THE INTERNATIONAL STANDARD OF DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE: AN OBSTACLE TO U.S. RATIFICATION OF THE INTERNATIONAL CRIMINAL COURT STATUTE?

AMEER F. GOPALANI*

"The graves are not yet quite full. Who is going to do the good work and help us fill them completely?"[1] *"You have to kill (the Tutsis); they are cockroaches. . . . We must all fight (the Tutsis); we must finish with them, exterminate them, sweep them from the whole country."*[2]

I. INTRODUCTION

As the conflicts in Rwanda and Yugoslavia demonstrate, virulent propaganda leads to ethnic conflict. To ensure effective means to combat such propaganda on the international level, countries must come to a consensus on what type of speech ad-hoc tribunals and future international courts should criminalize. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), an international treaty ratified by 102 countries including the United States, outlaws "direct and public incitement to commit genocide."[3] The statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tri-

* Associate, Arnold & Porter, Washington, D.C.; Law Clerk, Fall 2000, International Criminal Tribunal for the former Yugoslavia, The Hague.; J.D., 2001, University of Texas School of Law; B.A., 1997, Columbia University. I would like to thank the University of Texas, family and friends for their unconditional support. I would also like to thank Professor Steven R. Ratner for his comments, suggestions and general guidance. Finally, I express my gratitude to Elissa Steglich and Payam Akhavan for their helpful comments and editing.

1. ARYEH NEIER, WAR CRIMES 203-04 (1998) (quoting GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 24 (1995)).

2. Colette Braekman, *Incitement to Genocide*, *in* CRIMES OF WAR 192, 192 (Roy Gutman & David Rieff eds., 1999) (quoting Radio Televison des Milles Collines (RTLM) in Rwanda).

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

bunal for Rwanda (ICTR), and the proposed International Criminal Court (ICC) contain this exact phrase.[4]

Although most countries wish to criminalize incitement to genocide, they vastly disagree as to the meaning and scope of the crime. During the drafting sessions of the Genocide Convention, the incitement provision caused considerable dissension.[5] The United States representative, for example, declared the phrase was a plain infringement on the guarantees of free speech protected by the First Amendment.[6] Regardless of this objection, the United States signed the convention and submitted it to the Senate for ratification.

The phrase direct and public incitement, along with other provisions of the Genocide Convention became the subject of acrimonious debate in the Senate for almost forty years.[7] The exact meaning and confines of direct and public incitement constituted a significant portion of the ratification debates.[8] Many Senators feared that the Genocide Convention would curtail First Amendment freedom of speech rights. The following hypothetical posed by Senator Sam J. Ervin, Jr. reflects the hesitance of those who opposed ratification of the convention: "A Congressman makes a public speech in which he/she justifies the action of Arabs in killing Jews, or the action of Jews in killing Arabs."[9]

Would the hypothetical Congressman be subject to prosecution under the Genocide Convention? The answer to this question depends on where the speech was made, as each domestic jurisdiction will have slightly different substantive interpretations of the incitement provision. The Genocide Convention obligates countries to prosecute genocide within their own borders.[10] Under U.S. implementing legislation, the Proxmire Act,[11] federal prosecutors could theoretically initiate legal action against the Congressman. The U.S. court would then use domestic free speech case law to guide its interpretation of direct and public incitement. As will be more fully discussed, this type of speech is probably protected under the First Amendment.

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4. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 25(3)e (1998) [hereinafter ICC Statute]; Statute of the International Tribunal for the Former Yugoslavia, art. 4 (3)(c), *reprinted in* 32 I.L.M. 1203; The Statute of the International Tribunal for Rwanda, U.N. Doc S/RES/955 (1994), art. 2, ¶ 3, *reprinted in* 33 I.L.M. 1598, at 1602.

5. NEHEMIAN ROBINSON, THE GENOCIDE CONVENTION 66 (1960).

6. *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).

7. LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 1 (1991).

8. *See Considering the Constitutional Implications of the Proposed Genocide Convention*, 99th Cong. 1 (1985).

9. *The Prevention and Punishment of the Crime of Genocide: Hearing Before the Subcomm. of the Comm. on Foreign Relation*, 91st Cong. 202 (1970).

10. Genocide Convention, *supra* note 3, art. VI.

11. Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-1093 (2001).

Nevertheless, the hesitance expressed by Senators with respect to the incitement provision did not stem from future U.S. judicial interpretations of incitement. Rather, the Senate fretted about the possible establishment of a permanent international tribunal and the U.S. constitutional implications that would result from a possible broad reading of incitement.[12] An incitement holding by a permanent international court would arguably bind United States courts to a definitive interpretation of direct and public incitement; an interpretation that would potentially violate the First Amendment.[13] Thus, when the Senate finally adopted a resolution of ratification of the Genocide Convention in 1986, it did so with the following reservation: "Nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."[14]

A permanent international tribunal is now a reality on paper. On July 18, 1998, 120 delegations voted in favor of the creation of a permanent international court at the United Nations Diplomatic Conference held in Rome.[15] As of this writing, forty-two countries have already ratified the statute, leaving only eighteen more for the statute to enter into force.[16] The United States has thus far refused to sign the statute. The United States primary concerns are with the court's "overreaching" jurisdiction.[17] The Rome Statute provides the ICC with jurisdiction over any individual who commits genocide within a state that is a party to the statute or over any individuals who are nationals of party states.[18] The Statute also raises a number of questions relating to incitement.

Whether or not the United States chooses to ratify the ICC statute, an inquiry into incitement is useful to assuage U.S. fears because the Statue envisions broad jurisdictional powers not necessarily based on consent and

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12. *Considering the Constitutional Implications of the Proposed Genocide Convention*, 99th Cong. 66 (1985).

13. *Id.*. *See also* Johan D. Van Der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 295 (1999).

14. 132 CONG. REC. S1252-04 (daily ed. Feb. 18, 1986) (Lugar/Helms/Hatch Reservations to the Genocide Conventions).

15. U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, UN Press Release L/2889 (July 20, 1998).

16. *See* Ratification Status, Rome Statute of the International Criminal Court, *at* http://www.un.org/law/icc/index.html (Last visited Oct. 12, 2001).

17. David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999).

18. ICC Statute, *supra* note 4, art. 12(2).

> In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

Id.

prohibits any reservations.[19] The recent development of international jurisprudence on genocide, promulgated by the ICTR and ICTY, allows for a comparative analysis between First Amendment case law and incitement cases on the international level. Such a direct analysis was not possible at the time the United States ratified the Genocide Convention in 1986.[20]

This article argues that U.S. concerns about an international criminal court's broad interpretation of direct and public incitement are unfounded. If the ICC exercises jurisdiction over incitement cases, it will likely use a narrow incitement standard that fully comports with the First Amendment. The international standard of incitement, originating in the Genocide Convention and molded by the IMT, ICTR and ICTY, is very similar to the current incitement standard in the United States. U.S. free speech cases on incitement can guide international courts in the development of incitement jurisprudence. Conversely, a clear and reasoned international standard on incitement will guide domestic jurisdictions, such as the United States, in any future domestic prosecutions of incitement under the Genocide Convention. What advantage does international prosecution of incitement pose over domestic prosecution and what standard of direct and public incitement would the international court use? This article attempts to answer such questions.

Part II of this article explores the legal development of genocide and individual accountability. It then explains the justification for holding inciters to genocide accountable on the international level. Since the inquiry is limited to individual accountability, this article will not cover claims under the Genocide Convention brought before the International Court of Justice, which only hears disputes between states. Part III evaluates U.S. free speech law and the preparatory works of the Genocide Convention to determine the definition of incitement, how it differs from general advocacy, and whether U.S. conceptions of incitement are similar to the incitement norm promulgated by both the Genocide Convention and international criminal tribunals. Part IV reveals and analyzes the "direct" and "imminent" requirements of incitement that appear both on the domestic and international levels. As a concrete example, this part also examines how a U.S. court would approach the incitement prosecution of a recently indicted war criminal. Part V explores the paradox of indirect incitement and the requirement of specific intent to commit genocide.

19. ICC Statute, *supra* note 4, art. 120.

20. *See* 132 Cong. Rec. S1355-01 (1986) (Senate ratifying the International Convention for the Prevention and Punishment of the Crime of Genocide).

