SUPREME COURT OF CANADA

CITATION: Mugesera *v.* Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40

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BETWEEN:

Minister of Citizenship and Immigration
Appellant
v.
Léon Mugesera, Gemma Uwamariya, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grâce Hoho
Respondents
- and -
League for Human Rights of B'nai Brith Canada, PAGE RWANDA, Canadian Centre for International Justice, Canadian Jewish Congress, University of Toronto, Faculty of Law – International Human Rights Clinic, and Human Rights Watch
Interveners

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 180) McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

Mugesera *v*. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40

Minister of Citizenship and Immigration *Appellant*

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Neutral citation: 2005 SCC 40.

File No.: 30025.

2004: December 8; 2005: June 28.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

on appeal from the federal court of appeal

Administrative law — Judicial review — Standard of review — Role of reviewing court of secondary level of appellate review — Federal Court of Appeal setting aside findings of fact of Immigration and Refugee Board (Appeal Division) and making its own evaluation of evidence — Whether Federal Court of Appeal exceeded scope of its judicial review function — Federal Court Act, R.S.C. 1985, c. F-7, s. 18.1(4).

Immigration — Removal after admission — Offences committed outside Canada — Permanent resident alleged to have incited murder, genocide and hatred in speech made in Rwanda before obtaining permanent residency in Canada — Whether Federal Court of Appeal erred in finding speech did not constitute incitement to murder, genocide, or hatred — Whether permanent resident should be deported — Immigration Act, R.S.C. 1985, c. I-2, s. 27(1)(a.1)(ii), (a.3)(ii).

Immigration — Removal after admission — Crime against humanity committed outside Canada — Permanent resident alleged to have committed crime against humanity because of speech made in Rwanda before obtaining permanent residency in Canada — Whether Federal Court of Appeal erred in finding that there were no reasonable grounds to believe speech constituted crime against humanity — Whether permanent resident should be deported — Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1)(j), 27(1)(g).

Criminal law — Elements of offences — Incitement to murder — Incitement to genocide — Incitement to hatred — Permanent resident alleged to have incited murder, genocide and hatred in speech made in Rwanda before obtaining permanent residency in Canada — Deportation — Standard of proof set out in

relevant sections of Immigration Act — Whether elements of offences made out — Criminal Code, R.S.C. 1985, c. C-46, ss. 318(1), 319, 464(a) — Immigration Act, R.S.C. 1985, c. I-2, s. 27(1)(a.1)(ii), (a.3)(ii).

Criminal law — Elements of offence — Crimes against humanity — Permanent resident alleged to have committed crimes against humanity because of speech made in Rwanda before obtaining permanent residency in Canada — Provisions of Criminal Code to be interpreted and applied in accordance with international law — Deportation — Standard of proof set out in relevant sections of Immigration Act — Whether elements of offence made out — Criminal Code, R.S.C. 1985, c. C-46, s. 7(3.76), (3.77) — Immigration Act, R.S.C. 1985, c. I-2, s. 19(1)(j), 27(1)(g).

On November 22, 1992, M, an active member of a hard-line Hutu political party opposed to a negotiation process then under way to end the war, spoke to about 1,000 people at a meeting of the party in Rwanda. The content of the speech eventually led the Rwandan authorities to issue the equivalent of an arrest warrant against M, who fled the country shortly thereafter. In 1993, he successfully applied for permanent residence in Canada. In 1995, the Minister of Citizenship and Immigration commenced proceedings under ss. 27(1) and 19(1) of the *Immigration Act* to deport M on the basis that by delivering his speech, he had incited to murder, genocide and hatred, and had committed a crime against humanity. An adjudicator concluded that the allegations were valid and issued a deportation order against M. The Immigration and Refugee Board (Appeal Division) ("IAD") upheld the decision. The Federal Court – Trial Division dismissed the application for judicial review on the allegations of incitement to commit murder, genocide or hatred, but allowed it on the

allegation of crimes against humanity. The Federal Court of Appeal ("FCA") reversed several findings of fact made by the IAD, found the Minister's allegations against M to be unfounded and set aside the deportation order.

Held: The appeal should be allowed. The deportation order is valid and should be restored.

(1) *Standard of Review*

The FCA erred in its application of the standard of review. At the secondary level of appellate review, the court's role is limited to determining, based on the correctness standard, whether the reviewing judge has chosen and applied the correct standard of review. In this case, the FCA exceeded the scope of its judicial review function when it engaged in a broad-ranging review and reassessment of the IAD's findings of fact, even though it had not been demonstrated that the IAD had made a reviewable error on the applicable standard of reasonableness. The FCA did not focus on the reasonableness of the findings, but reviewed their correctness on its own view of the evidence. The IAD's findings of fact, as stated by the panel member who wrote the main reasons, were based on a careful review of all the evidence and were reasonable. The FCA should have proceeded with the review of the Minister's allegations on the basis of the facts as found by the IAD, including the findings of fact in relation to the interpretation of the speech. On questions of law, however, the standard of review is correctness. The IAD is thus not entitled to deference when it comes to defining the elements of a crime or whether the Minister's burden of proof has been discharged. [35-36] [39-43] [59]

(2) *Incitement to Murder, Genocide and Hatred*

For the purposes of this case, where the Minister relies on a crime committed abroad, a conclusion that the elements of the crime in Canadian criminal law have been made out will be deemed to be determinative in respect of the commission of crimes under Rwandan criminal law. With respect to the specific allegations made pursuant to s. 27(1)(*a*.1)(ii) and (*a*.3)(ii) of the *Immigration Act*, the evidence adduced by the Minister must meet the civil standard of the balance of probabilities. The Minister must prove that, on the facts of this case as found on a balance of probabilities, the speech constituted an incitement to murder, genocide or hatred. [58-61]

In the case of the allegation of incitement to murder, the offence of counselling under s. 464(*a*) of the *Criminal Code* requires that the statements, viewed objectively, actively promote, advocate, or encourage the commission of the offence. The criminal act will be made out where the statements are (1) likely to incite, and (2) are made with a view to inciting the commission of the offence. An intention to bring about the criminal result will satisfy the requisite mental element for the offence. Here, the allegation of incitement to murder that is not committed is well founded. The IAD's findings of fact support the conclusion that viewed objectively, the message in M's speech was likely to incite, and was made with a view to inciting murder even if no murders were committed. M conveyed to his listeners, in extremely violent language, the message that they faced a choice of either exterminating the Tutsi, the accomplices of the Tutsi, and their own political opponents, or being exterminated by them. M intentionally gave the speech, and he intended that it result in the commission

of murders. Given the context of ethnic massacres taking place at that time, M knew his speech would be understood as an incitement to commit murder. [64] [77-80]

As for the allegation of incitement to genocide (pursuant to s. 318 of the *Code*), the Minister does not need to establish a direct causal link between the speech and any acts of murder or violence. The criminal act requirement for incitement to genocide has two elements: the act of incitement must be direct and public. In order for a speech to constitute a direct incitement, the words used must be clear enough to be immediately understood by the intended audience. The guilty mind is an intent to directly prompt or provoke another to commit genocide. The person who incites must also have the specific intent to commit genocide. Intent can be inferred from the circumstances. In this case, the allegation of incitement to the crime of genocide is well founded. M's message was delivered in a public place at a public meeting and would have been clearly understood by the audience. M also had the requisite mental intent. He was aware that ethnic massacres were taking place when he advocated the killing of members of an identifiable group distinguished by ethnic origin with intent to destroy it in part. [85-89] [94-98]

Under s. 319(1) of the *Code*, the offence of inciting hatred against an identifiable group is committed if such hatred is incited by the communication, in a public place, of statements likely to lead to a breach of the peace; under s. 319(2), the offence is committed only by wilfully promoting hatred against an identifiable group through the communication of statements other than in private conversation. To promote hatred, more than mere encouragement is required. Only the most intense forms of dislike fall within the ambit of s. 319. The section does not require proof that the communication caused actual hatred. The guilty mind required by s. 319(1) is

something less than intentional promotion of hatred. Under s. 319(2), the person committing the act must have had as a conscious purpose the promotion of hatred against the identifiable group or must have communicated the statements even though he or she foresaw that the promotion of hatred against that group was certain to result. In many instances, evidence of the mental element will flow from the establishment of the elements of the criminal act of the offence. The trier of fact must consider the speech objectively but with regard for the circumstances in which the speech was given, the manner and tone used, and the persons to whom the message was addressed. The court looks at the understanding of a reasonable person in the social and historical context. Here, the allegation of incitement to hatred was well founded. The IAD's analysis of the speech supports the inference that M intended to target Tutsi and encourage hatred of and violence against that group. His use of violent language and clear references to past ethnic massacres exacerbated the already vulnerable position of Tutsi in Rwanda in the early 1990s. [100-107]

The Minister has discharged his burden of proof. Based on the balance of probabilities, M committed the proscribed acts and is therefore inadmissible to Canada by virtue of s. 27(1) of the *Immigration Act*. [108]

(3) *Crimes Against Humanity*

Under s. 19(1)(*j*) of the *Immigration Act*, a person shall not be granted admission to Canada if there are "reasonable grounds to believe" that the person has committed a "crime against humanity" outside Canada. The "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities.

Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information. This standard of proof applies to questions of fact. Whether the facts meet the requirements of a crime against humanity is a question of law. The facts, as found on the "reasonable grounds to believe" standard, must show that the speech did constitute a crime against humanity in law. The evidence reviewed and relied upon by the panel member who wrote the main reasons for the IAD's decision clearly meets the "reasonable grounds to believe" standard in that it consists of compelling and credible information that provides an objective basis for his findings of fact. [113-117]

Crimes against humanity, like all crimes, consist of a criminal act and a guilty mind. Under s. 7(3.76) of the *Criminal Code*, the criminal act for such a crime is made up of three elements: (1) one of the enumerated proscribed acts is committed; (2) the act occurs as part of a widespread or systematic attack; and (3) the attack is directed against any civilian population or any identifiable group. Based on the IAD's findings of fact, each of these elements has been made out. [127-128] [170]

With respect to the first element, both the physical and mental elements of an underlying act must be made out. In the case at bar, there were two possible underlying acts: counselling of murder, and persecution by hate speech. For counselling of murder to be considered a crime against humanity under international law, murders must actually have been committed. The IAD's finding that no murders were proven to have resulted from the speech therefore precludes a finding that M counselled murder within the meaning of s. 7(3.76), as interpreted in light of customary international law. The other possible underlying act, persecution, is a gross or blatant denial of fundamental rights on discriminatory grounds equal in severity to

the other acts enumerated in s. 7(3.76). Hate speech, particularly when it advocates egregious acts of violence, may constitute persecution, even if it does not result in the commission of acts of violence. The requisite mental element for persecution is that the person committing the act must have intended to commit the persecutory act and must have committed the act with discriminatory intent. The requirement of discriminatory intent is unique to persecution. Here, M's speech bears the hallmarks of a gross or blatant act of discrimination equivalent in severity to the other underlying acts listed in s. 7(3.76). Further, the IAD's findings of fact amply support a finding that M committed the criminal act of persecution with the requisite discriminatory intent. [142] [147-150]

As for the last two elements, they require that the proscribed act take place in a particular context: a widespread or systematic attack, usually violent, directed against any civilian population. The widespread or systematic nature of the attack will ultimately be determined by examining the means, methods, resources and results of the attack upon a civilian population. There is currently no requirement in customary international law that a policy underlie the attack. Furthermore, the attack must be directed against a relatively large group of people, mostly civilians, who share distinctive features which identify them as targets of the attack. A link must be demonstrated between the act and the attack. In essence, the act must further the attack or clearly fit the pattern of the attack, but it need not comprise an essential or officially sanctioned part of it. A persecutory speech which encourages hatred and violence against a targeted group furthers an attack against that group. In this case, in view of the IAD's findings, M's speech was a part of a systematic attack that was occurring in Rwanda at the time and was directed against Tutsi and moderate Hutu, two groups

that were ethnically and politically identifiable and were a civilian population as this term is understood in customary international law. [153] [156-158] [161-170]

Section 7(3.76) requires, in addition to the mental element of the underlying act, that the person committing the act have knowledge of the attack and either know that his or her acts comprise part of it or take the risk that his or her acts will comprise part of it. Knowledge may be factually implied from the circumstances. The IAD's findings clearly indicate that M possessed the required culpable mental state. M was a well-educated man who was aware of his country's history, of past massacres of Tutsi and of the ethnic tensions in his country, and who knew that civilians were being killed merely by reason of ethnicity or political affiliation. Moreover, the speech itself left no doubt that M knew of the violent and dangerous state of affairs in Rwanda in the early 1990s. Lastly, a man of his education, status and prominence on the local political scene would necessarily have known that a speech vilifying and encouraging acts of violence against the target group would have the effect of furthering the attack. [172-177]

Since there are reasonable grounds to believe that M committed a crime against humanity, he is inadmissible to Canada by virtue of ss. 27(1)(*g*) and 19(1)(*j*) of the *Immigration Act*. [179]

Cases Cited

Applied: *R. v. Dionne* (1987), 38 C.C.C. (3d) 171; *Prosecutor v. Akayesu*, 9 IHRR 608 (1998), aff'd Case No. ICTR-96-4-A, 1 June 2001; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Prosecutor v. Ruggiu*, 39 ILM 1338 (2000); *Prosecutor v. Kunarac*,

Kovac and Vukovic, ICTY, Case Nos. IT-96-23-T-II & IT-96-23/1-T-II, 22 February 2001, aff'd Case Nos. IT-96-23-A & IT-96-23/1-A, 12 June 2002; *Prosecutor v. Blaskic*, 122 ILR 1 (2000); **overruled:** *R. v. Finta*, [1994] 1 S.C.R. 701; **referred to:** *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Aguebor v. Minister of Employment and Immigration* (1993), 160 N.R. 315; *R. v. Ford* (2000), 145 C.C.C. (3d) 336; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T-I, 3 December 2003; *Canadian Jewish Congress v. North Shore Free Press Ltd. (No. 7)* (1997), 30 C.H.R.R. D/5; *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369; *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85; *Société St-Jean-Baptiste de Montréal v. Hervieux-Payette*, [2002] R.J.Q. 1669; *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297; *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 Imm. L.R. (3d) 61; *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T-I, 6 December 1999; *Prosecutor v. Kordic and Cerkez*, ICTY, Case No. IT-95-14/2-T-III, 26 February 2001; *Prosecutor v. Kupreskic*, ICTY, Case No. IT-95-16-T-II, 14 January 2000; *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T-II, 21 May 1999; *Prosecutor v. Mrksic, Radic and Sljivancanin*, 108 ILR 53 (1996); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, p. 15; *Prosecutor v. Tadic*, 112 ILR 1 (1997), aff'd in part 124 ILR 61 (1999).

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 2(*b*).

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, ss. 4, 6.

Criminal Code, R.S.C. 1985, c. C-46, ss. 7(3.76), (3.77), 21, 22, 235, 318(1), (2), (4), 319, 464(*a*).

Federal Court Act, R.S.C. 1985, c. F-7, s. 18.1(4)(*c*), (*d*).

Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1), (*j*), 27(1), (*a*.1)(ii), (*a*.3)(ii), (*e*), (*g*), 69.4(3).

Immigration and Refugee Protection Act, S.C. 2001, c. 27.

Penal Code (Rwanda), ss. 91(4), 166, 311, 393.

Treaties and Other International Instruments

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, art. II, III(*c*).

Rome Statute of the International Criminal Court, A/CONF. 183/9, 17 July 1998, art. 7(2)(*a*).

Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955, November 8, 1994.

Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827, May 25, 1993.

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Bassiouni, M. Cherif. *Crimes Against Humanity in International Criminal Law*, 2nd rev. ed. The Hague: Kluwer Law International, 1999.

Mettraux, Guénaël. "Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda" (2002), 43 *Harv. Int'l L.J.* 237.

APPEAL from a judgment of the Federal Court of Appeal (Décary, Létourneau and Pelletier JJ.A.), [2004] 1 F.C.R. 3, 232 D.L.R. (4th) 75, 309 N.R. 14,

31 Imm. L.R. (3d) 159, [2003] F.C.J. No. 1292 (QL), 2003 FCA 325, with supplementary reasons (2004), 325 N.R. 134, 40 Imm. L.R. (3d) 1, [2004] F.C.J. No. 710 (QL), 2004 FCA 157, varying the decision of Nadon J. (2001), 205 F.T.R. 29, [2001] 4 F.C. 421, [2001] F.C.J. No. 724 (QL), 2001 FCT 460. Appeal allowed.

Michel F. Denis, Normand Lemyre and *Louise-Marie Courtemanche, Q.C.*, for the appellant.

Guy Bertrand and *Josianne Landry-Allard*, for the respondents.

David Matas, for the interveners the League for Human Rights of B'nai Brith Canada, PAGE RWANDA and the Canadian Centre for International Justice.

