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**FROM HATE SPEECH TO INCITEMENT TO GENOCIDE:  
THE ROLE OF THE MEDIA IN THE RWANDAN  
GENOCIDE**

**ANGELA HEFTI\* & LAURA AUSSERLADSCHEIDER JONAS\*\***

ABSTRACT

*Free speech is essential in any democratic society. Voiced in a politically charged context, however, hateful speech can incite the “crime of crimes”—genocide. Democracy cannot be served if free speech is manipulated as a tool to incite the violation of human rights. Limits must be imposed on the media in its enjoyment of free speech. This paper seeks to establish these limits by using the case of the role of the media in the Rwandan genocide. The Rwandan example shows how the media can manipulate an entire population to commit heinous crimes. It also demonstrates that a context of political unrest can constitute the breeding grounds for incitement to genocide. Currently, President Donald Trump’s speech towards Muslims, although hateful, cannot be considered incitement to genocide. This paper should be seen as a much needed reminder of what can be done when hateful and untrue messages are broadcasted on new media.*

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\* Robina Fellow, European Court of Human Rights, Yale Law School.

\*\* International Mutual Legal Assistance in Criminal Matters Division, Seizure and Handover of Assets Unit, Schweizerische Eidgenossenschaft (Swiss Federal Administration).

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## INTRODUCTION

“A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society”.<sup>1</sup> However, what if the media is abused as a tool to direct an entire community to commit atrocities? What if the media is used as a device to convey evil? What are the limits, if any, of what the media can broadcast?

This paper investigates these questions in the context of the Rwandan genocide. First, it considers the historical background in which the Rwandan genocide emerged and explains the development of hate media in this context. Then, it discusses the point from which media broadcasts are not merely hate speech, but amount to inciting speech, capable of prompting genocide. Finally, this paper aims to discover the responsibility of the media with regard to the content of its broadcasts. To do so, it will examine the role of media, for example, the radio, in the Rwandan genocide.<sup>2</sup>

This paper argues that the media played a crucial role in the commission of the genocide in Rwanda. It will show that without the media, the genocide would never have reached the dimensions and levels of rage that it did. Thus, this paper will explore the limits on what the media can say and what must be explicitly prohibited. In discussing these lessons, it will reference President Trump’s tweets against Muslim minorities as a facilitation of hate speech.

## I. THE BACKGROUND OF THE RWANDAN GENOCIDE

This Section provides relevant background in order to understand the composition of Rwandan society, which consists of the Hutu and the Tutsi ethnic populations. It will then explain the roots of the tensions that lead to the growth of extremism in Rwanda where hate radio could thrive. This will be important for determining the line between what the media may broadcast and what should be prohibited, which will be discussed later in this paper.

A. *Pre-Colonial Rwanda: The People of the Land of a Thousand Hills*

Rwanda is one of the smallest countries in Central Africa.<sup>3</sup> Its stunning scenery of a thousand hills contrasts with the horrors its people committed during the genocide of 1994.<sup>4</sup> The years preceding the genocide were marked by

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<sup>1</sup> Human Rights Comm., General Comment No. 34, ¶ 13, U.N. Doc CCPR/C/GC/34 (Sept. 12, 2011).

<sup>2</sup> See Simone Monasebian, *The Pre-Genocide Case Against Radio-Télévision Libre des Milles Collines*, in *THE MEDIA AND THE RWANDA GENOCIDE* 308, 308 (Allan Thompson ed., Pluto Press 2007); Allan Thompson, *The Responsibility to Report: A New Journalistic Paradigm*, in *THE MEDIA AND THE RWANDA GENOCIDE* 433, 433 (Allan Thompson ed., Pluto Press 2007).

<sup>3</sup> GÉRARD PRUNIER, *THE RWANDA CRISIS, 1959-1994: HISTORY OF A GENOCIDE* 1 (1995).

<sup>4</sup> See JEAN-PIERRE CHRÉTIEN, *RWANDA, LES MÉDIAS DU GÉNOCIDE* 83 (2nd ed., Karthala 2002).

Rwanda's struggle with poverty and famine.<sup>5</sup> Given that Rwanda had the highest population density in Africa,<sup>6</sup> its food sources in relation to its rapidly growing population were scarce.<sup>7</sup>

The origins of the peoples inhabiting Rwanda are contentious.<sup>8</sup> It is believed that a hunting-gathering people known as the Twa originally inhabited Rwanda.<sup>9</sup> Hutu horticulturists seem to have arrived later from the east and soon outnumbered the Twa.<sup>10</sup> From the 12<sup>th</sup> to the 15<sup>th</sup> century, a small number of armed pastoral Tutsi people likely arrived from southern Ethiopia<sup>11</sup> and conquered Rwanda, subjecting the Hutu and the Twa to their rule.<sup>12</sup>

The original distinction between the Hutu and the Tutsi was not based on ethnic differences but rather was defined by their geographical origin and relation to a royal ruler.<sup>13</sup> Even if some disagreement exists as to the relations between the Hutu and the Tutsi prior to colonialism, it is generally believed that their interactions were largely peaceful.<sup>14</sup>

#### B. Colonial Rwanda

When assessing the impact of the European colonial rule on Rwanda, it is important to bear in mind the colonizers' misconception as to the "different ethnicities" there.<sup>15</sup> Indeed, the Hutu and the Tutsi cannot be considered two ethnic groups because they share too many common traits. They share the same language, live in the same area, intermarried, and followed the same traditions.<sup>16</sup> Moreover, depending on social status, members of the Hutu and the Tutsi could traditionally change their lineage.<sup>17</sup> Thus, the whole system resembled a caste

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<sup>5</sup> Paul J. Magnarella, *How Could it Happen? The Background and Causes of the Genocide in Rwanda*, in 3 J. OF INT'L CRIM. JUST. 801, 802 (2005).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Paul J. Magnarella, who opines that the Tutsi were an armed pastoral people who conquered the country, and Dale C. Tatum, who believes that the Tutsi were indigenous to Rwanda. Magnarella, *supra* note 5, at 802; DALE C. TATUM, GENOCIDE AT THE DAWN OF THE 21ST CENTURY: RWANDA, BOSNIA, KOSOVO, AND DARFUR 38-40 (2010).

<sup>9</sup> Magnarella, *supra* note 5, at 802.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 803.

<sup>13</sup> PRUNIER, *supra* note 3, at 19-21.

<sup>14</sup> Jeremy Sarkin & Carly Fowler, *The Responsibility to Protect and the Duty to Prevent Genocide: Lessons to be Learned from the Role of the International Community and the Media during the Rwandan Genocide and the Conflict in the Former Yugoslavia*, 33 SUFFOLK TRANSNAT'L L. REV. 35, 41 (2010); see also Magnarella, *supra* note 5, at 803.

<sup>15</sup> See Sarkin & Fowler, *supra* note 14, at 41-42.

<sup>16</sup> TATUM, *supra* note 8, at 40.

<sup>17</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 81 (Sept. 2, 1998); Sarkin & Fowler, *supra* note 14, at 42.

rather than a division of ethnicity.<sup>18</sup> The way the colonialists viewed the differences between the Hutu and the Tutsi and used these differences to their own advantage would become fatal for Rwanda's future.<sup>19</sup>

At the time of colonialization, the Hutu comprised around 82%,<sup>20</sup> the Tutsi constituted 17%,<sup>21</sup> and the Twa made up 1% of the population.<sup>22</sup> Rwanda was first colonized by Germany in 1897, and after World War I, Belgium colonized Rwanda as part of its League of Nations trusteeship.<sup>23</sup> Because the Belgian colonizers viewed the Tutsi as "white coloureds" due to their size and appearance,<sup>24</sup> they believed that the Tutsi were more intelligent than the Hutu.<sup>25</sup> The Belgian rulers actively favoured the Tutsi,<sup>26</sup> as evidenced by access to education and placements as supervisors over the Hutu's labor.<sup>27</sup> Because the Belgians issued identity cards based on ethnicity, the Hutu, the Tutsi, and the Twa were permanently divided.<sup>28</sup> From that point, ethnicity was transferred through lineage, and determined solely based on paternal ethnicity.<sup>29</sup> The criterion used to classify the three groups was arbitrary because it focused on physical features and wealth, and usually ignored lineage.<sup>30</sup> The seeds for the genocide were thus planted during the Rwandan colonialization.<sup>31</sup>

### C. A "Revolution" For Democracy and the Military Coup

When the Tutsi sought independence in the 1940s, Belgium began to turn to the Hutu.<sup>32</sup> Violence broke out in 1959 when the Hutu demanded a fair representation in the government.<sup>33</sup> As a result, thousands of Tutsis were killed and thousands more fled to Uganda and Burundi, which ended with the

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<sup>18</sup> Helen Codere, *Power in Rwanda*, 4 ANTHROPOLOGICA 45, 55 (1962); Magnarella, *supra* note 5, at 805.

<sup>19</sup> See TATUM, *supra* note 8, at 40.

<sup>20</sup> Sarkin & Fowler, *supra* note 14, at 41.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 80 (Sept. 2, 1998); TATUM, *supra* note 8, at 39.

<sup>24</sup> TATUM, *supra* note 8, at 39.

<sup>25</sup> Magnarella, *supra* note 5, at 806.

<sup>26</sup> *Id.* at 807.

<sup>27</sup> TATUM, *supra* note 8, at 39.

<sup>28</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 106 (Dec. 3, 2003) (quoting *Akayesu*, Case No. ICTR-96-4-T, ¶¶ 80-83).

<sup>29</sup> *Id.* at ¶ 345.

<sup>30</sup> Sarkin & Fowler, *supra* note 14, at 42.

<sup>31</sup> *Id.*

<sup>32</sup> Magnarella, *supra* note 5, at 809.

<sup>33</sup> *Id.*; Sarkin & Fowler, *supra* note 14, at 44.

establishment of a provisional government headed by a Hutu.<sup>34</sup> After Rwanda's independence in 1962, the first elections with universal suffrage were based on ethnicity. Consequently, the Hutu won with an overwhelming majority.<sup>35</sup>

Rwanda's first democratically-elected Hutu President Grégoire Kayibanda established an authoritarian rule, limiting the Tutsi's opportunities to enter into universities and civil services.<sup>36</sup> What had started as a revolution for democratic, political, and social order had turned into another era of discrimination.<sup>37</sup> In 1973, General Juvenal Habyarimana seized power through a military coup,<sup>38</sup> instituting a one-party system and creating the radical party, the *Mouvement révolutionnaire national pour le développement* (MRND).<sup>39</sup>

#### D. *The Exile Attack and Its Consequences*

Between 1964 and 1990, 100,000 Tutsi fled Rwanda.<sup>40</sup> The Tutsi exiles in Uganda organized and formed a political organization, the Rwandese Patriotic Front (RPF).<sup>41</sup> Because the Rwandan leadership opposed their inclusion in politics,<sup>42</sup> on 1 October 1990, Ugandan Tutsi exiles, led by the future President, Paul Kagame, invaded Rwanda.<sup>43</sup> In response, Habyarimana's security forces arrested and sometimes executed Tutsi people suspected of collaborating with the RPF.<sup>44</sup> Due to international pressure and internal conflicts, Habyarimana eventually permitted a multi-party system.<sup>45</sup> In this climate of unrest and tension, the seed was planted for a hard-line policy.<sup>46</sup> Extremists thrived and the Hutu founded the *Coalition pour la défense de la République* (CDR), which was even more radical and racist than Habyarimana's MRND.<sup>47</sup>

By 1992, the RPF was already in control of parts of Rwandan territory in the north-east, and it slowly started gaining support from within Rwanda.<sup>48</sup> As a

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<sup>34</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 89 (2 September 1998); Magnarella, *supra* note 5, at 809.

<sup>35</sup> Akayesu, Case No. ICTR-96-4-T, ¶ 89.

<sup>36</sup> *Id.* at ¶¶ 89, 93.

<sup>37</sup> See Codere, *supra* note 18, at 63.

<sup>38</sup> Gregory S. Gordon, "A War of Media, Words, Newspapers, and Radio Stations": *The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 140, 155 (2004-2005).

<sup>39</sup> Akayesu, Case No. ICTR-96-4-T, ¶ 92; PRUNIER, *supra* note 3, at 76.

<sup>40</sup> Magnarella, *supra* note 5, at 811.

