

MEDIA + VIGILANTE VIOLENCE:
THE FORMULA FOR AMERICAN ATROCITY

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“[T]he chasm between the principles upon which this Government was founded, in which it still professes to believe, and those which are daily practiced under the protection of the flag, yawn so wide and deep.”¹

– Mary Church Terrell

INTRODUCTION

In July 2022, Tucker Carlson, the once-popular host of the Fox News’ show, “Tucker Carlson Tonight,” ended a segment that discussed the Biden administration’s foreign policy by saying: “The great replacement? Yeah, it’s not a conspiracy theory. It’s their electoral strategy.”² With this startling statement, Carlson took a debunked conspiracy theory, espoused by Neo-Nazis and white supremacists alike,³ and spread it to millions of viewers via his mainstream media platform. The next day, other media outlets predictably exploded in response to Carlson’s comments.⁴ However, the flurry of responses in the mainstream media had—perhaps unintentionally—the effect of mainstreaming this Theory. Many commented on the harm that public acknowledgment and sanctioning of openly racist tropes would create, particularly for people of color in the United States.⁵ Would violence follow the remarks as adherents of the Theory acted on what they heard? Was Carlson’s endorsement of white supremacist tropes a “green-light” for

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¹ Mary Church Terrell, “What it Means to be Colored in the Capital of the U.S.” (October 10, 1906), *available at* <https://www.blackpast.org/african-american-history/1906-mary-church-terrell-what-it-means-be-colored-capital-u-s/> [https://perma.cc/TV4W-BLP6].

² Jonathan A. Greenblatt, *ADL Letter to Fox News Condemns Tucker Carlson’s Impassioned Defense of ‘Great Replacement Theory’*, ANTI-DEFAMATION LEAGUE (Apr. 29, 2021), <https://www.adl.org/resources/media-watch/adl-letter-fox-news-condemns-tucker-carlsons-impassioned-defense-great> [https://perma.cc/CC49-K4F7]; Josephine Harvey, *Tucker Carlson All Out Embraces ‘Great Replacement’ Theory*, HUFFPOST (July 19, 2022, 11:51 PM), https://www.huffpost.com/entry/tucker-carlson-great-replacement_n_62d76c96e4b081f3a8f87d45 [https://perma.cc/KEX3-SLQG].

³ Philip Bump, ‘Great replacement theory’ is ignorant both broadly and narrowly, WASH. POST (May 17, 2022, 2:54 PM), <https://www.washingtonpost.com/politics/2022/05/17/great-replacement-theory-is-ignorant-both-broadly-narrowly/> [https://perma.cc/Y6RB-JSBL].

⁴ *Explainer: What is ‘The Great Replacement’ and what are its origins?*, REUTERS (May 16, 2022, 2:13 PM), <https://www.reuters.com/world/us/what-is-the-great-replacement-what-are-its-origins-2022-05-16/>.

⁵ Bump, *supra* note 3; Douglas Yeung, ‘Replacement Theory’ Is a Danger to Us All, RAND (July 8, 2022), <https://www.rand.org/pubs/commentary/2022/07/replacement-theory-is-a-danger-to-us-all.html> [https://perma.cc/A5KZ-LLX5]; David Bauder, *What is ‘great replacement theory’ and how does it fuel violence?*, PBS (May 16, 2022, 4:10 PM), <https://www.pbs.org/newshour/politics/what-is-great-replacement-theory-and-how-does-it-fuel-racist-violence>.

vigilante violence? Carlson continued to invoke the Theory and other racist ideals countless times before his show was canceled in 2023.⁶

The use of public platforms and media outlets to stoke violence against underrepresented groups has historical connections with human rights atrocity. Indeed, numerous examples throughout world history illustrate the powerful link between media and vigilantes who commit violent acts in response to media provocation.⁷ Media—in its various forms—has been utilized to craft narratives, sway public opinion, and dehumanize racial groups, leading to genocide.⁸ In 1946, the United Nations (UN) drafted the Convention on the Punishment and Prevention of the Crime of Genocide (Genocide Convention).⁹ The Genocide Convention punishes not only those who commit the crime of genocide, but also those who directly and publicly incite it.¹⁰ Under the “Never Again” mantra, the UN sought to prevent and punish propaganda campaigns like those used during the Holocaust, which led to the destruction of millions of human lives.¹¹

Despite the mantra, and in the face of clear evidence indicating that similar media-fueled violence was occurring in the Southern United States,¹² the UN purposefully excluded Black Americans from the human rights protections provided under the Convention; by failing to recognize the claims made in the We Charge Genocide Petition presented by the Civil Rights Congress (CRC) in 1951, the UN decidedly held that “Never Again” did not apply to Black Americans.¹³ The denial of the CRC’s claims, one of the UN’s first acts as an international body created to protect human rights, not only

⁶ Nicholas Confessore, *How Tucker Carlson Stoked White Fear to Conquer Cable*, N.Y. TIMES (Apr. 30, 2022), <https://www.nytimes.com/2022/04/30/us/tucker-carlson-gop-republican-party.html> [https://perma.cc/JJL3-2SEH].

⁷ Richard M. Perloff, *The Press and Lynchings of African Americans*, 30 J. BLACK STUD. 315, 318 (2000) (discussing the history of media and vigilantism in the South); Francine Uenuma, *The Massacre of Black Sharecroppers That Led the Supreme Court to Curb the Racial Disparities of the Justice System*, SMITHSONIAN MAG. (Aug. 2, 2018), <https://www.smithsonianmag.com/history/death-hundreds-elaine-massacre-led-supreme-court-take-major-step-toward-equal-justice-african-americans-180969863/> [https://perma.cc/5G9X-FJP4]; Maria J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2325 (1989).

⁸ Paul Bibeau, *Some Virginia newspapers powered political disenfranchisement, brutalization of Black people*, VA. MERCURY (May 3, 2023, 12:04 AM), <https://www.virginiamercury.com/2023/05/03/some-va-newspapers-powered-political-disenfranchisement-brutalization-of-black-people/> [https://perma.cc/TWQ2-YD33]; Perloff, *supra* note 7, at 318, 327; Matsuda, *supra* note 7, at 2379.

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

¹⁰ *Id.* at art. III.

¹¹ See *Ratification of the Genocide Convention*, UNITED NATIONS, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> [https://perma.cc/4QLD-5VQE] (last visited Apr. 9, 2024).

¹² *Id.*; see also W.E.B. DUBOIS, AN APPEAL TO THE WORLD (1946).

¹³ See Alex Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously*, POLITICO (Dec. 26, 2021, 7:00 AM), <https://www.politico.com/news/magazine/2021/12/26/black-activists-charge-genocide-united-states-systemic-racism-526045>.

laid the landscape for the erasure of Black American human rights from international law, it likewise gave license to parties committed to the destruction of Black lives—in whole or in part—to continue their deadly work. By capitulating to American exceptionalism, false notions of white supremacy, and “aesthetics bias,”¹⁴ the UN weakened its efficacy and value as an institution committed to the lofty ideal of protecting human life and promoting international safety.

This Article provides an overview of the international and domestic responses to media-fueled violence and demonstrates how both legal systems have failed to provide meaningful protections for Black Americans from vigilante violence and atrocity.¹⁵ Part I explores the history of media as a propaganda tool against underrepresented groups, detailing how it has promoted atrocity domestically and internationally. There are parallels between the historical and contemporary use of media as a method to fuel atrocity against minority groups; illustrating these examples indicates the continued risk of violence and atrocity faced by Black Americans due to these models of persuasive communication. Part II provides an overview of the international and domestic responses to media-fueled atrocity. While both the UN and the United States claim to be committed to the prevention of atrocity and have even made attempts to prevent atrocity internationally,¹⁶ these legal responses have failed to provide an adequate safeguard against the widespread proliferation of racist narratives and tropes specifically designed to incite violence. Part III examines current efforts to prevent atrocity,

¹⁴ In the context of atrocity crimes, “aesthetics” is defined as “refer[ring] to both individual and social processes of the perception, production, and response to scenes evoking an intense emotional reaction . . . a decidedly negative one, of horror, disgust, terror, or the like.” RANDLE DEFALCO, *INVISIBLE ATROCITIES* 11 (2022). Aesthetic bias is the result of notions of normativity which are “linked to an aesthetics of horrific spectacle, to the point that it is commonly assumed that *all* atrocity harms will manifest themselves as such spectacles.” RANDLE DEFALCO, *INVISIBLE ATROCITIES* 230 (2022).

Aesthetic bias has broad implications: “The victims of manifestations of genocide, crimes against humanity, and war crimes failing to conform to atrocity aesthetic tend to be drawn from already vulnerable and marginalized populations . . . By expressing the sentiment that everyday forms of oppression that fail to shock us do not merit ICL’s attention, the aesthetic biases of international criminal justice subtly help condone the current stratification in terms of the importance of human lives (indeed, arguably extending to the very recognition of humanity of certain groups, and recognition of experiences of harm, trauma, and victimhood.” RANDLE DEFALCO, *INVISIBLE ATROCITIES* 214-15 (2022).

¹⁵ Under international criminal law, “atrocity crimes” are “considered to be the most serious crimes against humankind,” and the United Nations specifically names genocide, crimes against humanity, and war crimes as falling into this category. UNITED NATIONS, *FRAMEWORK OF ANALYSIS FOR ATROCITY CRIMES* 1 (2014). However, I use the term broadly to capture the crimes of similar magnitude that fall outside of the general categories. See DeFalco, *supra* note 14, at 24 (discussing advocates).

