"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

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I. INTRODUCTION

On December 3, 2003, former Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR) handed down its judgment in *The Prosecutor v. Nahimana, et al.*,[1] the so-called "Media Case." The three defendants—Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders of the infamous Radio Télévision Libre des Mille Collines

1. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Judgment and Sentence, ICTR Case No. 99-52-T (Dec. 3, 2003) [hereinafter *Nahimana Judgment*].

(RTLM), often called "Radio Machete," and Hassan Ngeze, editor-in-chief of the equally infamous newspaper *Kangura*—were convicted of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and persecution).[2] RTLM, through the airwaves, and *Kangura*, through print, exhorted Rwanda's Hutu majority population to exterminate the country's Tutsi minority. For their crimes, Nahimana and Ngeze were sentenced to life imprisonment, while Barayagwiza was sentenced to 35 years imprisonment.[3]

Beyond its importance in bringing three key perpetrators of the Rwandan genocide to justice, the case stands as a landmark in the jurisprudence of hate speech. Not since the International Military Tribunal (IMT) at Nuremberg tried the Nazi propagandists Julius Streicher and Hans Fritzsche in 1945-1946, had an international tribunal been called upon to decide whether the media's free expression prerogative had degenerated into war crimes (including genocide and crimes against humanity).[4] And not since the advent of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), had such a tribunal conducted a trial of news media members for the crime of "direct and public incitement to genocide."[5]

As expected, the *Nahimana* decision goes a long way toward answering significant questions regarding the proper legal standard for distinguishing between permissible speech and criminal advocacy in the context of massive violations of international humanitarian law. It also provides guidance regarding the application of that standard to the media and helps define the relationship between the most serious crimes

2. Although the decision in *The Prosecutor v. Nahimana* deals with Barayagwiza's criminal liability in connection with his activities as a founding member of the Hutu-power party Coalition for the Defense of the Republic (CDR), *see, e.g.*, *Nahimana Judgment* ICTR Case No. 99-52-T ¶¶ 975-977, this Article will not examine that aspect of the decision in any detail.

3. *Id.* ¶¶ 1105-1108. Barayagwiza was actually sentenced to life imprisonment but the decision reduced the sentence to thirty-five years in light of alleged procedural violations of his rights. *Id.* ¶¶ 1106-1107.

4. *See* IMT Judgment, Oct. 1, 1946, *reprinted in* 22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 501-02 (1946) [hereinafter Streicher]; *id.* at 525-26 [hereinafter Fritzsche]. *See also* Catharine MacKinnon, *International Decision: Prosecutor v. Nahimana Barayagwiza, & Ngeze*, 98 AM. J. INT'L L. 325, 328 (2004) ("This adjudication is the first since the Streicher and Fritzsche cases at Nuremberg to confront the responsibility of the media under international criminal justice principles.").

5. Convention on the Prevention and Punishment of the Crime of Genocide, art. III, Dec. 9, 1948, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention].

potentially arising from such advocacy: genocide, direct and public incitement to commit genocide, and conspiracy to commit genocide. On the other hand, the judgment raises other important questions, without necessarily resolving them, concerning such issues as the scope of criminal advocacy and jurisdiction. These answers and questions are of great moment, as the *Nahimana* case should serve as a crucial precedent for future cases involving human rights and free expression.[6]

Given the significance of the *Nahimana* decision, this Article will place it in its historical context, examine its facts and charges, delineate the issues involved in the case, and analyze how the Tribunal resolved them. Part II will begin by examining the decision's historical and legal precedents, including the Nuremberg decisions, UN conventions, other domestic and international precedents, the ICTR Statute and previous ICTR judgments dealing with hate speech. Part III will then consider the facts, charges and important legal issues involved in the *Nahimana* decision. This will include a brief history of RTLM and *Kangura* and their founders, as well as a review of the crimes charged and a parsing of the salient legal issues raised. Those issues include an examination of the contours of the line between free speech and criminal advocacy, and the scope of individual and superior responsibility in relation thereto. Finally, Part IV of the Article will assess which old issues the

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6. In particular, it will be significant for potential hate speech cases brought before the permanent International Criminal Court (ICC), which opened in July 2002. According to Radio Netherlands:

> Some people believe that Hate Radio is a phenomenon that started and ended in the mid-90's, notably in the Great Lakes Region of Africa around Burundi and Rwanda. [However, recent history] shows that hate radio continues to be a constant danger. Hate radio killed more than 800,000 people in the last decade. Its influence should not be ignored.

Counteracting Hate Media, Radio Netherlands Media Network, at http://www.rnw.nl/realradio/dossiers/html/hateintro.html (last visited Apr. 6, 2004).

Clandestine Radio Watch also reports that:

> The Rwandan case is perhaps the most familiar example of hate media from recent years. However, other regions in conflict have seen similar operations spring up, with the aim of spreading discord and heightening tension; Indonesia, the Philippines, and the Democratic Republic of Congo amongst them. Denmark's Copenhagen-based, extreme right-wing Radio Oasen has only recently had its state funding withdrawn. Meanwhile, in South Africa, Radio Pretoria continues to broadcast its pro-apartheid message. Described by the International Herald Tribune as the radio station where "apartheid is still revered," this "unique voice for conservative Afrikaners still broadcasts the old apartheid regime's national anthem every morning."

Analysis: Rwandan Hate Media—Ten Years On, Clandestine Radio Watch, at http://www.clandestineradio.com/crw/news.php?id=214&stn=153&news=403 (last visited Apr. 5, 2004).

Nahimana decision has resolved and forecast which new ones it has raised for future resolution.

II. THE LEGAL LANDSCAPE PRIOR TO *THE PROSECUTOR V. NAHIMANA*

A. International Law

The importance of *The Prosecutor v. Nahimana* becomes apparent when one considers the dearth of international precedent regarding media hate speech leading up to it. Nevertheless, a body of law did exist prior to the *Nahimana* judgment. The most important case law in this regard is derived from the opinions issued by the International Military Tribunal at Nuremberg, which essentially mark the birth of international jurisprudence for hate speech.

1. The International Military Tribunal at Nuremberg

After World War II, the victorious Allies opted for justice over vengeance and presided over the epochal Nuremberg trials 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.

a. The Julius Streicher Case

The ICTR has characterized the Julius Streicher case as the "most famous conviction for incitement."[7] The IMT sentenced Streicher to death for the anti-Semitic articles he published in his weekly newspaper *Der Stürmer*.[8] In its judgment, the IMT quoted numerous instances where *Der Stürmer* called for the extermination of Jews.[9] 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

7. Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR Case No. 96-4-T ¶ 550 (Sept. 2, 1998) [hereinafter *Akayesu Judgment*].

8. *See* Streicher, *supra* note 4, at 529-30.

9. *Id.* at 501-02.

Europe.[10] Significantly, the judgment does not posit a direct causal link between Streicher's publication and any specific acts of murder. 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."[11] While acknowledging that Streicher was not a Hitler adviser or even connected to Nazi policy formulation, the IMT nonetheless 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."[12]

b. The Hans Fritzsche Case

Also charged with incitement as a crime against humanity, Hans Fritzsche was acquitted by the International Military Tribunal.[13] Head of the Radio Section of the Propaganda Ministry during the war, Fritzsche was well known for his weekly broadcasts.[14] 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."[15] In fact, he claimed, he had expressly prohibited the term from being used by the German press and radio that he controlled. 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.[16] 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. 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.[17]

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10. *Id.*
11. *Id.*
12. *Id.*
13. *See* Fritzsche, supra note 4, at 525-26.
14. *Id.* at 525.
15. Transcript of IMT Proceedings, June 26, 1946, *reprinted in* 17 The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany 243, 245 (1948).
16. *Id.* at 256.
17. Fritszche, supra note 4, at 525-26. This decision has been criticized. For example, in

2. *International Conventions*

a. The Genocide Convention

In the wake of Nazi atrocities, the U.N. General Assembly began work on a Genocide Convention in 1946 with the passage of Resolution 96(1), establishing genocide as a crime carrying individual accountability under international law.[18] The finished product, adopted in 1948, listed the acts that constitute genocide and then enumerated a separate set of acts that warrant punishment. Article II of the Convention defines genocide as a series of acts (including, for example, killing and causing serious bodily or mental harm) committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Article III then states that a number of related acts committed in furtherance of Article II shall also be punishable. This includes "direct and public incitement to commit genocide."[19]

b. Other International Conventions

Notwithstanding the Genocide Convention, there is an inherent tension in international law between the right to be free from discrimination and the right to freedom of expression.[20] The Universal

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dissent, the Soviet Judge 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.'" Dissenting Opinion of the Soviet Member of the International Military Tribunal, Oct. 1, 1950, *reprinted in* 22 The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremburg Germany 538 (1950). The dissent continued:

> For 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.

Id.

The Soviet Judge also noted: "It 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.* at 539.

18. G.A. Res. 96(I), U.N. GAOR, 6th Comm., 55th plen. mtg. at 189, U.N. Doc. A/64/Add.1 (1946).

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

20. For a good discussion regarding this tension and an overview of the competing legal regimes, see STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-

Declaration of Human Rights,[21] for example, provides in Article 7 that "All are entitled to equal protection against any discrimination...and against any incitement to such discrimination."[22] Article 19, on the other hand, states: "Everyone has the right to freedom of opinion and expression."[23]

The International Covenant on Civil and Political Rights (ICCPR)[24] provides in Article 19(2) that "[e]veryone shall have the right to freedom of expression,"[25] while noting in Article 19(3) that the exercise of this right "carries with it special duties and responsibilities" and may therefore be subject to certain necessary restrictions: "for respect of the rights or reputations of others," and "for the protection of national security or of public order, or of public health or morals."[26] Article 20(2) goes even further, providing that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[27]

Similar to the dynamic between Articles 19(2) and (3) of the ICCPR, Article 10(1) of the European Convention on Human Rights provides for the right to freedom of expression[28] while Article 10(2) restricts such freedom, for example, "in the interests of national security" and "for the protection of the reputation or rights of others."[29] Like the ICCPR, a balancing test is employed that considers: (1) whether the restrictions are prescribed by law; (2) whether their aim is legitimate; and (3) whether they can be considered necessary in a democratic society. Overall, this requires a "pressing social need" and an intervention "proportionate to the legitimate aims pursued."[30]

More strictly focused on curbing hate speech, the International

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DISCRIMINATION (Sandra Coliver ed., 1992). *See also* Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1 (1996).

21. G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 1, U.N. Doc. A/810 (1948) [hereinafter UDHR].

22. *Id.* art. 7.

23. *Id.* art. 19.

24. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, opened for signature Dec. 16, 1966 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

25. *Id.* art. 19(2).

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

27. *Id.* art. 20(2).

28. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 10(1), 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

29. *Id.* art. 10(2).

30. *Nahimana Judgment*, ¶ 991.

Convention on the Elimination of all Forms of Racial Discrimination (CERD) requires States Parties to declare as an offense punishable by law "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof."[31] The CERD also requires the prohibition of organizations and all other organized propaganda activities that "promote and incite racial discrimination," and the recognition of participation in such organizations or activities as an offense punishable by law.[32]

B. Domestic Laws

Within individual countries, laws regulating hate speech can be placed in various categories. At one end of the spectrum are countries such as Denmark and the Netherlands, where hate speech laws are actively enforced and premised on the need to protect human dignity quite apart from any interest in safeguarding public order.[33]

At the other end of the spectrum is the United States, routinely considered the most speech-protective country. The First Amendment to the U.S. Constitution provides that the government may "make no law...abridging the freedom of speech, or of the press."[34] The United States, unlike perhaps any other nation, has relied on freedom of expression, as opposed to suppression, to expose inimical ideas, marginalize them, and thereby promote and safeguard democracy. In 1919, Justice Holmes filed a dissent in *Abrams v. United States*[35] in which he introduced the "marketplace of ideas" metaphor to encapsulate the U.S. concept of freedom of speech. In the marketplace metaphor, ideas compete against one another for acceptance—with the underlying faith that truth will prevail in such an open encounter.[36]

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31. International Convention on the Elimination of All Forms of Racial Discrimination, Art. 4(a), 660 U.N.T.S. 195, opened for signature Mar. 7, 1966 (entered into force Jan. 4, 1969).

32. *Id.* art. 4(b).

33. *See* WvS Art. 137(d) (1881) (amended 1996), *translated in* The Dutch Penal Code, 133 (Louise Rayer and Stafford Wadsworth trans., Rothman & Co. 1997); The Danish Criminal Code §266(b), *available at* The Danish Criminal Code 107 (G.E.C. Gad. 1958).

34. U.S. CONST. amend I.

35. Abrams v. United States, 250 U.S. 616 (1919).

36. Borrowing from John Milton's "Areopagitica" (1644) and John Stuart Mill's "On Liberty" (1859), Holmes wrote in his *Abrams* dissent:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the

Although highly speech-protective, the First Amendment does not protect all speech. Justice Holmes himself wrote in *Frohwerk v. United States*, "[W]e venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[37] The U.S. Supreme Court in *Brandenburg v. Ohio* formulated a test for whether such speech would qualify for constitutional protection. It held that the First Amendment will not protect speech that "is directed to inciting or producing imminent lawless action and is likely to produce such action."[38]

C. *ICTR Law*

1. *The ICTR Statute*

Responding to the massacre of hundreds of thousands of Tutsis and moderate Hutus in 1994, the Security Council, acting under Chapter VII of the U.N. Charter, created the International Criminal Tribunal for Rwanda (ICTR) by Resolution 955 of November 8, 1994. The ICTR was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. The ICTR is governed by its Statute, which is annexed to Security Council Resolution 955.[39]

The ICTR's subject matter includes the crimes of genocide (Article 2 of the Statute, which encompasses conspiracy, complicity, and direct and public incitement); crimes against humanity (Article 3 of the Statute, which includes, inter alia, murder, extermination, and persecution); and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4 of the Statute).[40]

In order to attach individual liability to these crimes, Article 6 of the Statute deals with "Individual Criminal Responsibility." Article 6(1)

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ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.... That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

250 U.S. at 630.

37. Frohwerk v. United States, 249 U.S. 204, 206 (1919).

38. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

39. *See* Statute of the International Criminal Court for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

40. *Id.* arts. 2, 3 & 4.

inculpates individuals for their own acts of planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute. Pursuant to Article 6(3) (the "superior" or "command" responsibility provision), the fact that criminal acts were committed by a subordinate does not relieve the superior of criminal responsibility if the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[41]

As a complement to "direct" individual criminal liability, "command" or "superior" responsibility assigns criminal responsibility to a leader who fails to control his or her subordinates and is thus a form of imputed culpability based on the leader's omissions.[42] Traditionally, and consistent with ICTR Statute Article 6(3), the doctrine has three elements: (1) superior-subordinate relationship; (2) knowledge; and (3) inaction.[43]

2. The Prosecutor v. Akayesu

In its first and perhaps most historic judgment to date, the ICTR found Taba commune Mayor Jean-Paul Akayesu guilty of genocide and crimes against humanity for the murder and rape of Tutsis by Hutus, including the local *Interahamwe* militia, in Taba.[44] It was the first conviction for genocide following a trial since the signing of the Genocide Convention. Among other ground-breaking decisions,[45] the Tribunal found Akayesu guilty of direct and public incitement to commit genocide.[46] To do so, the Tribunal was called upon to interpret

41. *Id.* art. 6.