<sup>41</sup> Akayesu, Case No. ICTR-96-4-T, ¶ 95. This Section generally uses the term 'RPF' to refer to the exiles.

<sup>42</sup> *Id.* at ¶ 92.

<sup>43</sup> *Id.* at ¶¶ 93, 164

<sup>44</sup> *Id.* at ¶ 29, 94.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at ¶ 98.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at ¶ 96.

result, negotiations with the RPF led to a cease-fire in 1992, resulting in the first round of Peace Accords between the Tutsi-led RPF and the Hutu government.<sup>49</sup>

E. *The Arusha Peace Accords*

After years of tensions and violence, President Habyarimana entered into negotiations with the RPF due to international pressure.<sup>50</sup> The Arusha Peace Accords, signed in Arusha, Tanzania (Arusha Accords), established a transitional government in Rwanda, that included the RPF.<sup>51</sup> The Arusha Accords provided for the sharing of power, the return of refugees to Rwanda, and the integration of the RPF in the armed forces.<sup>52</sup> Furthermore, partial demobilization was planned.<sup>53</sup> A demilitarized zone marked the border between RPF-controlled territory in the north and the rest of the country.<sup>54</sup> Like the MRND, the RPF would receive five ministries.<sup>55</sup> The extremist Hutu Power Movement was to be totally excluded from power.<sup>56</sup> On August 4, 1993, the Government of Rwanda and the RPF signed the final Arusha Accords.<sup>57</sup> To assist the implementation of the Arusha Accords, the United Nations deployed a peace-keeping force, United Nations Assistance Mission for Rwanda (UNAMIR), to Kigali.<sup>58</sup>

Although the Arusha Accords were finally signed, the situation remained tense.<sup>59</sup> The extremist CDR could not accept their exclusion from privileged positions,<sup>60</sup> and an increasing number of Hutu refugees from Burundi facilitated the creation of an extremist “Hutu Power” movement.<sup>61</sup> It was at this time that *Radio Télévision Libre des Mille Collines* (RTLM), which would become the voice of the genocide, was founded.<sup>62</sup> Within days of signing the Arusha Accords, RTLM began broadcasting anti-Tutsi propaganda.<sup>63</sup>

In a joint statement released at the end of 1993, the MRND and the CRD denounced the Arusha Accords as treason,<sup>64</sup> although Habyarimana continued

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<sup>49</sup> *Id.*

<sup>50</sup> Magnarella, *supra* note 5, at 813.

<sup>51</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶ 96.

<sup>52</sup> *Id.* at ¶ 102.

<sup>53</sup> *Id.*; Magnarella, *supra* note 5, at 813.

<sup>54</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶ 102.

<sup>55</sup> Magnarella, *supra* note 5, at 813.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶ 102.

<sup>59</sup> *See id.* at ¶¶ 99-100.

<sup>60</sup> Magnarella, *supra* note 5, at 813.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶ 104.

to sign additional parts of the Arusha Accords.<sup>65</sup> Indeed, the MRND and the CDR felt threatened by a Tutsi inclusion in the government.<sup>66</sup> The Hutu extremists seemed to believe that they could prevent the conquest of Rwanda through violence.<sup>67</sup> For this reason, extremists began to indoctrinate and train the *Interahamwe*, a Hutu youth militia.<sup>68</sup> In a climate of unemployment, the Hutu youth seized the opportunity to earn respect and money.<sup>69</sup> The *Interahamwe* learned to kill efficiently and were ready to function as a death squad in accordance with the hate radio's directions.<sup>70</sup>

In February 1994, UNAMIR Commander General Roméo Dallaire requested permission to seize hidden weapons that his intelligence had discovered.<sup>71</sup> According to a Hutu informant, the *Interahamwe* were capable of killing 1,000 people every twenty minutes and were thus capable of carrying out a Tutsi extermination plan.<sup>72</sup> General Dallaire's request was denied.<sup>73</sup> He was reminded that UNAMIR's mandate in Rwanda was not to intervene but to monitor the situation.<sup>74</sup>

By the end of March 1994, the transitional government had still not been installed.<sup>75</sup> Rwanda was close to bankruptcy, and international donors urged Habyarimana to apply the Peace Accords.<sup>76</sup> In a meeting in Tanzania, African heads of state convinced Habyarimana to implement the Peace Accords.<sup>77</sup> However, the plane returning with Habyarimana and President Cyprien Ntaryamia of Burundi was shot down and crashed on 6 April 1994 near Kigali Airport.<sup>78</sup> To this day, it is not known who assassinated the Rwandan President.<sup>79</sup> The Hutu blamed the RPF, but foreign observers believed that Hutu extremists had killed the President for his endorsement of the Peace Accords.<sup>80</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> Magnarella, *supra* note 5, at 814.

<sup>67</sup> Sarkin & Fowler, *supra* note 14, at 48 (citing ALAN J. KUPERMAN, THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA 12 (2001)).

<sup>68</sup> Magnarella, *supra* note 5, at 814; *see generally* Magnarella, *supra* note 5, at 813-14.

<sup>69</sup> CHRÉTIEN, *supra* note 4, at 313.

<sup>70</sup> Sarkin & Fowler, *supra* note 14, at 48; *See* CHRÉTIEN, *supra* note 4, at 313.

<sup>71</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 105 (Sept. 2, 1998).

<sup>72</sup> Sarkin & Fowler, *supra* note 14, at 54 (citing JARED COHEN, ONE HUNDRED DAYS OF SILENCE: AMERICA AND THE RWANDA GENOCIDE 33 (2007)).

<sup>73</sup> Akayesu, Case No. ICTR-96-4-T, ¶ 105.

<sup>74</sup> Sarkin & Fowler, *supra* note 14, at 54

<sup>75</sup> Akayesu, Case No. ICTR-96-4-T, ¶ 106.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Magnarella, *supra* note 5, at 815.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

F. *The Genocide: Its Trigger, Cause, and Reaction*

The death of President Habyarimana immediately triggered the genocide.<sup>81</sup> Within an hour of the plane crash, the *Interahamwe* had set up roadblocks in Kigali and had begun the killings:

...[B]y noon on the seventh, they were going house to houses...they killed some people on the spot but carried others away to a mass grave near the airport where they cut their arms and legs and finally massacred them [...]. Children between the age of 10 to 12 years old killed children. Mothers with babies on their backs killed mothers with babies on their backs. They threw babies into the air and mashed them on the ground.<sup>82</sup>

Among the first victims of the genocide were the Hutu supporting the Arusha Accords.<sup>83</sup> The Prime Minister, the President of the Supreme Court, and the entire leadership of moderate Hutu were assassinated.<sup>84</sup> With the systematic eradication of these people, the future for a transitional government according to the Arusha Accords was lost.<sup>85</sup> Government officials and RTLM stimulated the atmosphere of genocide in which extremist Hutus armed with machetes slaughtered Tutsis and moderate Hutus.<sup>86</sup> The urge to eradicate every trace of Tutsi was so strong that even pregnant Hutu women carrying a Tutsi fetus were hunted down and murdered.<sup>87</sup> No place was safe; people were lured into the same churches that had provided safe havens during the 1950 uprising and were brutally killed.<sup>88</sup> At that time, not even hospitals, schools, or government buildings could save those seeking refuge.<sup>89</sup> To be a Tutsi meant to be subjected to a cruel death.<sup>90</sup> These killings were not random outbursts of violence—in most cases, they were planned and controlled.<sup>91</sup> Orders were handed down from government ministers to prefects and mayors, who then gathered the masses to conduct the killings.<sup>92</sup> What in a normal society is a crime, became ordinary and even expected behavior, and refusal to participate resulted in death threats and violence.<sup>93</sup>

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<sup>81</sup> Gordon, *supra* note 38, at 156.

<sup>82</sup> Notes from a military briefing of Major Diagne in ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL, THE FAILURE OF HUMANITY IN RWANDA* 313-314 (Carrol & Graf Publishers, 2004) (2003).

<sup>83</sup> See Gordon, *supra* note 38, at 156.

<sup>84</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 107 (Sept. 2, 1998).

<sup>85</sup> See DALLAIRE, *supra* note 82, at 232.

<sup>86</sup> See *id.*; Magnarella, *supra* note 5, at 815.

<sup>87</sup> Magnarella, *supra* note 5, at 816.

<sup>88</sup> See DALLAIRE, *supra* note 82, at 190; Magnarella, *supra* note 5, at 814.

<sup>89</sup> Akayesu, Case No. ICTR-96-4-T, ¶ 110.

<sup>90</sup> *Id.*

<sup>91</sup> TATUM, *supra* note 8, at 41.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 42.

Although UNAMIR was present, its forces were weakened after the UN decided to reduce its peace-keeping force to a number of 450 soldiers on 29 April 1994.<sup>94</sup> This drastic reduction was due to the murder of Belgian UN soldiers, which had led to the withdrawal of the Belgian UN Contingent and caused an international outcry.<sup>95</sup> According to General Dallaire, this reduction meant that UNAMIR no longer had the capacities to halt the genocide.<sup>96</sup>

An endeavor to stop the genocide came from the RPF, which fought its way towards Kigali.<sup>97</sup> Nevertheless, the RPF's advancement could not match the pace at which civilians were being killed.<sup>98</sup> When the RPF conquered Kigali on 4 July 1994, 11% of Rwanda's population had already been killed.<sup>99</sup> After defeating the Hutu militia, the RPF declared a unilateral ceasefire.<sup>100</sup> What came to be known as history's most efficient genocide had lasted 100 days and ended only when the Tutsi rebels won the war after more than 800,000 Tutsi had been killed.<sup>101</sup>

This genocide was the product of a century's worth of injustice and division fostered by colonizers.<sup>102</sup> Economic difficulties coupled with "ethnic" tensions brought the situation to an outburst.<sup>103</sup> Although Rwandan soil was heavily exploited, food was scarce because of the disproportionate population size.<sup>104</sup> Land ownership was dominated by the Tutsi who herded cattle and needed vast amounts of land, whereas the Hutu were mainly farmers whose basic subsistence was endangered without land.<sup>105</sup> This imbalance of available land and economic hardship contributed to the genocide.<sup>106</sup> The uneducated and poor youth, in particular, had no prospects in such an environment. Consequently, they were receptive to the anti-Tutsi ideology.<sup>107</sup> When Tutsi owners were killed, land and

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<sup>94</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶ 108.

<sup>95</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶ 108.

<sup>96</sup> DALLAIRE, *supra* note 82, at 374.

<sup>97</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶ 109; Magnarella, *supra* note 5, at 816.

<sup>98</sup> Magnarella, *supra* note 5, at 816.

<sup>99</sup> *Id.*

<sup>100</sup> Magnarella, *supra* note 5, at 816. *Id.*

<sup>101</sup> Sarkin & Fowler, *supra* note 14, at 51; *Frontline: Ghosts of Rwanda* (PBS television broadcast Apr. 1, 2004), <https://www.pbs.org/wgbh/pages/frontline/shows/ghosts/video/> (available at CwnInternational, *Rwanda Genocide Documentary – Part VIII*, YOUTUBE (Mar. 15, 2012), [http://www.youtube.com/watch?annotation\\_id=annotation\\_101355&feature=iv&src\\_vid=eUAGmWxuHUI&v=4P2wA3Od7fE](http://www.youtube.com/watch?annotation_id=annotation_101355&feature=iv&src_vid=eUAGmWxuHUI&v=4P2wA3Od7fE)).

<sup>102</sup> Sarkin & Fowler, *supra* note 14, at 41-43.

<sup>103</sup> See TATUM, *supra* note 8, at 41.

<sup>104</sup> Magnarella, *supra* note 5, at 821.

<sup>105</sup> *Id.* at 818.