II. BACKGROUND ON INCITEMENT AND THE NEED FOR INTERNATIONAL PROSECUTION

A. The Legal Birth of Genocide

Following the systematic mass murder of millions of Jews before and during World War II, the international community sought to condemn such atrocious acts. The slaughtering of individuals belonging to a distinct ethnic or racial group, simply because they are members of that group, has been perpetrated throughout history.[21] Until the 1940's, such acts were "crime(s) without a name," and little was done to prevent or punish them on an international level. In his 1944 book, *Axis Rule in Occupied Europe*, Polish jurist Raphael Lemkin fashioned the term genocide from the Greek word *genos*, meaning race or tribe, and the Latin term for killing, *cide*.[22] Due to Lemkin's efforts, the United Nations General Assembly began work on a Genocide Convention with the passage of Resolution 96(I), affirming genocide as a crime carrying individual accountability under international law.[23]

The Secretary General of the United Nations and the Ad Hoc Committee of the Economic and Social Council of the General Assembly prepared the first drafts of the Genocide Convention.[24] The Sixth Committee then examined and amended these drafts article by article and submitted the proposed convention to the General Assembly, which unanimously adopted the convention on December 9, 1948.[25] The Genocide Convention lists the acts that constitute genocide and then enumerates a separate set of acts that warrant punishment.[26] The punishment of acts of and related to genocide under the convention constitute customary international law. [27]

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21. Diane F. Orentlicher, *Genocide*, *in* CRIMES OF WAR 156, 156 (Roy Gutman & David Rieff eds., 1999).

22. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944).

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

24. *See* Draft Convention on the Crime of Genocide, U.N. Secretary-General, U.N. Doc. E/447 (1947) [hereinafter Secretary General's Draft]; Second Draft Convention on the Crime of Genocide, Ad Hoc Comm., U.N. Doc. E/794 (1948), *available at* http://www.preventgenocide.org/law/convention/drafts [hereinafter Ad Hoc Committee Draft].

25. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES: BEYOND THE NUREMBURG LEGACY 26 (1997).

26. Article II of the Genocide Convention, *supra* note 3, defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily harm or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

B. Holding the "Inciter" Individually Accountable

1. The Development and Establishment of Individual Accountability

The notion of individual accountability has gradually become grounded in international law. For three centuries, the state was the exclusive subject of international law.[28] Over time, state responsibility could not keep up with the objectives of criminal law. After World War II, the International Military Tribunal (IMT) at Nuremberg held individual officials accountable for their atrocious conduct.[29] The judgments of the IMT emphasized that "[c]rimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[30]

Individual accountability has since expanded its reach to include private actors, regardless of whether their crimes are affiliated with state action. The Genocide Convention holds individuals accountable "whether they are constitutionally responsible rulers, public officials or private individuals."[31] The international community has come to the consensus that crimes such as genocide are so offensive and are of such "universal concern" that tribunals and states should punish both non-state actors and government officials for genocidal acts.[32] The United States has participated in the movement toward individual accountability. For example, The Restatement (Third) of Foreign

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Article III reads:
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.
This article focuses only on the separate act of direct and public incitement to commit genocide, through public meetings, television, radio or press, and on a particular form of genocide: killing or causing serious bodily harm to members of a national, ethnical, racial or religious group.

27. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Advisory Opinion, 1951 I.C.J. 15. *See also* RESTATEMENT (THIRD) OF THE LAW: FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (Tentative Draft No. 3, 1982).

28. Criton G. Tornaritus, *The Position of the Individual in International Law, in* A TREATISE ON INTERNATIONAL CRIMINAL LAW 103, 104 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

29. RATNER & ABRAMS, *supra* note 25, at 9.

30. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947).

31. Genocide Convention, *supra* note 3, art. IV.

32. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 514 (1999). *See also* Van Der Vyver, *supra* note 13, at 293-94.

Relations Law states: "Individuals may be held liable for offenses against international law, such as piracy, war crimes and genocide."[33]

2. *The Logic of "Inciter" Accountability*

Incitement to genocide, an act leading to genocide, also warrants individual accountability and punishment. The drafters of the Genocide Convention not only intended to punish individuals for acts already committed, but to prevent genocide as well.[34] As the Polish representative at the Sixth Committee meeting stated, "victims of genocide could derive but meager satisfaction from seeing the guilty persons brought to justice after the crime had been committed; it would be better to prevent the crime from being committed."[35]

Moreover, international condemnation and individual accountability correctly applies to incitement because incitement is likely to cause genocide. 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.[36] The Russian delegation to the Sixth Committee reasoned, with respect to the Holocaust: "it was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so."[37]

Most states agree that inciters should be held individually accountable, but disagree as to whether a separate provision enumerating direct and public incitement is necessary.[38] Arguably, states can punish inciters under the complicity or conspiracy provision of the Genocide Convention.[39] If one assumes that only several people can commit genocide, then the incitement provision is superfluous because an inciter's actions would fall under conspiracy or complicity.[40]

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33. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 27, at 71. *See also* Kadic v. Karadzic, 70 F.3d 232 (1996).

34. U.N. GAOR 6th Comm., 55th plen. mtg., *supra* note 23 at 189. *See also* Genocide Convention, *supra* note 3, art. I.

35. U.N. GAOR 6th Comm., 84th mtg., *supra* note 6, at 215.

36. Prosecutor v. Dusko Tadic, Opinion and Judgement, IT-94-1-T, ¶ 689 (1997).

37. U.N. GAOR 6th Comm., 84th mtg., *supra* note 6, at 219.

38. *Id.* at 213.

39. This was the position of the U.S. representative at *The Report of the Ad Hoc Committee on Genocide to the Economic and Social Council*, U.N. ESCOR, Supp. No. 6, at 8, UN Doc. E/AC.25/SR.1 to 28 (1948).

40. U.N. GAOR 6th Comm., 84th mtg. *supra* note 6, at 212-15: A majority of the international community, including the United States, characterize conspiracy as an agreement between two or more persons to commit an unlawful act. Complicity also concerns the actions of more than one individual since it punishes classic aiding and abetting; that is, associating with another person in the commission of a crime. *See* Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 548 (1998) (noting that the difference between complicity and conspiracy is that complicity requires a successful commission of the principal offense, while conspiracy does not).

The argument that tribunals should punish incitement under conspiracy or complicity fails to recognize the damage one inciter can cause, acting alone. Recent cases of genocide demonstrate the substantial role inciters, especially government officials, play in the commission of genocide. Preceding and during the genocide in Rwanda, a local radio station, Radio Televison des Milles Collines (RTLM), broadcast instructions to genocide that led to the massacre of one million Tustsis and moderate Hutus.[41] On or about June 21 1994, Jean Kambanda, the former Prime Minister of Rwanda, spoke on RTLM and encouraged the station to continue the incitement and calls for genocide against the Tutsi population.[42] Kambanda also sanctioned the genocide campaign in public engagements and at government meetings.[43] In the name of the government, Kambanda uttered incendiary phrases such as "you refuse to give your blood to your country and the dogs drink it for nothing."[44] Kambanda acknowledged that his speech had significant effects on the Rwandan people and therefore plead guilty to direct and public incitement.[45]

Georges Ruggiu, a Belgium journalist also used RTLM to wage a media war against the Tutsi.[46] Ruggiu admitted making several public broadcasts that his listeners interpreted as "go kill the Tutsis and Hutu political opponents of the interim government."[47] Ruggiu acknowledged that his broadcasts incited young Rwandans, Interahamwe militiamen and soldiers to engage in genocidal acts and was consequently sentenced to twelve years in prison.[48] As the findings of fact highlight in the *Kambanda, Ruggiu* and *Akayesu* cases, statements made by a single public official may have a significant impact on people,[49] much greater than similar statements made by numerous private individuals acting in concert.

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41. Braekman, *supra* note 2, at 192.

42. Prosecutor v. Jean Kambanda, Judgement and Sentence, ICTR-97-23-S, ¶ 39 (1998). Kambanda is the first person to be convicted of genocide since the signing of the 1948 Genocide Convention.

43. *Id.* ¶ 39.

44. *Id.* ¶ 39(x).

45. The ICTR sentenced Kambanda to life imprisonment on September 4, 1998. Kambanda requested the Appeals Chamber to revoke his guilty plea and to order a full trial, but the Chamber rejected his appeal and affirmed his sentence in October of 2000. Jean Kambanda v. Prosecutor, Appeal and Judgement, ICTR-97-23-A, ¶ 125 (2000).

46. Prosecutor v. Georges Ruggiu, Judgement and Sentence, ICTR-97-32-I, ¶ 44 (2000).

47. *Id.*

48. *Id.* ¶ 44 (xi).

49. *See, e.g., Kambanda,* ICTR-97-23-S, ¶ 39(ii) (noting that defendant was Prime Minister of Interim Government of Rwanda); Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 12-14 (1998) (noting that Akayesu was Bourgmestre [mayor] and held a meeting inciting murder of Tutsi in the village); *Riggiu,* ICTR-97-I, ¶ 44(i) (noting the defendant was a broadcast journalist).

3. *State v. International Jurisdiction to Prosecute Incitement*

The United States should delegate concurrent jurisdiction over incitement cases, committed within the United States or by U.S. nationals in another territory, to an international court. Article VI of the Genocide Convention obligates domestic tribunals to prosecute acts of genocide and genocide related acts committed within their own 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.[50] Therefore, Article VI also envisions prosecutions "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[51] This provision of the Genocide Convention relies on consent to international jurisdiction.

