a further ECHR case from Turkey, the Tribunal reviewed a book author's conviction for disseminating separatist propaganda.[100] The book was a narrative of a period of armed conflict between Kurdish separatists and the Turkish government. The period detailed in the book, however, pre-dated a current conflict, and the ECHR found the book was simply a narrative of the author's personal experiences of the earlier violence. The Court conceded that the book was obviously not intended as a neutral description of history and was meant to criticize (at times using vehement language) the governmental authorities. However, the opinion points out that where governmental criticism is concerned states have little latitude to restrict "political speech or debate on questions of public interest."[101] The Court again noted that minority and opposition viewpoints should occupy a specially protected place in society. Finally, the European Court examined the medium chosen by the author, a printed literary work. It stated that a book was less inflammatory than a mass media broadcast or printing of similar material. The medium of a published book, the court held, substantially limited the effect of the author's words on the public order.[102]

The ICTR's opinion later draws on the above conclusion; that some media are more dangerous than others because of their immediacy. The Tribunal's opinion notes that radio is "particularly dangerous and harmful," if used to incite.[103]

iv. Causation

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[100] *Arslan v. Turkey*, Application No. 23462/94 (European Court of Human Rights, 1999) (available online at:http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Arslan&sessionid=5314133&skin=hudoc-en).
[101] *Arslan v. Turkey*, Application No. 23462/94, ¶ 46.
[102] *Id*, ¶ 48.
[103] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶ 1031.

The Tribunal analyzed one final factor in examining intent to incite: Did the speech directly cause violence? In probing this element, the Tribunal first turned to a case from the Nuremberg trials. The case involved Julius Streicher, the publisher and editor of a weekly newspaper. The paper, called *Der Stürner*, regularly published articles, editorials, and a letter calling for the execution of Jews. The Nuremberg tribunal found that Streicher received updates on deportations and killings of Jews in concentration camps. The judgment did not directly link Streicher's paper to any particular killing; rather, it found that Streicher poisoned the minds of Germans into acceptance of the National Socialist plan of extermination of the Jewish people.[104] From the *Streicher* case the ICTR drew two principles. First, international law does not require a court to find that the speech in question directly cause violence.[105] Secondly, the Tribunal concluded that the relevant inquiry is what the likely impact of the speech might be.[106] Both of these conclusions operated to convict the defendants in the Media Cases more easily, and mark a departure from the position of U.S. courts.

In a more recent ECHR case, the owner of a weekly review appealed his conviction for his review's publication of letters from readers condemning government actions and officials.[107] The letters alleged that the Turkish government's military actions against the Kurds were aimed at eradicating the Kurds as an ethnic group. The letters ended by reaffirming the Kurdish will to defeat the government forces. One letter also named individual members of the government and stirred up enmity for them personally.

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[104] *Prosecutor v. Nahimana et al.* ICTR-99-52-T, ¶ 981.
[105] *Id*, ¶ 1007.
[106] *Id.*
[107] *Sürek v. Turkey (No. 1)*, Application No. 26682/95, (European Court of Human Rights, 1999) (available online at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Surek&sessionid=5314133&skin=hudoc-en).

The ECHR found that these letters went beyond the pale of simple government criticism by a minority group. Rather the letters "must be seen as capable of inciting to further violence in the region…the message which is communicated to the reader is that recourse to violence is [] necessary."[108] Additionally, the second letter, "identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence."[109] For the ECHR, these two factors pushed the letters into the realm of "hate speech and the glorification of violence;" thus they were properly proscribed by the Turkish authorities.[110]

The defendant argued that he was not responsible for the content of his publication, since as owner he had no editorial authority. The opinion of the ECHR roundly dismissed this reasoning, stating that instead of diminished responsibility the owner has just as great a duty to control the content of the paper as an editor. The Court also noted that the owner's responsibility included a duty to "shape the editorial direction of the review."[111] This was a particularly important precedent for the Rwandan Tribunal, as it provided the principle that owners and shareholders can incur criminal liability for the content of the media they own, even if they do not exercise direct editorial control.[112]

v. The ICTR's Conclusions

The Tribunal drew several points of law from the European Court precedents regarding analysis of intent to incitement. First, it held that publishers and editors have

[108] *Sürek v. Turkey (No. 1),* Application No. 26682/95, ¶ 62.
[109] *Id*.
[110] *Id*.
[111] *Id*, ¶ 63.
[112] *Prosecutor v. Nahimana et al.* ICTR-99-52-T ¶ 999.

generally been held accountable for the contents of their publications or broadcasts. [113] This arises since publishers and editors provide the forum for the speech.[114]

Secondly, the actual word choice of particular speech has long been used as an indicator of intent. Relying on *Jersild*, the ICTR drew the conclusion that a presenter's remarks distancing herself from those of the interviewee can be crucial to determining responsibility in this area.[115] Additionally, drawing on *Arslan*, the Tribunal concluded that a work clearly identified as demonstrating one group's point of view is acceptable, as long as there is adequate notice to the audience of the nature of the work.[116]