<sup>106</sup> See *id.*

<sup>107</sup> *Id.* at 814.

businesses were allocated to the Hutu.<sup>108</sup> The Hutu realized that sufficient resources became more available with the disappearance of the Tutsi.<sup>109</sup> Moreover, the war with the RPF had disadvantageous effects on the economy, which was impacted by the displacement of farmers and destruction of Rwanda's small tourist industry.<sup>110</sup> The Tutsi refugees fleeing from Rwanda and the Hutu refugees entering Rwanda from Burundi caused further unrest and food shortage in the region.<sup>111</sup> The end result of these issues was the vicious slaughter of the Tutsi.<sup>112</sup> In view of Rwanda's history, the genocide is not simply a tribal blood bath; its causes are of a complex political and social nature.<sup>113</sup>

#### G. Concluding Remarks on the Background to the Genocide

In conclusion, pre-colonial Rwanda did not recognize "ethnic" distinctions between the Hutu and the Tutsi. The creation of different "ethnicities" must be attributed to the colonialists who utilized this artificial distinction for their own purposes. Over time, different rulers who supported one particular group over another reinforced the ethnic distinction established by the colonialists. This divide deeply wounded Rwanda as its people split into different groups during the decades to follow. The Arusha Accords were supposed to end the unrest and war that resulted, but instead of peace, genocide soon permeated the country, fostered by a century's worth of violence and injustice coupled with an economic crisis.<sup>114</sup>

## II. THE ROLE OF THE MEDIA IN THE RWANDAN GENOCIDE

This Section aims to show the extreme impact that the Hutu radio, RTLM, had on its listeners, to the point that they became agents of genocide.<sup>115</sup> This Section will also examine the propaganda tactics employed by RTLM to reach and influence its audience. The example of RTLM journalist Georges Ruggiu will shed further light on the purpose of RTLM broadcasts and will provide guidance for understanding the media's responsibility and the limits that should be put on the media.

<sup>108</sup> TATUM, *supra* note 8, at 42; Magnarella, *supra* note 5, at 821.

<sup>109</sup> Magnarella, *supra* note 5, at 818.

<sup>110</sup> *Id.* at 820.

<sup>111</sup> *Id.* at 821.

<sup>112</sup> *Id.* at 820.

<sup>113</sup> Anna-Maria Brandstetter, *Ethnic or Socio-Economic Conflict? Political Interpretations of the Rwanda Crisis*, 4 INT'L J. ON MINORITY & GROUP RIGHTS 427, 429-430 (1997).

<sup>114</sup> *See infra* Part I.

<sup>115</sup> *See* William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L. J. REVUE DE DROIT DE MCGILL 142, 171 (2000). Not only RTLM, but many other media outlets also participated in the discourse of hatred against the Tutsi during the genocide. However, this paper will focus on the predominant role RTLM played. *See also* Kenneth L. Marcus, *Accusation in a Mirror*, 43 LOY. U. CHI. L. J. 375, 369 (2012).

A. *The Establishment of the Rwandan “Hate Radio”*

RTLM’s role was part of a sophisticated plan that systematically influenced the Hutu with propaganda and lies to bring about the genocide.<sup>116</sup> William Schabas described the importance of the media within the Rwandan context in 1994 as follows, “A well-read and well-informed genocidaire will know that at the early stages of planning of the ‘crime of crimes,’ his or her money is best spent not in purchasing machetes, or Kalatchnikovs, or Zyklon B gas, but rather investing in radio transmitters and photocopy machines.”<sup>117</sup>

In 1990 only the national Radio Rwanda existed.<sup>118</sup> After the Arusha Accords in 1993, Radio Rwanda even agreed to broadcast RPF messages.<sup>119</sup> At first, Radio Rwanda did not circulate hate messages,<sup>120</sup> however, during the genocide, Radio Rwanda turned into an extremist radio station.<sup>121</sup> In response, the RPF established their own Radio Muhabura, which had limited reach and, although it glorified the RPF,<sup>122</sup> tried to minimize the ethnic divide between Hutu and Tutsi.<sup>123</sup> With the relatively neutral Radio Rwanda and the RPF’s Radio Muhabara, the Hutu extremists soon started to plan their own extremist radio, RTLM.<sup>124</sup>

B. *Radio Télévision Libre des Mille Collines (RTLM) and its Broadcasts*

The Hutu extremists Ferdinand Nahimana, a history professor at the National University of Rwanda, and Jean-Bosco Barayagwiza, a lawyer and Director of Political Affairs in the Ministry of Foreign Affairs, established RTLM on 8 April 1993—one year before the Rwandan genocide.<sup>125</sup>

RTLM was supposed to be a response to the “Tutsi media monopoly.”<sup>126</sup> Although RTLM was a private station, it was connected to the government because it used Radio Rwanda’s equipment and was allowed to broadcast on the

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<sup>116</sup> Schabas, *supra* note 115, at 171; *See* Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶¶ 978-979 (Dec. 3, 2003).

<sup>117</sup> Schabas, *supra* note 115, at 171.

<sup>118</sup> Alex Obote Odora, *Criminal Responsibility of Journalists under International Criminal Law: The ICTR Experience*, 73 NORDIC J. OF INT’L L. 307, 309 (2004).

<sup>119</sup> *Id.*

<sup>120</sup> HUMAN RIGHTS WATCH, ALISON DES FORGES, LEAVE NONE TO TELL THE STORY GENOCIDE IN RWANDA, 67, 71 (1999).

<sup>121</sup> *Id.*

<sup>122</sup> Odora, *supra* note 118, at 309.

<sup>123</sup> DES FORGES, *supra* note 120, at 68.

<sup>124</sup> *Id.*

<sup>125</sup> Justin La Mort, *The Soundtrack to Genocide: Using Incitement to Genocide in the Bikindi Trial to Protect Free Speech and Uphold the Promise of Never Again*, 4 INTERDISC. J. OF HUMAN RIGHTS L. 43, 51 (2009-2010); Odora, *supra* note 118, at 315.

<sup>126</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 931 (Dec. 3, 2003).

same frequencies.<sup>127</sup> Thus, the radio was under *de facto* government control.<sup>128</sup> These were excellent conditions to convey hate messages to a large audience and to incite the Hutu to hate and kill the Tutsi.<sup>129</sup>

RTLM functioned differently than traditional radio.<sup>130</sup> Listeners could call in to interact with messages from other people and gossip while RTML was broadcasting live.<sup>131</sup> The announcers would then transmit the information without assessing its veracity.<sup>132</sup> In addition, RTLM aired the most recent tunes and used street language like “we have hot news,” which made it especially exciting and popular among Rwandan youth.<sup>133</sup> Through the programming and the excitement RTLM transmitted in its broadcasts, it was able to influence and direct Rwandans.<sup>134</sup> Because most of Rwanda’s population was illiterate,<sup>135</sup> the radio provided the only possibility of receiving news.<sup>136</sup> In this way, the radio facilitated the spread of hatred to thousands of listeners.<sup>137</sup>

With President Habaryimana’s death, the intensity of RTLM broadcasts increased.<sup>138</sup> In particular, calls for the population to take action against the enemy became louder.<sup>139</sup> In a broadcast on 4 June 1994, RTLM directed its calls to kill:

One hundred thousand young men must be recruited rapidly. They should all stand so that we kill the Inkotanyi [Tutsi]<sup>140</sup> and exterminate them, all the easier that...the reason we will exterminate them is that they belong to one ethnic group. Look at the person’s height and his physical appearance. Just look at his small nose and then break it. Then we will go on to Kibungo, Rusumo, Ruhengeri, Byumba, everywhere.<sup>141</sup>

And on 2 July 1994 RTLM rejoiced because it had finally finished its task:

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<sup>127</sup> Odora, *supra* note 118, at 315-316.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> DES FORGES, *supra* note 120, at 70.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> CHRÉTIEN, *supra* note 4, at 341; La Mort, *supra* note 125, at 51; Simone Monasebian, *The pre-genocide case against Radio-Télévision Libre des Mille Collines*, in THE MEDIA AND THE RWANDA GENOCIDE 298, 311 (Allan Thompson ed., Pluto Press 2007).

<sup>134</sup> See La Mort, *supra* note 125, at 51.

<sup>135</sup> Odora, *supra* note 118, at 308.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 481 (Dec. 3, 2003).

<sup>139</sup> *Id.*

<sup>140</sup> Inkotanyi referred to the Tutsi during the genocide. See Gordon, *supra* note 38, at 150.

<sup>141</sup> Nahimana, Case No. ICTR-99-52-T, ¶ 397.

So, where did all the Inkotanyi who used to phone me go, eh? They must have been exterminated...Let us sing: "Come, let us rejoice: the Inkotanyi have been exterminated! Come dear friends, let us rejoice, the Good Lord is just." The Good Lord is really just, these evildoers, these terrorists, these people with suicidal tendencies will end up being exterminated.<sup>142</sup>

It should be noted that not all of RTLM's broadcasts were vicious; some even discussed the inequitable distribution of power in Rwanda.<sup>143</sup> However, broadcasts in which RTLM admitted opposing views were exceptional.<sup>144</sup>

### C. *RTLM's Function in the Genocide*

Given that the Rwandan media was present everywhere,<sup>145</sup> it must be asked if the Rwandan genocide would have been possible without the media.<sup>146</sup>

Neither in Nazi Germany nor during the Armenian genocide had the media so openly called for extermination.<sup>147</sup> Undeniably, before and during the genocide, RTLM had an extremely wide public reach and impact on the Rwandan society.<sup>148</sup> RTLM's government support further increased its power and amplified its message.<sup>149</sup> Thus, RTLM functioned as a propaganda channel that facilitated the genocide.<sup>150</sup> RTLM became so important that it ultimately directed the killings and coordinated and mobilized the perpetrators.<sup>151</sup> Leaders of the militia, for instance, used RTLM to call their members to meetings in Kigali.<sup>152</sup> During the killings, RTLM was quick to deploy journalists to the roadblocks where Tutsis were discovered and killed.<sup>153</sup> The journalists

<sup>142</sup> *Id.* ¶ 403; see also Rwandan Genocide Project (Radio RTLM), YOUTUBE (Apr. 15, 2009), [http://www.youtube.com/watch?v=GeVa6U9yLCc&playnext=1&list=PLkuwHTdDvjNYaHXw8lddLsuUoCecES4g2&feature=results\\_main](http://www.youtube.com/watch?v=GeVa6U9yLCc&playnext=1&list=PLkuwHTdDvjNYaHXw8lddLsuUoCecES4g2&feature=results_main).

<sup>143</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 468.

<sup>144</sup> *Id.*

<sup>145</sup> Roméo Dallaire, *The Media Dichotomy*, in *THE MEDIA AND THE RWANDA GENOCIDE* 12, 12 (Allan Thompson ed., Pluto Press 2007).

<sup>146</sup> See also ICTR-TPIR, *Media Trial: Ferdinand Nahimana Part I*, YOUTUBE (Feb. 12, 2012), <http://www.youtube.com/watch?v=JkVCfd1jybU> (M. Bernard Muna served as Deputy Prosecutor for the ICTR).

<sup>147</sup> CHRÉTIEN, *supra* note 4, at 80.

<sup>148</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶¶ 1031-1034.

<sup>149</sup> Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 496 (2007).

<sup>150</sup> See Alison des Forges, *Call to Genocide: Radio in Rwanda, 1994*, in *THE MEDIA AND THE RWANDA GENOCIDE* 41, 44 (Allan Thompson ed., Pluto Press 2007); *Nahimana*, Case No. ICTR-99-52-T, ¶¶ 1031-34.

<sup>151</sup> des Forges, *supra* note 150, at 47, 49.

<sup>152</sup> *Id.* at 49.

<sup>153</sup> *Id.* at 50.

interviewed and praised the perpetrators, thus legitimizing their deeds.<sup>154</sup> RTLM also guided the perpetrators to their victims.<sup>155</sup> Tutsi victims paid close attention to RTLM's broadcasts due to the broadcasts' impact.<sup>156</sup> In one instance, Tutsis followed RTLM's reassurance that it was safe to leave their hiding places.<sup>157</sup> However, RTLM tracked their movements and issued subsequent directions to kill them.<sup>158</sup> As a result, the deceived Tutsi refugees were hunted down and massacred.<sup>159</sup> Given that both the perpetrators and the victims found RTLM to be authoritative, it can be concluded that RTLM directed the genocide.<sup>160</sup> As described by a witness, RTLM "spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country."<sup>161</sup> Because RTLM consistently convinced the whole country that they had a duty to extinguish the Tutsi,<sup>162</sup> it functioned as the voice of the genocide.<sup>163</sup>

If RTLM had a steering function for the genocide, the question arises why no one stopped it.<sup>164</sup> An attempt by Rwanda's Ministry of Information to call RTLM and change its dangerous course failed.<sup>165</sup> Although the international community was aware that the radio played a central role in the killings,<sup>166</sup> no action was taken.<sup>167</sup> Only the RPF directly attacked RTLM facilities in Kigali, but its attack failed.<sup>168</sup>

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 482 (Dec. 3, 2003).