Written submissions only by *Benjamin Zarnett*, *Francy Kussner* and *Daniel Cohen*, for the interveners the Canadian Jewish Congress, the University of Toronto, Faculty of Law — International Human Rights Clinic, and Human Rights Watch.

The following is the judgment delivered by

THE CHIEF JUSTICE AND MAJOR, BASTARACHE, BINNIE, LEBEL, DESCHAMPS, FISH AND CHARRON JJ. —

I. Introduction

1 In this appeal, this Court is required to determine whether the Federal Court of Appeal erred in overturning a decision of the Immigration and Refugee Board (Appeal Division) that had found the respondent inadmissible to Canada pursuant to ss. 27(1)(*a*.1)(ii), 27(1)(*a*.3)(ii), 27(1)(*g*) and 19(1)(*j*) of the *Immigration Act*, R.S.C. 1985, c. I-2 (now replaced by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27).

2 The outcome of the appeal hinges on the characterization of a speech delivered by the respondent Léon Mugesera in Rwanda in the Kinyarwandan language. The speech triggered a series of events that have brought the Government of Canada and Mr. Mugesera to this Court.

3 In short, the content of the speech led the Rwandan authorities to issue the equivalent of an arrest warrant against Mr. Mugesera, who fled the country shortly thereafter. He found temporary refuge in Spain. On March 31, 1993, he applied for permanent residence in Canada for himself, his wife, Gemma Uwamariya, and their five children, Irenée Rutema, Yves Rusi, Carmen Nono, Mireille Urumuri and Marie-Grâce Hoho. After the application was approved, the Mugesera family landed in Canada in August 1993.

4 In 1995, the Minister of Citizenship and Immigration became aware of allegations against the respondent and commenced proceedings under s. 27 of the *Immigration Act*. A permanent resident of Canada may be deported if it is determined, *inter alia*, that before or after being granted permanent residency, the individual committed criminal acts or offences. In this case, the speech was alleged to constitute an incitement to murder, hatred and genocide, and a crime against humanity.

5 In July 1996, an adjudicator concluded that the allegations were valid and issued a deportation order against Mr. Mugesera and his family. The Immigration and Refugee Board (Appeal Division) ("IAD") upheld the adjudicator's decision and dismissed the respondents' appeal ([1998] I.A.D.D. No. 1972 (QL)). The findings of fact and law were subject to judicial review in the Federal Court – Trial Division ("FCTD") ((2001), 205 F.T.R. 29, 2001 FCT 460), and then in the Federal Court of Appeal ("FCA"). Décary J.A., writing for the FCA, reversed several findings of fact made by the IAD and reversed the deportation order, concluding that the Minister had not met his burden ([2004] 1 F.C.R. 3, 2003 FCA 325, with supplementary reasons (2004), 325 N.R. 134, 2004 FCA 157). The Minister has now appealed to this Court, and he asks that the IAD's deportation order be confirmed.

6 This appeal raises a number of issues. First, we must consider the standard of review which a reviewing court should apply to findings of fact and conclusions of law. Second, we must apply the appropriate standard of review to determine the facts. This inquiry focuses on the interpretation of the contents of the speech which lies at the heart of these proceedings. Third, having determined the operative facts — what Mr. Mugesera said in the speech — we must apply the law to that speech to determine whether the legal requirements for a deportation order are met. This requires us to consider the provisions of the *Immigration Act* relating to the applicable standard of proof, and the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, relating to incitement to murder, incitement to hatred, incitement to genocide, and crimes against humanity.

7 For the reasons that follow, we would allow the appeal. The decision of the FCA should be set aside and the decision of the IAD in favour of deportation should be restored.

II. Background and Judicial History

A. *Overview of Rwandan History*

8 There is no doubt that genocide and crimes against humanity were committed in Rwanda between April 7 and mid-July 1994. Although we do not suggest that there is absolutely no connection between the events, it is important to be mindful that one cannot use the horror of the events of 1994 to establish the inhumanity of the speech of November 22, 1992. The allegations made against Mr. Mugesera must be analysed in their context, at the time of his speech.

9 In order to fully understand the content of the speech of November 22, 1992, it is necessary to situate the speech in the historical context in which it was given. "What we have is a speech delivered in a political context, to an audience that is already aware of several facts, but for which we need explanations if we are to follow it clearly" (IAD judgment, at para. 133).

10 We will not examine Rwandan history at length but will highlight some key facts and events that are relevant to the disposition of the issues on this appeal.

(1) The Political and Ethnic Context

11 Rwanda is a small, extremely hilly country in the Great Lakes region of Central Africa. In 1992 there were three officially recognized ethnic groups living in Rwanda: the Hutu, the Tutsi, and the Twa. The Hutu and the Tutsi were the two major ethnic groups as the Twa represented only about 1 percent of the population.

12 Although there are different explanations regarding the origin of and distinction between the two major ethnic groups, the IAD found that in 1992 a large number of Rwandans apparently believed the theory propagated by the colonists that the Tutsi were a distinct race who originated in Ethiopia. It was also common lore that the Tutsi had invaded and conquered Rwanda and enslaved its inhabitants, the Hutu (IAD judgment, at para. 45). The distinction between the groups was permanently entrenched at the time of colonization and with the introduction of identification cards. The European colonial authorities, first German and then Belgian, favoured the Tutsi and used them to administer the colony.

13 In 1959, shortly before the country gained independence, its first political parties were formed. They had ethnic rather than ideological foundations. The major Hutu party, the Parmehutu, won the June 1960 election. With the establishment of the first Republic in 1961, the entire Tutsi political and administrative structure was eliminated. In Rwanda, violence and harassment caused a large number of Tutsi to flee the country, mainly to Uganda. The IAD referred to the 1959-1961 revolution as the "crucial point of reference for three decades" (para. 49). A cycle of violence emerged. Tutsi in exile made incursions into Rwanda and each attack was followed by reprisals against Tutsi within the country. The IAD, at para. 26, described the situation as follows:

> Some refugees began to attack Rwanda in 1961 and tried to invade the country about a dozen times. These were the Inyenzi. After each attack, the Tutsi remaining in Rwanda suffered reprisals that were either spontaneous or organized by the authorities. And each time waves of refugees left Rwanda. Some relatively extensive massacres occurred in 1963 (5,000 to 8,000 deaths alone in Gikongoro prefecture).
>
> Further disturbances and massacres thrust more large groups into exile. An estimated 600,000 people, essentially Tutsi, left Rwanda between 1959 and 1973. [Footnotes omitted.]

14 In the wake of the massacres and of general discrimination in the period between 1963 and 1973, about one half of the Tutsi population left Rwanda (IAD judgment, at para. 49).

15 On July 5, 1973, General Juvénal Habyarimana seized power in "a coup d'état". This was the advent of Rwanda's second Republic. The Mouvement révolutionnaire national pour le développement ("MRND"), a hard-line Hutu political party, became the sole official party. In July 1986, the government declared that the return of refugees was conditional upon their ability to support themselves. Rwanda was not capable of settling the large numbers of refugees who had fled the country. Tutsi refugees were not able to return to Rwanda. This led to the creation of the Rwandan Patriotic Front ("RPF") in Kampala, Uganda. The RPF consisted of Rwandan refugees and former members of the Ugandan army. The objective of the exiles was to return to Rwanda.

16 In 1988, at an international conference of Rwandan refugees held in Washington, the Rwandan government reversed its position and a full right of return was affirmed. A special committee was created to deal with the problem of Rwandan refugees living in Uganda. The committee met a number of times to develop a plan

for the return. Although this process created a "dynamic of confrontation" the period was one of relative peace (IAD judgment, at para. 26).

(2) The Early 1990s

17 On July 5, 1990, President Habyarimana announced a [TRANSLATION] "political *aggiornamento*" and his wish to create a multiparty government with a new constitution. In September, a [TRANSLATION] "national synthesis commission" on political reform was established. It began its work in October 1990.

18 The RPF invaded northern Rwanda on October 1, 1990. Mass arrests and the detention of alleged RPF accomplices, 90 percent of whom were Tutsi, followed. The Minister of Justice considered Tutsi intellectuals to be RPF accomplices. Several massacres were perpetrated by the Rwandan army. By the end of October, the Rwandan army had pushed the insurgents back across the Ugandan border. This marked the end of conventional warfare and the beginning of a protracted semi-guerilla war. Between October 1990 and January 1993 approximately 2,000 Tutsi were massacred. There were also reports that hundreds of civilians had been attacked and killed by the RPF.

19 In late March 1991, a draft political charter was published along with a preliminary draft constitution. New political parties were created: the Mouvement démocratique républicain ("MDR"), the Parti social-démocrate ("PSD"), the Parti libéral ("PL") and the Parti démocrate-chrétien ("PDC"). The PL was the only party that was more or less identified with the Tutsi. On April 28, 1991, President Habyarimana announced changes to the MRND: the party's name was changed to

Parti républicain national pour le développement et la démocratie, and members of its central committee would henceforth be elected. A new constitution introducing the multiparty system was adopted on June 10, 1991, and this was followed on June 18 by the promulgation of a new law on political parties.

20 In December 1991, Prime Minister Nsanzimana announced the creation of a new government made up entirely of MRND members with the exception of one minister of the PDC. Thousands of people protested against this decision. As a result, negotiations between the MRND and the opposition parties resumed in February 1992. These discussions led to the formation of a multiparty transitional government in April. In response, the MRND militia launched attacks in several parts of the country.

21 The RPF had not been included in the initial negotiations, but in May 1992 it occupied a small part of northern Rwanda, which forced the new government to negotiate with it. Three agreements between the government and the RPF were concluded in Arusha: a cease-fire agreement on July 12, a rule of law protocol on August 18, and the initial power-sharing agreement on October 30. The day after the signing of the protocol, there were massacres of Tutsi and moderate Hutu.

22 On November 15, 1992, President Habyarimana referred to the Arusha accords as a scrap of paper. Months of escalating violence followed. There were reports of massacres of Tutsi and of political opponents. Nevertheless, the Arusha talks were resumed in March of 1993, and on August 4, 1993 the Government and the RPF signed the final Arusha accords and ended the war that had begun on October 1, 1990.

23 It was in this context of internal political and ethnic conflict that Mr. Mugesera made his speech. At the time, Mr. Mugesera was a well-educated and well-connected man. After receiving part of his higher education and completing a graduate degree in Canada, he returned to Rwanda, where he held teaching and public service positions. He also got involved in local politics. He was an active member of the MRND, the hard-line Hutu party which opposed the Arusha process.

24 On November 22, 1992, Mr. Mugesera delivered the speech which lies at the heart of this case. (See Appendix III. Paragraph numbering has been added to the speech for easier reference.) He spoke to about 1,000 people at a meeting of the MRND, at Kabaya in Gisenyi prefecture, just a few days after the speech in which President Habyarimana had described the Arusha agreements as a scrap of paper. As mentioned above, the contents of this speech led to an attempt to arrest Mr. Mugesera and to his flight to Canada, where he found refuge in August 1993.

B. *The Allegations Against Mr. Mugesera*

25 After receiving further information about the activities of Mr. Mugesera in Rwanda, the Minister of Citizenship and Immigration moved to deport the respondent and his family under s. 27 of the *Immigration Act*. The Minister alleged that the speech constituted an incitement to commit murder (A), an incitement to genocide and to hatred (B), and a crime against humanity (C). The Minister also alleged that by answering "no" on his permanent resident application to the question of whether he had been involved in a crime against humanity, Mr. Mugesera had misrepresented a material fact, contrary to the Act (D). A summary of the Minister's allegations is attached as Appendix I.

26 At the hearing before this Court, the Minister dropped the allegation of misrepresentation of a material fact. As this allegation would have been the sole basis for a deportation order against the members of Mr. Mugesera's family, the Minister no longer seeks to deport them.

C. *The Proceedings Below*

27 The proceedings before the adjudicator, Pierre Turmel, went on for 29 days and involved 21 witnesses. In his decision of July 11, 1996, the adjudicator ordered the deportation from Canada of Mr. Mugesera, his wife, and their children, who appealed the decision to the IAD. Although a hearing before the IAD is in fact a hearing *de novo* and the IAD may consider new evidence, the parties agreed that all the evidence at first instance would be filed in full on the appeal. In addition, each of the parties called four witnesses. The hearing lasted 24 days. The IAD found that all the Minister's allegations were justified and dismissed the family's appeal.

28 Pierre Duquette wrote the main reasons for the IAD's decision. Based on his interpretation of the speech, he held that the allegations of incitement to murder, genocide and hatred had been established. In his opinion, the allegation of crimes against humanity had also been made out. Mr. Duquette concluded that there was insufficient evidence to find, on a balance of probabilities, that Mr. Mugesera was a member of the death squads, that he participated in massacres, or that the killings committed in Rwanda following the speech were specifically tied to the speech. The other two members of the panel, Yves Bourbonnais and Paule Champoux Ohrt, concurred in part with these reasons, but disagreed with Mr. Duquette's findings on

the allegations that Mr. Mugesera incited others to commit murders and that one or more murders were committed as a result. They concluded, on a balance of probabilities, that murders were committed the day after the speech and that some of them were directly related to the speech. They also found that Mr. Mugesera was an Akazu and death squad member and that he participated in massacres. (The Akazu was a political and business network that was very close to President Habyarimana, and in particular to his wife's family. The Akazu was also one element of the death squads.) These acts constituted offences under ss. 91(4) of Book I and 311 of Book II of the Rwandan *Penal Code*, and would also have been crimes under ss. 22, 235 and 464(*a*) of the *Criminal Code*.

29 Mr. Mugesera applied to the Federal Court for judicial review of the IAD's decision. On May 10, 2001, after a hearing that lasted 14 days, Nadon J. found that there was no basis for allegations C (crimes against humanity) and D (misrepresentation), but that allegations A (incitement to murder) and B (incitement to genocide and hatred) were valid. With regard to the IAD's analysis of the speech, Nadon J. found that Mr. Duquette's reasons evinced a painstaking and careful analysis based on the evidence. It was therefore impossible for him to conclude that the interpretation of the speech and the resulting findings of fact were unreasonable. He acknowledged the applicant's argument that an interpretation other than the one accepted by Mr. Duquette was possible and could have been accepted, but found that this was not a reason to intervene. The applicable principles of judicial review are clear: unless the impugned conclusions are patently unreasonable, the IAD's findings of fact are entitled to great deference. Nadon J. dismissed the application for judicial review on allegations A and B and allowed it on allegations C and D. In respect of allegation C, he concluded that because Mr. Duquette could not link the speech to

murders or massacres, it could not in the circumstances constitute a crime against humanity. He referred the matter back to the IAD for reconsideration on this point of law.

30 In the FCA, Décary J.A., who wrote the main reasons for the court, held regarding the allegations of incitement to murder and incitement to genocide and hatred, that the initial decision by the Minister to seek deportation and the decisions of the adjudicator, the IAD and the FCTD were decisively influenced by a 1993 report of the International Commission of Inquiry ("ICI"). The IAD had acted in a patently unreasonable way by relying on the ICI's findings of fact. The ICI's conclusions regarding Mr. Mugesera lacked any credibility. The report should not have been taken into consideration.

31 In addition, Décary J.A. found that the IAD had made a patently unreasonable error in not accepting the testimony of Professor Angenot, one of Mr. Mugesera's experts, on the analysis of the speech; Professor Angenot suggested that certain comments made in the speech had been misinterpreted. The FCA took the position that since the speech could be classified as political speech, it had to be accorded wide latitude and substantial protection under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. Objectively speaking, if the speech and its context were analysed as a whole, the message of the speech did not incite to murder, hatred or genocide. As to the allegation of crimes against humanity, Décary J.A. found that the speech did not *prima facie* meet the requirement that the act be part of a widespread or systematic attack against the members of a civilian population for (in this case) reasons relating to ethnic origin. With respect to the situation on November 22, 1992, there was no evidence that the speech was part of a widespread

or systematic attack. For this reason, Décary J.A. found that the allegations of crimes against humanity were unfounded.

III. Applicable Legislation

32 Extracts from the following legislation in force at the relevant time are set out in Appendix II of these reasons: the *Immigration Act*; the *Federal Court Act*, R.S.C. 1985, c. F-7; the *Criminal Code* and the Rwandan *Penal Code*.

IV. Issues

33 Our Court must consider three related issues on this appeal. The first concerns the factual content of the speech and the question of whether the FCA exceeded its jurisdiction by substituting its own assessment of the evidence and failing to show due deference to the IAD's findings of fact. The second involves the legal characterization of the speech and the question of whether the FCA erred in law in finding that Mr. Mugesera did not incite to hatred, murder and genocide. The third issue is whether the FCA erred in law in finding that there were no reasonable grounds to conclude that Mr. Mugesera had committed a crime against humanity in Rwanda.

V. Analysis

A. *The Standard of Review*

34 The first issue we must consider in this appeal is whether the FCA improperly substituted its own findings of fact for those of the IAD. In discussing this

issue, we must examine the role played by the FCA in the judicial review process and the manner in which it performed the judicial review function in this case.

