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Is Incitement to Commit Genocide A Continuing Crime Such That Acts Committed Outside The Temporal Jurisdiction Of The ICTR Can Be Considered In Prosecuting An Accused?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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Is Incitement To Commit Genocide A Continuing Crime Such That Acts Committed Outside The Temporal Jurisdiction Of The ICTR Can Be Considered In Prosecuting An Accused?

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I. INTRODUCTION AND SUMMARY OF CONCLUSION

A. Issue

Article 7 of the Statute of the International Criminal Tribunal for Rwanda (hereinafter "the Rwandan Statute") states that "[t]he temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."[1] Considering that incitement to commit genocide is characterized as an inchoate crime in the Travaux Preparatoires of the Genocide Convention and that acts committed outside of the tribunal's temporal jurisdiction can be considered to prove conspiracy to commit genocide, the issue arises as to whether or not incitement to commit genocide is a continuing crime such that acts committed outside the temporal jurisdiction of the International Criminal Tribunal for Rwanda (hereinafter "ICTR") can be considered in prosecuting an accused. In other words, the issue presented is whether an accused can be prosecuted for committing incitement to commit genocide during times outside of the ICTR's temporal jurisdiction of 1994?

This memorandum will examine the ability of the ICTR to consider acts of incitement to commit genocide which is committed outside of its temporal jurisdiction in its prosecution of those responsible for the genocide in 1994. Part II of this memorandum will begin with a brief overview of the effect of inciters had on the 1994 genocide and a brief background of the establishment of the ICTR and the key reasons behind the establishment of the one year temporal jurisdiction. Part III will analyze the issue of whether incitement to commit genocide that occurred outside of the ICTR's temporal

[1] Statute of the International Criminal Tribunal for Rwanda, art. 7. [Reproduce in the accompanying notebook at Tab 27]

jurisdiction can be considered by the ICTR in terms of using that evidence to prosecute the incitement itself and the use of such evidence to prosecute other genocide related crimes that occurred within the ICTR's temporal jurisdiction.

B. Summary of Conclusions

The temporal jurisdiction of the ICTR in conjunction with the prosecution of incitement to commit genocide is unique from every other special tribunal such as the International Tribunal for the former Yugoslavia (hereinafter "ICTY") and the Special Court for Sierra Leone (hereinafter "SCSL"). Only the ICTR has a one year temporal jurisdiction which prevents the prosecution of many of those most responsible for the genocide that took place in 1994. As such, much of the analysis for this issue can only be drawn from the decisions made by the ICTR.

i. The ICTR May Not Prosecute Incitement to Commit Genocide Which Halted Before 1994 as It is Barred By the ICTR's Temporal Jurisdiction Absent a Casual Nexus Between the Incitement and the Genocide of 1994

Generally, mainly due to the fact that incitement to commit genocide, because it is characterized to be an inchoate crime, is considered to be continuing until the completion of the contemplated acts, the ICTR may not prosecute suspected persons for the commission of acts in violation of international humanitarian laws that is committed outside of the ICTR's temporal jurisdiction should those acts halt prior to 1994. This is so because the power to do so is not authorized by the Statute of the International Criminal Tribunal for Rwanda. Moreover the Prosecutor has specifically declined to pursue such action in at least one instance involving the crime of incitement to commit genocide because of the limits placed on it by the temporal jurisdiction of the ICTR.

Since inchoate crimes require simply an act with intent and nothing more, the Prosecutor will not have the authority to prosecute those crimes in Rwanda if it happened before 1994. However, as an inchoate crime, incitements to commit genocide are considered to be continuing until the last act committed. Therefore, the Prosecutor may prosecute acts of incitement to commit genocide of an individual which took place prior to 1994 as long as that individual also incited others to commit genocide in 1994. Moreover, should the Prosecutor be able to establish a casual nexus between the incitements that took place prior to 1994 and the genocide that occurred in 1994, the temporal jurisdiction of the ICTR Statute will also allow for the prosecution of those acts.

ii. The ICTR May Allow for the Introduction of Incitements to Commit Genocide Which Took Place Before 1994 as Evidence to Prove Elements Required for the Prosecution of a Crime That Took Place within Its Temporal Jurisdiction

In addition, over the course of its existence, the ICTR have also come to allow for the introduction of evidence of incitement to commit genocide which took place outside of the ICTR's temporal jurisdiction to be introduced as evidence if it fits under at least one of three exceptions to the general inadmissibility of pre-1994 evidence: evidence relevant to an offence continuing into 1994, evidence providing a context or background, and similar fact evidence. Thus, unless the evidence of prior incitement to commit genocide fits under one of the three exceptions, the ICTR will not even admit those acts into evidence to prove certain elements for other crimes that ICTR has the jurisdiction to prosecute.

In summary, the ICTR may not consider incitements to commit genocide which took place prior to 1994 as a crime in itself unless it can be proven that it was relevant to an offense continuing into 1994. Moreover, the ICTR may not consider incitements to

commit genocide which took place prior to 1994 even as evidence for other crimes unless it provides a context or background for the crime being prosecuted or was similar to the facts surrounding the crime being prosecuted. Hence, the temporal jurisdiction of the ICTR, unless amended, will seriously hamper the ICTR's role in prosecuting those most responsible for the genocide in Rwanda. As such, incitement to commit genocide is a continuing crime such that acts committed outside the temporal jurisdiction of the ICTR can be considered in prosecuting an accused so long as certain conditions are met.

II. FACTUAL BACKGROUND

Prior to the legal analysis of the issue, in order to understand why the prosecution of incitement to commit genocide is so important to the ICTR, it is necessary to provide a very brief overview on the role played by inciters and the effect it had on the Genocide in Rwanda. Moreover, it is also necessary to discuss the background surrounding the establishment of the ICTR and its temporal jurisdiction as it is the key obstacle preventing the Prosecutor from prosecuting much of those responsible for the atrocities that took place in 1994.

