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The Concept Of Freedom Of Expression In Prosecutions For Crimes Based On Expressive Acts

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MEMORANDUM FOR THE

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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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THE CONCEPT OF FREEDOM OF EXPRESSION

IN PROSECUTIONS FOR CRIMES

BASED ON EXPRESSIVE ACTS

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This research memorandum examines the following issue:

> How does the concept of freedom of expression limit prosecutions in the Tribunal for crimes based on expressive acts?[1]

The concept of freedom of expression puts few limitations on prosecutions in the Tribunal for crimes based on expressive acts. The statute of the International Criminal Tribunal for Rwanda ("ICTR Statute") enables prosecution for the crimes of direct and public incitement to commit genocide, and persecutions on political, racial and religious grounds as a crime against humanity.[2] The concept of restricting freedom of expression in the cases of hate speech, racial propaganda and group defamation is well supported in international law.[3] Several international conventions have provisions for such restrictions

[1] *See* International Criminal Tribunal for Rwanda, Office of the Prosecutor, Research Topic No. 1, Facsimile dated 27 August 2000. The focus of this paper derives from the facsimile which states, "[s]everal of the defendants before the Tribunal were members of the pro-government media, including the "hate radio," RTLM, and the newspaper Kangura. They are not charged with personally participating in the genocide, but with inciting and directing acts of genocide and crimes against humanity. Their specific acts range from making statements that promoted ethnic divisiveness to directing attacks against specific individuals and places. We anticipate that part of the defense will be based on the right of the defendants to freedom of expression." *Id*. Thus, the scope of this paper focuses on the three defendants currently under indictment at the Tribunal, Jean Bosco Barayagwiza, former Director of Political Affairs and senior member of administration of RTLM, Ferdinand Nahimana, former Director of RTLM and Hassan Ngeze, former Chief Editor of Kangura newspaper [hereinafter Defendants]. International Criminal Tribunal for Rwanda, Status of ICTR Detainees (9 November 2000). The Defendants' cases have been joined by the Trial Chamber. *Prosecutor v. Barayagwiza*, Case No: ICTR-97-19-I, Decision on the Prosecutor's Motion for Joinder, 6 June 2000.

[2] Statute of the International Tribunal for Rwanda, Art. 2(2)(c) and Art. 3(h), S/RES/955 (1994) (Annex), 8 November 1994, *cited in* 2 Virginia Morris and Michael P. Scharf, The International Criminal Tribunal for Rwanda 3-4 (1998) [hereinafter ICTR Statute]. [Reproduced in the accompanying notebook at Tab 1].

[3] An exhaustive list of sources is impossible, but the following works have contributed greatly to this discussion and form the foundation for the analysis in this memorandum: Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57 (1992); Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European*

and most states parties to these conventions have implementing domestic legislation that restrict hate speech and racial propaganda.

An examination of how several countries use their hate speech and racial propaganda legislation demonstrates that the concept of freedom of expression is not a legitimate defense for crimes of racial hatred and incitement to discrimination or violence. This memorandum examines restrictions on freedom of expression under international law and under the domestic laws of the United Kingdom, Germany, Nigeria, and the United States. This examination demonstrates that prosecutions of direct and public incitement to commit genocide and persecutions on political, racial and religious grounds as a crime against humanity may not be limited by claims of the defense of freedom of expression. The United States is unique among all other nations in its extreme emphasis on the protection of freedom of expression, but even under US concepts of freedom of expression, the prosecution of direct and public incitement to commit genocide and persecutions of political, racial and religious grounds as a crime against humanity may succeed.

II. FACTUAL BACKGROUND

The International Criminal Tribunal for Rwanda is currently prosecuting three defendants, Jean-Bosco Barayagwiza, Ferdinand Nahimana and Hassan Ngeze, ("the

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Approaches, 7 WM. & MARY BILL RTS. J. 305 (1999); LOUIS GREENSPAN AND CYRIL LEVITT, EDS., UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES (1993); Michael A.G. Korengold, Note, *Lessons in Confronting Racist Speech: Good Intentions, Bad Results, and Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination*, 77 MINN. L. REV. (1993); Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335 (1998); THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS (1998); Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 79 AM. J. INT'L L. (1985).

Rwandan Defendants") for the crimes of direct and public incitement to commit genocide and crimes against humanity committed during the 1994 campaign of genocide in Rwanda.[4] The Rwandan Defendants were media principles who started a campaign of hatred against the Tutsi people that incited and instigated the mass killings of hundreds of thousands of Tutsis.[5] Jean-Bosco Barayagwiza, the former Director of Political Affairs and Ferdinand Nahimana, with others, established the *Radio des Mille Collines* ("RTLM"), a radio station dedicated to advancing the cause of Hutu extremists, with Nahimana becoming the Director of the station.[6] Hassan Ngeze was the Editor-in-Chief of *Kangura* newspaper which published materials inciting hatred and violence against the Tutsi and certain Hutus.[7] Ngeze also made broadcasts over RTLM inciting hatred and violence against the Tutsi.[8]

III. LEGAL DISCUSSION

A. INTERNATIONAL APPROACHES TO RESTRICTING HATE SPEECH AND RACIAL PROPAGANDA

1. *International Conventions*

[4] *Prosecutor v. Barayagwiza*, Case No: ICTR-97-19-I, Amended Indictment, 18 December 1998; *Prosecutor v. Nahimana*, Case No: ICTR-96-11-T, Amended Indictment, 30 August 1999; *Prosecutor v. Ngeze*, Case No: ICTR-97-27-1, Indictment, 6 October 1997.

[5] *See* 1 VIRGINIA MORRIS AND MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 55-56 (1998). [Reproduced in the accompanying notebook at Tab 20].

[6] *Prosecutor v. Barayagwiza* and *Prosecutor v. Nahimana*, *supra* note 4.

[7] 1 Morris and Scharf, *supra* note 5 at 56 [Reproduced in the accompanying notebook at Tab 20]; *Prosecutor v. Ngeze*, *supra* note 4.

[8] *Id*. [Reproduced in the accompanying notebook at Tab 20].

