Court File No. 30025

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

- and -

LEON MUGESERA, GEMMA UWAMARIYA, IRENEE RUTEMA, YVES RUSI, CARMEN NONO, MIREILLE URUMURI AND MARIE-GRACE HOHO

Respondents

- and -

LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA, PAGE RWANDA AND THE CANADIAN CENTRE FOR INTERNATIONAL JUSTICE
CANADIAN JEWISH CONGRESS, THE UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH

Interveners

JOINT FACTUM OF THE INTERVENERS, CANADIAN JEWISH CONGRESS, THE UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH

GOODMANS LLP
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, ON M5B 2M6

Benjamin Zarnett (bzarnett@goodmans.ca)
Francy Kussner (fkussner@goodmans.ca)
Daniel Cohen (dcohen@goodmans.ca)
Tel: (416) 979-2211
Fax: (416) 979-1234

Solicitors for the Interveners Canadian Jewish Congress, The University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch

NELLIGAN O'BRIEN PAYNE
Barristers & Solicitors
Suite 1900, 66 Slater St.
Ottawa, ON K1P 5H1

Dougald E. Brown
Tel: (613) 238-8080
Fax: (613) 238-2098
TDD/ATS: (613) 563-4960

Ottawa Agent for the Solicitors for the Interveners Canadian Jewish Congress, The University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch

TO:

THE REGISTRAR OF THIS COURT

AND TO:

Deputy Attorney General of Canada
(Michel F. Denis, Esq.)
(Normand Lemyre, Esq.)
Counsel for the Appellant
200 Rene-Levesque Blvd. West
East Tower, 9th Floor
Montreal, Quebec H2Z 1X4
Tel: (514) 283-2126 (Mr. Denis)
Tel: (514) 283-5215 (Mr. Lemyre)
Fax: (514) 496-7372 (Mr. Denis)
Fax: (514) 283-3856 (Mr. Lemyre)
Email: michel.denis@justice.gc.ca
nlemyre@justice.gc.ca

Deputy Attorney General of Canada
(Christopher Rupar, Esq.)
Ottawa Agent
234 Wellington St., Room 1216
Ottawa, Ontario K1A 0H8
Tel: (613) 941-2351
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

AND TO:

GUY BERTRAND & ASSOCIES
(Mr. Guy Bertrand)
Counsel for the Respondents
871 Chemin St-Louis, 2nd Floor
Quebec City, Quebec G1S 1C1
Tel: (418) 687-2862
Fax: (418) 687-2848
Email: guy.bertrand@guybertrand.com

BERGERON, GAUDREAU, LAPORTE
(Mr. Richard Gaudreau)
Correspondent in Ottawa
167, rue Notre-Dame-de-L'lle
Gatineau, Quebec J8X 3T3
Tel: (819) 770-7928
Fax: (819) 770-1424
Email: bergeron.gaudreau@gc.aira.com

AND TO:

David Matas
225 Vaughan Street Suite 602
Winnipeg, Manitoba R3C1T7
Tel: (204) 944-1831
Fax: (204) 942-1494

Solicitor for the Interveners League for Human Rights of B'nai Brith Canada, PAGE RWANDA and the Canadian Centre for International Justice

GOWLING LAFLEUR HENDERSON LLP
(Brian Crane)
Ottawa Agent
2600 - 160 Elgin St Box 466 Station D
Ottawa, Ontario K1P1C3
Tel: (613) 232-1781
Fax: (613) 563-9869
Email: Brian.Crane@gowlings.com

TABLE OF CONTENTS

PART I – BACKGROUND AND FACTS

1. The Canadian Jewish Congress, the University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch (collectively the "Interveners") intervene in the within appeal pursuant to the order of Madam Justice Deschamps on August 26, 2004.

2. By Judgment dated September 8, 2003, the Federal Court of Appeal held that a speech given in Rwanda by Mr. Leon Mugesera ("Mugesera") a high ranking official in the Mouvement républicain national pour la democratie et le developpement ("MRND") on November 22, 1992, would not have contravened ss. 318 and 319 of the *Criminal Code* R.S.C. 1985, c. C-46 had it been made in Canada, nor did it violate comparable provisions under Rwandan criminal law, and, therefore, did not render him inadmissible to Canada pursuant to s. 27(1)(a.3)(ii) of the *Immigration Act* R.S.C. 1985, c. I-2. The Court further held that Mugesera's speech did not constitute a crime against humanity and therefore did not render Mugesera inadmissible pursuant to ss. 19(1)(j) and 27(1)(g) of the *Immigration Act*. The Interveners submit that the Federal Court of Appeal erred in law and request that its decision be overturned by this Honourable Court.

A. Interveners

3. The Canadian Jewish Congress ("Congress") is a non-profit human rights organization concerned with the rights and freedoms of the Canadian Jewish community as well as the rights of ethnic, religious and other minority groups in Canadian society. Congress played an important role in securing the enactment of ss. 318 and 319 of the Criminal Code. As these provisions were enacted to protect identifiable groups, the effective enforcement of these sections, including their use to prevent offenders from entering and remaining in Canada is of particular interest to identifiable groups, including Canada's Jewish community. In addition, Congress has always had an interest in ensuring that perpetrators of war crimes and/or crimes against humanity are brought to justice.

4. The International Human Rights Clinic ("IHRC") is a specialized center for international human rights advocacy at the University of Toronto, Faculty of Law and has unique experience and perspectives on international human rights issues, including international criminal law. The IHRC has represented parties or appeared as an intervener before the Special Court for Sierra

Leone, UN agencies – including the UN Office on the Coordination of Humanitarian Assistance – and the European Court of Human Rights. The IHRC has also appeared in judicial proceedings in the United States, Belize and Singapore. Given its position as an international human rights clinic located in Canada, and given its overall purposes and objectives, the IHRC has a particular interest in ensuring that Canada does not become a safe haven for those who commit crimes against humanity in foreign jurisdictions.

5. Human Rights Watch ("HRW") is the second largest international human rights organization in the world. It investigates and reports on violations of fundamental human rights in over 70 countries worldwide. HRW has a particular interest in this appeal because of its intensive involvement in the documentation of the human rights abuses which occurred in Rwanda.