A. The Role Inciters Played and the Effects of It on the Genocide in Rwanda

The genocide that took place in Rwanda in 1994 is one of the largest acts of genocide since the concentration camps of World War II. It involved people ranging from government officials to army personnel to ordinary citizens.[2] Perhaps the biggest cause of the genocide is the influential media that agitated the majority Hutu population against the minority Tutsi population as radio is the most significant means of mass

[2] *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 57-58 (Transnational Publishers 1998) [Reproduce in the accompanying notebook at Tab 1]

communication throughout all of sub-Saharan Africa.[3] In fact, the Radio-Television Libre des Mille Collines (hereinafter "RTLM") has been cited to have played a key role in inciting violence against the Tutsi and fervently opposed the Arusha Accords which is aimed at bringing peace to Rwanda.[4]

As a result of global intervention, mainly the U.N. and the French, along with the Rwandese Patriotic Front (hereinafter "RPF"), the country-wide massacre came to a halt as the war was declared over by the RPF on July 18, 1994.[5] By that time, millions of Rwandan citizens had been displaced from their homes into neighboring countries.[6] But more importantly, the massacre has left the number of unarmed civilians dead at somewhere between 500,000 to 1 million due to the powerful words of the RTLM and others.[7]

B. Establishment of the ICTR

In the case of Rwanda, national prosecutions seemed impossible as the Rwandese justice system had been destroyed by the events that took place in 1994.[8] As such, in the aftermath of the Rwandan genocide of 1994 and after gathering the attention of the global

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[3] *See* C. SCHELTEMA & W. VAN DER WOLF, THE INTERNATIONAL TRIBUNAL FOR RWANDA, FACTS CASES AND DOCUMENTS, VOLUME 1 82 (Global Law Association 1999) [Reproduce in the accompanying notebook at Tab 2] *See also* Alexander Dale, *Countering Hate Messages that Lead to Violence: The United Nation's Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcast,* 11 Duke J. Comp. & Int'l L. 109 (2001) [Reproduce in the accompanying notebook at Tab 6]

[4] *See Id. See also* Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons From Rwanda,* 24 Yale J. Int'l L. 365, 392 (1999) [Reproduced in the accompanying notebook at Tab 4]

[5] *See Id.* at 162.

[6] *See Id.* at 166.

[7] *See Id.* at 247.

[8] *See* Human Rights First Publications, *Prosecuting Genocide in Rwanda: A Human Rights First Report on the ICTR and National Trials,* (July, 1997) *available at* http://www.humanrightsfirst.org/pubs/descriptions/rwanda.htm (last accessed on 11/23/2004) [Reproduced in the accompanying notebook at Tab 8]

community, the ICTR was established by U.N. Security Council pursuant to its authority under Chapter VII of the U.N. Charter on November 8, 1994.[9] The U.N., building on the recently established the ICTY, decided that the genocide in Rwanda required a similar effort to insure the prosecution for the most serious crimes, such as genocide and crimes against humanity. As such, like the ICTY, the ICTR incorporate international treaty law and customary international law into its judgments.[10]

Under Article 1 of the Statute, the ICTR has the responsibility to prosecute persons responsible for the commission of serious violations of international humanitarian law in Rwanda or Rwandan citizens who committed those violations outside of Rwanda from January 1, 1994 to December 31, 2004.[11] Under Article 2, the Statute defined Genocide and made "Direct and public incitement to commit genocide" punishable.[12] In addition, Article 7 of the Statute established the ICTR's temporal jurisdiction to "extend to a period beginning on 1 January 1994 and ending on 31 December 1994."[13] This is to be contrasted with that of the ICTY where the temporal jurisdiction was much longer as it covered any criminal acts that took place after January

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[9] *See* U.N.S.C. Res. 955 adopted November 8, 1994 [Reproduced in accompanying notebook at Tab 33] *See also* U.N. CHARTER Chap. VII [Reproduced in accompanying notebook at Tab 30]

[10] *See* Joshua Wallenstein, *An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide,* 54 Stan. L. Rev. 351, 361 (November, 2001) [Reproduced in the accompanying notebook at Tab 15]

[11] *See* Statute of the International Criminal Tribunal for Rwanda, *supra* at note 1, art. 1. [Reproduced in the accompanying notebook at Tab 27]

[12] *See Id.* at art. 2.

[13] *Id.* at, art. 7.

1, 1991 and has no end date.[14] As such, the ICTR cannot prosecute any individuals for those crimes before or after 1994 even though there have been periodic international humanitarian law violations before and after 1994.[15]

Naturally, the Rwandese Government was of the view that the temporal jurisdiction of the Tribunal was too restrictive.[16] The Rwandese representative had proposed that account be taken of the period from the beginning of the armed conflict on October 1, 1990, until July 17, 1994, when it terminated with the victory of the Rwandese Patriotic Front, arguing that an international tribunal which refuses to consider the causes of the genocide in Rwanda and its planning cannot be of any use because it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation.[17] However, from the perspective of the Security Council members, the primary issue was whether application of Chapter VII to crimes committed prior to the April 1994 genocide would be justified.[18] During a similar discussion with respect to the temporal jurisdiction of the Yugoslav Tribunal, the French representative had pointed out that the competence of the Tribunal should not extend to crimes predating the dissolution of the former Yugoslavia and the outbreak of the current

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[14] *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 8. [Reproduced in the accompanying notebook at Tab 26] *See also* Mariann Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 Colum. Human Rights L. Rev. 177, 196 (1995) [Reproduced in the accompanying notebook at Tab 16]

[15] *See* Christina Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. Int'l L. J. 163 (2000) [Reproduced in the accompanying notebook at Tab 5]

[16] *See* Payam Akhavan, *The International Criminal Tribunal for Rwanda: the Politics and Pragmatics of Punishment*, 90 A.J.I.L. 501, 505 (July, 1996) [Reproduced in the accompanying notebook at Tab 3]

[17] *See Id.*

[18] *See Id*.

conflicts because, under Chapter VII, the establishment of a tribunal would be authorized only for the purpose of maintaining or restoring peace, [and] not in order to punish earlier crimes.[19]

Nevertheless, the concerns of the Rwandese Government were not entirely disregarded. Although the crash of the aircraft carrying the Presidents of Rwanda and Burundi on 6 April 1994 is considered to be the event that triggered the civil war and the acts of the genocide that followed, as the Secretary-General pointed out, the Security Council decided that the temporal jurisdiction of the Tribunal would commence on January 1, 1994, in order to capture the planning stage of the crimes.[20]

Another reason for the short temporal jurisdiction is funding as there was concern by the Rwandese Government over the meager human and financial resources allocated to the ICTR.[21] Should the U.N. extend the temporal jurisdiction to 1990, it would require much more resources to make the ICTR fully functional. Even now with the short temporal period, ever since its creation, the ICTR had not received adequate monetary support from the U.N. and the international community. Located in Arusha, Tanzania, the ICTR still lacks the resources to fill its key staff positions.

III. LEGAL DISCUSSION

A. ICTR's Ability to Prosecute Incitement that Took Place Outside of Its Temporal Jurisdiction

The ICTR has been presented with the option to pursue the prosecution of cases where incitement to commit genocide took place well before 1994. The most publicized

[19] *See Id.*

[20] *See Id.* at 508.

