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HAGUE INTERNATIONAL TRIBUNALS

The International Criminal Tribunal for Rwanda's Decision in *The Prosecutor v. Ferdinand Nahimana et al.*: The Past, Present, and Future of International Incitement Law

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Abstract
In *The Prosecutor* v. *Nahimana et al.*, the trial chamber of the International Criminal Tribunal for Rwanda sought to define the offence of 'direct and public incitement to commit genocide'. This case note discusses the elements required in the opinion before turning to the way in which the trial chamber applied its tests. Case law from the European Court of Human Rights and laws from a range of national jurisdictions are used to contrast the approach adopted by the trial chamber in the so-called 'Media Trial'.

Key words
direct and public incitement to commit genocide; freedom of speech; International Criminal Tribunal for Rwanda; 'Media Trial'; *The Prosecutor* v. *Nahimana et al.*

1. INTRODUCTION

On 3 December 2003, the International Criminal Tribunal for Rwanda (the Tribunal) convicted three Rwandan media executives, Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze, of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity in the so-called 'Media Trial'. Rwandans rejoiced in the decision, believing that those responsible for the 'hate media' were brought to justice, while the defence criticized the decision as a curtailment of the freedom of the press.

The trial chamber's decision in *The Prosecutor* v. *Nahimana et al.*[1] is important for several reasons. First, the decision will undoubtedly influence future international courts as they seek to define the inchoate offence of 'direct and public incitement to commit genocide'. The Tribunal's incitement precedent is the only relevant case law since the International Military Tribunal convicted Julius Streicher and acquitted

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1. ICTR-99-52-T (2003).

Hans Fritzsche at Nuremberg.[2] Furthermore, as Judge Schwebel of the International Court of Justice noted in 1986, 'the *delit* of "incitement" [is not] known to customary international law',[3] and the *Nahimana* decision represents the most ambitious attempt by an international court to place the offence within an international law framework.

The decision is important, however, for reasons beyond its treatment of international incitement law. The balance of power between national, regional, and international courts over the development of international criminal law remains in flux. Recently national courts, including the Canadian Federal Court of Appeals in *Mugesera* v. *Minister of Citizenship and Immigration*,[4] and regional courts, such as the European Court of Human Rights in *Sürek* v. *Turkey*,[5] have offered their own definitions of the offence of incitement. It remains unclear whether these national and regional courts will embrace the definition of incitement offered by the international tribunal in *Nahimana* or whether they will insist on defining international crimes within their jurisdiction according to their own traditions and beliefs.

2. The background, facts and holding of *The Prosecutor* v. *Nahimana*

2.1. Background

A brief background may be given as follows. In the early 1990s the small, central African country of Rwanda was in a state of civil war. On 1 October 1990 a mostly Tutsi force, the Rwandan Patriotic Front (RPF), invaded the country.[6] Their attacks radicalized the Hutu majority, which began a systematic campaign to eliminate innocent Tutsi civilians.[7] A peace agreement signed in August 1993 resulted in little progress, and when on 6 April 1994 an aircraft carrying the Rwandan president Juvénal Habyarimana crashed, killing him,[8] within hours the killings of Tutsis began; approximately 800,000 Rwandans were massacred in the subsequent three months.[9] The RPF announced its resumption of military activity, by mid-July gaining control of the whole country and putting an end to the killings.

Before and during the killings a radio station, Radio Télévision des Milles Collines (RTLM), and a newspaper, *Kangura*, provided listeners and readers with editorials in

2. See *Judgement: Streicher* (available online at www.yale.edu/lawweb/avalon/imt/proc/judstreich.htm); *Judgement: Fritzsche* (available on-line at www.yale/lawweb/avalon/imt/proc/judfritz.htm). The International Criminal Tribunal for Rwanda's first case, *The Prosecutor v. Akayesu*, ICTR-96-4 (1998), included a conviction for incitement to commit genocide.
3. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] ICJ Rep. 14, 523. Judge Schwebel, nevertheless, tried to define the offence. He noted that in national jurisdictions incitement 'has its origins and justifications in the psychological motives determining individual conduct'. *Ibid.*, Dissenting Opinion, para. 259. While an intent test is justified in national courts, an international court must ask whether a state's conduct constituted 'advocacy of acts in violation of the law'. *Ibid.*, para. 260. Thus a content test was deemed appropriate.
4. 2003 Fed. Crt. Appeals LEXIS 280; 2003 FCA 325 (2003).
5. App. No. 24762/94 (1999).
6. See *The Prosecutor* v. *Akayesu*, ICTR-96-4 (1998), paras. 95–6.
7. *Ibid.*, para. 98.
8. *Ibid.*, para. 106.
9. L. Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (2000), 4.

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Rwanda's native language, Kinyarwandan, on current events. Ferdinand Nahimana and Jean-Bosco Barayagwiza were the founders of RTLM,[10] while Hassan Ngeze owned, founded, and edited *Kangura*.[11]

On 12 July 1996 Ferdinand Nahimana was indicted before the International Criminal Tribunal for Rwanda,[12] an international court with limited subject-matter jurisdiction (e.g. over the crimes of genocide and direct and public incitement to commit genocide) and limited temporal jurisdiction (i.e. over acts committed in 1994 only).[13] Opening statements began on 23 October 2000, and the trial ended approximately three years later, by which time the prosecution had called 47 witnesses and the defence, collectively, 46.[14]

2.2. Factual record

The prosecutor argued that a wide range of speeches constituted genocide and incitement to commit genocide. To aid in analysis, I have grouped these speeches into three distinct categories: (i) reports on the hate speech and incitement of others; (ii) deadly mistakes about RPF membership; and (3) ambiguous radio broadcasts and newspaper articles. This section considers each group.