Next, the Tribunal considered that in assessing editorial liability the context of the message is of great importance.[117] This context includes events contemporaneous with the transmission of the message as well as any secondary meaning a message may carry.[118] Additionally, whether a message rises to the level of incitement is affected by its medium of transmission. A message transmitted in the mass media has a much more immediate, and potentially inflammatory, impact that a similar statement published in a book.[119]

The Tribunal also concluded that international jurisprudence imposes no strict causation requirement.[120] Rather, the test is what the likely impact of the speech might be given its content and context.[121] An important consideration here is whether the speaker is advocating a minority or opposition viewpoint; in those circumstances the speech

[113] *Id*, ¶ 1001 (drawing on the *Jersild* case).
[114] *Id*, ¶ 1003.
[115] *Id*. ¶ 1001.
[116] *Id*. ¶ 1006.
[117] *Id*, ¶ 1004.
[118] *Id*, ¶ 1005.
[119] *Id*, ¶ 1006.
[120] *Id*, ¶ 1007.
[121] *Id*.

should be given greater protections.[122] The Tribunal also noted that the converse is also true, majority speech, especially government, or government-aligned speech deserves special scrutiny when aimed at minority or opposition groups.[123]

Finally, the Tribunal briefly reviewed U.S. incitement law, as one of the defendants argued it set a higher standard. After first emphasizing that International Law and not the domestic law of any one state was controlling, the Tribunal noted the accord of American jurisprudence with the principles of international incitement law. The Tribunal looked especially to *Virginia v. Black*, 538 U.S. 343 (2003) to support the conclusion that speech made with an intent to incite can be banned.[124] I will discuss *Black* further in Part IV.

B. Application of the International Incitement Framework to the Three Rwandan Defendants

1. The Case against Ngeze

Hassan Ngeze was editor-in-chief of a newspaper called *Kangura* (meaning "to wake others up").[125] From February 1991 until publication ceased in 1995, the newspaper was subtitled "The Voice that Awakens and Defends the Majority People."[126] During this time period *Kangura* was the best known, and most widely circulated Rwandan paper.[127] One witness testified at trial that at least one issue specifically referred to Hutus as the "majority people."[128] He also stated that Ngeze called the paper "a voice of the Hutu."[129]

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[122] *Id*, ¶ 1008.
[123] *Id*.
[124] *Id*, ¶ 1010.
[125] *Id*, ¶ 135.
[126] *Id*. ¶ 136.
[127] *Id*. ¶ 121.
[128] *Id*. ¶ 136.

Given that Hutus comprised around 80% of the population, the idea of "majority people" was a clear one.

From early on *Kangura* published articles aimed at defaming Tutsis. One article, called "The Ten Commandments," suggested guidelines for keeping the Tutsi in check. It described Tutsi women as spies who would use their sex to gain access to Hutu households and businesses to obtain information and power for their ethnicity. The article continued to state that any Hutu man who married a Tutsi woman, kept one as a "concubine," or made a Tutsi woman his secretary or protégée was a traitor to the Hutu race.[130] These "Ten Commandments" were a response to an article Ngeze published earlier, entitled "The 19 Commandments." This first piece was a list of supposed Tutsi commands to subjugate, once again, the Hutu.[131] The cover of a November 1991 issue featured a headline which read "What Weapons Shall We Use to Conquer the *Inyenzi* Once and for All?" The cover also featured a picture of two soldiers, a machete, and a reference to the 1959 revolution during which Hutus killed Tutsis with machetes, ousting the Tutsi from power. *Inyenzi* is a word witch literally means "cockroach," but which was commonly used to refer to the rebel Tutsi groups from the 1960s on.[132]

Not long after, *Kangura* carried an editorial openly referring to all Tutsis as *Inyenzi*, and suggesting that Tutsis never change; that the present-day Tutsi are no different than the ruling Tutsi of the past. Consequently, the article leads the reader to

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[129] *Id.* ¶ 136.
[130] *Id*, ¶ 139.
[131] *Id.* ¶ 157.
[132] *Id.* ¶ 160.

conclude that Tutsis must be stopped, in much the same way as they were stopped after the 1959 revolution.[133]

Beginning in December 1990, *Kangura* published lists of people it dubbed traitors, and asked its readers to send any incriminating information they had on these people to the paper for publication. In February 1993, Ngeze published a list of 123 names of children along with their parents, who were suspected of supporting pro-Tutsi groups.[134] This list was later determined to be an official government list of dissenters, which Ngeze had obtained from bureaucrats in the Hutu administration.[135]

The paragraph introducing the list told readers that these people were traitors, insinuated that the government forces were unable to act against the listed people, and that the readers should organize themselves against those listed.[136]

The Trial Chamber found these lists particularly damning evidence, stating:

> The names published…were generally done so in the context of a threat that varied in explicitness. An official list of 123 names of suspects was published in *Kangura* No. 40 with an express warning to readers that the government was not effectively protecting them from these people and that they needed to organize their own self-defense to prevent their own extermination. This message classically illustrates the incitement of *Kangura* readers to violence: by instilling fear in them, giving them names to associate with this fear, and mobilizing them to take independent, proactive measures in an effort to protect themselves. In some instances, names were mentioned by *Kangura* without such an explicit call to action. The message was nevertheless direct. That it was clearly understood is overwhelmingly evidenced by the testimony of witnesses that being named in *Kangura* would bring dire consequences. François-Xavier Nsanzuwera called *Kangura* "the bell of death.[137]

[133] *Id*, ¶¶ 179, 180.
[134] *Id*, ¶ 198.
[135] *Id.*
[136] *Id.*
[137] *Id*, ¶ 1028.