B. Facts

6. The Interveners adopt Part I of the Appellant's factum with particular reference to the following facts:

(a) Mugesera delivered his November 22, 1992, speech at Kabaya, Gisenyi, in the context of acute ethnic hatred and violence. It is undisputed that ethnic strife between Hutus and Tutsis had been a prominent feature of Rwandan political culture since at least the 1960s. By the early 1990s, the political situation had reached a crisis point, and the two years preceding Mugesera's speech were marked by episodes of anti-Tutsi violence. Beginning in October 1990, Rwandan authorities arrested approximately 8,000 suspected accomplices of the Rwandan Patriotic Front, which was primarily comprised of Tutsi refugees. These arrests followed a staged attack on Kigali on October 4, 1990. The government responded to this attack by massacring 500 to 1,000 Tutsis from the Mutara region. From October 11 to 13, 1990, local officials encouraged the slaughter of an additional 350 to 500 Tutsis in the town of Kibilira in the prefecture of Gisenyi. In December 1990, the magazine Kangura published the "Ten Commandments" of the Hutu, which called for hatred and violence against Tutsis. From January 1991 to March 1991, following the withdrawal of the maily Tutsi Rwandan Patriotic Front from Rwanda, 500 to 1,000 Bagogwe Tutsis were killed in Gisenyi and the neighbouring Ruhengri region.

(b) From March 1992 to October 1992, despite movement towards agreement on the composition of a transitional government and permanent power sharing arrangement, violence against Tutsis and moderate Hutus continued. In March 1992, the racist Coalition for the Defence of the Republic ("CDR") party was formed, and MRND militias and local authorities massacred Tutsis in the

Bugesera region. From April 25, 1992 to May 6, 1992, while Mugesera was Vice President of the MRND, movement members launched attacks in Kigali, Ruhango, Kimisagera and Butare. On August 20, 1992, Tutsis and moderate Hutus were massacred in Kibuye, the region immediately south of Gisenyi. On September 21, 1992, the Rwandan army distributed a document defining Tutsis from the interior and Hutus opposed to the regime as *a priori* suspects.

(c) Mugesera held numerous government positions in the months preceding his speech, including the post of Vice-President of the MRND in Gisenyi, the home territory of President Habyarimana. He was head of the political affairs branch in the MRND headquarters from June 1989 to November 1991, Secretary General in the Ministry of Information from March 18 to November 15, 1992, and then counsellor for Political and Administrative Affairs in the Ministry of the Family and the Status of Women as of November 15, 1992. He was well-educated and commanded considerable respect from those around him. When Mugesera delivered his speech on November 22, 1992, the several thousand people to whom he spoke recognized him as a leader. The breadth of his popular appeal is evidenced by the fact that transcripts of his speech were later widely circulated.

Factum of the Appellant at Part I.

Reasons of the Federal Court of Appeal at paras. 134, 138.

PART II – POINTS IN ISSUE

7. In the Appellant's Factum, the issues in dispute regarding this matter are set out as follows (translated from French):

(a) As to the content of the speech, from a strictly factual point of view, the Federal Court of Appeal acted beyond its powers of intervention by undertaking its own assessment of the evidence, without granting the deference required to the Appeal Division's factual findings;

(b) The Federal Court of Appeal erred in law by finding that, in his speech, Mugesera did not incite hatred, murder and genocide;

(c) The Federal Court of Appeal erred in law in finding that the Appeal Division could not validly think, with reasonable cause, that through his speech, Mugesera committed a crime against humanity in Rwanda;

8. The Interveners' submissions will focus primarily on issues (b) and (c) outlining the importance of international law as an interpretive aid to Canadian law and addressing the significance to minority groups in Canada of the *Criminal Code* provisions which codify the crimes of incitement to hatred and genocide.

PART III – ARGUMENT

A. Mugesera's Speech Qualifies as Incitement to Genocide and is therefore a Crime Against Humanity

1 Introduction

9. The Interveners submit that the Federal Court of Appeal erred in finding that Mugesera's speech did not constitute incitement to genocide or a crime against humanity, and therefore failed to render Mugesera inadmissible under ss. 19(1)(j) and 27(1)(g) of the *Immigration Act*.

2 The Federal Court of Appeal Erred in Failing to Consider International Law under which Mugesera's Speech Qualifies as Incitement to Genocide

10. Unlike most international criminal laws, genocide and incitement to genocide are crimes created and defined by international law. While the majority of international crimes, including willful killing and rape, originated in domestic legal systems before being recognized as international crimes, genocide and incitement to genocide were created by international law and only later incorporated into domestic criminal laws. As a result, the primary source for the definition and analysis of the crimes' elements remains international law.[1]

11. The decision of the Federal Court of Appeal is silent on the use and significance of modern international law regarding incitement to genocide. Because international law is applicable not only to the interpretation of federal law, but also to the exercise of administrative discretion, it is respectfully submitted that the Court erred by ignoring international criminal law standards.

> *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-71.

12. While the Federal Court of Appeal correctly acknowledged the importance of using the word "genocide" "in the precise sense that it has in Canada and international criminal law", the Court's sole reference to international law on that subject was drawn from the language of the

[1] In the words of the International Criminal Tribunal for Rwanda (the "ICTR"): "The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards." *Prosecutor v. Ngeze* (2003), Case No. ICTR-99-52-T (Judgment and Sentence, International Criminal Tribunal for Rwanda, Trial Chamber I) at para. 1010. See also *Prosecutor v. Akayesu* (1998), Case No. ICTR-96-4-T (Judgment, International Criminal Tribunal for Rwanda, Trial Chamber I).

Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention") itself. The Court entirely failed to consider the intent, purpose and use of the Genocide Convention.[2]

> Reasons of the Federal Court of Appeal, at para. 18.

13. The Genocide Convention defines the offence of genocide as:

> (Article II) …any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."
> (Article III) "The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.
>
> > *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by the General Assembly of the United Nations on 9 December 1948 (entry into force January 12, 1951), at Arts. II & III. ["Genocide Convention"]

14. Article III(c) defines incitement to genocide as a central and punishable offence under the Convention. The Federal Court of Appeal decision failed entirely to discuss Article III(c), the punitive purposes of the Convention, or the uniform body of international criminal law which recognizes that genocide is a process which utilizes tactics of dehumanization and categorization to accomplish its ultimate purpose.[3] Much of that law comes from the International Criminal Tribunal for Rwanda ("ICTR"), an institution designed specifically to address the crimes committed in Rwanda, which form the subject matter herein.

> *Statute of the International Criminal Tribunal for Rwanda*, SC Res. 955, 3453d Mtg., UN Doc. S/RES/955 (1994).