2.2.1. Reporting the hate speech and incitement of others

In December 1990 *Kangura* published an article entitled 'Appeal to the Conscience of the Hutu' in which it printed the so-called Hutu 'ten commandments'.[15] The 'ten commandments', previously published in other newspapers,[16] urged the Hutu population to remain 'firm and vigilant towards their common Tutsi enemy',[17] an expression Rwandans understood as a call to kill all Tutsis.[18] Some men started killing their Tutsi wives because of the 'ten commandments'.[19]

The defence argued that 'publishing a news item was not the same as authorizing it', and Ngeze disavowed the texts that appeared in his newspaper.[20] The trial chamber, however, rejected these arguments, noting that 'Ngeze did not condemn *The Ten Commandments*',[21] and that 'it can reasonably be held [that he] support[ed] *The Ten Commandments* in substance if not in form'.[22]

2.2.2. Deadly mistakes: lists of RPF accomplices

In addition to publishing the 'ten commandments', *Kangura* printed lists of individuals suspected of being RPF enemy combatants.[23] Government sources provided the

10. *Nahimana*, *supra* note 1, paras. 5–6.
11. *Ibid.*, paras. 7, 135.
12. *Ibid.*, para. 20.
13. *Ibid.*, para. 4; UN Doc. S/RES 955 (8 Nov. 1994).
14. *Nahimana*, *supra* note 1, paras. 50, 94.
15. *Ibid.*, para. 138
16. *Ibid.*, para. 145.
17. *Ibid.* (Commandment 9).
18. *Ibid.*, para. 142.
19. *Ibid.*, para. 140.
20. *Ibid.*, para. 148.
21. *Ibid.*, para. 155.
22. *Ibid.*, para. 156.
23. *Ibid.*, para. 189 (describing a *Kangura* list in 1990).

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newspaper with several of these lists;[24] nevertheless, at least one *Kangura* list was not official and incorrectly listed innocent individuals as enemy combatants. Similarly, lists broadcast over RTLM incorrectly listed innocent civilians as enemy combatants. In at least one instance the names of the children of a suspected RPF agent were broadcast by RTLM, and Nahimana 'conceded ... that this was bad practice'.[25]

In analyzing these lists, the trial chamber noted that '*Kangura* clearly intended to mobilize its readers against the individuals named on the list',[26] and 'being named in *Kangura* would bring dire consequences'.[27] As to the RTLM lists, the trial chamber noted that 'the persons named in [the] broadcast were clearly civilians. The grounds on the basis of which RTLM cast public suspicion on them ... [were] vague, highly speculative, and ha[d] no apparent connection with military activity or armed insurrection.'[28]

2.2.3. Ambiguous speech

Finally, a third group of speeches involves two Kinyarwandan terms, *Inyenzi* and *Inkotanyi*. Both terms presented unique obstacles for the trial chamber, for the terms meant 'RPF soldier[s]' and were 'sometimes used to refer to Tutsi[s]'.[29] Thus their meaning was ambiguous (in that they meant both soldiers and civilians) in a country with a 'complex interplay between ethnic and political dynamics'.[30]

Consider the following RTLM broadcast:

> I cannot understand the atrocities committed by the *Inkotanyi*. They are people like everyone else. We know that most of them are Tutsi and that not all Tutsis are bad. And yet, the latter rather than help us condemn them, support them. But I believe that in the end, they will be discovered and they will be punished accordingly.[31]

On the one hand the *Inkotanyi* are accused of committing atrocities and they are distinguished from the Tutsi, who are not 'all bad'. On the other hand, the speech says, 'they will be punished' for supporting the *Inkotanyi*, suggesting that all Tutsis are the enemy. The trial chamber noted that the term '*Inkotanyi*' in this broadcast was 'explicitly associated or equated with the Tutsi population'.[32]

The defence cited broadcasts with disclaimers that 'not all Tutsis are wicked' and 'RTLM does not hate the Tutsis',[33] to show that '*Inkotanyi*' and '*Inyenzi*' meant RPF

24. *Ibid.*, paras. 199–200.
25. *Ibid.*, para. 477.
26. *Ibid.*, para. 206.
27. *Ibid.*, para. 1028.
28. *Ibid.*, para. 376.
29. *Ibid.*, Glossary.
30. *Ibid.*, para. 468.
31. *Ibid.*, para. 358.
32. *Ibid.* Other RTLM broadcasts were more explicit, stating that the *Inkotanyi* enemy 'belong[ed] to one ethnic group', which, incidentally, was basically true. In this broadcast, listeners were then urged to 'Look at the person's height and his physical appearance. Just look at his small nose and then break it'. *Ibid.*, para. 396. Other broadcasts called on listeners to 'exterminate the *Inkotanyi*, to exterminate the Tutsi all over the world'. *Ibid.*, para. 400. Thus an ethnic element was added as the difference between ethnicity and enemy status was blurred.
33. *Ibid.*, para. 368. Many RTLM broadcasts used the term *Inkotanyi* to refer exclusively to RPF combatants. One broadcast, for example, discussed how the *Inkotanyi* would die 'behind [their] gun[s]' pulling 'on the trigger with their feet'. The statement concluded, 'our children and grandchildren [will] not hear that word "*Inkotanyi*" ever again'. *Ibid.*, para. 403.