The foundation of the statute for the International Criminal Tribunal for Rwanda is the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention").[9] The drafting history of the Genocide Convention clearly indicates that the concept of freedom of expression was duly considered in the construction of the section of Article III dealing with direct and public incitement to commit genocide.[10] The United States was opposed to including incitement as an inchoate offense, not surprisingly because of its strong judicial and political commitment to freedom of expression, and argued that criminalization of incitement might endanger freedom of the press.[11] The final instrument defines direct and public incitement to commit genocide as an inchoate crime, so that the prosecution need not prove the incitement resulted in genocide.[12]

Although criminalizing incitement to commit genocide affects freedom of expression, the elements of the crime are crafted in such a way as to preclude any defense of freedom of expression. The prosecution must show that direct and public incitement took place, that the direct and public incitement was intentional, and that it was carried out with the intent to destroy in whole or in part a protected group as such.[13] Although

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[9] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948), *reprinted in* BARRY E. CARTER AND PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 426 (1999-2000 edition) [hereinafter Genocide Convention]. [Reproduced in the accompanying notebook at Tab 4].

[10] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 266-271 (2000) [hereinafter Schabas, GENOCIDE]. [Reproduced in the accompanying notebook at Tab 22].

[11] *Id.* at 267-268. Several countries (the United Kingdom, Chile, the Dominican Republic, Brazil, and Belgium) indicated some support for the United States' position, and other countries, while supporting the incitement provision in principle, were concerned about the scope of the text in the earlier drafts. *Id.* at 269. [Reproduced in the accompanying notebook at Tab 22].

[12] *Id*. at 266. [Reproduced in the accompanying notebook at Tab 22].

[13] *Id*. [Reproduced in the accompanying notebook at Tab 22].

the United States abstained from the vote to adopt Article III because incitement was included,[14] and the U.S. ratified the Genocide Convention subject to a reservation that "nothing in the Convention requires or authorizes legislation or other action by the [U.S.] prohibited by the Constitution of the United States as interpreted by the United States,"[15] in fact, the U.S. ultimately recognized that the right of freedom of expression would not be affected by the Genocide Convention.[16] In 1970, then Assistant Attorney General William H. Rehnquist testified before the Senate Foreign Relations Committee on this issue:

> Senator CHURCH. In other words, you are satisfied that such constitutional protection, as presently exists in the field of free speech, would not be adversely affected in any way by the terms of this convention?
>
> Mr. REHNQUIST. I am satisfied, first, that they would not be and, second, that they could not be.[17]

Since the United States, with its strong judicial and political commitment to freedom of expression does not see a conflict between prosecutions for direct and public incitement to commit genocide under the Genocide Convention, and since the text of the ICTR statute dealing with genocide is exactly the same as the

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[14] *Id* at 270. [Reproduced in the accompanying notebook at Tab 22].

[15] U.S. Reservations and Understandings to the Genocide Convention, 28 I.L.M 782 (1989), *reprinted in* CARTER & TRIMBLE, *supra* note 9 at 429. [Reproduced in the accompanying notebook at Tab 8].

[16] *See* Defeis, *supra* note 3 at 92-93; Leich, *supra* note 3 at 121. [Reproduced in the accompanying notebook at Tabs 12 and 16, respectively].

[17] Leich, *supra* note 3 at 121. In addition to Mr. Rehnquist's approval, a witness for the American Civil Liberties Union testified, "…if this convention did interfere with the first amendment, the American Civil Liberties Union would be the first one to be complaining, without regard to whether or not we commend the objectives of the convention. However, we do not think there is any problem under the first amendment to the Constitution." *Id*. [Reproduced in the accompanying notebook at Tab 16].

text of the Genocide Convention,[18] the ICTR Prosecutor should be able to make the case for direct and public incitement to commit genocide without being forced to answer a defense of freedom of expression.

The Genocide Convention is not the only international document that speaks to the concept of freedom of expression. Freedom of expression is a fundamental right recognized in several other international instruments, most notably the Universal Declaration of Human Rights[19] ("Human Rights Declaration") and the International Covenant on Civil and Political Rights[20] ("Civil and Political Rights Covenant"). Regional conventions, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,[21] the American Convention on Human Rights,[22] and

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[18] *See* ICTR Statute, *supra* note 2 at 3; Genocide Convention, *supra* note 9 at 427. [Reproduced in the accompanying notebook at Tab 4].

[19] *Universal Declaration of Human Rights*, U.N. G.A. Res. 217 (III 1948), *reprinted in* CARTER & TRIMBLE, *supra* note 9 at 388 [hereinafter Universal Declaration]. Article 19 of the Declaration states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *Id*. at 391. Rwanda is a party to this convention. [Reproduced in the accompanying notebook at Tab 9].

[20] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), *reprinted in* CARTER & TRIMBLE, *supra* note 9 at 394 [hereinafter Civil and Political Rights Covenant]. Article 19(2) states, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." *Id*. at 401. Rwanda is a party to this convention. [Reproduced in the accompanying notebook at Tab 7].

[21] European Convention for the Protection of Human Rights and Fundamental Freedoms, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, Protocol No. 8, E.T.S. 118 and Protocol No. 11, E.T.S. 155, *reprinted in* CARTER & TRIMBLE, *supra* note 9 at 472. Article 10(1) states, "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…" *Id*. at 476. [Reproduced in the accompanying notebook at Tab 5].

[22] American Convention on Human Rights, 9 I.L.M. 673 (1970), *reprinted in* CARTER & TRIMBLE, *supra* note 9 at 489. Article 13(1) is essentially the same as Art. 19(2) of the International Convention on Civil and Political Rights (*supra* note 9), *Id*. at 494. [Reproduced in the accompanying notebook at Tab 3].

the African Charter on Human and Peoples' Rights[23] ("African Charter"), also recognize the fundamental right of freedom of expression.