3 Nature of Incitement to Genocide

15. In addition to Article III(c) of the Genocide Convention, incitement to genocide is codified in the statutes of the ad hoc international tribunals for Rwanda and the former Yugoslavia (the "ICTY") and the International Criminal Court as "direct and public incitement to commit genocide." In specifying a distinct act, the drafters of the Genocide Convention

[2] See Nehemiah Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960).
[3] Gregory H. Stanton, "Eight Stages of Genocide," online: Genocide Watch <http://www.genocidewatch.org/8stages.htm>.

created an autonomous infraction, a crime that does not require the prosecution to prove any particular result.

16. Incitement to genocide is distinct from the crime of genocide in at least two important respects. First, incitement to commit genocide does not require the commission or even attempted commission of the actual crime of genocide. A person who incites genocide is punishable for the incitement even if the genocide is never actually committed or is unsuccessful. The rationale behind the foregoing is clear: the act of incitement is sufficiently dangerous and blameworthy to be punished. Accordingly, the crime is distinguished from other forms of complicity including incitement to conduct war crimes or crimes against humanity, and thus was separately defined in the Rome Statute of the International Criminal Court.[4]

> *Prosecutor v. Akayesu* (1998), Case No. ICTR-96-4-T (Judgment, International Criminal Tribunal for Rwanda, Trial Chamber I) at para. 562.

17. The inchoate nature of the offence is crucial to the interpretation of the crime and its application to Mugesera's speech, since it provides that **causation is not a required element of the crime**. It was unnecessary for the Minister to provide any evidence whatsoever that any individual who heard Mugesera's speech killed or attempted to kill a person in response. Indeed, in the well-known Nuremberg trial of Julius Streicher, no allegations were made connecting Streicher's inciting publications to any particular violence. Similarly, the judges in the recent ICTR *Media Case* convicted the defendants without hearing any evidence on that point. The Tribunal stated: "The Chamber recalls the incitement is a crime regardless of whether it has the effect intends it to have."

> 22 Trial of The Major War Criminals Before the International Military Tribunal (1946) at 547-549. *("Streicher"*)
>
> *Prosecutor v. Ngeze* (2003), Case No. ICTR-99-52-T (Judgment and Sentence, International Criminal Tribunal for Rwanda, Trial Chamber I) at para. 1029 (" *Media Case*").
>
> Reasons of the Federal Court of Appeal, at para. 24.

[4] Article 25(3)(e) of The Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) ["The Rome Statute"] prescribes individual criminal responsibility for a person that "In respect of the crime of genocide, directly and publicly incites others to commit genocide". In comparison article 25(3)(b) of the Statute impose individual criminal responsibility on a person that "Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted." The Trial Division erred in not distinguishing between incitement to genocide and incitement to murder and violence.

18. The second unique feature of the crime is that incitement to genocide is typically perpetrated by state or public officials, and is meant to increase the power of the state. Accordingly, the main rationale of protecting free speech, namely to protect those who resist the government, is less applicable.[5] In the case at bar, Mugesera was a high-ranking government official at the time he delivered his speech.

4 Elements of the Crime

19. To prove incitement to genocide, as distinguished from political speech, the Minister had to establish that, on a balance of probabilities, the speech at issue was *direct* and *public* and that the speaker had the requisite *intent*. It is respectfully submitted that each of these elements was present in Mugesera's speech and that the Federal Court of Appeal erred in failing to find that incitement to genocide took place.

> Reasons of the Federal Court of Appeal, at para. 27.

(a) The Speech Was "Direct"

20. The tribunal in *Akayesu* examined the definitions of incitement in comparative law and found that both the Common law and Civil law systems define incitement similarly: to encourage, persuade or provoke (the term used by Civil law systems) another person to commit a crime. *Akayesu* holds that incitement can occur "through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of postcards or posters, or through any other means of audiovisual communication."

> *Akayesu*, *supra* at para. 559.

21. The ICTR further determined in *Akayesu* that

> "… the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit."

> *Ibid*., at para. 557.

[5] Susan Benesch, "Inciting Genocide, Pleading Free Speech" (Summer 2004) World Policy J at 65.

22. Based on these tenets the *Akayesu* tribunal found that the analysis should be conducted on a case-by-case basis "by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof." Thus, for example, the ICTR determined that the ostensibly innocent phrase "go to work" came to be understood in the Rwandan context as an order to "go kill the Tutsis and Hutu political opponents of the interim government."

> *Ibid* at para. 558.
>
> *Prosecutor v. Ruggiu* (2000), Case No. ICTR 97-32-I (Judgment and Sentence, International Criminal Tribunal for Rwanda, Trial Chamber I) at para. 44.

23. Similarly, the ICTR stated in the *Media Case*:

> "The tone of the statement is as relevant to this determination as is its content. The Chamber also considers the context in which the statement is made to be important."
>
> *Media Case*, *supra* at para. 1022.

24. The Federal Court of Appeal acknowledged that Mugesera's speech must be viewed in light of the specific political and cultural context, yet it committed three errors in the application of that principle.

25. First, the Federal Court of Appeal's finding that the word "Tutsi" was used only once by Mugesera in his speech, ignores the fact that his speech used the terms "*inyenzi*" and "*Inkotanyi*" more than 25 times. The ICTR has repeatedly recognized that "*inyenzi*" translates as "cockroach". The Interveners submit that this term was deliberately used to dehumanize the Tutsi ethnic minority group in Rwanda.

> *Media Case*, *supra* at para. 217.
>
> *Akayesu*, *supra* at para. 148.
>
> *Ruggiu*, *supra* at para. 44 (iii)

26. Indeed, there is an infamous tradition of genocidal inciters portraying the "others" as vermin.[6] Far from the benign interpretation that the Federal Court of Appeal adopts, the ICTR in

[6] Julius Streicher, for example, described Jews as germs and pests; Slobodan Milosevic referred to Bosnian Muslims as "black crows": Benesch, *supra* at 64.

the *Akayesu* case referred to Mugesera's very speech as an important indicator in the build-up to genocide.

Akayesu, *supra* at para. 39.

27. Second, Mugesera's call for "self-defense" against the "invaders", including his use of the phrase "Do not be afraid, know that anyone whose neck you do not cut is the one that will cut your neck," was relied upon by the Court of Appeal, but genocide scholars recognize that calls to self-defence can be disguised calls to genocide and a common trope used to exacerbate ethnic tension. Dr. Helen Fein, a leading expert in the study of the victimization of Jews during the Holocaust, has observed that in the collective psychological process that leads to genocide, one group of people must come to see its potential victims as a threat to their existence, as subhuman, or both.[7] Moreover, the exhortation to defend the nation against its enemies is typically used in propaganda campaigns and official acts preceding genocidal acts. Nazi propaganda prior to World War II was officially directed at "protecting" the Aryan race from the Jewish "threat," a motif that was also reflected by the enactment of the Nuremberg Laws in 1935. Accordingly, advocacy for ostensibly "peaceful" political solutions ought to be viewed carefully in the context of extreme ethnic hatred.