[21] *See Id.*

instance of that occurred in a Canadian Immigration and Refugee Board hearing in the case of Leon Mugesera. Mugesera was a Rwandan extremist that called upon his supporter to massacre the Tutsi in a public speech on November 22, 1992.[22]

Mugesera fled Rwanda in 1993, well before the genocide took place thereby making it very difficult for the Prosecutor to show a casual nexus with the events that took place in the year after. While under deportation hearing, Mugesera was found to have made a speech calling for the killing of the Tutsi population by an adjudicator of the Immigration and Refugee Board (hereinafter "IRB") of Canada. In his opinion, the Canadian IRB adjudicator, Pierre Turmel wrote:

> "In my analysis of the testimony and the documentary evidence, I found that in my opinion Mr. Mugesera made a speech which incited people to drive out and to murder the Tutsi. It is also established that murders of Tutsis were in fact committed, and, on the basis of probabilities, resulted from the call for murder thrown out by Mr. Mugesera in his speech. The Tutsi, beyond a shadow of a doubt, form an identifiable group of persons. They constituted an identified group and they were a systematic and widespread target of the crime of murder.
>
> The counseling or invitation thus issued to his audience establishes personal participation in the offence. In addition, I find that this participation was conscious, having regard to Mr. Mugesera's social standing and privileged position. Mr. Mugesera's writings and statements clearly attest to the conscious nature of this participation. I would add that this counseling was consistent with the policy advocated by the MRND [political party of former president Habyarimana, of which Mugesera was a member], as established by the evidence.
>
> Having regard to the socio-political context which prevailed at the time in question, the assassination of members of this identifiable group constituted in my opinion a crime against humanity within the meaning of subsection 7(3.76) of the Criminal Code, all of the physical and mental elements of which are present. Did this crime constitute a contravention of customary international law or conventional international law in Rwanda at the time it was committed?

[22] *See* William A. Schabas, *International Conference: Hate Speech in Rwanda: The Road to Genocide*, 46 McGill L.J. 141, 157 (2000). [Reproduced in the accompanying notebook at Tab 13]

> In my opinion, the speech made by Mr. Mugesera constitutes a contravention of these provisions of the Convention, in that it is a direct and public incitement to commit genocide."[23]

However, in the final appeal for Mugesera of this decision, the Canada Federal Court of Appeal overturned this decision that was previously affirmed by the Appeals Board of Immigration and held that there was a lack of evidence to clearly establish that Mugesera had committed incitement to commit genocide which would have made him deportable.[24] Specifically, the Canadian Federal Court of Appeal pointed out that the initial decision by the Minister to seek deportation and the decisions of the Appeal Division and the Federal Court Trial Division were decisively influenced by a 1993 report of the International Commission of Inquiry (hereinafter "ICI").[25] According to the Canadian Federal Court of Appeal, the "[t]estimony of a witness involved in the preparation of the ICI report showed that the ICI concluded, without basis, in a manner contrary to the evidence or on the basis of a different and deliberately truncated text of the speech, that Leon Mugesera was a significant instigator of trouble and that he had ties to the President and to death squads. Conclusions the witness drew in her expert report on Leon Mugesera's role were without basis."[26] In addition, the Court found "[t]he witness's attitude throughout her testimony disclosed clear bias against Leon Mugesera and a determination to defend conclusions arrived at by the ICI."[27] As such, the Court deemed

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[23] *Re Mugesera and Minister of Citizenship and Immigration* (11 July 1996), QML-95-00171 at 42, 55-56 (I.R.B.) [Reproduced in the accompanying notebook at Tab 25] *See also* Schabas, *supra* note 21 at 158. [Reproduced in the accompanying notebook at Tab 13]

[24] *See Mugesera c. Canada*, 2003 CAF 325 [Reproduced in the accompanying notebook at Tab 17]

[25] *See Id.* at 3.

[26] *Id.*

[27] *Id.*

the ICI report itself to be unreliable in concluding that the Appeal Division acted in a patently unreasonable way by relying on the findings of fact made by the ICI.[28] Because the ICI report's conclusions regarding Leon Mugesera completely lacked credibility, the Court found that the ICI report should not have been taken into consideration.[29]

Moreover, the Canadian Federal Court of Appeal found that the Appeal Division had made a patently unreasonable error in finding Leon Mugesera deportable by not accepting the testimony of one of the experts on the analysis of Leon Mugesera's speech where the testimony showed that certain comments in Leon Mugesera's speech had been misinterpreted.[30] In that testimony, the expert had concluded that the message communicated was not, objectively speaking, that is, after analyzing the speech and its context as a whole, a message inciting to murder, hatred or genocide.[31] Moreover, that expert had also concluded that the speech by Leon Mugesera was not such a message in a subjective sense, either.[32] In essence, the Court found nothing in evidence to suggest that Leon Mugesera intended under cover of a bellicose speech that would be justified in the circumstances, to impel toward racism and murder an audience which he knew would be inclined to act on such a message.[33] Therefore, the Court concluded that there was no evidence, on a balance of probabilities that Leon Mugesera had any guilty intent.[34]

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[28] *See Id.*

[29] *See Id.*

[30] *See Id.*

[31] *See Id.*

[32] *See Id.*

[33] *See Id.*

[34] *See Id.*

In addition, the Canadian Federal Court of Appeal also found an absence of casual nexus between Leon Mugesera's speech and the genocide that occurred in 1994.[35] It opined that:

> "The speech appeared to have had a negligible impact in Rwanda in the days and weeks that followed. The fact that only three newspapers out of Rwanda's many publications mentioned the speech, that the national radio mentioned it in a brief and dismissive way, and that neither the foreign press nor human rights agencies in Rwanda at the time mentioned it supported the theory that the speech had been mischaracterized and that it did not have any impact on the conflict in Rwanda. The evident lack of impact on the life of Rwandans was more impressive than the official manhunt brought by political adversaries who were members of the coalition government. It was not surprising that L[eon] M[ugesera] was being sought given that he criticized members of the government and had asked to have certain government officials taken to court. L[eon] M[ugesera] was first seen as attacking the security of the State, then inciting to hatred and genocide, than as having planned the genocide. The manipulation of charges was suspicious and suggested that L[eon] M[ugesera]'s speech in 1992 was merely a pretext used by his political opponents to discredit him. The injunction to prosecute and bench warrant in November 1992 had nothing to do with the fact that the speech may have been a call to murder, hatred or genocide."[36]

Using those reasons, the Canadian Federal Court of Appeal found Leon Mugesera, at least for immigration purposes, not deportable because there lack evidence linking him to committing incitement to commit genocide.[37]

Meanwhile at the ICTR, the ICTR Prosecutor had decided not to pursue charging Mugesera with incitement to commit genocide because the act occurred and halted outside of the ICTR's temporal jurisdiction and the argument that his speech had effects during the massacres of 1994 would be difficult to sustain.[38]

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[35] *See Id.*

[36] *Id.*

[37] *See Id.*

Therefore, the temporal jurisdiction of the ICTR would preclude the prosecution of those incitements to commit genocide that occurred and halted prior to 1994 for which the Prosecutor could not establish a casual nexus between the incitement and the subsequent commission of genocide in 1994.[39]

B. Reconcilability of ICTR's Temporal Jurisdiction with the Genocide Convention

Under a literal interpretation of the Statute, the ICTR may not prosecute those acts which are in violation of international humanitarian laws if they were committed either before or after 1994. However, under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Hereinafter "Genocide Convention"), direct and public incite to commit genocide should be punished regardless of when it was committed.[40] The handicapping temporal jurisdiction of the ICTR will severely limit its ability to punish those who played a hand in the genocide in Rwanda. Under such limited jurisdiction, the ICTR is powerless to punish those for crimes outlined in the Genocide Convention and in its own Statute that was committed prior to 1994.