¹⁶ *Prevention of Atrocity Crimes*, UNITED NATIONS, <https://www.un.org/en/genocideprevention/prevention.shtml#:~:text=The%20Convention%20on%20the%20Prevention,the%20norms%20in%20them%20contained> [https://perma.cc/QHC4-XE55] (last visited Apr. 9, 2024); *The U.S. Strategy to Anticipate, Prevent, and Respond to Atrocities*, U.S. AGENCY FOR INT’L DEV. (Aug. 17, 2023), <https://www.usaid.gov/conflict-prevention-stabilization/fact-sheet/us-strategy-anticipate-prevent-and-respond-atrocities> [https://perma.cc/5NU3-C2M9].

offering alternative solutions that would provide accountability and atrocity protection for Black Americans.

I. CHANNELS OF ATROCITY: THE HISTORY OF MEDIA-FUELED VIOLENCE

A. *Anti-Black Propaganda During the Reconstruction and Redemption-eras.*

“The mouthings of white supremacists, the polemics of racists, echo constantly over the land, insisting that the Negro, by law if possible and by force if necessary, be imprisoned to an inferior status. The threat of violence is the common denominator to all these incidents, which play no small part in the resulting mass murder on the basis of race, whether they concern pleas for the preservation of the segregated school system, the white primary, or the ‘purity of white womanhood.’”¹⁷

“The ‘high falutin’ speech paying tribute to the slave holders’ Confederacy of the past and promising vengeance on any Negro who dares exercise his rights in the present is almost an American art form . . . spread to millions by means of the radio.”¹⁸

Violence against Black people is American history and its legacy. During slavery, individuals were assembled in bands of vigilantes to keep “order” and to pursue runaway slaves according to the Fugitive Slave Clause in the U.S. Constitution and various other state laws.¹⁹ These vigilante groups exacted compliance through the use of physical violence, harassment, threats, and other public demonstrations such as lynchings and cross burnings.²⁰ When these vigilante groups were formally organized into police departments in the early 18th century, members continued their reign of terror,

¹⁷ WILLIAM L. PATTERSON, WE CHARGE GENOCIDE: THE CRIME OF GOVERNMENT AGAINST THE NEGRO PEOPLE 187 (1970) [hereinafter WCG Petition].

¹⁸ *Id.* at 187.

¹⁹ See U.S. Const. art. IV, § 2, cl. 3, *repealed by* U.S. Const. amend. XIII. See also PAULI MURRAY, STATES’ LAWS ON RACE AND COLOR 21-524 (2016) (providing a state-by-state overview of various laws regulating race relations in the U.S.); A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 19-313 (1978) (describing various laws from Colonial America which dictated the subservience of enslaved and free Black people).

²⁰ SOUTHERN POVERTY LAW CENTER, KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE 7-9, 36 (Richard Baudoin ed., 6th ed. 2011) [hereinafter KKK History].

wearing badges by day and hoods by night.²¹ By deputizing and granting “police” powers to these vigilantes, the American government gave license to those who used violence as a means to achieve its own ends. In the case of police violence against Black Americans, this legacy is one that still pervades society today.²²

One of the techniques widely used to support and encourage the terrorism of Black Americans is media and propaganda. During Reconstruction and the period that followed—known as the “Redemption” era—Southern states sought to reclaim the South through the forced disenfranchisement of Black voters.²³ To achieve this abhorrent goal, anti-Black propaganda was mass produced.²⁴ Images, films, and false narratives depicted Black people as nonhuman, deviant, and violent, thereby justifying the use of extreme violence by Southern whites to torture and debase them.²⁵ The propaganda produced during this time dehumanized Black Americans so fully that vigilante violence continued on unchecked by state or federal government.²⁶ The Southern propaganda campaign also led to widespread adoption of the “Lost Cause” mythology,²⁷ which was used to attack the legitimacy of the Fourteenth Amendment and the federal government’s efforts to protect and advance Black interests.²⁸ To ensure this mythology was spread broadly and would persist, organizations like the United Daughters of the Confederacy (UDC) began publishing history textbooks which were adopted by Southern states, allowing myth to become truth to millions of Southerners.²⁹ This deadly combination of media-fueled vigilante violence burned throughout the South during Reconstruction, Jim Crow, and into the Civil Rights Era.³⁰

²¹ *Id.* at 7-9.

²² *The Origins of Modern Day Policing*, NAACP, <https://naacp.org/find-resources/history-explained/origins-modern-day-policing> [<https://perma.cc/YB5L-SN5U>] (last visited Apr. 9, 2024).

²³ HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* xiv (2019) (defining the Redemption Era as “starting in 1877” and “reaching its zenith in horror” in 1915).

²⁴ *See generally id.* at 26 (describing the many rhetorical techniques used in media to frame Blackness).

²⁵ *See id.* at xviii-xix.

²⁶ *See* Tiffany Wright, et al., *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 DICK. L. REV. 685, 715 n. 242 (discussing how the Ku Klux Klan act of 1870 was rendered defunct by Supreme Court cases such as cases such as *U.S. v. Cruikshank* and the *Slaughterhouse Cases*, thus eliminating any remedy against private individuals who committed violence towards Black Americans).

²⁷ Gates, *supra* note 23, at 18 (describing the two primary tenets of the Lost Cause: first, that the Civil War was fought to defend southern ideals and way-of-life from the federal government’s “despotic power”; second, that the Civil War was not fought over slavery).

²⁸ *See, e.g.*, U.S. Const. amends. XIII, XIV, XV.

²⁹ Coleman Lowndes, *How Southern socialites rewrote Civil War history*, VOX (Oct. 25, 2017, 1:37 PM), <https://www.vox.com/videos/2017/10/25/16545362/southern-socialites-civil-war-history> [<https://perma.cc/839V-747M>].

³⁰ *See generally Reconstruction in America: Racial Violence after the Civil War, 1865-1876*, EQUAL JUST. INITIATIVE, <https://eji.org/report/reconstruction-in-america/> (last visited Apr. 9, 2024).

As purveyors of anti-Blackness and vigilante violence, the Ku Klux Klan benefitted from UDC efforts to spread Lost Cause mythology and anti-Black propaganda.³¹ Founded in 1865 in Pulaski, Tennessee, the KKK was formed to protect the “purity of the white race” and to enforce the white supremacy as a facet of American life.³² Klan membership exploded between the years of 1865–1871, as many whites, fearing the end of slavery and the Southern way of life, joined the organization.³³ Though Klan membership would significantly dwindle by mid-1920, a substantial effort was made to revitalize the Klan via the use of media.³⁴ Thomas Dixon, Jr., a Klan sympathizer and Baptist minister, wrote several books romanticizing the organization.³⁵ One of his most notable publications, *The Clansman: An Historical Romance of the Ku Klux Klan*, was later adapted to film by D. W. Griffith’s *The Birth of a Nation*.³⁶ By 1921, as a result of these efforts, Klan membership grew by nearly 100,000 by the end of 1921. The increase in membership also led to an increase in revenue, as the organization charged its members ‘\$10 a head,’ all on a tax-free basis as a “benevolent” organization.³⁷

The widespread use of media propaganda by the Klan, along with news of Klan activities throughout the South, provided power and a common enemy to white men who committed their atrocities behind hoods.³⁸ Indeed, this propaganda emboldened members of the Klan and sharply influenced how Black Americans were viewed: “There is scarcely anyone, too low in reputation or too high in official position, particularly in the South, who does not feel qualified to threaten Negro Americans if they do not keep their ‘place.’”³⁹ The abandonment of Reconstruction, and, later, the wholesale adoption of the Lost Cause mythology, paved the way for widespread state

³¹ See JAKIYAH BRADLEY, WHOSE HISTORY? HOW TEXTBOOKS CAN ERASE THE TRUTH AND LEGACY OF RACISM 3 (2023), available at <https://tminstituteldf.org/wp-content/uploads/2023/03/2023-03-13-Black-History-Brief-web.pdf> [<https://perma.cc/52P2-SKZJ>].

³² See KKK History, *supra* note 20, at pg. 10.

³³ *Id.* at 10-15.

³⁴ *Id.* at 17 (noting that “the Klan’s membership [was] at only a few thousand” in June 1920).

³⁵ Gates, *supra* note 23, at 104; Thomas Dixon, BRITANNICA, <https://www.britannica.com/biography/Thomas-Dixon> [<https://perma.cc/CJP7-BJFF>] (last updated Mar. 30, 2024).

³⁶ Gates, *supra* note 23, at 151 (discussing Thomas Dixon’s contribution to anti-Black reconstruction media).

³⁷ KKK History, *supra* note 20, at pg. 17. Of note, many of these new members were from poor, rural communities that often competed for the same jobs as newly freed Black Americans. Thus, these communities viewed Black advancement as a threat to their own livelihoods. *See id.* at 7, 15.

³⁸ *Id.* at 18, 20. (“It almost seemed as if people in the rural areas of the country were determined to support whatever the big newspapers and congress condemned. Following more articles in the World in October (these concentrating on the violent nature of the Klan), membership in the Invisible Empire exploded. ‘It wasn’t until the newspapers began to attack the Klan that it really grew’ . . . ‘Certain newspapers also aided us by inducing Congress to investigate us. The result was that Congress gave us the best advertising we ever got. Congress made us’”).