The Chamber found that the general tone of the paper, throughout its existence, was aimed at defaming and denigrating Tutsis. Additionally, the chamber found that while much of the content focused simply on racial division or hatred, some of the articles went beyond that. Notably, the publication of lists of names, as well as the cover of the November 1990 issue, instilled the idea of killing Tutsi in the minds of the readers of *Kangura*.[138]

In addition to his activities at the newspaper, Ngeze drove a vehicle with a megaphone on top. Through this megaphone he mobilized the Hutu population, calling for them to come to meetings of the Coalition for the Defense of the Republic (CDR).[139]

As explored in Part II, the CDR was a pro-Hutu party, set up in direct opposition to the RPF. The CDR traced its ideological heritage to the 1959 revolution, clearly marking it as advocating Hutu supremacy and ethnic separation. The Trial Chamber stressed that, at its outset, the party's message was one of non-violence. As time progressed, however, the message of the CDR became increasingly divisive, eventually promoting violence against Tutsis. The CDR also developed a militia wing, which carried out attacks against the RPF, as well as civilian Tutsis, and moderate Hutus.[140] Ngeze also used the megaphone to spread the message that all Tutsi should be exterminated. While Ngeze used the word "*Inyenzi*," the Chamber noted that at the time of Ngeze's actions the words *Inyenzi* and Tutsi were synonymous.[141]

In his defense Ngeze stated that *Kangura* was even-handed in its treatment of the issues of the day, and particularly ethnic tensions. Ngeze specifically referred to

[138] *Id.* ¶ 1036.
[139] *Id.* ¶ 1039.
[140] *Id*, ¶¶ 258-61.
[141] *Id*, ¶ 172.

Kangura's printing of the "19 Commandments" as a concession to Tutsi viewpoints. The Trial Chamber, however, expressly rejected this approach. It stated that even if the content of the article was true, and did in fact represent a true Tutsi viewpoint (and was not an article invented by *Kangura* to incite the Hutu population as the prosecution argued) that the Tribunal must also examine the context of the article.[142]

The Tribunal looked to the publication of the "Ten Commandments," the pro-Hutu article published shortly after the supposedly Tutsi-authored "19 Commandments." The "Ten Commandments" the Chamber noted, were presented as a rebuttal to the first article. The Tribunal saw these two factors as evidence that both items should be read together. When examining the first article in light of the second the intent of *Kangura* to instill a culture of fear of the Tutsi became clear, the Chamber found. Additionally, the Tribunal held that the testimony of witnesses demonstrated *Kangura's* "well defined perspective for which [it] was known."[143] That is, *Kangura* openly advocated hatred of, and violence against Tutsis.

The Tribunal also found that not only did *Kangura* report on the ethnic tension and hatred of the period, but the paper failed to distance itself from the viewpoints it expressed. Rather than positioning itself as a detached observer, as in the *Jersild* case above, the paper became a loud voice in advocating ethnic hatred of Tutsi, as well as calling for their extermination. The fact that *Kangura* was the most widely distributed and well-known paper in Rwanda at the time of the genocide demonstrated the effect that the paper could have on a very large segment of the Rwandan population. Thus, the

[142] *Id*, ¶ 1023.
[143] *Id*, ¶ 1023.

Chamber found, the ability of *Kangura* to incite the populace to violence was that much greater.[144]

In examining the causal link between *Kangura's* articles and ensuing violence the Trial Chamber noted that incitement to genocide is an inchoate offence, continuing in time from the formation of intent until the completion of the acts contemplated. Here the overt act necessary is not actual genocide, but rather the dissemination of information which has as its goal that its listeners form the intent to commit genocide. The Tribunal held that incitement to genocide "is a crime regardless of whether it has the effect it intends to have."[145] The fact that actual genocide did follow, and could be directly linked to some articles, was simply highly persuasive evidence of this overt act.

For the publications in *Kangura*, as well as his recruiting activities on behalf of the CDR, the trial chamber convicted Hassan Ngeze of direct and public incitement to genocide.[146] The Tribunal found that the content of Ngeze's articles together with the context, both in regard to other articles and with respect to the role *Kangura* played in society, demonstrated intent to incite the Hutu population to commit genocide. The crime was complete, the Chamber found, upon publication. That publishing these articles was meant to incite genocide was demonstrated by the direct causal link between certain articles (particularly the lists of names) and killings of Tutsis.[147]

2. The Case Against Barayagwiza

[144] *Id*. ¶ 1024.
[145] *Id*, ¶ 1029.
[146] *Id*, ¶¶ 1036-39.
[147] *Id*.