combatants and not Tutsi civilians. The prosecutor countered that these disclaimers were merely 'intended to avert international criticism' and thus provide cover for additional massacres.[34] The trial chamber dismissed the disclaimers as 'unconvincing',[35] and instead noted that RTLM issued disclaimers after 'concern[s were] brought to the attention of the radio'.[36] It concluded that RTLM 'broadcasts called explicitly for the extermination of the Tutsi ethnic group'.[37]

3. The Tribunal's muddled definition of incitement

3.1. Three different definitions of incitement

The level of criminality of the three categories of speeches just discussed depends on the definition of genocide and direct and public incitement to commit genocide one adopts. According to the Statute of the International Tribunal for Rwanda, the crime of genocide consists of killing or seriously harming individuals 'with intent to destroy in whole or in part, a national, ethnical, racial or religious group'.[38] The Statute also criminalizes 'direct and public incitement to commit genocide',[39] although it does not define the term.

3.1.1. The intent test

The trial chamber's definition of 'direct and public incitement to commit genocide' in *Nahimana* is somewhat muddled and contradictory. First, the trial chamber developed an intent test, noting, 'In determining the scope of [criminal] responsibility [for incitement], the importance of *intent* ... emerges.'[40] The trial chamber said that it would look to the 'actual language used in the media ... as an indicator of *intent*',[41] and that 'In determining whether communications represent *an intent to cause genocide* and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred'.[42]

Punishing a speaker for her intent is common in many national jurisdictions including those of Israel[43] and Turkey.[44] The justifications for such a rule are well established: someone who intends to cause the commission of a crime loses the privilege to claim freedom of speech protections and can be punished accordingly.[45] To this end, the Soviet delegate to the drafting of the Genocide Convention understood

34. *Ibid.*, para. 424.
35. *Ibid.*, para. 369.
36. *Ibid.*, para. 370.
37. *Ibid.*, para. 486.
38. UN Doc. S/RES 955 (8 Nov. 1994) Art. II (2).
39. *Ibid.*
40. *Nahimana*, *supra* note 1, para. 1001 (emphasis added).
41. *Ibid.*, para. 1001 (emphasis added).
42. *Ibid.*, para. 1029 (emphasis added).
43. See A. Weitzman, 'A Tale of Two Cities: Yitzhak Rabin's Assassination, Free Speech, and Israel's Religious–Secular *Kulturkampf*', (2001) *Emory International Law Review* 1, 48 and n. 210 (saying that Israeli law applies 'an intent test only' in some cases).
44. *Sürek v Turkey* (No. 1), App no 26682/95, para. 60.
45. O. Holmes, 'Privilege, Malice, and Intent', (1894) 8 *Harvard Law Review* 1, 11 ('[I]n order to take away the protection of his right ... you must show that he intended to bring about consequences to which that unlawful act was necessary').

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incitement to include all 'forms of public propaganda … *aimed at* provoking the commission of acts of genocide'.[46]

3.1.2. The content test

Despite the significance given to the intent of the speaker in some portions of the *Nahimana* opinion, at other points the trial chamber focused exclusively on the content of the speech and treated this element as dispositive. For example, it held that an RTLM broadcast did not constitute 'direct incitement' because it did 'not call on listeners to take action of any kind'.[47] Similarly, a *Kangura* article 'brimming with ethnic hatred' was not incitement because it 'did not call on readers to take action against the Tutsi population'.[48]

While the content of a speech is probative evidence as to the speaker's intent, the Tribunal made it clear that the content test was distinct from the intent test it developed earlier. Specifically, it held that incitement – or 'a public call to commit genocide'[49] – requires a content test separate from proof of the speaker's intent. In most cases, both tests are satisfied; however, as discussed in more detail below, in some cases only one of these tests is met.

Indeed, in common-law jurisdictions the intent test is distinct from the content test.[50] For example, in US law, Judge Hand's famous opinion in *Masses Publishing Co.* v. *Pattern* offers a clear justification for requiring proof of content 'urging … others … to resist the law'.[51] Specifically, he argued that a court that does not look to the language used in a speech would make 'every political agitation … illegal'.[52] In other words, a content test is needed to differentiate discourse that serves a legitimate political function from incitement to commit criminal conduct, a distinction the intent test is unable to make.