However, these international conventions also recognize that freedom of expression is not an absolute right. Several of the conventions recognize that rights are interdependent and cannot be construed as to allow the interference with other rights.[24] The Human Rights Declaration declares that the rights and freedoms in the Declaration "may in no case be exercised contrary to the purposes and principles of the United Nations."[25] Similarly, the Civil and Political Rights Covenant states that the right of freedom of expression carries with it special duties and responsibilities and may be restricted "for the respect of the rights or reputations of others" or for "the protection of national security or of public order (*ordre public*) or of public health or morals.[26] The African Charter goes even farther than these two conventions in recognizing the interdependence of rights; the Preamble to the Charter states that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone" and the Charter lists fundamental duties of individuals "towards his family and society, the State and other legally recognized communities and the international community."[27]

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[23] African Charter on Human and Peoples' Rights, 21 I.L.M. 59 (1981), *reprinted in* CARTER & TRIMBLE, *supra* note 9 at 510 [hereinafter African Charter]. Article 9 states, "(1) Every individual shall have the right to receive information. (2) Every individual shall have the right to express and disseminate his opinions within the law." *Id*. at 512. Rwanda is a party to this charter. [Reproduced in the accompanying notebook at Tab 2].

[24] *See* Defeis, *supra* note 3 at 71. [Reproduced in the accompanying notebook at Tab 12].

[25] Art. 29, Universal Declaration, *supra* note 19 at 392. [Reproduced in the accompanying notebook at Tab 9].

[26] Art. 19(3), Civil and Political Rights Covenant, *supra* note 20 at 401. [Reproduced in the accompanying notebook at Tab 7].

[27] Art. 27, African Charter, *supra* note 23 at 516. [Reproduced in the accompanying notebook at Tab 2].

Individuals also have the obligation to exercise their rights and freedoms with "due regard to the rights of others, collective security, morality and common interest."[28]

Several international conventions, in addition to recognizing the interdependence of rights and freedoms and affirming the value of freedom of expression, also have provisions that expressly restrict freedom of expression in the cases of hate speech and racial propaganda. The Civil and Political Rights Covenant and the Convention on the Elimination of All Forms of Racial Discrimination ("Racial Discrimination Convention"), both of which Rwanda is party to, are two conventions in which such provisions are clearly stated.

Article 20 of the Civil and Political Rights Covenant states: "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[29] This article was controversial among states members drafting the Covenant, and several states entered reservations or declarations to this article upon ratification.[30] However, the article was adopted and the Human Rights Committee has upheld restrictions on freedom of expression in several cases before it, essentially holding that the freedom of expression right guaranteed by Article 19[31] is compatible with the restrictions outlined in Article 20.[32]

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[28] *Id*. [Reproduced in the accompanying notebook at Tab 2].

[29] Civil and Political Rights Covenant, *supra* note 20 at 401. [Reproduced in the accompanying notebook at Tab 7].

[30] Defeis, *supra* note 3 at 79-81. [Reproduced in the accompanying notebook at Tab 12]. Rwanda was not one of these states. 1 United Nations, Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999 133.

[31] *See* Civil and Political Rights Covenant *supra* note 20. [Reproduced in the accompanying notebook at Tab 7].

[32] Defeis, *supra* note 3 at 83. In *M.A. v. Italy*, the Committee ruled inadmissible a complaint that a conviction for reorganizing the dissolved Fascist Party in violation of Italian law violated freedom of

Article 4 of the Racial Discrimination Convention is much more comprehensive in regards to racist speech and propaganda than Article 20 of the Civil and Political Rights Covenant and attempts to balance restrictions on speech with the right of freedom of expression.[33] The article states:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.[34]

Article 4 was also very controversial among states members drafting the Convention. One of the delegates in the General Assembly stated that the Article "was

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expression and association rights protected by the Civil and Political Rights Convention. The Committee stated that the acts punished were of a kind which are removed from the protection of the Convention by Article 5 and were justifiably prohibited by Italian law. *Id*. In *F.R.T. and the W.G. Party v. Canada*, the Committee rejected the petitioners' contention that Canada had violated their right to freedom of expression, and stated that the petitioners' 'right' to communicate racist ideas was not only not protected by the Convention, but actually incompatible with its provisions, and Canada has an obligation under the Convention to prohibit their actions. *Id*. [Reproduced in the accompanying notebook at Tab 12].

[33] *Id*. at 86; Jones, *supra* note 3 at 145-146. [Reproduced in the accompanying notebook at Tabs 12 and 19, respectively].

[34] International Convention on the Elimination of All Forms of Racial Discrimination, *reprinted in* CARTER & TRIMBLE, *supra* note 9 at 431 [hereinafter Racial Discrimination Convention]. [Reproduced in the accompanying notebook at Tab 6].

the outcome of a difficult compromise after hours, and even days, of discussion, drafting and redrafting."[35] The Racial Discrimination Convention went farther than the Civil and Political Rights Covenant in not only prohibiting incitement to racial discrimination, but also the dissemination of ideas based on racial superiority or hatred.[36] Many critics of the Racial Discrimination Convention criticize Article 4 because the dissemination provision focuses solely the speaker's dissemination of ideas and, as Colombia's delegate stated, "punishing ideas…is to aid and abet tyranny, and leads to abuse of power."[37]

However, Article 4 itself contains protection for the right to freedom of expression. Legislation to implement Article 4 is to be taken "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention."[38] The right to freedom of expression is one of the rights expressly set for in Article 5 of the Convention.[39] Article 4 of the Convention only conflicts with the concept of freedom of expression if one adopts an absolutist approach to freedom of speech, protecting all utterances, even those that are libel or slander.[40] Even the United States, with its strong commitment to freedom of speech, rejects an absolutist approach, recognizing that some forms of speech are

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[35] Defeis, *supra* note 3 at 87. [Reproduced in the accompanying notebook at Tab 12].

[36] *Id*. [Reproduced in the accompanying notebook at Tab 12].

[37] Defeis, *supra* note 3 at 87; Korengold, *supra* note 3 at 723. [Reproduced in the accompanying notebook at Tabs 12 and 14, respectively].

[38] Racial Discrimination Convention, *supra* note 34 at 433. [Reproduced in the accompanying notebook at Tab 6].

[39] *Id*. at 434. [Reproduced in the accompanying notebook at Tab 6].