With respect to Rwanda, the acts of incitement to commit genocide are especially significant as they arguably played the most important role in causing the genocide in 1994 since there is evidence the genocide was a carefully orchestrated event for which

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[38] *See* Schabas, *supra* note 22 at 158. [Reproduced in the accompanying notebook at Tab 13]

[39] *See* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case for Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 355 (Spring, 1997) [Reproduced in the accompanying notebook at Tab 10]

[40] *See* 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "Genocide Convention") (1948) [Reproduced in the accompanying notebook at Tab 29]

planning had begun prior to 1994.[41] Hence, these crimes should be on the top of the list for prosecution as oppose to being on the list of non-prosecutions.

As stated in Article 1 of the Genocide Convention, the goals of the Genocide Convention are to both prevent and punish acts of genocide.[42] However, during the Sixth Committee of the General Assembly revision of the Ad Hoc Committee's drafting of the Convention, there was much disagreement over the inclusion of incitement to commit genocide as an inchoate crime due to strong support for freedom of speech from countries such as the United States.[43] On the other hand, countries such as Poland noted that prevention of genocide is just as important as punishment such that freedom of press "must not be so great as to permit the press to engage in incitement to genocide."[44]

By the time the Convention was over, original draft of "direct public incitement to any act of genocide, whether the incitement be successful or not" had became "Direct and public incitement to commit genocide."[45] Nonetheless, the prevention of genocide is still half of the purpose of the Genocide Convention as ratified by the General Assembly.[46] As such, the lack of jurisdiction for the ICTR to prosecute those who publicly incited the

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[41] *See* SCHELTEMA & VAN DER WOLF, *supra* note 3 at 277. [Reproduced in the accompanying notebook at Tab 2]

[42] *See* Genocide Convention, Art. 1, *supra* note 40. [Reproduced in the accompanying notebook at Tab 29]

[43] *See* Schabas, *supra* note 22 at 152. [Reproduced in the accompanying notebook at Tab 13]

[44] UN GAOR, 6th Committee, 3d Sess., 84th Mtg., UN Doc. A/C.6/SR.85 (1948) at 215 (Mr. Lachs, Poland). [Reproduced in the accompanying notebook at Tab 31] See also *Id.* at 219-20 (Mr. Morozov, Soviet Union); UN GAOR, 6th Committee, 3d Sess., 85th Mtg., UN Doc. A/C.6/SR.85 (1948) at 221 (Mr. Zourek, Czechoslovakia) [Reproduced in the accompanying notebook at Tab 32]

[45] *See* Schabas, *supra* note 22 at 151-155. [Reproduced in the accompanying notebook at Tab 13]

[46] *See* Genocide Convention, *supra* note 40. [Reproduced in the accompanying notebook at Tab 29] The two purposes of the Genocide prevention are the preventing of genocide and punishing acts of genocide.

masses to commit genocide prior to 1994 fails to uphold the first purpose of the Genocide Convention.

It is important to note that the temporal jurisdiction of ICTR is not required by the Genocide Convention for which the ICTR in entrusted with enforcing.[47] In theory, the parties who commit such acts should not enjoy any safe harboring provided by the temporal jurisdiction placed on the ICTR. Moreover, the prohibition on genocide has achieved the status of jus cogens, and thereby would bind all members of the international community, including Rwanda, regardless of whether it had ratified the Genocide Convention.[48] In this case, it is important to note that Rwanda has ratified the Genocide Convention.[49]

While it is true that Article VI of the Genocide Convention obligates domestic tribunals to prosecute acts of genocide and genocide related acts committed within its borders, domestic jurisdiction to prosecute genocide under Article VI is a hollow obligation because genocide is most frequently perpetrated with the assistance or acquiescence of the state such as is the case in Rwanda.[50] As such, Article VI of the Genocide Convention specifically envisioned prosecution of genocide or genocide related act by international tribunals such as the ICTR with respect to countries like Rwanda.[51]

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[47] *See* Genocide Convention, *supra* note 40. [Reproduced in the accompanying notebook at Tab 29]

[48] *See* SCHELTEMA & VAN DER WOLF, *supra* note 3 at 276. [Reproduced in the accompanying notebook at Tab 2]

[49] *See* Genocide Convention, *supra* note 40. [Reproduced in the accompanying notebook at Tab 29]

[50] *See* 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 of Justice?* 32 Cal. W. Int'l L. J. 87, 95 (2001) [Reproduced in the accompanying notebook at Tab 7]

[51] *See Id.*

Therefore, the temporal jurisdiction of the ICTR can not be reconciled with the Genocide Convention of 1948. Hence, the temporal jurisdiction of the ICTR will seriously hamper the ICTR's duty to investigate and prosecute all of those who are responsible for the atrocities of the 1994 massacre instead of just those who happens to fall within the ICTR's temporal jurisdiction in order to conform to the principles of the Genocide Convention of 1948. As such, those most responsible for the genocide will never be brought to justice and the purpose of the ICTR will never be fulfilled.

C. Incitement to Commit Genocide

While both the Genocide Convention and the ICTR specifically outlaw "Direct and public incitement to commit genocide," the issue arises in what constitutes as "Direct and public incitement to commit genocide."[52] Therefore, in order to punish those who commit this violation, one must understand what constitutes "Direct and public incitement to commit genocide."

i. What Constitutes Incitement

As the ICTY has noted, when an individual's conduct directly and substantially affects and supports the commission of an international offense, that individual should be held criminally liable for his actions.[53] Yet while most states agree that inciters should be

[52] *See* Genocide Convention *supra* note 40, Art. 3(c) and Statute of the International Criminal Tribunal for Rwanda, *supra* note 1, Art. 2(3)(c) contains the following identical language: [Reproduced in the accompanying notebook at Tab 29]