The Genocide Convention precludes an international criminal court from prosecuting genocide and incitement to genocide when a state has not ratified the court's statute. The drafters of the convention contemplated the idea of placing mandatory jurisdiction in the hands of an international criminal court.[52] However, most delegates rejected the notion of an international court exercising jurisdiction over cases of genocide without state consent, a primacy that the ICTY and ICTR enjoy. To the delegates, the implications of such a provision on state sovereignty and state pride were too costly. The delegates conveyed their genuine sympathy for the cause of genocide on the one hand, and their obligations to their country on the other by granting permissive jurisdiction to an international court.[53] Therefore, Article VI's reference to an international court is an aspiration rather than an obligatory provision that gives states the right to elect jurisdiction.[54]

With respect to genocide, the United States should accept the jurisdiction of the ICC, an international penal tribunal as specified by Article VI of the Genocide Convention. Similar to the Genocide Convention, the ICC Statute defers to domestic prosecutions of genocide.[55] In contrast to the Genocide Convention, the ICC Statute mandates "international jurisdiction"

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50. *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., 97-98th mtgs., at 365 (1948). There have been recent domestic prosecutions of genocide, but they deal with non-nationals that committed genocide within the borders of another country. *See Rwandan Nuns jailed in genocide; Belgian jury also sentences 2 others*, WASH. POST, June 9, 2001, at A01. Some countries, such as Belgium, have exceeded the requirements of the Genocide Convention by enacting domestic legislation that confers jurisdiction over nationals and non-nationals, residing in their borders, for international crimes committed in other countries. Payam Akhavan, *Enforcement of the Genocide Convention: A Challenge to Civilization*, 8 HARV. HUM. RTS. J. 229, 234 (1995).

51. Genocide Convention, *supra* note 3, art. VI.

52. U.N. GAOR 6th Comm., 97-98th mtgs., *supra* note 50, at 363-407.

53. *Id.*

54. 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, 58 (1994).

55. ICC Statute, *supra* note 4, art. 18, ¶ 2, and art. 19, ¶ 2(b).

when a state party is "unwilling or unable genuinely to carry out the investigation or prosecution."[56]

The back-up jurisdictional feature of the ICC Statute is crucial because in cases where the inciter is a government official, state tribunals may be unwilling to prosecute the offender.[57] For example, as one delegate to the Sixth Committee noted in reference to the Holocaust, "what would have been the result if the punishment of the war criminals had been left to the German people themselves?"[58] The delegates to the Genocide Convention intended to prevent another Holocaust and to remove the public official shield against prosecution. For this reason, the Secretary-General's draft of the Genocide Convention, in contrast to the final draft, *required* states to hand over certain individuals to an international tribunal: state officials who allegedly committed acts of genocide or private individuals that acted with the support and/or toleration of the state.[59]

Even if the United States or other countries refuse to ratify the ICC statute, they may still be subject to ICC jurisdiction. Article 12 of the ICC Statute empowers the ICC to exercise jurisdiction over the nationals of non-party states if the state of territory where the crime was committed is a State Party to the treaty.[60] The United States has justifiable concerns with Article 12 because, as the Senate ratification debates of the Genocide Convention illustrate, there is no method of predicting how long it might take to achieve the advice and consent of the U.S. Senate for ratification.[61] During Senate ratification debates, which may slowly progress through the years, U.S. nationals could be unfairly exposed to ICC jurisdiction.[62]

The U.S. concerns with respect to Article 12 do not apply to the crime of genocide. The United States, with the largest deployed peacekeeping force in the world, does not want its soldiers exposed to the jurisdiction of

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56. *Id.* art. 17, ¶ 1(a)-(b). During the drafting of the Genocide Convention, the U.S. delegation actually suggested that an international court should have jurisdiction over cases of genocide where "justice was not obtained from the competent national courts." U.N. ESCOR, Supp. No. 6, *supra* note 39, at 8.

57. As the French Delegation to the Ad Hoc Committee noted, "No State would commit its governing authorities to its own courts." U.N. ESCOR Ad Hoc Comm., 6th Sess., 8th mtg. at 9, U.N. Doc. E/AC.25/SR.8 (1948).

58. U.N. GAOR 6th Comm., 97-98th mtgs., *supra* note 50, at 381.

59. Secretary General's Draft, *supra* note 24, arts. VIII, IX.

60. David Scheffer, International Criminal Court: The Challenge of Jurisdiction, Address at the Annual Meeting of the American Society of International Law *3 (March 26, 1999) (transcript *available at* http://www.state.gov). Under the Genocide Convention, a national alleged to have incited foreigners to commit genocide within their own country would most likely escape prosecution, especially if his state partook in the incitement or failed to prevent it. U.N. GAOR 6th Comm., 97-98th mtgs., *supra* note 50, at 399. The Convention does not mandate extradition in such cases. *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., 94th mtg. at 331-32 (1948). *See also* Lippman, *supra* note 54, at 64-65.

61. Scheffer, *supra* note 60, at *2-3.

62. *Id.* at *2.

the court.[63] Although a particular soldier's action during a peacekeeping mission could constitute a war crime or a crime against humanity, it is unimaginable that U.S. soldiers would engage in conduct that meets the high threshold of genocide. In fact, the U.S. delegation to the Rome Conference was prepared to accept the "automatic jurisdiction" of the ICC over genocidal acts; that is, jurisdiction over genocide during the period in which the U.S. is a non-party to the statute.[64] However, other countries that remain non-parties to the ICC statute may continue to dispute the jurisdictional powers inherent in Article 12 by citing to the consent aspect of Article VI of the Genocide Convention.[65]

A strict reading of Article VI legally and technically overrides "automatic" jurisdiction residing in an international court, but in doing so, it belittles and ignores the purposes of the Genocide Convention. The Vienna Convention on the Law of Treaties instructs courts and states to interpret treaties according to a strict reading of the language and "in light of the treaty's object and purpose."[66] The Genocide Convention's main objective is to prevent and punish genocide.[67] If states are unable to prevent and prosecute genocide, an international tribunal should uphold the convention's objective, regardless of the lack of state consent to the court's jurisdiction.

Moreover, in *Bosnia and Herzegovina v. Serbia*,[68] the International Court of Justice held that states may have a duty to hand over state-sponsored criminals. The Court noted that the Genocide Convention's failure to mention state responsibility in Article IV did not preclude all forms of state responsibility.[69] Even though not expressly mentioned, states might be required to do more than simply prosecute acts of genocide.[70]

Recent examples demonstrate the need for an international criminal court to prosecute incitement to genocide, regardless of whether a state has consented to the court's jurisdiction. In the Rwandan genocide, Radio RTLM, a station owned by members of then President Habyarimana's inner circle, repeatedly incited government troops and pro-government militias to kill every last Tutsi, including children.[71] In the case of Rwanda, where the government controlled the media, it is implausible that Rwanda would prosecute inciters under the Genocide Convention. Although Article VI

63. *The United States and the International Criminal Court: Hearing and Debates of the 105th Cong.*, 2d Sess., 144 Cong. Rec. S8554-01, *S8554 (1998), WL 403474. (comments of Senator John Ashcroft).

64. Scheffer, *supra* note 17, at 19.

65. *See* LEBLANC, *supra* note 7, at 152.

66. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), S. Treaty Doc. L., 92d Cong., 1st Sess. 20, 1155 U.N.T.S. 331, 340.

67. U.N. GAOR 6th Comm., 55th plen. mtg., *supra* note 23, at 189.

68. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia, 1996 I.C.J. 595 (July 11).

69. *Id.* ¶ 32.

70. *Id.*

71. NEIER, *supra* note 1, at 203.

seemingly precludes an international tribunal from asserting jurisdiction over incitement cases in which a state has not opted for ICC jurisdiction, national courts will never obtain justice in cases of state-supported incitement.[72]

III. LIFTING THE VEIL OF AMBIGUITY THAT COVERS INCITEMENT

A. U.S. Free Speech Protection

The United States has a rich tradition of free speech protection that has made it the strongest guarantor of free speech rights in the world. Ever since the American Revolution, U.S. citizens have held fast to the notion of popular sovereignty, whereby the power to rule and criticize the government resides in the people.[73] Democratic society is a marketplace of ideas in which certain views should not be subject to outright prohibition. Therefore, free speech is an integral part of democracy in which the remedy to hate speech is "more speech, not enforced silence."[74]

Members of the U.S. Senate who opposed and delayed ratification of the Genocide Convention feared that rulings of an international tribunal pertaining to incitement would violate and chill the free speech rights of American citizens, thereby causing enforced silence.[75] Moreover, an international court's expansive interpretation of incitement would be the "controlling" definition of what constitutes incitement according to the Genocide Convention.[76] In response, those in favor of the convention consistently argued that even if an international tribunal happened to criminalize protected speech under the First Amendment, the United States could simply ignore the decision because ultimately, U.S. constitutional standards supercede treaty obligations.[77]

This article does not attempt to resolve whether the U.S. Constitution overrides treaty law. However, this article undertakes the fundamental inquiry that the Senators avoided and that resolves the confusion apparent at the ratification hearings: How do the Genocide Convention and international tribunals define incitement and does this definition comport with U.S. free speech law?