<sup>157</sup> *Id.* at ¶ 487.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*; des Forges, *supra* note 150, at 49.

<sup>160</sup> Odora, *supra* note 118, at 318.

<sup>161</sup> *Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 1078 (Witness GO).

<sup>162</sup> Alexander C. Dale, *Countering Hate Messages that Lead to Violence: The United Nation's Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts*, 11 DUKE J. OF COMP. & INT'L L. 109, 111 (2001).

<sup>163</sup> ICTR Trial, Media Trial, *Ferdinand Nahimana Part I*, YOUTUBE (Feb. 12, 2012), <http://www.youtube.com/watch?v=JkVCfd1jybU>; CHRÉTIEN, *supra* note 4, at 380.

<sup>164</sup> See *Nahimana*, Case No. ICTR-99-52-T, ¶ 458; Odora, *supra* note 118, at 309.

<sup>165</sup> Monasebian, *supra* note 133, at 310-11, 316.

<sup>166</sup> The Observer, for example, quoted RTLM broadcasts as of April 7, 1994, and UNAMIR reported RTLM propaganda against the Tutsi in December 1993. Lindsey Hilsum, *The Radio Station Whose Call Sign Is Mass Murder*, OBSERVER (May 15, 1994); Jamie Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AMERICAN J. OF INT'L L. 628, 633 (1997); Monasebian, *supra* note 133, at 312.

<sup>167</sup> John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 547 (2005-2006).

<sup>168</sup> Metzl, *supra* note 166, at 316.

D. *The Propaganda Tactics*

It is important to consider RTLM's propaganda tactics in order to understand how it was possible that thousands of people could be convinced to take up arms against the Tutsi.<sup>169</sup> By spreading lies, personal attacks, and prophecy of impending Tutsi attacks, RTLM created an atmosphere of fear among the Hutu that prompted them to take action.<sup>170</sup>

One propaganda tactic included the media's constant reference to "the truth," which it pretended to know and conveyed as one message.<sup>171</sup> In reality, the media manipulated the truth and made its audience believe that its word was reality.<sup>172</sup> RTLM frequently claimed that its information came from political authorities, intellectuals, and university professors, which impressed some Rwandans and made them accept the cruel jokes against the Tutsi and their misrepresentations as reality.<sup>173</sup> Cynical and hypocritical broadcasts added to the genocidal environment.<sup>174</sup> RTLM encouraged its listeners by stating that they would never be held accountable for their acts if they won against the Tutsi.<sup>175</sup>

Broadcasters also used religion to justify the attacks against the Tutsi.<sup>176</sup> Prayers sometimes preceded the violent acts.<sup>177</sup> Consequently, the policy of Tutsi extermination seemed to be tolerated and even endorsed by religion.<sup>178</sup> Given that 90% of Rwandans were Christians, the references to religion made the propagated violence acceptable.<sup>179</sup>

False claims portraying the Tutsi as traitors in times of economic crisis caused contempt for the Tutsi.<sup>180</sup> In October 1993, the media had already underlined the different physical features and the supposedly different origins of the Hutu and the Tutsi.<sup>181</sup> By relying on a theory of Tutsi immigration in pre-colonial times, the thought that the Tutsi had no right to inhabit Rwanda was put in the mind of the Hutu living in an overcrowded Rwanda.<sup>182</sup> Additionally, the media

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<sup>169</sup> CHRÉTIEN, *supra* note 4, at 307.

<sup>170</sup> *Id.* at 308. Before and after April 6, 1994, RTLM broadcasted the names of Tutsi, and moderate Hutu, who should be targeted. Many times these broadcasts were death warrants because their murder quickly followed the publication of Tutsi names. See Christopher Scott Maravilla, *Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law*, 17 TUL. J. OF INT'L AND COMP. L. 113, 140 (2008).

<sup>171</sup> CHRÉTIEN, *supra* note 4, at 338.

<sup>172</sup> *Id.* at 339.

<sup>173</sup> *Id.* at 307, 315.

<sup>174</sup> *Id.* at 317.

<sup>175</sup> *Id.* at 318.

<sup>176</sup> *Id.* at 326-327.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> DES FORGES, *supra* note 120, at 72.

<sup>180</sup> *Id.* at 74.

<sup>181</sup> des Forges, *supra* note 150, at 45.

<sup>182</sup> See DES FORGES, *supra* note 120, at 74.

sensationalized the horror of the Tutsi's pre-colonial torture practices.<sup>183</sup> Thus, the story that the RPF had come to restore the former Tutsi monarchy enslaving the Hutu painted the "Hutu as innocent victim[s]".<sup>184</sup> Moreover, the media frequently equated the Tutsi with the RPF.<sup>185</sup> The propagandists suggested that the Hutu's lives were in danger.<sup>186</sup> After 6 April 1994, the media insisted that the Tutsi planned a genocide against the Hutu and had, in fact, already prepared mass graves for the Hutu.<sup>187</sup> The media suggested that the Tutsi were cannibals who planned a Nazi-like empire.<sup>188</sup> As a result, the idea of pre-emptive self-defence against the Tutsi threat contributed to the horrors of the Rwandan genocide.<sup>189</sup>

The media provided a solution to the Tutsi danger by reminding the Hutu that they were the majority ethnic group and that this was their advantage against the imminent attack.<sup>190</sup> The picture the media drew of the Tutsi evil added additional hostility to the already poisoned atmosphere.<sup>191</sup> Through this campaign of hatred and contempt, it became clear to the Hutu population that the Tutsi had to be eliminated.<sup>192</sup>

#### E. *Prosecutor v. Ruggiu*

This Section assesses the case of *Prosecutor v. Ruggiu*<sup>193</sup> in order to grasp the conditions many RTLM broadcasts created for the commission of violence. Georges Ruggiu's admission and explanation of the media's responsibility<sup>194</sup> will further illustrate the media's responsibility for the genocide in Rwanda. *Prosecutor v. Ruggiu* was the only case in which a European was indicted before the International Criminal Tribunal for Rwanda (ICTR), an international tribunal established to prosecute the international crimes perpetrated during the Rwandan genocide.<sup>195</sup> Georges Ruggiu, a Belgian social worker, took active part in Rwandan politics and the Hutu cause.<sup>196</sup> Although he had no relevant training, Ruggiu was offered a job as a journalist and broadcaster for RTLM, where he worked from 6 January 1994 to 14 July 1994, thus contributing to the genocide

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<sup>183</sup> des Forges, *supra* note 150, at 45.

<sup>184</sup> DES FORGES, *supra* note 120, at 77, 80-81.

<sup>185</sup> des Forges, *supra* note 150, at 45, 49.

<sup>186</sup> DES FORGES, *supra* note 120, at 78.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 80.

<sup>189</sup> *See id.* at 45.

<sup>190</sup> *Id.* at 82.

<sup>191</sup> des Forges, *supra* note 150, at 45.

<sup>192</sup> *Id.* at 48.

<sup>193</sup> *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment and Sentence (June 1, 2000).

<sup>194</sup> *Id.* § 44.

<sup>195</sup> Gordon, *supra* note 38, at 153.

<sup>196</sup> *Id.*

through his media activities.<sup>197</sup> After much reflection, Ruggiu pled guilty to direct and public incitement of genocide.<sup>198</sup> With regard to his role, the ICTR held: “The accused waged a media war against the Belgians over the RTLM.”<sup>199</sup> In particular, Ruggiu encouraged the setting up of roadblocks and congratulated the perpetrators for massacring Tutsis.<sup>200</sup> Perhaps the greatest contribution towards establishing the responsibility of the media is Ruggiu’s guilty plea and his admission of RTLM’s role.<sup>201</sup> Ruggiu not only acknowledged that the broadcasts were aimed at provoking the population,<sup>202</sup> he also stated that the term *Inyenzi* clearly referred to the Tutsi and those who needed to be killed.<sup>203</sup> RTLM broadcasts reflected the political ideology and plans of extremist Hutu, particularly members of MRND and the CDR, as explained by Ruggiu.<sup>204</sup> He further admitted that RTLM broadcasts incited young Rwandans, *Interahamwe* militiamen, and soldiers to harm the Tutsi and moderate Hutu.<sup>205</sup> When he was asked during the hearing why he wished to change his plea, Ruggiu answered:

I realised that some persons in Rwanda had been killed during the events of 1994, and that I was responsible and guilty of those facts, that there was a direct link with what I had said and their deaths and under these circumstances I believed that I had no other choice than to plead guilty.<sup>206</sup>

#### F. *Concluding Remarks on the Role of the Media in the Genocide*

RTLM was so powerful during the genocide because Rwanda’s population was receptive to its hate propaganda.<sup>207</sup> In view of its ability to deploy people and to cause fear among the population, RTLM even directed the genocide.<sup>208</sup> Its impact on the horrors in Rwanda were acknowledged by Ruggiu, which shows that RTLM was indeed engaged in incitement of genocide.<sup>209</sup> This shows how powerful and dangerous the media can become when it follows a partisan and extremist course. It should also alert us to the danger that can occur if inciting inflammatory speech is not stopped.

<sup>197</sup> Ruggiu, *supra* note 193, at § 43.

<sup>198</sup> *Id.* § 10; Statute of the Int’l Crim. Trib. for Rwanda, art. 2, ¶ 3, 33 I.L.M. 1958, available at [http://legal.un.org/avl/pdf/ha/ictr\\_EF.pdf](http://legal.un.org/avl/pdf/ha/ictr_EF.pdf), adopted by S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR Statute].

<sup>199</sup> Ruggiu, *supra* note 193, at § 44(vii).

<sup>200</sup> Gordon, *supra* note 38, at 153.

<sup>201</sup> Ruggiu, *supra* note 193, at § 44.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* § 44(iii). The widespread use of the term *inyenzi* came to mean “persons to be killed.”

<sup>204</sup> *Id.* § 44(xi).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* § 45.

<sup>207</sup> See Odora, *supra* note 118, at 308.

<sup>208</sup> See des Forges, *supra* note 150, at 50.

<sup>209</sup> Ruggiu, *supra* note 193, at § 44(xi).

### III. FROM HATE SPEECH TO INCITEMENT TO GENOCIDE

This Section explores at what point hate speech is heinous enough to rise to the level of direct and public incitement to commit genocide (incitement to genocide).<sup>210</sup> This will be assessed with the example of the Rwandan hate radio, RTLM.

First, this Section discusses the prohibition of hate speech in international law. To determine the media's responsibility vis-à-vis dangerous speech, the evolution from hate speech to incitement to genocide will be considered in light of the ICTR's landmark case, *Prosecutor v. Nahimana* (Media Case).<sup>211</sup> Furthermore, the international legal definition of incitement to genocide will be assessed and examined through the role of the RTLM in order to understand the impact of the media's role in inciting the Rwandan genocide. This will then lead to a discussion of the responsibility of the media in view of the radio's role in Rwanda. Finally, the use by President Trump of the media to foster a climate of fear, which encourages violence, especially towards Muslims, will be discussed with these examples in mind.

#### A. *The International Criminalization of Hate Speech*

During the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),<sup>212</sup> member states debated whether hate speech should be penalized under incitement to genocide.<sup>213</sup> The proponents for the inclusion of hate speech into the Genocide Convention argued that it was necessary to halt speech before it led to the commission of violence and ultimately genocide.<sup>214</sup> However, to preserve the right of free speech and

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<sup>210</sup> Although hate speech can also amount to persecution as a crime against humanity, this paper will focus exclusively on the examination of hate speech in context of incitement to genocide. For the relation between persecution and hate speech, see Fausto Pocar, *Persecution as a Crime under International Criminal Law*, 2 J. OF NAT'L SECURITY L. & POL'Y 335, 360-361 (2008).

<sup>211</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).

<sup>212</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

<sup>213</sup> See *Ruggiu*, Case No. ICTR-97-32-I, ¶¶ 15-16; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 551 (Sept. 2, 1998).

