

THE SOUNDTRACK TO GENOCIDE:

Using Incitement to Genocide in the *Bikindi* Trial to Protect Free Speech and Uphold the Promise of Never Again

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INTRODUCTION

The promise to “never again” allow the crime of genocide is often made, although promises alone were not enough to protect the victims in Srebrenica and Kigali.¹ Legal concepts such as universal jurisdiction² and the Responsibility to Protect³ are being used, or at least considered, as ways to uphold this promise, but the Genocide Convention⁴ still remains the main means of protection. One of the Convention’s tools of prevention and punishment is the criminalization of “direct and public incitement to commit genocide.”⁵ The meaning of these seven controversial words will help decide where the international community draws the line between preventing the crime of crimes and protecting the fundamental right of free speech.⁶

The claims of genocide are increasing,⁷ while advocates are pushing for expanding the Convention’s boundaries.⁸ No one wants to allow the next genocide.

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¹ *E.g.*, Barack Obama, U.S. Sen., Guestbook of the Yad Vashem Holocaust Memorial Museum in Jerusalem (23 July 2008) (“Let our children come here and know this history so they can add their voices to proclaim *never again*.”); George W. Bush, U.S. President, Speech at the U.S. Holocaust Memorial Museum (18 Apr. 2007) (“[T]he words ‘*never again*’ do not refer to the past—they refer to the future.”); Bill Clinton, U.S. President, Speech to GAOR (21 Sep. 1999) (“It is easy to say *never again*, but much harder to make it so.”); Ronald Reagan, U.S. President, Speech to the international B’nai B’rith convention (6 Sep. 1984) (“Like you, I say in a forthright voice, ‘*Never again!*’”); Jimmy Carter, U.S. President, Remarks at the Presentation of the Final Report of the President’s Commission on the Holocaust (27 Sep. 1979) (“[W]e must forge an unshakable oath with all civilized people that *never again* will the world stand silent, *never again* will the world fail to act in time to prevent this terrible crime of genocide.”) (emphasis added).

² See generally Stephen Macedo, UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (2004).

³ See generally Gareth Evans, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (2008).

⁴ Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force 12 Jan. 1951) [hereinafter Genocide Convention].

⁵ *Id.* at art. 3(c).

⁶ William A. Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 73 (2000).

⁷ See, e.g., *Bolivia Governor Arrested on Genocide Charges*, INT’L HERALD TRIB., 16 Sep. 2008 (President Morales of Bolivia arrests an opposition governor under the charge of genocide); Megan K. Stack, *Russia’s Claim of Georgia Genocide in South Ossetia Hard to Verify*, L.A. TIMES, 18 Aug. 2008 (Prime Minister Putin justifies Russia’s invasion into Georgia with claims of preventing genocide); Anita Powell, *Africa Union Head: Kenya Facing Genocide*, ABC NEWS, 31 Jan. 2008 (Africa Union Chairman Konare warns of genocide in Kenya); H.R. Con. Res. 21, 110th Congress (2007) (enacted) (411-2 vote by House of Representatives urging the U.N. Security Council to charge Iran’s President Ahmadinejad with incitement to genocide for remarks about Israel); *Iran Accuses Israel of “Genocide” of Palestinians*, ASHARQ ALAWSAT, 10 May 2007 (Ahmadinejad accuses Israel of genocide against Palestinians).

⁸ See, e.g., David L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 STAN. J. INT’L L. 221, 264 (2007); David Luban, *Calling Genocide by Its Rightful Name: Lemkin’s Word, Darfur and the UN Report*, 7 CHI. J. INT’L L. 303, 320 (2006); Alycia T. Feindel, *Reconciling Sexual Orientation:*

No one wants to allow perpetrators to escape punishment. This does not mean that in striving towards “never again” we sacrifice free speech as a casualty of war. Freedom of speech is “the indispensable condition of nearly every other form of freedom.”⁹ A vague or overly expansive interpretation of incitement will be abused and misused by dictators in silencing artists, journalists, and genuine political opposition.¹⁰ A limited, well-defined interpretation will still allow for the intended purpose of prevention and punishment of genocide, yet respect the basic tenets of free expression.

The upcoming appeal of Rwandan musician Simon Bikindi, who was charged with incitement to genocide in various contexts, including direct calls to action, implicit appeals, music composition, and failure to prevent radio broadcasts of his songs, will allow the International Criminal Tribunal for Rwanda (ICTR) to clarify the elements of incitement to genocide. Based upon a review of the genocide jurisprudence and the lessons learned from the American experience, I propose the following test: whether the speaker directly, seriously, and publicly urges the commission of genocide in the near future and that the message is reasonably likely to produce such action. Explicitly incorporating an imminence standard will permit incitement to genocide to serve its intended purpose of prevention while safeguarding freedom of speech.

This analysis is divided into six parts. Part I reviews the background of Simon Bikindi whose case has the potential to elucidate the incitement to genocide standards. Part II tracks the development of international law in response to the Holocaust and Rwandan genocide, while Part III examines nearly a century of U.S. experience in balancing speech and security. Part IV canvasses the proposed tests leading to Part V, which explains why the proposed imminence test should become the accepted standard. Lastly, Part VI details the test’s application in Bikindi’s appeal.

I. SIMON BIKINDI

Simon Bikindi, once Rwanda’s most popular musician, is now convicted of being its most deadly. Bikindi was a child prodigy in traditional Rwandan music and dance.¹¹ At the age of 22, he was hired by the Ministry of Youth and Association Movements to organize song and dance displays for honored visitors such as the Pope.¹² He soon became Rwanda’s “Michael Jackson,” combining the old with the new, by rapping in English, French, and Kinyarwanda (native Rwandan language), set to traditional folk tunes.¹³

At the time of the genocide, Bikindi was still an official in the Ministry of Youth and Association Movements,¹⁴ as well as leader of the Irindiro Ballet.¹⁵ He was also closely connected to the ruling Hutu nationalist party, *Le Mouvement Républicain National pour la Démocratie et le Développement* (MRND).¹⁶ He was indicted for

Creating a Definition of Genocide that Includes Sexual Orientation, 13 MICH. ST. J. INT’L L. 197, 225 (2005).

⁹ *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). See also *Prosecutor v. Bikindi*, Case No. ICTR 01-72-T, Judgment, ¶ 382 (2 Dec. 2 2008) (“[F]reedom of expression is widely considered to be the very foundation of successful democracies.”).

¹⁰ See *Prosecutor v. Nahimana*, Case No. ICTR 99-52-A, Appeals Judgment, Partly Dissenting Opinion of Judge Meron ¶ (28 Nov. 2007).

¹¹ Donald G. McNeil, Jr., “Killer Songs,” N.Y. TIMES, 17 Mar. 2002.

¹² *Id.*

¹³ *Id.*

¹⁴ *Prosecutor v. Bikindi*, Case No. ICTR 01-72-T, Judgment, ¶ 4 (2 Dec. 2008).

¹⁵ *Id.* at ¶ 41.

¹⁶ *Id.* at ¶ 402.

six counts under the Genocide Convention by the ICTR, including committing murder. However, for the purposes of this analysis, the focus is only the charge for which he was convicted: direct and public incitement to commit genocide.

The easy question for the Tribunal is the explicit instigation. The Prosecution alleges late in the genocide, Bikindi, leading a caravan of MRND militia known as *Interahamwe*, announced over a public address system in his vehicle that, “The majority population, it’s you, the Hutu I am talking to. You know the minority population is the Tutsi. Exterminate quickly the remaining ones.”¹⁷

The next contextual category of incitement is implicit or coded instigation through speeches and performances. On several occasions it is alleged Bikindi spoke at meetings with coded references of exterminations.¹⁸ For example, in early 1994, he allegedly declared to a stadium full of people, “See how the Tutsi are exterminating you, the Hutu. If you do not react right away it’s your fault”¹⁹ The speech was then repeatedly broadcasted on the radio station *Radio Télévision Libre des Mille Collines* (RTLTM).²⁰

The third category of possible incitement posits that Bikindi poisoned the hearts and minds of his listeners. The Prosecution claims Bikindi composed, recorded, and performed three particular songs that manipulated the politics and history of Rwanda to promote Hutu solidarity and encourage ethnic hatred.²¹ Evidence includes Bikindi songs that often preceded RTLTM broadcasts, which called for attacks on the enemy.²² Witnesses testified the killers sang these songs as they murdered.²³ One of his most explicit songs was *Nanga Abahutu* (I Hate Hutus)²⁴:

I hate these Hutus, these de-Hutuized Hutus, who have renounced their identity, dear comrades.

I hate these Hutus, these Hutus who march blindly, like imbeciles.

This species of naïve Hutus who join a war without knowing its cause.

I hate these Hutus who can be brought to kill and who, I swear to you, kill Hutus, dear comrades.

And if I hate them, so much the better. ²⁵

Lastly, the Prosecution argued that under Rwandan law, Bikindi, as an author, had the right to forbid the broadcasts of his compositions.²⁶

Bikindi argues, “The songs I wrote in the 1990s were not for the government; they were what I felt inside myself” and that “[t]he peasants were blind. They were killing each other, and the politicians were giving them 10 francs to go kill someone. When I sang ‘Nanga Abahutu’ and the rest, I was saying ‘Stop!’ I was asking everybody to stop the chaos, stop the killing.”²⁷ The Defense claims Bikindi never advocated murder and that his performances were his duties as a government em-

¹⁷ *Id.* at ¶ 266.

¹⁸ Prosecutor v. Bikindi, Case No. ICTR 01-72-I, Amended Indictment, ¶ 34 (15 June 2005).