[40] Jones, *supra* note 3 at 146. [Reproduced in the accompanying notebook at Tab 19].

unprotected, and even some protected speech may be justifiably restricted to further compelling state interests.[41]

The existence of provisions in several international conventions that restrict freedom of expression clearly indicate that the concept is not an absolute right. Although the international community recognizes the importance of freedom of expression, it has also recognized the equal and complementary importance of restricting hate speech and racial propaganda in the furtherance of the goal of racial equality and nondiscrimination. This goal can be fairly characterized as *jus cogens*, a peremptory norm of international law.[42] The Defendants in the Rwanda genocide were involved in the broadcasting and publishing of racist hate speech and statements that constituted incitement to racial discrimination and violence.[43] They should not be allowed to justify their violations of international law by claiming their right to freedom of expression.

2. *Judicial Interpretations*

The Nuremberg Tribunal gives precedent for convictions of persons who commit incitement to commit genocide and persecution on political, racial and religious grounds as a crime against humanity. The Tribunal convicted Julius Streicher, the publisher of *Der Sturmer* newspaper of persecution on political and racial grounds as a crime against

[41] *Id*. at 148. [Reproduced in the accompanying notebook at Tab 19]. A more detailed discussion of the United States' concept of freedom of expression is set out below, *infra* pp. 24-33 and accompanying notes.

[42] *Id.* at 148. [Reproduced in the accompanying notebook at Tab 19].

[43] The *Kangura* newspaper was the most well-known example of government-sponsored hate propaganda. *Prosecutor v. Barayagwiza*, Indictment, *supra* note 4 at para. 1.19. The newspaper published the "Hutu Ten Commandments," which not only denigrated and persecuted Tutsi women but called on all the Hutu to hate and despise the Tutsi population. *Id*. Broadcasts over RTLM promoted ethnic hatred and incited ethnic violence. *Id*. at para. 1.22. The broadcasts identified individuals by name, indicated the hideouts of

humanity.[44] Streicher's newspaper was filled with anti-Semitic propaganda and incited the German people to active persecution of the Jews.[45] The broadcasts of the RTLM were similar to Streicher's publications in their extreme racial propaganda and incitement to violence against the Tutsi. The RTLM named individual Hutus and Tutsis opposed to the President and described them as "enemies" or "traitors" who deserved death.[46] Other RTLM broadcasts declared, "the graves are not yet quite full. Who is going to do the good work and help us fill them completely."[47]

Another Nazi defendant, Hans Fritzsche, a radio commentator and member of the Propaganda Ministry, was prosecuted in the Tribunal for the same crimes as Streicher.[48] He was ultimately acquitted because of the absence of sufficient evidence of the necessary intent to incite criminal conduct.[49] The Tribunal stated:

> It appears the Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to

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targeted citizens, described the entire Tutsi population as the enemy and called on the Hutus to exterminate the Tutsi. *Id.*

[44] 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS: OFFICIAL DOCUMENTS 301 (1947) [hereinafter Nuremberg Judgment]. [Reproduced in the accompanying notebook at Tab 11].

[45] *Id*. An article published in May, 1939, typical in its extremism, clearly establishes his intent to incite his audience to violence:

> A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch. *Id.* at 303 [Reproduced in the accompanying notebook at Tab 11].

[46] *Prosecutor v. Barayagwiza*, Indictment, *supra* note 4 at para. 5.3.

[47] *Id*. at para. 5.4.

[48] Nuremberg Judgment, *supra* note 44 at 336. [Reproduced in the accompanying notebook at Tab 10].

[49] 1 Morris and Scharf, *supra* note 5 at 238, note 904. [Reproduced in the accompanying notebook at Tab 20].

> arouse popular sentiment in support of Hitler and the German war effort.[50]

The Tribunal also found that Fritzsche had no control over the formation of Nazi propaganda policies and was merely a conduit to the press of the instructions given to him by the Third Reich Press Chief Deitrich.[51] In contrast, the Rwandan Defendants had authority and control over the content of the radio broadcasts and the material published in the newspaper.[52] In addition, Defendants Nahimana and Barayagwiza created the RTLM for the purpose of advancing the cause of Hutu extremism.[53] The *Kangura* newspaper celebrated the creation of RTLM as an instrument in the defense of the Hutu and a partner in the struggle to defend the Hutu majority.[54] Clearly, the Nuremberg precedent supports the prosecution of the Rwandan Defendants for crimes related to incitement.

A case concerning direct and public incitement to commit genocide in Rwanda was heard in Canadian judicial system in 1998.[55] In *Mugesera v. Minister of Citizenship and Immigration*, the Appeals Division of the Immigration and Refugee Board confirmed a prior ruling that Rwandan national Leon Mugesera had violated Article II(c) of the Convention for the Prevention and Punishment of the Crime of Genocide, by committing

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[50] Nuremberg Judgment, *supra* note 44 at 338. [Reproduced in the accompanying notebook at Tab 10].

[51] *Id.* [Reproduced in the accompanying notebook at Tab 10].

[52] *Prosecutor v. Barayagwiza*, Indictment, *supra* note 4 at para. 4.3; *Prosecutor v. Ngeze*, Indictment, *supra* note 4 at para. 3.7.

[53] *Prosecutor v. Barayagwiza*, Indictment, *supra* note 4 at para. 1.21.

[54] *Id.*

[55] Schabas, GENOCIDE, *supra* note 10 at 273. [Reproduced in the accompanying notebook at Tab 22].

direct and public incitement to genocide.[56] Mugesera, an extremist pamphleteer who gave an infamous speech in 1992 calling for the extermination of the Tutsi, had fled Rwanda for Canada after that incident and obtained permanent resident status there.[57] His speech fell outside the temporal jurisdiction of the ICTR because it occurred well before 1 January 1994, but under Canadian law he could be stripped of his resident status if it could be established that he had committed crimes against humanity or war crimes.[58] In the first ruling, by sole adjudicator Pierre Turmel (which was upheld by the Appeals Division), Turmel found that:

> Mr. Mugesera made a speech which incited people to drive out and to murder the Tutsi. It is also established that murders of Tutsis were in fact committed, and on the basis of probabilities, resulted from the call for murder thrown out by Mr. Mugesera in his speech. The Tutsi, beyond a shadow of a doubt, form an identifiable group of persons. They constituted an identified group and they were a systematic and widespread target of the crime of murder.
>
> The counseling or invitation thus issued to his audience establishes personal participation in the offence. In addition, I find that this participation was conscious, having regard to Mr. Mugesera's social standing and privileged position. Mr. Mugesera's writings and statements clearly attest to the conscious nature of this participation. I would add that this counselling was consistent with the policy advocated by the MRND [the political party of former president Habyarimana, of which Mugesera was a member], as established by the evidence.[59]

Although direct and public incitement to commit genocide under Article III(c) of the Genocide Convention does not require a showing that the genocide actually took

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[56] William A. Schabas, *International Decision: Mugesera v. Minister of Citizenship and Immigration*, 93 AM. J. INT'L LAW 529, 530 (1999) [hereinafter Schabas, *Mugesera v. Minister*]. [Reproduced in the accompanying notebook at Tab 17].