While not originally named an officer in the CDR, the Tribunal found Jean-Bosco Barayagwiza was the behind-the-scenes leader of the party from its inception. By the summer of 1992 the CDR was warning in its communiqués that "the Tutsi minority wants to grab power through force and violence."[148] Later releases also contained lengthy lists of "enemies of Rwanda," defined as anyone aiding the RPF, and included nearly every leader of every opposition party.[149] Finally, the CDR alleged the RPF had spies throughout Rwanda, conspiring to overthrow the current government to benefit the Tutsi minority.

As the rhetoric of the party's communiqués became increasingly violent, so did the discourse at its rallies. The Trial Chamber found the word "*tubatsembatsembe*" or "let's exterminate them" was used in clear reference to the Tutsi at these rallies. In some cases Barayagwiza himself led the chant; at other times militia and CRD officials chanted *tubatsembatsembe* in Barayagwiza's presence. This word also found its way into songs sung by the CDR's youth-militia. The ICTR held that Barayagwiza had the final say in which words were used in the CDR speeches and songs.[150]

The trial chamber found that Barayagwiza controlled the CDR and its political message. The Tribunal also found that he had command over the CDR's regular and youth militias. From April 6th to July 17th, 1994 these militias, along with the *Interhamwe* set up road blocks to identify and kill Tutsis. The Chamber further held that Barayagwiza oversaw these roadblocks and in some instances gave direct orders for killings. Additionally, he supplied the militia with weapons.[151]

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[148] *Id*, ¶ 297.
[149] *Id*, ¶ 297.
[150] *Id*, ¶ 1035.
[151] *Id*, ¶¶ 339-41.

The Tribunal had little difficulty finding Barayagwiza guilty of incitement to genocide. He had direct responsibility for CDR communications and speeches supporting killing Tutsis. Thus, like Ngeze, and the defendants in the *Sürek* and *Streicher* cases above, Barayagwiza was held responsible as an editor for his control over the message. He was also found guilty for his direct statements at rallies advocating the elimination of Tutsis, as well as for his direct orders to kill Tutsis at the roadblocks.[152]

3. The Case Against Nahimana

The third defendant, Ferdinand Nahimana, was the founder of the radio station RTLM, and chaired the station's "technical and programming committee." As such he controlled all content that the station aired.[153] He was also described by some witnesses as the "top man" at RTLM, though there was some debate on this point.[154]

RTLM was the most widely listened-to station in Rwanda in the early 1990s. It was also widely regarded as "setting people at odds" with one another, and as heavily favoring the Hutu. RTLM was very aware of both its large listener base and its reputation; yet only twice were opposition viewpoints aired. During both of these instances the Tutsis presenting their own views were ridiculed.[155]

Leading up to April 6th, 1994, the broadcasts of RTLM became increasingly insulting of Tutsis, and helped push a deep divide between the Hutu and Tutsi.[156] This was accomplished through reference to the Tutsi as both a political group seeking to undermine the Hutu government, and through stereotyping calculated to belittle the

[152] *Id*, ¶ 1035.
[153] *Id*, ¶ 557.
[154] *Id*.
[155] *Id*, ¶¶ 355-56.
[156] *Id*, ¶¶ 357-62.

Tutsi.[157] All of this divisive broadcasting resulted in the people believing that RTLM was "heating up heads," and instilling fear in both sides. The Hutu feared a Tutsi attack, and Tutsis began to fear violence by Hutus in anticipation of this alleged attack.[158]

In a broadcast on March 14th, 1994 an RTLM talk-show host named a "traitor" and this "traitor's" family. The presenter claimed he had intercepted a letter from a RPF commander to a subordinate. The radio host then proceeded to read much of this letter over the airwaves. The body of the letter identified the area of operation of this RPF group, as well as members of the commander's family, including children. An investigation by the ICTR Prosecutor after the genocide revealed that each person named on the air that day, including the children, was killed during the genocide.[159]

The namings expanded during the first week of April, 1994. RTLM DJ's mentioned the names of several people suspected of either being RPF or helping them. No evidence was ever presented on air that those named were actually aiding enemies of Rwanda. DJ's also speculated that two doctors with some Tutsi heritage were responsible for the death of a Ministry of Health driver; this driver was also a CDR party official. Again, without evidence, the radio host accused the two doctors of murdering a Hutu. The trial chamber found strongly suggestive language in this latter broadcast, which seemed to urge the neighbors of the accused to seek retribution for the killing on their own.[160]

Also during the first week of April, RTLM predicted an imminent attack on Kigali in the next few days. Testimony showed that this validated, in the minds of much

[157] *Id*, ¶¶ 362-69.
[158] *Id*.
[159] *Id*, ¶ 377.
[160] *Id*, ¶ 381-83.

of the Hutu population, many of the rumors swirling around the streets during this period.[161]

After President Habyarimana's plane crashed on April 6th, 1994, the radio broadcasts from RTLM took a decided turn toward outright advocacy of genocide. The trial chamber found many horrific examples. This one (marked at trial as exhibit P103/40D) is representative:

> 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. When I remember the number of corpses that I saw lying around in Nyamirambo yesterday alone; they had come to defend their Major who had just been killed. Some *Inkotanyi* also went to lock themselves up in the house of Mathias. They stayed there and could not find a way to get out, and now they are dying of hunger and some have been burnt. However, the *Inkotanyi* are so wicked that even after one of them has been burnt and looks like a charred body, he will still try to take position behind his gun and shoot in all directions and afterwards he will treat himself, I don't know with what medicine. Many of them had been burnt, but they still managed to pull on the trigger with their feet and shoot. I do not know how they are created. I do not know. When you look at them, you wonder what kind of people they are. In any case, let us simply stand firm and exterminate them, so that our children and grandchildren do not hear that word "*Inkotanyi*" ever again.[162]

The word *Inkotanyi* refers to the RPF, which RTLM broadcasts leading up to the genocide clearly equate with all Tutsis.

One witness, and frequent RTLM listener, described RTLM programming after April 6th saying;

> RTLM was constantly asking people to kill other people, to look for those who were in hiding, and to describe the hiding places of those who were described as being accomplices… it was obvious that the people who were speaking were happy to say that there had been massive killings of *Inyenzi*, and they made no difference between *Inyenzis* and Tutsis. And they said that they should continue to search for those people and kill them

[161] *Id*, ¶ 384-85.
[162] *Id*, ¶ 403.

> so that the future generations would have to actually ask what *Inyenzis* looked like, or, ultimately, what Tutsis looked like.[163]

In its reasoning the Trial Chamber stated that some of the broadcasts leading up to April 6th were legitimate uses of radio. There were several discussions of political issues, as well as presentation of news items in these broadcasts. The decision also pointed out that ethnic tension between Hutus and Tutsis was nothing new in Rwanda, and the long bloody history of the country certainly bore this out. During this period, however, there were also many broadcasts aimed at denigrating Tutsis as a whole. It was at this stage, the Chamber found, that RTLM presenters fully equated the terms *Inyenzi* and *Inkotanyi* with all Tutsi, not just RPF forces or sympathizers.[164]

The Tribunal also found evidence that violence followed RTLM broadcasts. Several witnesses testified that RTLM presenters would identify individuals, a group of people, or a certain area where RPF sympathizers were located, and within a few days (and sometimes only a few hours) the individuals, members of the group, or people in the area specified, would be dead. Indeed, after April 6th, 1994 RTLM was widely known as "Radio Machete."[165]

In *Sürek* above, the ECHR noted that namings which have the mere possibility of causing violence were proscribable. The Trial Chamber, however, not only found that violence *could likely* result from the RTLM broadcasts, but also did *in fact* result from some of these namings.[166] Thus, the crime of incitement was all the more apparent in the instant case.

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[163] *Id*, ¶ 437.
[164] *Id*, ¶¶ 471-74.
[165] *Id*, ¶ 1031.
[166] *Id*, ¶ 1029

The Trial Chamber held that Ferdinand Nahimana had direct oversight over programming content at RTLM. Again drawing on *Sürek* and *Streicher,* the Tribunal applied the international standard that editors are responsible for the content of their broadcasts and publications. Next, in examining the content of the broadcasts, the Chamber found that RTLM programming openly denigrated the Tutsi population, instilling fear and hatred of them in the Hutus. RTLM also openly advocated extermination of Tutsis as a group, as well as naming individual RPF members and sympathizers to be killed. During a broadcast advocating the killing of Tutsi, one particular announcer told his listeners to identify *Inkotanyi* by physical characteristics; he stated, "just look at his small nose and break it."[167] The Tribunal held up this statement as a vivid symbol of the intent to destroy Tutsis as a group.[168]

The Tribunal's opinion also points to the immediate effect of radio on its listeners. The opinion stated that instant transmission of radio messages, the ability of radio to broadcast across large distances, and the appeal of the human voice in the transmission make radio a particularly dangerous medium. The Trial Chamber found that the content of hate of the RTLM broadcasts was "augmented by the visceral scorn coming out of the airwaves."[169] This combination of content and delivery served to enhance the message of hate RTLM preached.[170]

As for the above two defendants, the chamber noted that there is no need to prove that genocide resulted from any particular broadcast. Rather, the crime of incitement to genocide occurs when the broadcaster advocates killing a group with the intent that his

[167] *Id*, ¶ 1032.
[168] *Id*.
[169] *Id*, ¶ 1031.
[170] *Id*.

listeners carry out that killing. Here, the chamber had already found that killing of Tutsis as a group did, in fact, follow many RTLM broadcasts. This fact demonstrated the intent of the presenters at RTLM, the Tribunal found.[171]

Given his oversight of radio programming, the clear genocidal message of RTLM, and the clear intent of RTLM broadcasts, the Chamber found Ferdinand Nahimana guilty of direct and public incitement to genocide.[172]

The ICTR used international precedents and primary sources of international law to convict the three defendants in the Media Cases. The defendants argued at trial, however, that U.S. law set a higher standard.[173] In its opinion, the Tribunal dismissed the argument. However, to more fully answer the question an examination of current incitement jurisprudence in the United States is warranted.