¹⁹ *Id.* at ¶ 37.

²⁰ *Id.*

²¹ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 264 (2 Dec. 2008).

²² *Id.* at ¶ 256.

²³ *Id.* at ¶ 253.

²⁴ There is debate over the song titles. For example the Defense argues *Nanga Abahutu’s* title is *Akabyutso* (The Awakening). See *id.* at ¶ 189.

²⁵ McNeil, *supra* note 11.

²⁶ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 116 (2 Dec. 2008).

²⁷ McNeil, *supra* note 11.

ployee.²⁸ Furthermore, they argue the re-contextualizing of his music by the genocidaires was outside of his control.²⁹

The trial took 61 days with 57 witnesses.³⁰ The Prosecution, in closing arguments, said, “This case is not the trial of a singer for his musical productions. Artistic liberty, freedom of thought, expression and speech are not on trial in this case,”³¹ because if Bikindi was only a murderer and not a musician, he would not be one of the select few chosen for prosecution by the Tribunal.³² This decision has the potential to become a landmark case in defining the boundaries of incitement to genocide.

II. EVOLUTION OF INCITEMENT TO GENOCIDE

A. International Military Tribunal (IMT) at Nuremberg

The origins of criminalizing incitement to genocide began at the International Military Tribunal at Nuremberg with the trials of Julius Streicher and Hans Fritzche. At the end of World War II, the allied powers considered three courses of action for their high level Nazi prisoners: freeing them, punishing them by political decision, or providing them a good-faith trial for specific offenses with the opportunity to defend themselves.³³ The allies chose the latter. The Tribunal, instead of becoming a show trial put on by the victors, established “a victory for the ‘rule of morality,’ which, in turn, became a victory for ‘the rule of law.’”³⁴ While Nuremberg had many flaws, its legacy is considered one of the high points in the history of law³⁵ and remains a guiding light to the gravest matters of justice and human rights.³⁶ The following sections will focus on the trials of Julius Streicher, publisher and editor-in-chief of the weekly newspaper *Der Sturmer*, and Hans Fritzche, Chief of German broadcasting. Both were charged with crimes against humanity for their role in inciting the mass murder of Jews.³⁷

1. Julius Streicher

Julius Streicher has been called the “perfect anti-Semite”³⁸ and the “Jew-

²⁸ *Id.*

²⁹ *Id.*

³⁰ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 6 (2 Dec. 2008).

³¹ Press Release, International Criminal Tribunal for Rwanda, Closing Arguments Presented in Bikindi Case, ICTR/INFO-9-2-562.EN (27 May 2008).

³² See McNeil, *supra* note 11 (quoting an U.N. official as saying, “He’s a big fish because of his musical compositions”).

³³ Robert H. Jackson, *Nuremberg in Retrospect: Legal Answers to International Lawlessness*, an address to the Canadian Bar Association (1 Sep. 1949), reprinted in Guénaël Métraux (ed.), PERSPECTIVES ON THE NUREMBERG TRIAL 357 (2008).

³⁴ Thomas W. Simon, THE LAWS OF GENOCIDE: PRESCRIPTIONS FOR A JUST WORLD 22 (2007).

³⁵ Norbert Ehrenfreund, THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIAL CHANGED THE COURSE OF HISTORY 215-19 (2007).

³⁶ See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 563 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 474, 486, 526, 550, 563 (2 Sep. 1998).

³⁷ Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485, 509 (2008). Since Nuremberg predated the codification of incitement to genocide they were charged with crimes against humanity.

³⁸ Eugene Davidson, THE TRIAL OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG 40 (1997).

Baiter of Nuremberg.”³⁹ Streicher participated in actions ranging from setting a crane in motion for the destruction of a synagogue to performing an anti-Semitic puppet show for children.⁴⁰ Submitted into evidence were 23 articles calling for the extermination of Jews published in *Der Sturmer* between 1938 and 1941.⁴¹ The Tribunal found that “[i]n his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution.”⁴²

Streicher argued the “solution” to the Jewish problem he advocated for was not murder. However, the Tribunal disagreed on the nature of his intent based upon his writings.⁴³ On December 25, 1941, Streicher wrote and published, “[i]f the danger of the reproduction of that curse of God in Jewish blood is finally to come to an end, then there is only one way—the extermination of that people whose father is the devil.”⁴⁴ 26 more articles between August 1941 and September 1944 were submitted into the record, 12 Streicher wrote himself, demanding the extermination of the Jews at a time when he knew mass executions were taking place.⁴⁵ The Tribunal found Streicher guilty for “incitement to murder and extermination”⁴⁶ and sentenced him to death by hanging.⁴⁷ The defining elements of his conviction were his knowledge of the organized extermination of the Jews and his attempt to poison the minds of Germans.⁴⁸

2. Hans Fritzsche

Hans Fritzsche was best known as a radio commentator with his program, “Hans Fritzsche Speaks,” as well as being one of the top leaders of the Propaganda Ministry.⁴⁹ While Fritzsche’s speeches showed “definite anti-Semitism,” they did not “urge persecution or extermination of Jews.”⁵⁰ It is interesting to contrast Fritzsche’s statement that the war was caused by the Jews and that their fate turned out “as unpleasant as the Fuhrer predicted,”⁵¹ with Streicher, who published, “A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.”⁵² The clear distinction was knowledge of the Holocaust. The Tribunal found “no evidence that he was aware of their extermination,”⁵³ unlike Streicher who was proven to have known of the atrocities.⁵⁴

³⁹ Henry T. King, Jr., et al., *Origins of the Genocide Convention*, 40 CASE W. RES. J. INT’L L. 13, 20 (2007-2008).

⁴⁰ Davidson, *supra* note 38, at 47-50.

⁴¹ IMT Judgment, 1 Oct. 1946, reprinted in THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY, Part 22, at 548 (1946) [hereinafter Nuremberg Judgment].

⁴² *Id.* at 547.

⁴³ *Id.* at 549.

⁴⁴ *Id.* at 548.

⁴⁵ *Id.* at 548-49.

⁴⁶ *Id.* at 549.

⁴⁷ Davidson, *supra* note 38, at 56-7.

⁴⁸ Gregory S. Gordon, *A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT’L L. 139, 144 (2004).

⁴⁹ Nuremberg Judgment, *supra* note 41, at 582-83.

⁵⁰ *Id.* at 584.

⁵¹ *Id.*

⁵² *Id.* at 548.

⁵³ *Id.* at 584.

⁵⁴ *Id.* at 549.

The Tribunal found Fritzche not guilty since his broadcasts were not “intended to incite the German people to commit atrocities on conquered peoples” but “rather to arouse popular sentiment in support of Hitler and the German war effort.”⁵⁵ He was merely a “conduit” of the messages dictated from above.⁵⁶ It is important Fritzche made no explicit calls for extermination, which would have been strong circumstantial evidence of specific intent to incite.⁵⁷ Without such evidence the Tribunal found his goal to be political speech in support of his leader and his country.

B. Drafting the Convention on the Prevention and Punishment of the Crime of Genocide

After Nuremberg, the international community decided a formal set of laws were needed for such atrocity, which led to the Convention on the Prevention and Punishment of the Crime of Genocide. There was fierce debate during the drafting including whether or not incitement should even be included in the Convention. The United States attempted to have the entire incitement provision deleted.⁵⁸ Arguments for removing the incitement provision included that it was a threat to free speech,⁵⁹ was unnecessary with the inclusion of the crime of conspiracy,⁶⁰ could be used for harm by unjust courts,⁶¹ and would be a source of international controversy.⁶²

There were two main arguments used to oppose the U.S. First, the incitement provision did not endanger free speech.⁶³ Second, many countries argued that criminalizing incitement was necessary to prevent future genocides.⁶⁴ The U.S. addressed the crux of the matter when it's representative, decades before the U.S. adoption of the *Brandenburg* imminence standard, said:

[T]he convention should not only punish but also prevent genocide. That was a general statement on which there was universal agreement but which could not settle the question. The real problem was to determine how far back it was required to go to prevent the crime⁶⁵

The U.S. amendment to delete incitement from the Genocide Convention

⁵⁵ *Id.* at 585.

⁵⁶ *Id.* at 583.

⁵⁷ Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 45-46 (1994).

⁵⁸ U.N. GAOR, 3d Sess., Eighty-fourth mtg., at 214, U.N. Doc. A/C.6/SR.84 (26 Oct. 1948) [hereinafter Eighty-fourth mtg.] (Maktos, United States).

⁵⁹ *id.* (“The convention might thus serve to encourage needless repressive measures.”); *Id.* at 217 (Arancibia Lazo, Chile) (“[I]ts inclusion among the punishable acts might give rise to many political difficulties and unjust accusations, made simply for the sake of propaganda.”).

⁶⁰ *Id.* at 214 (Maktos, United States), 218 (Fitzmaurice, United Kingdom).

⁶¹ *See id.* at 217-18 (Guerreiro, Brazil).

⁶² *Id.* at 218 (Fitzmaurice, United Kingdom).

⁶³ *See, e.g., id.* at 215 (Lachs, Poland) (“[F]reedom must not be so great as to permit the Press to engage in incitement to genocide.”); *id.* at 216 (Spanien, France) (“[F]reedom of speech . . . could not in any way imply a right to incite people to commit a crime.”).

⁶⁴ *See, e.g., id.* at 219 (Morozov, Union of Soviet Socialist Republics) (“It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so”); U.N. GAOR, 3d Sess., Eighty-fifth mtg., at 214, U.N. Doc. A/C.6/SR.85 (27 Oct. 1948) [hereinafter Eighty-fifth mtg.] (Manini y Rios, Uruguay) (“[T]o punish incitement to genocide was the best method of preventing the perpetration of that crime.”).