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72. Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 877 (1999).

73. Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 647, 691 (1980).

74. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

75. *See Considering the Constitutional Implications of the Proposed Genocide Convention*, 99th Cong. 66 (1985).

76. *Id.* at 71.

77. *The Genocide Convention Will not Override the Constitution*, 99th Cong., 1st Sess., 131 Cong. Rec. S6132-01 (1985) (statement of Senator Proxmire quoting Justice Rehnquist).

B. The Distinction Between Incitement and Advocacy

1. The Genocide Convention

The international standard of direct and public incitement, promulgated by the Genocide Convention, distinguishes between general advocacy and incitement and only criminalizes the latter. General advocacy is any speech that tends to provoke genocide. Hate speech, a current topic of heated discussion in international and domestic legal forums, can be classified as a type of advocacy but not necessarily as incitement. The Genocide Convention did not seek to ban hate speech that merely aims at arousing hatred; the drafters contemplated that this type of speech was more prone to prosecution at the domestic level.

In the early stages of drafting the Genocide Convention, the Secretary General recommended that countries prosecute all forms of speech that "tended" to make genocide "appear as a necessary, legitimate or excusable act."[78] This approach closely parallels the bad tendency approach U.S. courts adopted toward free speech issues prior to World War I.[79] The U.S. bad tendency standard permitted state punishment of speech that "tended" to harm the public welfare or cause lawless conduct.[80] However, the Supreme Court's ruling in *Brandenburg v. Ohio*,[81] completely overruled and rejected the reasoning of bad tendency.[82] States could no longer punish general advocacy, they could only criminalize incitement, speech directed to producing imminent lawless action.[83] Analogous to the Supreme Court's ruling in *Brandenburg*, the Ad Hoc Committee of the General Assembly struck the Secretary General's bad tendency provision from its draft of the Genocide Convention thereby criminalizing incitement and not advocacy.[84]

However, in the Sixth Committee, the Soviet Union brought up a proposal to prohibit propaganda in the media that *aims* at inciting national, ra-

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78. Secretary General's Draft, *supra* note 24, art. III. *See also* ROBINSON, *supra* note 5, at 125.

79. DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 132-46 (Arthur McEvoy & Christopher Tomlins eds., 1997).

80. *Id.* at 132. For example, in *Turner v. Williams*, the government successfully prosecuted Turner under a statute that excluded, "anarchists, or persons who believe in or *advocate* the overthrow by force of violence of the Government of the United States or of all forms of law." The government punished Turner's mere advocacy, a general urging of the appropriateness of illegal action. *Id.* at 135.

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

82. *Id.* at 447.

83. *Id.*

84. Secretary General's Draft, art. III was not included in the subsequent Ad Hoc Committee Draft Convention on Genocide. Secretary General's Draft, art. III states, "All forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished." Secretary General's Draft, *supra* note 24, art. III.

cial, or religious enmity or hatred.[85] The Soviet proposal, similar to the Secretary General's draft, sought to criminalize advocacy and the arousement of hatred.[86] The United States and other delegations opposed the Soviet proposal due to the possible implications it might have on an individual's right to free speech.[87] "It was because the United States delegation considered freedom of information and of the Press to be of price value that it was opposed to the adoption of the USSR amendment."[88]As the Uruguay delegation pointed out, since the convention envisaged an international tribunal, the USSR's amendment "would give such a tribunal a right of control over the methods employed by Governments to communicate with their citizens."[89] The drafters rejected the Soviet proposal by a vote of twenty-eight to eleven, with four abstentions.[90]

To safeguard freedom of speech, the representatives to the Genocide Convention acted with circumspection and chose to prohibit incitement, not advocacy. The decision to ban incitement began with the Secretary General's draft and remained throughout the subsequent drafts, including the finished product. The delegates' choice of the word incitement reflects their intention to criminalize speech that calls for the commission of acts of genocide, not speech that ambiguously encourages others to act.[91] The Nuremberg Court, in the trial of Hans Fritzsche, carried out the drafters' intention to prohibit incitement and not advocacy.[92]

2. The International Military Tribunal at Nuremberg

The Nuremberg trial of Hans Fritzsche suggests that an international tribunal would distinguish advocacy from incitement. In the Fritzsche case, the International Military Tribunal (IMT) at Nuremberg held that a conviction for incitement requires explicit calls to commit genocide, not general arousement.[93] Hans Fritzsche was the head of the Radio Division of the Propaganda Ministry in Nazi Germany.[94] In pursuance of this function, he held daily press conferences to deliver the directives of the propaganda ministry to German newspapers.[95] Fritzsche also held his own weekly radio broadcast entitled, "Hans Fritzsche Speaks." As the IMT noted, Fritzsche made some strong anti-Semitic statements in his radio broadcasts suggesting

85. U.N. GAOR 6th Comm., 84th mtg. *supra* note 6, at 244.
86. *Id.* at 245.
87. *Id.* at 246-47.
88. *Id.* at 247.
89. *Id.* at 249.
90. *Id.* at 253.
91. ROBINSON, *supra* note 5, at 20.
92. TRIAL OF MAJOR WAR CRIMINALS, *supra* note 30, at 336-38.
93. *Id.* at 338. *See also* Lippman, *supra* note 54, at 45.
94. Lippman, *supra* note 54, at 23.
95. TRIAL OF MAJOR WAR CRIMINALS, *supra* note 30, at 336.

that the war had been caused by Jews and that the Jewish peoples' fate turned out "as unpleasant as Fuhrer predicted."[96]

Nevertheless, the IMT held that Fritzsche's speech did not constitute incitement.[97] Making strong anti-Semitic statements is not equivocal to conveying explicit calls for the commission of genocide such as "exterminate the Jews." Fritzsche's speech, in the opinion of the Court, "did not urge persecution or extermination of Jews," "his aim was rather to arouse popular sentiment in support of Hitler and the German war effort."[98] To the court, Fritzsche was morally guilty of creating an atmosphere of hate. However, as the defense argued, and the Court ultimately accepted, there was no law under which the Court could prosecute Fritzsche for arousing hate; that is, legal prosecution of general advocacy was not possible.

One possible criticism of using the Fritzsche case to highlight the direct and public incitement standard is that the drafters of the Genocide Convention did not intend the convention to be a codification of the Nuremberg Charter and IMT judgments.[99] The preamble to the Ad Hoc Committee's draft contained a reference to the IMT, thereby establishing a connection between the principles laid down by the tribunal and those contained in the Convention.[100] The draft of the Sixth Committee omitted this provision and therefore severed the link. According to the drafters of the Genocide Convention, reference to the Nuremberg Charter would create confusion as to whether crimes against humanity overshadowed genocide. The IMT had not expressly provided for the punishment of genocide. Therefore, using the IMT judgments as precedent would detract credibility away from the establishment of genocide as a new international crime.[101]

The drafters' decision to strike the IMT reference from the preamble should not belittle the importance of the IMT judgments. The drafters simply did not want states to confuse genocide with crimes against humanity. The distinction between the two crimes that the drafters wanted to emphasize was that crimes against humanity are offenses committed during armed conflict, whereas, genocide could be committed "in time of peace or in time of war."[102] Besides this distinction, the drafters generally recognized that genocide was a subcategory of crimes against humanity.[103] According to the ICTY, "as previously recognised by an Israeli District Court in the Eichmann case and the Criminal Tribunal for Rwanda in the Kayishema

96. *Id.* at 338.
97. *Id.* at 336.
98. *Id.*
99. RATNER & ABRAMS, *supra* note 25, at 27.
100. ROBINSON, *supra* note 5, at 54.
101. Lippman, *supra* note 54, at 3.
102. *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., 68th mtg. at 53 (1948).
103. Lippman, *supra* note 54, at 9.

case, a crime characterised as genocide constitutes, of itself, crimes against humanity within the meaning of persecution."[104]

3. U.S. Free-Speech Cases

Although highly speech protective, the First Amendment does not protect the entire spectrum of speech. "Although the rights of free speech . . . are fundamental, they are not in their nature absolute."[105] The Supreme Court has imposed limits on certain types of speech such as obscenity and the utterance of "fighting words."[106] Obscenity and fighting words are outside the scope of protection guaranteed by the First Amendment. That is, states can pass statutes that ban obscenity and fighting words on a prophylactic basis.[107]

Similar to obscenity and fighting words, the First Amendment does not protect incitement to commit a crime.[108] In this respect, the First Amendment parallels the Genocide Convention. Similar to the preparatory works of the Genocide Convention, the First Amendment, since its beginnings, prohibited incitement. As Justice Holmes wrote in *Frohwerk*, "we venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, every supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[109] The U.S. Supreme Court in *Brandenburg v. Ohio* reaffirmed this lack of protection by holding that the First Amendment will not protect speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[110]