42. *Id. See also* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 345, 348-50 (1996).

43. *See* Curt A. Hessler, Note, *Command Responsibility for War Crimes*, 82 YALE L.J. 1274, 1276-77 (1973). It has been suggested that the term "command responsibility," which implies application in military contexts, should be replaced by the broader term "superior responsibility," which also encompasses non-military contexts. *See* Kai Ambos, *Superior Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 823, 824 n.1, 856 (Antonio Cassese et al. eds., 2002).

44. Prosecutor v. Jean-Paul Akayesu, Judgment, ICTR Case No. 96-4-T (Sept. 2, 1998) [hereinafter *Akayesu Judgment*].

45. The *Akayesu* judgment also found, for example, that the systematic rape of Tutsi women constituted the genocidal act of "causing serious bodily or mental harm to members of the [targeted] group." *Id.* ¶¶ 731-733.

46. *Id.* ¶¶ 673-675.

Article II 3(c) of the ICTR Statute, which mirrors Article III (b) of the Genocide Convention.

In *Akayesu*, the Tribunal began by pointing out that "at the time the Convention on Genocide was adopted, the delegates agreed to expressly spell out direct and public incitement to commit genocide as a specific crime, in particular, because of its critical role in the planning of a genocide."[47] In this regard, the delegate from the USSR stated, "It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized."[48] The Soviet delegate went on to ask "how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed."[49]

The Tribunal determined that Akayesu committed this crime by leading and addressing a public gathering in Taba on April 19, 1994, during which he urged the population to unite in order to eliminate what he referred to as the sole enemy: the accomplices of the "Inkotanyi"—a derogatory reference to Tutsis. This was understood to be a call to kill the Tutsis in general.[50] Mainly on the basis of Article 91 of the Rwandan Penal Code, the Tribunal defined the crime of direct and public incitement to commit genocide as directly provoking another to commit genocide through speeches at public gatherings, or through the sale or dissemination of written or audiovisual communication, and considered the crime to have been committed whether or not such public incitement was successful.[51]

A crucial aspect of the Tribunal's factual findings involved ascertaining when the killing of Tutsis in Taba began.[52] The Tribunal sought to demonstrate a nexus or "causal relationship" between Akayesu's speech and the subsequent massacres.[53] The Tribunal opined that establishing a "possible coincidence" between Akayesu's speech and the massacres would not be sufficient. Instead, "there must be proof of a possible causal link."[54] The Tribunal concluded that there was a

47. *Id.* ¶ 551.
48. *Id.*
49. *Id.*
50. *Id* ¶ 673.
51. *Id.* ¶ 553.
52. *Id.* ¶¶ 348-357.
53. *Id.* ¶ 673(vii).
54. *Id.* ¶ 349.

causal link between Akayesu's speech and the ensuing Tutsi massacres on April 19, 1994.

Further, the Tribunal considered that the mens rea required for the crime of direct and public incitement to commit genocide 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.[55] Based on the circumstances surrounding Akayesu's conduct, the Tribunal found he had the requisite mens rea.

Additionally, the Tribunal found that the "public" element of incitement to commit genocide may be determined in light of two factors:[56] the place where the incitement occurred and whether or not "assistance" was "selective" or "limited."[57] According to the Tribunal, a line of authority commonly followed in civil law systems would regard words as being "public" where they were "spoken aloud" in a place that was public "by definition." It concluded by citing the International Law Commission for the proposition that public incitement is characterized by "a call for criminal action to a number of individuals in a public place" or to "members of the general public at large by such means as the mass media, for example, radio or television."[58]

Moreover, in determining whether Akayesu's speech constituted "direct" and public incitement, the Tribunal held "that the direct element of incitement should be viewed in the light of its cultural and linguistic content."[59] Thus, while a particular speech may be perceived as "direct" in one country, it would not, depending on the audience, be so perceived in another country.[60] Based on this, the Tribunal held that a case-by-case factual inquiry would be necessary. That inquiry would consist of determining "whether the persons for whom the message was intended immediately grasped the implication thereof."[61]

In *Akayesu*, the Tribunal relied on both expert and fact witness

55. *Id.* ¶ 560.

56. *Id.* ¶ 556.

57. The Tribunal does not define "assistance." However, in *Prosecutor v. Ruggiu*, the Tribunal replaced the word "assistance" with "incitement." Prosecutor v. Ruggiu, Judgment and Sentence, ICTR Case No. 97-32-I ¶ 17 (2000) [hereinafter *Ruggiu Judgment*]. Nevertheless, it did not elaborate on the meaning of "selective" incitement, presumably because in both *Akayesu* and *Ruggiu*, the "public" element of the crime was not an issue. *Id.*

58. *Ruggiu Judgment*, ICTR Case No. 97-32-I ¶ 17.

59. *Akayesu Judgment*, ICTR Case No. 96-4-T ¶ 557.

60. *Id.*

61. *Id.* ¶ 558.

testimony to conduct this inquiry. In particular, the Tribunal considered the testimony of Dr. Mathias Ruzindana, Professor of Linguistics at the University of Rwanda.[62] In his speech, Akayesu insisted that his listeners kill the "Inkotanyi." Dr. Ruzindana examined several Rwandan publications and broadcasts by RTLM. From this, he concluded that, at the time of the events in question, the term "Inkotanyi" was equivalent to "RPF sympathizer"[63] or "Tutsi." Moreover, the Tribunal pointed out that several prosecution witnesses corroborated Ruzindana by testifying that when Akayesu urged the audience to kill the "Inkotanyi," his listeners understood that as a call to kill Tutsis.[64] Based on this, the Tribunal ruled that the prosecution had proved that in the context of the time, place and circumstances of Akayesu's speech, "Inkotanyi" meant "Tutsi."[65]

Finally, unrelated to his acts of incitement but still relevant for purposes of this Article, the Tribunal considered whether Akayesu could be held criminally responsible for sexual crimes committed by his subordinates (Counts 13-15—crimes against humanity) under Article 6(3) of the Statute. To begin, the Tribunal considered the mens rea required for superior responsibility. It found that "it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent."[66] Nevertheless, the Tribunal went on to conclude that Article 6(3)'s application to civilians is not clear and should be decided on a case-by-case basis:

> The Chamber therefore finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6(3), to civilians remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.[67]

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62. *Id.* ¶¶ 340, 673 (iv).

63. 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.

64. *Akayesu Judgment*, ICTR Case No. 96-4-T ¶¶ 333-347.

65. *Id.* ¶¶ 361, 709.

66. *Id.* ¶ 489.

67. *Id.* ¶ 491.

Although "the evidence supported a finding that a superior/ subordinate relationship existed" between Akayesu and the *Interahamwe* who were at the bureau communal, the Tribunal focused on the Indictment's failure to describe the relationship (superior/ subordinate) in precisely those terms. Therefore, the Tribunal found it could not consider Akayesu's guilt under Article 6(3).[68]

3. The Prosecutor v. Ruggiu

Georges Ruggiu, a Belgian national and the only European indicted by the Tribunal to date, pled guilty to one count each of direct and public incitement to genocide and crimes against humanity (persecution).[69] He was sentenced to twelve years imprisonment. Although the decision did not break new legal ground regarding the crime of incitement, it did provide valuable insight into the Tribunal's perception of RTLM's activities, and the criminal responsibility of its operators, during the genocide.[70]

In its judgment sentencing Ruggiu, the Trial Chamber noted that he had played a critical role in the incitement of ethnic hatred and violence that RTLM vigorously pursued: "Through his broadcasts at the RTLM, he encouraged setting up of road blocks and congratulated perpetrators of massacres of the Tutsi at these road blocks."[71] In this regard, the Tribunal opined that the Streicher judgment was particularly relevant since Ruggiu, like Streicher, infected people's minds with ethnic hatred and persecution.[72]

The Trial Chamber further noted that his broadcasts continued to call upon the population, particularly the military and the *Interahamwe* militia, to finish off "the 1959 revolution"—an incitement to massacre the entire Tutsi population. It also pointed out that Ruggiu "waged a media war against the Belgians over the RTLM," attacking the

68. *Id.* ¶ 691. *See also* Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE J. INT'L L. 89, 134 (2000).

69. *Ruggiu Judgment*, ICTR Case No.97-32-I.

70. However, *Ruggiu* is the Tribunal's first decision regarding persecution as a crime against humanity. Under the ICTR Statute, crimes against humanity consist of certain acts committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." ICTR Statute, *supra* note 39, art. 3. The Tribunal held that hate speech targeting a population on the basis of ethnicity or other discriminatory grounds constitutes persecution under Article 3(h) of its Statute. *Ruggiu Judgment*, ICTR Case No.97-32-I ¶¶ 22-23.

71. *Ruggiu Judgment*, ICTR Case No.97-32-I ¶ 50.

72. *Id.* ¶ 19.

international policy adopted by the Belgian government towards Rwanda.[73]

The last aggravating factor noted was that Ruggiu continued to work for RTLM and to incite hatred against Tutsis, Hutu political opponents, and Belgians, even after he became aware that the broadcasts of RTLM were contributing to the massacres.[74]

III. *THE PROSECUTOR V. NAHIMANA*

A. The Facts

1. Background

Rwanda's legacy of ethnic violence is of relatively recent vintage.[75] Belgium, which administered the country pursuant to a League of Nations mandate after World War I, used the minority Tutsis (roughly ten percent of the population) to administer the colony and conferred on them many privileges—such as access to education, training and jobs—that were denied to Hutus.[76] The Hutus became resentful of this disparate treatment. By the late 1950s, they began demanding a greater share of power and an improvement in their living conditions.[77] This led to a 1959 Hutu uprising in which Tutsis were massacred throughout the country.[78] Thus, a cycle of violence was inaugurated, which continued with independence in 1962 and the election of Grégoire Kayabanda as President of the First Republic.[79] The Kayabanda years were marked by continuing Hutu violence against Tutsis, many of whom took refuge in

73. *Id.* ¶ 44(vii).

74. *Id.* ¶ 51.

75. *See* PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 54-55 (1998). Gourevitch cites the observations of several Belgian clergymen who noted that "before the European penetration," the Rwandans genuinely had "the feeling of forming one people" and felt that "their country was the center of the world." *Id.* One clergyman concluded that "[t]here are few people in Europe among whom one finds these three factors of national cohesion: one language, one faith, one law." *Id.* at 55. Gourevitch concludes that until "1959 there had never been systematic political violence recorded between Hutus and Tutsis—anywhere." *Id.* at 59.

76. *Id.* at 57. *See also* GERARD PRUNIER, THE RWANDA CRISIS: A HISTORY OF A GENOCIDE 26-35 (1995).

77. GOUREVITCH, *supra* note 75, at 58.

78. *Id.* at 59. *See also* ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY 41-44 (1994); PRUNIER, *supra* note 76, at 54-60.

79. GOUREVITCH, *supra* note 75, at 61.

neighboring countries, such as Uganda.[80] The regime eventually destabilized, allowing General Juvenal Habyarimana, Army Chief of Staff, to seize power through a coup on July 5, 1973. Habyarimana instituted a one-party system with the creation of the Mouvement révolutionnaire national pour le développement (MRND).[81]

Habyarimana largely managed to keep the lid on anti-Tutsi violence for the next seventeen years. However, by 1989, world coffee prices, which had helped buoy the Rwandan economy, had collapsed and the country was again destabilized.[82] On October 1, 1990, some 5,000 well-armed Tutsi exiles—collectively called the Rwandan Patriotic Front (RPF)—invaded Rwanda from their base in Uganda, led by current president Paul Kagame.[83] Within days, the Rwandan army went on a rampage and slaughtered Tutsis suspected of collaborating with the RPF.[84] After another two years of high ethnic tension and violence, as well as pressure from international donors, Habyarimana and the RPF signed the Arusha Peace Accords—designed to give the RPF a place in the Rwandan government and military.[85] Extremist Hutus deplored the Arusha Accords.[86]

President Habyarimana, for his part, proceeded to stall on setting up the power-sharing government.[87] Extremist Hutus, becoming more agitated, started the "Hutu Power" movement, spearheaded by the CDR Party and its leader Jean Bosco Barayagwiza.[88] The extremists began to pour significant resources into training and arming youth militia groups—the *Interahamwe* (attached to Habyarimana's MRND party) and the *Impuzamugambi* (the CDR's youth militia).[89] Also at this time, Ferdinand Nahimana and Jean Bosco Barayagwiza established the

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80. *Id.* at 73 . *See also Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 106(90); PRUNIER, *supra* note 76, at 57-58, 61-64.

81. *Military Coup in Rwanda Follows Tribal Dissension*, N.Y. TIMES, July 6, 1973, at 3. *See also* Charles Mohr, *Rwanda Coup Traced to Area Rivalry and Poverty*, N.Y. TIMES, July 7, 1973, at 4; *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 106(91-92).

82. GOUREVITCH, *supra* note 75, at 76. *See also* PRUNIER, *supra* note 76, at 84-90.

83. *Thousands Invade, Rwanda Reports*, N.Y. TIMES, Oct. 3, 1990, at A21.

84. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 110. *See also Rwanda Says Its Army Did Not Kill Civilians*, N.Y. TIMES, Oct. 12, 1990, at A10.

85. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶¶ 106(96), 106(102).

86. GOUREVITCH, *supra* note 75, at 99-100. *See also Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 106(104).

87. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 106(104).

88. GOUREVITCH, *supra* note 75, at 92. *See also Nahimana Judgment*, ICTR Case No. 99-52-T ¶¶ 106(98), 106(101).

89. GOUREVITCH, *supra* note 75, at 93. *See also Nahimana Judgment*, ICTR Case No. 99-52-T ¶¶ 113, 319.

extremist radio station, Radio Television Libre des Mille Collines (RTLM), and began broadcasting Tutsi hate screeds.[90] Extremist newspapers such as *Kangura*, run by Hassan Ngeze, incited Tutsi hatred as well through the print media.[91] Human rights groups began to warn the international community of an impending calamity.