⁶⁵ Eighty-fifth mtg., *supra* note 64, at 224 (Maktos, United States).

was rejected by a vote of 27 to 16, with five abstentions.⁶⁶ While the international community believed in the importance of preventing incitement, they were uncomfortable with the wording. Belgium, immediately after the U.S. amendment failed, successfully proposed to change the provision from “direct incitement in public or in private to commit genocide whether such incitement be successful or not” to “direct and public incitement to commit genocide,”⁶⁷ which set the final arrangement of the text.⁶⁸ On December 9, 1948, less than five years after the creation of the term genocide, the UN General Assembly unanimously approved the Genocide Convention.⁶⁹

C. International Criminal Tribunal for Rwanda (ICTR)

After the creation of the Genocide Convention, the incitement provision laid dormant for decades until the Rwanda crisis. The majority of the incitement to genocide jurisprudence has come from the decisions of the International Criminal Tribunal for Rwanda (ICTR). The ICTR is an ad hoc United Nations tribunal that was created on November 8, 1994 in response to reports of “genocide and other systematic, widespread and flagrant violations of international humanitarian law” with the goal of putting “an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”⁷⁰ The ICTR Statute duplicated the language concerning incitement from the Genocide Convention.⁷¹ Since its inception, the ICTR has had two guilty pleas,⁷² one acquittal,⁷³ and five convictions,⁷⁴ with Bikindi’s conviction on appeal, in its incitement prosecutions. The key cases in the ICTR’s development of incitement are the Akayesu, Media, and Bikindi decisions.

1. Jean-Paul Akayesu

Jean-Paul Akayesu, the bourgmestre (mayor) of Taba, was the first person

⁶⁶ *Id.* at 229 (In favor: Turkey, Union of South Africa, United Kingdom, United States of America, Belgium, Bolivia, Brazil, Canada, Chile, Dominican Republic, Iran, Luxembourg, Netherlands, New Zealand, Nicaragua, Panama. Against: Sweden, Ukrainian Soviet Socialist Republic, Union of the Soviet Socialist Republics, Uruguay, Venezuela, Yemen, Yugoslavia, Argentina, Australia, Byelorussian Soviet Socialist Republic, China, Columbia, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Ethiopia, France, Haiti, India, Liberia, Mexico, Norway, Peru, Philippines, Poland. Abstaining: Saudi Arabia, Siam, Syria, Afghanistan, Greece.)

⁶⁷ *Id.* at 230-32 (The deletion of the words “or in private” passed twenty-six votes to six, with ten abstentions. The deletion of the words “whether such incitement be successful or not” was approved nineteen votes to twelve against, with fourteen abstentions.)

⁶⁸ The Soviet Union later attempted to change the Convention to criminalize all forms of public propaganda aimed at inciting racial, national, or religious hatred. U.N. GAOR, 3d Sess., Eighty-sixth mtg., at 244, U.N. Doc. A/C.6/SR.86 (28 Oct. 1948) (Morozov, Union of Soviet Socialist Republics). It failed twenty-eight votes to eleven, with four abstentions. U.N. GAOR, 3d Sess., Eighty-seventh mtg., at 253, U.N. Doc. A/C.6/SR.87 (29 Oct. 1948).

⁶⁹ G.A. Res. 260 (III), U.N. Doc. A/RES/3/260 (9 Dec. 1948).

⁷⁰ S.C. Res. 955, U.N. Doc. S/RES/955 (8 Nov. 1994).

⁷¹ *Id.* at art. 2(3)(c) (“Direct and public incitement to commit genocide.”).

⁷² Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 24 (1 June 2000); Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 40 (3) (4 Sep. 1998).

⁷³ Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 858, 892 (28 Nov. 2007).

⁷⁴ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 426 (2 Dec. 2008); Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 857, 886 (28 Nov. 2007); Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment and Sentence, ¶ 437 (16 May 2003); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 674 (2 Sep. 1998).

prosecuted for incitement to genocide.⁷⁵ On April 19, 1994, Akayesu joined a crowd of over 100 people gathered around the body of a young Hutu militiaman and urged the population to unite in order to eliminate their sole enemy, which were the accomplices of the RPF. A linguistic expert testified was a call to kill all Tutsi.⁷⁶ Akayesu testified the killings started later that day.⁷⁷ The Trial Chamber was satisfied beyond a reasonable doubt that his speech “had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi” and “the said acts constitute the crime of direct and public incitement to commit genocide”⁷⁸

The Chamber defined “direct” in a manner much broader than necessary to convict Akayesu.⁷⁹ The Chamber stressed the importance of context and that the words be “viewed in the light of its cultural and linguistic content.”⁸⁰ The Chamber went further and expanded the definition of direct to include explicit and implicit messages.⁸¹ To do this task, the Chamber decided to consider incitement “on a case-by-case basis” as to “whether the persons for whom the message was intended immediately grasped the implication thereof.”⁸² The Chamber defined direct and public incitement as:

directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.⁸³

The Chamber’s last major contribution to jurisprudence was deciding that incitement to genocide constituted such a great risk it should be considered an inchoate crime meaning inciters who fail to produce genocide would still be punished as if they were successful.⁸⁴ Akayesu was sentenced to life in prison.⁸⁵

2. Media Trial

The next major decision came from three cases joined together into what became known as the Media Trial.⁸⁶ The controversial Media Trial decision has been criticized as “the worst decision in the history of international justice”⁸⁷ as well as being hailed as “a landmark in the jurisprudence of hate speech.”⁸⁸ The defendants were Hassan Ngeze, the founder, owner, and editor-in-chief of the newspaper *Kan-*

⁷⁵ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 54 (2 Sep. 1998).

⁷⁶ *Id.* at ¶ 673 (i-iv).

⁷⁷ *Id.* at ¶ 355.

⁷⁸ *Id.* at ¶ 674.

⁷⁹ *Id.* at ¶ 557.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at ¶ 558.

⁸³ *Id.* at ¶ 559.

⁸⁴ *Id.* at ¶ 562.

⁸⁵ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Sentence, Count 4 (2 Oct. 1998).

⁸⁶ Marlise Simons, *Trial Centers on Role of Press During Rwanda Massacre*, N.Y. TIMES, 3 Mar. 2002.

⁸⁷ Joel Simon, *Murder by Media: Why the Rwandan Genocide Tribunal Went Too Far*, SLATE (11 Dec. 2003) available at www.slate.com/id/2092372 (quoting John Floyd, the Washington, D.C., lawyer who defended Ngeze).

⁸⁸ Gordon, *supra* note 48, at 141 (Prof. Gordon was the Legal Officer and Deputy Team Leader for the Prosecution in the Media Trial).

gura,⁸⁹ Ferdinand Nahimana, a professor of history at the National University of Rwanda, co-founder of RTLM, and political adviser to the interim government starting April 6, 1994,⁹⁰ and Jean-Bosco Barayagwiza, a lawyer, co-founder of RTLM, Director of Political Affairs in the Ministry of Foreign Affairs, and a leader in the Hutu political party *Coalition pour la Defense de la Republique* (CDR).⁹¹

Ngeze started publishing *Kangura* in May 1990, which soon became the most well known Rwandan newspaper, domestically and internationally, with a circulation of 1,500 to 3,000 copies.⁹² The Chamber found that the editorials and articles “consistently portrayed the Tutsi as wicked and ambitious, using women and money against the vulnerable Hutu” and that articles like “A Cockroach Cannot Give Birth to a Butterfly” portrayed Tutsi as innately evil.⁹³ One egregious example, issue number 26, published in November 1991, asked, “WHAT WEAPONS SHALL WE USE TO CONQUER THE INYENZI ONCE AND FOR ALL??” with a drawing of a machete next to it.⁹⁴

Nahimana and Barayagwiza were members of the six-person Steering Committee of the RTLM⁹⁵ that was created to promote the political views of the MRND.⁹⁶ It became very popular and was considered to have some of the best on-air talent and programming in Rwanda.⁹⁷ The Trial Chamber found that both men effectively controlled the management of the station before April 6, 1994, and that they had *de jure* authority afterwards.⁹⁸ On October 25, 1993, Faustino Rucogoza, the Minister of Information, sent a letter to RTLM chastising them for taking advantage of the *coup d’etat* in neighboring Burundi “to broadcast statements and programs encouraging violence and undermining the path to national unity”⁹⁹ Several meetings followed after the Ministry of Information concluded RTLM was continuing to broadcast false propaganda and ethnic hatred in violation of their broadcast license. However, the case against RTLM was discontinued when Minister Rucogoza and his family were murdered on April 7, 1994.¹⁰⁰

The RTLM broadcasts after the violence of April 6 became much more explicit. A May 13th broadcast exhorted people, “to exterminate the Tutsi from the surface of the earth”¹⁰¹ RTLM or “Radio Machete”¹⁰² was found to broadcast names and directions of Tutsi and Hutu political opponents who were subsequently killed and the station relentlessly sent the message “the Tutsi were the enemy and had to be eliminated once and for all.”¹⁰³

After three years and over 100 witnesses the Trial Chamber, in a 361-page decision, found all three defendants guilty of incitement to genocide.¹⁰⁴ Barayagwiza was sentenced to thirty-five years¹⁰⁵ and Nahimana and Ngeze were each sentenced

⁸⁹ Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1101 (3 Dec. 2003).

⁹⁰ *Id.* at ¶ 1099.