IV. Current Incitement Law in the Untied States

Congress, after ratifying the Convention on the Prevention and Punishment of the Crime of Genocide, passed enacting legislation, making genocide and incitement to genocide a criminal offence. The statute reads, in part:

> **(a) Basic offense.**--Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such--
>
> **(1)** kills members of that group;
> **(2)** causes serious bodily injury to members of that group;
> **(3)** causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
> **(4)** subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;

[171] *Id*, ¶ 1029.
[172] *Id*, ¶ 1033.
[173] *Id*, ¶ 1010.

> **(5)** imposes measures intended to prevent births within the group; or
> **(6)** transfers by force children of the group to another group;
>
> or attempts to do so, shall be punished as provided in subsection (b).
> …
> **(c) Incitement offense.**--Whoever in a circumstance described in subsection (d) directly and publicly incites another to violate subsection (a) shall be fined not more than $500,000 or imprisoned not more than five years, or both.[174]

Subsection (d) states that the offence must be committed in the United States, or by a U.S. national.

American courts have identified the same tension that the ICTR identified in the media cases; the need to protect freedom of expression, while not allowing this freedom to trample the rights of others. For example, the Supreme Court has held, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" *Texas v. Johnson*[175]. At the same time, the Court has recognized categories of speech that government can ban. [176]

The Supreme Court in *Brandenburg v. Ohio*[177], engaged in a discussion of incitement laws in the United States. The statute at issue in *Brandenburg* barred speech that advocates violence as a means of political reform, as well as assembling to promote this end. Rather than incitement to genocide, this could be characterized as incitement to rebellion. This particular statute, however, covered a bit more than just rebellion, or violence against the government.

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[174] 18 U.S.C. § 1091.
[175] 491 U.S. 397, at 414 (1989).
[176] *see e.g. Chaplensky v. New Hampshire* 315 U.S. 568, at 571-72 (1942).
[177] 395 U.S. 444 (1969).

The defendant in this case was convicted under Ohio's criminal syndicalism law for a meeting of the Ku Klux Klan, which the defendant held at his farm. During that meeting, the defendant, Brandenburg, while speaking to the group, stated that if the U.S. government did not institute changes to meet the Klan's objectives then, "there might have to be some revengeance [sic] taken."[178] He also proclaimed that African-Americans should be returned to Africa and Jews should be deported to Israel.

The Court overturned Brandenburg's conviction, reasoning that the government cannot convict for speech that merely suggests violence. Rather, the state can only proscribe speech which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[179] The Court also drew distinctions between speech which tells its listeners of violence in the abstract, or as a mere moral necessity; and speech which "prepares a group for action and steel[s] it to such action."[180] Here, the court found that Ohio's law failed to discriminate between these two levels of speech. On the contrary, the law on its face forbids assembly to advocate a specific point of view. Since there was no requirement in the statute that the action constitute an immediate and credible threat, the Court overturned the conviction[181].

In a concurrence Justice Douglas compared Brandenburg's actions to Justice Holmes' famous "shouting fire in a crowded theater" incitement example. In the theater scenario, Justice Douglas reasoned, speech is closely coupled with action. Conversely, Brandenburg's speech required nothing to be done immediately. It suggested future

[178] *Brandenburg*, 395 U.S. 444, at 446.
[179] *Id*, at 447.
[180] *Id*, at 448.
[181] *Id*, at 448-49.

action, but at an indefinite time.[182] For Justice Douglas, the inciting speech must be so linked to the ensuing prohibited behavior such that the "speech is brigaded with action… apart from [this example], speech is, I think, immune from prosecution."[183]

The Supreme Court later clarified the issue of how closely linked the speech and proposed action must be in *Hess v. Indiana.*[184] Here, in response to a police order to clear the street during an anti-war protest, a student stated that the group would retake the street later. The Court overturned the state-law conviction stating that at the worst the speaker was suggesting illegal activity at an abstract moment in the future. The conviction was overturned using the immediacy requirement from *Brandenburg*.

In another application of *Brandenburg* jurisprudence the Court examined a civil rights boycott.[185] The boycott organizer, Charles Evers, stated that those who violated the boycott would be "disciplined" and that "necks would be broken." Here the Court examined the context of the speech. It concluded that since the words were spoken during a lengthy speech, and since the situation in which the words were uttered was the charged atmosphere of the boycott rally, despite the fact that the words amounted to advocacy of violence, they were not directed at a specific person at a defined time. This, Justice Stevens explained, did not meet the immediacy requirement set out in *Brandenburg*. [186]

More recently, in *Virginia v. Black* the Court turned its attention to a state statute which banned only one activity: cross burning. Previously, in *R.A.V. v. City of St. Paul*[187], the Court had struck down a city ordinance on the basis that it forbade speech

[182] *Id*, at 456 (Douglas, J. concurring).
[183] *Id*, at 456-57 (Douglas, J. concurring).
[184] 414 U.S. 105 (1973).
[185] *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).
[186] *Id*, at 928
[187] 505 U.S. 377 (1992).

based upon the content of the speech. The ordinance in question in *R.A.V.* banned speech that would "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[188] The Court held that this ordinance picked out only certain types of speech, while other types, which could be equally offensive, were not included. In *Black* the majority points out that political affiliation, union membership and sexual identity are among groups not included in the *R.A.V.* ordinance.[189]

In *Black*, the Court, citing to *R.A.V.*, expressly stated that some specific speech can be banned if the prohibition is "based on the very reasons why…the speech at issue…is proscribable." [190] That is, if the underlying speech is rooted in sentiments which are themselves able to be banned as actions, then the speech itself may also be forbidden.