According to *Brandenburg*, advocacy approves use of illegal action in some indefinite future, while incitement entails counseling and ordering the use of illegal action in a manner that will lead to imminent harm.[111] In *Brandenburg v. Ohio*, the U.S. Supreme Court overturned a state statute that punished a Ku Klux Klan leader for advocating or teaching the use of violence as a means of accomplishing political reform, because the statute did not distinguish between advocacy and incitement. The *Brandenburg* standard requires that advocacy be punished only when: 1) it is "directed to inciting or producing imminent lawless action" and 2) it is "likely to incite or produce such action."[112] Therefore, the Court extends First Amendment protection to advocacy, which it defines as all urgings of the appropriateness of illegal ac-

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104. Prosecutor v. Goran Jelisic, Judgement, IT-95-10-T, ¶ 68 (1999).
105. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).
106. Beauharnais v. Illinois, 343 U.S. 250, 256-57 (1952). *See also* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).
107. *See Beuharnais*, 343 U.S. at 266.
108. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).
109. Frohwerk v. Debbs, 249 U.S. 204, 206 (1919).
110. *Brandenburg*, 395 U.S. at 447.
111. *Id.* at 449.
112. *Id.* at 447.

tion.[113] Incitement, a subcategory of advocacy, includes remarks directed to producing imminent lawless action.[114] The *Brandenburg* formulation of incitement is codified in the Proxmire Act, the U.S. federal law that implements the Genocide Convention into U.S. legislation.[115] The Proxmire Act defines "incites," as "to urge another to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct."[116]

IV. DIRECT AND IMMINENT: TWO REQUIREMENTS FOR THE PROSECUTION OF INCITEMENT ON THE U.S. AND THE INTERNATIONAL LEVEL

A. Defining Directness

Although the legal definitions of advocacy and incitement are distinct, in practical situations the line between the two is extremely blurred. To clear the haze, the delegates to the Genocide Convention qualified the word incitement with "direct."[117] However, neither the convention nor the preparatory works to the convention define what direct means. International tribunals, therefore, have formulated a standard for direct that is strikingly similar to the standard adopted by the Supreme Court of the United States.

1. The "Direct" Incitement Standard of Hand

Justice Learned Hand's "direct" incitement test in *Masses Publishing Co. v. Patten*,[118] is a carbon copy of the direct test elucidated by the ICTR in *Prosecutor v. Akayesu*.[119] One of the two requirements of *Brandenburg v. Ohio* is that incitement must be direct; U.S. constitutional scholars agree that this standard codifies the direct incitement standard of *Masses*.[120] The Masses was a revolutionary magazine that frequently contained antiwar articles and cartoons. The Government alleged that the magazine tended to produce a violation of the insubordination clause of the Espionage Act of 1917.[121] Hand rejected this argument and asserted that courts should declare language illegal only if it could "be thought directly to counsel or advise" lawless ac-

113. Greenawalt, *supra* note 73, at 651.

114. *Id.*

115. LEBLANC, *supra* note 7, at 256.

116. Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1093 (2001).

117. Ad Hoc Committee Draft, *supra* note 24, at 8.

118. *Compare* Masses Publishing Co. v. Patten, 244 F. 535, 542 (S.D.N.Y. 1917) ("indirect result of the language might be to arouse a seditious disposition, [but that] would not be enough") *with* Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 557 (1998) ("more than mere vague or indirect suggestion [are needed to] constitute direct incitement").

119. Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 557 (1998).

120. *See, e.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754-55 (1975).

121. RABBAN, *supra* note 79, at 261.

tion.[122] He insisted that "words are to be taken, not literally, but according to their full import."[123] Hand's direct standard in *Masses* relies heavily on contextual reasoning to determine the effects of certain words on individual listeners. The method of contextual reasoning examines the specific events and facts surrounding the speech and analyzes what the audience perceived the speech to mean.[124]

In *Masses*, Hand examined the meaning of the cartoons and articles of the Masses magazine and their effects on the magazine's audience. He concluded that the magazine's approval of draft resistance only aroused emulation in the minds of viewers and did not plainly urge others to follow the resisters' example.[125] Hand acknowledged that the magazine attacked the draft and the war with utmost violence.[126] Nevertheless, the government could not curtail the publication of the magazine, because the article and cartoons did not imply that others were "under a duty to follow."[127] "The most that can be said is that, if others do follow, they will get the same admiration and the same approval" of the magazine.[128]

2. The "Direct" Standard of Akayesu

In *Prosecutor v. Akayesu*, the ICTR theoretically applies Hand's incitement standard to the facts surrounding Akayesu's speech. Strikingly similar to Hand's standard in *Masses*, the ICTR held, "that the direct element of incitement should be viewed in the light of its cultural and linguistic content."[129] Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience."[130] Therefore, the ICTR concludes that the core standard of directness is a factual inquiry that focuses on "whether the persons for whom the message was intended immediately grasped the implication thereof."[131] The ICTR, for all intents and purposes, might as well have quoted Hand whose test turns on the meaning of words, an inquiry that comprises what an audience understands the words to convey.[132]

As part of its examination into directness, the Trial Chamber carefully weighed witness and expert testimony to determine whether the audience

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122. *Id.* at 264.

123. *Masses,* 244 F. at 542.

124. MARI J. MATUSDA ET AL., WORDS THAT WOUND 1-15 (Robert W. Gordon & Margaret Jane Radin eds., 1981).

125. *Masses*, 244 F. at 542.

126. *Id.* at 541.

127. *Id.*

128. *Id.*

129. Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 557 (1998).

130. *Id.*

131. *Id.* ¶ 558.

132. Bernard Schwartz, *Holmes v. Hand: Clear and Present Danger or Advocacy of Unlawful Action*? 1994 SUP. CT. REV. 209, 212.

construed the appellant's speech as a call to kill the Tutsi.[133] For example, the Trial Chamber relied on and cited to the testimony of Professor Mathias Ruzindana, an expert on linguistic matters.[134] In his speech, Akayesu urged the audience members to kill the Inkotanyi and the accomplices of the RPF.[135] Dr. Ruzindana appeared on behalf of the prosecution to support, beyond a reasonable doubt, that the population understood Akayesu's calls as directing them to kill the Tutsi.[136] Dr. Ruzindana examined several Rwandan publications and broadcasts by RTLM; from this analysis, he concluded that at the time of the events in question, the term Inkotanyi meant an RPF sympathizer or the Tutsi race.[137]

Moreover, the Trial Chamber noted that several prosecution witnesses confirmed that when Akayesu called on the audience to kill the Inkotanyi, the people took it to mean that they must kill the Tutsi.[138] Akayesu himself admitted that the audience would construe his calls to fight against the accomplices of the Inkotanyi as a call to kill the Tutsi in general.[139] In the eyes of the tribunal, the prosecution successfully proved that the Kinyarwanda language treats Inkotanyi as to mean the Tutsi.[140]

B. Producing or Likely to Produce Imminent Lawless Action

Another requirement of the *Brandenburg* standard in U.S. law and the standard formulated by the ICTR is that incitement be imminent. Imminence is a tricky standard that aims to establish some link between the speech and the resulting crime. The importance of establishing a link is closely related to the aims of preventing crime. As previously discussed, the drafters of the Genocide Convention aimed to prevent the occurrence of genocide and therefore took to prohibiting acts that directly and substantially affected or supported the commission of genocide.[141] Therefore, in *Prosecutor v. Akayesu*, the ICTR required proof of a possible link between incitement and the commission of genocide.

1. Prosecutor v. Akayesu: *An International Case Study on Imminence*

The case of *Prosecutor v. Akayesu* dealt directly with the interpretation of incitement to genocide under Article II (3)c of the tribunal's statute, which mirrors Article III (b) of the Genocide Convention. A requirement of

133. *Akayesu*, ICTR 96-4-T, ¶¶ 332-47.
134. *Id.* ¶ 673.
135. *Id.* ¶ 709.
136. *Id.* ¶ 361.
137. *Id.* ¶ 340.
138. *Id.* ¶¶ 333-47.
139. *Id.* ¶¶ 361, 709.
140. *Id.*
141. U.N. GAOR 6th Comm., 84th mtg., *supra* note 6, at 208.

imminence does not reside in the statutory definition of direct and public incitement. However, the International Criminal Tribunal for Rwanda (ICTR) implicitly found such a requirement in the *Akayesu* case and also noted a "direct link" between speech and the resulting genocide in the *Ruggiu* case.[142] A finding of imminence might be a separate requirement that is gradually developing in tribunal jurisprudence or it could be viewed as pertinent to the direct element of incitement.[143] Either way, an imminence analysis played an integral role in the Trial Chamber's judgment against Jean-Paul Akayesu.