Reasons of the Federal Court of Appeal, para. 17.

28. A prior suggestion of ethnic cleansing which does not amount to full-fledged genocide is frequently used by inciters as part of their build-up as propaganda against "others". Streicher, for example, suggested in a 1938 editorial that the solution for the "Jewish Question" was to be found by transporting them to Madagascar, an idea he later used as a primary line of defense to explain his anti-Semitic advocacy. The Nuremberg tribunal, however, flatly rejected his argument. In light of the Nuremberg precedent and the ICTR's recent examination of the question, the Federal Court of Appeal's interpretation of Mugesera's reference to the Nyabarongo River as an "anecdote" about a "story which had a happy ending" ought to be completely rejected.

Streicher, supra, at 548-549

[7] Helen Fein, *Accounting for Genocide: National Responses and Jewish Victimization during the Holocaust* (New York: Free Press, 1984) at 3-30; Benesch, *supra* at 63-64.

Reasons of the Federal Court of Appeal, at para. 183.

29. Third, it is respectfully submitted that the mere passage of time between the speech and the actual eruption of violence should have no legal bearing on the question of whether or not the speech constitutes incitement. Incitement to genocide differs from other forms of complicity such as instigation or solicitation by its slow, gradual effect on its listeners. For example, in defining incitement the ICTR in the *Media Case* found that a December 1990 newspaper article amounted to incitement to genocide long before the "great genocide," as the Federal Court of Appeal put it, took place.

Media Case, *supra* at para. 436.

William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide," (2000) 46 McGill L.J. 141 at 145.

30. The Interveners respectfully submit that the finding that Mugesera's speech did not incite genocide due to temporal proximity – 18 months before the "great genocide," – was premised on two errors: the Federal Court of Appeal failed to appreciate the nature of the crime[8] and the Court also failed to account for the existence of dehumanizing public discourse and the violent episodes that occurred in Rwanda prior to Mugesera's speech.

Reasons of the Federal Court of Appeal, at para. 18.

(b) The Speech Was "Public"

31. Public incitement is defined by the International Law Commission as "a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media." Mugesera's speech is a typical example of the first type of public incitement.

Akayesu, *supra* at para. 556.

[8] Compare, for example, the *Streicher* case, where the Nuremberg Tribunal based the conviction, *inter alia*, on the defendant's activities long before the beginning of the Holocaust. For instance, the Tribunal mentioned that "*As early as 1938* [Streicher] *began to call for the annihilation of the Jewish race. Streicher*, *supra* at 548.

(c) Mugesera Had the Requisite "Intent"

32. The ICTR held in *Akayesu* that the *mens rea* required for the crime is "the intent to directly prompt or provoke another to commit genocide," which also implies that the perpetrator (or the inciter) must himself possess the specific intent to commit genocide.

> *Akayesu*, *supra* at para. 560.

33. In international law, the intent element is related to the question of foreseeability, namely whether the perpetrator foresaw or should have reasonably foreseen that his or her speech would likely lead to genocidal acts. To the extent that Mugesera claimed that he did not foresee the effect of his speech, a determination must be made as to what should have been objectively foreseeable. The test employed by the ICTR requires the adjudicator to look into various factors including the language used by the speaker (e.g. the use of the term *inyenzi*) and the speaker's authority and renown.[9] The conclusion reached by the Federal Court of Appeal is at odds with multiple ICTR cases to have examined the question of incitement to genocide.

> *Akayesu*, *supra* at para. 554.
>
> *Media Case*, *supra* at para. 980.

34. Moreover, the fact that Mugesera's speech was found to be spontaneous does not mean that he lacked the requisite *mens rea*. To the contrary, a spontaneous speech can often reflect the speaker's real state of mind at the time it was made. Indeed, the ICTR convicted Akayesu based on a speech given spontaneously before a crowd of over 100 people who had gathered around the body of a young member of the Interahamwe in Gishyeshye in April 1994.

> *Akayesu*, *supra* at para. 673.

35. In addition, there is no requirement that the instigator be familiar with the details of the crime such as how and where exactly the genocide will be committed. The only requirement is that the instigator "anticipates the crime in its essential elements and rough outlines."[10]

36. In the *Media Case*, Hassan Ngeze – the founder, publisher and editor of *Kangura,* an anti-Tutsi magazine – was indicted and convicted of incitement to genocide for publishing "The

[9] Benesch, *supra* at 66.
[10] Antonio Cassesse, Paola Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court – A Commentary* (Oxford, 2002) at 797-98.

Ten Commandments of Hutu" in December 1990, four years before the Rwandan genocide erupted. While Ngeze argued that the passage of time between the publication of the material and the worst killing negated the proximate cause component of incitement, the tribunal found otherwise and convicted Ngeze of direct, public and intentional conduct which fueled a climate of hatred and that had predictable and intended consequences years into the future: "Without a firearm, machete or any physical weapon, [he] caused the deaths of thousands of innocent civilians."

> *Media Case*, *supra* at paras. 148 and 1099.

37. Mugesera's speech communicated the same message as Ngeze's publication. This Court should adopt the ICTR's analysis and conclusion to hold that the Minister met his burden of establishing that Mugesera incited genocide.

5 Mugesera's Speech is Defined as a Crime Against Humanity by International Criminal Bodies

38. Canada's *Crimes Against Humanity and War Crimes Act* defines a crime against humanity as:

> … murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

> *Crimes Against Humanity and War Crimes Act*, R.S.C. 2000, c. 24, s. 4(3).

39. The Canadian definition mirrors the definition provided by the Rome Statute of the International Criminal Court and incorporates much of the definition contained in the Statute of the International Criminal Tribunal for Rwanda:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a)Murder; (b)Extermination; (c)Enslavement; (d)Deportation; (e)Imprisonment; (f)Torture; (g)Rape; (h)Persecutions on political, racial and religious grounds; (i)Other inhumane acts.

> *Statute of the International Criminal Tribunal for Rwanda*, SC Res. 955, 3453d Mtg., UN Doc. S/RES/955 (1994);Article (3)

40. Today, genocide constitutes the most aggravated form of crime against humanity.[11] The ICTR has labeled it "the crime of crimes."

