Is Genocide Different?
Dealing with Hate Speech in a Post-Genocide Society

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I. Introduction

In January 2010, Victoire Ingabire returned to Rwanda after sixteen years of exile in the Netherlands to campaign for the presidency at the head of the United Democratic Force Party.[1] Her presence was immediately met with controversy, as her campaign touched on the ethnic tensions that sparked

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[1] Reuters, "Victoire Ingabire Stirs Ethnic Debate in Rwanda" *Radio Netherlands Online* (21 January 2010), online: Radio Netherlands Worldwide <http://www.rnw.nl/international-justice/article/victoire-ingabire-stirs-ethnic-debate-rwanda>.

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Rwanda's 1994 genocide where the country's majority Hutu population killed approximately 800,000 Tutsi and moderate Hutu.[2] Ingabire has called for prosecuting Tutsi for war crimes and crimes against humanity committed against Hutu during the 1994 conflict and for commemorating Hutu victims.[3] In April 2010, she was arrested on charges of denying the genocide, spreading genocide ideology, divisionism, and collaborating with Rwandan rebels based in the eastern Democratic Republic of Congo (DRC).[4]

Peter Erlinder, an American lawyer and law professor, traveled to Rwanda to assist in Ingabire's defense.[5] After Erlinder arrived, he was also arrested on charges of denying the genocide.[6] Ingabire and Erlinder both adamantly deny the charges against them. Ingabire has consistently maintained that advocating for recognizing and prosecuting crimes against humanity that Tutsi committed against Hutu during the genocide does not constitute a denial that the genocide happened.[7] The government disagrees and finds her talk of Tutsi massacres to be both a violation of Rwandan law and dangerous revisionism that could reignite conflict.[8]

The legal underpinning for the charges against Ingabire and Erlinder originated in 2002, when Rwanda passed a broadly worded law criminalizing "sectarianism."[9] The government later began to charge individuals with crimes associated with "genocide ideology," defined in a 2008 law as dehumanizing a person or group by such vague actions as

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[2] *Ibid*.
[3] "Rwanda Urged to Ensure Opposition Leader Receives Fair Trial" *Amnesty International* (28 April 2010), online: Amnesty International <http://www.amnesty.org/en/news-and-updates/rwanda-urged-ensure-opposition-leader-receives-fair-trial-2010-04-28>.
[4] Scott Baldauf & Max Delany, "Rwandan Opposition Leader Ingabire Released on Bail" *Christian Science Monitor* (22 April 2010), online: Christian Science Monitor <http://www.csmonitor.com/World/Africa/2010/0422/Rwandan-opposition-leader-Ingabire-released-on-bail>; "Rwanda Urged to Ensure Opposition Leader Receives Fair Trial" (28 April 2010), online: Amnesty International <http://www.amnesty.org/en/news-and-updates/rwanda-urged-ensure-opposition-leader-receives-fair-trial-2010-04-28> (stating that "Ingabire, was charged with 'genocide ideology' and 'minimising the genocide', 'divisionism' and 'collaboration with a terrorist group', the Democratic Forces for the Liberation of Rwanda (FDLR)").
[5] The Associated Press, "Rwanda Charges American over Articles" *The New York Times* (6 June 2010), online: The New York Times <http://www.nytimes.com/2010/06/06/world/africa/06rwanda.html?scp=9&sq=Erlinder&st=cse>.
[6] *Ibid*; Hereward Holland, "Rwanda Arrests U.S. Lawyer for Genocide Denial" *Reuters* (28 May 2010), online: Reuters <http://www.reuters.com/article/idUSTRE64R4AI20100528> (quoting a police spokesman saying "He was arrested this morning. He said that there was no genocide in Rwanda, that no Tutsis were killed by Hutus."); see also Peter Erlinder, "Rwanda: No Conspiracy, No Genocide Planning . . . No Genocide?" *Jurist* (24 December 2008) ("If there was no conspiracy and no planning to kill ethnic (i.e., Tutsi) civilians, can the tragedy that engulfed Rwanda properly be called 'a genocide' at all? Or, was it closer to a case of civilians being caught up in war-time violence, like the Eastern Front in WWII, rather than the planned behind-the-lines killings in Nazi death camps? The ICTR judgment found the former.")
[7] Baldauf & Delany, *supra* note 4; Reuters, "Victoire Ingabire Stirs Ethnic Debate in Rwanda," *supra* note 1.
[8] Reuters, "Victoire Ingabire Stirs Ethnic Debate in Rwanda," *ibid*.
[9] Amnesty International, *Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on 'Genocide Ideology' and 'Sectarianism'* (London: Amnesty International, 2010), online: Amnesty International <http://www.amnesty.org/en/library/asset/AFR47/005/2010/en/ea05dff5-40ea-4ed5-8e55-9f8463878c5c/afr470052010en.pdf > at 15-16.