(1) The Role of the Federal Court of Appeal

35 At the secondary level of appellate review, the court's role is limited to determining whether the reviewing judge has *chosen* and *applied* the correct standard of review. The question of what standard to select and apply is one of law and is subject to a correctness standard: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 43.

36 In the case at bar, we find that the FCA exceeded the scope of its judicial review function when it engaged in a broad-ranging review and reassessment of the IAD's findings of fact. It set aside those findings and made its own evaluation of the evidence even though it had not been demonstrated that the IAD had made a reviewable error on the applicable standard of reasonableness. Based on its own improper findings of fact, it then made errors of law in respect of legal issues which should have been decided on a standard of correctness.

37 Applications for judicial review of administrative decisions rendered pursuant to the *Immigration Act* are subject to s. 18.1 of the *Federal Court Act*. Paragraphs (*c*) and (*d*) of s. 18.1(4), in particular, allow the Court to grant relief if the federal commission erred in law or based its decision on an erroneous finding of fact. Under these provisions, questions of law are reviewable on a standard of correctness.

38 On questions of fact, the reviewing court can intervene only if it considers that the IAD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Federal Court Act*, s. 18.1(4)(*d*)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: s. 69.4(3) of the *Immigration Act*. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315, at para. 4.

(2) The Federal Court of Appeal Erred in Its Application of the Standard of Review

39 In the FCA, Décary J.A. concluded that "so far as the explanation and analysis of the speech are concerned" the IAD's findings were patently unreasonable (para. 242). In concluding as it did, the FCA showed no deference to the IAD's findings of fact and overstepped the boundaries of its judicial review function.

40 Décary J.A. based his conclusion on his own evaluation of the evidence: he reconsidered the relevance and weight to be accorded to the ICI's Report, reassessed the IAD's decision to reject Professor Angenot's interpretation of the speech, and reassessed the reliability and credibility of witnesses. Without saying so, the FCA applied a standard of correctness and reviewed the evidence as if it were the trier of fact. In a judicial review process, it is not open to the reviewing court to reverse a decision because it would have arrived at a different conclusion. The FCA

did not focus on the reasonableness of the findings, but reviewed their correctness based on its own view of the evidence.

41 We find that the conclusions of Mr. Duquette of the IAD were based on a careful review of all the evidence before the arbitrator and the IAD. Mr. Duquette reviewed and considered each passage in light of all the expert testimony. He identified evidence that he found to be credible and trustworthy and based his decision on it. His findings of fact were well reasoned, including references to the evidence and indications of the weight he accorded to it. Mr. Duquette explained his reasons for preferring one witness's testimony over another, referred expressly to other evidence which pointed to a different conclusion and explained why that evidence was rejected.

42 The findings of fact as stated by Mr. Duquette for the IAD were reasonable and should not have been interfered with. The FCA should have proceeded with the review of the Minister's allegations based on the facts as found by the IAD. The FCA had no reason to revisit and reconsider the evidence or the IAD's findings of fact in relation to the interpretation of the speech.

43 In contrast, Nadon J., the reviewing judge of the FCTD, appropriately intervened to reject the findings of Mr. Bourbonnais and Ms. Champoux Ohrt as patently unreasonable. Nadon J. concluded that "there is no evidence to justify the conclusions" (para. 43). As Mr. Duquette found, no conclusive evidence on the record supported the specific finding that Mr. Mugesera was an Akazu or a death squad member, that he had participated in massacres, or that murders had been committed as a result of his speech of November 22, 1992. In the absence of evidence to justify the findings, the reviewing judge was correct to reject them as patently unreasonable.

44 The analysis of the Minister's allegations against Mr. Mugesera will proceed on the basis of the facts as found by Mr. Duquette of the IAD, including his interpretation of the respondent's speech.

(3) The IAD's Interpretation of the Content of the Speech

45 Before proceeding to our examination of the Minister's allegations, it is necessary to review Mr. Duquette's analysis of the general meaning of the speech. This is essential because the factual meaning of the speech lies at the core of these allegations.

46 Mr. Mugesera's speech had been tape-recorded and subsequently transcribed. At the hearing before the adjudicator, it was proven that the transcript of the cassette ("composite No. 4") filed in that proceeding accurately represented the speech as given. This was officially acknowledged by Mr. Mugesera at a pre-hearing conference on January 30, 1997 (IAD judgment, at para. 134). At the initial hearing, a number of French translations of the transcript were considered. In particular, the adjudicator was invited to choose between a translation by Mr. Thomas Kamanzi (for the Minister) and another one by Mr. Eugène Shimamungu (for the respondent). The adjudicator preferred the Kamanzi version. There was considerable argument at the IAD hearing over which translation should be accepted, but during final submissions before the IAD, the respondents finally accepted Mr. Kamanzi's translation as a genuine rendition of the Kinyarwanda text.

47 Counsel for Mr. Mugesera argued that the speech was not an incitement

to murder or violence but rather a call for elections, law enforcement, justice, and self-defence. Counsel also argued that the speech could not be understood as an incitement because of the use of the conditional tense.

48 Although it is accepted that Mr. Mugesera mentioned elections in the speech, Mr. Duquette concluded that "the call for elections does not override the earlier calls to violence" (para. 225). It is also worth noting, as Mr. Duquette pointed out, that when he discussed elections, Mr. Mugesera continually referred to the other parties as "Inyenzi", which literally means cockroaches, and said that they must go away. He stated:

> [TRANSLATION] Let them pack their bags, let them get going, so that no one will return here to talk and no one will bring scraps claiming to be flags! [para. 28]

Mr. Duquette thus rejected Mr. Mugesera's contention that the speech conveyed a democratic spirit and that it was, above all, a call for elections.

49 Mr. Duquette also rejected Mr. Mugesera's argument that the speech was a plea for justice, law enforcement and self-defence. The speech could not be justified on the basis of self-defence because "[s]elf-defence cannot be used to defend against a threat of future harm, or to take the law into one's own hands as a preventive measure, or to avenge a past event" (para. 224). The speech urged the population to take the law into its own hands and this message went beyond a suggestion that proper law enforcement was necessary to restore order in the country. For example, while it was reasonable for Mr. Mugesera to advocate the prosecution of people who recruited

soldiers for enemy armies, he passed the point of advocating law enforcement when he called on the population to "exterminate" those individuals:

> [TRANSLATION] Why do they not arrest these parents who have sent away their children and why do they not exterminate them? Why do they not arrest the people taking them away and why do they not exterminate all of them? Are we really waiting till they come to exterminate us? [para. 16]

50 Given the context in which the reference to "extermination" was made, Mr. Duquette rejected Mr. Mugesera's explanation that the word should be understood to mean the imposition of the death penalty (which is lawful under the Rwandan *Penal Code*). Mr. Duquette explained this rejection, at para. 229:

> This is not my reading of the speech. First, the verdict has already been rendered: the accused are guilty and must be sentenced to death. If they are not sentenced, the population must take matters into their own hands. The accused are sometimes clearly identified and sometimes simply members of a group and guilty for that.

51 To support his conclusion, Mr. Duquette also relied on the speech's many passages encouraging the population to attack before being attacked (para. 232).

52 Counsel for Mr. Mugesera argued that any action encouraged by Mr. Mugesera was dependent on an unfulfilled condition and that there was therefore no suggestion that action should be taken. Mr. Duquette considered this argument and dismissed it as being without merit (paras. 233-38). It was understood in the speech that the conditions had already been fulfilled: there is no question that action was actively encouraged.

53 The examples cited by Mr. Duquette adequately illustrate the point and justify his conclusions:

> [TRANSLATION] . . . if someone strikes you on one cheek, you hit them twice . . . . [para. 9]

It is well understood in this passage that the first blow had already been struck:

> [TRANSLATION] . . . if one day someone attacks you with a gun, you will not come to tell us that we . . . did not warn you of it! [para. 19]

In the context of the speech, the word "if" means "when".

54 Finally, even in the case where the passage could appropriately be characterized as a conditional one, the threat was nonetheless real and the use of the conditional did not reduce it in any way:

> [TRANSLATION] If anyone penetrates a cell, watch him and crush him: if he is an accomplice do not let him get away! Yes, he must no longer get away! [para. 24]

55 Mr. Duquette concluded his analysis as follows at paras. 242-45:

> This speech was made in wartime (although a cease-fire was in effect) when a multi-party system was emerging. In this context, we may therefore expect strong language to be used. But the speech related to another context that must have been understood by both speaker and audience: the ethnic massacres. In mid-October 1990, a short time after the outbreak of the war, 348 Tutsi were killed within 48 hours in Kibilira and 18 in Satinsyi, two communes close to Kabaya where the speech was made. In March 1992, 5 Tutsi were killed in Kibilira. Also in March of that year, again in Gisenyi prefecture and in neighbouring Ruhengeri prefecture, 300 Bagogwe (a Tutsi subgroup) were assassinated, according to official statistics. From October 1990 to February 1993, a total of 2,000 persons, mostly Tutsi, lost their lives in similar massacres in Rwanda. They were killed because they were considered accomplices of the

> "Inyenzi". They were not soldiers or combatants, but civilians who were identified with the enemy because they belonged to a particular ethnic group. Under such circumstances, the speech cannot be considered innocuous.
>
> Mr. Mugesera urged the crowd not to leave themselves open to invasion, first by the FRP and second by those identified with them, members of the opposition parties and the Tutsi within the country.
>
> The heads of the opposition parties, Twagiramungu, Nsengiyaremye, and Ndasingwa (Lando), are traitors to the country. These parties must leave the region. The language used is extremely violent and is an incitement to murder. He recommends that the public take the law into their own hands by exterminating or being exterminated, using a language to provoke panic. He also uses the argument of party authority: ". . . do not say that we, the party representatives, did not warn you!"
>
> As for the Tutsi, it is already clear in paragraph 6 that the Hutu must defend themselves against them. I have concluded that the Tutsi were recruiting young people. Finally, the gist of paragraph 25 is clear: do not make the same mistake that you made in 1959 by letting the Tutsi leave; you must throw them into the river. All of this is an incitement to genocide. [Footnotes omitted; emphasis added.]

56 Having concluded that the FCA improperly substituted its own findings of fact for those of the IAD and having reviewed the factual content of the speech, we must now determine the legal nature of the speech in relation to the allegations made against the respondent Mugesera and in light of the applicable standard of proof set out in the relevant sections of the *Immigration Act*. This determination will be based on the IAD's findings of fact regarding the translation and the interpretation of the speech. We will consider in turn each of the grounds raised by the Minister to justify deporting Mr. Mugesera.

B. *Incitement to Murder, Genocide and Hatred*

57 As a first ground, the Minister alleges that Mr. Mugesera committed the crime of inciting to murder, contrary to ss. 91(4) and 311 of the Rwandan *Penal Code* and ss. 22, 235 and 464(*a*) of the *Criminal Code* of Canada. The Minister also asserts that the respondent committed the crime of incitement to hatred contrary to s. 393 of the Rwandan *Penal Code* and s. 319 of the *Criminal Code*. Finally, the Minister asserts that the respondent committed the crime of incitement to genocide in violation of s. 166 of the Rwandan *Penal Code* and of executive enactment 08/75 of February 12, 1975, by which Rwanda acceded to the International *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, December 9, 1948 ("*Genocide Convention*"), and contrary to s. 318(1) of the *Criminal Code*.

58 For the purpose of these specific allegations, the Minister's evidence must meet the civil standard of the balance of probabilities. Sections 27(1)(*a*.1) and 27(1)(*a*.3) of the *Immigration Act* provide:

> **27.** (1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who
>
> . . .
>
> (*a*.1) outside Canada,
>
> . . .
>
> (ii) has committed, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that would constitute an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

. . .

(*a*.3) before being granted landing,

. . .

(ii) committed outside Canada, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence referred to in paragraph (*a*.2),

. . .

59 As explained above, the standard of review on questions of law is one of correctness. Although the IAD is entitled to deference as regards findings of credibility and relevance, no such deference applies when it comes to defining the elements of the crime or to deciding whether the Minister has discharged the burden of proof, namely the burden of proving that, on the facts of this case, as found on a balance of probabilities, the speech constituted an incitement to murder, genocide and/or hatred. We will proceed, as did the courts below, on the basis that, where the Minister relies on a crime committed abroad, a conclusion that the elements of the crime in Canadian criminal law have been made out will be deemed to be determinative in respect of the commission of crimes under Rwandan criminal law. No one challenges the fact that the constituent elements of the crimes are basically the same in both legal systems.

(1) Incitement to Murder

60 As will be recalled, Mr. Duquette concluded that while there was evidence that murders had occurred following the speech by the respondent, the evidence

directly linking the murders to the speech was insufficient (para. 310). This finding of fact precludes the application of s. 22 of the *Criminal Code* on counselling an offence that is committed.

61 Under s. 464(*a*) of the *Criminal Code*, however, it is an offence to counsel another person to commit an offence even if the offence is not committed. The Rwandan *Penal Code* also provides that it is a crime to incite murder, whether or not the incitement is followed by the actual commission of an offence.

(a) *Elements of the Offence of Counselling a Murder Which Is Not Committed*

62 Section 464(*a*) of the *Criminal Code* provides that:

> **464.** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,
>
> (*a*) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable;

63 "Counsel[ling]" is defined in s. 22(3) of the *Criminal Code*, which says that its meaning includes "procur[ing]", "solicit[ing]", or "incit[ing]". To incite means to urge, stir up or stimulate: *R. v. Ford* (2000), 145 C.C.C. (3d) 336 (Ont. C.A.), at para. 28.

64 The offence of counselling requires that the statements, viewed objectively, actively promote, advocate, or encourage the commission of the offence described in them: *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 56. The criminal act will be made out where the statements (1) are likely to incite, and (2) are made with a view to inciting, the commission of the offence: *R. v. Dionne* (1987), 38 C.C.C. (3d) 171 (N.B.C.A.), at p. 180. An intention to bring about the criminal result, that the counsellor intend the commission of the offence counselled, will obviously satisfy the requisite mental element for the offence of counselling.

(b) *Findings in Respect of the Criminal Act*

65 Mr. Duquette held that the November 22, 1992 speech was an incitement to kill members of the Tutsi ethnic group and opposition party members. We will review certain key passages, and Mr. Duquette's explanation and analysis of them, in order to determine whether the criminal act of counselling a murder that is not committed has been made out.

66 Mr. Duquette's analysis began with a review of the following passage, which called upon the audience to defend themselves against an invasion:

> [TRANSLATION] The second point I have decided to discuss with you is that you should not let yourselves be invaded. At all costs, you will leave here taking these words with you, that you should not let yourselves be invaded. Tell me, if you as a man, a mother or father, who are here, if someone comes one day to move into your yard and defecate there, will you really allow him to come again? It is out of the question. You should know that the first important thing . . . you have seen our brothers from Gitarama here. Their flags — I distributed them when I was working at our party's headquarters. People flew them everywhere in Gitarama. But when

> you come from Kigali, and you continue on into Kibilira, there are no more M.R.N.D. flags to be seen: they have been taken down! In any case, you understand yourselves, the priests have taught us good things: our movement is also a movement for peace. However, we have to know that, for our peace, there is no way to have it but to defend ourselves. Some have quoted the following saying: [TRANSLATION] "Those who seek peace always make ready for war." Thus, in our prefecture of Gisenyi, this is the fourth or fifth time I am speaking about it, there are those who have acted first. It says in the Gospel that if someone strikes you on one cheek, you should turn the other cheek. I tell you that the Gospel has changed in our movement: if someone strikes you on one cheek, you hit them twice on one cheek and they collapse on the ground and will never be able to recover! So here, never again will what they call their flag, what they call their cap, even what they call their militant, come to our soil to speak: I mean throughout Gisenyi, from one end to the other! [para. 9]

67 Paragraph 9 introduced the second point in Mr. Mugesera's four-part speech: that they not allow themselves to be invaded. Mr. Duquette accepted Professor Angenot's view that the message here was not to allow oneself, as a Rwandan, to be invaded by aggressors from the RPF and from among political opponents. Mr. Duquette noted that throughout the speech political opponents were "systematically characterized as inyenzi", or cockroaches (para. 163).

68 Mr. Duquette explained the meaning of the term "Inyenzi" as follows:

> The expression "accomplices of the Inyenzi" should be explained. The term "inyenzi" was used during the 1960s to refer to a group of armed refugees who were attempting to stage incursions against Rwanda from outside the country. Inyenzi literally means cockroaches, alluding to the insects that infiltrate, are everywhere at night and are not seen during the day. By extension, Mr. Mugesera — and many others, to be sure — called those who were attacking Rwanda in the 1990s, the RPF, inyenzi. The RPF, for its part referred to its members as inkotanyi (literally, tenacious fighters) in a reference to militants of the king in the 19th century. In the dictionary filed as exhibit M-4-9, the third meaning is given as "[Translation] member of a Tutsi incursion group, at the time of Rwanda's independence; a partisan fighter". [Footnotes omitted; para. 156.]