⁹¹ *Id.* at ¶ 1100.

⁹² *Id.* at ¶ 122.

⁹³ *Id.* at ¶ 187.

⁹⁴ *Id.* at ¶ 160.

⁹⁵ *Id.* at ¶ 492.

⁹⁶ *Id.* at ¶ 490.

⁹⁷ Colette Braeckman, *Incitement to Genocide*, in Roy Gutman & David Rieff (eds.), *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 192, 192 (1999).

⁹⁸ *Id.* at ¶ 567-68.

⁹⁹ *Id.* at ¶ 571.

¹⁰⁰ *Id.* at ¶ 617-19.

¹⁰¹ *Id.* at ¶ 397.

¹⁰² *Id.* at ¶ 1031.

¹⁰³ *Id.* at ¶ 487-88.

¹⁰⁴ *Id.* at ¶ 1092-94.

¹⁰⁵ *Id.* at ¶ 1107.

to life.¹⁰⁶ The Tribunal found that the defendants used “the print and radio media systematically, not only for their own words but the words of many others, . . . for the mobilization of the population on a grand scale.”¹⁰⁷ For example, the Tribunal found that Nahimana “[w]ithout a firearm, machete or any physical weapon . . . caused the deaths of thousands of innocent civilians.”¹⁰⁸

There were several problems in the Trial Chamber’s decision, which muddled the water as to what constitutes incitement. The Chamber spent much of its analysis conflating international law on hate speech and racial discrimination with incitement to genocide.¹⁰⁹ By merging the International Covenant on Civil and Political Rights,¹¹⁰ the International Convention on the Elimination of all Forms of Racial Discrimination,¹¹¹ and the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹¹² into the Genocide Convention, the Trial Chamber confused incitement’s elements with hate speech.¹¹³ At the same time, the Chamber ignored the more appropriate U.S. law on incitement, only briefly discussing it in response to an argument by Ngeze’s attorney that it should apply¹¹⁴ and even then the Chamber’s examination “was more caricature than analysis.”¹¹⁵

The Appeals Chamber, in November 2007, scaled back the Trial Chamber’s holding with a 428-page decision of its own.¹¹⁶ The Appeals Chamber concurred that Nahimana and Ngeze were guilty,¹¹⁷ but due to errors made by the Trial Chamber, their sentences were reduced.¹¹⁸ Barayagwiza was acquitted of incitement because the Appeals found he lacked authority over RTLM once the genocide began¹¹⁹ and did not have the necessary effective control over the CDR militants to constitute incitement to genocide.¹²⁰ The Appeals made three important points. First, that defendants “cannot be held accountable for hate speech that does not directly call for the commission of genocide” and “the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide.”¹²¹ Second, they confirmed the *Akayesu* reasoning that the message must be considered in its entirety,¹²² taking into account the context of how it was understood by the audience¹²³ and the

¹⁰⁶ *Id.* at ¶ 1105, 1108.

¹⁰⁷ *Id.* at ¶ 979.

¹⁰⁸ *Id.* at ¶ 1099.

¹⁰⁹ See Diane F. Orentlicher, *International Criminal Tribunals in the 21st Century: Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 21 AM. U. INT’L L. REV. 557, 572-74 (2006).

¹¹⁰ *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 984-90 (3 Dec. 2003).

¹¹¹ *Id.* at ¶ 985.

¹¹² *Id.* at ¶ 991-99.

¹¹³ See Benesch, *supra* note 37, at 492-93.

¹¹⁴ *Id.* at ¶ 1010.

¹¹⁵ Kevin W. Goering et al., *Why U.S. Law Should Have Been Considered in the Rwanda Media Convictions*, 22 COMM. LAW. 10, 10 (2004); *But see* Catherine A. MacKinnon, *International Decisions, Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, 98 AM. J. INT’L L. 325, 330 (2004) (“The ICTR’s pathbreaking ruling shows that equality and speech rights can be harmonized when courts face the power of media to kill.”).

¹¹⁶ *Prosecutor v. Nahimana*, Case No. ICTR 99-52-A, Appeals Judgment (28 Nov. 2007).

¹¹⁷ *Id.* at ¶ 857, 886.

¹¹⁸ *Id.* at Disposition (Nahimana went from life to thirty-years and Ngeze from life to thirty-five years.).

¹¹⁹ *Id.* at ¶ 858.

¹²⁰ *Id.* at ¶ 882-83.

¹²¹ *Id.* at ¶ 693.

¹²² *Id.* at ¶ 739.

¹²³ *Id.* at ¶ 698-701.

speaker.¹²⁴ Lastly, they required “the only reasonable interpretation of the broadcast” to be incitement in order for the message to be criminal.¹²⁵

The Appeals Chamber found that the Trial Chamber did not clearly identify which specific acts constituted incitement to genocide.¹²⁶ They then took up the task of reviewing the messages but failed to better define the legal limits.¹²⁷ Instead, the Appeals repeatedly ruled that it could not “conclude beyond a reasonable doubt that the broadcast was a direct and public incitement to commit genocide.”¹²⁸ U.S. law, while more protective of speech than most countries, would have still convicted the defendants with the benefit of its clearly defined legal standards.¹²⁹

3. *Simon Bikindi*

The last major decision by the ICTR was Simon Bikindi. On December 2, 2008, the Tribunal convicted Bikindi of incitement and sentenced him to fifteen years.¹³⁰ The Trial Chamber stated its current understanding of incitement in that it must be more than a vague or indirect suggestion.¹³¹ The principal consideration is context, specifically, the cultural and linguistic content, political and community affiliation of the author, its audience, and whether the members of the audience to whom the message was directed understood the implication of the message.¹³² Lastly, a direct appeal may be implicit, as opposed to an explicit call for extermination, if done in a particular context.¹³³ This must be proved beyond a reasonable doubt and, if based on circumstantial evidence, it must be the only reasonable conclusion from the evidence.¹³⁴

The Trial Chamber found Bikindi guilty only of the explicit instigation to exterminate the Tutsi using a public address system while driving with a militia convoy.¹³⁵ Since the Chamber found the two witnesses to be credible, statements such as “do not spare anybody,” in the context of being surrounded by armed militia members to roadside spectators during a time of ongoing genocide clearly qualifies as incitement.¹³⁶

The second contextual category of incitement is implicit or coded exhorting through speeches and performances. Generally, the Tribunal will allow for implicit incitement if committed in the proper context.¹³⁷ The Prosecution failed to provide adequate evidence proving Bikindi’s actions or even attendance at most of the alleged events.¹³⁸ The insufficient evidence limited the Chamber’s ruling on the mat-

¹²⁴ *Id.* at ¶ 737.

¹²⁵ *Id.* at ¶ 746.

¹²⁶ *Id.* at ¶ 726-27.

¹²⁷ See Benesch, *supra* note 37, at 516 (“Disappointingly, it seems that the appeals panel drew a critical line based on a lack of evidence, not a legal distinction.”).

¹²⁸ Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 741-51 (28 Nov. 2007).

¹²⁹ This question will be examined more in-depth in Part III. See, e.g., Tonja Salomon, *Freedom of Speech v Hate Speech: The Jurisdiction of ‘Direct and Public Incitement to Commit Genocide,’* in Ralph Henham & Paul Behrens (eds.), *THE CRIMINAL LAW OF GENOCIDE: INTERNATIONAL, COMPARATIVE AND CONTEXTUAL ASPECTS* 141, 151 (2007); Goering, *supra* note 115, at 12.

¹³⁰ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 460 (Dec. 2, 2008).

¹³¹ *Id.* at ¶ 387.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at ¶ 30.

¹³⁵ *Id.* at ¶ 281.

¹³⁶ *Id.* at ¶ 423.

¹³⁷ *Id.* at ¶ 387.

¹³⁸ *Id.* at ¶ 149, 151, 155, 156, 158, 161, 167, 171, 176, 181, 182.

ter, but it appeared imminence became part of the context equation. The Chamber held beyond a reasonable doubt that Bikindi advocated the killing of serpents, a coded reference to Tutsi, at an MRND rally.¹³⁹ Yet he was not convicted because the Prosecution failed to establish that anti-Tutsi violence occurred “immediately thereafter.”¹⁴⁰

The third category includes the claim that Bikindi poisoned the hearts and minds of his listeners with his words and music. Unlike the Media case, the Trial Chamber remained rather silent on the issue finding that Bikindi had the specific intention to encourage ethnic hatred,¹⁴¹ but not the specific intent to incite murder while composing.¹⁴² Also, the Prosecution could not prove Bikindi’s role in disseminating his songs during the genocide.¹⁴³

Lastly the Prosecution failed to prove that Bikindi had a duty under Rwandan law to stop the broadcast of his songs on the radio and held without a legal duty the mere acquiescence was not sufficient to find guilt.¹⁴⁴

D. Future Developments in International Law

With the forthcoming closing of the ICTR, other courts will soon take the lead in deciding the meaning of incitement to genocide. National courts have already been used for some cases¹⁴⁵ and international courts have adopted the same statute as the Genocide Convention,¹⁴⁶ although their rulings have had little impact on defining the crime.¹⁴⁷ As this decentralization of the jurisprudence continues, it is imperative for the ICTR to use their moment of leadership to add clarity to the elements of incitement to genocide.

III. UNITED STATES EXPERIENCE WITH INCITEMENT TO GENOCIDE

After reviewing the recent developments of international law concerning incitement, an in-depth comparison to the evolution of incitement in the U.S. will help to demonstrate some of the flaws in the current reasoning of incitement to genocide. The First Amendment instructs Congress to pass no law abridging the freedom of speech, or of the press.¹⁴⁸ The U.S. is considered one of the most protective nations of free speech¹⁴⁹ and, while arguably inconsistent in its application

¹³⁹ *Id.* at ¶ 141.