The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

[53] *See Prosecutor v. Dusko Tadic*, Opinion and Judgment, IT-94-1-T, ¶ 689 (1997) [Reproduced in the accompanying notebook at Tab 24]

held accountable, they disagree on whether a separate provision enumerating direct and public incitement is necessary.[54] Many of the states reasoned that the incitement provision is superfluous because inciters' actions would fall under conspiracy or complicity to commit genocide.[55] This reasoning however, failed to recognize the damage one inciter could cause while acting alone such as the case with RTLM in Rwanda.[56] Prior to and during the genocide in Rwanda, the RTLM, a local radio station, broadcasted instructions to genocide which has been cited to have played a large role in helping cause the massacre of possibly one million unarmed civilians.[57] In addition, in June of 1994, in the midst of the massacre, Jean Kambanda, the former Prime minister of Rwanda even went of the air at RTLM and encouraged the station to continue the incitement and called for genocide against the Tutsi.[58] Moreover, Kambanda also preached genocide in public engagements and at governmental meetings and freely uttered incendiary phrases to inflame the masses.[59]

As seen in the cases such as *Kambanda*, some statements of certain individual inciters are able to make a much more significant impact on people than those statements made by some individuals in concert could ever make.[60]

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[54] *See Continuation of the Consideration of the Draft Convention on Genocide* [E/794]: *Report of the Economic and Social Council* [A/633], U.N. GAOR 6th Comm. 3d Sess., 84th mtg. at 213 (1948) [Reproduced in the accompanying notebook at Tab 28]

[55] *See Id.* at 213-215.

[56] *See* Gopalani, *supra* note 50 at 94. [Reproduced in the accompanying notebook at Tab 7]

[57] *See Id.*

[58] *See Prosecutor v. Jean Kambanda*, Judgment and Sentence, ICTR-97-23-S, ¶39 (1998). [Reproduced in the accompanying notebook at Tab 20]

[59] *See Id.*

The international standard for incitement to commit genocide as decided by the International Military Tribunal (hereinafter "IMT") at Nuremberg requires explicit calls to commit genocide, not just general arousement.[61] Yet, this standard was not codified by the Genocide Convention as the IMT had not expressly provided for the punishment of genocide.[62]

ii. The "Directness" Standard

Aside from the incitement standard, the also exists the standard for "Directness." In *Prosecutor v. Akayesu*, the ICTR held "that the direct element of incitement should be viewed in the light of its cultural and linguistic content."[63] As such, the ICTR concluded that the standard of directness is factual inquiry that focuses on "whether the persons for whom the message was intended immediately grasped the implications thereof."[64] Hence, in the case of *Akayesu*, the Trial Chamber looked to whether the audience construed Akayesu's speech as a call to kill the Tutsi.[65] If the Court could determine that the listener would interpret the speech to be calling for the killing of Tutsis, then the speech would be direct.

iii. The "Imminence" Standard

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[60] *See* e.g. *Id., Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, ¶¶ 12-14 (1998) (noting that a mayor held a meeting inciting murder of Tutsi in the village), *Prosecutor v. Georges Ruggiu*, Judgment and Sentence, ICTR-97-23-I, ¶ 44 (2000) (noting that defendant was a Belgian broadcast journalist who incited genocide on RTLM) [Reproduced in the accompanying notebook at Tab 20, Tab 18, and Tab 22 respectively]

[61] *See* 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 (1994) [Reproduced in the accompanying notebook at Tab 9]

[62] *See* Gopalani, *supra* note 50 at 101. [Reproduced in the accompanying notebook at Tab 7]

[63] *Prosecutor v. Akayesu*, ICTR-96-4-T at ¶ 557. [Reproduced in the accompanying notebook at Tab 18]

[64] *Id.* at ¶ 558.

[65] *See Id.* at ¶¶ 332-47.

Another standard to be met is the standard of imminence.[66] That is, how likely the incitement will produce imminent lawless action. As such, in *Prosecutor v. Akayesu*, the ICTR required proof of possible link between incitement and the commission of genocide.[67] Though not specifically required by Article 3 of the Genocide Convention and Article 2 of the ICTR Statute, the ICTR found imminence to be a requirement for the crime of direct and public incitement to commit genocide.[68]

As applied to Akayesu, the imminence requirement was satisfied when the ICTR found that Akayesu, the mayor of a commune addressed a crowd in which he encouraged the killing of Tutsi and it just happens that the killing of Tutsi in Akayesu's commune began immediately after his speech.[69] The ICTR noted that merely a possible coincidence would not suffice but proof of a possible casual link must exist for imminence standard to be satisfied.[70]

While the ICTR found actual casual link between the Akayesu's incitement and the killing of the Tutsi in his commune, it is important to note that only a possible casual link is required such that incitement is punishable regardless of whether or not it was successful.[71] As it is similar to other inchoate offenses, direct and public incitement is a separate and specific crime which is punishable by the virtue of the criminal act alone.[72]

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[66] *See* Gopalani, *supra* note 50 at 105. [Reproduced in the accompanying notebook at Tab 7]

[67] *See Id.*

[68] *See Prosecutor v. Ruggiu*, Judgment and Sentence, ICTR-97-32-I, at ¶¶ 44-45 (2000) [Reproduced in the accompanying notebook at Tab 22]

[69] *See Id.* at ¶¶ 334, 355.

[70] *See Id.* at ¶ 349.

[71] *See Id.*

As such, because incitement is a crime in itself regardless of its success, under the temporal jurisdiction of the ICTR, it can be prosecuted if it occurred in 1994 and only a possible casual link is required to satisfy the imminence standard.

D. Incitement to Commit Genocide as an Inchoate Crime

The primary international tool for criminalizing genocide is the Genocide Convention.[73] Under the Genocide Convention, there is no requirement that a genocidist achieves him or her aims or that the group attacked actually suffer partial or total destruction.[74] Rather, the crime is complete when certain enumerated acts are committed and target group members with the requisite intent.[75] As such, those crimes would be considered to be inchoate crimes.[76]

Furthermore, irrespective of the temporal jurisdiction, Article 6 of the Rwanda Statute, relating to the basis for individual criminal responsibility, as well as Article 2(3), which enumerates the punishable acts of genocide, would presumably cover acts such as planning, instigating, ordering, or otherwise aiding and abetting a crime that commenced prior to January 1, 1994, so long as there was a causal nexus between those acts and the completion of the crime during 1994.[77] That is, there is a continuum of criminal

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[72] *See Id.* at ¶¶ 554, 562.

[73] *See* David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 Cornell Int'l L.J. 293, 296 (2003). [Reproduced in the accompanying notebook at tab 11]

[74] *See Id.* at 298.

[75] *See Id.*

[76] *See Id.*

[77] *See* Akhavan, *Supra* Note 16 at 506. [Reproduced in the accompanying notebook at Tab 3]

responsibility that extends from the planning and preparation phases to the execution phase of the genocide.