3.1.3. The consequence test

Finally, the trial chamber in *Nahimana* distanced itself from a third basis of liability, namely the 'potential impact of expression'.[53] It simply noted that no 'specific causation requirement linking the expression at issue with the demonstration of a direct effect' was required.[54]

In many civil-law jurisdictions a court can convict an individual whose speech creates a sufficient danger of inducing criminal behaviour.[55] The justifications for a

46. Official Records of the Third Session of the General Assembly, Part I, Legal Questions, Sixth Committee, Summary Records of Meetings, 21 Sept.–10 Dec. 1948, at 253 (87th Meeting, 29 Oct. 1948) (emphasis added).
47. *Nahimana*, *supra* note 1, para. 1021.
48. *Ibid.*, para. 1037.
49. *Ibid.*, para. 1030.
50. See *Akayesu*, *supra* note 2, para. 555. For a specific example, see B. Saul, 'The International Crime of Genocide in Australian Law', (2000) 22 *Sydney Law Review* 558 (describing how the Australian Anti-Genocide Bill of 1999 sought to punish 'a person who publicly urges the commission of an act of genocide').
51. 244 F. 535 (SDNY 1917).
52. *Ibid.*
53. *Nahimana*, *supra* note 1, para. 1004.
54. *Ibid.*, para. 1007.
55. See, for example, a Belgian judge's instruction to a jury in the Rwanda 'Butare Four' case involving a charge of incitement to commit genocide (available on-line at www.asf.be/AssisesRwanda2/fr/fr_VERDICT_questions.htm at *52ème question*) ('*même si la provocation n'a pas été suivie d'effet*').

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'clear and present danger'[56] test are straightforward: a state should not have to wait for criminal conduct *actually* to result before punishing a speaker who *potentially* creates such a danger. To this end, representatives at the UN General Assembly debated, although they did not adopt, a clause prohibiting 'all forms of public propaganda *tending* by their systematic and hateful character *to promote genocide*, or *tending* to make it appear as a necessary, legitimate or excusable act'.[57]

3.2. The relationship between the three tests

The intent, content, and consequences tests are all related yet distinct grounds for punishing a speaker. Although proof of one test is probative as to the others, the intent and content tests adopted by the trial chamber in *Nahimana* are distinct. One could expressly advocate criminal conduct without having criminal intent (e.g. 'kill the umpire' said jokingly),[58] just as one could have criminal intent without expressly advocating illegal conduct (e.g. saying 'the Tutsis control all the wealth', in the hope that people would kill the Tutsis). In many cases, like that of Julius Streicher before the International Military Tribunal, all three tests are satisfied,[59] while in other instances, such as the acquittal of Hans Fritzsche at Nuremberg, a single test was held to be insufficient to justify a conviction.[60]

Perhaps the best way to reconcile the intent and content positions adopted in the *Nahimana* opinion is to say that the urging of others to engage in criminal conduct is the *actus reus* of incitement, while the intent to cause genocide is the *mens rea*. The trial chamber certainly does not make this distinction clear in its reasoning, for strategic purposes discussed in a moment.

3.3. The differences between the tests regarding temporal jurisdiction

The three definitions of incitement just discussed all have an impact as to when the offence of incitement begins and ends as a matter of law, and each of the three bases

56. *Schenck v. United States*, 249 US. 47 (1919).
57. Draft Convention on the Crime of Genocide, UN Secretary-General, UN Doc. E/447 (1947) (emphasis added).
58. G. Stone *et al.*, *Constitutional Law* (2001), 1012–13.
59. *Judgement: Streicher*, *supra* note 2. Streicher was convicted under the content test because he 'demanded annihilation and extermination in unequivocal terms'. *Ibid.* Furthermore, he was convicted under the consequence test because he 'caused [Germans] to follow the National Socialists' policy of Jewish persecution and extermination'. *Ibid.* While no direct causal link to any particular crime was noted, the causal connection was more general. *Nahimana*, *supra* note 1, para. 981. Finally, the intent test was discussed tangentially. Streicher argued that he 'did not wish for a solution of the Jewish problem in a forcible manner'. Office of the United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Supplement B 495 (1948). The judges rejected this argument, noting, 'In the face of the evidence ... it is idle for Streicher to suggest that the solution to the Jewish problem which he favored was strictly limited.' *Judgement: Streicher*, *supra* note 2. Whether the intent test is an element of the offence remains uncertain, for the language in the opinion is in the form of a double negative (Streicher cannot claim that he did not intend). As one commentator noted, 'the judges could have done a better job of explaining the legal basis for their verdict'. D. Arzt, 'Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal', (1995) 12 *New York Law School Journal of Human Rights* 718.
60. *Judgement: Fritzsche*, *supra* note 2. Fritzsche 'did not urge persecution or extermination of the Jews' under the content test. *Ibid.* Furthermore, he did not 'intend ... to incite the German people to commit atrocities'. *Ibid.* He, however, 'la[id] the groundwork and then ... put into practice the war crimes and crimes against humanity', satisfying the consequence test. See *Judgement: Dissenting Soviet Opinion: Fritsche* (available online at www.nizkor.org/hweb/imt/tgmwc/judgment/j-dissenting-fritsche.html). The consequence test is not discussed in the majority opinion, suggesting that the French, US, and UK judges either found the test irrelevant (improbable, given the importance of the test in the *Streicher* conviction) or conceded that the test was met.

of liability affects the ability of the Tribunal to convict on multiple charges. The ambiguity as to the elements of incitement in the opinion allowed the trial chamber to accomplish two conflicting ends in the following way.