³⁹ WCG Petition, *supra* note 17, at 187.

and local laws designed to keep Black people “in their place.”⁴⁰ Jim Crow laws mandated *de jure* segregation based on race, requiring that most public and private spaces be separated.⁴¹ Those socialized as “white” gained admittance, while individuals who possessed even “one drop” of Black ancestry were denied.⁴² Jim Crow laws were legitimized by the United States Supreme Court in a litany of nineteenth century cases—most notably, the *Civil Rights Cases* and *Plessy v. Ferguson*—which undermined the Fourteenth Amendment’s Equal Protection Clause and legalized the “separate but equal” doctrine as part of American constitutional jurisprudence for nearly six decades.⁴³

America’s anti-Black propaganda campaign effectively created a legal separation of the races, resulting in racial caste.⁴⁴ This catastrophe would not only have a profound impact on race relations in the United States, it would also have truly devastating international implications.⁴⁵

B. How Jim Crow “Fed” the Nazi Propaganda Machine.

The use of mass media by majority groups to disempower, dehumanize, and encourage violence against disfavored groups is not solely an American phenomenon. Hitler’s Third Reich extensively studied the United States’ laws and practices—including anti-miscegenation laws, voting restrictions, and the Jim Crow practices of the South, which had successfully relegated Black Americans and other non-whites to second-class citizenship—so as to apply these tactics in Nazi Germany.⁴⁶ The Nuremberg Laws of 1935 mirrored many of the United States’ Jim Crow

⁴⁰ *Id.* at 189.

⁴¹ See *Jim Crow Laws*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> [<https://perma.cc/FU7W-QZRV>] (last visited Apr. 11, 2024).

⁴² The U.S. Supreme Court attempted to define the outer contours of “whiteness” in a couple of cases in the early 1920’s. See, e.g., *Takao Ozawa v. United States*, 260 U.S. 178, 196 (1922) (excluding Japanese immigrants from the category of “free white persons” because the words refer only to Caucasians); *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923) (holding that, although anthropologically descended from Caucasians, Hindus are not Caucasian because the term is based on common understanding). Moreover, various anti-miscegenation laws relied on “one-drop” rules to define Blackness. See PAULI MURRAY, *States’ Laws on Race and Color* 681 (Univ. Ga. Press, 1997) (1951) (detailing various anti-miscegenation laws which relied on “one-drop” rules to define Blackness).

⁴³ See Gates, *supra* note 23, at 34.

⁴⁴ See ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 74-77 (2020) (advocating for use of the term “Caste” to describe the practice of creating false hierarchies between groups through de facto and de jure discrimination).

⁴⁵ See *infra* Part I.B.

⁴⁶ JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 2 (2017) (“In the late 1920s and early 1930s many Nazis, including not least Hitler himself, took a serious interest in the racist legislation of the United States. Indeed in *Mein Kampf* Hitler praised America as nothing less than ‘the one state’ that had made progress toward the creation of a healthy racist order of the kind the Nuremberg Laws were intended to establish”).

laws, restricting citizenship, homeownership, education, and general privilege to Germans of non-Jewish descent, thereby restricting the human rights of German Jews, as well as other groups.⁴⁷ Joseph Goebbels' appointment as Minister for Public Enlightenment and Propaganda in 1933 ushered in a totalitarian media strategy whereby all public communications—specifically, radio, press, and other publications—were required to uphold the anti-Semitic ideologies of the Nazi Party.⁴⁸ With fearmongering as its ultimate goal, the Nazi Propaganda Machine was highly effective in carrying antisemitism throughout Germany and into other parts of Europe.⁴⁹

The Nazi strategy was nearly a wholesale adoption of the United States' segregation policies against Black Americans, following a similar pattern.⁵⁰ Images, films, and other forms of media are used to spread narratives which degraded and dehumanized members of minority groups as inherently inferior, while simultaneously portraying the majority group as “pure” and superior. Media outlets, largely controlled by powerful majority members, controlled the flow of information, releasing “approved-only” messages that reinforced these false narratives and desensitized majority members to the mistreatment of minorities. These narratives of superiority and inferiority based on “race”—or “ethnicity,” in the case of Jews—thus created a de facto system of advantage and disadvantage based on this new caste. . In-fact mistreatment soon became legal mistreatment, as the basic human and civil rights of minority group members were quickly eliminated. Any acts of vigilante violence committed against them by majority members were excused by the majority-led government, ultimately culminating in state-sanctioned violence and atrocity.

II. LEGAL RESPONSES TO INCITEMENT CLAIMS

Two years after the International Court of Justice was established in 1946, the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) was drafted by the United Nations.⁵¹ The Genocide Convention firmly establishes that genocide, “whether

⁴⁷ *Id.* at 5 (“[W]hile [Nazi lawmakers] saw much to deplore [in the United States], they also saw much to emulate. It is even possible, indeed likely, that the Nuremberg Laws themselves reflect direct American influence”); *Nuremberg Laws*, NAT'L ARCHIVES, <https://www.archives.gov/publications/prologue/2010/winter/nuremberg.html> [https://perma.cc/YMP2-QPW5] (last updated Apr. 3, 2023).

⁴⁸ Joseph Goebbels, United States Holocaust Memorial Museum, <https://encyclopedia.ushmm.org/content/en/article/joseph-goebbels-1> [https://perma.cc/5WRW-HC9B] (last updated Dec. 18, 2019).

⁴⁹ Whitman, *supra* note 46, at 60-65 (discussing the use of America's anti-Black race laws as an example of the protective measures Germany needed to adopt against Jews).

⁵⁰ *Id.* at 5.

⁵¹ Genocide Convention, *supra* note 9.

committed in time of peace or in time of war, is a crime under international law.”⁵² Moreover, Article II defines genocide to include specific, violent conduct “committed with [the] intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁵³ As defined, acts of genocide include “[k]illing,” “[c]ausing serious bodily or mental harm,” [d]eliberately inflicting . . . conditions of life calculated to bring about [a protected group’s] physical destruction in whole or in part,” “[i]mposing measures intended to prevent births” within a protected group, or “forcibly transferring children” from the protected group to another group.⁵⁴

Given the widespread use of media propaganda to justify and incite the Holocaust, Article III of the Genocide Convention also provides for the punishment of “[d]irect and public incitement to commit genocide.”⁵⁵ Accordingly, under this Article, one could be liable for genocide even if they did not physically participate in genocide. Indeed, if a person directly incites another person to commit any of the violent acts proscribed by Article II, they could likewise face criminal liability.

A. *We Charge Genocide – 1951.*

In 1951, the Civil Rights Congress (CRC), a group of Black activists and intellectuals, filed the *We Charge Genocide Petition* (the Petition).⁵⁶ Specifically, the Petition sought redress under the Genocide Convention for the treatment of Black Americans in the Jim Crow South.⁵⁷ This was the first opportunity, following the Nuremberg trials, to test both the applicability and enforcement of the Genocide Convention, and the UN’s commitment to protecting human rights across the globe. When drafting the Petition, the CRC had two primary goals: “first, the Petitioners sought to expose the systemic racism at the heart of American institutions, evidenced by their failure to ratify the Convention, and second, they wanted to raise public and international awareness of the plight of Black Americans in ‘the land of the free.’”⁵⁸

In the Petition, the CRC indicted the United States government with numerous violations of Article II of the Convention.⁵⁹ Specifically, Petitioners accused the United States government of killing members of the

⁵² *Id.* at art. I.

⁵³ *Id.* at art. II.

⁵⁴ *Id.*

⁵⁵ *Id.* at art. III(c).

⁵⁶ WCG Petition, *supra* note 17.

⁵⁷ *Id.* at 43-50.

⁵⁸ Tiffany Atkins, *These Brutal Indignities: The Case for Crimes Against Humanity in Black America*, 111 KY. L.J. 61, 67 (2023).

⁵⁹ WCG Petition, *supra* note 17, at 45-47.

group, causing serious mental or bodily harm to members of the group, and deliberately inflicting conditions upon the group designed to bring out the group's demise.⁶⁰ Furthermore, Petitioners also alleged, under Article III, incitement and conspiracy to commit genocide based on decades of de facto segregation, de jure segregation, and Jim Crow.⁶¹ Based largely on the treatment of Black Americans in the "Black Belt,"⁶²

[P]etitioners allege that public officials, particularly in the Southern states of the United States, are frequently guilty of murder on the basis of race, of genocide, by direct and public incitement to genocide, by participating in actual violence on the basis of race as in the case of sheriffs and law enforcement officers, by use of the courts to kill innocent Negroes on the basis of race as a matter of public policy in sustaining white supremacy, by approving and soliciting the murder or assault of Negroes who attempt to vote, by being parties to the creation of that terror which results in "serious bodily and mental harm," by passing and enforcing laws providing for segregation in violation of the Constitution, the Charter and the Genocide Convention, and by refusing to enforce the criminal law against those guilty of crimes against the Negro people.⁶³

To support their claims, Petitioners included several excerpts from speeches delivered by government officials and leaders of vigilante groups—like the Ku Klux Klan—that directly incited violent acts against Black citizens.⁶⁴ Speeches by Governor Herman Talmadge of Georgia called for "hand to hand" fighting with weapons to resist integration.⁶⁵ Senator Theodore Bilbo of Mississippi instructed white radio listeners to "use any means to keep them [Black men] from the polls,"⁶⁶ and, in reference to commonly used Klan techniques to prevent voting, added further that: "I say

⁶⁰ *Id.*

⁶¹ *Id.* at 47-48.