They were prophetic. On April 6, 1994, the Hutu extremists began to implement a plan of genocide. President Habyarimana and the president of Burundi, Cyprien Ntaryamira, were killed that day when Habyarimana's plane was shot down near Kigali Airport.[92] That night the genocide began when a list of Tutsis and Hutu moderates were systematically murdered in Kigali.[93] Subsequently, throughout the country, the Rwandan Armed Forces (FAR), the Presidential Guard, and the *Interahamwe/Impuzamugambi*, at the behest of national and local politicians, set up roadblocks. Then, in every prefect, commune, and cellule they went from house to house, killing Tutsis and moderate Hutus. They were exhorted and instructed by RTLM, which led the killers to the location of victims over the airwaves. The killings were especially gruesome. Most victims were hacked to death with machetes. Congregants were slaughtered in churches and patients in hospitals. These sacred complexes became makeshift concentration camps.[94] By July, as many as 800,000 Tutsis were murdered.[95]

2. *The Defendants*

a. Hassan Ngeze

Hassan Ngeze was born in Rwanda on December 25, 1957, in Rubavu commune, Gisenyi prefecture. He began working as a journalist in 1978.[96] By 1990, he was working for the independent newspaper *Kanguka*.[97] Ngeze left *Kanguka* in May 1990.[98]

Ngeze started publishing *Kangura* (translated as "wake others up") as owner and editor-in-chief in May 1990. The last issue of *Kangura*

90. GOUREVITCH, *supra* note 75, at 99.
91. *Id.* at 87-88.
92. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 114.
93. *Id.*
94. *Id. See also* Donatella Lorch, *Heart of Rwanda's Darkness: Slaughter at a Rural Church*, N.Y. TIMES, June 3, 1994, at A1.
95. *See* Milton Leitenberg, *Anatomy of a Massacre*, N.Y. TIMES, July 31, 1994, at E15.
96. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 7.
97. *Id.* ¶ 124.
98. *Id.*

published in Rwanda was No. 59, which appeared in March 1994, one month before the start of the genocide. *Kangura* was considered the best known and most widely read Rwandan newspaper during the time of its publication. Among its most notorious pieces was the so-called "Hutu Ten Commandments," published in *Kangura* No. 6, in December 1990, within an article entitled "Appeal to the Conscience of the Hutu." The article itself referred to the 1990 RPF invasion and warned readers that the RPF and Tutsi "infiltrators" within the country were attempting to conquer Rwanda and impose a feudal monarchy on Hutus. It characterized the Tutsi as "bloodthirsty" and claimed they would use their money, women and dishonesty to gain control over the country. Hutus were urged to "cease feeling pity for the Tutsi!" and to "take all necessary measures to deter the enemy from launching a fresh attack."[99] The article then set forth the "Ten Commandments." Among other things, the Commandments directed Hutus to shun Tutsi women, avoid doing business with Tutsis or provide them with government jobs or positions in the military. It also ordered the "1959 social revolution" (during which thousands of Tutsis were massacred) be taught to Hutus "at all levels."[100]

Another infamous *Kangura* publication was the cover of No. 26, issued in November 1991. The cover asked readers: "How about re-launching the 1959 Bahutu revolution so that we can conquer the *Inyenzi-Ntusi*."[101] Adjoining text asked in capital letters: "WHAT WEAPONS SHALL WE USE TO CONQUER THE INYENZI ONCE AND FOR ALL??" Just to the left of this was a drawing of a machete.[102] In a February 1993 article in *Kangura* No. 40, entitled "A Cockroach Cannot Give Birth to a Butterfly," Tutsis were described as biologically distinct from Hutus and inherently marked by malice and wickedness.[103] In fact, throughout *Kangura*, Tutsis were denigrated as wily, devious, greedy, power-hungry, and bloodthirsty. Tutsi women were accused of conspiring with Tutsi men to use their sexuality to lure Hutu men into liaisons to promote Tutsi ethnic dominance over Hutus.[104] The newspaper often used crude, pornographic cartoons (much as Streicher did in *Der Stürmer*) to debase the Tutsis and opposition Hutus.[105]

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99. *Id.* ¶ 139.
100. *Id.*
101. "Inyenzi" is the Kinyarwanda word for "cockroach." *Id.* ¶ 160.
102. *Id.*
103. *Id.* ¶¶ 179-180.
104. *Id.* ¶ 963.
105. *Id.* ¶¶ 207-210.

Only five issues of *Kangura* were published in 1994.[106] The Tribunal described them as focused more on the military threat posed by the RPF and the potential bloody consequences of an RPF attack.[107]

One feature of the 1994 *Kangura* issues stood out, however, and demonstrated a link between *Kangura* and RTLM. A competition was launched in *Kangura* Nos. 58 and 59, published in March 1994, one month before the beginning of the genocide. The competition consisted of questions asking participants to identify which back issue of *Kangura* contained a particular text. The purpose of the competition was stated as "sensitizing the public, who loves the newspaper, to its ideas."[108] Certain competition prizes could "be seen at RTLM."[109] A portion of the competition asked readers to evaluate various RTLM broadcasters.[110] Moreover, the competition was publicized on RTLM in March 1994. Listeners were encouraged to purchase *Kangura* on an expedited basis so they could send in answers and participate in the competition.[111]

b. Ferdinand Nahimana

Ferdinand Nahimana was born in Rwanda on June 15, 1950 in Gatonde commune, Ruhengeri prefecture. Nahimana was a history professor who gradually rose in prominence at the National University of Rwanda. He started in 1977 as an assistant lecturer of history at the University. Within one year, he was elected Vice-Dean of the Faculty of Letters. He was elevated again to the position of Dean of the Faculty in 1980. From there, he was named President of the Administrative Committee in 1981 and Assistant Secretary-General in 1983. His rise was capped by his promotion to Director of the Rwandan Office of Information (ORINFOR—which controlled the national radio station, Radio Rwanda) in 1990. He held that position until 1992.[112]

The Tribunal noted in its Judgment and Sentence that a number of prosecution witnesses testified to Nahimana's discriminatory practices against Tutsis as a university student, professor, and administrator, and as Director of ORINFOR. However, the Tribunal did not rely on this evidence, characterizing it as too remote in time to the criminal

106. *Id.* ¶ 212.
107. *Id.* ¶ 230.
108. *Id.* ¶ 248.
109. *Id.* ¶ 247.
110. *Id.* ¶ 250.
111. *Id.* ¶¶ 251-252.
112. *Id.* ¶ 5.

charges.[113] Nevertheless, it did consider one allegation of related previous criminal conduct dating to Nahimana's tenure at ORINFOR. In 1992, Nahimana ordered five broadcasts on Radio Rwanda describing a "communiqué" allegedly faxed from Nairobi (suspected to be a fabrication at the time and later proved to be such) revealing a supposed plot by Tutsis to assassinate a group of Hutu leaders. As a result of these broadcasts, hundreds of Tutsis were murdered in the Bugesera region of Rwanda.[114] The prosecution introduced evidence showing that Nahimana was terminated as ORINFOR Director because of this.[115]

Within months of his dismissal, Nahimana seized on the idea of starting a private radio station that would better reflect the voice of his party, President Habyarimana's MRND.[116] Nahimana used his extensive contacts, within the party and as former ORINFOR Director, to set up a "*Comité d'initiative*" or "Steering Committee" (which consisted of six people, including Nahimana and Barayagwiza) and to arrange for financing. The Steering Committee was described by Nahimana as a provisional Board of Directors.[117] Delegated authority to act under the auspices of the Steering Committee, Nahimana was named Chair of the Technical and Programming Committee.[118] The fifty founding members (financial contributors and shareholders) of RTLM represented a cross-section of conservative and extremist Hutus within the country, including members of the MRND, CDR and leaders of the *Interahamwe* militia.[119]

Nahimana played a central role in the establishment and management of the radio station. He was one of three members of the Steering Committee authorized to sign checks on behalf of the company.[120] Nahimana procured the technical equipment from Europe to set up the

113. *Id.* ¶ 620.

114. *Id.* ¶ 691.

115. *Id.* ¶ 690.

116. *Id.* ¶¶ 490-491. Nahimana testified that, at the time, he felt that Radio Rwanda was in the hands of the MDR party and he felt that Habyarimana's MRND party views were not getting sufficient coverage on the national radio. *Id.* ¶ 490.

117. *Id.* ¶ 498. No election ever took place for a permanent Board of Directors. Thus, the "Steering Committee" continued to operate as a Board of Directors for RTLM throughout its existence. *Id.*

118. *Id.* ¶ 491.

119. *Id.* ¶ 494. The list of shareholders eventually would include President Juvenal Habyarimana (the largest shareholder with 200 shares) and Colonel Théoneste Bagosora (widely considered to be the chief architect and behind-the-scenes leader of the 1994 genocide in Rwanda). *Id.* ¶ 508.

120. *Id.* ¶ 495.

radio station.[121] He also participated in the hiring of its editor-in-chief, Gaspard Gahigi, and journalists, including the infamous Kantano Habimana.[122]

Although the company eventually appointed a provisional director, Phocas Habimana,[123] and Nahimana testified that he exercised no control over the programming, content or day-to-day running of RTLM,[124] the evidence suggested otherwise. In addition to a slew of documents tendered by the prosecution showing Nahimana's control over RTLM banking, corporate management, and public relations,[125] the Tribunal examined a 1993 document entitled "Organization and Structure of the Broader Initiative [Steering Committee]." The document listed four committees operating under the Steering Committee, including one responsible for technical matters and programs, headed by Nahimana. Among Nahimana's supervisory functions listed in this capacity was to "review and possibly improve RTLM program policy," "design the grid for pilot programming from 1 August to 31 December 1993," and "design a proposed grid for radio and TV programming to be submitted to the official organs of the general assembly."[126] Additionally, Nahimana admitted in his testimony that, on at least one occasion in February or March 1994, he participated (as a member of the Steering Committee) in reprimanding RTLM journalists for a broadcast in which *Inkotanyi* (i.e., RPF or RPF spies) were identified as being in a specified vehicle heading in a certain direction at a certain place and time.[127] Finally, a parade of witnesses testified to dealing with and perceiving Nahimana in the period before the genocide as the "main brain" behind RTLM or its "leader."[128] In Swiss journalist Philippe Dahinden's videotaped interview of Gaspard Gahigi, the RTLM editor-in-chief referred to Nahimana as the "top man."[129] Former Kigali Prosecutor Francois-Xavier Nsanzuwera testified that, when Kantano Habimana was called in for questioning in connection with a March 1994 broadcast, he told Nsanzuwera that he

121. *Id.* ¶ 492.
122. *Id.* ¶ 495.
123. *Id.* ¶ 498.
124. *Id.* ¶ 500.
125. *Id.* ¶¶ 506-508.
126. *Id.* ¶ 507.
127. *Id.* ¶ 501.
128. *Id.* ¶¶ 509-530.
129. *Id.* ¶ 511.

had simply read a telegram given to him by his supervisor, Ferdinand Nahimana.[130]

Significant evidence was offered regarding RTLM's radio transmissions during the period between its initial broadcast in July 1993[131] and the beginning of the genocide on April 6, 1994. In general, the Tribunal analyzed four aspects of pre-genocide programming: (1) general efforts to create animosity toward Tutsis;[132] (2) broadcasts that equated the terms *Inyenzi* and *Inkotanyi* with Tutsis in general;[133] (3) acknowledgements of RTLM's reputation as anti-Tutsi and inciting hatred toward Tutsis;[134] and (4) specific examples of verbal attacks on Tutsis.[135] The latter included broadcasting names and locations of individuals who were subsequently targeted with violence. For instance, the Tribunal considered an April 3, 1994, broadcast in which Kantano Habimana denounced a doctor in Cyangugu. Three days later, the doctor was burnt alive in front of his house.[136]

Among the evidence presented at trial were accounts of the Ministry of Information taking the RTLM Steering Committee to task for its programming before April 6, 1994. This evidence included an October 25, 1993, letter sent to the Steering Committee that warned RTLM its programs were "encouraging violence."[137] There was also evidence of two meetings between the Steering Committee and the Minister of Information. These meetings took place on November 26, 1993, and February 10, 1994, respectively.[138] During the meetings, the Minister of Information warned RTLM that it was fomenting ethnic hatred and violence. A segment of the February 10, 1994, meeting was captured on videotape. In the videotape, RTLM was warned again that it was stirring up ethnic hatred and violence and it had to stop or severe measures

130. *Id.* ¶¶ 516-517.

131. *Id.* ¶ 342.

132. *Id.* ¶¶ 345-355, 363-368 (wherein the Tutsis were criticized for having too much wealth), 368 (engaging in ethnic stereotyping in reference to physical characteristics). It should be noted that certain paragraphs in this section of the Tribunal's opinion also provide three examples of RTLM permitting speakers counter to its point of view to make statements during its broadcasts: see, *id.* ¶ 348 (Vincent Ravi Rwabukwisi, editor of *Kanguka*); *id.* ¶ 350 (Landouald Ndasingwa, Vice Chair of the Liberal Party); *id.* ¶ 351 (RPF leader Tito Rutaremara.)

133. *Id.* ¶¶ 358-362.

134. *Id.* ¶¶ 353 ("So, those who think that our radio station sets people at odds with others will be amazed."), 356 (acknowledging people think RTLM "creates tension," and "heats up heads").

135. *Id.* ¶¶ 371-389.

136. *Id.* ¶¶ 384-385.

137. *Id.* ¶¶ 571-572.

138. *Id.* ¶¶ 573-607.

would be taken against it. Ferdinand Nahimana was pictured in the videotape receiving this warning (along with Felicien Kabuga and Jean-Bosco Barayagwiza).[139]

The Tribunal also considered the nature of RTLM transmissions after the genocide started on April 6, 1994. It concluded that the same themes predominated but with greater intensity.[140] In addition, it identified new categories of broadcasts: (1) those calling for a blanket extermination of all Tutsis;[141] (2) those reporting that extermination had taken place and praising it;[142] (3) those attacking UNAMIR;[143] (4) those downplaying the extermination or urging the population to hide traces of it to improve Rwanda's image among the international community;[144] and (5) those giving instructions to militia manning the roadblocks.[145] The Tribunal focused on one broadcast in particular which left no doubt that Tutsis were being targeted for extermination because of their ethnicity. In the June 4, 1994 broadcast, Kantano Habimana said:

> One hundred thousand young men must be recruited rapidly. They should all stand up so that we kill the Inkotanyi and exterminate them, all the easier that [Tr.]...the reason we will exterminate them is that they belong to one ethnic group. Look at the person's height and his physical appearance. Just look at his small nose and then break it.[146]

Although Nahimana admitted to limited involvement with RTLM in the period before the genocide, he claimed to have had no involvement in RTLM once the genocide began. He testified that after April 6 through the end of July 1994, the Steering Committee no longer existed

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139. *Id.* ¶¶ 587-590.

140. For example, there is reference to broadcasts where *Inkotanyi* are equated with Tutsi, *id.* ¶ 395, where the Tutsi ethnicity is negatively stereotyped, *id.* ¶ 408, and where individuals are singled out for slaughter, *id.* ¶ 431.

141. *See, e.g.*, *id.* ¶ 402 (recounting Kantano Habimana's broadcast of April 13, 1994: "This never happened anywhere in the world, that a few individuals [Tutsis], a clique of individuals (*agatsiko k'abantu*) who want power...who want power...who are lying that they are defending the interest of a few people...who, thirsty for power...should be exterminated.").

142. *Id.* ¶ 403. In an RTLM broadcast of July 2, 1994, Kantano Habimana exulted in the extermination of the *Inkotanyi*: "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.'" *Id.*

143. *Id.* ¶ 432.

144. *Id.* ¶¶ 419-424.

145. *Id.* ¶ 433 (describing a May broadcast in which Kantano Habimana directly encourages those guarding the trenches against the *Inyenzi* to take drugs because it appears to make them "quite courageous.")