In the *Black* case three defendants, all members of the Ku Klux Klan, burned or attempted to burn crosses in violation of Virginia state law banning the practice. In upholding the ban in general (though striking down a portion of the intent section of the statute) the Court looked to the "long, pernicious" history of the Klan and cross burning.

Justice O'Connor admitted that not every cross burning was necessarily meant to intimidate. In fact, defendant Black burned a cross on private property during a Klan meeting. However, she reasoned that cross burnings aimed at non-members of the Klan served only to intimidate. The historic record, said Justice O'Connor, demonstrates a long legacy of cross-burning intimidation. The Klan's own history, the opinion continued, was replete with violence, which served to make the intimidation all the more credible.

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[188] *R.A.V. v. City of St. Paul*, 505 U.S. 377, at 380 (quoting the Bias-Motivated Crime Ordinance, St. Paul, MN Legis. Code § 292.02 (1990)).
[189] *Virginia v. Black*, 538 U.S. 343, at 361 (2003).
[190] *Id*, at 361 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, at 388).

Moreover, the threat of violence this intimidation carried with it was explicit and very real.[191]

The opinion then discussed the link between incitement and "true threats." Here, Justice O'Connor defined a true threat as one "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence…[t]he speaker need not actually intend to carry out the threat."[192] The Court gave the example of outlawing threats against the president, since they have "special force" given the president's status as leader of the country. For two of the *Black* defendants the exact impetus to burn the cross was unclear; the intimidation could have been motivated by race, sexual orientation, religion, or membership in a particular organization. It is the intent to intimidate, and not the motivation behind the intimidation which makes cross burning reprehensible, the court found.[193]

The Court struck down part of the statute which stated that burning a cross is *prima facie* evidence of intent to intimidate. The opinion held that defendants convicted under the statute must have a separate intent to intimidate their victims.[194] The fatal flaw of this element of the statute was that it failed to discriminate (much like the Ohio statute at issue in *Brandenburg*) between cross burning done with intent to instill fear, and burning done with intent to arouse anger, or even directed at other Klan members to produce a sense of belonging. The statute's *prima facie* intent portion also failed to account for the placement of the cross; whether on a homeowner's lawn, as part of a public rally, or during a private gathering. Since the *prima facie* intent element of the

[191] *Black*, 538 U.S. 343, at 357.
[192] *Id*, at 359-60.
[193] *Id*, at 362.
[194] *Id*, at 366-67.

statute lacked ability to discriminate in these circumstances the Court held that this portion of the law was unconstitutional. Here, the intent portion was offensive to the First Amendment, since speech not intended to intimidate is not proscribable.[195]

V. A Brief Comparison of the International and U.S. Approaches to Incitement

The reasoning of the Tribunal in the Media Cases and American incitement jurisprudence are very similar, though the Tribunal's opinion differs in two key facets. First, the ICTR examined European and other international jurisprudence which has not protected speech to the same extent at the U.S. First Amendment. Secondly, the Tribunal did not apply the same temporal restraints that U.S. courts do. Notwithstanding these differences, the ultimate verdicts in the Media Cases would not have been different if decided under U.S. law.

One factor the trial chamber examined in the Media Cases was the ongoing pitting of the Hutu against the Tutsi. This was accomplished over a period of years by all three defendants. It was partly due to this instigation of racial tension that the Chamber returned convictions. This reasoning, however, is not supported by *Brandenburg* and *Black*. Rather, this denigration of Tutsis by the Hutu media and political parties might be characterized as speech aimed at arousing anger, but not at inciting immediate violence by the listeners.

For instance, the *Kangura* articles equating all Tutsi with *Inyenzi*, simply do not rise to this higher standard. While this speech is certainly insulting it lacks a credible call

[195] *Id*, at 367.

to immediate violence. Under *Black*[196] one could argue that throughout Rwanda's history equating a larger group with *Inyenzi* was a threat to the safety of those people. However, there was no evidence presented that this equation resulted in *immediate* violence toward that group. This is not the same as "speech brigaded with action" described in *Brandenburg*.[197]

On the other hand, some acts of the Media Cases defendants, certainly met the U.S. standard. This is especially true of the lists of names published in the paper, and announced over RTLM. Given Rwanda's violent history, the large following of the paper and radio, and the climate following April 6th, 1994, it was virtually certain that readers of *Kangura* and those listening to RTLM would take action against anyone identified as a RPF member or sympathizer. Indeed, the trial chamber heard testimony that the militias manning the roadblocks would stay tuned into RTLM so they would know whom to kill next, and where to find their victims. The same was true of the political rallies hosted by the CDR. Few threats could be more true or imminent than Barayagiwza ordering enraged masses (which he had taken the trouble to arm) to exterminate Tutsis.