⁶² See BOOKER T. WASHINGTON, UP FROM SLAVERY ch. 7 (1901) (describing the "Black Belt" as a term "first used to designate a part of the country which was distinguished by the colour of the soil. The part of the country possessing this thick, dark, and naturally rich soil was, of course, the part of the South where slaves were most profitable, and consequently they were taken there in the largest numbers. Later, and especially since the war, the term seems to be used wholly in a political sense—that is, to designate the counties where the black people outnumber the white").

⁶³ WCG Petition, *supra* note 17, at 47.

⁶⁴ *See Id.* at 187-91.

⁶⁵ *Id.* at 187.

⁶⁶ *Id.* at 187-88.

the best way to keep a n----r from the polls is to see him the night before.”⁶⁷ Still more officials and leaders incited groups to join them in the extermination of Black Americans: “We want 15,000,000 members in the United States, and every one of them with a good gun and plenty of ammunition. . . . Eventually we must eliminate the negroes from this country.”⁶⁸ The CRC thus alleged that these speeches—made by members of the government to the general public—incited the other allegations in the Petition: domestic terrorism at the hands of vigilante groups, as well as other acts of genocide by the American government. Namely, the public executions, assaults, rapes, unlawful imprisonments, mass disenfranchisement, intentional under-education, and other acts of degradation specifically directed at the Black community.⁶⁹

The CRC made a compelling case for the atrocity crime of genocide being committed against the Black community. The UN, however, never even convened a tribunal or otherwise investigated the allegations. Rather, the Petition was denounced by the U.S. State Department as “a clumsy piece of Russian propaganda,” and members of the CRC were labeled as part of an “aggressive Communist organization.”⁷⁰ In the months preceding official presentation of the Petition, the application of the Genocide Convention to the horrors faced by Black Americans was vehemently rejected by UN delegates, politicians, the American Bar Association, and others, who found it humiliating and slanderous to make the association.⁷¹ Proponents and architects of the Genocide Convention took deliberate measures to prevent awareness of the Petition from spreading, even going so far as revoking William T. Patterson’s passport in an effort to prevent him from traveling to Paris to present the Petition before the delegates at the UN gathering.⁷²

Shortly after the Petition was filed, the U.S. government issued several reports—initiating its own propaganda campaign—in an effort to disparage the CRC. These reports highlighted the achievements and advancement of the Black condition in the United States, and also included census data⁷³ to rebut the claims of genocide in the South. Opponents of the Petition also took to the media. Rafael Lemkin, who is credited with coining

⁶⁷ *Id.* at 188.

⁶⁸ *Id.* at 190.

⁶⁹ Atkins, *supra* note 58, at 67; *see also* WCG Petition, *supra* note 17, at 45–47.

⁷⁰ ANTON WEISS-WENDT, THE SOVIET UNION AND THE GUTTING OF THE GENOCIDE CONVENTION 239–40 (2017) (“The reaction of the US establishment to the publication of *We Charge Genocide* was fierce. The CRC was labeled an ‘aggressive communist organization,’ and its campaign was presented as an example of the attempts made by communist groups in the United States and abroad to divert attention away from Soviet actions”).

⁷¹ *Id.* at 227.

⁷² *Id.* at 239 (describing how the the U.S. State Department, purportedly “in the interests of the United States,” revoked Patterson’s passport in an attempt to subvert the WCG Petition).

⁷³ *Id.* at 241 (noting that counterarguments to the WCG Petition “pointed to the US census figures, which showed that the black population had increased by over two million since the early 1940s”).

the term “genocide” and heralded as a champion of the Genocide Convention itself, participated in a series of debates with Petitioners as to whether Genocide was occurring in the United States.⁷⁴ In one such debate, Lemkin remarked: “[f]or America, Genocide is an outside crime. It is like African leprosy.”⁷⁵ He added further that any attempt to label the treatment of Black Americans as genocide was a “maneuver to divert attention from the crimes of genocide committed against Estonians, Latvians, Lithuanians, Poles, and other Soviet-subjugated people.”⁷⁶ In one particular debate, when asked whether, under his framing, Jim Crow segregation and lynching could amount to genocide, Lemkin doubled down: “[o]nly segregation with purposes similar to those motivating Nazi use of concentration and labor camps would violate” the Genocide Convention.⁷⁷

Given the historical record of what transpired in the months before and after the Petition’s filing, it became clear that the UN’s human rights protections against atrocity and genocide did not extend to Black Americans. Despite the truthfulness of the allegations in the Petition,⁷⁸ the UN did not provide any relief, thus allowing the atrocities against Black Americans to continue. Lemkin and others negotiated whiteness as contract, thus turning the Genocide Convention into a gatekeeping tool that delegitimized Black suffering and erased them from international human rights protections.⁷⁹ This gatekeeping ideology ran in stark contrast with stated purpose of the Genocide Convention, as found in its Preamble: to condemn genocide as “contrary to the spirit and aims of the United Nations and . . . the civilized world,” and to encourage “international co-operation.”⁸⁰ Motivated by racist ideology and false notions of American Exceptionalism,⁸¹ the Convention was construed to exclude, rather than include, thus allowing the tendrils of white supremacy to sweep broadly across international law.

⁷⁴ See *id.* at 226-27, 243-45.

⁷⁵ *Id.* at 227.

⁷⁶ *Id.* at 244.

⁷⁷ *Id.* at 245.

⁷⁸ *Id.* at 228 (“Although it was commonly mentioned as one of many factors that had prevented immediate US ratification of the Genocide Convention, racial segregation in the American South was probably *the* major concern for US politicians”).

⁷⁹ See Marissa Jackson-Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1825 (2022). (“To maintain this racially-casted domination, signatories to the social contract of whiteness continue to negotiate the terms of whiteness to fight the existential threats to that domination—including the struggle of Black and Indigenous peoples for their own contracting and property-holding authority”).

⁸⁰ Genocide Convention, *supra* note 9, at pmb1; see also U.N. Charter Preamble, ¶ 1 (“We the Peoples the United Nations Determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. . .”).

⁸¹ See Weiss-Wendt, *supra* note 70, at 9. (“Racism was the single most important factor that prevented the United States from promptly ratifying the Genocide Convention”); see also Atkins, *supra* note 58, at 97-98 (defining American Exceptionalism as the “false notion that American laws, practices, and moral codes are superior to all others—making the United States accountable to no others”).

The value and substance of the Petition has been the subject of debate. Many have praised the collective effort of the CRC in bringing international awareness to the plight of Black Americans under Jim Crow.⁸² Others still have critiqued the group for its communist ties and accusing the group of attempting to sabotage UN efforts.⁸³ Despite this, the Petition succeeded in drawing the world's eye to what was happening in plain sight: that while the United States was leading international efforts to protect human rights abroad, its government was simultaneously preventing the international community from recognizing its own human rights atrocities.⁸⁴

B. The ICTR issues the First Article III Convictions – 1996.

When media-fueled-violence once again led to international atrocity in 1994, the “Never Again” mantra was put to the test. In stark contrast with the response to We Charge Genocide in 1951, the International Criminal Tribunal of Rwanda (ICTR), was created to investigate and prosecute those accused of genocide and incitement to commit genocide, leading to the first Article III convictions.⁸⁵

In Rwanda, power clashes between the two largest ethnic groups—the Hutus and the Tutsis—were followed by years of conflicts and exile, ultimately culminating in civil war.⁸⁶ In 1990, the Rwandan Patriotic Front (RPF), a primarily Tutsi-led militia group founded to return exiled Rwandans to their homeland, and to initiate a shared power structure between Hutus and Tutsis, invaded Rwanda.⁸⁷ This invasion ignited the Rwandan Civil War, a conflict that resulted in the death of 10,000 Rwandans.⁸⁸

In July 1993, Radio Television Libre des Mille Collines (RTLM) was founded and quickly became Rwanda's most popular radio station, due in large part to its anti-Tutsi messages.⁸⁹ Prominent supporters of RTLM

⁸² Alex Hinton, *70 Years Ago Black Activists Accused the U.S. of Genocide. They Should Have Been Taken Seriously*, POLITICO (Dec. 26, 2021, 7:00 AM), <https://www.politico.com/news/magazine/2021/12/26/black-activists-charge-genocide-united-states-systemic-racism-526045> (explaining why the WCG petition should have been investigated by the U.N. in 1951).

⁸³ Weiss-Wendt, *supra* note 70, at 237, 239-40 (discussing the relationship between CRC leadership and the Communist Party).

⁸⁴ *Id.* at 242-243 (describing the global distribution and discussion of the WCG Petition).

⁸⁵ Timeline of the International Criminal Tribunal of Rwanda, United Nations ICTR Legacy Website <https://unictr.irmct.org/en/genocide#:~:text=On%2020September%201998%2C%20the,in%20the%201948%20Geneva%20Conventions.> (describing the timeline of events following the Genocide and leading up to the first Article III Convictions in 1998).

⁸⁶ RINA M. ALLURI, *A HISTORY OF CONFLICT: THE ROLE OF TOURISM IN POST-CONFLICT PEACEBUILDING IN RWANDA* 13-14 (2009).

⁸⁷ *Id.*

⁸⁸ *Id.* at 14.