However, inchoate crimes are punishable irrespective of a nexus with the subsequent commission of genocide. With that respect, Incitement to commit genocide is characterized as an inchoate crime according to the Travaux Preparatoires of the Genocide Convention.[78] As such, the crime of incitement to commit genocide is complete when that incitement is done with the specific intent for genocide to result regardless of the success of the incitement in causing that intended genocide. Moreover, as an inchoate crime, the crime of incitement to commit genocide is to be deemed as continuing until the completion of the acts contemplated.[79]

Since evidence of a linkage with other acts is not required, this provision would seem to give the prosecution a considerable advantage when it comes to the prosecution of incitement to commit genocide.[80] Yet when taken in conjunction with the Tribunal's temporal jurisdiction, this advantage is negated as it would not extend to acts of incitement completed prior to 1994.[81] For example, it is alleged by the Rwandese Government and the Canadian IRB that, in a statement made on November 26, 1992, Dr. Leon Mugesera, one of the advisers to President Habyarimana, called for the extermination of the Tutsi in what is described as a final solution, Rwandese-style.[82]

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[78] *See* Nersessian, *Supra* Note 73 at 298. [Reproduced in the accompanying notebook at Tab 11]

[79] *See Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze,* Judgment and Sentence, IC-TTR-99-52-T at ¶1017. [Reproduced in the accompanying notebook at Tab 21]

[80] *See* Akhavan, *Supra* Note 16 at 506. [Reproduced in the accompanying notebook at Tab 3]

[81] *See Id.*

[82] *See Id. See also* Schabas, *supra* note 22 at 157. [Reproduced in the accompanying notebook at Tab 13]

Within the confines of the Rwanda Statute's temporal jurisdiction, the incitement to commit genocide allegedly committed in 1992 would fall under the jurisdiction of the Tribunal (e.g., as planning, instigating, or aiding and abetting under Article 6, or incitement to genocide under Article 2(3)(c)) only if a causal nexus is established with the subsequent commission of genocide in 1994.[83] Therefore, due to the inability to establish a casual nexus with the subsequent commission of genocide along with no evidence that Mugesera had incited others to commit genocide in 1994, the ICTR will not be able to prosecute Mugesera for his actions in 1992 because the continuing crime that he had allegedly committed halted outside of the ICTR's temporal jurisdiction.

E. Incitement to Commit Genocide as Used in the ICTR Media Case: Prosecutor v. Nahimana, Barayagwiza, and Ngeze

In a landmark decision by the ICTR in December of 2003, the ICTR found Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze guilty of direct and public incitement to commit genocide under Article 2(3)(c) of the Statute of the ICTR.[84]

i. Case Background

Nahimana was a former history professor who was in control of the RTLM ever since its foundation.[85] Over the course of being in control of RTLM, Nahimana was responsible for numerous broadcasts of messages calling for the extermination of the

[83] *See* Akhavan, *Supra* Note 16 at 506. [Reproduced in the accompanying notebook at Tab 3]

[84] *See* Statute of the International Criminal Tribunal for Rwanda, *supra* note 1, Art. 2(3)(c). [Reproduced in the accompanying notebook at Tab 27]

[85] *See Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, ICTR-99-52 at ¶¶567-568 (2003). [Reproduced in the accompanying notebook at Tab 21]

Tutsi population.[86] He was found guilty of direct and public incitement of genocide for his role in RTLM programming inciting violence against the Tutsi population.[87]

Jean-Bosco Barayagwiza was a lawyer who was also in control of the RTLM as well as being one of the principal founders of the Coalition for the Defense of the Republic (hereinafter "CDR") who played a leading role in its formation and development.[88] He was found guilty of direct and public incitement of genocide for his role in RTLM programming inciting violence against the Tutsi population as well as for failing to take necessary and reasonable measures to prevent the acts of direct and public incitement to commit genocide caused by other members of the CDR.[89]

Hassan Ngeze was the owner, founder and editor of the [newspaper], *Kangura*. He controlled the publication and was responsible for its contents.[90] He was also one of the founding members of the CDR.[91] He was found guilty of direct and public incitement to commit genocide for his role in using the newspaper to "instill hatred, promote fear, and incite genocide" against the Tutsi population.[92] Moreover, Ngeze was also found guilty of direct and public incitement to commit genocide for his role in driving "around

[86] *See* Schabas, supra note 22 at 146-147. [Reproduced in the accompanying notebook at Tab 13]

[87] *See Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, IC-TTR-99-52 at ¶¶ 1033-34. [Reproduced in the accompanying notebook at Tab 21]

[88] *See Id.* at ¶¶970-977.

[89] *See Id.* at ¶ 1035.

[90] *See Id.* at ¶135.

[91] *Id.* at ¶277.

[92] *Id.* at ¶1038.

with a megaphone in his vehicle, mobilizing the Hutu population to come to CDR meetings and spreading the message that the [Tutsi population] would be terminated."[93]

ii. The Issue of Advocacy of Idea and Advocacy of Violence in Nahimana

The ICTR in *Nahimana* was given the task of distinguishing between the advocacy of ideas from the advocacy of violence.[94] The ICTR acknowledge this important distinction and made attempts to articulate the difference between the two kinds of advocacy.[95]

In its decision, the ICTR acknowledge the fact that some of the *Kangura* articles and the RTLM broadcasts conveyed "historical information, political analysis, or advocacy of an ethnic consciousness regarding the inequitable distribution of privileges in Rwanda."[96] In this case, the ICTR found those articles and broadcasts to fall "squarely within the scope of speech that is protected by the right to freedom of expression."[97]

However, the ICTR also stressed the intent of the speech in deciding the guilty of the RTLM broadcasts and the *Kangura* articles. In its analysis, the ICTR considered four factors: 1) the accuracy of the statement, 2) the tone of the statement, 3) the context in which the statement was made, and 4) the positioning of the media.[98]

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[93] *Id.* at ¶ 1039.

[94] *See* Philip E. Hamilton, *The reconcilability of the Nahimana "Media Case" Decision for Direct and Public Incitement to Commit Genocide and Persecution as a Crime Against Humanity with U.S. Free Expression Law*, 11-13, (2004) *available at* http://law.case.edu/War-Crimes-Research-Portal/ (last visited on 11/23/2004) [Reproduced in the accompanying notebook at Tab 34]

[95] *Id.* at 12.

[96] *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, ICTR-99-52-T at ¶1019. [Reproduced in the accompanying notebook at Tab 21]

[97] *Id.*

[98] *See Id.* at ¶¶ 1022, 1024.

Under the first factor, the ICTR reasoned that if a statement was true or even "information[al] in nature," while it might generate resentment or even a desire to take action, the impact would merely be the result of the information conveyed by the statement rather than the statement itself.[99] However, in the event the statement is false, the inaccuracies will be viewed as an indicator that the intent of the statement was not to convey information but rather to promote hatred and inflame ethnic tensions.[100] With that reasoning, the ICTR concluded that the statement "the Tutsi are the ones with all the money" would be distinct from a statement regarding the Tutsi owning a percentage of the taxis.[101] Thus, the former statement would be considered advocacy with intent for violence while the latter would be merely advocacy for idea.