146. *Id.* ¶ 396.

and there was a "total dysfunctioning."[147] He asserted that RTLM was taken over by the army, "kidnapped" by people who did not have the same objectives as its founding members, and, he admitted, transformed into a "tool for killing."[148] There was evidence presented that, at the outbreak of the genocide, Nahimana had taken refuge at the French embassy and had been evacuated by French troops to Bujumbura, Burundi.[149]

There was also evidence, however, that contradicted Nahimana's testimony. For example, on April 25, 1994, Nahimana was interviewed in Cyangugu, Rwanda on Radio Rwanda. He referred to himself as "one of the founders of RTLM" and described an exchange he had with the former Burundian Ambassador to Kigali. Nahimana reported telling him, "I am very happy because I have understood that RTLM is instrumental in awakening the majority people." Nahimana also stated that "today's wars are not fought using bullets only, it is also a war [sic] of media, words, newspapers and radio stations." Referring to RTLM and Radio Rwanda, he concluded, "We were satisfied with both radio stations because they informed us on how the population from all corners of the country had stood up and worked together with our armed forces, the armed forces of our country with a view to halting the enemy."[150]

Prosecution witness Philippe Dahinden testified that he saw Nahimana twice in Geneva, on June 9 and 15, 1994. In testimony before the UN Human Rights Commission, Dahinden had earlier stated that Nahimana, as "the spiritual leader and kingpin of RTLM" and "the main ideologue behind Hutu extremism," should be prosecuted for war crimes.[151] Dahinden had asked for a June 9 meeting with the President of the Interim Government, Theodore Sindikubwabo, but was told that was not possible. Instead, he would be received by Nahimana, who was working as "Political Adviser" to the President.[152] Dahinden asked

147. *Id.* ¶ 538. Nahimana acknowledged, however, that on April 8, 1994, he went to RTLM and saw some of its personnel (including journalists). By his account, he simply stopped by for fifteen to twenty minutes to see how everyone was faring. He gave no instructions while he was there and did not return to RTLM after this visit. *Id.*

148. *Id.*

149. *Id.* ¶ 541.

150. *Id.* ¶ 539.

151. *Id.* ¶ 541.

152. *Id.* ¶ 565. Nahimana admitted using the title "Adviser to the President" during the genocide but claimed it was "less than real." However, as noted by the Tribunal, Nahimana accompanied the President to various foreign destinations including Geneva. He also traveled with the President to Tunis for a meeting of the Organization for African Unity (OAU). *Id.*

Nahimana whether he knew about the statement Dahinden had made, mentioning him, to the UN Human Rights Commission. Nahimana said he knew about it.[153] He did not express disapproval to Dahinden of the RTLM broadcasts.[154] For the June 15 meeting, Dahinden had again asked to speak with the President. This time, Nahimana and Barayagwiza met him. At some point during this meeting, Dahinden asked whether RTLM was still operating. Nahimana and Barayagwiza told him that RTLM was about to be transferred from Kigali to Gisenyi. Dahinden mentioned that he was hoping to set up a radio station in the region. Barayagwiza responded, in a jovial manner, that Dahinden's radio station would compete with RTLM.[155]

Additional key evidence also tied Nahimana to RTLM during the genocide. According to the report of prosecution expert witness Alison Des Forges, in early May 1994, Nahimana was seen entering the Ministry of Defense in the company of RTLM Provisional Director Phocas Habimana.[156] More damningly, her report also stated that in late June a French diplomat, Ambassador Yannick Gerard, told Nahimana that the broadcasts were deplorable and must stop, particularly those threatening General Dallaire and UNAMIR. Nahimana promised to intervene with the journalists and Gerard reported subsequently that RTLM attacks on General Dallaire and UNAMIR halted promptly thereafter.[157]

153. He denied, however, that he was the head of RTLM. *Id.* ¶ 542.

154. *Id.* ¶ 564.

155. *Id.*

156. *Id.* ¶ 543. Hearsay is admissible under Rule 89 of the ICTR Rules of Procedure and Evidence (Amended July 6, 2002). Pursuant to Rule 89(C): "A Chamber may admit any relevant evidence which it deems to have probative value." ICTR Rules of Procedure and Evidence, Rule 89, U.N. Doc. ITR/3/REV.1 (1995) (amended July 6, 2002), *available at* http://www.ictr.org/ENGLISH/rules/index.htm.

157. In his testimony, Nahimana denied going to the Ministry of Defense with Phocas Habimana. He also denied that French officials spoke to him about RTLM. He acknowledged meeting with them, but said they only talked about Operation Turquoise. The source cited for the information about Nahimana's conversation with Gerard was a February 28, 2000, interview with Jean-Christophe Belliard of the French Foreign Ministry, based on a French diplomatic telegram from which he was reading. Des Forges testified that Belliard was with Gerard when he met with Nahimana. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 543. In hearings of the French National Assembly on Rwanda, extracts of which were introduced into evidence, Operation Turquoise was discussed and Belliard's meeting with Nahimana was mentioned. In the report of the hearings, Nahimana was referred to three times as the "Director" of RTLM. *Id.* ¶ 544.

c. Jean-Bosco Barayagwiza

Jean-Bosco Barayagwiza was born in 1950 in Mutura commune, Gisenyi prefecture, Rwanda. A lawyer by training, he was a founding member of the extremist Hutu CDR party, which was established in 1992. Like Nahimana, he was a member of the *Comité d'initiative*, which organized the founding of RTLM. During this time, he also held the post of Director of Political Affairs in Rwanda's Ministry of Foreign Affairs.[158]

As RTLM was being established, Barayagwiza, considered a "well known jurist in Rwanda," was chosen to chair RTLM's Legal Committee, which was tasked to draw up articles of association.[159] Barayagwiza was given such a prominent role, in part, because he was "known by the government and had many contacts, which could be helpful in bringing in shareholders for the company."[160] In May 1993, Barayagwiza was one of three individuals (in addition to Nahimana and Kabuga) delegated authority to act on behalf of RTLM (including check-signing authority).[161] As a member of the *Comité d'initiative*, Barayagwiza participated in RTLM management largely to the same extent as Nahimana. For example, both Nahimana and Barayagwiza represented RTLM in meetings called by the Ministry of Information to warn RTLM about its programming.[162] And both men conducted RTLM's banking and dealings with shareholders.[163] In an August 1993 interview, RTLM editor-in-chief Gaspard Gahigi referred to Nahimana as "the top man" and to Barayagwiza as "number two."[164]

In the period before the genocide, Barayagwiza also participated in RTLM broadcasts. In an RTLM broadcast on December 12, 1993, for example, Barayagwiza shared with RTLM listeners his own experience as a Hutu:

> A Hutu child...let me take my own example, for I was born a Hutu. [My parents] are Hutus. They brought me up as a Hutu, I grew up in Hutu culture. I was born before the 1959 revolution; my father did forced labor.... My mother used to weed in the fields of the Tutsis who were in power. My grandfather paid

158. *Id.* ¶ 6.
159. *Id.* ¶¶ 491, 494.
160. *Id.* ¶ 494.
161. *Id.* ¶¶ 495, 506.
162. *Id.* ¶ 501.
163. *Id.* ¶ 506.
164. *Id.* ¶ 511.

> tribute money. I saw all those things, and when I asked them why they go to cultivate for other people, weed for other people when our gardens were not well maintained, they would tell me: "That is how things are; we must work for the Tutsis." The Tutsi had to be brought up knowing that he was the chief, that the Hutu child was under his authority.... No Hutu would share his meal with a Tutsi; that was forbidden. It was inculcated in the Tutsis never to eat with the Hutus and we were told to fear the Tutsis.[165]

During the genocide, Barayagwiza retained a high degree of power in Rwanda. He worked as an advisor to Rwandan President Sindikubwabo and traveled to France, the United States and elsewhere to defend the Rwandan government.[166] Barayagwiza also continued his relationship with RTLM and remained current regarding its operations. As proof of this, the Tribunal referred to Barayagwiza's presence at the June 15, 1994, meeting between Nahimana and Swiss journalist Philippe Dahinden. As noted *supra*, during the meeting, Dahinden asked whether RTLM was still operating. Barayagwiza, along with Nahimana, told him that RTLM was about to be transferred from Kigali to Gisenyi. Barayagwiza mentioned lightheartedly that if Dahinden set up a radio station in the region, which Dahinden was hoping to do, that it would compete with RTLM.[167]

d. Interaction among the Three Defendants

Based on the testimony of several witnesses, the Tribunal perceived Barayagwiza as a "lynchpin" between Nahimana and Ngeze.[168] Apparently, Nahimana and Ngeze did not have a very good relationship.[169] However, Nahimana and Barayagwiza worked very closely together in the management of RTLM. At the same time, Barayagwiza and Ngeze worked very closely together in the CDR. According to one witness, Barayagwiza and Ngeze discussed the CDR, *Kangura*, and RTLM all in the context of the Hutu struggle against the Tutsi. Based on this, the Tribunal perceived an institutional link among Barayagwiza (CDR and RTLM), Ngeze (CDR and *Kangura*) and Nahimana (RTLM).[170]

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165. *Id.* ¶ 345.
166. *Id.* ¶ 540.
167. *Id.* ¶ 542.
168. *Id.* ¶ 1050.
169. *Id.* ¶ 882.
170. *Id.* ¶¶ 888-889.

B. The Charges

Hassan Ngeze (based primarily on his *Kangura* activities) and Ferdinand Nahimana (based primarily on his RTLM activities) were charged, pursuant to Articles 2 and 3 of the Tribunal's Statute, with seven counts: conspiracy to commit genocide; genocide; direct and public incitement to commit genocide; complicity in genocide and crimes against humanity (persecution, extermination, and murder).[171] Ngeze was charged with individual responsibility for these crimes under Article 6(1) of the Statute. He was additionally charged with superior responsibility under Article 6(3) with respect to all but one of the crimes—conspiracy to commit genocide.[172] Similarly, Nahimana was charged under Article 6(1) of the Statute for his crimes. However, he was charged with superior responsibility under Article 6(3) only with respect to direct and public incitement to commit genocide and crimes against humanity (persecution), not for genocide.[173]

Barayagwiza was charged with the same crimes. In addition, he was charged with two counts of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 4 of the Statute. He was charged with individual responsibility under Article 6(1) of the Statute with respect to all of these counts except the Article 4 charges. Additionally, he was charged with superior responsibility under Article 6(3) of the Statute with respect to all counts, except that of conspiracy to commit genocide.[174]

Pursuant to motions for acquittal filed by each defendant, the Tribunal, in a decision dated September 25, 2002, acquitted Nahimana and Barayagwiza of crimes against humanity (murder). It further acquitted Barayagwiza of the two Article 4 counts. The prosecution had conceded that there was no evidence presented of these crimes.[175]

The trial in this case had opened on October 23, 2000, and ended, after 230 trial days, on August 22, 2003.[176]

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171. *Id.* ¶ 8.
172. *Id.* ¶ 10.
173. *Id.* ¶ 8.
174. *Id.* ¶ 9.
175. *Id.* ¶ 74.
176. *Id.* ¶ 94.

C. *The Decision*

The Tribunal began its analysis of the legal issues by quoting a UN General Assembly Resolution, adopted in 1946, which declared that freedom of information, a fundamental human right, "requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to see the facts without prejudice and to spread knowledge without malicious intent."[177] The Tribunal went on to consider significant issues raised by certain key charges in the case.[178]

1. Genocide

Count Two of the Indictments charged each defendant, respectively, with genocide pursuant to Article 2(3)(a) of the Statute. This translates to killing members of an ethnic or racial group (in this case, Tutsis) with the intent to destroy, in whole or in part, the ethnic or racial group as such. As concerned their respective roles in the media, none of the defendants ever engaged in direct acts (such as killing or inflicting serious bodily harm) that could, on their face and in and of themselves, constitute *actus reus* predicates to the crime of genocide.

The Tribunal could look to some precedent in considering whether these media defendants committed the crime of genocide. The Streicher case, for example, dealt with a defendant's use of the media to incite the public during a time of mass exterminations. In addition, the *Akayesu* case involved a speaker addressing a large, public audience and inciting it to acts of genocide. Those precedents, however, were of somewhat limited value. In the case of Streicher, decided before the Genocide Convention, the defendant was found guilty of crimes against humanity (persecution).[179] *Akayesu*, for its part, was distinguishable because the speaker was in the direct presence of his audience and urged that

177. *Id.* ¶ 944.

178. This Article limits itself to analysis of issues related to hate speech crimes. Of those, it further limits itself to discussion of issues significantly contributing toward the development of international criminal law. Thus, although the Tribunal examined the culpability of Barayagwiza and Ngeze in reference to ethnic violence not directly related to RTLM and *Kangura*, this Article will not touch on that. Moreover, this Article will not analyze in any depth the defendants' respective convictions for crimes against humanity (persecution and extermination). No significant new ground was broken with respect to these charges. *But see* Kevin W. Goering, et al., *Why U.S. Law Should Have Been Considered in the Rwandan Media Convictions*, 22 COMM. LAW. 10, 12 (2004): "However, the charges for persecution would be considered attacking mere advocacy, and would not have been sustained in the United States."

179. *See* Streicher, *supra* note 4.

particular audience to kill a specifically identified group (i.e., the Tutsis of Taba).[180]

In *Nahimana*, on the other hand, the Tribunal was confronted with a series of newspaper articles (in the case of *Kangura*) and radio broadcasts (in the case of RTLM) issued for the most part by persons other than the defendants themselves, which lodged generalized attacks against the Tutsi ethnicity.[181] No specific causal connection could be established between these articles and broadcasts and the widespread massacres that occurred after April 6, 1994. The defense seized on this and argued that it was the downing of President Habyarimana's airplane that precipitated the killing of innocent Tutsi civilians, not the media messages. The Tribunal thought this analysis did not go far enough:

> The Chamber accepts that this moment in time [the downing of the airplane] served as a trigger for the events that followed. That is evident. But if the downing of the plane was a trigger, then RTLM, *Kangura*, and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. The Chamber therefore considers the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, *Kangura* and CDR, before and after April 6, 1994.[182]

The Tribunal concluded:

> The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself. In the Chamber's view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication.[183]

A pivotal issue had been resolved.[184] Assuming the message could be

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180. *See Akayesu Judgment*, ICTR Case No. 96-4-T, *supra* note 44.

181. This is in contrast to the specific calls for killing issued on RTLM. The Tribunal recognized these separately and had no trouble in linking them to the crime of genocide: "In 1994, both before and after 6 April, RTLM broadcast the names of Tutsi individuals and their families.... In some cases these persons were subsequently killed. A specific causal connection between the RTLM broadcasts and the killing of these individuals...has been established." *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 949.

182. *Id.* ¶ 953.

183. *Id.* ¶ 952.

184. As Professor Catharine MacKinnon has recently noted: "The *Media Case* is notable for holding a newspaper editor and a broadcast executive criminally accountable not only for the

deemed genocidal and genocide did occur, the fact that the message, widely diffused through newspapers and radio, could not be directly tied to specific acts of killing would not absolve the message's master of the crime of genocide. Thus, the Tribunal found, the substantive crime of genocide could be committed through the airwaves and print[185] without targeting specific individuals. The question of whether this mass media message was in fact criminal, however, remained to be resolved.

2. *Direct and Public Incitement to Commit Genocide*

a. Content

The Tribunal next had to examine the content of the messages at issue to decide whether the defendants had engaged in the permissible exercise of free speech or in non-protected criminal hate advocacy. It began by reviewing existing jurisprudence in this area. The Tribunal framed its analysis in terms of reconciling the inherent tension between freedom of speech and freedom from discrimination. First, it had to decide between the more speech-protective American model, as urged by John Floyd III, counsel for Ngeze, or the discrimination-sensitive international model. It opted for the latter: "The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards."[186]

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crime of what they said, but for the crimes their words did: the genocidal acts that resulted from what they said, or were responsible for saying, to others." MacKinnon, *supra* note 4, at 328-29. She concluded: "But the greatest conceptual breakthrough of the case is its ruling that media committed genocide through instigating it, with media leaders held accountable accordingly." *Id.* at 329.