"propounding wickedness," "laughing at one's misfortunes," and "stirring up ill feelings."[10] Ingabire and Erlinder's cases serve as examples of the Rwandan government using these laws to crackdown on opposition voices.

Every nation, in crafting and interpreting its speech laws, must balance the tension between allowing citizens to express themselves and deciding when that expression crosses the line into dangerous threats to others or to the country as a whole. The stakes for getting that balance right, however, are exponentially higher in post-conflict nations such as Rwanda. Rwanda may have erred in overzealously prosecuting Ingabire, Erlinder, and others like them, but the government has a valid concern that failing to identify and act on a legitimate threat has the potential to rekindle a conflict that has already taken hundreds of thousands of lives. So should a country have greater latitude to restrict speech in the aftermath of genocide? Which considerations should it take into account in deciding whether and how to limit speech? How can a nation struggling to establish the rule of law provide effective checks on the potential misuse of speech restrictions?

This article examines these questions by comparing how legal regimes with a broad range of experiences have answered speech questions for themselves, and how their solutions may or may not work for Rwanda. Part I will discuss the 1994 Rwandan genocide, the role that hate speech played in the rise of violence, and the state of the country post-genocide. Part II will provide a comparative analysis of approaches to hate speech in the United States, Germany, Israel, and the European Union (EU) as starting points for a broader discussion on post-conflict speech restrictions. Finally, Part III will expand on elements to consider in crafting post-conflict speech restrictions, explain how different legal regimes have addressed these elements, and suggest ways in which Rwanda could draw on other countries' examples to strike an effective, workable balance between preserving national stability and protecting its citizens' right to free speech.

II. Rwanda, Genocide, and Speech

1. A Brief History of the Rwandan Genocide

On 6 April 1994, the plane of Juvénal Habyarimana, the president of Rwanda, was shot down.[11] President Habyarimana and several other important figures died in the crash.[12] The incident triggered a wave of violence resulting in the death of more than 800,000 people in a little over three months, with most of the victims from the minority Tutsi population.[13]

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[10] *Ibid* at 13-14.

[11] Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999) at 181-82; Romeo Dallaire, *Shake Hands With the Devil: The Failure of Humanity in Rwanda* (New York: Carroll & Graf Publishers, 2004) at 220.

[12] Des Forges, *supra* note 11 at 181-82 (noting that Cyprien Ntaryamira, the President of Burundi, and General Nsabimana, the Chief of Staff of the Rwandan army also died in the crash).

[13] *Ibid* at 15. For a detailed analysis of the genocide, see Dallaire, *supra* note 11; Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed With Our Families: Stories From Rwanda* (New York: Picador, 1998).

A brief discussion of the history leading up to the conflict provides a useful context to understand the current tensions in the country and the rationale used to justify the *Genocide Ideology Law*.

The ethnic categorization and subsequent hostility between the Hutu and Tutsi developed over the course of the 20th century and significantly intensified when Belgium became the colonial power in the 1920s and 1930s.[14] The Belgians cemented an already growing separation between the two ethnic groups by decreeing that only Tutsi could be officials, giving them increased power over the Hutu.[15] The Belgians also registered the entire population and issued ethnic identity cards which all adult Rwandans were required to carry.[16] Domination by the minority Tutsi population, with the support of Belgium, continued until the end of the colonial era in the 1950s. The departure of the Belgians led to the ascendency of the Hutu in the 1960 elections, which were followed by the often-violent expulsion of many Tutsi from regions that had previously been predominately Hutu.[17] Many of the Tutsi fled and became refugees on the margins of neighboring countries.[18]