69 At paragraph 13 of his speech, Mr. Mugesera attempted to draw a connection between the partisan fighters of the 1960s and the RPF. To him, they were all "Inyenzi":

> [TRANSLATION] Something else which may be called [TRANSLATION] "not allowing ourselves to be invaded" in the country, you know people they call "Inyenzis" (cockroaches), no longer call them "Inkotanyi" (tough fighters), as they are actually "Inyenzis". These people called Inyenzis are now on their way to attack us.

He referred to the "Inkotanyi" as "Inyenzi". Mr. Duquette concluded that: "The connection will necessarily also be made with all those he refers to as inyenzi in the speech" (para. 168).

70 At paragraph 15, Mr. Mugesera added that those who recruited soldiers for enemy armies should be arrested and prosecuted:

> [TRANSLATION] You know what it is, dear friends, "not letting ourselves be invaded", or you know it. You know there are "Inyenzis" in the country who have taken the opportunity of sending their children to the front, to go and help the "Inkotanyis". That is something you intend to speak about yourselves. You know that yesterday I came back from Nshili in Gikongoro at the Burundi border, travelling through Butare. Everywhere people told me of the number of young people who had gone. They said to me [TRANSLATION] "Where they are going, and who is taking them . . . why are they are (*sic*) not arrested as well as their families?" So I will tell you now, it is written in the law, in the book of the Penal Code: [TRANSLATION] "Every person who recruits soldiers by seeking them in the population, seeking young persons everywhere whom they will give to the foreign armed forces attacking the Republic, shall be liable to death". It is in writing.

This was not an unreasonable statement. Mr. Duquette concluded that, although Mr. Mugesera did not say that people should be arrested because they were Tutsi, there was evidence to support the finding that it was understood at the time in Rwanda that the recruiters were Tutsi extremists. Indeed this was the explanation given by Mr. Mugesera to a journalist from *Le Soleil* (para. 178).

71 Mr. Duquette interpreted the following two passages, in particular, as a call for murder:

> [TRANSLATION] Why do they not arrest these parents who have sent away their children and why do they not exterminate them? Why do they not arrest the people taking them away and why do they not exterminate all of them? Are we really waiting till they come to exterminate us?
>
> I should like to tell you that we are now asking that these people be placed on a list and be taken to court to be tried in our presence. If they (the judges) refuse, it is written in the Constitution that "ubutabera bubera abaturage". In English, this means that [TRANSLATION] "JUSTICE IS RENDERED IN THE PEOPLE'S NAME". If justice therefore is no longer serving the people, as written in our Constitution which we voted for ourselves, this means that at that point we who also make up the population whom it is supposed to serve, we must do something ourselves to exterminate this rabble. I tell you in all truth, as it says in the Gospel, "When you allow a serpent biting you to remain attached to you with your agreement, you are the one who will suffer". [paras. 16-17]

72 Mr. Duquette rejected Mr. Mugesera's suggestion that, when he said "exterminate", he was talking about the death penalty. It is clear that he was suggesting that the legal system was not functioning and that the public should take the law into their own hands. He even suggested the verdict: extermination.

73 Paragraph 24 conveyed a similar "kill or be killed" message:

> [TRANSLATION] One important thing which I am asking all those who are working and are in the M.R.N.D.: "Unite!" People in charge of finances, like the others working in that area, let them bring money so we can use it. The same applies to persons working on their own account. The M.R.N.D. have given them money to help them and support them so they can live as men. As they intend to cut our necks, let them bring (money) so [[we can defend ourselves by cutting their necks]]! Remember that the basis of our Movement is the cell, that the basis of our Movement is the sector and the Commune. He (the President) told you that a tree which has branches and leaves but no roots dies. Our roots are fundamentally there. Unite again, of course you are no longer paid, members of our cells, come together. If anyone penetrates a cell, watch him and crush him: if he is an accomplice do not let him get away! Yes, he must no longer get away!

74 Mr. Mugesera suggested that the first part of the paragraph was only a call for donations to support the war effort: he was asking the audience to help the government buy weapons. Mr. Duquette rejected this explanation as too subtle for the audience (para. 189). Mr. Mugesera referred to people who allegedly intended to cut his throat and said that resources had to be pooled to kill them.

75 In the second part of the same paragraph, Mr. Mugesera focused on people who might enter the "cell". The "cell" is the smallest administrative unit in Rwanda. Each prefecture is composed of communes, which are in turn composed of cells. The message conveyed here was that if someone arrived in the cell and was found to be an accomplice, he must not be allowed to get away. Mr. Duquette concluded that what was meant was that he should not be allowed to get out alive. Mr. Mugesera argued that he meant to say only that the stranger should be questioned to establish his identity and that he should be brought to trial. Mr. Duquette rejected this explanation as totally unreasonable. The audience would not believe that this alternative explanation is implicit in the words "he must no longer get away!"

76 Finally, the conclusion of the speech again called for murder:

> [TRANSLATION] So in order to conclude, I would remind you of all the important things I have just spoken to you about: the most essential is that we should not allow ourselves to be invaded, lest the very persons who are collapsing take away some of you. Do not be afraid, know that anyone whose neck you do not cut is the one who will cut your neck. Let me tell you, these people should begin leaving while there is still time and go and live with their people, or even go to the "Inyenzis", instead of living among us and keeping their guns, so that when we are asleep they can shoot us. Let them pack their bags, let them get going, so that no one will return here to talk and no one will bring scraps claiming to be flags! [para. 28]

Mr. Mugesera reminded the audience not to leave themselves open to invasion. He warned that "anyone whose neck you do not cut is the one who will cut your neck". The point of this, Mr. Duquette concluded, was not to respond to an attack, but rather to make the first move. The speech also advised members of other political parties to leave before it was too late. Mr. Duquette found that while it did not amount to a direct call to murder, such advice was "extremely threatening because of what ha[d] just been said" (para. 218).

77 The IAD's findings of fact support the conclusion that Mr. Mugesera's speech should be viewed as an incitement to kill Tutsi and opposition party members. The elements of the *actus reus* are met: viewed objectively, Mr. Mugesera's message was likely to incite, and was made with a view to inciting, murder. Mr. Mugesera conveyed to his listeners, in extremely violent language, the message that they faced a choice of either exterminating the Tutsi, the accomplices of the Tutsi, and their own political opponents, or being exterminated by them.

(c) *Findings in Respect of the Guilty Mind*

78 On the question of whether Mr. Mugesera had the requisite intent, Mr. Duquette found that, given the context, Mr. Mugesera knew his speech would be understood as an incitement to commit murder. The context to which Mr. Duquette referred was the context of the ethnic massacres that took place before and after the speech:

> From October 1990 to February 1993, a total of 2,000 persons, mostly Tutsi, lost their lives in similar massacres in Rwanda. They were killed because they were considered accomplices of the "Inyenzi". They were not soldiers or combatants, but civilians who were identified with the enemy because they belonged to a particular ethnic group. [Footnote omitted; para. 242.]

79 This finding of fact is sufficient to meet the *mens rea* for counselling an offence that is not committed. It shows that, on the facts, Mr. Mugesera not only intentionally gave the speech, but also intended that it result in the commission of murders.

80 We find that the IAD correctly concluded that the allegation of incitement to murder that is not committed was well founded, and that the FCA erred in overturning that finding. We must now consider the Minister's allegations in respect of the crime of incitement to genocide.

(2) Incitement to Genocide

81 The second offence that the Minister alleges Mr. Mugesera committed in giving the speech is advocating or promoting genocide. We will now consider the elements of the offence and whether they are made out on the facts as found by Mr. Duquette.

82 Genocide is a crime originating in international law. International law is thus called upon to play a crucial role as an aid in interpreting domestic law, particularly as regards the elements of the crime of incitement to genocide. Section 318(1) of the *Criminal Code* incorporates, almost word for word, the definition of genocide found in art. II of the *Genocide Convention*, and the Minister's allegation B makes specific reference to Rwanda's accession to the *Genocide Convention*. Canada is also bound by the *Genocide Convention*. In addition to treaty obligations, the legal principles underlying the *Genocide Convention* are recognized as part of customary international law: see International Court of Justice, Advisory Opinion of May 28, 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, at p. 15. The importance of interpreting domestic law in a manner that accords with the principles of customary international law and with Canada's treaty obligations was emphasized in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 69-71. In this context, international sources like the recent jurisprudence of international criminal courts are highly relevant to the analysis.

(a) *The Elements of Advocating Genocide*

83 Section 318(1) of the *Criminal Code* proscribes the offence of advocating genocide: "Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years." Genocide is defined as the act of killing members of an identifiable group or of deliberately inflicting conditions of life on an identifiable group calculated to bring about the physical destruction of that group, in whole or in part: subs. (2). Subsection (4), at the relevant time, defined an identifiable group as "any section of the public distinguished by colour, race, religion or ethnic origin". There is no Canadian jurisprudence dealing specifically with s. 318(1) of the *Criminal Code*.

(i) Is Proof of Genocide Required?

84 In *Prosecutor v. Akayesu*, 9 IHRR 608 (1998), the Trial Chamber of the International Criminal Tribunal for Rwanda ("ICTR") drew a distinction between the constituent elements of the crimes of complicity in genocide and incitement to genocide. In the case of a charge of complicity, the prosecution must prove that genocide has actually occurred. A charge of incitement to genocide, however, does not require proof that genocide has in fact happened:

> In the opinion of the Chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator. [para. 562]

85 In the case of the allegation of incitement to genocide, the Minister does not need to establish a direct causal link between the speech and any acts of murder or violence. Because of its inchoate nature, incitement is punishable by virtue of the criminal act alone irrespective of the result. It remains a crime regardless of whether it has the effect it is intended to have: see also *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T (Trial Chamber I) ("*Media Case*"), 3 December 2003, at para. 1029. The Minister is not required, therefore, to prove that individuals who heard Mr. Mugesera's speech killed or attempted to kill any members of an identifiable group.

(ii) The Criminal Act: Direct and Public Incitement

86 The criminal act requirement for incitement to genocide has two elements: the act of incitement must be direct and it must be public: *Akayesu*, Trial Chamber, at para. 559. See also art. III(*c*) of the *Genocide Convention*. The speech was public. We need only consider the meaning of the requirement that it be direct.

87 In *Akayesu*, the Trial Chamber of the ICTR held that the *direct element* "implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement" (para. 557). The direct element of incitement "should be viewed in the light of its cultural and linguistic content" (para. 557). *Depending on the audience*, a particular speech may be perceived as direct in one country, and not so in another. The determination of whether acts of incitement can be viewed as direct necessarily focusses mainly on the issue of whether the persons for whom the message

was intended immediately grasped the implication thereof (para. 558). The words used must be clear enough to be immediately understood by the intended audience. Innuendo and obscure language do not suffice.

(iii) The Guilty Mind for Direct and Public Incitement to Genocide

88 The guilty mind required for the crime of incitement to genocide is an "intent to directly prompt or provoke another to commit genocide" (*Akayesu*, Trial Chamber, at para. 560). It implies a desire on the part of the perpetrator to cause another to have the state of mind necessary to commit the acts enumerated in s. 318(2) of the *Criminal Code*. The person who incites must also have the specific intent to commit genocide: an intent to destroy in whole or in part any identifiable group, namely, any section of the public distinguished by colour, race, religion, or ethnic origin (s. 318(2) and (4) of the *Criminal Code*).

89 Intent can be inferred from the circumstances. Thus, the court can infer the genocidal intent of a particular act from the systematic perpetration of other culpable acts against the group; the scale of any atrocities that are committed and their general nature in a region or a country; or the fact that victims are deliberately and systematically targeted on account of their membership in a particular group while the members of other groups are left alone: *Akayesu*, Trial Chamber, at para. 523. A speech that is given in the context of a genocidal environment will have a heightened impact, and for this reason the environment in which a statement is made can be an indicator of the speaker's intent (*Media Case*, at para. 1022).

(b) *Findings in Respect of the Criminal Act*

90 Mr. Duquette's conclusion that Mr. Mugesera advocated genocide in his speech of November 22, 1992, is based on a number of findings of fact. The most important of them is Mr. Duquette's interpretation of para. 25 of the speech, the infamous "river passage":

> [TRANSLATION] Recently, I told someone who came to brag to me that he belonged to the P.L. — I told him [TRANSLATION] "The mistake we made in 1959, when I was still a child, is to let you leave". I asked him if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! I told him [TRANSLATION] "So don't you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly".

91 The first relevant finding of fact is that the individual to whom Mr. Mugesera was speaking in this story was a Tutsi. As Mr. Duquette explained, Mr. Mugesera was speaking to a member of an opposition party, the PL. He referred specifically to the events of 1959 when many Tutsi went into exile, and he mentioned Ethiopia. It is common lore in Rwanda that the Tutsi originated in Ethiopia. This belief was even taught in primary and secondary schools.

92 The second relevant finding of fact is that Mr. Mugesera was suggesting at this point that Tutsi corpses be sent back to Ethiopia. Mr. Mugesera argued that he was only telling his audience that, just as the Falasha had left Ethiopia to return to their place of origin, Israel, so should the Tutsi return to Ethiopia. In their case, the return trip would be by way of the Nyabarongo River, which runs through Rwanda toward

Ethiopia. This river is not navigable, however, so the return would not be by boat. In earlier massacres, Tutsi had been killed and their bodies thrown into the Nyabarongo River.

93 The reference to 1959 is also important, because the group that was exiled then was essentially Tutsi. The "Inyenzi" and the "Inkotanyi" were recruited from this group. Throughout his speech, as we have seen, Mr. Mugesera drew connections between the two groups. Mr. Duquette also found that the speech clearly advocated that these "invaders" and "accomplices" should not be allowed to "get out", suggesting that the mistake made in 1959 was to drive the Tutsi out of Rwanda, with the result that they were now attacking the country.

94 Summarizing his findings on the meaning of this paragraph, Mr. Duquette wrote:

> It is therefore clear that the speaker is a Tutsi and that when Mr. Mugesera says "we will send you down the Nyabarongo", "you" means the Tutsi and "we", means the Hutu. It is also obvious that the speaker is impressing on the audience that it was a mistake to drive the Tutsi out of Rwanda in 1959, since they are now attacking the country. Finally, it is clear that he is suggesting that the Tutsi corpses be sent back via the Nyabarongo River. [para. 201]

This message was delivered in a public place at a public meeting and would have been clearly understood by the audience.

95 Mr. Duquette concluded that the individual elements of the "river passage" were inconclusive, but that, taken together, they contained a deliberate call for the

murder of Tutsi. "When a person says that Tutsis should be thrown into the river as [*sic*] and is making references to 1959, he is sending out a clear signal" (para. 323). Drawing on these findings of fact, Mr. Duquette held that Mr. Mugesera had advocated the killing of members of an identifiable group distinguished by ethnic origin, namely the Tutsi, with intent to destroy the group in part.

(c) *Findings in Respect of the Guilty Mind*

96 On the issue of whether Mr. Mugesera had the requisite mental intent, Mr. Duquette found that "[s]ince he knew approximately 2,000 Tutsis had been killed since October 1, 1990, the context leaves no doubt as to his intent" (para. 323), and that "he intended specifically to provoke citizens against one another" (para. 324). The *mens rea* for incitement to genocide would not be made out if the finding were that Mr. Mugesera had intended to destroy, in whole or in part, members of his political opposition only. Members of a political group do not fit within the definition set out in s. 318(4) of the *Criminal Code*. The IAD went further than this and held that Mr. Mugesera had advocated the destruction of Tutsi, a distinct and identifiable ethnic group.

97 In discussing the elements of the crime, Mr. Duquette concluded that Mr. Mugesera had attempted to incite citizens to act against each other (which is an element of the offence under s. 166 of the Rwandan *Penal Code*). He specified that the citizens in question were "either MRND supporters against opposition parties or Hutu against Tutsi" (para. 324). This finding, coupled with the holding that

Mr. Mugesera was aware of the ethnic massacres that were taking place, is sufficient to infer the necessary mental element of the crime of incitement to genocide.

98 The allegation of incitement to the crime of genocide is well founded. The IAD came to the correct legal conclusion on this question.

(3) Incitement to Hatred

(a) *The Elements of Incitement to Hatred*

99 The Minister alleged as a further ground for the deportation of Mr. Mugesera that he committed the crime of incitement to hatred. Section 319 of the *Criminal Code* proscribes this offence in the following terms:

> **319.** (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of [an offence].
>
> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of [an offence].

100 Section 319 creates two distinct offences in relation to the incitement of hatred against an identifiable group. Under subs. (1), an offence is committed if such hatred is incited by the communication, in a public place, of statements likely to lead to a breach of the peace. Under subs. (2), an offence is committed only by wilfully promoting hatred against an identifiable group through the communication of

statements other than in private conversation. "Identifiable group" has the same meaning as in s. 318.