Because the Tribunal's statute limits its temporal jurisdiction to acts committed in 1994, the trial chamber sought a way to expand its jurisdiction to include acts committed prior to 1994. The intent test provided the Tribunal with a solution to this problem. As the trial chamber noted, 'pre-1994 material may constitute evidence of the intent of the Accused',[61] and such intent 'continues to the time of the commission of the acts incited'.[62] Thus a speech in 1990 could demonstrate the intent of the accused to have listeners commit genocide which continues into the 1994 temporal jurisdiction.[63] Indeed, the trial chamber boldly wrote off temporal limitations in the incitement context, noting, 'It is only the *commission of acts completed* prior to 1994 that is clearly excluded from the temporal jurisdiction of the Tribunal'.[64]

Because much of the prosecutor's case depended on speeches made prior to 1994, the trial chamber's use of the intent test to in order to consider speech before 1994 is convenient, to say the least. Had the trial chamber adopted a purely content-based test, the temporal limitation would complicate prosecution. Few acts of urging occurred in 1994,[65] and there are strong arguments to be made based on common-law precedent that the act of urging is completed once the speech is finished.[66]

3.4. The differences between the tests regarding accumulation of charges

While the trial chamber used the intent test to expand its temporal jurisdiction, by doing so it created a problem in the context of accumulation of charges. Earlier in its opinion, the trial chamber convicted RTLM executives because 'a causal connection has been established by the evidence' between RTLM broadcasts and deaths,[67] and the defendants acted with the intent to destroy the Tutsis.[68] Having established proof of genocide (killings with the requisite intent), the trial chamber piggybacked the crime of incitement (defined simply as the intent to cause genocide). Because Ferdinand Nahimana and Jean-Bosco Barayagwiza committed genocide with the intent to destroy the Tutsis, they obviously committed incitement to commit genocide, that is, the intent to commit genocide.[69]

61. *Nahimana*, *supra* note 1, para. 103.
62. *Ibid.*, para. 104.
63. *Ibid.*, para. 1017.
64. *Ibid.*, para. 104 (emphasis added).
65. *Ibid.*, para. 122. That is not to say that the trial chamber conceded this point. It noted that in 1994 *Kangura* held a competition in which it encouraged readers to look at past editions of the paper. *Ibid.*, para. 247. Although Ngeze denied any mal-intent in running the competition, *ibid.*, para. 253, the trial chamber found that 'the competition was designed to direct participants to any and all of … [*Kangura*] publications'. *Ibid.*, para. 257. Thus the temporal limitations of the Tribunal were creatively circumvented, for in 1994 *Kangura* referred readers to an earlier edition of *Kangura*, which in turn quoted a previously published version of the 'ten commandments'. *Ibid.*, para. 1018. No comparable competition was broadcast by RTLM.
66. See *R v. Gonzague*, (1983) 4 CCC (3d) 505, 34 CR (3d) 169 (Ont. Canada) (suggesting that renouncing incitement does not absolve an accused of liability since the act is completed once the words are spoken).
67. Nahimana, *supra* note 1, para. 482.
68. *Ibid.*, paras. 1033–4.
69. *Ibid.*

Hoping to avert concerns over the accumulation of charges, the trial chamber sought to show how genocide and incitement 'comprise materially distinct elements'[70] by saying that genocide does 'not necessarily require the existence of a public call to commit genocide, an element at the core of the crime of public and direct incitement to commit genocide'. But if the 'public call' is 'at the core of the crime', the trial chamber should have discussed whether the Tribunal's temporal jurisdiction extends to 'public call' completed prior to 1994.

To summarize the contradiction, in order to expand its temporal jurisdiction and to avoid acquittals on procedural grounds the trial chamber adopted an intent-based definition of incitement. However, in order to avoid concerns of accumulation of charges, the trial chamber distinguished the intent to commit genocide (i.e. incitement) from genocide. It did so by incorporating a content test, without considering how such a test would affect whether the crime fell within the temporal jurisdiction of the Tribunal. That the trial chamber benefited from the inconsistency offers a reason why it was less than forthcoming as to whether both intent and content are required for a conviction.[71]

4. Application of the intent test

4.1. Inferential intent

The trial chamber's application of the intent test exposes several flaws in its reasoning. The two most egregious sentences in the entire opinion read,

> In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect.[72]

In US law this argument is known as the 'damning doctrine of inferential intent',[73] and its flaws are readily evident. While the fact that genocide occurred *might* indicate intent to cause genocide, genocide might have occurred for reasons unrelated to an individual's intent. The fact that the Mars mission failed *might* indicate my intent to have it fail; however, the mission probably failed for reasons unrelated to my alleged intent.[74] This flawed doctrine contributed to additional problems with the decision.

4.2. Shifting burdens regarding the reporting of hate speech and incitement

The Tribunal adopted a modified version of the doctrine of 'inferential intent' in analysing *Kangura*'s reprinting of 'the ten commandments', discussed above. It noted

70. *Ibid.*, para. 1030.
71. See E. Bloustein, 'Criminal Intent and the "Clear and Present Danger" Theory of The First Amendment', (1989) 74 *Cornell Law Review* 1136 (accusing US Supreme Court Justice Holmes of the same thing, noting that he 'indulged in ambiguity, muddied the waters and tried to have it both ways, sometimes seemingly deciding the case as if actual intent were required, and sometimes not'.)
72. *Nahimana*, *supra* note 1, para. 1029.
73. Z. Chafee, 'Freedom of Speech and Press', (1921) 25 *New Republic* 344 (referring to Professor Freund). See Bloustein, *supra* note 71, at 1125 ('the law treats the person who is unaware of what might normally be expected from his acts as if he had expected them').
74. The 'inferential intent' argument is also in conflict with concerns of accumulation of charges, as discussed above, for the fact that genocide occurred should not be the basis of criminal liability for incitement, namely the intent to cause genocide.

that 'where the media disseminates views that constitute ethnic hatred and calls to violence for [non-criminal] purposes, a clear distancing ... is necessary to avoid conveying an endorsement of the broadcast and in fact to convey a counter-message to ensure that no harm results from the broadcast'.[75] Thus once a media outlet reprints or broadcasts someone else's incitement, it must distance itself from the message. If it does not, the Tribunal will infer the intent of the outlet to have listeners follow through with this incitement.