[57] *Id*. at 529. [Reproduced in the accompanying notebook at Tab 17].

[58] Schabas, GENOCIDE, *supra* note 10 at 273. [Reproduced in the accompanying notebook at Tab 22].

[59] *Id*. at 274. [Reproduced in the accompanying notebook at Tab 22].

place, the massacres that occurred subsequent to Mugesera's speech were relevant in proving that the speech constituted genuine incitement and was not, as Mugesera claimed, a harmless political diatribe.[60] This decision in the Canadian judicial system relating to a crime under international law may be instructive to the Rwanda Tribunal.[61] If the Canadian Immigration and Refugee Board did not even consider Mugesera's claim of a "harmless political diatribe" as involving a defense of freedom of expression, the ICTR may similarly decline to consider the Defendants' claims of freedom of expression a legitimate defense to the charges against them.

B. DOMESTIC APPROACHES TO RESTRICTING HATE SPEECH AND RACIAL PROPAGANDA

As discussed above, freedom of expression is an internationally recognized right. Most countries have codified this right in their domestic constitutions or similar state laws. However, freedom of expression is not an absolute right, and restrictions on expression exist in every country, albeit to varying degree. This section analyzes the restrictions placed on speech in Germany, the United Kingdom, Nigeria and the United States, and demonstrates why, under each of these systems, the concept of freedom of expression would not be a legitimate defense for the Rwandan Defendants.[62]

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[60] *Id*. [Reproduced in the accompanying notebook at Tab 22].

[61] Obviously, the Canadian Immigration and Refugee Board is not a criminal court and the burden of proof required before the Board is only one of preponderance of the evidence. Schabas, *Mugesera v. Minister*, *supra* note 56 at 531. [Reproduced in the accompanying notebook at Tab 17].

[62] A review of the historical development of speech restriction in each of these countries is beyond the scope of this memo; the author attempts to provide a brief overview of the current laws in each countries, according to her research.

1. *Germany*

Freedom of expression is an essential feature in the German Constitution.[63] However, the Constitution also states clearly that freedom of expression is not an absolute right.[64] The freedom of expression provisions in the Constitution interact with measures in the German Criminal Code designed to prohibit hate speech and racial propaganda. Section 130 of the Criminal Code states:

> (1) Whoever, in a manner liable to disturb the public peace,
> (a) incites hatred against parts of the population or invites violence or arbitrary acts against them, or
> (b) attacks the human dignity of others by insulting, maliciously degrading or defaming parts of the population shall be punished by imprisonment of no less than three months and not exceeding five years.
> (2) Imprisonment, not exceeding five years, or fine will be the punishment for whoever
> (a) distributes,
> (b) makes available to the public,
> (c) makes available to persons of less than 18 years, or
> (d) produces, stores or offers for use as mentioned in letters (a) to (c) documents inciting hatred against part of the population or against groups determined by nationality, race, religion, or ethnic origin, or inviting to violent or arbitrary acts against these parts or groups, or attacking the human dignity of others by insulting, maliciously ridiculing or defaming parts of the population or such a group or
> (e) distributes a message of the kind described in (1) by broadcast.
> (3) Imprisonment, not exceeding five years or fine, will be the punishment for whoever, in public or in an assembly, approves, denies or minimizes an act described in section 220a paragraph 1 committed

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[63] Douglas-Scott, *supra* note 3 at 321. Article 5(1) of the German Basic Law states, "Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasting and films are guaranteed. There shall be no censorship." *Id.* [Reproduced in the accompanying notebook at Tab 13].

[64] *Id.* Article 5(2) states, "These rights are limited by the provision of the general laws, the provisions of law for the protection of youth, and the right to inviolability of personal dignity." *Id.* [Reproduced in the accompanying notebook at Tab 13].

> under the regime of National-socialism, in a manner which is liable to disturb the public peace.[65]

The basic rule of paragraph (1) prohibits racist speech with the requirement of a threat to public peace, but without also requiring an attack on human dignity.[66] Upon the introduction of the original legislation in the Bundestag, the Justice Ministry defined an attack on human dignity as an attack "'on the core area of [the victim's] personality,' a denial of the victim's 'right to life as an equal in the community,'" or treatment of the victim as "an inferior being excluded from the protection of the constitution."[67] Paragraph (2) punishes the production and distribution of racist materials by print or through the media, without the requirements of an attack on human dignity or a threat to public peace.[68] Paragraph (3) prohibits the denial, approval or minimization of the Holocaust, and includes the requirement of a threat to public peace.[69]

Germany also has legislation that regulates public and private broadcasting; this field of law is exclusively legislated by the states, although the basic principles are established in a "Broadcasting Interstate Agreement" formed in 1991 and amended in 1996 by accord of all the states.[70] The agreement prohibits programs

> which incite hatred against parts of the population or against a group which is determined by nationality, race, religion, or ethnic origin, or which propagate violence and discrimination against such parts or

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[65] Kübler, *supra* note 3 at 345. [Reproduced in the accompanying notebook at Tab 15].

[66] *Id*. [Reproduced in the accompanying notebook at Tab 15].

[67] Douglas-Scott, *supra* note 3 at 323. [Reproduced in the accompanying notebook at Tab 13].

[68] Kübler, *supra* note 3 at 345. [Reproduced in the accompanying notebook at Tab 15].

[69] *Id*. [Reproduced in the accompanying notebook at Tab 15].