¹⁴⁰ *Id.* at ¶ 283.

¹⁴¹ *Id.* at ¶ 254.

¹⁴² *Id.* at ¶ 255.

¹⁴³ *Id.* at ¶ 421.

¹⁴⁴ *Id.* at ¶ 439.

¹⁴⁵ *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.R. 100 (Can.).

¹⁴⁶ Along with the ICTR the International Criminal Tribunal for the Former Yugoslavia has adopted the same language from the Genocide Convention but has not used it for any indictments. S.C. Res. 827, U.N. Doc. S/RES/827 art. 4(3)(c) (25 May 1993). The International Criminal Court also adopted the language. See Rome Statute of the International Criminal Court, U.N. Doc. A/ CONF.183/9, art. 25(3)e (17 July 1998). However there is some debate on whether incitement is a crime or an element to the crime in how the Rome Statute was structured. See Thomas E. Davies, Note, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide* 22 HARV. HUM. RTS. J. 245 (2009).

¹⁴⁷ See, e.g., Case Concerning the Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) 1996 I.C.J. Judgment ¶ 417 (26 Feb. 2007) available at www.icj-cij.org/docket/files/91/13685.pdf.

¹⁴⁸ U.S. CONST. amend. I.

¹⁴⁹ *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1010 (3 Dec. 2003).

abroad¹⁵⁰ and possibly in times of conflict,¹⁵¹ the near century of experience through world wars and times of terror should inform the development of the incitement to genocide jurisprudence.

A. The Early Experiments

The modern American experiment of balancing speech and security began with the passage of the Espionage Act of 1917.¹⁵² The Act criminalized numerous forms of speech that interfered or opposed U.S. military policies during times of war.¹⁵³ There was scant precedent for the lower courts leading to very different types of analysis. Learned Hand, as a district court judge, wrote, “If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.”¹⁵⁴ Hand’s test in *Masses* would only look at the words themselves, and if they solely counseled criminal acts, they could be forbidden; all other messages were permissible.¹⁵⁵

The Ninth Circuit, however, asked, “whether the natural and probable tendency and effect of the words quoted therefrom are such as are calculated to produce the result condemned by the statute.”¹⁵⁶ This “bad tendency” test allowed the government to suppress words opposing the perceived common good. The court could presume the speaker intended the probable results of the message, so under the doctrine of constructive intent the mere utterance of words found to have bad tendencies would be enough to infer the requisite *mens rea*.¹⁵⁷ Most federal courts adopted this test.¹⁵⁸

The government was active in its prosecutions commencing 1,956 cases with 877 convictions.¹⁵⁹ This vigilance brought the U.S. Supreme Court into the fray with *Schenck v. United States*.¹⁶⁰ Justice Holmes declared the test to be “whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”¹⁶¹ While the phrase “clear and present danger” could be interpreted narrowly, Holmes elaborated that the “tendency and the intent with which it is done are the same,”¹⁶² making the clear and present danger test little more than another “intent and bad ten-

¹⁵⁰ See generally LyriSSa Barnett Lidsky, *Brandenburg and the United States’ War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009 (2002).

¹⁵¹ See Lee C. Bollinger, *Epilogue*, in Lee C. Bollinger & Geoffrey R. Stone (eds.), *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 311, 313 (2002) (“The fact that the last thirty years since *Brandenburg* have been remarkably peaceful and prosperous means that the understandings we now have about the meaning of free speech have not really been tested.”).

¹⁵² Larry Alexander, *Incitement and Freedom of Speech*, in David Kretzmer & Francine Kershman Hazan (eds.), *FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY* 101, 102 (2000).

¹⁵³ Espionage Act of 1917, ch. 30, § 3, Pub. L. No. 65-24, 40 Stat. 219 (1917).

¹⁵⁴ *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917).

¹⁵⁵ Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 725 (1975).

¹⁵⁶ *Shaffer v. United States*, 255 F. 886, 887 (9th Cir. 1919).

¹⁵⁷ Stephen M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192, 196-97 (2008).

¹⁵⁸ Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 421 (2002).

¹⁵⁹ Zachariah Chafee, Jr., *FREE SPEECH IN THE UNITED STATES* 52 n.30 (1941).

¹⁶⁰ 249 U.S. 47 (1919).

¹⁶¹ *Id.* at 52.

¹⁶² *Id.*

gency” test as used in *Shaffer*.¹⁶³

The Supreme Court continued unanimous decisions under this reasoning¹⁶⁴ until *Abrams v. United States*.¹⁶⁵ Justice Holmes, joined by Brandeis, dissented from the majority and attempted to change the test he established just eight months previously.¹⁶⁶ Holmes introduced the “marketplace of ideas” as a defense for the protection of free speech¹⁶⁷ and changed the meaning of present to the narrower imminence:

Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.¹⁶⁸

Holmes moved from presuming intent through bad tendency to requiring specific intent.¹⁶⁹ His new test asked if the speech produced “a clear and imminent danger” bringing substantive evils the U.S. may constitutionally seek to prevent.¹⁷⁰

B. Dennis’ Balancing Test

The next stage of development occurred during the height of the Communist Red Scare when the Supreme Court attempted a new method with the approval from some of the nation’s top jurists including Learned Hand, Felix Frankfurter, and Robert Jackson.¹⁷¹ The Court’s new test became “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”¹⁷² Learned Hand warned that courts may strike the wrong balance “but that is a responsibility that they cannot avoid. Abdication is as much a failure of duty, as indifference is a failure to protect primal rights.”¹⁷³

The Dennis test allowed judges and juries to engage in cost-benefit analysis in which dangerous consequences skewed the results towards guilty regardless of a low likelihood of success.¹⁷⁴ The Justice Department took the *Dennis* decision as a green light and indicted 126 communists obtaining convictions in 89 percent of the cases that made trial and winning every case that reached the court of appeals level.¹⁷⁵ In 1957, the Court scaled back *Dennis* by requiring “those to whom the advocacy is addressed must be urged to do something, now or in the future, rather

¹⁶³ Rodney A. Smolla, *FREE SPEECH IN AN OPEN SOCIETY* 99 (1993).

¹⁶⁴ See, e.g., *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States* 249 U.S. 211 (1919).

¹⁶⁵ 250 U.S. 616 (1919).

¹⁶⁶ *Id.* at 624-31 (Holmes, J., dissenting).

¹⁶⁷ *Id.* at 630 (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market”).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 629.

¹⁷⁰ *Id.* at 627.

¹⁷¹ William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 429 (2001).

¹⁷² *Dennis v. United States*, 341 U.S. 494, 510 (1951) quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

¹⁷³ *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

¹⁷⁴ Smolla, *supra* note 161, at 109.

¹⁷⁵ Michal R. Belknap, *Cold War in the Courtroom: The Foley Square Communist Trial*, in Michal R. Belknap (ed.), *AMERICAN POLITICAL TRIALS* 233, 255 (1981).

than merely to believe in something.¹⁷⁶ The effect of this additional requirement was to curb discretion and insist on more emphasis of the actual communication by the defendants.¹⁷⁷

C. The Brandenburg Imminence Standard

The Court came to the current standard with *Brandenburg v. Ohio*.¹⁷⁸ A Ku Klux Klan leader was convicted for advocating violence by stating, “If our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.”¹⁷⁹ The Brandenburg test criminalizes speech that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁸⁰ This has been interpreted to mean public speech should only be punished if the “speaker seriously and expressly urges the commission of a specific crime in the very near future” and that “it is reasonably likely that the speech will contribute to the commission of the crime in the very near future.”¹⁸¹

D. U.S. & the Genocide Convention

The fear that the Genocide Convention would be used to violate the First Amendment played a major role in delaying its ratification. The U.S. was the first country to sign the Genocide Convention, but it took decades to ratify it.¹⁸² The Senate held over a dozen hearings on the Genocide Convention with testimony from more than 200 witnesses during the nearly forty years of debate.¹⁸³ Many experts feared incitement to genocide would violate the Constitution.¹⁸⁴ One witness argued the Genocide Convention had never stopped a murder but would be used “to attack a principle which is the very foundation of our liberty, and that is freedom of speech.”¹⁸⁵

To overcome these fears, Congress defined incitement in the act as “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”¹⁸⁶ and adopted a reservation to the Genocide Convention “stating that nothing in the treaty requires the United States to take any action that might be

¹⁷⁶ *Yates v. United States*, 354 U.S. 298, 325 (1957), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978) (overruling unrelated to First Amendment issues).

¹⁷⁷ Gunther, *supra* note 155, at 753.

¹⁷⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (Many First Amendment cases divide the court but *Brandenburg* was decided without dissent.).

¹⁷⁹ *Id.* at 446.

¹⁸⁰ *Id.* at 447.

¹⁸¹ Kent Greenawalt, “*Clear and Present Danger*” and *Criminal Speech*, in Lee C. Bollinger & Geoffrey R. Stone (eds.), *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 97, 118 (2002).

¹⁸² Benesch, *supra* note 37, at 507.

¹⁸³ S. REP. NO. 100-333, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 4156, 4157.