> *Prosecutor v. Kambanda* (1998), Case No. ICTR 97-23-S (Judgment and Sentence, International Criminal Tribunal for Rwanda, Trial Chamber) at para. 16.

41. Additionally, inciting others to commit a crime against humanity is tantamount to committing a crime against humanity. Canada's own Criminal Code has recognized this principle. Section 7(3.77) of the Criminal Code, repealed in 2000 with the enactment of the Crimes Against Humanity and War Crimes Act, but in effect at the material time, provided, 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, counseling 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.

42. Similarly, the ICTY has held that "public pronouncements" which propagate hatred against identifiable groups constitute crimes against humanity. In *Prosecutor v. Plavsic*, the defendant was convicted for pronouncing that the use of violent force was justified because certain territories within Bosnia-Herzegovina were Serbian as of right, and because Bosnian Muslims and Croats would otherwise attempt to commit genocide against the Serbs.

> *Prosecutor v. Plavsic* (2003), Case No. IT-00-39&40/1 (Sentencing Judgment, International Criminal Tribunal for the former Yugoslavia, Trial Chamber) at para. 14.

43. The lesson of Plavsic is that counseling another to commit a crime against humanity is in itself, a crime against humanity. Former s. 7 (3.77) of the *Criminal Code* is thus consistent with international precedent.

B. Sections 318 and 319 of the *Criminal Code*

1 Introduction

44. The Interveners agree with the submissions of the Appellant that the Federal Court of Appeal erred in finding that Mugesera's speech, if given in Canada, would not have violated ss.

[11] See William A. Schabas, *Genocide in International Law, The Crime of Crimes* (Cambridge: Cambridge University Press, 2000) at 9.

318 and 319 of the *Criminal Code* making Mugesera an inadmissible person within the meaning of section 27(1)(a.3)(ii) of the *Immigration Act*.

45. Section 318 of the *Criminal Code* creates an indictable offence for advocating or promoting genocide.

46. Genocide is defined in section 318 as any of the following acts committed with intent to destroy in whole or in part any "identifiable group":

(a) Killing members of the group; or

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

47. An identifiable group is defined therein as any section of the public distinguished by colour, race, religion or ethnic origin.

48. Section 319(1) of the *Criminal Code* provides that it is a criminal offence to communicate statements in any public place which incite hatred against any identifiable group where such incitement is likely to lead to a breach of the peace.

49. In *R. v. Buzzanga and Durocher*, Martin J.A. of the Ontario Court of Appeal described, in *obiter*, the requisite *mens rea* for this offence as involving either the intentional or reckless inciting of hatred.

R. v. Buzzanga and Durocher (1979), 25 O.R. (2d) 705 at 717 (C.A.)

50. Under section 319(2) of the *Criminal Code*, any person who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group, is guilty of a crime. An identifiable group has the same definition as in section 318.

51. The terms "willfully" and "promotes" were considered by this Court in *R.* v. *Keegstra.* This Court concluded that "promotes" means to actively support or instigate hatred. With regard to "wilfully," the Court held that a conviction can only be secured where the accused both intended, in the sense of desired, and foresaw the stimulation of hatred.

R. v. Keegstra, [1990] 3 S.C.R. 697 at 774, 776-77.

Buzzanga, *supra* at 717-18.

52. In addition, wilful blindness is sufficient to constitute "wilfully" promoting hatred and to state that where an accused subjectively communicates with the intention of promoting hatred, he will have done so "wilfully".

R. v. Harding (2001), 57 O.R. (3d) 333 at para. 66 (C.A.), leave to appeal to S.C.C. refused (2002), 167 C.C.C. (3d) vi.

2 Application of Sections 318 and 319

53. The Interveners are in agreement with the submissions of the Appellant regarding the errors of the Federal Court of Appeal in its application of ss. 318 and 319 of the *Criminal Code.*

54. The Interveners submit that Mugesera made references in his speech which were clearly intended to incite hatred and genocide against Tutsis.

55. There is no dispute that his speech was made in public.

56. Mugesera's repeated use of the derogatory term *inyenzis* to describe Tutsis is *prima facie* evidence of his intent to dehumanize and promote hatred against Tutsis. Derogatory language of this type leads to the recategorization of the target group as beyond "the boundaries of the universe of obligation," promoting hatred and vilification and creating fertile ground for genocide to occur. By defining individuals by such characteristics, hate mongers reject the individuality of group members, and thereby dehumanize them, as was the case in Nazi Germany's vilification of Jews.

Helen Fein, *Accounting for Genocide: National Responses and Jewish Victimization during the Holocaust* (New York: Free Press, 1984) at 33.

57. In addition to the vilification and dehumanization of Tutsis through his language, Mugesera's speech also refers to a historical massacre of Rwandan Tutsis. This reference would have been understood by his audience as an explicit call for violence against Tutsis. He stated in his speech that he told a member of the Parti Libéral, a Tutsi-dominated political group, that "[t]he mistake we made in 1959, when I was still a child, is to let you leave." He then stated: "I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly." The 1959 massacres, during which bodies of Tutsis were thrown into the Nyabarongo River, figure prominently in the historical memory of the Rwandan people. Given

this historical context, the Interveners submit that this language clearly advocated and promoted genocide against the Tutsis.

> Reasons of the Federal Court of Appeal at para. 33.
>
> *Akayesu*, *supra* at paras. 115, 120, 159, 161, 168.

58. Mugesera's words were communicated in such a manner as to foreseeably incite a breach of the peace and the Federal Court of Appeal erred in failing to so find. The context in which Mugesera delivered his speech was one of acute ethnic and racial hatred. In the two years prior to Mugesera's speech, there had been numerous incidents of ethnic violence during which thousands of Tutsis were killed. The threats, veiled and otherwise, made by Mugesera, must be viewed in the context of the country's history of bloodshed, intimidation and fear. Mugesera's incendiary words were uttered in a climate of violence and served to urge his followers to action.

> Richard Moon, "Drawing Lines in a Culture of Prejudice: R. v. Keegstra and The Restriction of Hate Propaganda" (1992) 26 U.B.C.L. Rev. 99 at para. 97.

59. The hateful expression and genocidal overtones of Mugesera's speech are clearly recognizable when examined in light of the pervasiveness of racist thought and expression in the early 1990s in Rwanda. The irrational power and injurious nature of hate speech is very real, and all the more so where it represents part of a pattern of victimization. Each new expression solidifies the public's bigoted view of the target group and adds to the target group members' feelings of fear and inferiority. Further, where prejudice is rampant in a society, the assertions made by a person inciting genocide or promoting hate can become difficult to refute.

> Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling" 1982, 17 Harv. C.R. – C.L. Rev. 133 at 143.
>
> Moon, *supra* at para. 91.

60. Mugesera's speech has been recognized by the International Criminal Tribunal for Rwanda as one of the most significant pre-cursors leading up to the great genocide in Rwanda. The ICTR decision in *Akayesu* cites Mugesera as a notorious propaganda agent in Rwanda during the 1990s, referencing both the speech at issue in this case, as well as two pamphlets he published accusing the Tutsis of planning a genocide of the Hutus.

> *Akayesu*, *supra* at para. 100.

61. The Interveners submit that in light of all of these facts and conclusions of law, Mugesera's speech violated ss. 318 and 319 of the *Criminal Code* and the Federal Court of Appeal erred in its determination that the Minister had not met the balance of probabilities required to order Mugesera's removal.

3 The Importance of Sections 318 and 319 to Identifiable Groups in Canada

62. In addition to the foregoing, the Interveners stress the importance of ss. 318 and 319 of the *Criminal Code* to vulnerable minority groups. If the Minister of Citizenship and Immigration's ability to utilize these sections to exclude persons who incite hatred and genocide from Canada is unduly inhibited, identifiable groups will be disproportionately affected.

63. The adoption of hate propaganda laws has provided Canadian authorities with an important tool in the fight against the harmful effects of hate propaganda. Speech which constitutes a promotion of genocide and hatred threatens the physical and psychological security of victimized communities, and aims to destroy societies that are open and pluralistic. The harm caused by hate speech is thus two-fold; harm is suffered by members of the target group, and hate propaganda harms the community at large by being adopted, even subconsciously, as an idea that holds some truth. The dissemination of hate propaganda creates "a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics."

> *Keegstra, supra* at 745-49.

64. Although there have been no reported decisions considering s. 318, Maxwell Cohen, former Dean of Law at McGill University, and Chair of the 1965 Special Committee on Hate Propaganda in Canada, which initiated the introduction of these provisions, has noted that "[t]here surely cannot be any legitimate argument that suggesting that identifiable groups shall be wiped out is part of a democratic debating process." The report of the Special Committee affirmed that section 318 provided "an emphatic public declaration of our total commitment to the elimination of this most inhuman manifestation of prejudice and a reassurance to any minority groups in our midst that promoting such a concept in public discussions is beyond the pale."

> Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, *Eleventh Proceedings on Bill S-21*, No. 11 (1 May, 1969) at 254.

> Canada, Report to the Minister of Justice of the Special Committee on Hate Propaganda (Ottawa: Queen's Printer, 1966) (Chair: Maxwell Cohen).

65. Criminal prohibitions demonstrate to members of the target group that they are valued and respected by the vast majority of society. In this way, their existence and effective enforcement serve to combat the very real and tangible harm done to identifiable groups:

> "The harm lies in the atmosphere of fear and apprehension to which all hate crimes contribute."
>
> Julian V. Roberts, "Disproportionate Harm: Hate Crime in Canada" Department of Justice: Research, Statistics and Evaluation Directorate, Policy Sector (1995) at 3.

66. Dickson CJC emphasized the risk that irrational hate messages might be adopted by broader segments of society when he stated:

> "It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society."
>
> *Keegstra, supra* at 747.

67. When the state, on behalf of the greater community, prosecutes a hate monger pursuant to ss. 318 or 319 of the *Criminal Code*, it retains the victimized community's trust in the legal system to which it looks for protection, and prevents the community from being alienated from the rest of society. In the context of immigration proceedings, the same goal is served by excluding or deporting individuals found to have disseminated hate propaganda. Hate speech that prompts prosecutions in Canada for incitement to genocide or persecution disqualifies prospective entrants to Canada.

68. The Interveners submit that Mugesera's speech is precisely the type of speech that must engage the application of ss. 318 and 319. The Interveners further submit that the speech was clearly meant by Mugesera to be, and understood by his audience to be, an incitement to hatred and genocide. Accordingly, the Interveners submit that the Federal Court of Appeal erred in its determination to the contrary.

69. If the decision of The Federal Court of Appeal is allowed to stand, it will severely restrict the ability of the Minister to deport persons who engage in hate speech abroad and then seek to enter this country. This seriously undermines the purposes and protections of ss. 318 and 319 of the *Criminal Code*. Failure to engage these provisions in the present case, will also greatly

diminish the perceived protections and reassurances that they offer to Canada's minority groups. The Interveners respectfully request that this Honourable Court refuse to dilute these provisions which are so important to minority groups in this country.

C. Conclusion

70. The Federal Court of Appeal committed serious error by disregarding international law and jurisprudence in finding that Mugesera's speech was not incitement to genocide. This Court held in *Baker* that Canadian courts should take account of developments in international law in interpreting and applying domestic legislative enactments. In the case of Mugesera, the Federal Court of Appeal should have applied internationally recognized definitions of incitement to genocide and crimes against humanity. According to international law and jurisprudence, incitement to genocide requires that the speech be direct and public, and that the speaker have the requisite intent. The Interveners submit that in the case of Mugesera, each of these elements was satisfied.

Baker, *supra* at paras. 69-71.

71. The Interveners also submit that the Federal Court of Appeal erred in its conclusions with respect to incitement of hatred and genocide. The Court erred in its finding that the speech would not have constituted a crime contrary to ss. 318 and 319 of the *Criminal Code*. As stated above, Mugesera's speech was delivered in a public place before several thousand members of the MRND; it incited hatred against and advocated genocide of an identifiable group, namely Tutsis. Moreover, Mugesera possessed the requisite *mens rea* for either of the offences.

72. Finally, Canadian legislative enactments, case law and policy have been unequivocal in articulating Canada's long-standing policy of denying safe harbour to those who commit war crimes and crimes against humanity.[12] Since the 1985 Deschênes Commission, Canada's policy has been to prosecute, extradite, or deport such individuals. Canada's *Crimes Against Humanity and War Crimes Act*, *Extradition Act*, and *Immigration and Refugee Protection Act* each seek to ensure that war criminals do not reach or remain at large in Canada. For the purpose of this case,

[12] See *e.g. Naredo v. Canada (Minister of Employment & Immigration)* (1990), 37 F.T.R. 161; *Ramirez v. Canada (Minister of Employment & Immigration)*, [1992] 2 F.C. 306; *Rudolph v. Canada (Minister of Employment & Immigration)*, [1992] 2 F.C. 653.

the provisions of the *Immigration Act* on which the Appellant relies are informed by the same policy.