This application of the intent test is problematic because it shifts the burden of proof from the prosecutor to the defendant. In other words, under the *Nahimana* standard all the prosecutor has to do is to show that the defendant published someone else's hate speech or incitement. Once it shows this, the defendant then has the burden of showing that she lacked intent to have others commit a crime. In the criminal context, however, the prosecutor has the burden of proving all elements of the crime, and intent is one of these elements.

It is worth noting that reprinting another's incitement might indicate intent to have others follow through with that incitement, and it is definitely probative evidence. Nevertheless, there are non-criminal reasons why one might reprint someone else's incitement, and the burden of showing that the criminal reason for publishing the work, and not some benign intent, motivated the speaker should have fallen to the prosecutor. To infer such intent simply from the act of reprinting materials is to absolve the prosecutor of her fundamental responsibility.

4.3. Deadly lists and mistakes

The Tribunal's application of the intent test to the RTLM and *Kangura* lists is also flawed. It should be recalled that mistakes were made in accusing individuals of being RPF members, for example, by listing innocent family members. The trial chamber stated, 'If [factual statements] were not true, the inaccuracy of the statement might then be an indicator that the intent of the statement was not to convey information but rather to promote unfounded resentment and inflame ethnic tensions'.[76] Thus mistakes can demonstrate criminal intent.

To infer such criminal intent in the RTLM and *Kangura* context, the trial chamber noted, 'the only common element [in the mistakes] is the Tutsi ethnicity of the persons named, and the evidence in some cases clearly indicates that their ethnicity was in fact the reason they were named'.[77] Furthermore, it said, 'RTLM had no basis to conclude that [individuals named] were [RPF members], but rather targeted them solely on the basis of their ethnicity'.[78]

While it is true that including Tutsi civilians in the lists *might* demonstrate intent to cause genocide, there is another plausible reason, namely that someone made a mistake.[79] Again, US law can serve as a useful counter-example.

75. *Nahimana*, *supra* note 1, para. 1024.
76. *Ibid.*, para. 1021.
77. *Ibid.*, para. 1026.
78. *Ibid.*, para. 474.
79. As to the ethnicity argument, recall that most RPF combatants were Tutsis.

In the 1960s the *New York Times* ran an advertisement on behalf of the Committee to Defend Martin Luther King which contained multiple mistakes as to the actions of officials in the southern United States. These officials quickly sued the newspaper for libel in southern courts, and the *Times* conceded that it had not checked the accuracy of the advertisements. Despite these admissions, the US Supreme Court in *The New York Times* v. *Sullivan*[80] – in contrast with the trial chamber in *Nahimana* – refused to attribute 'malice' to the *New York Times* for these mistakes. Had US courts adopted the *Nahimana* standard, the *New York Times* might still be paying damages to white southern officials to this day, and for this reason the praise of the *New York Times* of the Tribunal's decision in *Nahimana* is surprising.[81]

The second problem with the trial chamber's treatment of the RTLM and *Kangura* lists is that these mistakes cannot constitute incitement to commit genocide under the content test. There is a juridical difference between saying, 'kill these people, they are Tutsis', and saying, 'kill these people, they are RPF combatants', when the people named are not in fact RPF combatants. In the former statement, the listener is urged to commit genocide (i.e. killing based on ethnicity), while in the latter the listener is urged to become an unknowing agent in an unjustified killing. While both speeches are criminal, only the former is incitement to commit genocide under the content test. The latter is either an attempt to commit genocide (if unsuccessful) or genocide proper (if successful), and the trial chamber should have done a better job distinguishing between the two in its analysis if the content test is an element in the offence.[82]

5. The trial chamber's finding of facts

In general a tribunal's factual determinations are often the most difficult to criticize. Few people, excluding counsel, defendants, and adjudicators, sit through an entire trial, and outsiders can never know for certain whether judges have objectively weighed all the facts. Consequently, it is extremely difficult to discern whether calls to kill the *Inkotanyi* or the *Inyenzi* were in fact calls for national defence or calls for genocide.

Nevertheless, a Canadian Federal Court of Appeals case, *Mugesera* v. *Ministry of Citizenship*,[83] raises serious questions as to the factual determinations of the *Nahimana* trial chamber. Both the *Mugesera* and *Nahimana* cases hinged on speeches using the terms *Inyenzi* and *Inkotanyi*. Furthermore both the national and international

80. 376 US 254 (1964). Because the *New York Times* did not authorize the content of the advertisements, the US Supreme Court was more willing to find that 'there was no evidence whatever that [the newspaper was] aware of any erroneous statements or [was] in any way reckless in that regard'. *Ibid.*, at 285.
81. Editorial, *New York Times*, 4 Dec. 2003.
82. It is worth giving a word of caution over the conflation of *incitement to commit genocide* with *incitement to hatred*. Incitement to hatred can become incitement to commit genocide if one focuses on the intent of the speaker. However, using a content test, urging someone to hate is different from urging someone to kill. Consequently some of the Tribunal's analysis seems misplaced. See *ibid.*, paras. 983–93, 1010 (discussing US immigration law).
83. *Supra* note 4.