¹⁸⁴ *See, e.g.*, Legislation to Implement the Genocide Convention: Hearing on S. 1851 Before S. Comm. on the Judiciary, 100th Cong. 27 (1988) (statement of Trisha Katson, Legislative Director, Liberty Lobby); Crime of Genocide: Hearing Before S. Comm. on Foreign Relations, 99th Cong. 59 (1985) (statement of Grover Rees III, Professor, University of Texas School of Law); Crime of Genocide, 103 (statement of Phyllis Schlafly, President, Eagle Forum); Genocide Convention: Hearing Before the Subcomm. on Genocide Convention of the S. Comm. on Foreign Relations 81st Cong. 13 (1970) (Sen. Sam J. Ervin, Jr.).

¹⁸⁵ Legislation to Implement the Genocide Convention: Hearing on S. 1851 Before S. Comm. on the Judiciary, 100th Cong. 27 (1988) (statement of Trisha Katson, Legislative Director, Liberty Lobby).

¹⁸⁶ S. REP. NO. 100-333, at 10 (1988), reprinted in 1988 U.S.C.C.A.N. 4156, 4163.

prohibited by the U.S. Constitution.”¹⁸⁷ On February 19, 1986¹⁸⁸ ratification finally came with the passing of the Proxmire Act, named for Sen. William Proxmire who gave over 3,000 floor speeches in support.

IV. PROPOSED STANDARDS

The ICTR decisions have inspired a debate as to what standards should be used to criminalize incitement to genocide to prevent atrocity without sacrificing civil liberties. The three leading arguments are free speech absolutism, Professor Benesch’s reasonable possibility test, and Professor Gordon’s four-prong content test.

A. Free Speech Absolutism

Some propose that instead of “shoot[ing] the messenger” we should focus on those in power who use the media to retain control.¹⁸⁹ While being sympathetic towards such a strong defense of free expression, I do not believe inaction is an acceptable option. I agree with legal scholar David Matas that the “greatest obstacle to ending genocide is stopping incitement to genocide before genocide occurs.”¹⁹⁰ During the 60 years of the Genocide Convention, 140 countries have committed themselves to the promise of “never again.”¹⁹¹ To understand the importance of incitement one need only believe that people do not spontaneously rise up to kill en masse.¹⁹² Therefore, criminalizing incitement is essential as a preventative measure, but must be done so in a manner respectful to the importance of free speech.

B. Benesch’s Reasonable Possibility Test

Professor Susan Benesch describes incitement to genocide as “alarmingly ill-defined” noting how Canadian courts drew different conclusions from the same language.¹⁹³ She created a six-part “possible consequences” test drawing from analysis of previous genocides¹⁹⁴ to supplement the present requirements of being “direct and public” and that the speaker have specific intent to cause genocide.¹⁹⁵

First, the audience must understand the speech as a call to commit genocide based upon a detailed factual investigation of the words and context.¹⁹⁶ Next, the speaker must be able to influence the audience, whether by position of power, cul-

¹⁸⁷ Legislation to Implement the Genocide Convention: Hearing on S. 1851 Before S. Comm. on the Judiciary, 100th Cong. 46-47 (1988) (statement of Orrin G. Hatch, Member, S. Comm. on the Judiciary).

¹⁸⁸ S. REP. NO. 100-333, at 8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4156, 4160.

¹⁸⁹ Dylan Craig & Nomalanga Mkhize, *Vocal Killers, Silent Killers: Popular Media, Genocide, and the Call for Benevolent Censorship in Rwanda*, in Michael Drewett & Martin Cloonan (eds.), *POPULAR MUSIC CENSORSHIP IN AFRICA* 39, 50 (2006).

¹⁹⁰ David Matas, Amnesty International USA, Justice for Genocide, www.amnestysusa.org/Justice_for_Genocide/David_Matas/page.do?id=1051082&n1=3&n2=35&n3=1398 (accessed 13 Aug. 2009).

¹⁹¹ See United Nations Treaty Collection, Convention on the Prevention and Punishment of the Crime of Genocide, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en (accessed 13 Aug. 2009).

¹⁹² Susan Benesch, *Inciting Genocide, Pleading Free Speech*, 21 *WORLD POL’Y J.* 62, 63 (2004).

¹⁹³ Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, *OPINIO JURIS* (17 Apr. 2008), available at <http://opiniojuris.org/2008/04/17/vile-crime-or-inalienable-right-defining-incitement-to-genocide/>.

¹⁹⁴ Benesch, *supra* note 37, at 498.

¹⁹⁵ *Id.* at 519-20.

¹⁹⁶ *Id.* at 520-21.

tural icon, or media control, and the audience must have the capacity to commit genocide against the intended victims.¹⁹⁷ Third, the targeted group must have suffered recent violence.¹⁹⁸ The last three prongs are used to narrow incitement by describing the social context needed before genocide can occur.¹⁹⁹ The marketplace of ideas must no longer be functioning, the speaker must dehumanize the target group and justify the killing, and the audience must have already received similar messages.²⁰⁰ All six prongs must be satisfied for genocide to be reasonably possible.²⁰¹

Professor Benesch's reasonable probability test is impressive in its detail and its thorough analysis. All courts, in their reasoning, should include the factors identified, but the test itself should not be the standard with which we use. The test is under inclusive by requiring strict adherence to history and over inclusive in avoiding a temporal requirement. There have been too few instances of genocide to infer absolute preconditions and while the standards provided are accurate for past atrocities, they may not universally be present in future conflicts. If in the immediate aftermath of Habyarimana's plane being shot down, a local politician gave a speech similar to Marc Anthony's funeral oration,²⁰² but replaced Brutus with their Tutsi neighbors. The speaker would have the specific intent. However, his message would do so in a manner without dehumanizing the target group.

For incitement to serve its dual role of prevention and punishment, the test must be adaptable to the unknown. The success of all six prongs is dependent on the fact that our limited understanding of genocide will be applicable to all future scenarios, for if one prong fails, the test fails. However, without the requirement of all six prongs, and no imminence protection, we have a reincarnation of the Dennis Test that failed in the U.S. because of its inability to fairly balance the great weight given to the dangers of Communism.²⁰³ This specter is unintentionally raised by Benesch herself when she wrote, "even a small risk of genocide is too much,"²⁰⁴ an argument often used to justify the restriction of fundamental civil liberties.²⁰⁵ The Reasonable Probability test is a step in the right direction, but due to historical inflexibility and insufficient speech safeguards, it should not be adopted.

C. Gordon's Four-Prong Test

A competing test is one proposed by Professor Gregory Gordon. He has identified five analytic elements: the "public" element, the "direct" element, the "incitement" element (or speech content), *mens rea*, and causation.²⁰⁶ He then developed a four-prong test in analyzing content regarding race as either legitimate expression or criminal advocacy by looking at purpose, text, context, and the relationship

¹⁹⁷ *Id.* at 521.

¹⁹⁸ *Id.* at 522.

¹⁹⁹ Benesch, *supra* note 193.

²⁰⁰ Benesch, *supra* note 37, at 523-25.

²⁰¹ *Id.* at 520.

²⁰² William Shakespeare, *THE TRAGEDY OF JULIUS CAESAR*, Act 3, Sc. 2.

²⁰³ As discussed in Part III B. See Smolla, *supra* note 163, at 109.

²⁰⁴ Benesch, *supra* note 37, at 495.

²⁰⁵ See Joel Simon, *Of Hate and Genocide: in Africa, Exploiting the Past*, COLUM. JOURNALISM REV. (Jan.-Feb. 2006), available at <http://cpi.org/2006/01/of-hate-and-genocid-e.php> ("The practice of casting the suppression of critical media as a legitimate effort to fight hate speech and incitement is now distressingly common, so much so that it has become a major impediment to independent journalism in many countries in Africa.")

²⁰⁶ Gregory S. Gordon, *From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework*, 98 J. CRIM. L. & CRIMINOLOGY 853, 895 (2008).

between the speaker and subject.²⁰⁷ The public, direct, specific, intent and lack of a causation requirement are as expressed above in the ICTR section.²⁰⁸

The real test is in the four-prongs applied in the incitement element.²⁰⁹ Purpose asks whether there was specific intent by looking at the text of the words and context of the circumstances.²¹⁰ While Gordon keeps these separate in his test, they are different means to the same end, which is the specific intent to incite genocide. His last prong, the relationship between the speaker and the subject, serves as a free speech safeguard.²¹¹ This factor would be more speech-protective when the speaker is a member of a minority criticizing the government or majority population.²¹²

The problem with Professor Gordon's test is that it does little service in distinguishing incitement from legitimate speech. Explicit tests force courts to be held accountable and assists in avoiding skewed risk assessment that could be possible in using incitement as a preventative measure.²¹³ The goal is to create a "doctrine that can counteract the effects of fear and prejudice" and serve as a guide to future courts.²¹⁴ Much like the Dennis Test,²¹⁵ Gordon's four-prongs are intellectually attractive but, in application, are vague and unduly favoring of conviction from fear of atrocity. For example, even though he claims Benesch's Reasonable Possibility factors flesh out his own test,²¹⁶ he arrives at an opposite conclusion and finds President Ahmadinejad guilty of incitement.²¹⁷

The test's failure stems from the same original sin committed by the judges in the Media Trial decision in the confounding of hate speech with incitement. Gordon's test is gleaned from a "rambling discussion of 'general principles'" of international hate speech from the Media Trial decision,²¹⁸ and while there are those who still claim incitement and hate speech are intertwined,²¹⁹ the ICTR decisions in the Media Appeals and Bikindi Trial say otherwise.²²⁰ Ahmadinejad's call for

²⁰⁷ See, e.g., Gordon, *supra* note 48, at 184; Navathem Pillay, *Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance*, 14 NEW ENG. J. INT'L & COMP. L. 203, 208-09 (2008); Robert H. Snyder, Note, "Disillusioned Words Like Bullets Bark": *Incitement to Genocide, Music, and the Trial of Simon Bikindi*, 35 GA. J. INT'L & COMP. L. 645, 670-73 (2007).