The Trial Chamber made clear that to be convicted of incitement each of the victims needed to have the intent that their audiences commit genocide. The Supreme Court conducted a similar analysis in *Black*[198] (in fact, the Chamber cited to *Black* in support of its ruling[199]). This is an important element of protection of those charged with intent crimes. Without the intent that their listeners immediately engage in violence, some speakers will be deprived of important speech rights.

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[196] 538 U.S. 343.
[197] 395 U.S. 444, at 456-57 (Douglas, J. concurring).
[198] 538 U.S. 343.
[199] *Prosecutor v. Nahimana et al.* ICTR-99-52-T, ¶ 1010.

The situation in Rwanda bore witness to this point. The defendants all stated that rather than trying to instigate genocide, they were engaging in lively political debate. They argue that the politics of Rwanda are so deeply rooted along ethnic lines, that ethnic tensions, and the exploitation of those tensions, are just a part of political life.[200]

The Chamber wholly agreed with this point regarding some instances. One such situation was an interview that Barayagwiza gave on RTLM. He described growing up Hutu in a decidedly Tutsi-centric country. He spoke of his parents and grandparents toiling away in the houses and farms of rich Tutsi while they lived in poverty. He described what he felt when the only answer to the question "why are things this way," was "because they are." In this interview Barayagwiza also made disparaging remarks about the Tutsi as a whole. Regardless, the Chamber characterized this interview (and several others also recounting what it is to be Hutu, and what community perceptions of the Tutsi were) as permissible speech.[201]

The result would be the same under U.S. jurisprudence. Black burned a cross at a Klan meeting not to incite members to violence, but to create feelings of belonging in the other members. The Media Cases defendants (in speech like the interview described in the paragraph above) did not intend to instigate wiping out the Tutsi in part or in whole. Instead, they wished to communicate their displeasure with the current economic situation (a common Hutu complaint was that the Tutsis had all the wealth), or to express their feelings on the subject of what it is to be Hutu. While none of the above actions can be characterized as entirely noble (they all do contain some element of deriding another group), they certainly fall within the ambit of protected speech.

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[200] *Id*, ¶ 1021
[201] *Id*, ¶ 1020.

Of course, the listing of names both in *Kangura* and on RTLM, Ngeze's use of a megaphone to urge others to violence, and Barayagwiza's public calls for extermination are all clear examples of speech which meets the U.S. standard. In many instances the ICTR found that violence directly followed these acts. The tribunal even found that Barayagwiza lead extermination groups.

Thus, an application of U.S. jurisprudence to the Media Cases would provide the same result; conviction of all three defendants. Some of the defendants' speech, however, would have received much greater protection in U.S. courts. While genocide is an evil which is to be abhorred by all, and prevented by serious laws, these preventions cannot infringe too far upon the expression of others. The immediacy requirement helps to ensure that words uttered too far in the past will not be cause for future criminal responsibility for incitement offences.

VI. Conclusion

With its chaotic history of ethnic strife, and leaders willing to twist this history to their own political ends, perhaps the Rwandan genocide of 1994 was inevitable. Even so, the question remains: Would the killings have been as widespread and numerous without the complicity of the media and political parties?

Some would argue that the naming of suspected RPF members and sympathizers in particular warrants stricter statutes and more active enforcement of incitement laws. However, in a free society, any law that restricts actions of media or political organizations must be carefully scrutinized. What makes this task more difficult is that it is often groups and individuals who espouse viewpoints on the fringes of socially

acceptable discourse which test our collective patience, as well as our incitement laws. These groups (and the KKK and anti-semetic groups discussed in this article are prime examples) often garner little sympathy for their speech from the public. However, these same groups also serve as the miners' canary of expressive and speech freedoms. Their demise is the first indication of a catastrophe near at hand.

Thus, it is important to preserve a distanced and detached attitude when evaluating speech by groups which are repulsive to a society, and reflect on the larger implications. Curtailing the speech of groups on the edge of social discourse can soon be turned toward other underrepresented groups. As the Supreme Court noted in *Black*, "[we] need to walk the sometimes difficult path of denouncing the bigot's hateful idea with all [our] power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law."[202]

We as a society must closely examine any limitation of our expressive freedoms, while balancing this against the need to be free from violence. Certainly, preserving the public peace is instrumental to the free exchange of ideas. Therefore, it is only when the questioned speech presents an immediate threat of violence that it can be considered incitement to violence.

Perhaps, the idea of "true threats" discussed in *Black*[203] requires some further development to become a truly workable standard. The idea, however, that only "true threats" to immediate violence are proscribable is what sets apart U.S. jurisprudence from the precedents discussed in the Media Cases. This standard provides a greater protection of the freedom of expression, while still preventing speech such as the namings and the

[202] *Black*, 538 U.S. 343, at 367 (*citing* Casper, Gerry, 55 Stan. L. Rev. 647, 649 (2002)).
[203] *Id*, at 359.

other more heinous behavior of the three defendants in the Media Cases. As such, this temporal constraint should be required whenever courts of law consider the crime of incitement to violence.