⁸⁹ David Yanagizawa-Drott, *Propaganda and Conflict: Evidence from the Rwandan Genocide*, 129 OXFORD

included Rwandan President Juvénal Habyarimana and other public officials, such as Ferdinand Nahimana.⁹⁰ Nahimana was a former member of the government's media office who eventually became co-founder and content editor of RTLM.⁹¹ RTLM, which would later be dubbed "Hutu Radio," gained popularity among Hutus—who made up nearly 85 percent of the country's population at the time—based on the general belief that the outlet was more responsive and credible than other competitors.⁹²

On August 4, 1993, the Arusha Accords, a peace agreement proposed by the Organization of African Unity to end the civil war, were signed by both the RPF and President Habyarimana.⁹³ However, this peace was fragile and did not last long. On April 6, 1994, a plane carrying President Habyarimana and others was shot down by a missile, killing everyone on board.⁹⁴ His assassination detonated the fuse of genocide which had been lit centuries prior during the German colonization and Belgian occupation of Rwanda.⁹⁵ On April 7th, RTLM accused the RPF or Belgian forces of assassinating the President and called for Hutus to "exterminate" the Tutsi "cockroach."⁹⁶ For the next 100 days, RTLM became one of the primary modes of communication of the Interwamwe, the Hutu extremist group which took control of the Rwandan government following Habyarimana's assassination, thus leading to the mass execution of Tutsis.⁹⁷ The group coordinated executions over the airways, inciting horrific acts which ultimately resulted in the killings of an estimated one million Tutsis before the genocide's end in July 1994.⁹⁸

Following the Rwandan genocide, the ICTR was created to investigate and prosecute those involved in the killings, either directly or indirectly. In the case of *Prosecutor v. Nahimana*, Ferdinand Nahimana, Jean Bosco Barayagwiza, and Hassan Ngeze, were tried and convicted of genocide

Q. J. ON ECON. 1947, 1953 (2014).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Yanagizawa-Drott, *supra* note 89, at 1954.

⁹³ Alluri, *supra* note 86, at 14; *see also* Christopher Clapham, *Rwanda: The Perils of Peacemaking*, 35 J. OF PEACE RSCH. 193, 194 (1998).

⁹⁴ Linda Melvern, *Rwanda: at last we know the truth*, *Guardian* (Jan. 10, 2012, 3:18 PM), <https://www.theguardian.com/commentisfree/2012/jan/10/rwanda-at-last-we-know-truth> [<https://perma.cc/92AS-5BM8>].

⁹⁵ *See* Alluri, *supra* note 86, at 13-14 (discussing the historical foundations of the Hutu-Tutsi divide and the assassination of President Habyarimana).

⁹⁶ ALLAN THOMPSON, *MEDIA AND THE RWANDA GENOCIDE* 48 (2007).

⁹⁷ *See* Yanagizawa-Drott, *supra* note 89, at 1953-954; *see also* Chris Simpson, World: Africa Interhamawe: A serious military threat, *BBC* (Mar. 2, 1999), <http://news.bbc.co.uk/2/hi/africa/288937.stm> [<https://perma.cc/Q8AW-WFU9>].

⁹⁸ *See* Thompson, *supra* note 96, at 49-50 (providing various examples of RTLM-incited violence, including coordinated roadblocks, ambushes, and other acts); *see also* Yanagizawa-Drott, *supra* note 89, at 1953 (detailing the end of the Rwandan Genocide).

and incitement to genocide for their use of RTLM to broadcast messages that encouraged the killing of Tutsis during the 100-day genocide.⁹⁹ Nahimana and Jean Bosco Barayagwiza managed RTLM as shareholders and founders, exercising control over radio broadcasts.¹⁰⁰ Many findings of fact regarding the impact of media to incite violence were produced during Nahimana's trial.¹⁰¹ It was determined that, during the months preceding the genocide, the "RTLM exhorted Hutus to exterminate Tutsis and moderate Hutus, identified specific targets, and helped coordinate attacks."¹⁰² In addition to the use of radio messages to directly incite physical violence against Tutsis,¹⁰³ RTLM also created a hostile environment by spreading propaganda and speculative (or outright incorrect) stories, which were specifically designed to fuel further hostility in the country.¹⁰⁴

Hassan Ngeze, the third defendant tried alongside Nahimana, was the editor-in-chief of a local Rwandan newspaper, *Kangura*.¹⁰⁵ He was convicted for incitement based on articles which were run in the *Kangura* newspaper before and during the genocide.¹⁰⁶ Specifically, Ngeze ran articles that described Tutsis as enemies who were evil and nonhuman, and the newspaper also displayed visuals such as machetes—a killing tool notoriously used throughout the genocide—that called for the elimination of Tutsis through violence.¹⁰⁷

In addition to individual convictions for those who used radio and print media to incite genocide in Rwanda, the ICTR also convicted individuals for public speeches that incited genocide. In *Prosecutor v. Augustine Ngirabatware*,¹⁰⁸ Ngirabatware was found guilty of genocide and incitement to genocide based on several public comments made.¹⁰⁹ In February of 1994, at a gathering of hundreds at a local school, Ngirabatware declared that he would "provide weapons" to Hutu fighters.¹¹⁰ Later, he

⁹⁹ See *Prosecutor v. Nahimana*, *infra* note 108; see also Orentlicher, *supra* note 95, at 1-2 (discussing how language from the ICTR's empowering statute is taken from the Genocide Convention).

¹⁰⁰ Spencer W. Davis, *Incitement to Terrorism in Media Coverage: Solutions to Al-Jazeera After the Rwandan Media Trial*, 38 GEO. WASH. INT'L. L. REV. 749, 765-771 (2006) (describing the factual allegations of the defendants in *Prosecutor v. Nahimana* and the ICTR's consideration of "the responsibilities inherent in ownership and institutional control over the media").

¹⁰¹ *Prosecutor v. Nahimana*, *infra* note 108, at ¶¶ 390-433 (outlining the ICTR's factual findings related to RTLM broadcasts, immediately after the death of President Habyarimana, calling for violence).

¹⁰² Orentlicher, *supra* note 95, at 1; see also *Prosecutor v. Nahimana*, *infra* note 108, at [].

¹⁰³ See generally Thompson, *supra* note 96, at 42-50 (discussing the use of RTLM radio to exact violence on specific victims).

¹⁰⁴ See Davis, *supra* note 113, at 767.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 767-68.

¹⁰⁸ Case No. ICTR-99-54-T, Judgment (Dec. 20, 2012) [hereinafter *Prosecutor v. Ngirabatware*].

¹⁰⁹ *Id.* at ¶¶ 1341, 1369.

¹¹⁰ Jacqueline Niba & Davina Ogochukwu, *Judgment Summaries: International Criminal Tribunal for Rwanda*, 21 HUM. RTS. BRIEF 44, 44 (2014).

appeared at a roadblock and instructed the crowd to “kill Tutsis.”¹¹¹ On April 7, 1994, Ndirakobuca distributed machetes and other killing tools to commence the massacre of Tutsis.¹¹²

In prosecuting those who carried out the Rwandan Genocide, the ICTR relied heavily on Article III of the Genocide Convention and its prohibitions against genocide and the incitement of genocide,¹¹³ thus becoming the first tribunal to interpret and apply the tenets of the Genocide Convention.¹¹⁴ Between 1996 and 2015, the ICTR has indicted 93 individuals for their participation in the Rwanda genocide.¹¹⁵ Those convicted included journalists and other public figures like Nahimana and Ndirakobuca.¹¹⁶ The ICTR thus provides an example of international human rights law at work; when atrocities are recognized—regardless of how long that recognition might take—parties can be held accountable for their use of media to fuel and incite atrocity. Moreover, the ICTR serves as a warning for what can happen within a country when those dangers are ignored.

C. US Ratification of the Genocide Convention – 1988.

The United States delayed ratification of the Genocide Convention for forty years.¹¹⁷ Debates around ratification centered primarily on the text and enforceability of the Convention, as well as on the political ramifications of ratification. Given the American influence on the Convention’s language,¹¹⁸ key debates were held between members of the American legal

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Orentlicher, *supra* note 95, at 1-2 (discussing how language from the ICTR empowering statute is taken from the Genocide Convention).

¹¹⁴ *The Genocide*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, ... <https://unictr.irmct.org/en/genocide#:~:text=On%20%20September%201998%2C%20the,in%20the%201948%20Geneva%20Conventions> (last visited May 5, 2024).

¹¹⁵ *The ICTR in Brief*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://unictr.irmct.org/en/tribunal> [<https://perma.cc/GE3V-9GUN>] (last visited Apr. 12, 2024).

¹¹⁶ Thomas E. Davies, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*, 22 HARV. HUM. RTS. J. 245, 252 (discussing the conviction of Jean-Paul Akayesu, who used his position of influence with Hutus to incite genocide against Tutsis. “Akayesu was a ‘well known and popular figure in the local community,’ who . . . was ‘the leader of the commune and commonly treated with great deference and respect.’ The trial chamber found that Akayesu had given a speech he knew ‘would be construed as a call to kill the Tutsi in general’ before a crowd of over a hundred people”).

¹¹⁷ While the exact reason for the delay in ratification remains opaque, historical evidence makes clear that many within the U.S. government feared scrutiny and potential indictment by a member-State based on the treatment of Black Americans highlighted in the WCG Petition. See Weiss-Wendt, *supra* note 70, at 243 (describing the reservations of the American government surrounding ratification and discussing the Soviet Union as the “true” opponent of the Genocide Convention).