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courts were asked to weigh the testimony of the same witnesses[84] and to determine the same legal test, namely whether the speech was 'calculated to promote public disorder or physical force or violence'.[85]

The Canadian court found that Mugesera's speeches did not constitute incitement. It noted that while Mugesera 'lumped together in his speech "*Inyenzis*", "*Inkotanyis*" [RPF], and "infiltrators"', 'the speaker's primary aim was to call for elections' and not to kill Tutsis.[86] Furthermore it noted in its lengthy analysis that, unlike propaganda during the Holocaust, Mugesera's speech did not clearly identify 'the object of hatred', namely Tutsis, a term which was only used once in the speech.[87] In this sense, Mugesera's speech was similar to those broadcast by RTLM and published in *Kangura*, in that the meaning was ambiguous.

While *Mugesera* can be distinguished from *Nahimana* on the basis of the severity of the speeches made, it is the concurring opinion of Judge Letourneau that is the most telling. The judge wrote, 'I cannot but express my bewilderment not only at the ease with which Mr Mugesera's speech was altered [to suggest that it was incitement] for partisan purposes by the International Commission of Inquiry, but especially at the ease and confidence with which the alterations of the text were subsequently accepted'.

Similar manipulations of the evidence may have occurred in the *Nahimana* proceedings. 'The Chamber note[d] the errors made by [prosecutor's expert witness] Jean-Pierre Chrétien in his book, which were replicated by [prosecutor's expert witness] Alison Des Forges in her book'.[88] Furthermore, in at least one instance, Nahimana, a multilingual professor, challenged the translation of RTLM broadcasts.[89] In the end the trial chamber chose the interpretation of Alison Des Forges, an American, and Jean-Pierre Chrétien, a Frenchman, over that of Nahimana, native Rwandan and defendant.

Thus while the Canadian court viewed an incitement case with great scepticism and refused to embrace the human rights community's interpretation of key Kinyarwandan terms, the International Criminal Tribunal for Rwanda embraced an alternative account of the meaning of '*Inkotanyi*' and '*Inyenzi*', overlooking historical inaccuracies in the evidence brought forth by so-called experts.

The trial chamber seemed to anticipate concerns over its methodology and called for different standards in national and international courts. In national courts concerns over abuses of 'state power' require a standard more protective of freedom of speech according to which incitement charges are viewed with scepticism.[90] Thus national courts must protect speakers from over-zealous government prosecution. In an international tribunal, however, where 'incitement to violence [is] against others, particularly ... members of the minority group',[91] an approach less inclined

84. *Ibid.*, para. 86 (Des Forges).
85. *Ibid.*, para. 204.
86. *Ibid.*, para. 193.
87. *Ibid.*, paras. 188–9.
88. *Ibid.*, para. 169.
89. *Ibid.*, para. 367.
90. *Ibid.*, para. 1009.
91. *Ibid.*

towards freedom of speech was deemed justified. That is, international courts must protect minorities from over-zealous speakers.

This is perhaps the most interesting argument in the entire opinion, but it too is flawed. First, in terms of translations and the ability to understand the content and context of speech, national courts have greater capacity than international tribunals.[92] Meaning gets lost in translation, and the outcome of freedom-of-speech cases is most accurate when adjudicators understand the language and circumstances of the speech. For this reason, international tribunals should be just as sceptical as national courts, if not more.

Next, the self-interested 'state power' behaviour attributed to national jurisdictions can be attributed to international courts. For example, the International Criminal Tribunal for Rwanda could be accused of being beholden to the human rights community that created it. It was the works of human rights experts such as Alison Des Forges[93] that generated enough support for the establishment of the Tribunal, and these same advocates of the Tribunal testified before it in such cases as *Nahimana*. Thus the self-interest concerns used to justify distinguishing national courts from international tribunals simply ignore the self-interest or 'state power' of the International Criminal Tribunal for Rwanda and other international institutions.

6. The European Court of Human Rights case law

Given the muddled nature of the *Nahimana* decision, one might be tempted to look to decisions of other international tribunals for clarity. Unfortunately, a divided European Court of Human Rights (the Court) did not offer a better definition of incitement in *Sürek* v. *Turkey*.

By way of background, Turkey prosecuted and convicted a Kurdish media executive because the defendant's newspaper was 'aimed at the destruction of the territorial integrity of the Turkish State'.[94] All the judges at the European Court found Turkey's intent test 'insufficient';[95] however, they were divided over the elements a state must prove to punish speech.