[70] *Id*. at 346. [Reproduced in the accompanying notebook at Tab 15].

> groups, or which attack the human dignity of others by insulting, maliciously ridiculing or defaming parts of the population.[71]

Without a doubt, Germany's strict regulation of hate speech and racial propaganda is informed by the country's Nazi history, and by the resurgence of Neo-Nazi activities that occurred in the post cold-war period.[72] One might argue that Rwanda's history of ethnic tension and conflict, going back well before the 1994 genocide,[73] calls for a similar commitment to laws restricting hate speech and racial propaganda in Rwanda. In any case, considering this history of ethnic conflict, the ICTR may well be justified in adopting a perspective on the necessity and value of restrictions on hate speech and racial propaganda similar to Germany's perspective, instead of a perspective more protective of free speech.

2. *United Kingdom*

In the United Kingdom, hate speech and racial propaganda is controlled by §§ 17-28 of the Public Order Act of 1986, which criminalizes acts intended to or likely to stir up "racial hatred."[74] Section 17 defines racial hatred as "hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origin."[75] Section 18 criminalizes the use of "threatening, abusive, or

[71] *Id*. at 347. An interesting note to these state statutes regulating broadcasting is that none of them have ever been contested before a court or other forum and they are strictly obeyed by Germany's public broadcasting system. *Id*. [Reproduced in the accompanying notebook at Tab 15].

[72] Douglas-Scott, *supra* note 3 at 319. [Reproduced in the accompanying notebook at Tab 13].

[73] *See* 1 Morris and Scarf, *supra* note 5 at 48-53. [Reproduced in the accompanying notebook at Tab 20].

[74] Jones, *supra* note 3 at 190. [Reproduced in the accompanying notebook at Tab 19].

[75] *Id*. at 202. [Reproduced in the accompanying notebook at Tab 19].

insulting words or behaviour" that are racially derogatory.[76] This section prohibits the display of written material that is "threatening, abusive or insulting" and that is intended or likely to stir up racial hatred.[77] Section 19 prohibits the publishing or distributing of the same kind of written material described in §18.[78] Section 20 prohibits the direction or public performance of a play that involves threatening, abusive or insulting words, if the play is intended or likely to stir up racial hatred.[79] Section 21 prohibits the distributing, showing or playing of a "recording of visual images or sounds" that are intended or likely to stir up racial hatred and §22 prohibits the broadcast or inclusion in a cable program of any visual images or sounds mentioned in §21.[80] Section 23 prohibits the possession of material that is threatening, abusive or insulting if the individual possesses it with a view to displaying, publishing, distributing, broadcasting or showing it, and if the individual intended to stir up racial hatred or racial hatred was likely to be stirred up by the individual's possession of the material.[81] The consent of the Attorney General is required for prosecution under the Act.[82]

The materials broadcast by the RTLM and published in the *Kangura* newspaper by the Defendants would clearly fall within the scope of the prohibitions in Britain's Public Order Act. The radio station broadcast messages from the government to the

[76] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[77] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[78] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[79] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[80] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[81] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[82] *Id*. at 203. [Reproduced in the accompanying notebook at Tab 19].

people to "go and work" and sent the militia to kill the Tutsis and incite the local people to kill their Tutsi neighbors.[83] The broadcasts also denigrated Tutsi women and called for acts of hatred and sexual violence against them.[84] The material published in the *Kangura* newspaper persecuted Tutsis and certain Hutus, and incited the people to kill or cause serious bodily and mental harm to Tutsis.[85]

The United Kingdom has actually prosecuted few cases under the Public Order Act. In 1988, a "soapbox orator" was convicted of making a "racist speech" and "distributing racist literature."[86] Another defendant was convicted and fined for placing Neo-Nazi stickers on lampposts.[87] In 1990, a member of the Conservative Party in Cheltenham who described a Black parliamentary candidate as a "Bloody Nigger" was charged under the Act, but died before trial.[88] In 1991, Lady Birdwood was convicted of distributing anti-Semitic publications, and later that year, three Ku Klux Klan members were convicted of possessing racially inflammatory materials.[89]

The fact that few cases have actually been prosecuted under the Act may well be a positive indication of the co-existence of the concept of freedom of expression and laws restricting hate speech and racial propaganda. In fact, the UK Attorney General refused

[83] *Prosecutor v. Barayagwiza*, Indictment, *supra* note 4 at para. 5.1.

[84] *Id*. at para. 5.6.

[85] *Prosecutor v. Ngeze*, Indictment, *supra* note 4 at para. 3.9.

[86] Jones, *supra* note 3 at 190. [Reproduced in the accompanying notebook at Tab 19].

[87] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[88] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[89] *Id*. [Reproduced in the accompanying notebook at Tab 19].

to grant consent for prosecution in four cases as of October 1995.[90] In three of the four cases, there was insufficient evidence; in the fourth case, the Attorney General concluded that it would not have been "in the public interest" to prosecute the accused.[91] This may indicate that the Attorney General takes seriously the concept of freedom of expression and will only commit to prosecuting offenses that fall clearly within the scope of the Public Act.

3. *Nigeria*

The organizational structure and substantive content of Nigeria's Constitution are patterned on the Constitution of the United States and freedom of expression is one of the fundamental rights provided for in the Nigerian Constitution.[92] However, freedom of expression is not absolute in Nigeria's Constitution. Article 43 of the Constitution states, *inter alia*:

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[90] *Id.* [Reproduced in the accompanying notebook at Tab 19].

[91] *Id.* [Reproduced in the accompanying notebook at Tab 19].

[92] *Id.* at 214-215. Article 38 of the Nigeria Constitution provides:

> (1) Every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information without interference.
> (2) Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:
>
> Provided that no person, other than the Government of the Federation or of a State or any other person or body authorized by the President, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.
> (3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society –
>
> (a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts on regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or
>
> (b) imposing restrictions upon persons holding office under the government of the Federation or of a State or of a Local Government, members of the Armed Forces of the Federation or members of the Nigeria Police Force or other government security services established by law. *Id.* at 215. [Reproduced in the accompanying notebook at Tab 19].