101 "Promotes" means actively supports or instigates. More than mere encouragement is required: *R. v. Keegstra*, [1990] 3 S.C.R. 697. Within the meaning of s. 319, "hatred" connotes "emotion of an intense and extreme nature that is clearly associated with vilification and detestation": *Keegstra*, at p. 777. Only the most intense forms of dislike fall within the ambit of this offence.

102 The offence does not require proof that the communication caused actual hatred. In *Keegstra*, this Court recognized that proving a causal link between the communicated message and hatred of an identifiable group is difficult. The intention of Parliament was to prevent the risk of serious harm and not merely to target actual harm caused. The risk of hatred caused by hate propaganda is very real. This is the harm that justifies prosecuting individuals under this section of the *Criminal Code* (p. 776). In the *Media Case*, the ICTR said that "[t]he 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" (para. 1072).

103 In determining whether the communication expressed hatred, the court looks at the understanding of a reasonable person in the context: *Canadian Jewish Congress v. North Shore Free Press Ltd. (No. 7)* (1997), 30 C.H.R.R. D/5 (B.C.H.R.T.), at para. 247. Although the trier of fact engages in a subjective interpretation of the communicated message to determine whether "hatred" was indeed what the speaker intended to promote, it is not enough that the message be offensive

or that the trier of fact dislike the statements: *Keegstra*, at p. 778. In order to determine whether the speech conveyed hatred, the analysis must focus on the speech's audience and on its social and historical context. An abstract analysis would fail to capture the speaker's real message.

104 In a passage in *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), at pp. 384-85, cited with approval by this Court in *Keegstra*, Martin J.A. compared the two subsections of s. 319 and concluded that the guilty mind required by subs. (1) is something less than intentional promotion of hatred. On the other hand, the use of the word "wilfully" in subs. (2) suggests that the offence is made out only if the accused had as a conscious purpose the promotion of hatred against the identifiable group, or if he or she foresaw that the promotion of hatred against that group was certain to result and nevertheless communicated the statements. Although the causal connection need not be proven, the speaker must desire that the message stir up hatred.

105 In *Keegstra*, at p. 778, this Court found that "[t]o determine if the promotion of hatred was intended, the trier will usually make an inference as to the necessary *mens rea* based upon the statements made." In many instances, evidence of the mental element will flow from the establishment of the elements of the criminal act of the offence. The speech will be such that the requisite guilty mind can be inferred.

106 As is the case with the crime of incitement to genocide, the crime of incitement to hatred requires the trier of fact to consider the speech objectively but

with regard for the circumstances in which the speech was given, the manner and tone used, and the persons to whom the message was addressed.

(b) *Findings in Respect of the Criminal Act and the Guilty Mind*

107 Based on his findings of fact, Mr. Duquette concluded that the allegation of incitement to hatred was well founded. We agree. Mr. Mugesera's speech targeted Tutsi and encouraged hatred of and violence against that group. His use of violent language and clear references to past ethnic massacres exacerbated the already vulnerable position of Tutsi in Rwanda in the early 1990s. The IAD's analysis of the speech supports the inference that Mr. Mugesera intended to incite hatred.

108 Mr. Duquette's findings of fact reveal that each element of the offences of incitement to murder, to hatred and to genocide has been made out. We are of the opinion that, based on the balance of probabilities, Mr. Mugesera committed the proscribed acts and is therefore inadmissible to Canada by virtue of ss. 27(1)(*a*.1)(ii) and 27(1)(*a*.3)(ii) of the *Immigration Act*. To this extent, we disagree with the reasons of the FCA on this subject.

109 The FCA erred in adopting the reasonable observer standard from *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85, and *Société St-Jean-Baptiste de Montréal v. Hervieux-Payette*, [2002] R.J.Q. 1669 (C.A.). It failed to acknowledge that the audience to which a speech is addressed is a relevant factor in determining the nature of the speech itself. If the manner in which the audience is

likely to perceive the speech is not taken into account, the harm targeted by these offences may not be prevented.

110 The FCA's conclusions were predicated upon its own interpretation of the speech. Because he attributed a purely political nature to the speech, Décary J.A. found that it did not incite hatred or genocide:

> In the case at bar, for the reasons I have given above, the message communicated by Mr. Mugesera is not, objectively speaking — that is, after analysing the speech and its context as a whole — a message inciting to murder, hatred or genocide. Nor is it such a message subjectively speaking, as there is nothing in the evidence to suggest that Mr. Mugesera intended under cover of a bellicose speech, that would be justified in the circumstances, to impel toward racism and murder an audience which he knew would be inclined to take that route. There is simply no evidence, on a balance of probabilities, that Mr. Mugesera had any guilty intent. [para. 210]

111 The FCA failed to take account of the nature of the target audience, which is an important contextual factor, and consequently erred in relying on an abstract "reasonable listener". This led it to err in its characterization of the nature of the speech. As a result, the FCA erred in law in finding that the speech of November 22, 1992 did not constitute an incitement to murder, genocide, or hatred.

C. *Crimes Against Humanity*

112 Having concluded that the FCA improperly substituted its own findings of fact for those of the IAD and failed to consider the appropriate legal test in characterizing Mr. Mugesera's speech, we must now move to the final issue raised on

this appeal: whether there are reasonable grounds to believe that Mr. Mugesera committed a crime against humanity and is therefore inadmissible to Canada by virtue of s. 19(1)(*j*) of the *Immigration Act*. This ground is raised by the Minister's allegation C.

113 Section 19(1)(*j*) of the *Immigration Act* provides:

> **19.** (1) No person shall be granted admission who is a member of any of the following classes:
>
> . . .
>
> (*j*) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code* and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission.

Section 19(1)(*j*) therefore requires that we consider two essential questions in this case. First, what is meant by "reasonable grounds to believe"? Second, what is a crime against humanity within the meaning of ss. 7(3.76) and 7(3.77) of the *Criminal Code*? What are the elements of this crime?

(1) The Standard of Proof: Reasonable Grounds to Believe

114 The first issue raised by s. 19(1)(*j*) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere

suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.).

115 In imposing this standard in the *Immigration Act* in respect of war crimes and crimes against humanity, Parliament has made clear that these most serious crimes deserve extraordinary condemnation. As a result, no person will be admissible to Canada if there are reasonable grounds to believe that he or she has committed a crime against humanity, even if the crime is not made out on a higher standard of proof.

116 When applying the "reasonable grounds to believe" standard, it is important to distinguish between proof of questions of fact and the determination of questions of law. The "reasonable grounds to believe" standard of proof applies only to questions of fact: *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.), at p. 311. This means that in this appeal the standard applies to whether Mr. Mugesera gave the speech, to the message it conveyed in a factual sense and to the context in which it was delivered. On the other hand, whether these facts meet the requirements of a crime against humanity is a question of law. Determinations of questions of law are not subject to the "reasonable grounds to believe" standard, since the legal criteria for a crime against humanity will not be made out where there are merely reasonable grounds to believe that the speech *could*

be classified as a crime against humanity. The facts as found on the "reasonable grounds to believe" standard must show that the speech *did* constitute a crime against humanity in law.

117 The evidence reviewed and relied upon by Mr. Duquette of the IAD clearly meets the "reasonable grounds to believe" standard in that it consists of compelling and credible information that provides an objective basis for his findings of fact. Based on these findings of fact, therefore, we must determine the question of law raised by s. 19(1)(*j*) of the *Immigration Act* in this case: whether the facts as found on the reasonable grounds to believe standard show that the speech did constitute a crime against humanity in law.

(2) The Elements of a Crime Against Humanity

118 At the time relevant to this appeal, crimes against humanity were defined in and proscribed by ss. 7(3.76) and 7(3.77) of the *Criminal Code*, which provided:

> **7.** . . .
>
> (3.76) For the purposes of this section,
>
> . . .
>
> "crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

. . .

> (3.77) In the definitions "crime against humanity" and "war crime" in subsection (3.76), "act or omission" includes, for greater certainty, attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission.

Sections 7(3.76) and 7(3.77) of the *Criminal Code* have since been repealed. Crimes against humanity are now defined in and proscribed by ss. 4 and 6 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24. Those sections define crimes against humanity in a manner which differs slightly from the definition in the sections of the *Criminal Code* relevant to this appeal. However, the differences are not material to the discussion that follows.

119 As we shall see, based on the provisions of the *Criminal Code* and the principles of international law, a criminal act rises to the level of a crime against humanity when four elements are made out:

1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);

2. The act was committed as part of a widespread or systematic attack;

3. The attack was directed against any civilian population or any identifiable group of persons; and

4. The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

120 Despite relying on essentially the same authorities, the lower courts and the tribunal in this appeal were inconsistent in their identification and application of the elements of a crime against humanity under s. 7(3.76) of the *Criminal Code*. We will now briefly review their views on these questions.

121 For the IAD, Mr. Duquette, relying on this Court's decision in *R. v. Finta*, [1994] 1 S.C.R. 701, found that a crime against humanity must be committed against a civilian population or an identifiable group, must be cruel and must shock the conscience of all right-thinking people (para. 335). He also held that the individual who commits the crime must be aware of the circumstances which render the act inhumane and must be motivated by discriminatory intent (paras. 337-38). To these requirements, he added, relying on *Sivakumar*, that crimes against humanity must occur on a widespread and systematic basis (para. 339).

122 Applying these principles to the facts, Mr. Duquette concluded that counselling murder, even where no murder is subsequently committed, is sufficient to constitute a crime against humanity, particularly where murders have been happening on a widespread and systematic basis (para. 344). In his opinion, Mr. Mugesera had acted with discriminatory intent, and was an educated man who was aware of his country's history, the current political situation and the fact that civilians were being

massacred (para. 338). He was therefore aware of the circumstances which rendered his speech a crime against humanity.

123 Nadon J., reviewing the IAD's decision, did not elaborate on the elements of a crime against humanity. He limited his consideration of the issue to finding that Mr. Duquette had erred in law because Mr. Mugesera's counselling of murder and incitement to hatred, absent proof that actual murders had ensued, was not sufficiently "cruel and terrible" to constitute a crime against humanity (paras. 55-56). Nadon J. relied on this Court's decision in *Finta*, at p. 814, to support the proposition that the alleged acts must show an added degree of inhumanity.

124 Décary J.A., for the FCA, who apparently also drew on *Finta* and *Sivakumar*, reached an entirely different outcome, both on the law and on its application to the facts. He found that a crime against humanity must occur in the context of a widespread or systematic attack directed against a civilian population with discriminatory intent (para. 57). Having set aside the IAD's findings of fact, he concluded that there was no evidence that the speech had taken place in the context of a widespread or systematic attack, since the massacres which had occurred to that point were not part of a common plan and since there was no evidence that Mr. Mugesera's speech was part of an overall strategy of attack (para. 58).

125 The decisions below leave no doubt as to the existence of a great deal of confusion about the elements of a crime against humanity. Though this Court has commented on the issue in the past, most notably in *Finta*, it is apparent that further clarification is needed.

126 Since *Finta* was rendered in 1994, a vast body of international jurisprudence has emerged from the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the ICTR. These tribunals have generated a unique body of authority which cogently reviews the sources, evolution and application of customary international law. Though the decisions of the ICTY and the ICTR are not binding upon this Court, the expertise of these tribunals and the authority in respect of customary international law with which they are vested suggest that their findings should not be disregarded lightly by Canadian courts applying domestic legislative provisions, such as ss. 7(3.76) and 7(3.77) of the *Criminal Code*, which expressly incorporate customary international law. Therefore, to the extent that *Finta* is in need of clarification and does not accord with the jurisprudence of the ICTY and the ICTR, it warrants reconsideration.

127 Crimes against humanity, like all crimes, consist of two elements: (1) a criminal act; and (2) a guilty mind. Each must be considered.

(a) *The Criminal Act of a Crime Against Humanity*

128 It can be seen from s. 7(3.76) of the *Criminal Code* that the criminal act (*actus reus*) of a crime against humanity consists in the commission of one of the enumerated proscribed acts which contravenes customary or conventional international law or is criminal according to the general principles of law recognized by the community of nations. The requirement that the enumerated proscribed acts contravene international law concerns the context in which the enumerated acts occur. According

to customary international law, a proscribed act will constitute a crime against humanity where it is committed as part of a widespread or systematic attack directed against any civilian population. Therefore, the criminal act of a crime against humanity is made up of three essential elements: (1) one of the enumerated proscribed acts is committed; (2) the act occurs as part of a widespread or systematic attack; and (3) the attack is directed against any civilian population or any identifiable group. We will consider each element in turn.

(i) The Proscribed Act

129 The proscribed acts listed in s. 7(3.76) of the *Criminal Code* provide a first and essential requirement for a crime against humanity: an "underlying offence" must be committed. In essence, the listed acts represent the different ways in which a crime against humanity can be committed. This means that various acts may become crimes against humanity as long as the other elements of the offence are met. In s. 7(3.76) those crimes are murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission.

130 Establishing an enumerated act involves showing that both the physical element and the mental element of the underlying act have been made out. For instance, where the accused is charged with murder as a crime against humanity, the accused must (1) have caused the death of another person, and (2) have intended to cause the person's death or to inflict grievous bodily harm that he or she knew was likely to result in death. Once this has been established, the court will go on to consider whether the murder was committed in the context of a widespread or

systematic attack directed against a civilian population or an identifiable group; this requirement is discussed more fully below.

131 The question we must now consider is whether, as alleged by the Minister, Mr. Mugesera's speech satisfies the initial criminal act requirement for a crime against humanity. We have found that the speech counselled murders which were not committed and incited hatred and genocide. This raises two issues: whether counselling a murder that is not committed meets the initial criminal act requirement for murder as a crime against humanity and whether speech inciting hatred meets the initial criminal act requirement for persecution as a crime against humanity.

1. *Counselling an Enumerated Act That Is Not Committed and Murder as a Crime Against Humanity*

132 The first question raised on the facts of this appeal is whether the fact that Mr. Mugesera counselled the commission of murders that were not committed meets the initial criminal act requirement for a crime against humanity. Section 7(3.77) of the *Criminal Code* provides that "counselling" an act listed in s. 7(3.76) will be sufficient to meet the requirement. Murder is one of the acts listed in s. 7(3.76). Mr. Duquette found, as a matter of fact, that Mr. Mugesera's speech counselled the commission of murders. His findings of fact are sufficient to conclude, as discussed above, that Mr. Mugesera satisfied both the physical and mental elements of the "underlying offence" of counselling a murder that is not committed.

133 This does not end our analysis, however. As we noted above, s. 7(3.76) expressly incorporates principles of customary international law into the domestic formulation of crimes against humanity. We must therefore go further and consider whether the prevailing principles of international law accord with our initial analysis. A review of the jurisprudence of the ICTY and the ICTR suggests that it does not.

134 The statutes of the ICTY and the ICTR (U.N. Doc. S/RES/827 (1993) and U.N. Doc. S/RES/955 (1994), respectively) do not use the word "counselling". This does not mean, however, that the decisions of these courts cannot be informative as to the requirements for counselling as a crime against humanity. Both statutes provide that persons who "instigate" the commission of a proscribed act may be liable under international law. This Court found in *Sharpe*, at para. 56, that counselling refers to active inducement or encouragement from an objective point of view. The ICTR has found that instigation "involves prompting another to commit an offence": *Akayesu*, Trial Chamber, at para. 482. The two terms are clearly related. As a result, we may look to the jurisprudence of the ICTY and the ICTR on instigation in determining whether counselling an offence that is not committed will be sufficient to satisfy the initial criminal act requirement for a crime against humanity under s. 7(3.76) of the *Criminal Code*.

135 In *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T (Trial Chamber I), 6 December 1999, the ICTR conducted a review of the jurisprudence of the ICTY and the ICTR on individual criminal responsibility. The ICTR found that instigation (other than of genocide) involves (1) direct and public incitement to commit a proscribed act; but (2) *only where it has led to the actual commission of the instigated offence*:

para. 38; see also *Akayesu*, Trial Chamber, at para. 482. It should be noted that the second requirement does not mean that the offence would not have been committed "but for" the instigation. However, a sufficient causal link must be made out: *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T (ICTY, Trial Chamber III), 26 February 2001, at para. 387.

136 Mr. Duquette of the IAD was unable to find that the commission of murders had actually occurred as a result of Mr. Mugesera's counselling. An interpretation of ss. 7(3.76) and 7(3.77) of the *Criminal Code* in light of customary international law shows that Mr. Mugesera's counselling of murder was not sufficient to satisfy the initial criminal act requirement for a crime against humanity.

2. *Speech That Incites Hatred and Persecution as a Crime Against Humanity*

137 As discussed above, the facts on this appeal raise a second question: can a speech that incites hatred, which as we have seen Mr. Mugesera's speech did, meet the initial criminal act requirement for persecution as a crime against humanity? Once again, the express incorporation of customary international law into s. 7(3.76) suggests that we should consider the jurisprudence of the ICTY and the ICTR in formulating an answer.