<sup>214</sup> Frans Vilhoen, *Hate speech in Rwanda as a test case for international human rights law*, 33 COMP. AND INT'L L. J. OF SOUTHERN AFRICA 1, 3 (2005). The opponents of including hate speech in the Genocide Convention were concerned that totalitarian states could prohibit legitimate political speech under the cover of "incitement to genocide." See Jean-Marie Bjiu-Duval, *'Hate Media' – Crimes Against Humanity and Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda*, in THE MEDIA AND THE RWANDA GENOCIDE 343, 345-46 (Allan Thompson ed., Pluto Press 2007).

because the criminalization of hate speech was considered a domestic matter, hate speech was not included in the Genocide Convention.<sup>215</sup>

Although the Genocide Convention does not place an obligation on states to penalize hate propaganda, the International Convention on the Elimination of all Forms of Racial Discrimination (CERD)<sup>216</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>217</sup> explicitly prohibit hate speech in international law.<sup>218</sup> Article 4(a) of the CERD requires States to proscribe the “dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.”<sup>219</sup> Although Article 19 of the ICCPR protects freedom of expression, it also prohibits “propaganda for war” and states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>220</sup> Furthermore, the European and the Inter-American systems for human rights protection have established that hate speech is excluded from the protection of freedom of expression.<sup>221</sup> Thus, although hate speech is not prohibited under the Genocide Convention, its prohibition in international law is well-established.

#### B. *When Hate Speech Becomes Incitement to Genocide*

This Section will discuss the progression from legitimate expression to incitement to genocide in order to address the question of when hate speech effectively constitutes incitement to genocide. Monitoring this evolution is especially important in halting hate speech before it turns into incitement to genocide. Once incitement to genocide is successful, the horrors of genocide will follow.<sup>222</sup>

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<sup>215</sup> Vilhoen, *supra* note 214, at 3.

<sup>216</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD].

<sup>217</sup> International Covenant on Civil and Political Rights, art. 5, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>218</sup> Vilhoen, *supra* note 214, at 3-4. The Human Rights Committee (HRC) excluded hate speech from the protection of freedom of expression. *See Faurisson v. France*, Commc’n No. 550/1993 (Hum. Rts. Comm. Nov. 8, 1996); *see also Ross v. Canada*, Commc’n No. 736/1997 (Hum. Rts. Comm. Oct. 18, 2000); *W.G. Party v. Canada*, App. No. 736/1997, Eur. Comm’n H.R. (2000).

<sup>219</sup> CERD, *supra* note 216, at 220.

<sup>220</sup> ICCPR, *supra* note 217, at 178.

<sup>221</sup> *See, e.g., Pavel v. Russia*, App. No. 35222/04, Eur. Ct. H.R. (2007); *see also* Organization of American States, Charter of the Organization of American States, art. 5, Feb. 27, 1967, 2 U.S.T. 2394, 119 U.N.T.S. 3.

<sup>222</sup> *See Benesch, infra* note 247, at 63.

Under international law, the scope of freedom of expression not only entails inoffensive expressions but also applies to those expressions that “offend shock or disturb the State or any sector of the population”.<sup>223</sup> However, no universally accepted definition of hate speech exists. The Council of Europe provided a comprehensive definition of hate speech as a prohibition to “spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”<sup>224</sup>

Due to its harmful effect on human dignity, society, and the creation of a poisoned atmosphere, hate speech is prohibited under human rights law.<sup>225</sup> When hate speech calls for imminent violence, it is particularly harmful.<sup>226</sup> Incitement to genocide includes<sup>227</sup> speech that intends to directly incite its audience to destroy “a national, ethnical, racial or religious group.”<sup>228</sup> Although, incitement to genocide does not require a result, a speaker must have a certain authority over her audience to convey the hateful message, and the audience must be likely to respond to the speaker’s words.<sup>229</sup> Furthermore, the audience must understand the speech as a call to commit genocide.<sup>230</sup> Therefore, when hate speech calls for the destruction of a “national, ethnic, or religious group,” it can become incitement to genocide. Nevertheless, hate speech alone, even if it calls for violence, is not inherently incitement to genocide.<sup>231</sup>

Additionally, incitement to genocide can only occur in a genocidal context.<sup>232</sup> In the case of Rwanda, the artificial colonial distinction, the subsequent tensions, and the hostile environment created by RTLM formed the environment where hate speech could thrive to the extent that it became incitement to genocide.<sup>233</sup>

<sup>223</sup> *Handyside v. United Kingdom*, App. No. 5493/72 (Eur. Ct. H.R. Dec. 7, 1976).

<sup>224</sup> Comm. of Ministers, *Council of Europe, Recommendation No. R (97) 20 on “Hate Speech,”* Doc. No. 4870 (1997).

<sup>225</sup> *Onder Bakircioglu, Freedom of Expression and Hate Speech*, 16 *Tulsa J. Comp. & Int’l L.* 1, 5 (2008); *Pavel v. Russia*, App. No. 35222/04, Eur. Ct. H.R. (2007); *Ross v. Canada*, Comm’n No. 736/1997 (Hum. Rts. Comm. Oct. 18, 2000); *Faurisson v. France*, Comm’n No. 550/1993 (Hum. Rts. Comm. Nov. 8, 1996).

<sup>226</sup> *Bakircioglu*, *supra* note 225, at 5; *see also* American Convention on Human Rights art. 13, Nov. 22, 1969, 9 I.L.M. 673, K.A.V. 2305 (explicitly prohibiting “incitement to lawless violence”).

<sup>227</sup> ICTR Statute, *supra* note 198.

<sup>228</sup> *Id.*

<sup>229</sup> *Benesch*, *supra* note 149, at 494.

<sup>230</sup> *Id.* at 498; *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 1011 (Dec. 3, 2003); *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶ 700 (Nov. 28, 2007).

<sup>231</sup> *See* ICTR Statute, *supra* note 198, at art. 2, ¶ 2.

<sup>232</sup> *Benesch*, *supra* note 149, at 493-94.

<sup>233</sup> *See Nahimana*, Case No. ICTR-99-52-T, ¶ 1004.

Thus, hate speech voiced in a certain hostile environment, which additionally calls for the commission of genocide, amounts to incitement to genocide.<sup>234</sup>

In conclusion, hate speech can result in violent acts. However, only when it asks for the commission for genocide in a certain context, will it become incitement to genocide.<sup>235</sup> Thus, while hate speech and incitement to genocide can both call for violent acts, the aim of such violence differs. The violence required for incitement to genocide is the destruction of a specific group.<sup>236</sup>

1. From Hate Speech to Genocide in the Context of the Media Case

In this Section, the Media Case<sup>237</sup> will be analyzed in order to determine the line between hate speech and incitement to genocide. Its primary principles concerning the role of the media during the genocide will be addressed, and the principles governing hate speech will be outlined.<sup>238</sup>

The Media Case concerns three defendants with significant control over the Rwandan media before and during the genocide.<sup>239</sup> Ferdinand Nahimana was one of the founders of RTLM, the infamous hate radio station that started broadcasting in 1993,<sup>240</sup> and Jean-Bosco Barayagwiza was an RTLM executive. The third defendant, Hassan Ngeze, was the editor-in-chief of the Anti-Tutsi newspaper, *Kangura*.<sup>241</sup>

RTLM's spread of hatred and incitement to violence was fundamental for the genocidal plan to exterminate the Tutsi.<sup>242</sup> Indeed, RTLM advocated the cause of conservative and extremist Hutu, including members of the MRND, CDR, and *Interahamwe*.<sup>243</sup> For their role within the media, the defendants were convicted of incitement to commit genocide.<sup>244</sup> In its judgment, the Trial

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<sup>234</sup> See *id.* at ¶ 1001.

<sup>235</sup> *Id.*

<sup>236</sup> See ICTR Statute, *supra* note 198, at art. 2, ¶ 2.

<sup>237</sup> See *Nahimana*, Case No. ICTR-99-52-A, ¶ 1001.

<sup>238</sup> Monasebian, *supra* note 133, at 308. The Media Case marked the first time since the Nuremberg Trials that hate speech had been prosecuted as a war crime. See Charity Kagwi-Ndungu, *The Challenges in Prosecuting Print Media for Incitement to Genocide*, in *THE MEDIA AND THE RWANDA GENOCIDE* 330, 337 (Allan Thompson ed., Pluto Press 2007).

<sup>239</sup> Benesch, *supra* note 149, at 515.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> Schabas, *supra* note 115, at 171; see *Nahimana*, Case No. ICTR-99-52-A, ¶ 978-79; see also Prosecutor v. *Nahimana*, Case No. ICTR-99-52-T, Amended Indictment, § 1.8 (Nov. 5, 1999).

<sup>243</sup> Gordon, *supra* note 38, at 159.

<sup>244</sup> *Id.*, at 141; *Nahimana*, Case No. ICTR-99-52-T, ¶¶ 1106-07. The defendants were also convicted of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity (extermination and persecution).

Chamber carefully analyzed when hate speech issued through the media amounts to incitement to genocide.<sup>245</sup>

*a. Hate speech*

In *Prosecutor v. Nahimana*, the Trial Chamber stated that hate speech in a certain context can amount to incitement to genocide.<sup>246</sup> It further clarified that media that fosters hatred, such as RTLM, can be held liable for incitement to genocide.<sup>247</sup> Thus, *Prosecutor v. Nahimana* laid the foundation for the prevention of propaganda leading to incitement to genocide.<sup>248</sup>

The Trial Chamber in *Prosecutor v. Nahimana* reviewed the existing law on hate speech and incitement to violence to assess the criminal liability of the defendants.<sup>249</sup> In doing so it discussed articles published by *Kangura* and RTLM broadcasts and concluded that hate speech is:<sup>250</sup>

[A] discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.<sup>251</sup>

The Trial Chamber specified that ethnic hatred alone does not amount to incitement to genocide but that a call for action against the Tutsi specifically was necessary.<sup>252</sup> While it remains difficult to assess when speech calls for violence, criteria to distinguish hate speech from incitement to genocide can be identified from the Media Case.

*b. Distinguishing between Hateful Speech and Incitement*

In *Prosecutor v. Nahimana*, the ICTR found that hate speech transmitted through mass media can amount to incitement to genocide, even if genocide does not occur.<sup>253</sup> To categorize speech either as a means of legitimate expression or

<sup>245</sup> *Nahimana*, Case No. Case No. ICTR-99-52-T, ¶¶ 978-99.

<sup>246</sup> *Id.* at ¶¶ 1004-06, 1022.

<sup>247</sup> See Gordon, *supra* note 38, at 141; *Nahimana*, Case No. ICTR-99-52-T, ¶¶ 1106-07.

<sup>248</sup> Susan Benesch, *Inciting Genocide, Pleading Free Speech*, 21 WORLD POL'Y J. 62, 62 (2004).

<sup>249</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 980. This approach was later criticized by the Appeals Chamber. See *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶ 693 (Nov. 28, 2007).

<sup>250</sup> Benesch, *supra* note 149, at 515-516.

<sup>251</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 1072.

<sup>252</sup> *Id.* at ¶ 1037.

<sup>253</sup> See Gordon, *supra* note 38, at 184; *Nahimana*, Case No. ICTR-99-52-T, ¶¶ 1012-13.

criminal advocacy, the ICTR employed four criteria, namely: purpose, context, causation, and relationship between speaker and subject.<sup>254</sup>

The determinant factor to establish the purpose of a communication is the intent to incite violence.<sup>255</sup> This intent can be established through the actual language used.<sup>256</sup> The ICTR referred to the European Court of Human Rights (ECtHR) jurisprudence in this regard. In *Jersild v. Denmark*,<sup>257</sup> the purpose of a racist broadcast was educational in nature and thus had a proper purpose.<sup>258</sup> In *Sürek and Özdemir v. Turkey*,<sup>259</sup> a newspaper was permitted to publish an interview with a PKK leader who said that he would pursue his goals with the use of violence.<sup>260</sup> The text as a whole was considered “newsworthy,” as opposed to a glorification of violence.<sup>261</sup> In this context, the ICTR also referred to *Sürek v. Turkey*,<sup>262</sup> in which a weekly newspaper had published letters which called for revenge and violence.<sup>263</sup> A failure to distance themselves from the letters led to the liability of the editors.<sup>264</sup> Thus, the tone of a broadcast that conveys hostility and resentment has an improper purpose.<sup>265</sup> In conclusion, while historical research and the dissemination of news and information are protected, explicit calls for violence and propaganda are not.<sup>266</sup>

Furthermore, the context in which a statement is issued can aggravate an already “explosive situation” such as the ethnic hatred, economic struggle, and poverty in Rwanda.<sup>267</sup> Thus, the impact a statement has on a certain audience in a specific situation is another determining element for its criminalization.<sup>268</sup>

With regard to the criteria of causation, the Trial Chamber held that even if incitement to genocide does not lead to actual genocide, i.e., the *destruction* of a group, the inciting speech can still be illegitimate because of its *potential to trigger* a genocide.<sup>269</sup> Moreover, the Trial Chamber acknowledged “that causation in this context [between incitement and genocide] might be relatively

<sup>254</sup> Gordon, *supra* note 38, at 172.