A majority of the justices adopted a content-and-consequences combination, saying that they would 'have particular regard to the words used in the articles and to the context in which they were published'.[96] First, the content test is satisfied when the speech is 'a call to violence'.[97] Next, the consequence test is satisfied when the articles can 'be construed as being capable of inciting to further violence'.[98]

Five justices concurring, however, adopted a more 'contextual approach' focusing on the consequences of the speech and the intent of the speaker. They asked, 'Was the language intended to inflame or incite to violence? Was there a real and genuine

92. Of course, translation problems plagued the Canadian court in *Mugesera* too.
93. See, e.g., A. Des Forges, *Leave No One to Tell* (1999).
94. See, for example, *Sürek v. Turkey* (No. 1), App. No. 26682/95, para. 60.
95. *Ibid.* (Bonello, concurring).
96. *Ibid.*, para. 58.
97. *Ibid.*, para. 58.
98. *Ibid.*, para. 58.

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risk that it might actually do so'?[99] Thus these justices would replace the majority's content test with an intent test, while maintaining the consequences test.

Perhaps realizing that none of the justices at the European Court of Human Rights adopted a content and intent combination, the trial chamber in *Nahimana* was forced to circumvent the *Sürek* holding. It wrote, 'The sensitivity of the [European] Court to volatile language [i.e. the content test] goes to the determination of intent, as evidenced by one of the questions put forth in a concurring opinion in [the] case: "Was the language intended to inflame or incite to violence"'?[100] Thus the holding of the European Court of Human Rights majority was conveniently side-stepped, and one portion of the concurring opinion was described as the law of the European Court. While creative, the trial chamber's use of precedent is disingenuous to say the least, for the Court in *Sürek* certainly disapproved of an intent-only test and, to some extent, of the *Nahimana* holding.

6.1. Analysis

Comparing of the Court's holding in *Sürek* with the Tribunal's holding in *Nahimana*, one finds a range of options. From the majority opinion in *Sürek* and the conviction of Julius Streicher by the International Military Tribunal,[101] we know that content and consequences can create liability. From the *Nahimana* decision and the acquittal of Hans Fritzsche at Nuremberg,[102] we know that intent and content are important elements of the offence of incitement. Finally, from the concurring opinion in *Sürek* and from the dissenting Soviet judge at Nuremberg,[103] we can infer that consequences and intent together can be used to convict a speaker. All possible combinations of the three tests have been suggested at various points.

I pause briefly to note the difficulties in choosing between these three formulations for a modern international standard. Requiring all three tests might be over-protective of the freedom of the press, while allowing a conviction under any one of the three tests might be under-protective. The line between the two extremes is difficult, for any compromise involves telling national jurisdictions that their traditions will not become part of international law. Furthermore, as Geoffrey Stone has argued,

> In the abstract, each of these approaches [based on intent, content, or consequences] is principled, coherent and defensible. In theory at least, each could enable the government to restrict especially evil, especially valueless or especially dangerous expression [respectively], without necessarily endangering 'that public opinion which is the final source of government in a democratic state'. As applied, however, these approaches may produce quite different outcomes.[104]

99. *Ibid.*, Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall, and Greve.
100. *Ibid.*, para. 1002.
101. See note 59.
102. See note 60.
103. *Ibid.*
104. G. Stone, 'The Origins of the "Bad Tendency" Test: Free Speech in Wartime', (2002) *Supreme Court Review* 444.

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I concur with Stone in believing that it is appropriate to require all three tests. Nevertheless, public choice principles suggest that there might not be a right answer to this important question, and for this reason I do not harshly criticize the Tribunal for not requiring all three tests.[105]

The main criticism of any decision, as suggested by Stone, should focus on the application of the tests, and on not their selection, as done above in sections 3.4 and 4.

7. Conclusion

In 2001 the former US Secretary of State, Henry Kissinger, and the Human Rights Watch executive director, Kenneth Roth, debated the merits of universal jurisdiction specifically and international criminal law more generally in the pages of *Foreign Affairs*. Roth argued that international institutions contribute to ending an era of impunity for criminal behaviour.[106] Today he could cite the differences in the treatment of incitement charges in Canadian courts from those in the International Criminal Tribunal for Rwanda as support for his proposition. Henry Kissinger could counter that international criminal law replaces the will of the people with a tyranny of unelected foreign judges.[107] He too can point to the *Nahimana* decision and its manipulation of precedent, law, and facts as grounds for concern.

We will know shortly which side is right when the Appeals Chamber reviews the trial chamber's holding in *Nahimana* and when an incitement case is brought before the International Criminal Court. Releasing Ferdinand Nahimana, Hassan Ngeze, and Jean-Bosco Barayagwiza will undoubtedly draw fire from governments and the media (as will a new trial), even though the manner in which these three individuals were convicted was problematic to say the least. Depending on one's point of view, the decision was pragmatic in overcoming problems in the drafting of the Tribunal's temporal jurisdiction, or it represents dangerous activism from an institution that lacks sufficient checks on its authority. National and regional courts too will have an opportunity either to embrace the bold decision made by the Tribunal or to criticize it and maintain their important function in the development of international criminal law.

105. Cf. F. Easterbrook, 'Ways of Criticizing the Court', (1982) 95 *Harvard Law Review* 802 (suggesting that when there are three possible positions, inconsistency or arbitrariness may result).
106. K. Roth, 'The Case for Universal Jurisdiction', (2001) *Foreign Affairs* (available online at www.foreignaffairs.org).
107. H. Kissinger, 'The Pitfalls of Universal Jurisdiction', (2001) *Foreign Affairs* (available online at www.foreignaffairs.org).