²⁰⁸ Gordon, *supra* note 206, at 893-907.

²⁰⁹ *Id.* at 896.

²¹⁰ Gordon, *supra* note 48, at 172-73.

²¹¹ *Id.* at 173-74.

²¹² *Id.* at 173.

²¹³ See Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 935-40 (2004).

²¹⁴ Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 119 (2005).

²¹⁵ As discussed in Part III B.

²¹⁶ Gregory S. Gordon, *Defining Incitement to Genocide: A Response to Susan Benesch*, OPINIO JURIS (17 Apr. 2008) available at <http://opiniojuris.org/2008/04/17/defining-incitement-to-genocide-a-reply-to-susan-benesch-2/>.

²¹⁷ Compare Gordon, *supra* note 206, at 920, with Benesch, *supra* note 37, at 527-28.

²¹⁸ Susan Benesch, *Vile Crime or Inalienable Right: A Reply to Professor Gordon*, OPINIO JURIS (17 Apr. 2008) available at <http://opiniojuris.org/2008/04/17/vile-crime-or-inalienable-right-a-reply-to-professor-gordon/>.

²¹⁹ See, e.g., Christopher Scott Maravilla, *Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law*, 17 TUL. J. COMP. & INT'L L. 113, 144 (2008); Gordon, *supra* note 204, at 878 n.181.

²²⁰ See Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 460 (2 Dec. 2008) ("[T]he Genocide Convention was only intended to criminalise direct appeals to commit acts of genocide and not all forms of incitement to hatred."); Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 741-51 (28 Nov. 2007) ([T]he jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide."); Prof. Gordon argues the Appeals Cham-

Israel to be “wiped off the map” would be a disgusting and outrageous act, but not a criminal one, and Gordon’s willingness to stretch the boundaries to pass guilt on “a sitting head of state whose words defy easy translation²²¹ and whose audience appears amorphous”²²² is indicative of the dangers of an ill-defined standard. Under Gordon’s application, it would only take a “minimal expansion of current doctrine”²²³ for holocaust denial and fierce criticism of Israel to qualify as direct incitement.²²⁴ Fear of Iran’s dormant nuclear program²²⁵ alone does not justify stretching incitement to apply in times where there is no reasonable possibility of genocide occurring.²²⁶ If anything, such restrictive censorship could help produce further violence.²²⁷

V. PROPOSED INCITEMENT TEST

Censorship law is too often a hatchet when a scalpel is what’s needed. Therefore, my proposed incitement test is narrowly tailored using the elements defined by Nuremberg and the ICTR and supplemented with the lessons learned from nearly a century of legal experimentation by the United States. I propose an imminence incitement test asking whether the speaker directly, seriously, and publicly urges the commission of genocide in the near future and that the message is reasonably likely to produce such action. I use “publicly” as required by *Brandenburg*²²⁸ and explained at length by the ICTR.²²⁹

The insertion of “directly” and “seriously” includes those with the requisite specific intent,²³⁰ but excludes the protected speech of those without intent who are engaging in advocacy.²³¹ Proving the *dolus specialis* to destroy a specific group is one of the greatest challenges in prosecution.²³² A direct appeal, implicit or explicit, must be more than a vague suggestion.²³³ To determine if the speech rises to the level of incitement to genocide, the principal consideration is context such as the text,²³⁴ the speaker’s knowledge of the targeted group’s recent suffering of violence or mass murder,²³⁵ the functioning marketplace of ideas,²³⁶ the linguistic and cul-

ber didn’t alter the Media Trial standard, *See* Gordon, *supra* note 204, but this is not persuasive in light of the fact that the elements and their application were so poorly explained that the Appeals had to review each incident individually. *See* Prosecutor v. Nahimana, *supra* ¶ 726-28.

²²¹ *See* Ethan Bronner, *Just How Far Did They Go, Those Words Against Israel?*, N.Y. TIMES, 11 June 2006.

²²² Gordon, *supra* note 206, at 856.

²²³ *Id.* at 920.

²²⁴ *Id.* at 902.

²²⁵ *See* Mark Mazzetti, *U.S. Intelligence Finding Says Iran Halted Its Nuclear Arms Efforts in 2003*, N.Y. TIMES, 4 Dec. 2007. *But see* Gordon, *supra* note 206, at 920 (“Perhaps only when Iran gives the world incontrovertible proof of its nuclear weapons capacity and begins training its fortified missiles directly on Israel will the international legal community seriously contemplate judicial action against Mahmoud Ahmadinejad. Unfortunately, that might be too late.”).

²²⁶ *See* Benesch, *supra* note 37, at 528.

²²⁷ *See generally*, C. Edwin Baker, *Autonomy and Hate Speech* (forthcoming).

²²⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

²²⁹ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 559 (2 Sep. 1998).

²³⁰ *Id.* at ¶ 560.

²³¹ *See, e.g.*, Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1019 (3 Dec. 2003); *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam).

²³² *See* Mikhail Wladimiroff, *Defending Individuals Accused of Genocide*, 40 CASE W. RES. J. INT’L L. 271, 278 (2007-2008).

²³³ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 387 (2 Dec. 2008).

²³⁴ *See* Nuremberg Judgment, *supra* note 41, at 584.

²³⁵ *Id.* at 548-49.

tural content,²³⁷ and if genocide actually takes place.²³⁸ Lastly the speech must be clearly identified by the court²³⁹ and be “the only reasonable interpretation”²⁴⁰ to meet the burden of proof that guilt be beyond reasonable doubt.²⁴¹

The second part of the direct test is whether the “message is reasonably likely to produce such action.” This portion focuses more on the audience than the speaker. There would be little reason to punish someone on a soapbox at the Mall of America imploring his fellow Americans to commit genocide against Canadians. A judge would need to look at whether the members of the audience to whom the message was intended understood its implication,²⁴² had the capacity to commit such acts,²⁴³ and any perceived authority in the affiliation of the speaker.²⁴⁴

The last portion of the test is an imminence standard. I’m not the first to claim the Genocide Convention parallels *Brandenburg* in requiring public incitement, directness, and imminence,²⁴⁵ but the leading scholars on the issue find the U.S. model overprotective.²⁴⁶ However, the ICTR has repeatedly used such standards in their reasoning. In *Akayesu*, “whether the persons for whom the message was intended *immediately* grasped the implication thereof”²⁴⁷ clearly uses a temporal element. In *Bikindi*, the Trial Chamber held beyond a reasonable doubt that Bikindi advocated the killing of serpents, a coded reference to Tutsi, at an MRND rally²⁴⁸ and, yet, he was not convicted because no violence occurred “*immediately* thereafter.”²⁴⁹ Even the Media Trial decision “implies that speech will not be penalized unless it carries a propensity to produce actual violent results, again emphasizing the concept of ‘imminent’ action.”²⁵⁰ It is only logical that as this nascent law evolves, it would move towards imminence, not because of U.S. hegemony, but because “[n]o better phrasing of the test has yet been suggested.”²⁵¹

The Tribunal has already ruled that the purely textual Masses Publishing test²⁵² and the bad tendency test²⁵³ have no place in deciding the elements of in-

²³⁶ See Benesch, *supra* note 37, at 495. Even the most ardent supporter for free expression would consider the failure of the market place of ideas as a reason to take caution. See Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 54-55 (2000 [1948]).

²³⁷ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 387 (2 Dec. 2008).

²³⁸ Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 709 (Nov. 28, 2007).

²³⁹ *Id.* at ¶ 727.

²⁴⁰ *Id.* at ¶ 746.

²⁴¹ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 30 (2 Dec. 2008).

²⁴² *Id.* at ¶ 387.

²⁴³ Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 713 (28 Nov. 2007).

²⁴⁴ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 387 (2 Dec. 2008).

²⁴⁵ See, e.g., C. Edwin Baker, *Genocide, Press Freedom, and the Case of Hassan Ngeze* 22 (U. Pa. L. Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 46, 2003) available at <http://lsr.nellco.org/upenn/wps/papers/3>; Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT’L L.J. 87, 111 (2001).

²⁴⁶ See, e.g., Gordon, *supra* note 206, at 911 n.376; Benesch, *supra* note 37, at 495-97.

²⁴⁷ Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 558 (2 Sep. 1998) (emphasis added).

²⁴⁸ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 141 (2 Dec. 2008).

²⁴⁹ *Id.* at ¶ 283 (emphasis added).

²⁵⁰ Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT’L L. 1, 59 (2005).

²⁵¹ *Id.* at 60.

²⁵² See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 557 (2 Sep. 1998).

citement. The models currently proposed, however, share many characteristics with Dennis' Balancing Test and, like *Dennis*, seem to tilt in favor of finding guilt. This is best characterized by Benesch's comment that "There is less to lose by restricting incitement to genocide and much more to lose by not restricting it."²⁵⁴ If free speech must overcome the threat of hundreds of thousands of murders, then free speech will lose every time. Following this one-percent doctrine in free speech did not work in the U.S. then²⁵⁵ and it is not working in Africa now.²⁵⁶ If we truly believe that a failure to protect freedom of expression allows repressive regimes to flourish,²⁵⁷ then the time has come for openly adopting a standard that better balances speech and security.