A generation later, Tutsi who grew up as refugees formed the Rwandan Patriotic Front (RPF) with the goal of overthrowing President Habyarimana and establishing a new government.[19] In 1990, the RPF crossed the border and attacked Rwanda.[20] The RPF attack was followed by years of sporadic fighting between the two sides, with numerous cease-fire agreements signed and broken.[21] Ethnic tensions continued to run very high in the country and racist views were being encouraged by both radio and print media.[22] In 1994, as attempts to implement a peace agreement slowly unwound, the President's death set off a wave of violence.[23] The Hutu targeted and killed approximately 800,000 Tutsi and moderate Hutu in what the International

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[14] See Des Forges, *supra* note 11 at 32-35 (prior to the Belgian colonization there was some fluidity between the Hutu and Tutsi groups, which had generally split along occupational lines– the Tutsi were pastoralists and the Hutu cultivated the land–but the categories were not completely fixed).
[15] *Ibid* at 35.
[16] *Ibid* at 36-38 (after the registration, approximately 15% of the population identified as Tutsi, 84% as Hutu, and 1% as Twa, a distinct ethnic group).
[17] *Ibid* at 38-40.
[18] More than 300,000 Tutsi fled abroad: *ibid* at 39-40 citing Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1995) at 62. By the late 1980s, the population had grown to approximately 600,000: *ibid* at 48 citing André Guichaoua, *Vers Deux Générations de Réfugiés Rwandais?* in André Guichaoua, ed, *Les Crises Politiques au Burundi et au Rwanda, 1993-1994: Analyses, Faites et Documents* (Lille: Université des Sciences et Technologies de Lille, 1995) at 343. Those Tutsi who ended up in Tanzania were the only refugees who were encouraged to integrate into the local population: *ibid* at 48.
[19] Des Forges, *ibid* at 48.
[20] *Ibid* at 49. Many of the Tutsi in Uganda were part of Yoweri Museveni's National Resistance Army (NRA), which put him in power in Uganda in 1986, fueling much of the ethnic tension that led to the creation of the Lord's Resistance Army. Paul Kagame was the deputy head of military intelligence for the NRA: *ibid* at 48.
[21] See e.g. Des Forges, *supra* note 11 at 106, 109, 123, 180; see also Dallaire, *supra* note 11 at 96, 100-10.
[22] See e.g. Des Forges, *supra* note 11 at 68-76.
[23] See e.g. Dallaire, *supra* note 11 at 212, 221-62.

Criminal Tribunal for Rwanda (ICTR) later found to be "a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population"—meeting the definition of genocide.[24] By the end of the conflict, the RPF had taken full control of the country and they have continued to dominate Rwandan politics since.[25] The RPF drove approximately two million Hutu refugees, including many of those who planned and committed the genocide, into neighboring countries.[26] Several thousand still remain in what is now the eastern part of the DRC, acting as a destabilizing force in the region.[27] During the violence, many international humanitarian law violations were committed by both sides.[28]

2. The International Criminal Tribunal for Rwanda and the Media Case

Reports by the UN Special Rapporteur for Rwanda and a Commission of Experts established by the UN Security Council concluded that genocide occurred in Rwanda.[29] These reports led the Security Council to establish the ICTR in November of 1994.[30] The ICTR's mandate is to "prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."[31]

The Tribunal is located in Arusha, Tanzania, and has three Trial Chambers where cases are heard by three-judge panels.[32] The first trial began in January 1997 and the tribunal has heard a number of notable cases.[33] In the

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[24] *Prosecutor v Karemera et al*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (16 June 2006) at para 35 (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.unictr.org/Portals/0/Case%5CEnglish%5CKaremera%5Ctrail%5C160606.pdf>.

[25] Dallaire, *supra* note 11 at 474-76 (commenting on the RPF victory), *infra* Section II (4).

[26] Dallaire, *supra* note 11 at 465, 488, 493-94, 518; Human Rights Watch, *Renewed Crisis in North Kivu* (2007) at 14, online: Human Rights Watch <http://hrw.org/reports/2007/drc1007/drc1007webwcover.pdf>.

[27] Human Rights Watch, *Renewed Crisis in North Kivu*, *supra* note 26 at 14-15.

[28] Des Forges, *supra* note 11 at 13-14, 301-302, 701-735; See e.g. Dallaire, *supra* note 11 at 469.