185. The Tribunal's conclusion that newspaper articles, as opposed to radio broadcasts, could have a causal link to genocide has been questioned. *See, e.g.*, *Recent Cases, The Media Case*, 117 HARV. L. REV. 2769, 2774-75 (2004). The Tribunal's conclusion, however, is at least partially bolstered by the Streicher decision, which involved the print media exclusively. *See also* Joshua Wallenstein, *Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide*, 54 STAN. L. REV. 351, 391 (2001) ("Written materials can be utilized in a similarly insidious fashion to promote and incite genocide. Periodicals can trigger the same mass effects that radio propaganda can activate."). For a more detailed discussion, see *supra* Section IV.A.

186. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 1010. The Tribunal went on to note, however, that U.S. law also accepts the fundamental principles set forth in international law and has recognized that incitement to violence, threats, libel, false advertising, obscenity, and child pornography are among those forms of expression that fall outside the scope of freedom of speech

The Tribunal first considered cases decided under the International Covenant on Civil and Political Rights (ICCPR). It began by focusing on the clash between ICCPR Article 19 (protecting freedom of expression) and Article 20 (forbidding incitement to national, racial or religious discrimination). Two cases from Canada refused to sanction anti-Semitic speech under ICCPR Article 19. In *Ross v. Canada*, the Human Rights Committee upheld disciplinary action taken against a school teacher in Canada for statements he made that were found to have "denigrated the faith and beliefs of Jews...."[187] Similarly, in *J.R.T. and the W.G. Party v. Canada*, the complaint alleged Article 19 violations stemming from a refusal to permit the use of phone services to circulate messages warning of the dangers of "international Jewry" leading the world into wars, unemployment, and inflation and the collapse of world values and principles. The Human Rights Committee declared the complaint inadmissible as it sought to disseminate "advocacy of racial or religious hatred."[188]

In *Robert Faurisson v. France*, the Human Rights Committee considered the meaning of the term "incitement" in Article 20(2) of the ICCPR. In that case, the complainant challenged his conviction in France for publishing his view doubting the existence of gas chambers at Nazi concentration camps. The Committee found the complainant incited "his readers to anti-semitic [sic] behaviour" and the French decision did not violate Article 19's freedom of expression provision.[189] A concurring opinion supported the finding of anti-Semitic purpose by citing the complainant's references to terms such as "particularly Jewish historians" or the "magic gas chamber." The concurring opinion also focused on the context of the complainant's messages—a challenge to well-documented historical facts with the implication that "under the

protection. *Id.* ¶ 1010. It also pointed out that in the recent case of *Virginia v. Black*, 538 U.S. 343 (2003), the U.S. Supreme Court recently interpreted the free speech guarantee of the First Amendment to permit a ban on cross burning with intent to intimidate. Moreover, in the immigration context, adherents of National Socialism have been stripped of citizenship and deported from the United States on the basis of their anti-Semitic writings. *See, e.g.*, United States v. Sokolov, 814 F.2d 864 (2d Cir. 1987).

187. International Covenant on Civil and Political Rights, Communication No. 736/1997: Canada (Jurisprudence) ¶ 11.5, U.N Docs. CCPR/C/70/D/736/1997 (2000) (*Ross v. Canada*).

188. International Covenant on Civil and Political Rights, Communication No. 104/1981: Canada (Jurisprudence) ¶ 8(b), U.N Docs. CCPR/C/18/D/104/1981 (*J.R.T. & the W.G. Party v. Canada*) (declared inadmissible Apr. 6, 1983).

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

guise of impartial academic research...the victims of Nazism were guilty of dishonest fabrication."[190]

The Tribunal also examined cases decided under the European Convention on Human Rights, which 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). On one hand, cases such as *Jersild v. Denmark* overturned the conviction of a journalist who interviewed members of a racist youth group. Although the journalist did not explicitly condemn the interviewees, the Court pointed to portions of the interview in which the journalist identified the interviewees as "racist" and "extremist youths" and thus "clearly disassociated him[self] from the persons interviewed."[191] On the other hand, in *Zana v. Turkey*, the Court upheld the conviction of a former mayor whose region was under emergency rule owing to violent clashes raging between government security and Kurdish separatist forces. In a major national newspaper, the mayor stated that he supported the Kurdish forces and seemingly condoned Kurdish massacres by saying "anyone can make mistakes." Given the violence raging about him, the Court concluded that the mayor's statements "had to be regarded as likely to exacerbate an already explosive situation in that region."[192]

From these cases, the Tribunal gleaned four criteria through which speech content regarding race or ethnicity could be analyzed as either legitimate expression or criminal advocacy: (1) purpose; (2) text; (3) context; and (4) the relationship between speaker and subject. The first two criteria, purpose and text, are lumped together by the Tribunal, but they should be considered separately.[193]

First, under the test set out by the Tribunal, the finder of fact must consider the object of the speech. The Tribunal provided some examples of legitimate objectives: historical research, the dissemination of news and information, and the public accountability of government

190. *Id.* ¶ 6 (Evatt, J., Kretzmer, J., & Klein, J. concurring).

191. Jersild v. Denmark, 19 Eur. Ct. H.R. 1, 27 (1995).

192. Zana v. Turkey, 27 Eur. Ct. H.R. 667, 670 (1999). It should be noted as well, however, that the mayor stated he was not in favor of massacres. *Id.* at 669.

193. In fact, the judgment's subheadings suggest that the only criteria are purpose and context. *See Nahimana Judgment*, ICTR Case No. 99-52-T ¶¶ 1000-1006. However, as mentioned above, the Tribunal lumped together purpose and text. Moreover, the Tribunal did not explicitly characterize as a separate criterion the relationship between the speaker and the subject. As explained *infra*, this should be considered as a distinct point of analysis.

authorities.[194] At the opposite end of the spectrum, explicit calls for violence would evince a clearly illegitimate purpose.

Second, the analysis should focus on the text itself, which will help reveal the purpose of the speech. The Tribunal noted, for example, that in the *Faurisson* case,[195] the UN Human Rights Committee saw the term "magic gas chamber" as suggesting that the author was motivated by anti-Semitism rather than pursuit of historical truth.[196] In contrast, the interviewer in the *Jersild* case[197] distanced himself from a message of ethnic hatred by referring to his interviewees as "racist" and "extremist youths." According to the Tribunal, this textual analysis allowed the *Jersild* Court to conclude that the purpose of the program was the dissemination of news, rather than the propagation of racist views.

Third, the examination should center on context. In other words, circumstances external to and surrounding the text must be considered in order to grasp the text's significance.[198] Once again, the Tribunal looked to the *Faurisson* case,[199] where the Human Rights Committee noted that, in context, the impact of challenging the existence of gas chambers—a well-documented historical fact—would promote anti-Semitism. Similarly, in the *Zana* case,[200] the European Court of Human Rights considered the general statement made about massacres by the former mayor in the context of the massacres taking place at that time, which in the Court's view made the statement "likely to exacerbate an already explosive situation...." The Tribunal also indicated that, in the case of oral communication, the tone of the speaker in uttering the words would help put the speech into its proper context.[201]

Finally, the finder of fact should consider the relationship between the speaker and the subject. The analysis should be more speech-protective when the speaker is part of a minority criticizing the government or the country's majority:[202]

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194. *Id.* ¶ 1001.

195. International Covenant on Civil and Political Rights, Communication No. 550/1993: France (Jurisprudence), U.N. Doc. CCPR/C/58/D/550/1993 (1996) (*Robert Faurisson v. France*).

196. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 1001.

197. *Jersild*, 19 Eur. Ct. H.R. at 27.

198. This would appear to be complimentary to the "cultural" and "linguistic" contextual analysis of direct and public incitement recommended by the Tribunal in the *Akayesu* case. *See Akayesu Judgment*, ICTR Case No. 96-4-T ¶ 557.

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

200. *Zana*, 27 Eur. Ct. H.R. at 670.

201. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 1022.

202. *Id.* ¶ 1006.

> 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.[203]

Based on this analysis, the Tribunal was able to distinguish between permissible speech and illegal incitement in the cases of *Kangura* and RTLM. The Tribunal noted, for example, that some of the articles and broadcasts offered into evidence by the prosecution conveyed historical information, political analysis, or advocacy of ethnic consciousness regarding the inequitable distribution of privilege in Rwanda. Of note, in this regard, was Barayagwiza's December 12, 1993, broadcast in which he spoke of the discrimination he experienced as a Hutu child.[204] 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, 2004, but a period of social instability and political debate. Finally, the speaker spoke about 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."[205]

In contrast to the raising of ethnic consciousness, the Tribunal condemned "harmful ethnic stereotyping" such as the RTLM broadcast which stated the Tutsis "are the ones who have all the money." Here, the text itself does not withstand scrutiny. The Tribunal compared it to a broadcast that stated people of the Tutsi ethnicity owned seventy

203. *Id.* ¶ 1008.
204. *Id.* ¶ 345.
205. *Id.* ¶ 1019.

percent of the taxis in Rwanda.[206] This was informational in nature as opposed to saying that Tutsis "have all the money," which the Tribunal described as "a generalization that has been extended to the Tutsi population as a whole."[207] This textual analysis allowed the Tribunal to attribute an improper purpose to the speech. This was underscored, according to the Tribunal, by the context of the speech. In the first place, the "tone of the broadcast...conveys the hostility and the resentment of the journalist, Kantano Habimana."[208] Moreover, "a statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence."[209] Finally, although the Tribunal did not explicitly point it out, the statement was made by a member of the majority who supported the government then in place, and who criticized members of the minority. Overall, then, using the Tribunal's analytic criteria, this would not be considered protected speech.[210]

At the far end of this spectrum is *Kangura*'s December 1990 publication of the "Ten Commandments"[211] and Kantano Habimana's June 4, 1994, broadcast calling on listeners to exterminate the *Inkotanyi*, who would be known by height and physical appearance. Habimana concluded: "Just look at his small nose and then break it."[212] The purpose and text of this broadcast clearly amounted to impermissible incitement to ethnic violence. The speaker was part of the majority ethnic group, supporting government policies, and attacking the minority. Moreover, the external context was one of an ongoing genocide.[213] Finally, in terms of context, the speaker in no way

206. *Id.* ¶ 1021.

207. *Id.*

208. *Id.*

209. *Id.* ¶ 1022.

210. Even if this did not qualify as "incitement," the Tribunal pointed out that less virulent forms of hate speech can constitute persecution, a crime against humanity. *Id.* ¶ 1072. The Tribunal found that hate speech is as serious as the other acts enumerated as crimes against humanity under Article 3(h). *Id.* The Tribunal suggested that the *Kangura* article "A Cockroach Cannot Give Birth to a Butterfly," while not rising to the level of incitement, would constitute persecution and a crime against humanity. *See id.* ¶ 1037. *See also Recent Cases, The Media Case*, *supra* note 185, at 2773 n.37 (describing the article as "discriminatory but not exhortatory.").

211. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶¶ 138-139.

212. *Id.* ¶ 396. The Tribunal also described this broadcast as fitting into the "incitement" category. *Id.* ¶ 1032.

213. Of course, *Kangura*'s publication of *The Ten Commandments* was not within the context of the genocide. In this sense, the illegal nature of the article is somewhat diminished.

attempted to distance himself from the message. To the Tribunal, this was significant:

> In cases where the media disseminates views that constitute ethnic hatred and calls to violence for informative or educational purposes, a clear distancing from these is necessary to avoid conveying an endorsement of the message and in fact to convey a counter-message to ensure that no harm results from the broadcast. The positioning of the media with regard to the message indicates the real intent of the message, and to some degree the real message itself. The editor of *Kangura* and the journalists who broadcast on RTLM did not distance themselves from the message of ethnic hatred. Rather they purveyed the message.[214]

b. Causation

In *Akayesu*, the Tribunal concluded that the crime of direct and public incitement to commit genocide could be committed whether or not such public incitement was successful.[215] As noted above, however, a crucial aspect of the Tribunal's factual findings involved demonstrating a "causal relationship" between Akayesu's speech and the subsequent massacres. The Tribunal concluded that there was such a causal link.[216]

Thus, *Akayesu* left the door open to the argument that direct and public incitement to commit genocide required a showing of violence occasioned by the incitement.

The *Nahimana* judgment closed that door: "The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is

214. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 1024. The defense attempted to argue that the defendants had distanced themselves from these pernicious messages by offering a forum for the opposition to air its views. For example, Ngeze pointed to his publication of the *19 Commandments of the Tutsi* as offering a riposte to the Hutu *Ten Commandments*. Similarly, defense counsel touted RTLM's broadcast of an interview with an RPF leader as showing even-handedness. However, the Tribunal countered that "the examples do not in fact establish the even-handedness suggested, largely due to the tone and manner in which they were presented." *Id.* ¶ 1023. For example, the *19 Commandments*, although supposedly told from the Tutsi point of view, paint the Tutsis in a negative light. Moreover, the Tribunal found that the manner in which RTLM presented the RPF leader "with derogatory references to the tall, milk-drinking Tutsi, hardly suggests even-handedness. The journalist exudes scorn and contempt for the Tutsi while boasting that 'even' the *Inkotanyi* can speak on RTLM." *Id.* ¶ 1023.

215. *Akayesu Judgment*, ICTR Case No. 96-4-T ¶ 553.

216. *Id.* ¶ 674.

the potential of the communication to cause genocide that makes it incitement."[217]

c. Temporal Jurisdiction

As noted, above, the Tribunal's temporal jurisdiction is limited to the period January 1, 1994, through December 31, 1994. However, most issues of *Kangura*, as well as a large portion of RTLM broadcasts, were published and transmitted prior to January 1, 1994. The Tribunal nevertheless asserted jurisdiction over these actions under the doctrine of "inchoate offenses." According to the Tribunal, the crime of direct and public incitement to commit genocide, as well as conspiracy, "is an inchoate offense that continues in time until the completion of the acts contemplated."[218] In other words, the crime is parasitic to the substantive offense it contemplates. Until the underlying substantive offense, i.e., genocide, is completed, the crime is continuing. As a result, the Tribunal found that:

> The publication of *Kangura*, from its first issue in May 1990 through its March 1994 issue, the alleged impact of which culminated in events that took place in 1994, falls within the temporal jurisdiction of the Tribunal to the extent the publication is deemed to constitute direct and public incitement to genocide. Similarly, the Chamber considers that the entirety of RTLM broadcasting, from July 1993 through July 1994, the alleged impact of which culminated in events that took place in 1994, falls within the temporal jurisdiction of the Tribunal to the extent that the broadcasts are deemed to constitute direct and public incitement to genocide.[219]

3. *Superior Responsibility*

In *Akayesu*, the Tribunal had demonstrated a certain discomfort with extending the doctrine of superior responsibility to civilians. First, it "declined to state a general rule" that the superior responsibility doctrine even "applies to civilians."[220] Despite noting that "the evidence supported a finding that a superior/subordinate relationship existed"

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217. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 1015.
218. *Id.* ¶ 1017.
219. *Id.*
220. Vetter, *supra* note 68, at 135.

between Akayesu and the local militia, moreover, the Tribunal ultimately refused to make such a factual finding.[221]

The *Nahimana* decision evidenced a sea change on this issue, with the Tribunal signaling its new attitude in one terse sentence: "The Chamber notes that in *Musema*, the Tribunal found that superior responsibility extended to non-military settings, in that case to the owner of a tea factory."[222] *The Prosecutor v. Musema*[223] involved a Gisovu commune tea factory director who was charged with bringing armed individuals, including tea factory employees, into the Bisesero region of the Kibuye prefecture and ordering an attack on Tutsis who had sought refuge there. [224] Musema was convicted of one count of genocide and two counts of crimes against humanity.[225] With respect to the crimes committed by the tea factory employees, Musema's guilt was predicated on Article 6(3) superior responsibility. In arriving at this result, the Tribunal reaffirmed the principle of case-by-case analysis established in *Akayesu*:

> [T]he Chamber reiterates its reasoning in the *Akayesu* Judgment, with which Trial Chamber II concurred in the *Kayishema* and *Ruzindana* Judgment,[226] that it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration. Therefore the superior's actual or formal power of control over his subordinates remains a determining factor in charging civilians with superior responsibility.[227]

In determining whether Musema could be held criminally liable under the doctrine of superior responsibility, the Tribunal bifurcated its

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221. *Akayesu Judgment*, ICTR Case No. 96-4-T ¶ 691.

222. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 976.

223. Prosecutor v. Alfred Musema, Judgment and Sentence, ICTR Case No. 96-13-A (2000). [hereinafter *Musema Judgment*].

224. *Id.* ¶¶ 9, 371.

225. *Id.* ¶¶ 936, 951 & 967.

226. Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgment, ICTR Case No. 95-1-T (1999) [hereinafter *Kayishema Judgment*]. Kayishema was charged with Article 6(3) responsibility for murders in the Kibuye prefecture. As préfet (somewhat akin to a governor) of that region, Kayishema was found to have de jure authority over many of the assailants, who were police and prison employees. *Id.* ¶ 489. Moreover, as a well-known and respected figure in the community, who was present at the killings, Kayishema exercised de facto control over the assailants. *Id.* ¶ 501.

227. *Id.* ¶ 135.

analysis between the concepts of "*de jure* power and *de facto* control."[228] With respect to *de jure* power over the employees, the Tribunal found Musema satisfied the test given his nominal position as director of the tea factory.[229] Regarding *de facto* control, the Tribunal focused on certain key factual findings. First, it noted the testimony of one witness that, although Musema had to answer to superiors in the Rwandan government, he was responsible for the day-to-day administration of the tea factory, including the hiring and firing of employees.[230] The Tribunal also found that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or punish the use of tea factory vehicles, uniforms or other tea factory property in the commission of the charged crimes.[231]

Finally, in determining whether Musema could be held liable under the doctrine of superior responsibility, the Tribunal homed in on the fact that Musema was personally present at the attack sites[232] and knew, or had reason to know, that his subordinates were about to commit the charged crimes or had already done so. Moreover, Musema aided and abetted such crimes through his presence and participation.[233] Based on all this, the Tribunal found Article 6(3) liability.[234]

In light of existing ICTR precedent, the odds might have seemed long that the Tribunal would pin Article 6(3) superior responsibility on RTLM founders Ferdinand Nahimana and Jean-Bosco Barayagwiza for the acts of RTLM journalists. That is especially true when each of the superior responsibility criteria is considered—i.e., superior-subordinate relationship, knowledge, and inactivity. The evidence against Nahimana and Barayagwiza supporting these criteria was arguably weaker than that proffered in *Akayesu* and *Musema*.

With respect to the superior-subordinate relationship, the evidence in support of the defendants' *de jure* power over the RTLM journalists was not clear-cut. On one hand, there was no question that, prior to the genocide, Nahimana and Barayagwiza wielded a reasonable degree of control over RTLM operations. As Steering Committee directors, they

228. *Id.* ¶ 881.
229. *Id.* ¶ 880.
230. *Id.* ¶ 876.
231. *Id.* ¶ 880.
232. This would also appear to be a salient fact in terms of analyzing whether Musema exercised de facto control over the Tea Factory employees who participated in the massacres. This is consistent with the *Kayishema* analysis of de facto control. *See Kayishema Judgment*, ICTR Case No. 95-1-T. *See also* discussion *supra* note 226.
233. *Id.* ¶ 924.
234. *Id.* ¶ 925.

had authority over banking, corporate management, public relations, hiring and firing of employees, and broadcast content. For example, check-writing power vested exclusively in the defendants (and Felicien Kabuga). The evidence also indicated that they hired provisional director Phocas Habimana and journalists Gaspard Gahigi and Kantano Habimana. Moreover, prosecution witness Francois-Xavier Nsanzuera, the former Kigali prosecutor, testified that when he called in Kantano Habimana for questioning regarding a broadcast, Habimana told him that Nahimana had him read what was broadcast. And Nahimana himself admitted that on one occasion he reprimanded a journalist for reasons relating to broadcast content. Finally, both Nahimana and Barayagwiza attended meetings with the Minister of Information wherein the defendants were warned about the incendiary nature of RTLM broadcasts.[235]

On the other hand, the evidence regarding *de jure* power after the genocide began was certainly less compelling. There is no doubt that both defendants worked for the provisional genocide government and had some knowledge regarding RTLM's operations. The strongest piece of evidence in this regard was the conversation the defendants had with Swiss Journalist Philippe Dahinden on June 15, 1994. Aside from Barayagwiza's comment to Dahinden that a new radio station would compete with that of the defendants, however, there appeared to be no evidence the defendants still held themselves out as *de jure* directors of RTLM.

Evidence demonstrating *de facto* control was similar. Pre-genocide, such control was ample. During the genocide, however, *de facto* control was quite scant, with one exception: when a French diplomat informed Nahimana in late June that broadcasts threatening UNAMIR were deplorable and needed to stop, Nahimana promised to intervene with the journalists. The diplomat reported subsequently that RTLM attacks on UNAMIR halted promptly thereafter. There was no anecdotal evidence in this regard concerning Barayagwiza.

The knowledge element is also subject to different analyses pre- and post-genocide. Certainly, the defendants were well acquainted with RTLM operations and broadcasts before the genocide. After April 6, however, there was little evidence showing knowledge, aside from the Dahinden conversation. *Musema* and *Kayishema* suggest that physical

235. *Nahimana Judgment,* ICTR Case No. 99-52-T ¶¶ 573-607. The evidence is not as clear whether Barayagwiza had as much authority as Nahimana over hiring and firing as well as broadcast content.

presence at the crimes is a good indicator of knowledge. In *Akayesu*, that was not enough. In *Nahimana*, physical presence was completely lacking—it appears undisputed that Nahimana and Barayagwiza were not on the premises when RTLM made its murderous broadcasts during the genocide. If anything, evidence was presented that the defendants were frequently outside the country when these events took place.

Although this appears to satisfy the "inactivity" criterion, the defendants' lack of physical proximity and pursuit of other activities while the crimes at issue were being committed seem to render this criterion moot. On the other hand, there was evidence that Nahimana was able to control RTLM activities by communicating with the radio station by telephone.[236]

4. *Conspiracy*

Article 2(3)(b) of the Statute provides that the Tribunal shall have the power to prosecute persons charged with the crime of conspiracy to commit genocide.[237] In *Musema*, the Tribunal held that the crime of conspiracy to commit genocide is defined as "an agreement between two or more persons to commit the crime of genocide."[238] It emerges from this that the key element is the agreement itself and not its consequences.[239] As expressed in the *Nahimana* judgment, "[t]he essence of the charge of conspiracy is the agreement of those charged."[240]

The *Nahimana* judgment then pointed out that the existence of a "formal or express" agreement was not needed to prove the charge of conspiracy. Rather, an agreement could be inferred from concerted or coordinated action, and a tacit understanding of the criminal purpose

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236. Curiously, Nahimana was charged with Article 6(3) liability, and found guilty thereof, only with respect to the crime of direct and public incitement to commit genocide, not genocide itself. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 973. Barayagwiza was found guilty of superior responsibility for the crimes of both genocide and direct and public incitement to commit genocide. *Id.*

237. This portion of the ICTR statute comes from the Genocide Convention. The official records ("*travaux préparatoires*") of the negotiations of the U.N. Genocide Convention suggest that the rationale for including such an offense was to ensure, in view of the serious nature of the crime of genocide, that the mere agreement to commit genocide should be punishable even if no preparatory act has taken place. *See* U.N. GAOR, 6th Comm., 3rd Sess. (1948).

238. *Musema Judgment*, ICTR Case No. 96-13-A ¶ 191.

239. *Id.* ¶ 193. In fact, the Tribunal held that an accused cannot be convicted of both conspiracy and the substantive crime which is its object. *Id.* ¶ 198. It also held, however, that the requisite intent for the crime of conspiracy to commit genocide is the same intent required for the crime of genocide itself. *Id.* ¶ 192.

240. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 1045.

was sufficient.[241] As an example of this, the Tribunal cited its decision in *The Prosecutor v. Niyitegeka*.[242] In that case, ICTR's first post-trial conviction for conspiracy to commit genocide, the Tribunal found that the Minister of Information for Rwanda's 1994 Interim Government had procured arms for an attack, led other attacks, and incited others to commit attacks against Tutsis in the Kibuye region. As part of this, Niyitegeka participated in a series of meetings in the region. Kibuye préfet Clément Kayishema and prominent Kibuye businessman Obed Ruzindana also participated. At each meeting, plans were made to attack Tutsis and the attacks were subsequently carried out.[243] Based on this, the Tribunal could infer the existence of an agreement to commit genocide between, inter alia, Niyitegeka, Kayishema, and Ruzindana.[244]

In *Nahimana*, however, there was no evidence of meetings attended by Barayagwiza, Ngeze, and Nahimana in which genocidal acts were planned. In fact, the record indicates that Nahimana and Ngeze disliked each other[245] and were rarely in one another's presence.[246] The defense argued that this loose association could not be described as a "conspiracy" but would more appropriately be termed "conscious parallelism."[247]

The Tribunal disagreed. Notwithstanding the limited personal contact among the defendants,[248] it found that, through RTLM, *Kangura*, and CDR, they engaged in a sufficient degree of "institutional coordination" to form a conspiracy to commit genocide. For example, *Kangura* was a shareholder of RTLM and the two sponsored a joint contest designed to increase *Kangura*'s readership. One of the prizes offered was for CDR

241. *Id.*

242. Prosecutor v. Eliézer Niyitegeka, Judgment and Sentence, ICTR Case No. 96-14-T (2003).

243. *Id.* ¶¶ 216-232.

244. *Id.* ¶ 428.

245. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 882.

246. *Id.* ¶ 1050. The evidence showed only two occasions on which the two men were together. At one point, they were together in Barayagwiza's office at the Ministry of Foreign Affairs. *Id.* The only other time they were in each other's presence was at a large 1993 MRND rally at Nyamirambo Stadium. *Id.* It appears the two men were never alone. Moreover, the two above-described occasions were the only times all three defendants were in one another's presence.

247. *Id.* ¶ 1048.

248. However, the Tribunal did allude to the Barayagwiza office meeting, the Nyamirambo Stadium rally, and a *Kangura* cover, on which all three men appear, to suggest a sufficient degree of "personal collaboration" to form a conspiracy with Barayagwiza as "the lynchpin among the three Accused." *Id.* ¶¶ 1055, 1050.

members only.[249] *Kangura* promoted the CDR[250] and important CDR members, in addition to Barayagwiza, were involved with RTLM. For example, Stanislas Simbizi, a member of the CDR Executive Committee, became a member of the RTLM Steering Committee.[251] As a result, the Tribunal found the existence of an "institutional conspiracy" to commit genocide:

> This evidence establishes, beyond a reasonable doubt, that Nahimana, Barayagwiza and Ngeze consciously interacted with each other, using the institutions they controlled to promote a joint agenda, which was the targeting of the Tutsi population for destruction. There was public presentation of this shared purpose and coordination of efforts to realize their common goal.[252]

IV. THE LEGAL LANDSCAPE AFTER *THE PROSECUTOR V. NAHIMANA*

While the *Nahimana* judgment will most likely be remembered for its historic development of hate speech jurisprudence, it has certainly left its mark on other emerging areas of international law dealing with the scope of criminal liability—i.e., superior responsibility, conspiracy, and temporal jurisdiction. Notwithstanding the breadth of its analysis, however, the *Nahimana* judgment left certain hate speech issues unexplored. This Part assesses the significance, as well as the strengths and potential shortcomings, of the *Nahimana* judgment, and attempts to gauge its possible influence on the growth of future international criminal jurisprudence.

A. The Relationship between Speech, Genocide, and the Mass Media

Perhaps of greatest significance, *The Prosecutor v. Nahimana* helped define the relationship between speech, genocide, and mass media. It did this by analyzing the role of a radio station, a newspaper, and their respective operators in relation to the crimes of genocide and direct and public incitement to commit genocide.[253] The Tribunal's rulings

249. *Id.* ¶ 1051.
250. *Id.* ¶ 1052.
251. *Id.* ¶ 1053.
252. *Id.* ¶ 1054.
253. Of course, it did this as well with respect to crimes against humanity (persecution and murder).

represent an historical expansion of international criminal liability with respect to hate speech.

To begin, the Tribunal found that ethnic hate speech, not necessarily targeting specific individuals but transmitted through the mass media during a time of genocide, can give rise to the crime of genocide. Moreover, even if genocide does not occur, mass diffusion of certain derogatory speech can constitute the crime of direct and public incitement to commit genocide. Rejecting the American model and opting instead to refine and expand on existing international hate speech jurisprudence, the *Nahimana* judgment provided invaluable guidance for future courts to examine the content of such speech. It laid out a four-criteria test (purpose, text, context, and relationship between the speaker and subject) and gave examples of how to apply it.

To take but one example, the continued activities of hate radio stations in the Democratic Republic of Congo could likely be the subject of future international criminal prosecution.[254] The Rome Statute of the International Criminal Court (ICC), consistent with the ICTR Statute, criminalizes direct and public incitement to commit genocide.[255] The *Nahimana* judgment should be crucial to ICC jurists in prosecuting, defending and judging such cases.[256] It will also play an important role in the ICTR trial of Simon Bikindi, a popular Rwandan music composer and singer who is accused of composing and performing songs which mobilized and incited the *Interahamwe* and civilians to murder Tutsis. He has been charged with, inter alia, direct and public incitement to commit genocide.[257]

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254. For instance, the French media watchdog organization Reporters Sans Frontières (RSF) recently issued a warning regarding the National Congolese Radio and Television program called "Forum des Médias." According to RSF, the program, presented by journalist Noël Kalonda, contains incitement to ethnic hatred, violence, and murder of ethnic Rwandans or people who are "considered to be Rwandan by virtue of their physical characteristics." *See* May 19, 2004 Press Release of Reporters Sans Frontières, *available at* http://www.monuc.org/news.aspx?newsID=2627.

255. *See* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, *reprinted in* 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute], arts. 6 & 25.

256. *See* Marlise Simons, *Trial Centers on Role of Press During Rwanda Massacre*, N.Y. TIMES, Mar. 3, 2002, at A3 ("Legal specialists believe that the outcome of the current [media] trial may set a crucial precedent for future international cases, in particular for the permanent International Criminal Court....").

257. *See* Prosecutor v. Bikindi, Indictment, ICTR Case No. 01-72-I (June 27, 2001). The indictment was subsequently amended to include a charge of crimes against humanity (persecution).