¹¹⁸ *Id.* at 142 (“The structure and form of the convention was unmistakably American; the text of the convention was grounded in Anglo-American legal tradition”).

community to discuss the impact the Convention might have on U.S. law. Indeed, “[o]pponents . . . argued that its adoption would create a new category of federal crimes,” and that “under the Tenth Amendment to the US Constitution, all powers not delegated to the federal government were reserved to the states,” therefore arguing that the Genocide Convention “might undermine the American system of human rights and fundamental freedoms.”¹¹⁹ During ratification hearings, many Senators voiced concerns that U.S. ratification might lead to the Convention being used for political gain.¹²⁰ These debates regarding ratification of the Genocide Convention—of which the United States had been one of the earliest signatories—demonstrates the fraught nature of these deliberations.

Finally, in November of 1988, the U.S. ratified the Genocide Convention, thus becoming an official party.¹²¹ However, it did so with two “reservations” and five “understandings” attached to the treaty itself.¹²² The ability to submit reservations to the Convention had been raised by the Soviet Union during ratification hearings in 1950, with it being decidedly held by the International Court of Justice that “states could from now on ratify the convention with reservations, whether they liked the specific clauses attached by others or not.”¹²³ The ability of a country like the U.S. or Soviet Union to ratify the Genocide Convention with reservations would thus allow them to signal support for the Convention, while, at the same time, ultimately altering its effectiveness and reach.¹²⁴

In light of congressional concerns regarding the impact of the Genocide Convention on the U.S. Constitution,¹²⁵ the second reservation provides “[t]hat nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution

¹¹⁹ *Id.* at 145.

¹²⁰ *Id.* at 153 (“[T]he Soviet Union featured prominently in the 1950 debate. On the one hand, opponents of the Genocide Convention hinted at the probability that the United States might be indicted for genocide—no doubt by communist fellow travelers—on evidence of race riots. On the other, they expressed regret that the omission of political groups from the wording of the convention prevented similar charges from being leveled against the Soviet Union”).

¹²¹ *Signatories for Convention on the Prevention and Punishment of the Crime of Genocide*, DANISH INST. FOR HUM. RTS., <https://sdg.humanrights.dk/en/instrument/signees/23> [<https://perma.cc/7CD9-VY9E>] (last visited Apr. 12, 2024); see also Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 100 (2011)

¹²² Venetis, *supra* note 121, at 102 (noting that “[r]eservations change U.S. obligations without necessarily changing the text,” and defining “understandings” as “interpretative statements that clarify or elaborate provisions but do not alter them”); *Declarations and Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, PREVENT GENOCIDE INT’L, <http://www.preventgenocide.org/law/convention/reservations/> [<https://perma.cc/B2V9-GSE4>] (last visited Apr. 12, 2024) [hereinafter Genocide Convention RUDs].

¹²³ Weiss-Wendt, *supra* note 70, at 158.

¹²⁴ *Id.* at 145 (discussing the political responses to the Genocide Convention, including US fears of constitutional violations if ratified).

¹²⁵ See *supra* notes 133-37 and accompanying text.

of the United States as interpreted by the United States.”¹²⁶ This reservation relieves the U.S. of its obligations under the Convention if compliance would violate provisions of the U.S. Constitution, thus “seriously undermin[ing] the scope of U.S. obligations under the [Genocide] Convention.”¹²⁷

III. U.S. PROTECTIONS FOR INCITEMENT UNDER THE FIRST AMENDMENT.

While Ferdinand Nahimana and Augustine Ngirabatware—individuals who used the media and their respective positions of power to incite violence or to create an environment of racial or ethnic hostility—were liable for incitement under the Genocide Convention, American reservations to the Genocide Convention restrict its domestic application to the four corners of the U.S. Constitution.¹²⁸ In the context of media-fueled violence and incitement, the Supreme Court’s First Amendment jurisprudence provides the current, inadequate legal standard for prosecuting incitement under American constitutional law.

A. Origins of Supreme Court Incitement Jurisprudence

The Supreme Court first addressed the bounds of First Amendment protections for inciteful speech in *Schenck v. United States*, where it articulated a “clear and present danger” test.¹²⁹ This test asks whether the words used were “of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”¹³⁰ Accordingly, if one’s speech resulted in the creation of a clear and present danger, that speech is not protected by the First Amendment.¹³¹ Moreover, in making a determination of whether speech is protected by the First Amendment, the Court made clear that the underlying facts in a given case hold significant weight.¹³² However, subsequent Supreme Court decisions applying *Schenck*’s “clear and present danger” test, led to a number of questionable outcomes.¹³³ As a result, the Supreme Court eventually

¹²⁶ Genocide Convention RUDs, *supra* note 122.

¹²⁷ Maria Frankowska, *The United States Should Withdraw its Reservations to the Genocide Convention: A Response to Professor Paust’s Proposal*, 12 MICH. J. INT’L L. 141, 142 (1990) (citing Jordan J. Paust, *Congress and Genocide: They’re not Going to Get Away with It*, 11 MICH. J. INT’L L. 90, 95-100 (1989)).

¹²⁸ Genocide Convention RUDs, *supra* note 122.

¹²⁹ 249 U.S. 47, 52 (1919).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* (noting that a determination of whether speech presents a clear and present danger is “a question of proximity and degree”).

¹³³ *See, e.g.*, *Frohwerk v. U.S.*, 249 U.S. 204 (1919) (upholding convictions under the Espionage Act without considering the underlying speech’s “proximity and degree” to a clear and present danger); *Gitlow v. New York*, 268 U.S. 652, 669 (1925) (holding that, in prosecuting speech designed to incite, “[t]he State cannot reasonably be

articulated a new standard that constituted a “clear break with First Amendment law up until that point.”¹³⁴

B. Brandenburg v. Ohio

In 1964, Clarence Brandenburg, a leader of the Cincinnati branch of the Ku Klux Klan, made televised statements calling for “revengeance” if the federal government continued to “suppress the white, Caucasian” race.¹³⁵ He was charged and convicted of violating an Ohio statute that prohibited the use of media to advocate for violence.¹³⁶ On appeal, the Supreme Court overturned Brandenburg’s conviction and articulated a new standard for prosecuting incitement cases under the First Amendment.¹³⁷ Having found that, because Brandenburg’s comments were “‘abstract teaching’” distinguishable from “‘preparing a group for violent action and steeling it to such action,’” the Court held that they were protected.¹³⁸ Furthermore, since Ohio’s statute did not “distinguish between ‘mere advocacy’ and ‘incitement to imminent lawless action,’” it did not pass scrutiny under this heightened test, and was deemed unconstitutional.¹³⁹ Thus, the *Brandenburg* standard, which has persisted since 1969, established that:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁴⁰

Under this standard, courts must distinguish between those who merely advocate for violence and those who incite “imminent” and “likely” violence.¹⁴¹ *Brandenburg* also introduced an intent requirement.¹⁴² However,

required to measure the danger from each such utterance A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration); *Dennis v. U.S.*, 341 U.S. 494, 509 (1951) (holding that the Government may regulate and prosecute speech promoting communism because “an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers of power of the revolutionists, is a sufficient evil for Congress to prevent”).

¹³⁴ Wilson & Kiper, *supra* note 154, at 202-03.

¹³⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969).

¹³⁶ Wilson & Kiper, *supra* note 154, at 203-04.

¹³⁷ *Id.*

¹³⁸ *Brandenburg*, 395 U.S. at 447-48 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

¹³⁹ Wilson & Kiper, *supra* note 154, at 204.

¹⁴⁰ *Brandenburg*, 395 U.S. at 447.

¹⁴¹ See Wilson & Kiper, *supra* note 154, at 204 (describing the *Brandenburg* standard as an “innovation” that “add[ed] two contextual conditions—imminence and likelihood—to the long-established element of criminal advocacy”).

¹⁴² *Id.* at 205-06 (noting that “[c]onstitutional scholars . . . maintain[] that ‘*Brandenburg* contains an intent

courts have struggled to clearly define imminence.¹⁴³ For example, while some courts have held that as few as five weeks between the “speech” and the responsive act was sufficiently “imminent” so as to support suppressing the speech,¹⁴⁴ others have held that “weeks or months” was insufficiently to warrant suppression.¹⁴⁵ Equally difficult for courts to determine has been the “likelihood” of speech to incite violence.¹⁴⁶

Given the difficulty of articulating and applying constitutional standards to incitement cases under the *Brandenburg* test, which effectively protects the right to incite racial and political violence as “mere advocacy,” the United States’ reservations to the Genocide Convention ensure that there is no protection against media-fueled atrocity for Black Americans. Thus, if a public figure, such as a sitting United States President, uses the media to call for violence, neither the Genocide Convention nor the U.S. Constitution would offer protection.

IV. MITIGATING THE RISK OF FURTHER AMERICAN ATROCITY

Professor David Yanagizawa-Drott’s 2014 study, *Propaganda and Conflict: Evidence from the Rwandan Genocide*, examined the relationship between speech and action.¹⁴⁷ Using the Rwandan Genocide as an example, the study specifically investigated how the dynamics of persuasive communication and social interaction lead to atrocity by comparing data gathered from two radio transmitters within Rwanda, anecdotal information on how frequently genocide participants listened to broadcasts, and the number of prosecutions for genocide-connected violent crimes in each village.¹⁴⁸ They found several notable correlations. First, “RTL M broadcasts were most effective in inducing violence in villages where the population was relatively uneducated and . . . where Tutsis made up a relatively small minority.”¹⁴⁹ Second, the broadcasts led to a “spillover” effect of violence,

requirement: the speech must be directed to causing the harm.’ Subsequent decisions have made this explicit”).