138 Both the ICTR and the ICTY have approached the question of speech inciting hatred as relating to the enumerated act of "persecution". Persecution is expressly

listed in s. 7(3.76) of the *Criminal Code* as one of the underlying acts which, in the appropriate circumstances, may constitute a crime against humanity.

139 Determining whether an act constitutes persecution can be difficult. Persecution, unlike the other acts enumerated in s. 7(3.76), is not a stand-alone crime in Canadian law or in the legal systems of other countries: M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd rev. ed. 1999), at p. 327. In contrast with murder, for instance, it is not evident from our domestic law what types of acts will constitute persecution.

140 As a result, both the physical and mental elements (criminal act and guilty mind) of persecution have been considered at great length by the ICTY and the ICTR. In considering the criminal act of persecution in *Prosecutor v. Tadic*, 112 ILR 1 (Trial Chamber II 1997), the ICTY, having reviewed the relevant jurisprudence and academic commentary, found that persecution "is some form of discrimination [on traditionally recognized grounds such as race, religion, or politics] that is intended to be and results in an infringement of an individual's fundamental rights" (para. 697).

141 A danger arises, however, that the criminal act of persecution, as so defined, might apply to acts that are far less serious than the other forms of crimes against humanity. Crimes against humanity should not be trivialized by applying the concept to fact situations which do not warrant the full opprobrium of international criminal sanction. Thus, the ICTY found in *Prosecutor v. Kupreskic*, Case No. IT-95-16-T (Trial Chamber II) 14 January 2000, that the alleged persecution, in order to satisfy the criminal act requirement, must reach the same level of gravity as the other enumerated

underlying acts. Persecution as a crime against humanity must constitute a "gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited" (para. 621).

142 Turning to the requisite mental element for persecution, we find that the accused must have intended to commit the persecutory acts and must have committed them with discriminatory intent. The requirement for discriminatory intent is unique to persecution and need not be shown in respect of the other forms of crimes against humanity (e.g., murder). This point was made persuasively in the appeal from the Trial Chamber's decision in *Tadic*, in which the Appeals Chamber of the ICTY conducted a thorough review of the international law principles on discriminatory intent and crimes against humanity in reaching a conclusion that the discriminatory intent requirement is unique to crimes against humanity which take the form of persecution: 124 ILR 61 (1999), at paras. 287-92.

143 The ICTR too has concluded that discriminatory intent is relevant only to persecution: *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A (Appeals Chamber), 1 June 2001, at paras. 460-69. This is particularly significant since crimes against humanity as defined in art. 3 of the ICTR statute must be committed as part of a widespread and systematic attack against any civilian population "<u>on national, political, ethnic, racial or religious grounds</u>". In this respect, the judgment of our Court in *Finta* appears to be inconsistent with the recent jurisprudence of the ICTR and the ICTY. The close relationship between our domestic law and international law

on this question mandates that the nature and definition of crimes against humanity should be closely aligned with the jurisprudence of the international criminal courts.

144 We see no reason to depart from the well-reasoned and persuasive findings of the ICTY and the ICTR on the question of discriminatory intent. Insofar as *Finta* suggested that discriminatory intent was required for all crimes against humanity (see *Finta*, at p. 813), it should no longer be followed on this point.

145 We conclude from the preceding discussion that the criminal act of persecution is the gross or blatant denial of a fundamental right on discriminatory grounds. The guilty mental state is discriminatory intent to deny the right. The following question remains to be answered: Was Mr. Mugesera's speech a gross or blatant denial of fundamental rights on discriminatory grounds such that it was equal in gravity to the other acts enumerated in s. 7(3.76)?

146 The ICTR and the ICTY have both considered whether hate speech can ever satisfy the criminal act requirement for persecution. In one prominent case, the ICTR found that it was "evident" that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds was equal in gravity to the other enumerated acts: *Media Case*, at para. 1072. The ICTY, on the other hand, found in *Kordic* that the hate speech alleged in the indictment did not constitute persecution because it did not rise to the same level of gravity as the other enumerated acts (para. 209). The Trial Chamber distinguished hate speech that could properly form the basis of a crime against humanity from the hate speech alleged in the indictment, which fell short of incitement to murder, extermination, and genocide (footnote 272). The guiding

concern must therefore always be whether the alleged persecutory act reaches the level of a gross or blatant denial of fundamental rights equivalent in gravity to the other enumerated acts.

147 In *Keegstra*, this Court found that the harm in hate speech lies not only in the injury to the self-dignity of target group members but also in the credence that may be given to the speech, which may promote discrimination and even violence (p. 748). This finding suggests that hate speech always denies fundamental rights. The equality and the life, liberty and security of the person of target-group members cannot but be affected: see, e.g., *Prosecutor v. Ruggiu*, 39 ILM 1338 (ICTR, Trial Chamber I 2000), at para. 22. This denial of fundamental rights may, in particular instances, reach the level of a gross or blatant denial equal in gravity to the other acts enumerated in s. 7(3.76). This is particularly likely if the speech openly advocates extreme violence (such as murder or extermination) against the target group, but it may not be limited to such instances. In contrast to the case of counselling an enumerated violent act, whether the persecution actually results in the commission of acts of violence is irrelevant: *Media Case*, at para. 1073.

148 What then can be said of Mr. Mugesera's speech? Mr. Duquette found as a matter of fact that Mr. Mugesera's speech had incited hatred of Tutsi and of his political opponents (para. 335). This incitement included the encouragement of acts of extreme violence, such as extermination (para. 336). Keeping in mind that acts of persecution must be evaluated in context, Mr. Duquette's finding that Mr. Mugesera's speech occurred in a volatile situation characterized by rampant ethnic tensions and political instability which had already led to the commission of massacres is also

compelling (paras. 335-38). A speech such as Mr. Mugesera's, which actively encouraged ethnic hatred, murder and extermination and which created in its audience a sense of imminent threat and the need to act violently against an ethnic minority and against political opponents, bears the hallmarks of a gross or blatant act of discrimination equivalent in severity to the other underlying acts listed in s. 7(3.76). The criminal act requirement for persecution is therefore met.

149 Having concluded that the criminal act requirement for persecution is made out, we must go on to consider whether the culpable mental element of persecution is made out. Mr. Duquette found that Mr. Mugesera had a discriminatory intent in delivering his speech (para. 335). He found that Mr. Mugesera targeted Tutsi and political opponents on the sole basis of ethnicity and political affiliation with the intent to compel his audience into action against these groups. The IAD's findings of fact thus amply support a finding that Mr. Mugesera not only committed the criminal act of persecution, but did so with the requisite discriminatory intent.

150 In sum, the criminal act requirement for a crime against humanity under ss. 7(3.76) and 7(3.77) of the *Criminal Code* contains two primary elements: (1) the accused has committed an underlying enumerated act; and (2) that act contravened international law. With respect to the first element, both the physical and mental elements of the underlying act must be made out. In the case at bar, there were two possible underlying acts: counselling of murder, and persecution by hate speech. For counselling of murder to be considered a crime against humanity under international law, murders must actually have been committed. Mr. Duquette's finding that no murders were proven to have resulted from the speech therefore precludes a finding

that Mr. Mugesera counselled murder within the meaning of s. 7(3.76). The other possible underlying act, persecution, is a gross or blatant denial of fundamental rights on discriminatory grounds equal in severity to the other acts enumerated in s. 7(3.76). Hate speech, particularly when it advocates egregious acts of violence, may constitute persecution. In this case, it does.

(ii) The Act Contravenes Customary or Conventional International Law or Is Criminal According to the General Principles of Law Recognized by the Community of Nations

151 We now turn to the second element of the criminal act requirement for a crime against humanity: that the proscribed act contravene international law. The second element of the criminal act requirement for crimes against humanity concerns the context in which the first element, the enumerated act, takes place. Customary international law tells us that the enumerated acts will become crimes against humanity if they are committed *as part of a widespread or systematic attack directed against any civilian population or any identifiable group*. This additional contextual requirement is what distinguishes a crime against humanity from an ordinary crime: *Tadic*, Trial Chamber, at paras. 648 and 653; see also G. Mettraux, "Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda" (2002), 43 *Harv. Int'l L.J.* 237, at p. 244.

152 In order to determine whether there are reasonable grounds to believe that Mr. Mugesera's act of persecution constituted a crime against humanity, we must therefore consider whether the speech was part of a widespread or systematic attack directed against a civilian population. Since this requirement is dictated entirely by

customary international law, the jurisprudence of the ICTY and the ICTR is again very relevant.

1. *What Is a Widespread or Systematic Attack?*

153 An "attack" may be "a course of conduct involving the commission of acts of violence": *Prosecutor v. Kunarac, Kovac and Vukovic*, Case Nos. IT-96-23-T & IT-96-23/1-T (ICTY, Trial Chamber II), 22 February 2001, at para. 415. It may also be a course of conduct that is not characterized by the commission of acts of violence if it involves the imposition of a system such as apartheid, or the exertion on the population of pressure to act in a particular manner that is orchestrated on a massive scale or in a systematic manner: *Akayesu*, Trial Chamber, at para. 581. It is fair to say, however, that in most instances, an attack will involve the commission of acts of violence. This definition aptly conveys the idea that the existence of an attack does not presuppose armed conflict (though it does not preclude armed conflict).

154 A *widespread* attack "may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" — it need not be carried out pursuant to a specific strategy, policy or plan: *Akayesu*, Trial Chamber, at para. 580; and *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T (Trial Chamber II), 21 May 1999, at para. 123. It may consist of a number of acts or of one act of great magnitude: Mettraux, at p. 260.

155 A *systematic* attack is one that is "thoroughly organised and follow[s] a regular pattern on the basis of a common policy involving substantial public or private

resources" and is "carried out pursuant to a . . . policy or plan", although the policy need not be an official state policy and the number of victims affected is not determinative: *Akayesu*, Trial Chamber, at para. 580; and *Kayishema*, at para. 123. As noted by the ICTY's Trial Chamber in *Kunarac*, at para. 429: "The adjective 'systematic' signifies the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes — that is the non-accidental repetition of similar criminal conduct on a regular basis — are a common expression of such systematic occurrence."

156 An attack need be only widespread *or* systematic to come within the scope of s. 7(3.76), not both: *Tadic*, Trial Chamber, at para. 648; *Kayishema*, at para. 123. The widespread or systematic nature of the attack will ultimately be determined by examining the means, methods, resources and results of the attack upon a civilian population: *Kunarac*, at para. 430. Only the attack needs to be widespread or systematic, not the act of the accused. The IAD, relying on *Sivakumar*, appears to have confused these notions, and to the extent that it did, it erred in law. Even a single act may constitute a crime against humanity as long as the attack it forms a part of is widespread or systematic and is directed against a civilian population: *Prosecutor v. Mrksic, Radic and Sljivancanin*, 108 ILR 53 (ICTY, Trial Chamber I 1996), at para. 30.

157 A contentious issue raised by the "widespread or systematic attack" requirement is whether the attack must be carried out pursuant to a government policy or plan. Some scholars suggest that limiting crimes against humanity to attacks which implement a government policy is necessary due to the nature and scale of such

crimes: see, e.g., Bassiouni, at pp. 243-46. Others point out that the existence of a government policy has never been required and suggest that crimes against humanity take on their international character simply by virtue of the existence of a widespread and systematic attack: see, e.g., Mettraux, at pp. 270-82.

158 The Appeals Chamber of the ICTY held in *Prosecutor v. Kunarac, Kovac and Vukovic* that there was no additional requirement for a state or other policy behind the attack: Case Nos. IT-96-23-A & IT-96-23/1-A, 12 June 2002, at para. 98. The Appeals Chamber acknowledged that the existence of such a policy might be useful in establishing that the attack was directed against a civilian population or that it was widespread or systematic (particularly the latter). However, the existence of a policy or plan would ultimately be useful only for evidentiary purposes and it does not constitute a separate element of the offence (para. 98). It seems that there is currently no requirement in customary international law that a policy underlie the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement (see, e.g., art. 7(2)(*a*) of the *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998).

159 Considering all these factors, was a widespread or systematic attack taking place when Mr. Mugesera gave his speech? With respect to whether the attack was widespread, Mr. Duquette found that, between October 1, 1990 and November 22, 1992, almost 2,000 Tutsi were massacred in Rwanda (para. 336). Mr. Duquette also found as a fact that in October 1990 approximately 8,000 people, 90 percent of them Tutsi, were falsely arrested on suspicion of complicity with the RPF (para. 26). The massacres occurred in various parts of the country and the number of victims grew to

the thousands. This suggests a large-scale action directed against a multiplicity of victims.

160 In any event, it is unnecessary to decide whether the attack was widespread because the facts as found by Mr. Duquette support the conclusion that it was, at the very least, systematic. Mr. Duquette found as a fact that the Rwandan government staged a military attack on Kigali which served to justify the arrest of and continued violence against Tutsi and against political opponents (para. 255). According to Mr. Duquette, a pattern of massacres, sometimes participated in and overtly encouraged by MRND officials and the military, began in 1990 and was still under way when Mr. Mugesera gave his speech (para. 50). As discussed above, a pattern of victimizing behaviour, particularly one which is sanctioned or carried out by the government or the military, will often be sufficient to establish that the attack took place pursuant to a policy or plan and was therefore systematic. There was an unmistakable policy of attacks, persecution and violence against Tutsi and moderate Hutu in Rwanda at the time of Mr. Mugesera's speech. Mr. Mugesera's act of persecution therefore took place in the context of a systematic attack.

2. *What Does It Mean for the Attack to Be "Directed Against Any Civilian Population"?*

161 The mere existence of a systematic attack is not sufficient, however, to establish a crime against humanity. The attack must also be directed against a civilian population. This means that the civilian population must be "the primary object of the attack", and not merely a collateral victim of it: *Kunarac*, Trial Chamber, at para. 421.

The term "population" suggests that the attack is directed against a relatively large group of people who share distinctive features which identify them as targets of the attack: Mettraux, at p. 255.

162 A prototypical example of a civilian population would be a particular national, ethnic or religious group. Thus, for instance, the target populations in the former Yugoslavia were identifiable on ethnic and religious grounds. It is notable that the fact that non-civilians also form part of the group will not change the character of the population as long as it remains largely civilian in nature: *Prosecutor v. Blaskic*, 122 ILR 1 (ICTY, Trial Chamber I 2000), at para. 211.

163 The Tutsi and moderate Hutu, two groups that were ethnically and politically identifiable, were a civilian population as this term is understood in customary international law. Mr. Duquette's findings of fact leave no doubt that the ongoing systematic attack was directed against them. For these reasons, we agree that at the time of Mr. Mugesera's speech, a systematic attack directed against a civilian population was taking place in Rwanda.

3. *What Does It Mean for an Act to Occur "as Part of" a Systematic Attack?*

164 As we have seen, the existence of a widespread or systematic attack helps to ensure that purely personal crimes do not fall within the scope of provisions regarding crimes against humanity. However, because personal crimes are committed in all places and at all times, the mere existence of a widespread or systematic attack will

not be sufficient to exclude them. To ensure their exclusion, a link must be demonstrated between the act and the attack which compels international scrutiny. For this reason, we must explore what it means for an act to occur "as part of" a widespread or systematic attack and determine whether Mr. Mugesera's speech was indeed "a part of" the systematic attack occurring in Rwanda in the early 1990s.

165 The requirement for a link between the act and the attack may be expressed in many ways. For instance, "in the context of" or "forming a part of" are common wordings. These phrases require that the accused's acts "be objectively part of the attack in that, by their nature or consequences, they are liable to have the effect of furthering the attack": Mettraux, at p. 251. In *Tadic*, the Appeals Chamber of the ICTY found that the acts of the accused must "comprise part of a pattern" of widespread or systematic abuse of civilian populations or must objectively further the attack (para. 248).

166 To say that an act must be part of a pattern of abuse or must objectively further the attack does not mean that no personal motive for the underlying act can exist. The presence of a personal motive does not change the nature of the question, which remains an objective one: is the act part of a pattern of abuse or does it further the attack?

167 Also, and this is particularly relevant given the findings of Décary J.A. for the FCA in this case, the proscribed act need not be undertaken as a particular element of a strategy of attack. In essence, the act must further the attack or clearly fit the pattern of the attack, but it need not comprise an essential or officially sanctioned part

of it. Thus, in *Kunarac*, where the three accused took advantage of a widespread and systematic attack to rape and sexually torture Muslim women and girls, the nexus requirement was made out: Trial Chamber, at para. 592. The accused knew of the attack, their acts furthered the attack directed against the Muslim population of Foca and they contributed to a pattern of attack against that population.

168 These legal principles make it clear that Décary J.A. erred in law when he suggested that a crime against humanity could not be made out because Mr. Mugesera's speech was not part of a "strategy" (para. 58). However, we must still consider whether Mr. Mugesera's speech objectively furthered the attack or fit into its pattern.