Under the second factor, the ICTR stressed the equal importance of the tone of the statement in the determination of whether the intent of the statement was to educate or to preach violence when it stated that "[t]he tone of the statement is as relevant to this determination as is its content."[102] The ICTR concluded "that Nahimana was aware of the relevance of the tone to culpability was evidenced by his reluctance to acknowledge the text of the broadcast, 'they are the ones with all the money,' when he was questioned on it [and] eventually, he said…that he would not have used such language but would have expressed the reality in a different way."[103]

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[99] *Id.* at ¶ 1020.

[100] *See Id.* at ¶ 1021.

[101] *See Id.*

[102] *Id.* at ¶ 1022.

[103] *Id.*

Under the third factor, the ICTR considered "the context in which the statement is made to be important."[104] The ICTR states that "a statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement."[105]

And under the last factor, the ICTR "recognizes that some media are advocacy-oriented and considers that the issue of importance to its findings is not whether the media played an advocacy role but rather the content of what it was actually advocating."[106] Therefore, the actual positioning of *Kangura* and RTLM as advocates of violence indicates the real intent of its articles and broadcasts.[107] According to the ICTR, "in cases where the media disseminates views that constitutes ethnic hatred and calls to violence for informative or educational purposes, a clear distancing from these is necessary to avoid conveying an endorsement of the message and in fact to convey a counter-message to ensure that no harm results from the broadcast."[108] In the ICTR's view, the RTLM and *Kangura's* failure to distance themselves from the message of ethnic hatred meant they were endorsing the advocacy of violence against the Tutsi.[109]

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[104] *Id.*

[105] *Id*

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[106] *Id.* at ¶ 1024.

[107] *See Id.*

[108] *Id.*

[109] *See Id.*

In its decision, the ICTR equated the fact that genocide actually occurring in Rwanda with the finding of intent for incitement to commit genocide.[110] In its reasoning, the ICTR noted that "incitement is a crime is a crime regardless of whether it had the effect it intends to have. 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 in tended to have this effect is evidenced in part by the fact it did have this effect."[111]

iii. The Stretch of the Imminence Requirement in Nahimana

The imminence requirement used in *Akayesu* was stretched, if not eliminated by the ICTR in *Nahimana.* As used in *Akayesu,* the imminence requirement is used to establish a link between the speech and the resulting crime.[112] While the ICTR held in *Akayesu* that the immediate killing of Tutsi in the commune after a speech by Akayesu promoting the killing of the Tutsi population was what satisfy the imminence requirement, the ICTR in *Nahimana* allowed for a much longer time in its definition of "imminence."[113] In *Nahimana,* the ICTR held that direct and public incitement to commit genocide is an "inchoate crime which continues until the completion of the acts contemplated."[114] The ICTR determined that the publication of *Kangura* prior to 1994 fell within its temporal jurisdiction because "the alleged impact of which culminated in

[110] *See Id.* at ¶ 1029.

[111] *Id.*

[112] *See* Gopalani, *supra* note 50 at 105. [Reproduced in the accompanying notebook at Tab 7]

[113] *See Prosecutor v. Nahimana, Barayagwiza, and Ngeze,* ICTR-99-52-T at ¶ 1017. [Reproduced in the accompanying notebook at Tab 21]

[114] *See Id.*

events that took place in 1994."[115] Similarly, the ICTR concluded that the entirety of RTLM broadcasting falls within its temporal jurisdiction because "the alleged impact culminated in events that took place in 1994."[116]

With that said however, it is important to note that the ICTR originally interpreted its temporal jurisdiction restrictively when it held that no facts "pre-dating or post-dating 1994 could be used to support a count in the indictment; however, alleged facts which took place during those times can be used to establish an "historical context" for an indictment."[117] Only later in its final judgment did the Trial Chamber of the ICTR make a final ruling and held that such material fell within the temporal jurisdiction of its Statute.[118] Moreover, an ICTR Appeals Chamber has ordered the withdrawal of all reference to facts predating 1994 from specific counts of the indictment.[119]

iv. Reconcilability of *Nahimana* with *Mugesera*

As mentioned before, Leon Mugesera was suspected of committing incitement to commit genocide. As such, the question of why are Nahimana, Barayagwiza, and Ngeze prosecuted and not Mugesera when all four have been suspected of inciting others to commit genocide must be addressed.

Nahimana is different from the Mugesera scenario for several reasons. The factual difference between the two is that unlike Nahimana, Barayagwiza, and Ngeze, the

[115] *Id.*

[116] *Id.*

[117] *See* Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 Mich. J. Int'l L. 653, 684 (Spring, 2004) [Reproduced in the accompanying notebook at Tab 12]

[118] *See Id.*

[119] *See Id.*

possible incitement to commit genocide made by Mugesera halted prior to 1994 whereas the RTLM and *Kangura's* incitement to commit genocide continued well into 1994. As such, Nahimana, Barayagwiza, and Ngeze's actions fell within the ICTR's temporal jurisdiction and may be prosecuted by the ICTR because inchoate crimes such as incitement to commit genocide is deemed to be continuing until the completion of the acts contemplated.[120]

Moreover, as the Canadian Federal Court of Appeal have concluded, there lack clear evidence that Mugesera did indeed incite others to commit genocide.[121] As such, it is quite possible that the ICTR have not charged Mugesera with incitement to commit genocide because of the lack of such evidence.

Should the ICTR uncover sufficient evidence to overcome the burden of proving that Mugesera have incited others to commit genocide, it would still be faced with the obstacle of overcoming the temporal jurisdiction of the ICTR to prosecute Mugesera for such crime.