(1) Nothing in sections 36, 37, 38, 39, and 40 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society
(a) in the interest of defence, public safety, public order, public morality or public health; or
(b) for the purpose of protecting the rights of other persons.[93]

Chapter 10 of the Laws of the Federation of Nigeria constitutes the implementing legislation which brought the African Charter on Human and Peoples' Rights into force on the domestic level.[94] Although there are no laws specifically proscribing group defamation or incitement to racial hatred, Chapter 7 of the federal Criminal Code Act of Nigeria does contain restrictions on freedom of expression in Nigeria by prohibiting "[s]edition and the [i]mportation of [s]editious or undesirable [p]ublications.[95] The relevant portions of the sedition law state:

50. (1)(b) …"seditious publication" means a publication having a seditious intention; "seditious words" means words having a seditious intention.
(2) A "seditious intention" is an intention…
(c) to raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria; or
(d) to promote feelings of ill-will and hostility between different classes of the population of Nigeria.

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(3) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.

51. (1) Any person who –
(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;

[93] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[94] *Id.* at 215-216. See discussion *supra* pp. 7-8 and accomanying notes for analysis of the African Charter. [Reproduced in the accompanying notebook at Tab 19].

[95] *Id*. at 216. [Reproduced in the accompanying notebook at Tab 19].

> (b) utters any seditious words;
> (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
> (d) imports any seditious publication, unless he has no reason to believe that it is seditious;
>
> shall be guilty of an offence and liable on conviction for a first offence to imprisonment for two years or to a fine of two thousand naira or to both such imprisonment and fine and for a subsequent offence to imprisonment for three years and any seditious publication shall be forfeited to the state.
>
> (2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and liable on conviction, for a first offence to imprisonment for one year or to a fine of one hundred naira or both such imprisonment and fine, and for a subsequent offence to imprisonment for two years; and such publication shall be forfeited to the state.[96]

Similar to the United Kingdom Public Order Act, the Nigerian sedition law requires the consent of the Attorney General of the federation or the state to prosecute an offence under the Act.[97] The prohibitions in the Act against raising discontent or disaffection among citizens or promoting hostility and ill-will between different classes of people in Nigeria are broad enough to cover prosecutions against individuals or organizations that engage in hate speech or racial propaganda that incite hatred or violence among ethnic or religious groups.[98] Nigeria, like Rwanda, has several ethnic tribes living in the country and Nigeria has a history of ethnic civil wars; the country has also seen a rise in ethnic tension and conflict since gaining independence from the United Kingdom in 1960.[99]

[96] *Id*. at 217. [Reproduced in the accompanying notebook at Tab 19].

[97] *Id*. [Reproduced in the accompanying notebook at Tab 19].

[98] *Id*. at 218. [Reproduced in the accompanying notebook at Tab 19].

[99] *Id*. [Reproduced in the accompanying notebook at Tab 19].

Professor Oko, an African scholar, endorses the use of the sedition law to stem the spread of language used to foment discord among ethnic groups:

> Section 15(4) of the 1979 Constitution further provides that the State shall foster a feeling of belonging and of involvement among the various people of the Federation to the end that loyalty to the Nation shall override sectional loyalties. Why then should the court declare unconstitutional an existing law which facilitates the attainment of the political objectives contained in sections 14(3) and 15(4). Better still, why should the state not punish anybody who utters or publishes anything with the intention of promoting ill-will and hostility between different ethnic or sectional groups of the Federation. It is, in my view, reasonably justifiable in a democratic society in the interest of public safety and public order that anyone who publishes anything with the intention of promoting feelings of ill-will and hostility between different classes of the population should be punished.[100]

Nigeria's experiences with ethnic conflict and the strong potential for the country's use of the sedition law to prosecute hate speech and racial propaganda is instructive to case of the Defendants in Rwanda. The Defendants' broadcasts and published materials were clearly intended to promote ill-will and hostility between the Hutus and the Tutsis.[101]

4. *United States*

The United States has the strongest concept of freedom of expression of all countries in the world, and the foundation for the current political and judicial commitment to freedom of expression is the principle prohibiting "content-based" regulation of speech.[102] In the U.S., there is no federal or uniform legislation that

[100] *Id*. at 219. Professor Oko was critically analyzing *Nwankwo v. The State*, an appellate court decision that declared the sedition act unconstitutional. The Nigerian Supreme Court has upheld the sedition act as constitutional. *Id*. [Reproduced in the accompanying notebook at Tab 19].

[101] *Prosecutor v. Barayagwiza*, Indictment, *supra* note 4 at para. 1.19, 1.22.

[102] Douglas-Scott, *supra* note 3 at 313. [Reproduced in the accompanying notebook at Tabs 13]. Freedom of expression is guaranteed in the United States by the First Amendment to the Constitution, which states, "Congress shall make no law….abridging the freedom of speech, or of the press." U.S. CONST. amend I.

restricts hate speech or racial propaganda.[103] However, criminal solicitation to commit a crime is a crime itself: "Whoever commits an offense…or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.[104]

The First Amendment is not an absolute protection of all speech and some categories of speech continue to be excluded from protection.[105] These categories include: obscenity;[106] "words that are used in such circumstances and are 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;"[107] the "fighting words" doctrine;[108] and defamation.[109]

A brief discussion of two important cases dealing with freedom of expression in U.S constitutional law is important to understand the concept of freedom of expression in

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[103] Kübler, *supra* note 3 at 347-348. [Reproduced in the accompanying notebook at Tab 15].

[104] Donald A. Downs, *Racial Incitement Law and Policy in the United States: Drawing the Line between Free Speech and Protection Against Racism, in* Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries 107, 119 (Louis Greenspan and Cyril Levitt, eds., 1993). [Reproduced in the accompanying notebook at Tab 18].

[105] *See generally* Jones, *supra* note 3 at 61-86; *See also* Douglas-Scott, *supra* note 3 at 315. [Reproduced in the accompanying notebook at Tabs 19 and 13, respectively].

[106] Douglas-Scott, *supra* note 3 at 315. [Reproduced in the accompanying notebook at Tab 13].