<sup>255</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶¶ 1002-03.

<sup>256</sup> *Id.* ¶ 1001.

<sup>257</sup> *Jersild v. Denmark*, App. No. 15890/89 (Hum. Rts. Comm. Sept. 23, 1994).

<sup>258</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 1001; *See Navanethem Pillay, Freedom of Speech and Incitement to Criminal Activity: A Delicate Balance*, 14 NEW ENG. J. INT’L & COMP. L. 203, 209 (2008).

<sup>259</sup> *Sürek and Özdemir v. Turkey*, App. No. 23927/94 & 24277/94 (Eur. Ct. H.R. 1999).

<sup>260</sup> *See Nahimana*, Case No. ICTR-99-52-T, ¶ 1002.

<sup>261</sup> *See id.* at ¶¶ 1002-03.

<sup>262</sup> *Sürek and Özdemir v. Turkey*, App. No. 23927/94 & 24277/94 (Eur. Ct. H.R. 1999).

<sup>263</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 1002.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at ¶¶ 1001, 1021.

<sup>266</sup> Gordon, *supra* note 38, at 172-73; *see also* Pillay, *supra* note 258, at 208-09.

<sup>267</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 1004.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at ¶ 1015.

indirect.”<sup>270</sup> The ICTR Trial Chamber illustrated this point by reference to Streicher’s<sup>271</sup> hate propaganda, which did not directly cause violence but “injected in to the minds of thousands of Germans” ideas which led to their support of the National Socialist policy of Jewish persecution and extermination.<sup>272</sup> Thus, calls for violence alone are prohibited even if no specific violent acts follow them.<sup>273</sup>

Finally, the ICTR acknowledged that in addition to the speech, a proximate cause must lead to the killings.<sup>274</sup> Although the massacres in Rwanda started when President Habyarimana died in a plane crash, the Trial Chamber held, “if the downing of the plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded.”<sup>275</sup>

The Trial Chamber’s test clarifies that speech must always be assessed within its specific circumstances.<sup>276</sup> What may seem legitimate in one context may be likely to prompt genocide in other circumstances. While calls to genocide do not have to be successful, they must call for action.<sup>277</sup> The intent of the speaker clarifies the purpose of the speech.<sup>278</sup>

### c. *The application of the Trial Chamber’s Criteria*

The Trial Chamber’s four criteria for determining whether speech amounts to incitement to genocide are: context, purpose, causation, and speaker-subject relation. Some broadcasts issued by RTLM did not call for hatred; for example, a broadcast concerning the discrimination a Hutu experienced in his childhood.<sup>279</sup> The purpose of the speech was advocacy of ethnic consciousness, the language referred to the discrimination, and the context was one of political debate and not genocide.<sup>280</sup> The speech was therefore legitimate.<sup>281</sup> For instance, the speech that the Tutsi “are the ones who have all the money” as opposed to the fact that the Tutsi owned 70% of all the Taxis in Rwanda have a different

<sup>270</sup> *Id.* at ¶ 1007.

<sup>271</sup> Julius Streicher was convicted and sentenced to death by the International Military Tribunal for Nuremberg for his hate propaganda in his articles in *Der Stürmer*. Gordon, *supra* note 38, at 143-144.

<sup>272</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 1007.

<sup>273</sup> Compare *id.*, with Bakircioglu, *supra* note 225, at 16-17 (describing the United States’ “clear and present danger test,” which only prohibits speech that is directed to incite *imminent* lawless or violent acts).

<sup>274</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 952.

<sup>275</sup> *Id.* at ¶ 953.

<sup>276</sup> *Id.* at ¶ 1004.

<sup>277</sup> *Id.* at ¶ 1015.

<sup>278</sup> *Id.* at ¶¶ 1002-1003.

<sup>279</sup> Gordon, *supra* note 38, at 174.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

purpose. The first statement has the purpose of prohibited ethnic stereotyping, which may have a violent impact, whereas the latter is merely informative and thus legitimate.<sup>282</sup> *Kangura*'s publication of the "Ten Commandments" and the reference to the Tutsi's physical appearance incited ethnic violence in the context of the genocide.<sup>283</sup> The fact that the speakers did not distance themselves from the message was imperative for their establishing responsibility:

In cases where the media disseminates views that constitute ethnic hatred and calls to violence for informative or educational purposes, a clear distancing from these is necessary to avoid conveying an endorsement of the message and in fact to convey a counter-message to ensure that no harm results from the broadcast. The positioning of the media with regard to the message indicates the real intent of the message, and to some degree the real message itself. The editor of *Kangura* and the journalists who broadcast on RTLM did not distance themselves from the message of ethnic hatred. Rather they purveyed the message.<sup>284</sup>

Therefore, the purpose of a communication may depend on how a message is voiced. The same content can be transmitted in a fashion that calls for hatred and killings, whereas other messages objectively criticize injustice without attacking. The position the media takes is therefore imperative in determining its responsibility.

## 2. The Appeal of the Media Case

The Appeals Chamber generally accepted the Trial Chamber's findings regarding the distinction between hate speech and incitement to genocide.<sup>285</sup> However, the Appeals Chamber criticized the failure of the Trial Chamber to explain how it identified certain broadcasts as incitement to genocide.<sup>286</sup> Thus, the Appeals Chamber reviewed the broadcasts mentioned in the Trial Chamber's judgment itself.<sup>287</sup> The Appeals Chamber found that none of the broadcasts issued before 1994 constituted incitement of genocide<sup>288</sup> because the Appeals Chamber could not "conclude beyond reasonable doubt that the broadcast directly and publicly incited the commission of genocide."<sup>289</sup> Moreover, the Appeals Chamber held that the ICTR had no jurisdiction over incitement to genocide committed before 1994 and, therefore, the pre-1994 broadcasts could

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<sup>282</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶¶ 1021-22.

<sup>283</sup> Gordon, *supra* note 38, at 175.

<sup>284</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 1024.

<sup>285</sup> See *Nahimana*, Case No. ICTR-99-52-T, ¶¶ 700-703; *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶¶ 696, 700-701 (Nov. 28, 2007).

<sup>286</sup> Benesch, *supra* note 149, at 489.

<sup>287</sup> *Id.* at 516.

<sup>288</sup> *Nahimana*, Case No. ICTR-99-52-A, ¶ 115; Jennifer M. Allen & George H. Norris, *Is Genocide Different? Dealing with Hate Speech in a Post-Genocide Society*, 7 J. INT'L L. & INT'L REL. 146, 152 (2011); Benesch, *supra* note 149, at 516.

<sup>289</sup> *Nahimana*, Case No. ICTR-99-52-A, ¶¶ 744-45, 748.

not be considered.<sup>290</sup> The Appeals Chamber did, however, find that broadcasts aired after 6 April 1994 substantially contributed to the genocide.<sup>291</sup> The Appeals Chamber's judgment turned in favor of Jean-Bosco Barayagwiza, cofounder of RTLM and founding member of CDR. Because the Appeals Chamber did not find the broadcasts before 6 April 1994 to be linked to incitement to genocide, he was not held liable for incitement to genocide through the media.<sup>292</sup> With regard to the broadcasts aired after 6 April 1994 (which were deemed to directly incite genocide), the Appeals Chamber found that Barayagwiza was not sufficiently in control to be held responsible.<sup>293</sup> Therefore, his conviction for incitement to genocide was reversed.<sup>294</sup>

The Appeals Chamber clarified that hate speech can amount to the crime of genocide because it can precede direct and public incitement to commit genocide.<sup>295</sup> However, it concluded that authors of hate speech can be held accountable under the ICTR Statute only if the hate speech is so heinous as to directly call for genocidal acts.<sup>296</sup>

Nevertheless, legal clarity would have been served if the Appeals Chamber had distinguished the broadcasts aired before 1994 from those that followed on a legal basis, rather than on the basis of a lack of evidence.<sup>297</sup> Instead, the Appeals Chamber should have included the broadcasts issued before 1994 in its analysis and followed the Trial Chamber's conclusion that incitement to genocide is a continuing crime which started well before 1994 but ended in 1994.<sup>298</sup> In Rwanda, hate speech that directly asked for the killings of Tutsi amounted to incitement to genocide because it was voiced in a context where genocide was likely to take place.<sup>299</sup> Thus, the Appeals Chamber should have considered the broadcasts issued before 1994 as a whole because they contributed to the genocidal context.<sup>300</sup>

### C. *Excursus: President Trump's Use of the Media and Hate Speech*

President Trump's use of media to propagate hatred does not amount to incitement to genocide even though his behaviour on social media, as well as his

<sup>290</sup> *Id.* at ¶ 724.

<sup>291</sup> Allen & Norris, *supra* note 288, at 152.

<sup>292</sup> *Nahimana*, Case No. ICTR-99-52-A, ¶¶ 636, 858.

<sup>293</sup> *Id.* at ¶¶ 635-36.

<sup>294</sup> *Id.* at ¶¶ 636, 858.

<sup>295</sup> *Id.* at ¶ 692.

<sup>296</sup> *Id.* at ¶ 693.

<sup>297</sup> *See* Benesch, *supra* note 149, at 516.

<sup>298</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 104 (Dec. 3, 2003). In this regard, see the Canadian Supreme Court which convicted Musagera of incitement to genocide, although he had left Rwanda already one year before the start of the genocide. Benesch, *supra* note 149, at 517-518.

<sup>299</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 1037.

<sup>300</sup> *See infra* Section II.B.

policies (e.g., the “Muslim Travel Ban”), seem to amplify racist misinformation and encourage violence against Muslims.<sup>301</sup> One of the most notable examples of President Trump’s hate speech is his recent Twitter attack against Representative Ilhan Omar.<sup>302</sup> Rep. Omar is one of the first Muslim women elected to the United States Congress.<sup>303</sup> On the 12<sup>th</sup> of April 2019, President Trump tweeted an edited video that aims to show Rep. Omar being dismissive of the September 11, 2001 attacks.<sup>304</sup> Together with this video, he added the caption “WE WILL NEVER FORGET!”<sup>305</sup>

Rep. Omar said that since President Trump’s retweet of the video, she has received many threats that referred or replied to the posted video.<sup>306</sup> She stated that “[s]ince the president’s tweet Friday evening, I have experienced an increase in direct threats on my life — many directly referencing or replying to the president’s video.”<sup>307</sup>

President Trump seems to use the media to promote the expansion of an extremist movement and to allow for endorsement of hatred towards Muslims.<sup>308</sup> This constitutes hate speech under international human rights law.<sup>309</sup> As the head of state and head of government of the United States of America, he has the power to shape public opinion and to prompt actions.<sup>310</sup> The “Omar tweet” proves that he has the authority to convey hateful messages to his audience. The audience responded to the President’s words by threatening the life of Rep.

<sup>301</sup> Adam Taylor, *Foreign critics of Trump’s travel ban face a new foe: The Supreme Court*, WASH. POST (June 27, 2018), [https://www.washingtonpost.com/news/worldviews/wp/2018/06/27/foreign-critics-of-trumps-travel-ban-face-a-new-foe-the-supreme-court/?utm\\_term=.e8d75e35edbe](https://www.washingtonpost.com/news/worldviews/wp/2018/06/27/foreign-critics-of-trumps-travel-ban-face-a-new-foe-the-supreme-court/?utm_term=.e8d75e35edbe); Saeed Kamali Dehghan et al., *How Trump’s Travel Ban is Affecting People Around the World*, THE GUARDIAN (Jan 29, 2017), <https://www.theguardian.com/us-news/2017/jan/29/trump-travel-ban-peoples-stories-from-us-and-around-the-world>.

<sup>302</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 12, 2019, 2:35 PM), <https://twitter.com/realdonaldtrump/status/1116817144006750209>.

<sup>303</sup> About Rep. Ilhan Omar, U.S. House of Representatives, <https://omar.house.gov/about> (last visited Sept. 19, 2019).