¹⁴³ *Id.* at 209 (“By requiring imminence, *Brandenburg* built on *Schneck*’s language of ‘proximity and degree,’ but *Brandenburg* did not explain precisely how imminent the lawless action must be to warrant suppression of the speech”).

¹⁴⁴ See *People v. Rubin*, 96 Cal.App.3d 968, 979 (Cal. Ct. App. 1979) (“We think solicitation of murder . . . even though five weeks away, can qualify as incitement to imminent lawless action”).

¹⁴⁵ See *NAACP v. Claiborne*, 458 U.S. 886, 928 (1982).

¹⁴⁶ See *Wilson & Kiper*, *supra* note 154, at 213 (“Thus far, there has been no systematic discussion of the class of speech acts or the contextual factors most likely to incite imminent lawless action. The caselaw is anecdotal and has thus far abjured any comprehensive or rigorous statement of a generalizable principle of risk analysis. Courts are left to reach back to cases with wildly different fact patterns, with the result that principles gleaned from earlier trials are often misapplied”).

¹⁴⁷ Yanagizawa-Drott, *supra* note 89.

¹⁴⁸ See *id.* at 1949.

¹⁴⁹ *Id.* at 1950.

even in areas where broadcasts were less frequent.¹⁵⁰

These findings bolstered the theory of persuasive communication, which holds that one's exposure to mass media has the ability to affect behavior and beliefs.¹⁵¹ In Rwanda, specifically, RTLM was not viewed as an extremist radio station that would lack credibility or cause a listener to question their response. In fact, the "RTLM broadcasts were endorsed by the government," and "they arguably carried some credibility and signaled . . . that civilian participation [in the genocide] was strongly encouraged."¹⁵² Furthermore, the RTLM broadcasts incentivized participation in genocide by vilifying Tutsis—often characterizing them as threats to Hutu safety—and threatening moderate Hutus who refused to participate in the killings with death.¹⁵³ Indeed, Hutus who refused to participate in the genocide "would be considered accomplices to 'the enemy'" and killed.¹⁵⁴ Thus, participation in the killing—even by Hutus who were not fully committed to the extermination of Tutsis—was compelled by the media and fueled by those who sought to broadly disseminate their hateful messages.

Therein lies the risk of atrocity in the United States: media incitement begets vigilante violence, and legal systems—which should provide protection and relief—fail to do so, thus leading to acceptance and avoidance as part of American culture. In the *Petition*, the CRC laid out the media strategy to incite racial violence in Southern states.¹⁵⁵ Vigilante groups like the Ku Klux Klan, as well as various public officials, participated in the extreme violence that followed.¹⁵⁶ State and federal laws provided no protection,¹⁵⁷ and racial violence burned throughout the nation, as did the hateful rhetoric which inspired it.

By the late twentieth century, the Ku Klux Klan had largely disbanded.¹⁵⁸ However, while "The Klan" no longer existed as a single entity,

¹⁵⁰*Id.* at 1989-90 ("These spillovers are consistent with social interactions being important drivers in the production of militia violence Violence may beget violence, such that it endogenously spreads across space. Alternatively, information and beliefs may spread via social interactions among neighbors. The two mechanisms may also work in tandem").

¹⁵¹*Id.* at 1955.

¹⁵²*Id.*

¹⁵³*Id.* at 1956 ("RTLM effectively disseminated the message 'kill or be killed,' which referred to the notion of self-defense against an upcoming Tutsi takeover"); Alluri, *supra* note 86, at 14 (discussing how the Hutu Power Movement "instilled fear amongst those who had land and power to lose" and "called upon [them] to protect themselves against the Tutsi 'foreign invaders' [...] who would threaten to take their properties and once again cast them into servitude").

¹⁵⁴ Yanagizawa-Drott, *supra* note 89, at 1956.

¹⁵⁵ See WCG Petition, *supra* note 17, at 187-191.

¹⁵⁶ See, e.g., *id.* at 58-77 (detailing the killings of Black Americans by public officials and members of the KKK).

¹⁵⁷ See Wright, et al., *supra* note 26, at 695 (describing various federal laws and Supreme Court cases which failed to curtail racial violence against Black Americans).

¹⁵⁸ See KKK History, *supra* note 20, at 51. (noting that the "Invisible Empire" was no more and the largest successor of the KKK, called the "Knights of the Ku Klux Klan," were "fractured and disorganized")

it continued informally through a network of former members, recruiters, imitators, and sympathizers who still held fast to Klan values.¹⁵⁹ Over time, the Klan's messaging shifted slightly. To prevent any solidarity between working class rural white people and Black farmers, and to recruit others to its cause, the Klan refashioned itself as "rabidly pro-American," which meant that, while they were still strongly anti-Black, they were also anti-Jewish and anti-Catholic.¹⁶⁰ On this new platform, the Klan and its many imitators, including neo-Nazis, The Order, the Aryan Nation, and others brought the movement into the twenty-first century, where it continues to provoke racial violence.¹⁶¹

On June 17, 2015, twenty-two year old Dylann Roof entered Mother Emmanuel A.M.E. church in Charleston, South Carolina and killed nine Black churchgoers during a Bible study program.¹⁶² Later, Roof admitted to being motivated by white supremacy: "Somebody had to do it . . . [B]lack people are killing white people everyday."¹⁶³ Moreover, he added: "Our people are superior, . . . [t]hat's just the fact."¹⁶⁴

On August 11, 2017, white supremacists gathered in Charlottesville, Virginia, at the Unite the Right rally.¹⁶⁵ Comprised of Neo-Nazis, members of the KKK, and other members of various alt-right white nationalist groups, they assembled to protest the recent removal of Confederate statues in Virginia.¹⁶⁶ They marched throughout the streets of Charlottesville, carrying tiki torches and chanting slogans rooted in the "Great Replacement" theory and other racist ideologies.¹⁶⁷ The rally was largely publicized through social media channels, with attendees using the internet to share strategy and their intent to use violence against counter-protestors.¹⁶⁸ In response, the next day white supremacist James Alex Fields, Jr. drove his truck into a group of counter-protestors, including Heather Heyer, who later died from her

¹⁵⁹ See *id.* at 48, 51.

¹⁶⁰ *Id.* at 17.

¹⁶¹ *Id.* at 48, 51; in 2022, 59 percent of hate crimes committed were on the basis of race and ethnicity, with 51 percent of perpetrators identifying as white, *FBI Releases 2022 Hate Crimes Statistics*, DEP'T JUST., <https://www.justice.gov/hatecrimes/hate-crime-statistics> [<https://perma.cc/32D3-9LD5>] (last visited Apr. 12, 2024).

¹⁶² Ray Sanchez & Keith O'Shea, *Mass Shooter Dylann Roof, with a laugh, confesses, 'I did it'*, CNN (Dec. 10, 2016, 7:16 AM), <https://www.cnn.com/2016/12/09/us/dylann-roof-trial-charleston-video/index.html> [<https://perma.cc/GUZ4-PF6A>].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Debbie Elliot, *The Charlottesville rally 5 years later: 'It's what you're still trying to forget'*, NPR (Aug. 12, 2022, 5:00 AM), <https://www.npr.org/2022/08/12/1116942725/the-charlottesville-rally-5-years-later-its-what-youre-still-trying-to-forget> [<https://perma.cc/KXD9-PQE7>].

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Neil MacFarquhar, *Jury Finds Rally Organizers Responsible for Charlottesville Violence*, N.Y. TIMES (Nov. 23, 2021), <https://www.nytimes.com/2021/11/23/us/charlottesville-rally-verdict.html>.

injuries.¹⁶⁹

On May 16, 2022, eighteen year old Payton Gendron shot and killed ten Black people at a Buffalo grocery store.¹⁷⁰ Gendron, a white supremacist, posted a manifesto on the website “4chan” just days before.¹⁷¹ In it, he explicitly vowed to carry out a shooting in a Black neighborhood in New York.¹⁷² In addition to being a white supremacist in his own right, Gendron was also an adherent of Replacement Theory.

Given the *Brandenburg* standard, which has often protected inciteful speech as “mere advocacy,” public figures like Tucker Carlson who arguably used the media to spread racist messages like Replacement Theory, would not be held responsible for their speech that resulted in violence unless it could be shown that such speech would imminently and likely produce violence.¹⁷³ On January 6, 2021, following the loss of his bid for reelection, former President Donald Trump held a rally in Washington DC.¹⁷⁴ In his speech, Trump urged supporters to “fight like hell” to stop what they viewed as a stolen election by Joe Biden and Democrats.¹⁷⁵ Following these remarks, thousands of protestors, including members of far-right organizations like Q-Anon and white supremacist groups such as the Proud Boys and Oath Keepers, converged on the State Capitol.¹⁷⁶ Over the course of several hours, they attacked and injured law enforcement officers, vandalized and ransacked the Capitol, stole classified documents, and laid siege to the seat of American government.¹⁷⁷ One person was killed,¹⁷⁸ dozens more were injured.