169 Mr. Duquette found as a fact that Mr. Mugesera's speech had targeted Tutsi and moderate Hutu (para. 335). Tutsi and moderate Hutu were the targets of the systematic attack taking place in Rwanda at the time. A persecutory speech which encourages hatred and violence against a targeted group furthers an attack against that group. Also relevant is geographical proximity. Mr. Duquette found that many of the massacres perpetrated in Rwanda between 1990 and 1993 had occurred in and around Gisenyi prefecture, where the speech was given (paras. 26 and 50). He also noted that local MRND officials had participated in and encouraged the targeting of Tutsi and moderate Hutu. Mr. Mugesera's speech therefore not only objectively furthered the attack, but also fit into a pattern of abuse prevailing at that time. We therefore conclude that Mr. Mugesera's speech was "a part of" a systematic attack directed against a civilian population that was occurring in Rwanda at the time.

170 In sum, we have seen that the criminal act requirement for crimes against humanity in ss. 7(3.76) and 7(3.77) is made up of three essential elements: (1) a proscribed act is carried out; (2) the act occurs as part of a widespread or systematic attack; and (3) the attack is directed against any civilian population. The first element means that all the elements of an enumerated act — both physical and moral — must be made out. The second and third elements require that the act take place in a particular context: a widespread or systematic attack directed against any civilian population. Each of these elements has been made out in Mr. Mugesera's case.

171 However, as noted above, making out the criminal act of a crime against humanity will not necessarily imply that there are reasonable grounds to believe that Mr. Mugesera has committed a crime against humanity. Mr. Mugesera must also have had a guilty mind. As a result, we must now go on to consider the mental element of s. 7(3.76) of the *Criminal Code*.

(b) *The Guilty Mind for Crimes Against Humanity*

172 We have seen that an individual accused of crimes against humanity must possess the required guilty state of mind in respect of the underlying proscribed act. We have also underlined that, contrary to what was said in *Finta*, discriminatory intent need not be made out in respect of all crimes against humanity, but only in respect of those which take the form of persecution. This leaves a final question: in addition to the mental element required for the underlying act, what is the mental element required to make out a crime against humanity under s. 7(3.76) of the *Criminal Code*?

173 The question of whether a superadded mental element exists for crimes against humanity was a point of significant contention in *Finta*. Cory J., for the majority, found that the accused must have an awareness of the facts or circumstances which would bring the act within the definition of a crime against humanity (p. 819). La Forest J. penned dissenting reasons suggesting that establishing the mental element for the underlying act was sufficient in itself and thus no additional element of moral blameworthiness was required (p. 754). At the time, there was little international jurisprudence on the question. It is now well settled that in addition to the *mens rea* for the underlying act, the accused must have knowledge of the attack and must know that his or her acts comprise part of it *or* take the risk that his or her acts will comprise part of it: see, e.g., *Tadic*, Appeals Chamber, at para. 248; *Ruggiu*, at para. 20; *Kunarac*, Trial Chamber, at para. 434; *Blaskic*, at para. 251.

174 It is important to stress that the person committing the act need only be cognizant of the link between his or her act and the attack. The person need not intend that the act be directed against the targeted population, and motive is irrelevant once knowledge of the attack has been established together with knowledge that the act forms a part of the attack or with recklessness in this regard: *Kunarac*, Appeals Chamber, at para. 103. Even if the person's motive is purely personal, the act may be a crime against humanity if the relevant knowledge is made out.

175 Knowledge may be factually implied from the circumstances: *Tadic*, Trial Chamber, at para. 657. In assessing whether an accused possessed the requisite knowledge, the court may consider the accused's position in a military or other government hierarchy, public knowledge about the existence of the attack, the scale

of the violence and the general historical and political environment in which the acts occurred: see, e.g., *Blaskic*, at para. 259. The accused need not know the details of the attack: *Kunarac*, Appeals Chamber, at para. 102.

176 In *Finta*, the majority of this Court found that subjective knowledge on the part of the accused of the circumstances rendering his or her actions a crime against humanity was required (p. 819). This remains true in the sense that the accused must have knowledge of the attack and must know that his or her acts are part of the attack, or at least take the risk that they are part of the attack.

177 Returning to the case at bar, the findings of the IAD leave no doubt that Mr. Mugesera possessed the culpable mental state required by s. 7(3.76) of the *Criminal Code*. Mr. Duquette found that Mr. Mugesera was a well-educated man who was aware of his country's history and of past massacres of Tutsi (para. 338). He was aware of the ethnic tensions in his country and knew that civilians were being killed merely by reason of ethnicity or political affiliation (para. 338). Moreover, Mr. Duquette found that the speech itself left no doubt that Mr. Mugesera knew of the violent and dangerous state of affairs in Rwanda in the early 1990s (para. 338). These findings of fact clearly show that Mr. Mugesera was aware of the attack occurring against Tutsi and moderate Hutu. Furthermore, a man of his education, status and prominence on the local political scene would necessarily have known that a speech vilifying and encouraging acts of violence against the target group would have the effect of furthering the attack.

178 In the face of certain unspeakable tragedies, the community of nations must provide a unified response. Crimes against humanity fall within this category. The interpretation and application of Canadian provisions regarding crimes against humanity must therefore accord with international law. Our nation's deeply held commitment to individual human dignity, freedom and fundamental rights requires nothing less.

179 Based on Mr. Duquette's findings of fact, each element of the offence in s. 7(3.76) of the *Criminal Code* has been made out. We are therefore of the opinion that reasonable grounds exist to believe that Mr. Mugesera committed a crime against humanity and is therefore inadmissible to Canada by virtue of ss. 27(1)(*g*) and 19(1)(*j*) of the *Immigration Act.*

VI. Disposition

180 The appeal is allowed. The deportation order of July 11, 1996 in respect of Mr. Léon Mugesera is held to be valid on the grounds stated above. There will be no order as to costs.

APPENDIX I

Summary of the Allegations of the Minister of Citizenship and Immigration (Appellant's Record, vol. 38, at pp. 7629-30)

(A) Léon Mugesera is a person described in s. 27(1)(*a*.1)(ii): By inciting other persons to commit murder, Léon Mugesera committed an act that would, in Rwanda, constitute an offence under ss. 91(4) and 311 of the Rwandan *Penal Code* and that would, in Canada, constitute an offence within the meaning of ss. 22, 235 and 464(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46.

(B) Léon Mugesera is a person described in s. 27(1)(*a*.3)(ii): By inciting MRND members and Hutu to kill Tutsi, Léon Mugesera committed an act that constitutes an offence under s. 166 of the Rwandan *Penal Code* and executive enactment 08/75 of February 12, 1975, by which Rwanda acceded to the *Convention on the Prevention and Punishment of the Crime of Genocide*, and that would, in Canada, constitute an offence within the meaning of s. 318(1) of the *Criminal Code*. Furthermore, by inciting people to hatred against Tutsi, Léon Mugesera also committed an act that constitutes an offence under s. 393 of the Rwandan *Penal Code* and s. 319 of the *Criminal Code*.

(C) Léon Mugesera is a person described in s. 27(1)(*g*) because he is a member of the inadmissible class described in s. 19(1)(*j*) of the *Immigration Act.* Léon Mugesera committed crimes against humanity within the meaning of s. 7(3.76) of the *Criminal Code*, by counselling MRND members and Hutu to kill Tutsi, taking part in massacres of Tutsi, and fomenting or advocating genocide of the members of an identifiable group, namely members of the Tutsi tribe.

(D) Léon Mugesera is a person described in s. 27(1)(*e*), having been granted landing by reason of a misrepresentation of a material fact, that is, by answering "No" on his permanent residence application form to Question 27-F, which asked if he had been involved, during a time of peace or war, in the commission of a war crime or a crime against humanity.

APPENDIX II

Federal Court Act, R.S.C. 1985, c. F-7

18.1 . . .

(4) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

. . .

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

Immigration Act, R.S.C. 1985, c. I-2

PART III

EXCLUSION AND REMOVAL

Inadmissible Classes

19. (1) No person shall be granted admission who is a member of any of the following classes:

. . .

(*j*) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code* and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission.

Removal After Admission

27. (1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who

(*a*) is a member of an inadmissible class described in paragraph 19(1)(*c*.2), (*d*), (*e*), (*f*), (*g*), (*k*) or (*l*);

(*a*.1) outside Canada,

(i) has been convicted of an offence that, if committed in Canada, constitutes an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or

(ii) has committed, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that would constitute an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

except a person who has satisfied the Minister that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

. . .

(*a*.3) before being granted landing,

. . .

(ii) committed outside Canada, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that constitutes an offence under the laws of the place

where the act or omission occurred and that, if committed in Canada, would constitute an offence referred to in paragraph (*a*.2),

except a person who has satisfied the Minister that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

. . .

(*e*) was granted landing by reason of possession of a false or improperly obtained passport, visa or other document pertaining to his admission or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by himself or by any other person,

. . .

(*g*) is a member of the inadmissible class described in paragraph 19(1)(*j*) who was granted landing subsequent to the coming into force of that paragraph,

. . .

Criminal Code, R.S.C. 1985, c. C-46

7. . . .

(3.76) For the purposes of this section,

. . .

"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

(3.77) In the definitions "crime against humanity" and "war crime" in subsection (3.76), "act or omission" includes, for greater certainty, attempting or conspiring to commit, counselling any person to commit,

aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission.

21. (1) Every one is a party to an offence who

(*a*) actually commits it;

(*b*) does or omits to do anything for the purpose of aiding any person to commit it; or

(*c*) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

235. (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment.

Hate Propaganda

318. (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

(*a*) killing members of the group; or

(*b*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

. . .

319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(*b*) an offence punishable on summary conviction.

464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

(*a*) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the same punishment to which a person who attempts to commit that offence is liable;

(*b*) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.

Rwandan Penal Code

[TRANSLATION]

BOOK ONE — OF OFFENCES AND ENFORCEMENT IN GENERAL

. . .

Title III

Of Persons Liable to Punishment

. . .

CHAPTER V
OF PARTICIPATION IN CRIMES

. . .

91. — The following shall be considered to be accomplices:

. . .

(4) persons who, by speeches, shouts or threats made in public places or at public meetings, by written or printed material sold or distributed, offered for sale or displayed in public places or at public meetings, or by posters or signs displayed in sight of the public, directly provoke a person or persons to commit such an act, without prejudice to the penalties provided for persons who provoke offences, even if the provocations produce no effect.

. . .

BOOK TWO — OF SPECIFIC OFFENCES AND THE ENFORCEMENT THEREOF

Title I
Of Offences Against the Public Interest

CHAPTER I
OF OFFENCES AGAINST STATE SECURITY

. . .

Division II
Of Breaches of Internal State Security

. . .

166. — Every one who, by making speeches at public meetings or in public places, by posting or distributing written or printed material, pictures or symbols of any kind or selling them, offering them for sale or displaying them in sight of the public, or by knowingly spreading false rumours, stirs up or attempts to stir up the public against the established government, stirs up or attempts to stir up citizens against one another, or alarms the public and thereby seeks to cause disturbances in the territory of the Republic, shall be sentenced to both imprisonment for two to ten years and a fine of two thousand to five thousand francs, or to either one of these penalties, without

prejudice to any heavier penalties provided for in other provisions of this code.

. . .

Title II
Of Offences Against Persons

CHAPTER I
OF HOMICIDE AND INTENTIONAL BODILY HARM

. . .

Division I
Of Murder and Its Various Forms

311. — Homicide committed with the intent of causing death is called murder; it is punishable by imprisonment for life.

. . .

CHAPTER VIII
OF DEFAMATORY STATEMENTS AND INSULTS

. . .

393. — Every one who displays, by defamation or public insult, an aversion to or hatred of a group of persons who, by their origin, belong to a particular race or religion, or who commits an act liable to provoke such aversion or hatred, shall be sentenced to both imprisonment for one month to one year and a fine not exceeding five thousand francs, or to either one of these penalties.

APPENDIX III

In his reasons for judgment ([2004] 1 F.C.R. 3, at para. 17), Décary J.A. reproduced Mr. Kamanzi's French translation of Mr. Mugesera's speech, and the English version of his reasons contains an English translation of the speech that was based on Mr. Kamanzi's translation. The translation of Mr. Mugesera's speech found in Décary J.A.'s reasons is reproduced below. Paragraph numbering has been added for easier reference.

SPEECH MADE BY LÉON MUGESERA AT A MEETING OF THE M.R.N.D. HELD IN Kabaya ON NOVEMBER 22, 1992.

Long life to our movement . . . .

Long life to President Habyarimana . . . .

Long life to ourselves, the militants of the movement at this meeting.

1. Militants of our movement, as we are all met here, I think you will understand the meaning of the word I will say to you. I will talk to you on only four points. Recently, I told you that we rejected contempt. We are still rejecting it. I will not go back over that.

2. When I consider the huge crowd of us all met here, it is clear that I should omit speaking to you about the first point for discussion, as I was going to tell you to beware of kicks by the dying M.D.R. That is the first point. The second point on which I would like us to exchange ideas is that we should not allow ourselves to be invaded, whether here where we are or inside the country. That is the second point. The third point I would like to discuss with you is also an important point, namely the way we should act so as to protect ourselves against traitors and those who would like to harm us. I would like to end on the way in which we must act.

3. The first point I would like to submit to you, therefore, is this important point I would like to draw to your attention. As M.D.R., P.L., F.P.R. and the famous party known as P.S.D. and even the P.D.C. are very busy nowadays, you should know what they are doing, and they are busy trying to injure the President of the Republic, namely, the President of our movement, but they will not succeed. They are working against us, the militants: you should know the reason why all this is happening: in fact, when someone is going to die, it is because he is already ill!

4. The thief Twagiramungu appeared on the radio as party president, and he had asked to do so, so he could speak against the C.D.R. However, the latter struck him down. After he was struck down, in all taxis everywhere in Kigali, militants of the M.D.R., P.S.D. and accomplices of the Inyenzis were profoundly humiliated, so they were almost dead! Even Twagiramungu himself completely disappeared. He did not even show up at the office where he was working! I assure you that this man's party is covered with shame: everyone was afraid and they nearly died!

5. So, since this party and those who share its views are accomplices of the Inyenzis, one of them named Murego on arrival in Kibungo stood up to say [TRANSLATION] "We are descended from Bahutus and are in fact Bahutus". The reply to him was [TRANSLATION] "Can you lose your brothers by death! Tell us, who do you get these statements about Bahutus from?" They were so angry they nearly died!

6. That was when the Prime Minister named, they say, I don't know whether I should say Nsengashitani (I beg Satan) or (Nseng) Iyaremye (I beg the Creator), headed for Cyangugu to prevent the Bahutus defending themselves against the Batutsis who were laying mines against them. You heard this on the radio. Then we laughed at him, you heard him yourselves, and he lost his head, he and all the militants in his party, and those of the other parties who shared his views. This is when these people had just suffered such a reverse . . . you yourselves heard that the president of our party, His Excellency Major-General Habyarimana Juvénal, spoke when he arrived in Ruhengeri. The "Invincible" put himself solemnly forward, while the others disappeared underground! In their excitement, these people were nearly dead from excitement, as they learned that everyone, including even those who were claiming to be from other parties, were leaving them to come back to our party, as a result of our leader's speech.

7. Their kicks would threaten the most sensible person. Nevertheless, in view of our numbers, I realize there are so many of us that they could not find where to give the kicks: they are wasting their time!

8. That is the first point. The M.D.R. and the parties who share its views are collapsing. Avoid their kicks. As I noted, you will not even have a scratch!

9. The second point I have decided to discuss with you is that you should not let yourselves be invaded. At all costs, you will leave here taking these words with you, that you should not let yourselves be invaded. Tell me, if you as a man, a mother or father, who are here, if someone comes one day to move into your yard and defecate there, will you really allow him to come again? It is out of the question. You should know that the first important thing . . . you have seen our brothers from Gitarama here. Their flags — I distributed them when I was working at our party's headquarters. People flew them everywhere in Gitarama. But when you come from Kigali, and you continue on into Kibilira, there are no more M.R.N.D. flags to be seen: they have been taken down! In any case, you understand yourselves, the priests have taught us good things: our movement is also a movement for peace. However, we have to know that, for our peace, there is no way to have it but to defend ourselves. Some have quoted the following saying: [TRANSLATION] "Those who seek peace always make ready for war". Thus, in our prefecture of Gisenyi, this is the fourth or fifth time I am speaking about it, there are those who have acted first. It says in the Gospel that if someone strikes you on one cheek, you should turn the other cheek. I tell you that the Gospel has changed in our movement: if someone strikes you on one cheek, you hit them twice on one cheek and they collapse on the ground and will never be able to recover! So here, never again will what they call their flag, what they call their cap, even what they call their militant, come to our soil to speak: I mean throughout Gisenyi, from one end to the other!