Jean-Paul Akayesu was the borgmestre (mayor) of a commune in Rwanda charged with the performance of executive functions, oversight of the local police and maintenance of public order in the commune.[144] Instead of maintaining order, Akayesu encouraged disorder. On April 19, 1994, Akayesu addressed a crowd in which he encouraged the killing of accomplices of the RPF, which the crowd understood to mean Tutsis.[145] Coincidentally, the killing of Tutsis in Taba, Akayesu's commune, began immediately after Akayesu's speech.[146]

An integral part of the Chamber's factual findings was to determine when the killing of Tutsi in the commune began.[147] The Chamber's concern was to establish a nexus or "causal relationship" between the speech and the resulting genocide.[148] The Chamber noted that it is not sufficient to establish a possible coincidence between the accused's words and the killings, but "there must be proof of a possible causal link."[149] Witnesses provided the possible causal link by testifying to the fact that the killings in the commune flowed from the incitement.

At the Akayesu trial, witnesses testified that no killings in Taba occurred before the meeting that Akayesu attended.[150] However, once the meeting took place, one Tutsi man claimed that five Tutsi were killed that same day.[151] Jean-Paul Akayesu himself confirmed that killings in the commune

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142. The Prosecutor v. Ruggiu, Judgement and Sentence, ICTR-97-32-I, ¶ 44(viii), 45 (2000). For example, the Trial Chamber noted a particular broadcast given by Ruggiu that, according to the accused, resulted in many deaths.

143. The Trial Chamber in *Akayesu* held that it will consider the direct element of incitement on a case-by-case basis by mainly focusing on whether the persons for whom the message was intended "*immediately* grasped the implication thereof." *Akayesu*, ICTR-96-4-T, ¶ 558 n.128. The direct requirement of incitement could possess an objective and subjective element. The objective inquiry would focus on the nexus between speech and crime while the subjective on how the listeners interpreted the speech.

144. *Akayesu*, ICTR-96-4-T, ¶ 54.

145. *Id.* ¶ 334.

146. *Id.* ¶ 355.

147. *Id.* ¶¶ 348-57.

148. *Id.* ¶ 673 (vii).

149. *Id.* ¶ 349.

150. *Id.* ¶ 350.

151. *Id.* ¶ 353.

started on April 19, 1994, the day of the meeting.[152] The chamber concluded that there was a causal link between the statement of the accused at the April 19, 1994 gathering and the ensuing widespread killings in Taba.[153]

In Akayesu, a case in which incitement was successful, an effort to establish imminence led to the finding of an actual causal link. However, as previously stated, the tribunal's jurisprudence only requires a possible causal link.[154] The possible causal link requirement comports with the court's holding that incitement is punishable whether it is successful or not. Similar to a common-law inchoate offense, direct and public incitement is a separate and specific crime, which is punishable by virtue of the criminal act alone.[155] Proof that killings occurred immediately after harmful speech, an actual link, could never be established for a case in which the accused held the requisite intent to commit genocide and directly encouraged others to kill, but whose incitement was unsuccessful. Since such an individual should nevertheless be punished due to the grave danger he/she poses,[156] the ICTR requires proof of a possible causal link.

Besides proving that killings occurred shortly after an accused's virulent speech, what other methods can prosecutors employ to prove a possible causal link? In U.S. case law, the counterpart to proof of a possible causal link is the requirement that speech be "likely" to cause a crime to warrant an incitement prosecution. U.S. courts have established various means to determine the likeliness of incitement to cause a crime.

2. The Varying U.S. Standards on Imminence

In *Abrams v. United States*,[157] Justice Holmes elucidated the required proximity needed between speech and crime in order to prosecute for incitement. First, Holmes recognized that the First Amendment does not protect speech that counsels another to commit murder.[158] States can punish imperatives such as "Kill him, Jack." However, many situations are less clear. For example, does the First Amendment protect the following speech that lies between an explicit appeal and a protected factual assertion: "You'll get rich if you kill our uncle."[159]

To deal with the tougher cases, Holmes suggested that states should objectively examine the plain meaning of words and only punish words that "imminently threaten interference with the lawful and pressing purposes of

152. *Id.* ¶ 355.
153. *Id.* ¶ 362.
154. *Id.* ¶ 349.
155. *Id.* ¶¶ 554, 562.
156. *Id.* ¶ 562.
157. 250 U.S. 616 (1919).
158. *Abrams*, 250 U.S. at 627.
159. Greenawalt, *supra* note 73, at 684.

the law."[160] Therefore, the First Amendment protects one who explicitly urges specific criminal action as long as the action is not imminent.[161] What is an example of unambiguous, non-imminent encouragement of specific criminal action? In *Hess v. Indiana*, the Supreme Court ruled that the words "We'll take the fucking street later" might be taken to urge the illegal action of taking the street at some subsequent, non-imminent, time.[162] The Court stated, "at worst [the statement] amount[ed] to nothing more than advocacy of illegal action at some indefinite future time."[163]

Another method, besides examining the words themselves, to analyze imminence is to consider the closeness between the speech and a subsequent crime. If the incitement is successful, the court can simply determine imminence by examining the length of time between the incitement and the resulting action. In *Hess*, the Court required a short time span between the incitement and the resulting action.[164] Whether a certain time span is short in one case as opposed to another will depend on the factual circumstances of the case. As Justice Holmes noted in *Abrams*, in times of emergency or war, the imminent standard is given more flexibility.[165] Therefore, in *Hess*, where the crime was "taking to the street," illegal action taken a few hours later was not imminent.[166] On the other hand, where the crime is genocide, illegal action taken a week later might be considered imminent.[167]

In *Whitney v. California*,[168] Justice Brandeis formulated another standard of imminence that might form part of the current Brandenburg incitement standard. Brandeis believed that imminence depends on whether there is an opportunity for full discussion to prevent the crime.[169] To Brandeis, "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[170] Brandeis's reasoning closely parallels one of the foundations of the strong protection of free speech underlying the Constitution. John Stuart Mill influenced the founding fathers' views on free speech when he argued against government suppression of ideas. Mill advocated an open marketplace of ideas where false or violent ideas are countered and

160. RABBAN, *supra* note 79, at 346.
161. Greenawalt, *supra* note 73, at 650.
162. Hess v. Indiana, 414 U.S. 105, 108 (1973).
163. *Id.* at 108.
164. *Id.*
165. Abrams v. United States, 250 U.S. 616, 627-28 (1919).
166. *Hess*, 414 U.S. at 108-09.
167. Many state and lower federal courts have suggested that where the crime is grave enough, less emphasis is placed on the time lapse between the speech and the act. *See* People v. Rubin, 96 Cal.App.3d 968, 978 (1979); United States v. Compton, 428 F.2d 18 (2d Cir. 1970); United States v. Kelner, 534 F.2d 1020, 1029 (2d Cir. 1976).
168. Whitney v. California, 274 U.S. 357, 357 (1927).
169. *Id.* at 376 (Brandeis J., concurring).
170. *Id.* at 377.

driven out of the market by reasoned reflection and proper discussion.[171] In Brandeis' view, the imminence of illegal conduct flowing from incitement only occurs when the marketplace analogy fails, as in times of war or emergency.[172]

3. The Hypothetical Trial of Akayesu by a U.S. Court

The "possible causal link" standard promulgated by the ICTR parallels and might be more exacting than the imminence standards employed by the U.S. Supreme Court. In the Akayesu case, the Court found that the wording of Akayesu's speech was something to the effect of "[t]he accomplices of the Rwandan Patriotic Front (RPF) must be killed."[173] As Holmes recognized in *Abrams*, the clear counseling of murder is not protected speech under the First Amendment. Under the facts in *Akayesu*, a U.S. federal court would probably reject any First Amendment defense arguments. A United States court may simply examine the words employed by Akayesu to conclude that the words posed an imminent threat of lawless action.[174]

If the U.S. court does not agree that the words themselves were proof of imminence and holds that the words simply urged killings in some indefinite future, the circumstances surrounding the speech still point to imminent lawless action. The court would examine whether the genocide occurred or was likely to have occurred after the speech. This is exactly the same inquiry that the ICTR undertook. In *Akayesu*, the ICTR went above and beyond holding that imminence flowed from the words themselves, to examining the context of the situation and determining whether there was a close spatial connection between speech and crime. The possible causal link standard of the ICTR is therefore an exacting standard that comports with First Amendment analysis.

However, a U.S. court could still try to acquit Akayesu on grounds that the remedy to counter incitement is more speech, not enforced silence. As Justice Brandeis argued in *Whitney*, the marketplace of ideas should judge the morality of Akayesu's speech.[175] On the contrary, arguing for the acquittal of Akayesu on the marketplace theory is a flawed reasoning of Brandeis's concurrence and of the reasoning behind the First Amendment. The conventional marketplace of ideas analogy for the justification of free speech does not apply in many cases of genocide. Imperfections in the marketplace, most notably the concentrated power of the mass media, interfere with the discov-

171. JOHN STUART MILL, ON LIBERTY (Alburey Castell ed., 1912).

172. Gilbert v. Minnesota, 254 U.S. 325, 338 (1920) (Brandeis J., dissenting).

173. Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 315 (1998).