Some of the greatest American jurists also believed that they could not "bind the Government to wait" until an attempt to act was imminent.²⁵⁸ From experience we learned this was false. There are no examples of the U.S. courts overprotecting dissent during wartime that has caused any demonstrable harm to national security,²⁵⁹ but there are numerous governments using broad incitement standards to suppress critical media and political opposition.²⁶⁰ We also must not forget the importance of speech to individual autonomy or the cathartic value of venting as an alternative to violence.²⁶¹ Lastly, the legitimacy of incitement prosecutions must not be tarnished from misuse if the international community is to take preventative measures beyond prosecution ranging from radio jamming²⁶² to military intervention.²⁶³ I am reminded of the prescient words of Justice Brandeis who wrote eighty-two years ago that:

To justify suppression of free speech there must be reasonable ground to

²⁵³ See *Prosecutor v. Nahimana*, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 710-11 (28 Nov. 2007).

²⁵⁴ Benesch, *supra* note 37, at 495-97.

²⁵⁵ As discussed in Part III B. See Smolla, *supra* note 163, at 109.

²⁵⁶ See Simon, *supra* note 205; Rwanda's rank has dropped every year since Reporters Without Borders began measuring press freedom. See Reporters Without Borders, *Worldwide Press Freedom Index 2007* (2007) available at www.rsf.org/article.php3?id_article=24025 (accessed 13 Aug. 2009) (107th in 2002, 110th in 2003, 113th in 2004, 122nd in 2005, 128th in 2006, and 147th in 2007).

²⁵⁷ *Prosecutor v. Bikindi*, Case No. ICTR 01-72-T, Judgment, ¶ 382 (2 Dec. 2008). See also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]ear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.").

²⁵⁸ See *Dennis v. United States*, 341 U.S. 494, 509-11 (1951).

²⁵⁹ See Geoffrey R. Stone, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 544 (2004).

²⁶⁰ See Simon, *supra* note 205 ("Many governments there have exploited the perception that the violence in Rwanda was fueled by the media to impose legal restrictions on the press in their own countries" and "instances in which legal means have been used to suppress actual hate speech or incitement are rare.").

²⁶¹ See John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement That Threatens*, 8 *TEX. J. WOMEN & L.* 207, 227 (1999).

²⁶² See generally Monroe E. Price, *Information Intervention: Bosnia, the Dayton Accords, and the Seizure of Broadcasting Transmitters*, 33 *CORNELL INT'L L.J.* 67 (2000); Jamie Frederic Metzler, *Rwandan Genocide and the International Law of Radio Jamming*, 91 *AM. J. INT'L L.* 628 (1997).

²⁶³ See Int'l Comm'n on Intervention & State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* ¶ 4.18 (2001) available at www.iciss.ca/pdf/Commission-Report.pdf ("Military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure, and for it to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur.") (emphasis added).

fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.²⁶⁴

There have been three major critiques to this approach in regards to incitement to genocide. First, it is argued that free speech doctrine protects against state suppression but incitement to genocide is often committed in service to the state.²⁶⁵ While this is true, the principals behind protecting speech and the application of the standards would not be invalidated by this difference. It would, however, affect the context on whether the message is “reasonably likely to produce such action” in the near future. A message propagated on behalf of those in power against a minority is much more likely to succeed and therefore more likely to pass the incitement test.

Second, it is argued that First Amendment protections are only applicable in free societies and not so in undemocratic regimes.²⁶⁶ Again I argue that the application of the incitement test is heavily fact dependent. The context of a tyrannical government only increases the likelihood of imminent acts of genocide, not lessens. Since the judicial body making this determination would likely be in a stable society,²⁶⁷ there is no justifiable reason to hold different countries to different standards.

The last criticism is that imminence is incompatible with the inchoate nature of incitement to genocide.²⁶⁸ U.S. incitement law, much like Benesch’s Reasonable Possibility test, is a consequences test that is able to measure the possible consequences at the time of dissemination²⁶⁹ regardless if genocide actually takes place.²⁷⁰ The imminence test is by no means a perfect solution, but rather, it is merely the best one offered so far for terribly imperfect times.²⁷¹

VI. APPLICATION IN BIKINDI

To better understand how the imminence test would work in the real world, the following section applies it to the four contexts used in the Bikindi trial. Bikindi’s act of explicitly instigating murder from the public address system of a vehicle at a time when genocide is taking place would clearly pass the imminence test. It was direct, serious, and public in a climate with an incredibly high likelihood that such a call to action would be responded to with further killings.

The implicit or coded references by Bikindi would depend on the totality of the circumstances, such as his specific intent and whether a capable audience understood the message. When Bikindi praised the MNRD and *Interahamwe* it was found to be propaganda,²⁷² much like Fritzsche,²⁷³ and not incitement. The words

²⁶⁴ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

²⁶⁵ See Benesch, *supra* note 37, at 495-96.

²⁶⁶ See, e.g., Benesch, *supra* note 37, at 496; Audrey Golden, Comment, *Monkey Read, Monkey Do: Why the First Amendment Should Not Protect the Printed Speech of an International Genocide Inciter*, 43 WAKE FOREST L. REV. 1149, 1178-79 (2008); Jordan Wallenstein, Note, *Punishing Words: An Analysis of the Necessity of the Element of Causation in Persecutions for Incitement to Genocide*, 54 STAN. L. REV. 351, 398 (2001).

²⁶⁷ See, e.g., Part II D; William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, The “Crimes of Crimes,”* 1 J. INT’L CRIM. JUST. 39 (2003).

²⁶⁸ Gordon, *supra* note 216.

²⁶⁹ *Prosecutor v. Nahimana*, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 723 (28 Nov. 2007).

²⁷⁰ See Benesch, *supra* note 37, at 494-95.

²⁷¹ See McCormack, *supra* note 250, at 60.

²⁷² *Prosecutor v. Bikindi*, Case No. ICTR 01-72-T, Judgment, ¶ 158 (2 Dec. 2008).

lacked the directness in message and therefore could not be found as a motivating factor for an audience. On the other hand, if Bikindi was found to have encouraged killing with the phrase to “work”²⁷⁴ or if the circumstance were more volatile when he proclaimed, “you must exterminate . . . these serpents which are among you”²⁷⁵ then Bikindi could be convicted as direct from the situation’s context.

Under the imminence test, Bikindi could not be found guilty for poisoning the hearts and minds of his listeners. The Nuremberg decision of Streicher was often criticized for its reasoning,²⁷⁶ though the Tribunal did identify 26 articles calling for extermination at a time he knew killings were taking place.²⁷⁷ When the Media Trial followed similar reasoning,²⁷⁸ the Appeals Chamber rebuked such “continuing crime” analysis and mandated that the specific acts be identified.²⁷⁹ A long history of speech can help inform the context²⁸⁰ but each individual act would need to be scrutinized under the imminence test.

Bikindi would not be criminally liable for his songs on the radio. The U.S. case law details how difficult it is to blame artists for the actions of their listeners²⁸¹ and since the Prosecution could not prove Bikindi disseminated music,²⁸² he would not have any specific act to undergo the imminence test and could not be convicted for having composed “conduits”²⁸³ for RTLM’s incitement.²⁸⁴

CONCLUSION

The lessons of history clearly show the times governments have silenced dissent at home far outnumber the times governments have intervened to prevent atrocities abroad. Structuring incitement to allow the prevention and punishment of genocide must be done, but not in a manner that would be an open invitation to dictators to transform the Genocide Convention into a tool of tyranny. To best maintain the delicate balance of speech and security, the standard for which incitement to genocide should be judged is whether the speaker directly, seriously, and publicly urges the commission of genocide in the near future and that the message is reasonably likely to produce such action. This incorporation of imminence from nearly a century of American jurisprudence and the emerging incitement to

²⁷³ See Nuremberg Judgment, *supra* note 41, at 585.

²⁷⁴ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 177 (2 Dec. 2008). The phrase has previously been found to be a call to kill. See Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment and Sentence, ¶ 257 (16 May 2003).

²⁷⁵ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 135, 141-42 (2 Dec. 2008).

²⁷⁶ See, e.g., Ann Tusa & John Tusa, THE NUREMBERG TRIAL 457 (1983); Bradley F. Smith, REACHING JUDGMENT AT NUREMBERG 202-03 (1977).

²⁷⁷ Nuremberg Judgment, *supra* note 41, at 548-49.

²⁷⁸ Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1099, 1101 (3 Dec. 2003).

²⁷⁹ Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 726-27 (28 Nov. 2007).

²⁸⁰ *Id.* at ¶ 315, 725.

²⁸¹ See, e.g., Pahlser v. Slayer, 2001 WL 1736476 (Cal. Super. Ct. 2001) (Principles of free speech bar wrongful death cause of action against Slayer); Davidson v. Time Warner, Inc., 1997 WL 405907 (S.D. Tex. 1997) (Tupac Shakur’s music did not incite the killing of a police officer); Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff’d*, 958 F.2d 1084 (11th Cir. 1992) (Ozzy Osbourne’s music did not incite a suicide); Vance v. Judas Priest, 1990 WL 130920 (Nev. Dist. Ct. 1990) (Judas Priest’s did not intentionally place subliminal messages that incited a suicide); Matarazzo v. Aerosmith Productions, Inc., 1989 WL 140322 (S.D. N.Y. 1989) (Aerosmith did not incite “crazies” to violence); McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (Ct. App. 1988) (Ozzy Osbourne’s lyrics did not incite a suicide).

²⁸² Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 440 (2 Dec. 2008).

²⁸³ See Nuremberg Judgment, *supra* note 41, at 583.

²⁸⁴ Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, ¶ 264 (2 Dec. 2008).

genocide doctrine will better safeguard the fundamental right of free expression while providing more direction and confidence in using incitement as an instrument of prevention.