<sup>304</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 12, 2019, 2:35 PM), <https://twitter.com/realdonaldtrump/status/1116817144006750209>.

<sup>305</sup> *Id.*

<sup>306</sup> Greg Sargent, *Just Say It: Trump’s Attacks on Ilhan Omar are Designed to Incite Hatred*, WASH. POST (Apr. 15, 2019), <https://www.washingtonpost.com/opinions/2019/04/15/just-say-it-trumps-attacks-ilhan-omar-are-designed-incite-hatred>.

<sup>307</sup> *Id.*

<sup>308</sup> See RALPH SCHROEDER, *SOCIAL THEORY AFTER THE INTERNET: MEDIA, TECHNOLOGY, AND GLOBALIZATION* 63 (2018).

<sup>309</sup> See COMM. OF MINISTERS, *Council of Europe, Recommendation No. R (97) 20 on “Hate Speech,”* Doc. No. 4870 (1997).

<sup>310</sup> See Theodore C. Sorensen, *Foreign Policy in a Presidential Democracy*, 109 POL. SCI. Q. 523, 524 (1994).

Omar. Therefore, his speech should be closely monitored in order to not cross the fine line towards incitement of genocide.

President Trump's statements regarding Rep. Omar, and Muslims in general, are made in a sensitive context which continues to aggravate the situation.<sup>311</sup> Keeping in mind the circumstances of United States' contemporary political climate, President Trump's speech, even though hateful, cannot be considered incitement to genocide because his statement does not prompt another to commit genocide against Muslims.<sup>312</sup> It would, however, be wise to remember that under the right circumstances, hate speech can be the bullets in a loaded gun.

#### D. *Concluding Remarks on Hate Speech*

Hate speech is prohibited in international law because of the danger it poses for society.<sup>313</sup> In some circumstances, moreover, hate speech can amount to incitement to genocide.<sup>314</sup> Incitement to genocide is linked to the definition of genocide, which means that incitement that is not stopped can result in the crime of genocide.<sup>315</sup> The Media Case clarified that the media's role was crucial for incitement to genocide during the Rwandan genocide.<sup>316</sup>

Regarding President Trump, because his speech does not ask for the destruction of all Muslims. It does not amount to incitement to genocide because calling for violence is not sufficient to become incitement to genocide. His policies, notably the "Muslim Travel Ban", as well as tweets, such as the one directed towards Rep. Omar, are hateful but do not constitute an incitement to genocide.

### IV. INCITEMENT TO GENOCIDE

Incitement to genocide is an inchoate crime and, as such, a step toward the commission of genocide.<sup>317</sup> The killing of thousands of people is nothing spontaneous and incitement is thus a crucial part in genocide.<sup>318</sup> It must be understood that, in order to prevent genocide, its incitement must be stopped.<sup>319</sup>

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<sup>311</sup> David Masci, *Many Americans See Religious Discrimination in U.S. – Especially Against Muslims*, PEW RES. (May 17, 2019), <https://www.pewresearch.org/fact-tank/2019/05/17/many-americans-see-religious-discrimination-in-u-s-especially-against-muslims/>; Rachel Gillum, *Assessing - and Reducing - Public Fear of Muslims*, SCHOLARS STRATEGY NETWORK, (May 22, 2018), <https://scholars.org/brief/assessing-and-reducing-public-fear-muslims>.

<sup>312</sup> See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgment, ¶ 693 (Nov. 28, 2007).

<sup>313</sup> Bakircioglu, *supra* note 225, at 5, 27.

<sup>314</sup> See *infra* Section III.B.2.

<sup>315</sup> Benesch, *supra* note 248, at 63.

<sup>316</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 49-50, 52.

<sup>317</sup> *Id.* at ¶ 1017.

<sup>318</sup> Benesch, *supra* note 248, at 63.

<sup>319</sup> *Id.*

This Part first explains why incitement to genocide was codified as a criminal act punishable under international law.<sup>320</sup> A broad and complete definition of incitement to genocide will be provided in the second sub-Section. In the last sub-Section, the detection of the intent, especially with regards to the media, will be discussed.

A. *The Roots of Incitement to Genocide*

Although it was not then codified, incitement to genocide was penalized in the Nuremberg Trials with regard to Julius Streicher's<sup>321</sup> hate propaganda.<sup>322</sup> However, it was not until the creation of the Genocide Convention that incitement to genocide was codified in an international treaty.<sup>323</sup> As a response to the World War II atrocities, the Genocide Convention functions as a tool to prevent future genocides.<sup>324</sup> The reason behind the criminalization of incitement to genocide is the consideration that the organizers of genocide are its masterminds but not necessarily its direct perpetrators.<sup>325</sup> Therefore, it cannot be just that those who incite the commission of genocidal acts escape punishment.<sup>326</sup> Article 2 of the ICTR Statute, reflecting the Genocide Convention,<sup>327</sup> states that the ICTR "has the power to prosecute persons committing genocide" and that genocide requires intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".<sup>328</sup> Speech amounting to incitement to genocide is defined as a "direct appeal to":<sup>329</sup>

killing members of the group; causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group.<sup>330</sup>

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<sup>320</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 556, 559 (Sept. 2, 1998).

<sup>321</sup> See Gordon, *supra* note 38, at 143-144.

<sup>322</sup> Eric Blinderman, *International Law and Information Intervention, in FORGING PEACE, INTERVENTION, HUMAN RIGHTS AND THE MANAGEMENT OF MEDIA SPACE* 104, 121 (Monroe E. Price & Mark Thompson eds., 2002).

<sup>323</sup> Benesch, *supra* note 248, at 64-65

<sup>324</sup> La Mort, *supra* note 125, at 48-49.

<sup>325</sup> See Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgment, ¶ 15 (June 10, 2000); See ICTR Statute, *supra* note 198.

<sup>326</sup> See Ruggiu, Case No. ICTR-97-32-I, ¶ 15.

<sup>327</sup> La Mort, *supra* note 125, at 48-9; see ICTR Statute, *supra* note 198, at art. 2 ¶ 3.

<sup>328</sup> ICTR Statute, *supra* note 198, at art. 2.

<sup>329</sup> Bjiu-Duval, *supra* note 214, at 346.

<sup>330</sup> ICTR Statute, *supra* note 198, at art. 2 ¶ 2; Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, ¶ 692 (Nov. 28, 2007).

### B. *Defining Incitement to Genocide*

The first time the ICTR convicted a person for incitement to genocide was in the case of *Prosecutor v. Akayesu*.<sup>331</sup> Jean Paul Akayesu was a mayor who called on the people to “eliminate the accomplices of the RPF.”<sup>332</sup> Akayesu provided a list of names of people who supposedly wanted to kill the Hutu.<sup>333</sup> He spread the fear that if these people were not killed, they would attack the Hutu and conquer Rwanda.<sup>334</sup> As a result, a great number of Tutsis were killed in his commune.<sup>335</sup> For his speech, Akayesu was convicted for his “intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group.”<sup>336</sup> In relation to this, *Prosecutor v. Akayesu* defined incitement to genocide:

[D]irect and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.<sup>337</sup>

Only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the ICTR Statute.<sup>338</sup> Yet, speech might be viewed as direct in one country, but, depending on the audience, it may be perceived as indirect in another.<sup>339</sup> If the language used is not clear, it must be examined whether the audience understood the message as a call for genocide and whether the audience was willing to take action.<sup>340</sup> The word *Inyenzi*, for instance, meant armed Tutsi rebels but later was understood as meaning all Tutsis.<sup>341</sup> The phrase “go to work” sounds benign but in the context of the genocide was understood by the population as a call to kill.<sup>342</sup> Therefore, in the Rwandan context, RTLM’s hate messages directly called upon the citizens to commit genocide.<sup>343</sup>

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<sup>331</sup> Benesch, *supra* note 248, at 64.

<sup>332</sup> Blinderman, *supra* note 322, at 122.

<sup>333</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 334-36 (Sept. 2, 1998).

<sup>334</sup> Benesch, *supra* note 248, at 64.

<sup>335</sup> Blinderman, *supra* note 322, at 122.

<sup>336</sup> *Akayesu*, Case No. ICTR-96-4-T, ¶ 674.

<sup>337</sup> *Id.* at ¶¶ 556, 559; Benesch, *supra* note 248, at 54; *see* *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶¶ 1011, 1014 (Dec. 3, 2003).

<sup>338</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgment, ¶ 692 (Nov. 28, 2007).

<sup>339</sup> *Id.* at ¶ 698.

<sup>340</sup> *See* Benesch, *supra* note 149, at 494.

<sup>341</sup> Benesch, *supra* note 248, at 67.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

C. *Intent to Incite Genocide*

The orchestrator of a genocide generates a state of mind to commit genocide in the people she is inciting.<sup>344</sup> Thus, while the inciter must herself have the intent to commit genocide, the intent to prompt another to commit genocide is the core of incitement to genocide.<sup>345</sup> Depending on the intent, political speech can be distinguished from prohibited inciting speech.<sup>346</sup> The words chosen, the types of expressions, and the accuracy of the statements determine a speaker's intent.<sup>347</sup> Moreover, the tone and the context are imperative when determining intent and protecting legitimate political speech.<sup>348</sup>

To establish the intent of the media and its responsibility, the position taken with regard to ethnic hatred and calls to violence is pertinent.<sup>349</sup> Instead of distancing themselves from the hateful messages, the editors of *Kangura* and RTLM and the journalists who broadcasted on RTLM<sup>350</sup> actively spread and endorsed ethnic hate speech leading to the genocide.<sup>351</sup> Therefore, they had the intent to incite Rwandan people to commit genocide.<sup>352</sup>

D. *Concluding Remarks on Incitement to Genocide*

In conclusion, the close and immediate link of inciting speech to genocide makes it necessary to stop it at an early stage. *Prosecutor v. Akayesu* stressed the importance of viewing incitement to genocide in its cultural and linguistic context.<sup>353</sup> The masterminds of a genocidal plan create a state of mind within an audience that become willing to take action.<sup>354</sup> Inciters do not take up arms. Their weapons are words. By prompting other people to do the "dirty work" for them, they should not escape punishment. For the purpose of discovering the intent of a communication, the media must take a clear position on the statements they broadcast.<sup>355</sup> Otherwise, their silence can be mistaken for the endorsement of the atrocities and entail their criminal liability.

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<sup>344</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶¶ 1012-13 (Dec. 3, 2003).

<sup>345</sup> *Id.*; *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment, ¶ 14 (June 1, 2000); Kagwi-Ndungu, *supra* note 238, at 338.

<sup>346</sup> Benesch, *supra* note 248, at 66.

<sup>347</sup> Maravilla, *supra* note 170, at 141.

<sup>348</sup> *Id.*

<sup>349</sup> *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994); Benesch, *supra* note 248, at 66; *id.*

<sup>350</sup> Maravilla, *supra* note 170, at 141.

<sup>351</sup> *Id.*

<sup>352</sup> *See Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 1012 (Dec. 3, 2003).

<sup>353</sup> Kagwi-Ndungu, *supra* note 238, at 339.

<sup>354</sup> *See also Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 1012.

<sup>355</sup> *See Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994).

V. THE RESPONSIBILITY OF THE MEDIA IN THE CONTEXT OF THE RWANDAN GENOCIDE: WHERE SHOULD ONE DRAW THE LINE?

This Part discusses the responsibility of the media with regard to the speech it broadcasts. It will explain when content no longer deserves to be disseminated to the public because of its dangerous impact. It will further elucidate the duty of the state with regard to the media's role in democracy. Also, this Section will assess the necessity of having an international response to hate media. Finally, it will outline lessons learned from the media's role in the Rwandan genocide.