On the other hand, there were certain fuzzy areas in the *Nahimana* record regarding hate speech that the Tribunal could have elucidated but chose to ignore. Most of these deal with speech content.[258] Although the Tribunal established a four-criteria test to evaluate the criminality of hate speech, it failed to apply that test in certain key instances.

As the Tribunal noted, "Several hundred tapes of RTLM broadcasts have been introduced into evidence...."[259] The Tribunal, however, relied on only "the most incriminating and the most exculpatory evidence."[260] As a result, it overlooked an important body of more "gray" evidence. That sort of evidence is referred to in the *Ruggiu* judgment.[261] It consists of the following types of speech: (1) use of code words (e.g., suggesting that "to fight" means to "kill" Tutsis);[262] (2) praising the killers for past acts of violence (e.g., congratulating the "valiant combatants" who engaged in a "battle" against Tutsi civilians);[263] and (3) generally ascribing positive virtues to violence (e.g., stating that the population is having a "good time" killing).[264] These are not direct calls to murder but

258. It has been pointed out as well that the Tribunal could have found that the hate speech at issue was responsible for genocidal sexual violence that should have been imputed to the defendants. *See* Recent Cases, The Media Case, *supra* note 185, at 2775-76:

> Much of the evidence demonstrated the media's vilification of Tutsi women's sexuality as a means through which the Tutsis would undermine the Hutu's majority power. Given the Tribunal's earlier holding that rape can constitute genocide and its findings in the Media Case with regard to causation for other genocidal acts, the causation element should be the same with respect to the genocidal sexual violence that occurred on a mass scale.

See also Llezlie Green, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 COLUM. HUM. RTS. L. REV. 733 (2002).

259. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 344.

260. *Id.*

261. *Ruggiu Judgment*, ICTR Case No. 97-32-I.

262. *Id.* ¶ 44(iv). In *Akayesu*, the prosecution relied on linguistics expert Mathias Ruzindana to define words such as "Inkotanyi." *Akayesu Judgment*, ICTR Case No. 96-4-T ¶¶ 340, 673. In *Nahimana*, Ruzindana was qualified as an expert witness, but his expert conclusions, if any, are not referred to in the Tribunal's judgment. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 53. Ruzindana should have been used to provide a lexicon of hate-speech code words. This would have gone a long way toward fleshing out an important aspect of genocide propaganda. According to Professor William Schabas: "[t]he history of genocide shows that those who incite the crime speak in euphemisms." William A. Schabas, *Mugesera v. Minister of Citizenship and Immigration*, 93 AM. J. INT'L L. 529, 530 (1999). As an example of this, in the Kambanda case, the Prime Minister of the interim genocide government was found to have committed the crime of direct and public incitement to commit genocide by uttering the following metaphor: "[Y]ou refuse to give your blood to your country and the dogs drink it for nothing." Prosecutor v. Kambanda, Judgment and Sentence, ICTR Case No. 97-23-S (1998) ¶ 39(x).

263. *Ruggiu Judgment*, ICTR Case No. 97-32-I ¶ 44(v).

264. *Id.*

are indispensable in mentally conditioning a population for genocide and in helping the perpetrators cover their tracks.

Similarly, the *Nahimana* judgment suggested that the Rwandan government had sought to avail itself of a propaganda technique known as "accusation in a mirror":

> [Expert witness Alison] Des Forges testified that a document was found in the Butare prefectural office, written by a propagandist who based his work on a French book, *Psychologie de la publicité et de la propagande*. Drawing also on Lenin and Goebbels, he advocated the use of lies, exaggeration, ridicule and innuendo against the adversary and suggests that the public might be persuaded that the adversary stands for war, death, slavery, repression, injustice and sadistic cruelty. He stressed the importance of linking propaganda to events and suggested simply "creating" events, if necessary. He proposed the use of what he called "Accusation in a mirror," meaning that one would impute to the adversary one's own intentions and plans. "In this way," he wrote, "the party which is using terror will accuse the enemy of using terror." Such a tactic could be used to persuade honest people that attack by the enemy justifies taking whatever measures are necessary for legitimate defense.[265]

Although the judgment does make reference to one pre-genocide broadcast where RTLM warned of nefarious Tutsi intentions,[266] the Tribunal did not consider it in its analysis of the types of speech of which RTLM availed itself. Out of the hundreds of RTLM tapes introduced into evidence, one might expect to find genocide-period passages where Tutsis were falsely accused of committing or planning to commit against Hutus the types of atrocities extremist Hutus were actually committing against Tutsis.[267] Although it is indirect, such evidence is equally inflammatory and should have been highlighted in the judgment as additional proof of direct and public incitement to commit genocide. Incitement can take many forms and this might have

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265. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 111.

266. *Id.* ¶ 388. As Professor Catharine MacKinnon has noted: "This infamous 'accusation in a mirror'—the propaganda technique in which one side falsely attributes attacks to the other in order to justify retaliation in kind, casting aggression as self-defense—was especially causally potent." MacKinnon, *supra* note 4, at 330.

267. Ruggiu has been quoted availing himself of this technique on RTLM during the genocide: "The fifty thousand bodies that can be found in Lake Victoria, which threaten Lake Victoria with pollution—they come from massacres which only the RPF could have committed." *See* GOUREVITCH, *supra* note 75, at 161.

been a golden opportunity for international law to recognize them explicitly.

Finally, the Tribunal overlooked one other important aspect of incitement in its judgment. The *Ruggiu* case made clear that Belgians were also targeted for murder.[268] No mention is made of this in discussing RTLM-related criminal liability. Although this would not appear to qualify as a genocide crime (as Belgians were not targeted for genocide), it would constitute a crime against humanity (persecution) pursuant to Article 3 of the ICTR Statute.[269] As Ruggiu's superiors, Nahimana and Barayagwiza were equally liable for these broadcasts targeting Belgians.

While the *Nahimana* judgment may be criticized for a failure to address certain elements of the case, its trail-blazing in the area of incitement has already subjected it to the scorn of some free-speech advocates.[270] They fear the decision could provide cover to repressive governments around the world that routinely stifle legitimate criticism and dissent through pretextual restrictions on hate speech and incitement.[271] Ngeze's American attorney, John Floyd, 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."[272] On the other hand, according to Joel Simon, Deputy Director of the Committee to Protect Journalists:

> Floyd's concerns were largely dismissed by free-speech advocates in this country [the United States]—after all, the kind of speech the defendants engaged in would not be protected under any international standard. Even under the U.S. First Amendment, by far the most protective legal framework in the

268. *See, e.g.*, *Ruggiu Judgment*, ICTR Case No. 97-32-I ¶ 44(vi). For example, Ruggiu exhorted the population to take "measures" against Belgians for the assassination of President Habyarimana. *Id.* He also railed that Belgians were responsible for the oppression of Hutus by Tutsis. *Id.*

269. In reference to these broadcasts, the *Ruggiu* judgment referred to "mass persecutions" of the Belgian contingent on "political or ethnic grounds." *Id.* ¶ 45. It is possible, of course, that such crimes could have risen to the level of genocide. Based on the record presented, however, genocidal intent against the Belgians is not readily apparent.

270. *See* Joel Simon, *Murder by Media: Why the Rwandan Genocide Tribunal Went Too Far*, (Dec. 11, 2003), *at* http://slate.msn.com/id/2092372/.

271. *Id.*

272. Dina Temple- Raston, *Radio Hate*, Legal Affairs, September/October 2002, at 32, *available at* http://www.legalaffairs.org/issues/September-October-2002/feature_raston_sepoct2002.html.

> world, speech is not protected if it is intended to provoke imminent lawless violence and is likely to do so.[273]

In the case of Ngeze, First Amendment attorney Floyd Abrams has nevertheless suggested that "the Tribunal could have used a less restrictive standard to achieve the same result." Abrams questioned, "[i]f Ngeze was convicted for actual participation in the genocide, was it even necessary to consider articles he wrote years before the genocide occurred?"[274] Abrams believes the issue is not whether U.S. standards should be imposed on the world, but "whether international tribunals can be persuaded to adopt measures that minimize the potential impact on freedom of expression."[275]

In the *Nahimana* judgment, the Tribunal has adopted such measures. Its four-criteria test for analyzing speech content aims to exempt legitimate dissent and criticism, as well as other forms of protected speech, from criminal prosecution. Illustrative of this is Barayagwiza's personal account of ethnic discrimination broadcast on RTLM.[276] Although potentially capable of stoking ethnic hatred, application of the Tribunal's criteria resulted in classifying this as a form of legitimate expression.[277] With respect to Ngeze in particular, it was important for the Tribunal to consider articles written before the genocide occurred. Consistent with the IMT decision in the Streicher case, Ngeze's articles worked as a poison "injected into the minds" of thousands of Rwandans which caused them to follow the extremist Hutu policy of Tutsi persecution and extermination.[278] In Streicher, the IMT found a link between the articles in *Der Stürmer* and Nazi extermination despite the absence of a close temporal nexus. It concluded that the articles helped condition Germans to hate Jews and to commit ethnic and religious violence against them.[279] In light of this, it was reasonable for the Tribunal to conclude that Ngeze's *Kangura* articles had the same effect on Rwanda's Hutu populace; as one commentator has noted: "Written

273. *See* Simon, *supra* note 270. *See also* C. EDWIN BAKER, GENOCIDE, PRESS FREEDOM, AND THE CASE OF HASSAN NGEZE, U. PENN. LAW SCHOOL, PUBLIC LAW WORKING PAPER NO. 46 (June 17, 2004), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=480762.

274. *See* Simon, *supra* note 270; *see also Recent Cases, The Media Case, supra* note 185 (questioning the Tribunal's conclusion that newspaper articles, as opposed to radio broadcasts, could have a causal link to genocide).

275. *See* Simon, *supra* note 270.

276. *See supra* notes 165, 205 and accompanying text.

277. *Id.*

278. *See supra* note 8. Although it should be pointed out that the Streicher decision involved the charge of crimes against humanity, not genocide.

279. *Id.*

materials can be utilized in a similarly insidious fashion to promote and incite genocide. Periodicals can trigger the same mass effects that radio propaganda can activate."[280]

B. The Breadth of Criminal Liability

In addition to exploring and stretching the contours of mass media incitement crimes, the Tribunal also cast a wide net over the situations and individuals to which and to whom liability for such crimes could attach. The *Nahimana* judgment extended that liability vertically, horizontally, and temporally.

1. Superior Responsibility

Through the doctrine of superior responsibility, the Tribunal extended hate speech criminal liability in a vertical manner. The *Nahimana* judgment represents an important stage in ICTR's evolution of superior responsibility jurisprudence. In *Akayesu*, the Tribunal showed some hesitation in applying the superior responsibility doctrine to civilians. Announcing a case-by-case approach to determinations of superior responsibility, it refused to find the Taba mayor liable for the crimes of the local militia in spite of a superior/subordinate relationship and Akayesu's knowledge of the crimes and presence at their commission.[281] In *Musema*, the Tribunal got off the fence and unequivocally acknowledged that superior responsibility applies to civilians. It went on to find that the tea factory director bore superior responsibility for the crimes of his employees since he exercised over them *de jure* power and *de facto* control. In so finding, the Tribunal noted, inter alia, Musema's day-to-day administration of the tea factory, his presence at the crime scene, and his aiding and abetting the subordinate criminals.[282]

In light of the foregoing, *Nahimana* represents a giant leap forward in ICTR's development of the civilian superior responsibility doctrine. In *Nahimana*, as opposed to *Musema*, the defendants clearly were not involved in the day-to-day operations of RTLM during the genocide. Nor were they physically present during the commission of the crimes

280. Joshua Wallenstein, *Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide*, 54 STAN. L. REV. 351, 391 (2001). Of course, this begs the question of whether publication of Ngeze's articles fit within the Tribunal's temporal jurisdiction. For a more detailed discussion of this issue, see *infra* Section IV.B.3.

281. *Akayesu Judgment*, ICTR Case No. 96-4-T ¶ 691.

282. *Musema Judgment*, ICTR Case No. 96-13-A ¶¶ 876, 880, 881, 924 & 925.

at issue. To the contrary, the record revealed that both defendants were often out of the country during that time and not in regular touch with RTLM employees.

Instead, the Tribunal's judgment seems to turn more on a "Deistic"[283] approach to superior responsibility: i.e., the defendants established RTLM, financed it, staffed it, controlled its initial programming and tone, continued their stewardship of it even after intense censure regarding its message of hate, and then left it to run its horrific course during the genocide. The evidence at trial, however slim, showed that the defendants knew what RTLM was doing and could have tried to intervene to stop the dissemination of its murderous message but chose not to. Moreover, the record demonstrated the defendants' apparent satisfaction with RTLM's activities during the genocide.

In essence, the Tribunal found that the defendants, knowingly and with foresight of the consequences, had created a genocidal monster and willingly set it loose on the Rwandan population. And they knew what the monster was doing after it was unleashed on the public. That the defendants did not accompany the monster on its killing spree did not exonerate them from superior responsibility.

This view of civil superior responsibility augurs well for the ICC, whose Statute contains separate provisions for military and civilian command responsibility.[284] Although structurally similar, these provisions differ in wording with respect to the superior-subordinate element and the knowledge element.[285]

In particular, for liability to attach to a civilian, the underlying crimes must concern "activities that were within the effective responsibility and control of the superior." This qualification is not present in the military command responsibility provision.[286] More significantly, however, a military commander is criminally responsible for crimes of which he or she "should have known," whereas a civilian superior is criminally

283. "Deism" is an Enlightenment-era theory that posits God's creation of the universe and subsequent absence from its operation. Instead of intervening, God lets life run its own course. Deism's original adherents included Locke, Rousseau, and Voltaire. "Currently, most Deists seem to believe that God created the universe, 'wound it up' and then disassociated himself from his creation. Some refer to Deists as believing in a God who acts as an absentee landlord or a blind watchmaker." David Loren Buehner, "A Non-Religious Naturalistic Perspective on God" (2d. ed. 2001), *available at* http://www.geocities.com/gamemuse/naturalisticgod.PDF. *See also* Oxford Dictionary of World Religions (Oxford University Press 1997) at 267 ("Thus Deism proposed a God who initiated creation and donated its laws, but then allowed it to pursue its own course.").

284. *See* Rome Statute, *supra* note 255, art. 28.

285. *See* Vetter, *supra* note 68, at 110.

286. *Compare* Rome Statute, *supra* note 255, art. 28(a), *with* art. 28 (b)(ii).

responsible only if he or she "consciously disregarded information which clearly indicated" that the subordinates were committing or about to commit a crime.[287]

In light of this more rigorous standard, the Tribunal's flexible approach to superior responsibility may help level the playing field between civilians and military personnel when it comes to attaching superior responsibility to breaches of international criminal law.

2. *Conspiracy*

The ICTR Statute represents a blend of both the common law and civil law traditions,[288] and the tension between the two systems is felt perhaps most keenly when examined through the prism of conspiracy. The Tribunal has noted, for example, that at the time of the Genocide Convention "conspiracy was a foreign concept to French law." [289] Even today, conspiracy in the civil law tradition is narrowly circumscribed and, in contrast to the Anglo-Saxon system, mere agreement and overt acts are not sufficient—the object of the conspiracy must be achieved.[290] Given this incompatibility between the two systems, civil law practitioners might have expected an ICTR approach to conspiracy forged in a spirit of compromise and conservatism. The *Nahimana* judgment dashed such expectations.