[107] *Id*. at 69-70; Douglas-Scott, *supra* note 3 at 315. The "clear and present danger" test was ultimately limited by the Supreme Court in *Brandenburg v. Ohio*. Jones, *supra* note 3 at 70; Douglas-Scott, *supra* note 3 at 316. [Reproduced in the accompanying notebook at Tabs 19 and 13, respectively]. This case is discussed in more detail *infra* p. 25.

[108] Douglas-Scott, *supra* note 3 at 316. The "fighting words" doctrine is from the case *Chaplinsky v. New Hampshire* and refers to those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace…[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived form them is clearly outweighed by the social interest in order and morality." *Id*. [Reproduced in the accompanying notebook at Tab 13].

[109] Jones, *supra* note 3 at 68-69. [Reproduced in the accompanying notebook at Tab 19].

the U.S. context. These cases are *Brandenburg v. Ohio*[110] and *R.A.V. v. City of St. Paul*.[111]

The defendant in *Brandenburg*, who organized a Ku Klux Klan meeting, made statements such as, "the nigger should be returned to Africa, the Jew returned to Israel" and threatened "revengeance [*sic*.]."[112] He was convicted under an Ohio Criminal Syndicalism Statute, of "adovact[ing] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.[113] The Supreme Court held the statute unconstitutional, saying:

> the principle that the 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.[114]

In *R.A.V. v. City of St. Paul*, the defendant, with a clear intent to intimidate, placed a burning cross on the lawn of a Black family that had moved into a formerly all-white neighborhood.[115] He was charged under the St. Paul Bias-Motivated Crime Ordinance, which states, "Whoever places on public or private property a symbol, [or] object…including…a burning cross…which one knows or has reasonable grounds to

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[110] 395 U.S. 444 (1969), discussed in Kübler, *supra* note 3 at 352-353; Douglas-Scott, *supra* note 3 at 316. [Reproduced in the accompanying notebook at Tabs 15 and 13, respectively].

[111] 505 U.S. 377 (1992), discussed in Jones, *supra* note 3 at 129-136; Douglas-Scott, *supra* note 3 at 308-309. [Reproduced in the accompanying notebook at Tabs 19 and 13, respectively].

[112] Kübler, *supra* note 3 at 352. [Reproduced in the accompanying notebook at Tab 15].

[113] *Id*.; Douglas-Scott, *supra* note 3 at 316. [Reproduced in the accompanying notebook at Tabs 15 and 13, respectively].

[114] *Id*. [Reproduced in the accompanying notebook at Tabs 15 and 13, respectively].

[115] Jones, *supra* note 3 at 129; Douglas-Scott, *supra* note 3 at 308. [Reproduced in the accompanying notebook at Tabs 19 and 13, respectively].

know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct."[116] The Supreme Court struck the St. Paul ordinance down as unconstitutional because it "prohibit[ed] …speech solely on the basis of the subjects the speech address[ed]."[117]

Some scholars believe that since the St. Paul ordinance that was struck down was a group libel ordinance, all group libel laws are constitutionally suspect.[118] However, a strong case can be made for the argument that the *R.A.V.* case did not destroy the ability of the state or federal government to pass group libel or group defamation laws.[119] The holding of the case applies to fighting words, not to defamation.[120] The Supreme Court struck down the St. Paul ordinance because the ordinance had engaged in selective, content-based discrimination in proscribing not all "fighting words," but only those fighting words that were insulting or inciteful of violence based on race, color, creed, religion, or gender.[121] A suggestion has been made that if the ordinance had been drafted to proscribe fighting words that have a tendency to create discord and violence, the ordinance might have passed constitutional muster.[122] In any event, it appears reasonable

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[116] *Id.* [Reproduced in the accompanying notebook at Tabs 19 and 13, respectively].

[117] Douglas-Scott, *supra* note 3 at 308. [Reproduced in the accompanying notebook at Tab 13].

[118] *See* Downs, *supra* note 104 at 122. [Reproduced in the accompanying notebook at Tab 18].

[119] Jones, *supra* note 3 at 132-133. [Reproduced in the accompanying notebook at Tab 19].

[120] *Id* at 132. [Reproduced in the accompanying notebook at Tab 19].

[121] *Id*. at 131. [Reproduced in the accompanying notebook at Tab 19].

[122] *Id*. at 132. Justice Scalia's (writing for the majority) conclusion that the ordinance was unconstitutional because it was underinclusive leads one to the problem that it would be virtually impossible to draft a statute that would cover all prohibited classes and categories of fighting words. *Id* at 132-133. In addition, there may well be public policy reasons why drafters of a "fighting words" statute may decide that fighting words implicating race, gender and religion were in greater need of regulation than other types of fighting words. *Id* at 133. [Reproduced in the accompanying notebook at Tab 19].

to believe that carefully drafted group defamation statutes may indeed be constitutional in the U.S.

Even under the extraordinarily protected concept of freedom of expression in the U.S., the Rwandan Defendants may not avoid prosecution for incitement to commit genocide and persecutions on political, racial and religious grounds as a crime against humanity. The radio broadcasts and newspaper publications put forth by the Defendants may well fall under one of the exceptions to freedom of expression. Broadcasts like those that identified individuals by name, indicated the hideouts of targeted citizens and incited the people to violence against them[123] would very likely fall within even the restrictive concept of "incitement to imminent lawlessness" from the *Brandenburg* case. Other inciting statements, like, "The graves are not yet quite full. Who is going to do the good work and help us fill them completely,"[124] and the statements that called for sexual violence against Tutsi women[125] may also qualify as incitement to imminent lawlessness. Statements that denigrated and persecuted the Tutsi may fall within the "fighting words" category of exclusions to freedom of expression.

In sum, international law and the domestic legislation of many countries, while valuing freedom of expression, place varying levels of restrictions on speech that can be characterized as hate speech or racial propaganda. The ICTR may be justified in choosing to follow the more restrictive provisions, such as those found in the Racial Discrimination Convention or in the domestic legislation of Germany. However, even

[123] *Prosecutor v. Barayagwiza*, Indictment, *supra* note 4 at para. 1.22, 5.5.

[124] *Id*. at para. 5.4.

[125] *Id*. at para. 5.6.

under the United States concepts of protection for freedom of expression, the broadcasts and publications by the Defendants may be beyond protection.