In *Nahimana*, because some of the incitements to commit genocide being prosecuted took place in 1994, the ICTR enjoyed the advantage of the characterization of incitement to commit genocide as an inchoate crime in that it simply have to prove that Nahimana, Barayagwiza, and Ngeze incited others to commit genocide in 1994 with the intention of causing genocide.[122] It does not have to prove however, that their incitement had a link with the genocide that eventually took place.[123]

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[120] *See Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, ICTR-99-52-T at ¶1017. [Reproduced in the accompanying notebook at Tab 21]

[121] *See Mugesera c. Canada*, 2003 CAF 325 at 3. [Reproduced in the accompanying notebook at Tab 17]

[122] *See Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, ICTR-99-52-T at ¶ 1017. [Reproduced in the accompanying notebook at Tab 21]

In contrast, the alleged incitement of Mugesera took place in 1992, well outside of ICTR's temporal jurisdiction and there exist no evidence of any future incitement to commit genocide by Mugesera in 1994.[124] As such, the characterization of incitement to commit genocide as an inchoate crime will be of no use to the ICTR because the completion of the acts contemplated by Mugesera took place before 1994. As such, since the prosecution of inchoate crimes outside of 1994 is not authorized by the ICTR Statute and given the current fact pattern, the ICTR have no jurisdiction to prosecute Leon Mugesera. Therefore, in order to prosecute Mugesera for incitement to commit genocide, the Prosecutor must establish a casual nexus between his alleged incitements with the subsequent commission of genocide in 1994.[125] Unless that can established, the ICTR will have to leave the responsibility of prosecuting those like Mugesera to the Rwanda national court.[126]

F. ICTR-made Exceptions to the Statute's Temporal Jurisdiction

As mentioned in the foregoing, during the course of the *Nahimana* trial, the defense counsel made several motions objecting to the inclusion of several acts of incitement which took place before 1994 that was included in the indictment citing ICTR's temporal jurisdiction.

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[123] *Id.*

[124] *See* Schabas, *supra* note 22 at 157. [Reproduced in the accompanying notebook at Tab 13]

[125] *See* Akhavan, *Supra* Note 16 at 506. [Reproduced in the accompanying notebook at Tab 3]

[126] *See* Human Rights First Publications, *supra* note 8 at 7. [Reproduced in the accompanying notebook at Tab 8] *See also* Sriram, Chandra. *Revolutions in Accountability: New Approaches to Past Abuses.* 19 Am. U. Int'l L. Rev. 301 (2003) [Reproduced in the accompanying notebook at Tab 14] Due to the concurrent jurisdiction of the ICTR, the Rwandan national courts will be able to ask for the extradition of Mugesera from Canada and then prosecute him should the ICTR be limited by its temporal jurisdiction.

In *Prosecutor v. Jean-Batiste Gatete*, the ICTR in a chamber decision noted that in *Nahimana* "The Appeals Chamber held that an accused cannot be held accountable for his crimes committed prior to 1994, and that such events would not be referred to except for historical purposes or information."[127] Furthermore, the motion decision in *Gatete* stressed the concurring opinion of Judge Shahabuddeen in holding that "evidence of events prior to 1994 could form a basis upon which to draw reasonable inferences regarding elements of crimes committed within the temporal jurisdiction, for example, intent, if it is to prove that the element existed during the commission of the crime in 1994."[128] In addition, "such evidence can also be used to establish that a conspiracy agreement made before 1994 was fulfilled or renewed in 1994. Moreover, pre-1994 evidence may be admissible to prove a pattern, design or systemic course of conduct by the accused, or to provide background evidence."[129] As such, the ICTR have begun to see incitements to commit genocide before 1994 as both evidence and as inchoate crimes that is to be prosecuted if at all possible.

Similarly, the ICTR in *Prosecutor v. Aloys Simba* echoed that view on August 31, 2004 in its decision on a defense motion to preclude prosecution evidence.[130] In its decision, it confirmed the existence of "three bases of relevance for pre-1994 evidence, which are exceptions to the general inadmissibility of pre-1994 evidence: (i) evidence

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[127] *See Prosecutor v. Jean-Batiste Gatete*, Motion Decision, ICTR-00-61-I, ¶6 (2004). [Reproduced in the accompanying notebook at Tab 19]

[128] *Id*

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[129] *Id.*

[130] *See Prosecutor v. Aloys Simba*, Motion Decision, ICTR-01-76-I, ¶ 3 (2004). [Reproduced in the accompanying notebook at Tab 23]

relevant to an offence continuing into 1994; (ii) evidence providing a context or background; or (iii) similar fact evidence."[131]

As such, those are the only exceptions to the pre-1994 inadmissibility rule as established by the temporal jurisdiction of the Statute made by the ICTR. Therefore, in order for the ICTR to consider any pre-1994 acts of incitement to commit genocide, it must fit within the three exceptions.

Thereby, in applying this line of analysis to the situation with Mugesera, his alleged incitement to commit genocide will likely not be allowed to be introduced as evidence much less to be prosecuted. Because there is no evidence of any incitement on Mugesera's part that took place in 1994, his actions in 1992 are not relevant to an offense continuing into 1994. In addition, his 1992 acts could not provide context or background to the non-existence offense that took place in 1994. And moreover, Mugesera's acts in 1992 can not be used to show similar patterns of conduct when there is no act that took place in 1994 to compare to.

In this case, the exceptions made by the ICTR in *Gatete* and *Simba* really do not do much, if at all for the prosecution of incitement to commit genocide. In the event that there exists a crime of incitement to commit genocide which took place in 1994, there would be no need to introduce past acts of incitement in order provide context, background, relevance, or similar fact pattern because as an inchoate crime, the mere existence of an incitement that took place in 1994 would be enough for the ICTR to prosecute the incitements that took place prior to 1994. As such, the best way to

[131] *Id.*

prosecute incitement to commit genocide which took place prior to 1994 is by establish evidence of further incitements that took place in 1994.

IV. CONCLUSION

In summary, following the Travaux Preparatoires of the Genocide Convention, the ICTR has also classified incitement to commit genocide as an inchoate crime thereby negating the necessity of the success of such incitement in causing genocide and deeming incitement to commit genocide as continuing until the completion of the acts contemplated. As such, combined with the opinions of *Nahimana* and *Akayesu*, the criminal act of incitement to commit genocide requires no more than a possibility of a casual nexus to the genocide in 1994 in order for it to be prosecuted at the ICTR if any incitement took place within 1994.

However, should the incitement to commit genocide halt before 1994, the ICTR may not prosecute those who committed incitement to commit genocide prior to 1994 unless there is a casual nexus between the incitement and the genocide that occurred in 1994. In the event there exists evidence of a casual nexus between incitement that took place prior to 1994 and the genocide, the ICTR would have jurisdiction to consider those acts. However, it is important to note that due to the mass scale of the genocide, establishing actual connection between incitement and genocide had proven to be difficult. As such, the prosecution by the ICTR of incitements to commit genocide which took place and halted before 1994 will severely be limited by the temporal jurisdiction.

In conclusion, the ICTR is limited to prosecuting acts of incitement to commit genocide only if a casual nexus between the incitement and the genocide can be established, it provides context for another crime, it provides a historical background for

another crime, or it was similar to the facts surrounding another crime. As such, the crime of incitement to commit genocide is a continuing crime such that acts committed outside of the temporal jurisdiction can be considered in prosecuting an accused so long as the prosecution is able to meet the conditions set forth in this memorandum. Otherwise, acts of incitement to commit genocide committed outside of the temporal jurisdiction, even being deemed as continuing crimes, would not be considered in prosecuting an accused if none of the aforementioned conditions are met.