As the doctrine of superior responsibility effected a generous vertical expansion of hate speech liability, the Tribunal managed an equally generous horizontal extension through an insightful and bold approach to conspiracy law. In particular, the Tribunal's formulation of an "institutional conspiracy" theory permitted it to find an "agreement" between three individuals who, on an individual level, did not appear to be working as a trio. Similarly, on a higher level, no evidence was marshaled showing the defendants' coordination as part of a larger government cabal to commit genocide. Nevertheless, on closer inspection of the evidence, each individual's institution (RTLM, CDR, and *Kangura*) was genocidally linked with the other through various

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287. *See* Rome Statute, *supra* note 255, art. 28(a)(i), (b)(i). *See also* ROY S. LEE, THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS (Kluwer Law International 1999).

288. *See* Jodi Thorp, *Welcome Ex-Dictators, Torturers and Tyrants: Comparative Approach to Handling Ex-Dictators and Past Human Rights Abuses*, 37 GONZ. L. REV. 167, 181 (2002) (noting that both ICTR and ICTY "operate under a hybrid approach combining common law and civil legal systems...").

289. *Musema Judgment*, ICTR Case No. 96-13-A ¶ 187.

290. *Id.* ¶ 196.

media activities, including promotions, contests, and advertising. Thus, although two of the three defendants (Nahimana and Ngeze) actually experienced personal animosity toward one another and an apparent aversion to working together, their institutions worked sufficiently in concert to demonstrate a criminal agreement to commit genocide through use of the media.

Such an astute approach to conspiracy law is vital for the success of future war crimes tribunals. According to one commentator:

> Without conspiracy theory, prosecutors miss an entire category of potential defendants.... Conspiracy is a theory that can bring leaders to justice for organizing and inspiring criminal activity. In addition, the crime of conspiracy recognizes the special dangers of joint action, allowing the sweep of prosecution to focus on group criminality, which is often more potent and effective than individual wrongdoing.... It is particularly important that tribunals such as the ICTY and the ICC experiment with new approaches in order to expand the effectiveness of international criminal law. These tribunals are poised to advance and refine the law more quickly than treaty drafters and negotiators, on whom the task of refining the conspiracy theory would otherwise rest were it not for flexibility by judges and prosecutors.[291]

The *Nahimana* judgment has answered this call and, through the concept of "institutional conspiracy," has advanced and refined the reach of international law with respect to group criminality.

3. *Temporal Jurisdiction*

As noted above, nearly all of Ngeze's acts of incitement, through *Kangura*, occurred prior to the start of the Tribunal's temporal jurisdiction on January 1, 1994. *Kangura* published only five issues in 1994 and none past the month of March. It published nothing during the genocide. In concluding that Ngeze, in his capacity as *Kangura* editor-in-chief, committed the crime of direct and public incitement to commit genocide, the Tribunal focused primarily on pre-1994 issues of *Kangura*.[292] So how does the Tribunal shoehorn these pre-1994 acts

291. Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 84 (2003).

292. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 1023 (focusing on *The Appeal to the Conscience of the Hutu* and *The Ten Commandments*, published in *Kangura* No. 6 in December

within its temporal jurisdiction? It does so through its treatment of "inchoate" offenses.[293]

In pre-trial proceedings, Nahimana and Ngeze challenged their indictments on the grounds that they included allegations of crimes that fell outside the Tribunal's temporal jurisdiction.[294] The Trial Chamber ruled that, while such events "provide a relevant background" and may constitute "subsidiary or interrelated allegations" with possible "evidentiary value," the accused "could not be held accountable for crimes committed prior to 1994" and "such events would not be referred to 'except for historical purposes or information.'"[295] Accordingly, the allegations would remain in the indictments.[296]

On interlocutory appeal, the Appeals Chamber confirmed the Trial Chamber's decision.[297] The appellate decision was supplemented by a Joint Separate Opinion of Judges Vohrah and Nieto-Navia, in which they noted:

> With inchoate crimes in particular, it can be difficult to ascertain when all of the constituent elements of the offence exist so that a potential problem arises if it is intended that a conviction will be based upon not just one defined event occurring on a specific date but upon a series of events or acts which took place over an extended period of time.[298]

Thus, the Joint Separate Opinion questioned whether the Tribunal's limited temporal jurisdiction was intended to apply so as to exclude evidence of "pre-1994 incitement or conspiracy."[299] The Opinion noted, however, that the Security Council expressly established the Tribunal's temporal jurisdiction from January 1, 1994, rather than April 6, 1994

1990), ¶ 1028 (referring to *Kangura* No. 40 published in February 1993) & ¶ 1036 (dealing again with *Kangura* No. 6 and the "machete" cover of No. 26 of November 1991). It should be noted, however, that the Tribunal does refer in paragraph 1036 to "the increased attention in 1994 issues of *Kangura* to the fear of an RPF attack and the threat that killing of innocent Tutsi civilians that would follow as a consequence."

293. *Id.* ¶¶ 100-104, 1017.

294. *Id.* ¶ 100 (quoting Prosecutor v. Hassan Ngeze, Decision on the Prosecutor's Request for Leave to Amend the Indictment, ICTR Case No. 97-I, ¶ 3 (Nov. 5, 1999); *Prosecutor v. Ferdinand Nahimana*, ICTR Case No. 96-11-T, ¶ 28 (Nov. 5, 1999)).

295. *Id.* ¶ 100 (citing Hassan Ngeze & Ferdinand Nahimana v. The Prosecutor, Decision on the Interlocutory Appeals, Case Nos. ICTR-97-27-AR72 and ICTR-96-11-AR72 ¶ 6 (Sept. 5, 2000) [hereinafter *Ngeze & Nahimana Interlocutory Appeals*].

296. *Id.*

297. *Id.*

298. *Ngeze & Nahimana Interlocutory Appeals*, Joint Separate Opinion of Judge Lal Chand Vohrah and Judge Rafael Nieto-Navia, Case Nos. ICTR-97-27-AR72 and ICTR-96-11-AR72 ¶ 7.

299. *Id.*

(the start of the genocide), "in order to capture the planning stage of the crime."[300] Thus, the Opinion concluded, the ICTR Statute should be interpreted "in a restrictive fashion in order to fulfill this intention."[301]

The *Nahimana* Trial Chamber eschewed such an interpretation. The Trial Chamber noted that the aforementioned Security Council debate was held regarding a general proposal that the Tribunal's jurisdiction cover acts from October 1990. As a result, the Trial Chamber also noted, the Security Council did not specifically consider inchoate offenses. Thus, the *Nahimana* Trial Chamber found, "the Security Council debate does not provide guidance on the application of temporal jurisdiction to these particular offenses."[302] It concluded:

> The Chamber considers that the adoption of 1 January 1994 rather than 6 April 1994 as the commencement of the Tribunal's temporal jurisdiction, expressly for the purpose of including the planning state, indicates an intention that is more compatible with the inclusion of inchoate offences that culminate in the commission of acts in 1994 than it is with their exclusion. *It is only the commission of acts completed prior to 1994 that is clearly excluded from the temporal jurisdiction of the Tribunal.*[303]

Thus, for purposes of this analysis, the issue boils down to when the acts giving rise to the inchoate offenses have been "committed." The *Nahimana* Trial Chamber concluded that the commission of inchoate offenses continues "until the completion of the acts contemplated."[304] Precedent suggests otherwise.

In *The Prosecutor v. Musema*, the Tribunal noted that inchoate crimes (in that case conspiracy) are "punishable by virtue of the criminal act as such and not as a consequence of the result of that act."[305] In an accompanying footnote, the Tribunal explicitly stated that this applied to the inchoate crime of direct and public incitement to commit genocide. It added that this crime carries such a high risk for society that it must be punished without reference to subsequent acts, if any, of genocide.[306]

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300. *Id.* (citing *Report of the Secretary-General Pursuant to Paragraph 5 of the Security Council Resolution 955* (1994), U.N. Doc. S/1995/134, ¶ 14 (Feb. 13, 1995)).

301. *Id.* ¶¶ 17, 18 & 23.

302. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 104.

303. *Id.* (emphasis added).

304. *Id.* ¶ 1017.

305. *Musema Judgment*, ICTR Case No. 96-13-A ¶ 193.

306. *Id.* at n.37 (citing *Akayesu Judgment*, ICTR Case No. 96-4-T ¶ 52).

This is consistent with well-established definitions of inchoate crimes. "Crimes that are punished before the harm that is the ultimate concern of society occurs are called inchoate crimes."[307] That an inchoate crime is committed prior to, and independently of, the object crime is axiomatic. "Indeed, the main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime."[308]

As a result, for the grounds stated in the *Nahimana* judgment, the Tribunal's inclusion of the defendants' pre-1994 incitement within its temporal jurisdiction would appear to be problematic. Under the traditional view of inchoate crimes, each such act of incitement was seemingly completed, and therefore capable of being punished, immediately after it occurred, i.e., after the publication of the newspaper article or broadcast of the radio message.[309]

On the other hand, it may be possible to understand the Tribunal's view of incitement as broader and more fluid. In other words, the Tribunal perceived the incitement not as a series of discreet, individual acts but as part of an extended, overarching "scheme of incitement." In fact, this might be a more appropriate understanding of "mass media" incitement to genocide, which could be seen as proceeding in fits and starts and building to a genocidal crescendo. And it would seem to comport with the American "continuing offense doctrine" under which "a continuing offense is one which is not complete upon the first act, but instead continues to be perpetrated over time."[310] This doctrine applies

307. Nick Zimmerman, *Attempted Stalking: An Attempt-To-Almost-Attempt-To-Act*, 20 N. ILL. U. L. REV. 219, 222 (2000).

308. Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 3 (1989).

309. Nevertheless, even if Ngeze's pre-1994 acts of incitement were excluded as falling outside the Tribunal's temporal jurisdiction, there is support in the record for finding him liable based on his 1994 publications. As noted above, *Kangura*'s March 1994 competition consisted of questions asking participants to identify which back issue of *Kangura* contained a particular text. To participate, readers had to scour back issues of the newspaper. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶¶ 247-252. In this way, *Kangura* was able, in effect, to republish its pre-1994 incitement. Thus, even under a more restrictive interpretation of the Tribunal's temporal jurisdiction, Ngeze might have been found guilty of direct and public incitement to commit genocide based on his 1994 issues of *Kangura*.

310. United States v. Gilbert, 136 F.3d 1451, 1453 (11th Cir. 1998). *But see* Toussie v. United States, 397 U.S. 112, 114-15 (1970) (offenses should not be considered as continuing unless "the explicit language of the...statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing [offense]").

to conspiracy, an inchoate offense, and thus could conceivably be applied as well to the inchoate offense of incitement.[311]

Once again, the resolution of this issue will have a large impact on the future international prosecution of hate speech crimes. In particular, the ICC Statute limits its temporal jurisdiction to "crimes committed after entry into force of [the] Statute."[312] Because the ICC entered into force on July 1, 2002, numerous instances of incitement to genocide committed before that date may go unpunished. Under the Tribunal's inchoate offense analysis, however, it is possible those crimes could be prosecuted.

V. CONCLUSION

It has been said that "words kill." In *The Prosecutor v. Nahimana*, the International Criminal Tribunal for Rwanda explained in legal terms how instruments of mass media can be responsible for using words to commit genocide. Moreover, the Tribunal provided analytic criteria to understand how certain words, their purpose, context, speaker, and target can be examined to determine when the exercise of free speech corrodes into illegal advocacy. Had the Tribunal's judgment stopped there, it would have made a significant contribution to the development of international criminal law. But the judgment's importance is wider-reaching.

In considering the role of mass media executives in relation to genocidal hate speech crimes, the judgment also considered the vertical reach of criminal liability, through the charge of "superior

311. *See* BLACK'S LAW DICTIONARY 291 (5th ed. 1979) ("A continuing offense is the '[t]ype of crime which is committed over a span of time as, for example, a conspiracy. As to period of statute of limitation, the last act of the offense controls for commencement of the period....'"). In fact, in a separate opinion attached to the Appeals Chamber Decision on Interlocutory Appeals of Ngeze and Nahimana, the *Nahimana* judgment notes that Judge Shahabuddeen alluded to a rationale analogous to the continuing offense doctrine:

> With regard to the charge of conspiracy, where the conspiracy agreement might date back to a time prior to 1 January 1994, Judge Shahabuddeen expressed the view that so long as the parties continue to adhere to the agreement, they may be regarded as constantly renewing it up to the time of the acts contemplated by the conspiracy. Therefore a conspiracy agreement made prior to but continuing into the period of 1994 can be considered as falling within the jurisdiction of the Tribunal.

Nahimana Judgment, ICTR Case No. 99-52-T ¶ 104. Thus, while the continuing offense doctrine permits expanded inclusion of crimes going forward in time (retarding operation of the statute of limitations), the Tribunal's theory of inchoate offenses permits expanded inclusion of time going backwards in time (thereby shoehorning crimes into the Tribunal's temporal jurisdiction).

312. Rome Statute, *supra* note 255, art. 11, § 1.

responsibility," as well as its horizontal reach, through the charge of conspiracy. With respect to the former, the Tribunal wisely concluded that the RTLM defendants' physical distance from the scene of the crimes and limited communication with the perpetrators during the genocide did not absolve them of liability—by setting up RTLM and forging it into a hate-message factory, the defendants had knowingly activated a time bomb and, despite having the means to do so, failed to defuse it. Similarly, the Tribunal astutely concluded that, despite any personal animosity and disharmony among the defendants, their enterprises were sufficiently linked in a common purpose to find an "institutional conspiracy."

Moreover, through an analysis of "inchoate offenses," the Tribunal was able to find that Ngeze's pre-1994 incitement, the lion's share of the charges against him, fell within the Tribunal's temporal jurisdiction. The inchoate offense of incitement is not completed, reasoned the Tribunal, until its object crime has been committed. This arguably flies in the face of the rationale behind inchoate offenses: society criminalizes certain inchoate acts because it seeks to punish incipient actions before they can blossom into more serious crimes. Still, conspiracy is an inchoate offense. Under the American "continuing offense" doctrine, it may not be completed, for statute of limitations purposes, until, among other possible outcomes, the target offense is committed. Perhaps a valid argument can be made that the mass media incitement in *Nahimana*, which was intimately linked with the conspiracy, did not consist of discrete units of action. Instead, it was a stream of drumbeats that ebbed and flowed, but ultimately reached a crescendo in the Rwandan genocide. In this sense, the Tribunal's take on temporal jurisdiction may ultimately be validated.

At the dawn of a new millennium, the world is no safer from the type of hate speech that closed the last one. Although the Tribunal in *Nahimana* could have explored in greater detail how more subtle forms of speech (e.g., code words, glorification of violence, congratulations) can constitute genocidal incitement, it has provided a blueprint for future courts to engage in such analysis. Ferdinand Nahimana may have been correct when he testified, "When there is war, there is war, and propaganda is part of it."[313] After the Tribunal's judgment, one might add, "When a war crime has been committed, a war crime has been committed and mass media propaganda can be part of it."

313. *Nahimana Judgment*, ICTR Case No. 99-52-T ¶ 3.

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