10. (A proverb) says: [TRANSLATION] “Hyenas eat others, but when you go to eat them they are bitter”! They should know that one man is as good as another, our yard (party) will not let itself be invaded either. There is no question of allowing ourselves to be invaded, let me tell you. There is also something else I would like to talk to you about, concerning “not being invaded”, and which you must reject, as these are dreadful things. Our elder Munyandamutsa has just told you what the situation is in the following words: [TRANSLATION] “Our inspectors, currently 59 throughout the country, have just been driven out. In our prefecture of Gisenyi there are eight. Tell me, dear parents gathered here, have you ever seen, I do not know if she is still a mother, have you ever seen this woman who heads the Ministry of Education, come herself to find out if your children have left the house to go and study or go back to school? Have you not heard that she said that from now on no one will go back to school? — and now she is attacking teachers! I wanted to draw to your attention that she called them to Kigali to tell them that she never wanted to hear anyone say again that an education inspector had joined a political party. They answered: “First leave your party, because you yourself are a Minister and you are in a political party, and then we will follow your example”. She is still there! You have also heard on the radio that nowadays she is even insulting our President! Have you ever heard a mother insulting people in public? So what I would like to tell you here, and this is the truth, there is no doubt, to say it would be this or that, there might be among them people who have behaved flippantly. Have you heard that they are persecuted for membership in the M.R.N.D.? They are persecuted for membership in the M.R.N.D. Frankly, will you allow them to invade us to take the M.R.N.D. away from us and to take our men?

11. I am asking you to take two very important actions. The first is to write to this shameless woman who is issuing insults publicly and on the airwaves of our radio to all Rwandans. I want you to write her to tell her that these teachers, who are ours, are irreproachable in their conduct and standards, and that they are looking after our children with care; these teachers must continue to educate our children and she must mend her ways. That is the first action I am asking you to take. Then, you would all sign together: paper will not be wanting. If you wait a few days and get no reply, only about seven days, as you will send the letter to someone who will take it to its destination, so he will know she has received it, if seven days go by without a reply, and she takes the liberty of arranging for someone else to replace the existing inspectors, you can be sure, if she thinks there is anyone who will come to replace them (the inspectors), for anyone who comes . . . the place where the Minister is from is the place known as Nyaruhengeri, at the border with Burundi, (exactly) at Butari, you will ask this man to get moving, with his travelling provisions on his head, and be inspector at Nyaruhengeri.

12. Let everyone whom she has appointed be there, let them go to Nyaruhengeri to look after the education of her children. As for ours, they will continue to be educated by our own people. This is another

important point on which we must take decisions: we cannot let ourselves be invaded: this is forbidden!

13. Something else which may be called [TRANSLATION] "not allowing ourselves to be invaded" in the country, you know people they call "Inyenzis" (cockroaches), no longer call them "Inkotanyi" (tough fighters), as they are actually "Inyenzis". These people called Inyenzis are now on their way to attack us.

14. Major-General Habyarimana Juvénal, helped by Colonel Serubuga, whom you have seen here, and who was his assistant in the army at the time we were attacked, have (both) got up and gone to work. They have driven back the "Inyenzis" at the border, where they had arrived. Here again, I will make you laugh! In the meantime these people had arrived who were seeking power. After getting it, they headed for Brussels. On arrival in Brussels, note that this was the M.D.R., P.L. and P.S.D., they agreed to deliver the Byumba prefectorate at any cost. That was the first thing. They planned together to discourage our soldiers at any cost. You have heard what the Prime Minister said in person. He said they (the soldiers) were going down to the marshes (to farm) when the war was at its height! It was at that point that people who had low morale abandoned their positions and the "Inyenzis" occupied them. The Inyenzis descended on Byumba and they (the government soldiers) ransacked the shops of our merchants in Byumba, Ruhengeri and Gisenyi. The government will have to compensate them as it had created this situation. It was not one of our merchants (who created it), as they were not even asking for credit! Why credit! So those are the people who pushed us into allowing ourselves to be invaded. The punishment for such people is nothing but: [TRANSLATION] "Any person who demoralizes the country's armed forces on the front will be liable to the death penalty". That is prescribed by law. Why would such a person not be killed? Nsengiyaremye must be taken to court and sentenced. The law is there and it is in writing. He must be sentenced to death, as it states. Do not be frightened by the fact that he is Prime Minister. You have recently heard it said on the radio that even French Ministers can sometimes be taken to court! Any person who gives up any part of the national territory, even the smallest piece, in wartime will be liable to death. Twagiramungu said it on the radio and the C.D.R. dealt with him on the radio. The militants in his (party) then lost their heads — can you believe that? I would draw to your attention the fact that this man who gave up Byumba on the radio while all of us Rwandans, and all foreign countries, were listening to him, this man will suffer death. It is in writing: ask the judges, they will show you where it is, I am not lying to you! Any person who gives up even the smallest piece of Rwanda will be liable to the death penalty; so what is this individual waiting for?

15. You know what it is, dear friends, "not letting ourselves be invaded", or you know it. You know there are "Inyenzis" in the country who have taken the opportunity of sending their children to the front, to go and help the "Inkotanyis". That is something you intend to speak about yourselves. You know that yesterday I came back from Nshili in

Gikongoro at the Burundi border, travelling through Butare. Everywhere people told me of the number of young people who had gone. They said to me [TRANSLATION] "Where they are going, and who is taking them . . . why are they are (*sic*) not arrested as well as their families?" So I will tell you now, it is written in the law, in the book of the Penal Code: [TRANSLATION] "Every person who recruits soldiers by seeking them in the population, seeking young persons everywhere whom they will give to the foreign armed forces attacking the Republic, shall be liable to death". It is in writing.

16. Why do they not arrest these parents who have sent away their children and why do they not exterminate them? Why do they not arrest the people taking them away and why do they not exterminate all of them? Are we really waiting till they come to exterminate us?

17. I should like to tell you that we are now asking that these people be placed on a list and be taken to court to be tried in our presence. If they (the judges) refuse, it is written in the Constitution that "ubutabera bubera abaturage". In English, this means that [TRANSLATION] "JUSTICE IS RENDERED IN THE PEOPLE'S NAME". If justice therefore is no longer serving the people, as written in our Constitution which we voted for ourselves, this means that at that point we who also make up the population whom it is supposed to serve, we must do something ourselves to exterminate this rabble. I tell you in all truth, as it says in the Gospel, "When you allow a serpent biting you to remain attached to you with your agreement, you are the one who will suffer".

18. I have to tell you that a day and a night ago — I do not know if it is exactly in Kigali, a small group of men armed with pistols entered a cabaret and demanded that cards be shown. They separated the M.D.R. people. You will imagine, those from the P.L. they separated, and even the others who pass for Christians were placed on one side. When an M.R.N.D. member showed his card, he was immediately shot; I am not lying to you, they even tell you on the radio; they shot this man and disappeared into the Kigali marshes to escape, after saying they were "Inkotanyis". So tell me, these young people who acquire our identity cards, then they come back armed with guns on behalf of the "Inyenzis" or their accomplices to shoot us! — I do not think we are going to allow then (*sic*) to shoot us! Let no more local representatives of the M.D.R. live in this commune or in this prefecture, because they are accomplices! The representatives of those parties who collaborate with the "Inyenzis", those who represent them . . . I am telling you, and I am not lying, it is . . . they only want to exterminate us. They only want to exterminate us: they have no other aim. We must tell them the truth. I am not hiding anything at all from them. That is in fact the aim they are pursuing. I would tell you, therefore, that the representatives of those parties collaborating with the "Inyenzis", namely the M.D.R., P.L., P.S.D., P.D.C. and other splinter groups you run into here and there, who are connected and who are only wandering about, all these parties and their representatives must go to live in Kayanzi with Nsengiyaremye: in that way we will know where the people we are at war with are.

19. My brothers, militants of our movement, what I am telling you is no joke, I am actually telling you the complete truth, so that if one day someone attacks you with a gun, you will not come to tell us that we who represent the party did not warn you of it! So now, I am telling you so you will know. If anyone sends a child to the "Inyenzis", let him go back with his family and his wife while there is still time, as the time has come when we will also be defending ourselves, so that . . . we will never agree to die because the law refuses to act!

20. I am telling you that on the day the demonstrations were held, Thursday, they beat our men, who had to take refuge in the church at the bottom of the Rond-Point. These so-called Christians from the P.D.C. pursued them and went into the church to beat them. Others fled into the Centre Culturel Français. I should like to tell you that they have begun killing. That is actually what is happening! They attack homes and kill people. Now, anyone who they hear is a member of the M.R.N.D. is beaten and killed by them; that is how things are. Let these people who represent their parties in our prefecture go and live with the "Inyenzis", we will not allow people living among us to shoot us when they are at our sides!

21. There is another important point I would like to talk to you about so that we do not go on allowing ourselves to be invaded: you will hear mention of the Arusha discussions. I will not speak about this at length as the representative of the (Movement's) Secretary General will speak about it in greater detail. However, what I will tell you is that the delegates you will hear are in Arusha do not represent Rwanda. They do not represent all of Rwanda, I tell you that as a fact. The delegates from Rwanda, who are said to be from Rwanda, are led by an "Inyenzi", who is there to discuss with "Inyenzis", as it says in a song you hear from time to time, where it states [TRANSLATION] "He is God born of God". In the same way, they are [TRANSLATION] "Inyenzis born of Inyenzis, who speak for Inyenzis". As to what they are going to say in Arusha, it is exactly what these "Inyenzi" accomplices living here went to Brussels to say. They are going to work in Arusha so everything would be attributed to Rwanda, while there was nothing not from Brussels that happened there! Even what came from Rwanda did not entirely come from our government: it was a Brussels affair which they put on their heads to take with them to Arusha! So it was one "Inyenzi" dealing with another! As for what they call "discussions", we are not against discussions. I have to tell you that they do not come from Rwanda: they are "Inyenzis" who conduct discussions with "Inyenzis", and you must know that once and for all! In any case, we will never accept these things which come from there!

22. Another point I have talked to you about is that we must defend ourselves. I spoke about this briefly. However, I am telling you that we must wake up! Someone whispered in my ear a moment ago that it was not only the parents who must wake up as well as the teachers about the famous problem for inspectors. Even people who do not have children

in school should also support them, as they will have one tomorrow or they had one yesterday. Let us all wake up and sign!

23. The second point I wish to speak to you about is the following: we have nine Ministers in the present government. Just as they rose up to drive out our inspectors, relying on their Ministry, as they rose up to drive out teachers from secondary schools . . . a few days ago, you have heard that the famous woman was going around the schools. She had no other reason for going there but to drive out the inspectors and teachers who were there and who were not in her party. You have heard what happened in Minitrape: it was not just a diversion, they even went after our workers! You have heard what happened at the radio, and the Byumba program that was cancelled. You have heard how all this happened. I have to tell you that we must ask our Ministers that they too, there are people working for their parties and who are in our Ministries. . . . For example, you have heard mention of the Militant-Minister Ngirabatware, who is not present here because the country has given him an important mission. I visited his Ministry on Thursday. There was a little handful of people there, I am not exaggerating because I am in the M.R.N.D., (a handful of) some people from the M.R.N.D., those who were there were exclusively "Inyenzis" belonging to the P.L. and the M.D.R.! Those are the ones who are in the Planning Ministry! You will understand that if this Minister said: [TRANSLATION] "If you touch our inspectors, I will also liquidate yours", what would happen? Our Ministers would also shake the bag so the vermin who were with them would disappear and go into their Ministries.

24. One important thing which I am asking all those who are working and are in the M.R.N.D.: "Unite!" People in charge of finances, like the others working in that area, let them bring money so we can use it. The same applies to persons working on their own account. The M.R.N.D. have given them money to help them and support them so they can live as men. As they intend to cut our necks, let them bring (money) so [[we can defend ourselves by cutting their necks]]! Remember that the basis of our Movement is the cell, that the basis of our Movement is the sector and the Commune. He (the President) told you that a tree which has branches and leaves but no roots dies. Our roots are fundamentally there. Unite again, of course you are no longer paid, members of our cells, come together. If anyone penetrates a cell, watch him and crush him: if he is an accomplice do not let him get away! Yes, he must no longer get away!

25. Recently, I told someone who came to brag to me that he belonged to the P.L. — I told him [TRANSLATION] "The mistake we made in 1959, when I was still a child, is to let you leave". I asked him if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! I told him [TRANSLATION] "So don't you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly".

26. What I am telling you is, we have to rise up, we must really rise up. I will end with an important thing. Yesterday I was in Nshili, you learned that the Barundis slandered us, I went to find out the truth. Before I went there, people told me that I would not come back. That I would die there. I replied [TRANSLATION] "If I die, I will not be the first victim to be sacrificed". In Nshili they fired the mayor who was there before, apparently on the pretext that he was old! — that he began working in 1960! I saw him yesterday, and he was still a young man! — but because he was in the M.R.N.D., he left! They wanted to put in a thief; that didn't work either. When they put in an honest man, they (the public) refused him! Now, this commune known as Nshili is administered by a consultant who also has no idea what to do! At this place called Nshili, we have armed forces of the country who are guarding the border. There are people known as the J.D.R. for the good reason that our national soldiers are disciplined and do not shoot anyone, especially they would not shoot a Rwandan, unless he was an "Inyenzi", these soldiers did not know that everyone in the M.D.R. had become "Inyenzis"! They did not know it! They surrounded them and arrested our police, so that a citizen who was not in our party personally told me [TRANSLATION] "What I want is for them to hold elections so we can elect a mayor. Otherwise, before he comes, let us provisionally put back the person who was there before because from the state things are in, he will not be able to put people on the right path again".

27. Dear relations, dear brothers, I would like to say something important to you: elections must be held, we must all vote. As you are now all together here, has anyone scratched anyone else? They talk of security. They say we cannot vote. Are we not going to mass on Sunday? Did you not come here to the meeting? In the M.R.N.D., did you not elect the incumbents at all levels? Even those who say this, did they not do the same thing? Did they not vote? On the pretext they suggest, there is no reason preventing us from voting on security grounds, because those who are going about the country and the troubles which have occurred, it is those who provoke them. That is the word I would say to you: they are all misleading us: even here where we are, we can vote.

28. Second, they are relying on the war refugees in Byumba. I should tell you that no one went to ask those people if they did not want to vote. They told me personally that they previously had lazy counsellors, that even some of their mayors were lazy. Since the Ministry which gives them what they live on is supervised by an "Inkotanyi", or rather by the "Inyenzi" Lando, he chose people known as "Inyenzis" and their accomplices who are in this country, and gave them the job of taking food supplies to those people. Instead of taking it to them there, they sold it so they could buy ammunition which they gave to the "Inyenzis" who have been shooting us! I should tell you that they said [TRANSLATION] "They shoot us from behind and you shoot us from in front by sending us this rabble to bring us food supplies". I had no answer to give them, and they went on [TRANSLATION] "What we want, they said, is that from ourselves, we can elect incumbents, advisors, cell leaders, a mayor; we can know he is with us here in the camp, he

protects us, he gets us food supplies". You will understand that what I was told by these men and women who fled in such circumstances as you hear about from time to time, on all sides, was that they also wanted elections: the whole country wants elections so that they will be led by good people as was always the case. Believe me, what we should all do, that is what we should do, we should call for elections. So in order to conclude, I would remind you of all the important things I have just spoken to you about: the most essential is that we should not allow ourselves to be invaded, lest the very persons who are collapsing take away some of you. Do not be afraid, know that anyone whose neck you do not cut is the one who will cut your neck. Let me tell you, these people should begin leaving while there is still time and go and live with their people, or even go to the "Inyenzis", instead of living among us and keeping their guns, so that when we are asleep they can shoot us. Let them pack their bags, let them get going, so that no one will return here to talk and no one will bring scraps claiming to be flags!

29. Another important point is that we must all rise, we must rise as one man . . . if anyone touches one of ours, he must find nowhere to go. Our inspectors are going nowhere. Those whom they have placed will set out for Nyaruhengeri, to Minister Agathe's home, to look after the education of her children! Let her keep them! I will end with one important thing: elections. Thank you for listening to me and I also thank you for your courage, in your arms and in your hearts. I know you are men, you are young women, fathers and mothers of families, who will not allow yourselves to be invaded, who will reject contempt. May your lives be long!

Long life to President Habyarimana . . . .

Long life and prosperity to you . . . .

[Translated into English from the French Translation of]
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BUTARE — RWANDA

Appeal allowed.

Solicitor for the appellant: Deputy Attorney General of Canada, Montréal.

Solicitors for the respondents: Guy Bertrand & Associés, Québec.

Solicitor for the interveners the League for Human Rights of B'nai Brith Canada, PAGE RWANDA and the Canadian Centre for International Justice: David Matas, Winnipeg.

Solicitors for the interveners the Canadian Jewish Congress, the University of Toronto, Faculty of Law — International Human Rights Clinic, and Human Rights Watch: Goodmans, Toronto.