Extradition Act, S.C. 1999, c. 18.

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

73. Given the foregoing submissions concerning ss. 318 and 319 of the *Criminal Code*, as well as the internationally recognized definition of incitement to genocide, the Interveners submit that Mugesera is an inadmissible person pursuant to ss. 19(1)(j) and 27(1)(a.3)(ii) of the *Immigration Act* and ought to be deported.

PART IV – ORDER REQUESTED

74. The Interveners request that the order sought by the Appellants be granted in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Benjamin Zarnett

Francy Kussner

Daniel G. Cohen

PART V – TABLE OF AUTHORITIES

Cases

Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817, paras. 11, 70.

Prosecutor v. Akayesu (1998), Case No. ICTR-96-4-T (Judgment, International Criminal Tribunal for Rwanda, Trial Chamber I), paras. 16, 20-22, 25-26, 31-34, 57.

Prosecutor v. Kambanda (1998), Case No. ICTR 97-23-S (Judgment and Sentence, International Criminal Tribunal for Rwanda, Trial Chamber), para. 40.

Prosecutor v. Ngeze (2003), Case No. ICTR-99-52-T (Judgment and Sentence, International Criminal Tribunal for Rwanda, Trial Chamber I), paras. 17, 23, 25, 29, 33, 36.

Prosecutor v. Plavsic (2003), Case No. IT-00-39&40/1 (Sentencing Judgment, International Criminal Tribunal for the former Yugoslavia, Trial Chamber), para 42.

Prosecutor v. Ruggiu (2000), Case No. ICTR 97-32-I (Judgment and Sentence, International Criminal Tribunal for Rwanda, Trial Chamber I), paras. 22, 25.

R. v. Buzzanga and Durocher (1979), 25 O.R. (2d) 705 at 717 (C.A.), paras. 49, 51.

R. v. Harding (2001), 57 O.R. (3d) 333 at para. 66 (C.A.), leave to appeal to S.C.C. refused (2002), 167 C.C.C. (3d) vi, para. 52.

R. v. Keegstra,[1990] 3 S.C.R. 697, paras. 51, 63, 66.

Trial of The Major War Criminals Before the International Military Tribunal (1947), para. 17.

Other Authorities

Susan Benesch, "Inciting Genocide, Pleading Free Speech" (Summer 2004) World Policy J, paras. 18, 26-27, 33.

Canada, Report to the Minister of Justice of the Special Committee on Hate Propaganda (Ottawa: Queen's Printer, 1966) (Chair: Maxwell Cohen), para. 64.

Antonio Cassesse, Paola Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court – A Commentary* (Oxford, 2002), para. 35.

Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling" 1982, 17 Harv. C.R. – C.L. Rev. 133, para. 59.

Helen Fein, *Accounting for Genocide: National Responses and Jewish Victimization during the Holocaust* (New York: Free Press, 1984), paras. 27, 56.

Richard Moon, "Drawing Lines in a Culture of Prejudice: R. v. Keegstra and The Restriction of Hate Propaganda" (1992) 26 U.B.C.L. Rev. 99, paras. 58-59.

Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Eleventh Proceedings on Bill S-21, No. 11 (1 May, 1969), para. 64.

Julian V. Roberts, "Disproportionate Harm: Hate Crime in Canada" Department of Justice: Research, Statistics and Evaluation Directorate, Policy Sector (1995), para. 65.

Nehemiah Robinson, *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960), para. 12.

William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide," (2000) 46 McGill L.J. 141, para. 29.

William A. Schabas, *Genocide in International Law, The Crime of Crimes* (Cambridge: Cambridge University Press, 2000), para. 40.

Gregory Stanton, "Eight Stages of Genocide," online: Genocide Watch <http://www.genocidewatch.org/8stages.htm>, para. 14.

PART VI – STATUTES

***Crimes Against Humanity and War Crimes Act,* R.S.C. 2000, c. 24, s. 4(3)**	***Crimes contre l'humanité et les crimes de guerre, Loi sur les,* L.R.C. 2000, ch. 24**
4(3) The definitions in this subsection apply in this section.	**4**(3) Les définitions qui suivent s'appliquent au présent article.
"crime against humanity" means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission…	« crime contre l'humanité » Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait -- acte ou omission -- inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel, ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu…

***Criminal Code,* R.S.C. 1985, c. C-46**	***Code criminel,* L.R.C. 1985, ch. C-46**
Hate Propaganda	*Propagande haineuse*
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.	**318.** (1) Quiconque préconise ou fomente le génocide est coupable d'un acte criminel et passible d'un emprisonnement maximal de cinq ans.
(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,	(2) Au présent article, «génocide» s'entend de l'un ou l'autre des actes suivants commis avec l'intention de détruire totalement ou partiellement un groupe identifiable, à savoir :
(*a*) killing members of the group; or	*a*) le fait de tuer des membres du groupe;
(*b*) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.	*b*) le fait de soumettre délibérément le groupe à des conditions de vie propres à entraîner sa destruction physique.
(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.	(3) Il ne peut être engagé de poursuites pour une infraction prévue au présent article sans le consentement du procureur général.
(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.	(4) Au présent article, « groupe identifiable » désigne toute section du public qui se différencie des autres par la couleur, la race, la religion, l'origine ethnique ou l'orientation sexuelle.
R.S., 1985, c. C-46, s. 318; 2004, c. 14, s. 1.	