The killings of thousands of people over a period of a few months would have been impossible without the contribution of RTLM and *Kangura*.<sup>356</sup> RTLM created the atmosphere in which genocide could sprout.<sup>357</sup> The ICTR's jurisprudence on various occasions referred to the creation of a state of mind in the audience that encouraged people to commit genocide.<sup>358</sup> Inspired by RTLM's hate and fear campaign, thousands of Hutu murdered almost a million Tutsi in only a couple of months.<sup>359</sup> The media actively endorsed and even directed these killings and, as such, was a cause for the genocide.<sup>360</sup>

A. *The Responsibility of the Media for Hateful and Inciting Speech*

The media's freedom of expression covers exaggerated or provocative communications.<sup>361</sup> However, under international law, media outlets bear certain responsibility not only concerning incitement to genocide but also for hate speech.<sup>362</sup> This is especially important since hate speech is dangerous as such and can have a preparatory function for inciting speech.<sup>363</sup> Indeed, in the case of Rwanda: "The road to genocide in Rwanda was paved with hate speech".<sup>364</sup> Even if the media does not call for violence, the creation of a state of mind within its audience in which violent acts are possible leads to its responsibility.<sup>365</sup> Hate speech coupled with lies and the creation of fear can be conducive to this state of mind without actually calling for violence.<sup>366</sup> Therefore, the spread of hatred through the media can be extremely dangerous. In the case of Rwanda, the media reached and influenced a wide public within a

<sup>356</sup> Benesch, *supra* note 248, at 62.

<sup>357</sup> See Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgment, ¶ 44 (June 1, 2000).

<sup>358</sup> *Nahimana*, Case No. ICTR-99-52-T; *Ruggiu*, Case No. ICTR-97-32-I, ¶¶ 15-16; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

<sup>359</sup> See Odora, *supra* note 118, at 318.

<sup>360</sup> See CHRÉTIEN, *supra* note 4, at 380.

<sup>361</sup> *Oberschlick v. Austria*, 204 Eur. Ct. H.R. (ser. A) ¶¶ 27, 29, 33 (1997).

<sup>362</sup> See Prosecutor v. *Nahimana*, Case No. ICTR-99-52-A, Judgment, ¶ 692 (Nov. 28, 2007).

<sup>363</sup> *Id.*

<sup>364</sup> Schabas, *supra* note 115, at 144.

<sup>365</sup> See Prosecutor v. *Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 1073 (Dec. 3, 2003).

<sup>366</sup> See *id.* at ¶ 1007.

very short time.<sup>367</sup> Even if the pre-1994 broadcasts were not regarded as having an inciting character by the Appeals Chamber, they can at least be viewed as hate speech and, in their context, as having contributed to the state of mind in which people became willing to commit genocide.<sup>368</sup>

As the Appeals Chamber held in *Prosecutor v. Nahimana*, the elements of incitement to genocide apply to media outlets.<sup>369</sup> The test elaborated by the ICTR in *Prosecutor v. Nahimana* provides guidance even if the speech voiced is ambiguous.<sup>370</sup> Accordingly, the media should always take into account a communication's context, purpose, and potential to cause violence. Otherwise, it could risk to voice speech which incites to violence or even to genocide.

The threshold for incitement to genocide is much easier to detect than the one concerning hate speech because the Genocide Convention provides clear international standards.<sup>371</sup> Incitement to genocide is particularly dangerous because the speech is intended to convince a determined public to commit the crime of genocide.<sup>372</sup> Thus, for speech to be incitement to genocide, the media needs to intentionally call for genocidal acts.<sup>373</sup> If calls for atrocities were broadcast, this could result the media's responsibility for incitement, even if genocide did not occur. Writing for the non-governmental organization "Article 19," Linda Kirschke states that "giving orders to carry out human rights abuses is not protected whether this is done in writing, orally by two-way radio or by public broadcast."<sup>374</sup>

In cases where the media's broadcasts call for ethnic hatred or violence, the media must distance itself from the message.<sup>375</sup> Without positioning itself towards the content, the media can appear to support the cause and can thus be held responsible.<sup>376</sup> The positioning towards hate speech plays a role insofar as it determines the intent of the inciter to genocide. As a consequence, this determines the purpose of the speech at issue.<sup>377</sup>

The media should always be aware of the circumstances in which it broadcasts. New media outlets like Facebook and Twitter must be particularly sensitive to the context in which they broadcast and how their messages will be

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<sup>367</sup> See La Mort, *supra* note 125, at 51-52.

<sup>368</sup> See also *Nahimana*, Case No. ICTR-99-52-T.

<sup>369</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgment, ¶ 695 (Nov. 28, 2007).

<sup>370</sup> Gordon, *supra* note 38, at 172.

<sup>371</sup> See ICTR Statute, *supra* note 198.

<sup>372</sup> Wibke Kristin Timmermann, *Incitement in International Criminal Law*, 88 INT'L REV. RED CROSS 823, 825 (2006).

<sup>373</sup> See *Nahimana*, Case No. ICTR-99-52-T, ¶ 104.

<sup>374</sup> LINDA KIRSCHKE, BROADCASTING GENOCIDE, CENSORSHIP, PROPAGANDA AND STATE-SPONSORED VIOLENCE IN RWANDA, 1990-1994 166-67 (1996).

<sup>375</sup> Kagwi-Ndungu, *supra* note 238, at 340.

<sup>376</sup> *Id.*; see *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994).

<sup>377</sup> See *Nahimana*, Case No. ICTR-99-52-T, ¶ 1024.

perceived by their audience.<sup>378</sup> In the context of the Rwandan genocide, seemingly benign words such as “go to work” were understood as a call to kill.<sup>379</sup> This means that media must be especially cautious in a context of unrest or rage.<sup>380</sup> In their sensitive environment, cartoons of the prophet Mohammed, for example, were likely to translate into a violent reaction.<sup>381</sup> Thus, the way statements are voiced and the words chosen will determine their legitimacy and thus the media’s responsibility.<sup>382</sup>

In a nutshell, the media must abstain from directly calling for violence via content published in print or online. Moreover, repeated and emphasized calls by the media for hatred that ultimately contribute and create a public state of mind where violence is a foreseeable consequence must be prevented.<sup>383</sup> The media should be careful how it phrases its broadcasts in a specific context. In cases where messages of hatred are transmitted for legitimate informational purposes, the media should clearly distance itself in order to prevent its liability.<sup>384</sup>

#### B. *The Responsibility of the State*

A free media is essential for democracy<sup>385</sup> because it has the onus to impart information of public concern.<sup>386</sup> Therefore, states must make an effort to facilitate conditions in which different ideas can be expressed equally and the media can pursue its task.<sup>387</sup>

During the genocide, the Rwandan media could not fulfil its role as a public watchdog because RTLM monopolized the media.<sup>388</sup> Therefore, it is important that a state ensure plurality with the media and foster a climate where extremist media cannot dominate its surroundings.<sup>389</sup> In a situation like Rwanda, where there was only one media outlet supported by the government, the state must

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<sup>378</sup> See *Perozo v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 195, ¶¶ 132, 138, 160-61, 369 (Jan. 28, 2009).

<sup>379</sup> Benesch, *supra* note 248, at 67.

<sup>380</sup> *Perozo*, Judgment, (ser. C) No. 195, ¶ 160.

<sup>381</sup> See Robert A. Kahn, *Fleming Rose, the Danish Cartoon Controversy, and the new European Freedom of Speech* 261-62 (Univ. of St. Thomas School of Law, Working Paper No. 9-24, 2009).

<sup>382</sup> See *infra* Section III.B.2.

<sup>383</sup> See *Perozo*, Judgment, (ser. C) No. 195, ¶ 160.

<sup>384</sup> See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994).

<sup>385</sup> See *Perozo*, Judgment, (ser. C) No. 195, ¶ 117.

<sup>386</sup> *Bergens Tidende v. Norway*, 2000-IV Eur. Ct. H.R. 371, 400 (2000).

<sup>387</sup> *Perozo*, Judgment, (ser. C) No. 195, ¶ 117; *Rios v. Venezuela*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 194, ¶ 106 (Jan. 28, 2009).

<sup>388</sup> See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment, ¶ 1011 (Dec. 3, 2003).

<sup>389</sup> Human Rights Comm., General Comment No. 34 ¶ 40, U.N. Doc. C/GC/34/CRP (2011); KIRSCHKE, *supra* note 374, at 171.

make sure that the media imparts information and ideas of public interest.<sup>390</sup> Because the public has a right to access information, the media must impart accurate and balanced information.<sup>391</sup> The state further has positive legal obligations under the ICCPR's hate speech provisions, national law, and the Genocide Convention to prohibit hate speech and incitement to genocide.<sup>392</sup>

However, the problem of restricting incitement to genocide in the Rwandan case was that, because RTLM was linked to the government, the Rwandan government implicitly endorsed the incitement by the media.<sup>393</sup> This means that, although governments have the onus to stop hate media, an intervention on the part of a government is an unrealistic expectation during in an ongoing genocide. Therefore, international action against inciting media<sup>394</sup> may be justified when done to prevent genocide.<sup>395</sup>

#### CONCLUSION

The case of the Rwandan genocide shows that the media has a power beyond the word transmitted. RTLM broadcasts called on listeners to eliminate the Tutsi because of their "ethnicity".<sup>396</sup> When one considers history, it becomes evident that ethnicity cannot be regarded as a distinctive criterion between the Tutsi and the Hutu. The colonialists created a difference by initially favouring the Tutsi over the Hutu and later turning to the Hutu. This laid the ground for tensions and violence that shaped Rwanda until the start of the genocide.<sup>397</sup>

In times of the Tutsi's demand of inclusion into politics, an economic crisis, food shortage, and overpopulation, extremist forces thrived. These forces were eager to conduct "a final solution" to respond to the perceived Tutsi threat. However, genocide could not take place without the support of almost the entire population, for which the population had to be incited to commit crimes.

The crime of incitement to genocide does not require a result.<sup>398</sup> It is therefore sufficient that the public mind is poisoned to the extent that genocidal acts become possible.<sup>399</sup> RTLM was the instrument to convince and create a state of mind where killings are accepted as ordinary and necessary actions. The artificial colonial distinction between Tutsi and Hutu became the theme of RTLM hate propaganda, which successfully incited the murder of the Tutsi population.<sup>400</sup>

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<sup>390</sup> KIRSCHKE, *supra* note 374, at 157.

<sup>391</sup> *Id.*

<sup>392</sup> *See infra* Part III.

<sup>393</sup> Odora, *supra* note 118, at 316.

<sup>394</sup> KIRSCHKE, *supra* note 374, at 106.

<sup>395</sup> *See* Benesch, *supra* note 248, at 63.

<sup>396</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment, ¶ 969 (Dec. 3, 2003).

<sup>397</sup> *See supra* Part II.

<sup>398</sup> *Nahimana*, Case No. ICTR-99-52-T, ¶ 1013.

<sup>399</sup> *Id.* at ¶ 1007.

<sup>400</sup> *See infra* Section I.F and Part V; *Nahimana*, Case No. ICTR-99-52-T, ¶¶ 108-09.

Only when the failure to intervene in Rwanda was acknowledged in the end of the genocide did the international community make an effort to punish the perpetrators.<sup>401</sup> The media was held responsible for incitement to genocide in Rwanda by the ICTR in *Prosecutor v. Nahimana*. This case marked an important step in the criminal responsibility of the media, since media could no longer hide under the cover of freedom of expression.<sup>402</sup> *Prosecutor v. Ruggiu* further clarified how RTLM was one of the immediate causes of the genocide.<sup>403</sup>

The use of the media by President Trump to convey hatred towards Muslims is worrying and, in the instance of Ms. Omar, has propagated threats of violence. At this stage, it does not cross the line toward incitement of genocide. Even so, as one of the most important public figures of his time, President Trump should monitor his speech carefully to avoid unintended calls for hatred and violence.

The case of the Rwandan hate media shows that there are limits to what the media can broadcast. The media must abstain from calls to violence and human rights abuses.<sup>404</sup> Calls to hatred are the subject of national law but must be prohibited. Systematic and repeated calls to hatred can poison people's minds for the purpose of incitement to genocide. Therefore, hate speech should be viewed in their context and relation to other hateful calls, because hate speech could lead to incitement to genocide.<sup>405</sup> However, nothing in this paper should be understood as an endorsement to censor the media. The role of the media is imperative as it upholds democracy and provides for transparency.<sup>406</sup> Nevertheless, democracy is not served if calls to human rights abuses are conveyed through the media under the cover of free speech.

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<sup>401</sup> See *infra* Part II.

<sup>402</sup> See *Nahimana*, Case No. ICTR-99-52-T.

<sup>403</sup> See *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment (June 1, 2000).

<sup>404</sup> Gordon, *supra* note 38, at 172-173; see also Pillay, *supra* note 258, at 208-209.

<sup>405</sup> See *infra* Parts III, IV.

<sup>406</sup> Human Rights Comm., General Comment No. 34 ¶ 13, U.N. Doc. C/GC/34/CRP (2011).