174. *See* Rice v. Paladin Enter., 128 F.3d 233 (4th Cir. 1997) (holding that a murder instruction manual was not entitled to protection under the First Amendment because it methodically and comprehensively prepared and geared its audience to specific criminal conduct through detailed instructions on planning, commission, and concealment of criminal conduct).

175. *Whitney*, 274 U.S. at 377.

ery of truth.[176] In the Rwandan and Yugoslavian genocides, the government controlled the media thereby precluding the opportunity for full discussion and counter thought. During the events leading up to the Yugoslav conflict, the leaders of the several fragmented republics molded the media in their respective regions into propaganda instruments for their nationalist causes.[177] In Serbia, Slobodan Milosevic took over the reins of the media and shaped media policy to characterize the Albanians as counterrevolutionaries and the Muslims as rapists of nuns.[178] "Belgrade Television-state run and immensely powerful in shaping public opinion was firmly in Milosevic's grip."[179]

In the Rwandan genocide, the government-controlled media played a significant role in the commission of genocide. Members of President Habyarimana's inner circle owned the RTLM radio station and used it to their advantage.[180] In Rwanda, a developing country with few media outlets, there was no room for counter-discussion to RTLM's explicit calls for the commission of genocide against the Tutsi.[181] Beginning in April and continuing through July, RTLM prepared the ground for the genocide and continued to incite listeners once the genocide began. Messages such as "I do not know whether God will help us exterminate (the Tutsis) . . . but we must rise up to exterminate this race of bad people"[182] were the only broadcasts over the airwaves of Rwanda.

A central purpose of the marketplace analogy is to block attempts by governments to regulate and control the dissemination of information or ideas. But in genocidal contexts, the government is doing exactly what free speech strives to prevent: the government makes certain that there is no room for counter-discussion and allows citizens to hear only what the government wants them to hear.[183] In Rwanda, RTLM started broadcasting months prior to the genocide with a license that the government denied to other stations that might offer different views.[184] In times of ethnic conflict, calls for the commission of genocide are the antithesis of free speech. "Reason is not free to combat it (incitement). No free and open encounter is possible between truth and falsehood. The panic takes place too quickly. Only one side can possibly be heard."[185]

Finally, the defense of Akayesu in a U.S. court would argue that the "direct and public incitement" provision of the Genocide Convention is vague

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176. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 979 (1978).

177. NEIER, *supra* note 1, at 194.

178. *Id.* at 194-95.

179. *Id.* at 195.

180. *Id.* at 203.

181. Braekman, *supra* note 2, at 192.

182. *Id.*

183. NEIER, *supra* note 1, at 207.

184. *Id.*

185. *Id.* at 207-08.

and overbroad according to U.S. constitutional standards. A vague statute is one that does not give fair warning of what behavior is prohibited.[186] A vagueness argument relies on the due process clause of the Fourteenth Amendment and parallels the concept of *nullum crimen sine lege* in international law. *Nullum crimen sine lege* protects defendants against retroactive laws in situations that they were not given a warning of what behavior the law criminalizes. The direct and public incitement provision of the Genocide Convention does not violate *nullum crimen sine lege* because the incitement provision has been codified for over fifty years, fifteen years in the United States. Moreover, the provision does not criminalize a random assortment of speech; thereby, it is also shielded from vagueness criticisms. As previously argued, the incitement provision precisely punishes incitement and not advocacy.

The argument that the direct and public incitement provision is overbroad, according to U.S. constitutional standards, and therefore invalid on its face is more persuasive than a challenge on vagueness. The relevant question in an overbroad analysis is whether the statute sweeps with a broad brush and criminalizes speech that the First Amendment protects.[187] The reasoning behind such a doctrine is "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted."[188]

U.S. courts are rarely willing to accept an overbroad defense.[189] Moreover, the direct and public incitement provision of the Genocide Convention parallels *Brandenburg* with respect to requiring incitement, imminence and directness. The incitement provision does not criminalize speech that the First Amendment protects.

V. EXPLORING THE INTANGIBLES

A. Indirect Incitement?: A Quandary That Should Be Left Unexplained

In *Prosecutor v. Akayesu*, the ICTR erred in its treatment of indirect incitement.[190] If directness is unclear, courts should properly focus on imminence and criminal intent in an incitement case. A precise standard to treat indirect incitement is difficult to formulate. The ICTR is not alone in its failed approach. Many scholars in the United States criticize Justice Hand's incitement standard for failing to address how the law should handle indirect but purposeful incitement such as Marc Anthony's funeral oration.[191] In

186. Greenawalt, *supra* note 73, at 721.

187. *See* Coates v. Cincinnati, 402 U.S. 611 (1971).

188. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

189. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1234 (13th ed. 1998).

190. Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 1.1 (1998).

191. WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR, act 3, sc. 2. (1601) *avail-*

Masses, Hand acknowledges that speech which urges lawless action "may be accomplished as well by indirection as expressly, since words carry the meaning that they impart."[192] Incitement is not always a simple imperative such as "kill the Tutsis."[193]

In the Akayesu case, an instruction to kill the Tutsi clearly constituted a direct message to commit genocide, but what if an accused does not use the word "kill?" Previous to his guilty plea, Georges Ruggiu, the Belgium journalist convicted of incitement, declared his innocence in the press by challenging anyone to produce a recording of him using the word "kill," in his speech.[194] Although Ruggiu's claim was weak since he supposedly broadcast "Take up your machetes and hack your enemies to pieces,"[195] his claim warrants discussion. For example, how should tribunals treat the following language, "The graves are not yet quite full. Who is going to do the good work and help us fill them completely?"[196]

Hand suggests that courts should ask the following: "Could any reasonable man say, not that the indirect result of the language might be to arouse a seditious disposition, for that would not be enough, but that the language directly advocated resistance to the draft [or in this case, incitement to genocide]."[197] The Hand reasonableness test would exempt the previous broadcast example or Marc Anthony's funeral oration unless a requisite number of listeners understood the words to convey direct action. The quandary is how much latitude should courts afford for judicial findings that the specific words fell short of counseling, but which listeners nevertheless understood to imply direct action.[198]

The ICTR affords a broad latitude and argues that sufficiency of conviction lies for words that "play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favorable to the perpetration of the crime."[199] The ICTR's implicit incitement standard is cast too wide and betrays the original understanding of the drafters to the Genocide Convention. The "play skillfully on mob psychology" quote that the tribunal cites in the *Akayesu* judgment was made by a Polish delegate in support of the USSR amendment to criminalize mere advocacy that aims at inciting national, racial, or religious enmity or hatred.[200] As discussed previ-

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able at http://www.hn.psu.edu/faculty/jmanis/shake.htm.

192. Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917).

193. Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 673 (1998).

194. Defendant in Rwanda Massacre Trial Interviewed, Hirondelle press agency (June 25, 1998), *at* http://www.hirondelle.org.

195. *Id. See also* Prosecutor v. Georges Ruggiu, Judgement and Sentence, ICTR-97-32-I (2000) (detailing the legal case against him).

196. NEIER, *supra* note 1, at 203-04.

197. Schwartz, *supra* note 131, at 212.

198. Greenawalt, *supra* note 73, at 704.

199. Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 557 (1998).

200. *Continuation of the Consideration of the Draft Convention on Genocide [E/794]:*

ously, the delegates to the convention rejected the Soviet proposal by a vote of twenty-eight to eleven.[201] The ICTR's cite to the Polish delegate quote betrays two objectives of the delegates to the Genocide Convention. First, it belittles the drafters' intention of punishing "direct" incitement.[202] Second, it surreptitiously tries to sidestep the drafters' decision not to criminalize general advocacy of violence or hate speech. Future international tribunals may use the *Akayesu* decision to criminalize all types of speech that incite audiences to hatred. Not only would criminal indictments of general advocacy pose threats to the First Amendment, but they would also violate the domestic constitutions of numerous countries that recognize the value of free speech in a democratic society. In allowing for the criminalization of indirect incitement, the ICTR lifts the legal distinction between advocacy and incitement, the distinction between what speech courts can and cannot criminalize.

B. Criminal Intent: A Preferred Alternative

Courts should not punish ambiguous speech that borders on indirectness unless the alleged perpetrator possessed the requisite mens rea to commit genocide. The intent standard for incitement is high and will only allow for prosecutions of ambiguous speech in which the speaker possessed the intent to destroy a group.

1. The Specific Intent of Incitement

The prosecution of direct and public incitement promulgated by the Genocide Convention requires that the alleged perpetrator act with the requisite mens rea or criminal intent. The distinguishing characteristic of genocide is to direct action toward a certain group with the intention of destroying that group.[203] Without genocidal intent, the U.S. representative to the Sixth committee observed, an act of murder is simply prosecutable as homicide under domestic law.[204] Therefore, Article II of the Genocide Convention requires that a perpetrator have the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[205]

Report of the Economic and Social Council [A/633], U.N. GAOR 6th Comm., 87th mtg. at 251 (1948).

201. *Id.* at 253.