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. (3) No person shall be convicted of an offence under subsection (2) (*a*) if he establishes that the statements communicated were true; (*b*) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (*c*) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (*d*) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada. (4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct. (5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section	L.R. (1985), ch. C-46, art. 318; 2004, ch. 14, art. 1. **319.** (1) Quiconque, par la communication de déclarations en un endroit public, incite à la haine contre un groupe identifiable, lorsqu'une telle incitation est susceptible d'entraîner une violation de la paix, est coupable : *a*) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans; *b*) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire. (2) Quiconque, par la communication de déclarations autrement que dans une conversation privée, fomente volontairement la haine contre un groupe identifiable est coupable : *a*) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans; *b*) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire. (3) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (2) dans les cas suivants : *a*) il établit que les déclarations communiquées étaient vraies; *b*) il a, de bonne foi, exprimé une opinion sur un sujet religieux ou une opinion fondée sur un texte religieux auquel il croit, ou a tenté d'en établir le bien-fondé par argument; *c*) les déclarations se rapportaient à une question d'intérêt public dont l'examen était fait dans l'intérêt du public et, pour des motifs raisonnables, il les croyait vraies; *d*) de bonne foi, il voulait attirer l'attention, afin qu'il y soit remédié, sur des questions provoquant ou de nature à provoquer des sentiments de haine à l'égard d'un groupe identifiable au Canada. (4) Lorsqu'une personne est déclarée coupable d'une infraction prévue à l'article 318 ou aux paragraphes (1) ou (2) du présent article, le juge de la cour provinciale ou le juge qui préside peut ordonner que toutes choses au moyen desquelles ou en liaison avec lesquelles l'infraction a été commise soient, outre toute autre peine

318 or subsection (1) or (2) of this section. (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General. (7) In this section, "communicating" includes communicating by telephone, broadcasting or other audible or visible means; "identifiable group" has the same meaning as in section 318; "public place" includes any place to which the public have access as of right or by invitation, express or implied; "statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations. R.S., 1985, c. C-46, s. 319; R.S., 1985, c. 27 (1st Supp.), s. 203; 2004, c. 14, s. 2.	imposée, confisquées au profit de Sa Majesté du chef de la province où cette personne a été reconnue coupable, pour qu'il en soit disposé conformément aux instructions du procureur général. (5) Les paragraphes 199(6) et (7) s'appliquent, compte tenu des adaptations de circonstance, à l'article 318 et aux paragraphes (1) et (2) du présent article. (6) Il ne peut être engagé de poursuites pour une infraction prévue au paragraphe (2) sans le consentement du procureur général. (7) Les définitions qui suivent s'appliquent au présent article. «communiquer» S'entend notamment de la communication par téléphone, radiodiffusion ou autres moyens de communication visuelle ou sonore. «déclarations» S'entend notamment des mots parlés, écrits ou enregistrés par des moyens électroniques ou électromagnétiques ou autrement, et des gestes, signes ou autres représentations visibles. «endroit public» Tout lieu auquel le public a accès de droit ou sur invitation, expresse ou tacite. «groupe identifiable» A le sens que lui donne l'article 318. L.R. (1985), ch. C-46, art. 319; L.R. (1985), ch. 27 (1er suppl.), art. 203; 2004, ch. 14, art. 2.

***Immigration Act* R.S.C. 1985, c. I-2, as rep. by *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27** 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:	***Loi sur l'immigration*, L.R.C.1985, ch. I-2, abr. par *Immigration et la protection des réfugiés, Loi sur l'*, L.R.C. 2001, ch. 27** PARTIE III EXCLUSION ET RENVOI *Catégories non admissibles* **19.** (1) Les personnes suivantes appartiennent à une catégorie non admissible :

...	. . . . .
(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.	*j*) celles dont on peut penser, pour des motifs raisonnables, qu'elles ont commis, à l'étranger, un fait constituant un crime de guerre ou un crime contre l'humanité au sens du paragraphe 7(3.76) du *Code criminel* et qui aurait constitué, au Canada, une infraction au droit canadien en son état à l'époque de la perpétration . . .
...	. . . . .
Removal after Admission	*Renvoi après 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	**27.** (1) L'agent d'immigration ou l'agent de la paix doit faire part au sous-ministre, dans un rapport écrit et circonstancié, de renseignements concernant un résident permanent et indiquant que celui-ci, selon le cas :
(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,	*a*) appartient à l'une des catégories non admissibles visées aux alinéas 19(1)*c*.2), *d*), *e*), *f*), *g*), *k*) ou *l*);
(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	*a*.1) est une personne qui a, à l'étranger : (i) soit été déclarée coupable d'une infraction qui, si elle était commise au Canada, constituerait une infraction qui pourrait être punissable aux termes d'une loi fédérale, par mise en accusation, d'un emprisonnement maximal égal ou supérieur à dix ans, sauf si la personne peut justifier auprès du gouverneur en conseil de sa réadaptation et du fait qu'au moins cinq ans se sont écoulés depuis l'expiration de toute peine lui ayant été infligée pour l'infraction,
(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,	(ii) soit commis, de l'avis, fondé sur la prépondérance des probabilités, de l'agent d'immigration ou de l'agent de la paix, un fait - acte ou omission - qui constitue une infraction dans le pays où il a été commis et qui, s'il était commis au Canada, constituerait une infraction qui pourrait être punissable, aux termes d'une loi fédérale, par mise en accusation, d'un emprisonnement maximal égal ou supérieur à dix ans, sauf si la personne peut justifier auprès du gouverneur en conseil de sa réadaptation et du fait qu'au moins cinq ans se sont écoulés depuis la commission du fait . . .
except a person who has satisfied the Governor in Council that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for	. . . . . *a*.3) avant que le droit d'établissement ne lui ait été accordé, a, à l'étranger : . . . . .

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; ... (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;	(ii) soit commis, de l'avis, fondé sur la prépondérance des probabilités, de l'agent d'immigration ou de l'agent de la paix, un fait - acte ou omission - qui constitue une infraction dans le pays ou il a été commis et qui, s'il était commis au Canada, constituerait une infraction visée à l'alinéa *a*.2), sauf s'il peut justifier auprès du ministre de sa réadaptation et du fait qu'au moins cinq ans se sont écoulés depuis la commission du fait . . . . *g*) appartient à la catégorie non admissible visée à l'alinéa 19(1)*j*) et a obtenu le droit d'établissement après l'entrée en vigueur de cet alinéa . . .

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

LÈON MUGESERA, GEMMA UWAMARIYA, IRENÈE RUTEMA, YVES RUSI, CARMEN NONO, MIREILLE URUMURI, and MARY-GRÂCE HOHO

Respondents

Court File No: 30025

IN THE SUPREME COURT OF CANADA

(On Appeal from the Federal Court of Appeal)

JOINT FACTUM OF THE INTERVENERS, CANADIAN JEWISH CONGRESS, THE UNIVERSITY OF TORONTO, FACULTY OF LAW – INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH

GOODMANS LLP
Barristers & Solicitors
250 Yonge Street, Suite 2400
Toronto, ON M5B 2M6

Benjamin Zarnett
Francy Kussner
Daniel G. Cohen
Tel: 416.979.2211
Fax: 416.979.1234

Solicitors for the Applicants Canadian Jewish Congress, The University of Toronto, Faculty of Law – International Human Rights Clinic and Human Rights Watch