Media + vigilante violence is a formula for American atrocity; the January 6th Insurrection provides a perfect example of this expression. Although President Trump’s remarks did not encourage racial violence, the incident—which played out for the world to see—illustrates the power of media, the risk of harm to human life, and the ineffectiveness of domestic law to provide adequate remedy. Because the question remains: were these remarks by President Trump protected speech under *Brandenburg*? While

¹⁶⁹ *Id.*

¹⁷⁰ Emma Bowman, et al., *What we know so far about the Buffalo mass shooting*, NPR (May 16, 2022, 9:45 AM) <https://www.npr.org/2022/05/15/1099028397/buffalo-shooting-what-we-know> (last visited Mar. 22, 2024).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁷⁴ Charlie Savage, *Incitement to Riot? What Trump Told Supporters Before Mob Stormed the Capitol*, N.Y. TIMES (Jan. 10, 2021) <https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html> (last visited Mar. 22, 2024).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Kat Lonsdorf, Courtney Droning, May Isackson, Mary Louise Kelly, Ailsa Change, *A Timeline of the Jan. 6 Capitol Attack – including how and when Trump responded*, N.Y. TIMES (originally published Jan. 5, 2022) <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when> (last visited Mar. 22, 2024).

¹⁷⁸ *Id.*

scholars debate whether his remarks will meet with imminence and likelihood standard,¹⁷⁹ the harms have already been committed.

If the imminence and likelihood standards had been applied to Augustine Ngirabatware or Hassan Ngeze for their roles in inciting the Rwandan Genocide through media, although both would undoubtedly be considered “speech,” they could possibly be protected under *Brandenburg*, despite their actions being a clear violation of genocide protections under human rights law. In prioritizing protections for speech over the need to resist media-fueled atrocity, the United States thus provides less protections against race-based and vigilante violence, leaving American citizens vulnerable.

To provide protection from racial violence and to prevent American atrocity, reforms are required. First, the U.S. must remove its Reservations and Understandings (RUDs) from the Genocide Convention. As written, the reservations vary in absurdity: from requiring consent of the U.S. government before any trials for genocide may commence, to limiting treaty compliance if doing so would violate constitutional law as interpreted by constitutional law makers.¹⁸⁰ These RUDs effectively relegate the Genocide Convention to ornamental status, and it thus provides no substantive protections for American citizens at risk of violence and atrocity. In addition to providing a structural remedy,¹⁸¹ removing these RUDs would also serve an expressive function—recognizing finally the applicability of international human rights law to American citizens.

Next, to mitigate the risk of atrocity in the U.S., the *Brandenburg* standard should be redefined and codified within federal anti-incitement legislation. Professors Richard Ashby Wilson and Jordan Kiper provide a helpful matrix that includes ten factors to assess the risk of incitement.¹⁸² Of note, in determining whether speech falls under the category of incitement, the matrix evaluates: “attributes of the speaker,” which considers personal attributes of the speaker such as charisma and access to mass media communication;¹⁸³ “content of the message,” including explicit calls for violent acts or dehumanizing language against specific groups;¹⁸⁴ and finally, “context of the speech” considers whether there is history of violence between group members, significant polarization along racial lines, whether

¹⁷⁹Joshua Azriel and Jeff DeWitt, “We Fight Like Hell”: *Applying Brandenburg to Trump’s Speech Surrounding the U.S. Capitol Siege*, The Criminal Law Practitioner American University Washington College of Law <https://www.crimlawpractitioner.org/post/we-fight-like-hell-applying-brandenburg-to-trump-s-speech-surrounding-the-u-s-capitol-siege> (analyzing President Trump’s speech as a modern test of the Brandenburg standard).

¹⁸⁰ See Genocide Convention RUDs, *supra* note 122.

¹⁸¹ See Frankowska, *supra* note 127, at 145-48.

¹⁸² Wilson & Kiper, *supra* note 154, at 228-47.

¹⁸³ *Id.* at 231-37.

¹⁸⁴ *Id.* at 237-42.

a major political election is looming, and the emotional state of listeners when the speech is uttered.¹⁸⁵ Implementing this matrix would provide courts with a more holistic view of incitement in the context of the climate where media was used to communicate such speech. In Professor Yanagizawa-Drott's study, such considerations were highly relevant to whether individual Hutus participated in killings based on the climate which had been created by RTLM's constant anti-Tutsi messaging.¹⁸⁶ Moreover, the matrix would provide useful guidance in ensuring the goals of the Elie Wiesel Genocide and Atrocities Prevention Act (the Elie Wiesel Act) are met.¹⁸⁷

Proposed in 2018 in response to several failures on the part of the U.S. government to effectively respond to international atrocities, Elie Wiesel provides a federal framework for better assessing and preventing international atrocities.¹⁸⁸ Its stated goal is to "help prevent acts of genocide and other atrocity crimes, which threaten national and international security, by enhancing United States Government capacities to prevent, mitigate, and respond to such crises."¹⁸⁹ Elie Wiesel, which was enacted in 2021, achieves its goals through several mandates requiring interagency coordination to identify gaps in U.S. foreign policy, create recommendations and regular reports to the Executive and Legislative branches, facilitate outreach, and dedicate resources to the endeavor of preventing genocide and atrocity.¹⁹⁰ The Atrocities Prevention Board (APB) was tasked with the responsibility of achieving the Elie Wiesel Act's mandates.¹⁹¹ However, the Elie Wiesel Act is an outward-facing mandate, and there is no indication that the APB would be used to assess the risk of atrocity within the United States.¹⁹² To provide true atrocity prevention, Elie Wiesel should be amended to provide the APB with the power to assess risks of atrocity within the U.S. using a matrix proposed by Professors Wilson and Kiper, or various international documents which provide tools for assessment.¹⁹³ Without such tools and capabilities, atrocity will remain an "outside crime" for America, despite history indicating otherwise.

¹⁸⁵ *Id.* at 242-47.

¹⁸⁶ See generally Yanagizawa-Drott, *supra* note 89.

¹⁸⁷ Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. 115-441, 132 Stat. 5586 (2019) [hereinafter Elie Wiesel Act].

¹⁸⁸ See Zachary D. Kaufman, *Legislating Atrocity Prevention*, 57 Harv. J. on Legis. 163, 168 (2020) (noting that "[t]he U.S. government has often responded too late or ineffectively, if at all, to atrocity crimes, including the Holocaust; genocides in Armenia, Bosnia, Cambodia, Darfur, Iraq, and Rwanda; and recent crises in Myanmar, South Sudan, Syria, Venezuela, and Yemen").

¹⁸⁹ Elie Wiesel Act, *supra* note 187, at pmb1.

¹⁹⁰ *Id.* at § 2.

¹⁹¹ *Id.* at § 2.

¹⁹² See Kaugman, *supra* note 188, at 183-85.

¹⁹³ See, e.g., UNITED NATIONS, FRAMEWORK FOR ANALYSIS OF ATROCITY CRIMES: A TOOL FOR PREVENTION (2014), available at <https://www.globalr2p.org/resources/framework-of-analysis-for-atrocity-crimes-a-tool-for-prevention/> [<https://perma.cc/F9G9-PQ62>].

V. CONCLUSION

The combination of media and vigilante violence has led to unspeakable atrocity throughout American and global history. The UN recognized the powerful role that media plays in inciting genocide and atrocity when it developed the Genocide Convention.¹⁹⁴ However, by embedding racism and white supremacy into the Genocide Convention, the UN has failed to protect and uphold the human rights of Black Americans who remain under attack in the United States. When many consider international human rights, they often think of the rights of citizens of other countries, not the rights of Americans. Due, in part, to the many techniques the U.S. government has used to limit the scope and applicability of international law within its borders, international human rights are for “them,” not “us.” The same narratives that have shielded the U.S. from international accountability—our democratic principles, our legal system, and our commitment to equality—have been barriers to the full recognition of Black humanity.

In December 2023, the UN celebrated the seventy-fifth anniversary of the Genocide Convention with remarks from Volker Türk, the UN High Commissioner for Human Rights.¹⁹⁵ In his official remarks, Türk called upon nations across the world to live up to the “never again” sentiment following the Holocaust.¹⁹⁶ However, it has never been “jus cogens” for Black Americans who have enjoyed human rights subject to the whims of the state and federal government, governments which had been committed to their exclusion and subjugation for centuries. To show true commitment to the principle of protecting the human rights of all people, the U.S. should undertake efforts to remove the RUDs attached to the Genocide Convention. Moreover, Congress should revise the Elie Weisel Act to prevent atrocity from occurring within U.S. borders, and the *Brandenburg* standard should be revisited to allow greater ease of enforcement and applicability to individuals who incite violence and atrocity.

Analysis of whether the term “genocide” was applicable to Black Americans during the Jim Crow era was the subject of much debate during the Convention in 1946.¹⁹⁷ Ultimately, the UN chose to exclude CRC’s claims to appease the U.S. government’s self-serving interests. Contemporary examples demonstrate the continued risk of media-fueled

¹⁹⁴ See Genocide Convention, *supra* Note 9.

¹⁹⁵ Volker Türk, UN High Comm’r for Hum. Rts., 75 years of the Genocide Convention (Dec. 8, 2023), available at <https://www.ohchr.org/en/statements-and-speeches/2023/12/75-years-genocide-convention> (last visited Apr. 12, 2024).

¹⁹⁶ *Id.*

¹⁹⁷ See Weiss-Wendt, *supra* note 70, at 226-27, 243-45.

violence against Black Americans,¹⁹⁸ both as a result of the public figures who invoke and incite racial violence through their rhetoric, and the laws which protect them from accountability. To America, atrocity is not an outside crime; allowing the U.S. government to skirt accountability from anyone other than itself is a threat to international human rights. And as history has shown, to Black American rights as well.

¹⁹⁸ See *supra* notes 189-213 and accompanying text.