202. Genocide Convention, *supra* note 3, art. III.

203. ROBINSON, *supra* note 5, at 58.

204. *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., 73d mtg. at 97 (1948); *See also* Prosecutor v. Jelisic, Judgement, IT-95-10-T, ¶ 66 (1999) "It is in fact the *mens rea* which gives genocide its specialty and distinguishes it from an ordinary crime and other crimes against international humanitarian law." (emphasis in original).

205. Genocide Convention, *supra* note 3, art II; *see also* Prosecutor v. Jean-Paul Akayesu, Judgement, ICTR-96-4-T, ¶ 498 (1998):

Some scholars argue that the genocidal intent requirement does not extend to acts connected to genocide.[206] Acts connected to genocide are not crimes in and of themselves. For example, Article 6(1) of the ICTR statute addresses individual responsibility and holds individuals liable if they "planned, instigated, ordered [the crime of another]." The theory behind these secondary offenses is that an accused can be held responsible for the criminal acts of others only if he plans, instigates or orders the crime and the crime is successfully committed.[207] That is, individual criminal responsibility in Article 6 is based upon accomplice liability.

On the contrary, incitement is a distinct crime and therefore requires a *mens rea* for prosecution. The principle of holding individuals liable for incitement is in sharp contrast to the principle of individual responsibility inured in Article 6(1) of the ICTR statute. Under the Genocide Convention, the act of incitement or conspiracy is a crime in and of itself and is not simply *connected* to genocide under conventional terminology. Article III lists all crimes that are punishable under the convention. If incitement or conspiracy were simply an accessory crime, the drafters would not have purposely categorized these acts with the act of genocide in Article III. Moreover, incitement is not grounded in accomplice liability. As the ICTR recognized in the *Akayesu* case, incitement can be punished whether it successfully causes genocide or not. The presence of attempt and conspiracy in Article III also highlight that some crimes can be punished without the actual occurrence of genocide. The acts listed in Article III, excluding complicity, are unique in their nature because all other international crimes implicitly require successful completion of an offense.[208]

The requirement of a mens rea for incitement actually precedes the Genocide Convention. The most famous conviction for incitement to genocide was the Nuremberg Trial of Julius Streicher. Julius Streicher was the founder of the anti-Semitic weekly, Der Stuermer.[209] Der Stuermer was filled with lewd and derogatory articles that portrayed the Jewish people as subhumans. For his role in the publication of Der Stuermer, the IMT convicted Streicher of incitement to murder and extermination[210] and characterized his

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> Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (emphasis in original).

206. *Association of American Law Schools Panel On The International Criminal Court*, 36 AM. CRIM. L. REV. 223, 234 n.87 (arguing that the Rome Statute provision on incitement "makes no reference to intent").

207. *Akayesu*, ICTR-96-4-T, ¶ 473.

208. *Id.*

209. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 30, at 301.

210. *Id.* at 302-03.

acts as a crime against humanity. The court inferred Streicher's specific intent from his knowledge of the ongoing war crimes and from the circumstances surrounding his speech:[211] "Streicher's incitement to murder and extermination *at the time* when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds."[212]

The ICTR, in *Prosecutor v. Akayesu*, holds true to the Streicher precedent by ruling that the crime of direct and public incitement requires a mens rea that "[l]ies in the intent to directly prompt or provoke another to commit genocide."[213] Moreover, intent means knowledge or purpose to destroy a group and not mere negligence or recklessness.[214] This is a strict standard that goes above and beyond requiring the intent to incite; according to the tribunal "[t]he person who is inciting . . . must have himself the *specific* intent to commit genocide."[215] The ICTR illustrates a number of factors that can guide a court in finding such an intent. The Tribunal notes that the systematic (deliberate) nature of acts, the scale of the atrocities committed and their general nature can infer the genocidal intent of a particular act.[216]

2. The U.S. Notion of Inciter Intent: A Double Standard

The ICTR's reference to specific intent does not parallel the U.S. interpretation of the intent provision in the Proxmire Act.[217] Although one of the United States' understandings with respect to the Genocide Convention was that the intent provision "meant a *specific* intent to destroy . . . as such by the acts specified in Article II,"[218] the U.S. conception of specific intent is different from that of the ICTR. The United States drafted an understanding related to intent because it did not want international tribunals prosecuting individuals on a general intent which could "be inferred from circumstances, or the result of circumstances, which, when allowed by a government, might be interpreted as an intended consequence."[219] The United States, among other reasons, desired to make the prosecution of incitement difficult so it would not tread on First Amendment rights. However, the U.S. imposes a double standard on the international level. In domestic cases involving al-

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211. Jamie Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 637 (1997).

212. TRIAL OF MAJOR WAR CRIMINALS, *supra* note 30, at 549.

213. *Akayesu*, ICTR-96-4-T, ¶ 560.

214. *Id.* ¶ 520.

215. *Id.* ¶ 560.

216. *Id.* ¶ 523.

217. Genocide Convention Implementation Act of 1987 (Proxmire Act) Pub.L. No. 100-606, 102 STAT. § 3045 (1988).

218. LEBLANC, *supra* note 7, at 43.

219. *Id.* at 49.

leged infringement on free speech rights by criminal statutes, the Supreme Court has allowed lower courts to infer intent from factual circumstances.[220]

First Amendment concerns should not guide the United States objections to the intent provision of the Genocide Convention. With respect to possible U.S. fears, harassment of minority groups or hate speech cannot be used to infer general intent in incitement cases.[221] The intent to discriminate or to persecute against another group is not identical to the intentional pursuit of the physical annihilation of a group.[222] The standard of intent promulgated by the ICTR and the Genocide Convention remains high.

3. Revisiting The Indirect Paradox

The intent requirement of incitement assists in resolving the direct/indirect paradox. In the case of clear, direct encouragement to imminent destruction of a group, in part or whole, the direct, imminent and intent requirements are easily met. But when speech is ambiguous, or is a mixed bag of direct and indirect encouragement, the finding of intent should be determinative of whether the speech should be punished (assuming the imminence requirement is met). If it is evident that a speaker is uttering a value judgment—that borders on indirect incitement—solely to cause a particular action, free speech arguments should not obstruct such a conviction. "When society has forbidden an action as undesirable, punishment of utterances whose overriding import is to bring that action about does not involve the same kind of denial of respect and frustration of personality as punishment of the expression of fundamental beliefs."[223]

VI. CONCLUSION

Returning to the question posed at the beginning of this article, how would an international tribunal handle the case of a Congressman who made a public speech in which he/she justified the action of Arabs in killing Jews, or vice-versa? This article has argued that an international tribunal would try the Congressman in a similar fashion as to a U.S. court. At first glance, the hypothetical seems frivolous because neither a Prosecutor of the ICC nor the Security Council would bring the case to court.[224] But supposing the case was brought before the ICC and assuming one group committed genocidal acts

220. Greenawalt, *supra* note 73, at 725.

221. LEBLANC, *supra* note 7, at 52.

222. Guglielmo Verdirame, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals*, 49 INT'L & COMP. L. Q. 578, 588 (2000).

223. Greenawalt, *supra* note 73, at 686.

224. The ICC statute notes that the court is to try cases "of sufficient gravity to justify further action." ICC Statute, *supra* note 4, art. 17, ¶ 1(d). *See also* Brown, *supra* note 72, at 880-81 (noting safeguards embodied in the ICC Statute to prevent frivolous prosecutions).

against the other, the ICC would interpret the Congressman's words as constituting advocacy and not incitement. The Congressman is justifying conduct and is not explicitly counseling others to commit genocide. Moreover, the Congressman's speech is not direct. Of course, more facts would have to be procured as to the explicit meaning of the Congressman's words and how the audience interpreted them. Finally, a court would examine if the Congressman's words were likely to cause imminent conduct; that is, did a possible causal link exist.

Hopefully, this comparative and integrated analysis has removed any U.S. fears toward an international standard of incitement. The unfounded conflict between U.S. constitutional jurisprudence on free speech and the development of incitement on the international level is only representative of a broader need to clarify the boundaries of incitement. A clear and reasoned standard will lead to consistent prosecutions of incitement on the domestic and international levels. In domestic and international prosecutions of incitement, defendants will claim that they were merely exercising their rights of free speech.[225] As this article has demonstrated, the incitement standard accounts for an individual's protected right of speech; however, it correctly criminalizes speech that is so closely connected with a possible or successful genocide, that the instigator himself has committed the atrocities that he encouraged.

225. The ICTR is currently trying Jean Bosco Barayagwiza, a former Director of Political Affairs in the Ministry of Foreign Affairs of Rwanda, along with Ferdinand Nahimana, a former Director of RTLM, and Hassan Ngeze, a former Editor of a Kangura newspaper in "The Media Trial." *See* ICTR Press Release, *Barayagwiza to be Jointly Tried with Nahimana and Ngeze*, http://www.ictr.org/english/pressrel. Due to the media element of incitement present in this case, and lacking in *Akayesu*, the defendants may claim that they were merely exercising their free speech rights.