[29] *Report of the Special Rapporteur on the Situation of Human Rights in Rwanda*, UN GAOR, UN Doc S/1994/1157, A/49/508 (13 October 1994). *Letter dated 94/10/01 from the Secretary-General addressed to the President of the Security Council [Preliminary Report of Independent Commission of Experts]*, UN Doc S/1994/1125 (4 October 1994).

[30] *Security Council Resolution 955 (1994) [on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal]*, SC Res 955, UN SCOR, 49th Sess, 3453rd Mtg UN Doc S/Res/955 (1994) *[UNSC Resolution 955]*; Des Forges, *supra* note 11 at 737-78.

[31] *UNSC Resolution 955 – Annex: Statute of the International Tribunal for Rwanda*, at art 1.

[32] *Ibid* at art 11 (Composition of the Chambers*); Security Council resolution 1512 (2003) [on the amendment of articles 11 and 12 quarter of the Statute of the International Criminal Tribunal for Rwanda]*, SC Res 1512, UN SCOR, 58th Sess, 4849th Mtg, UN Doc S/RES/1512 (2003) (amending art 11).

[33] Erik Møse, "Main Achievements of the ICTR" (2005) 3 Int'l Crim Just 920 at 920 (containing a detailed history of the accomplishments of the Tribunal divided into its separate mandates and describing some of the difficulties in establishing the Tribunal). The Court's mandate has been extended five times as of 2010: see *Security Council resolution 1932 (2010) [on extension of the terms of office of permanent and ad litem judges to the International Criminal Tribunal for Rwanda (ICTR) and on amending article 12 of the Statute of the International Tribunal]*, SC Res 1932, UN SCOR, 64th Sess,

case of Jean-Paul Akayesu, the tribunal was the first to interpret the definition of genocide and obtained the first conviction since the adoption of the Genocide Convention in 1948.[34] The Akayesu case was also the first time rape was found to be an element of the crime of genocide.[35] With his guilty plea, Prime Minister Jean Kambanda also became the first head of state to be convicted of genocide and the first accused to acknowledge his or her guilt for acts of genocide.[36]

On 28 November 2007, the ICTR Appeals Chamber released its opinion in the appeal of three leading members of the Rwandan media in another well-known case, unsurprisingly nicknamed the Media Case. Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze were convicted of various crimes including direct and public incitement to commit genocide and persecution.[37]

Ferdinand Nahimana and Jean-Bosco Barayagwiza established a radio station called *Radio télévision libre des mille collines* (RTLM), that started broadcasting in July 1993 and became very popular.[38] Nahimana and

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6349th Mtg, UN Doc S/RES/1932 (2010); *Security Council resolution 1955 (2010) [on authorization of the judges to complete cases notwithstanding the expiry of their term of office at the International Criminal Tribunal for Rwanda (ICTR)]*, SC Res 1955, UN SCOR, 66th Sess, 6447th Mtg, UN Doc S/RES/1955 (2010). On 22 December 2010, the Security Council also set up the International Residual Mechanism for Criminal Tribunals to try fugitives who are captured after the current tribunals have completed their work and to handle any appellate work not completed when the Mechanism goes into effect: *Security Council resolution 1966 (2010) [on establishment of the International Residual Mechanism for Criminal Tribunals with two branches and the adoption of the Statute of the Mechanism]*, SC Res 1966, UN SCOR, 66th Sess, 6463rd Mtg, UN Doc S/RES/1966 (2010). As of November 2010, the Tribunal completed the cases of sixty accused in the first instance, including six acquittals: *Letter dated 2010/11/05 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council [Report on the Completion Strategy of the International Criminal Tribunal for Rwanda]*, UN Doc S/2010/574 (5 November 2010), at Annex I(a) [*ICTR Completion Strategy Report*]. Fifteen other accused are awaiting judgments in four cases and five are still involved in ongoing trials: *ICTR Completion Strategy Report*, at Annex I(b)-(d). An additional two accused are waiting for trial and ten fugitives remain at large: *ICTR Completion Strategy Report*, at Annex II-IV.

[34] *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

[35] *Ibid* at 7.7.

[36] *Prosecutor v Kambanda*, ICTR-97-23-S, Trial Judgment and Sentence (4 September 1998) (International Criminal Tribunal for Rwanda, Trial Chamber), online: ICTR <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>. Kambanda was sentenced to life in prison. Notably, Slobodan Milosevic of the former Yugoslavia and Charles Taylor of Liberia were the first sitting heads of state charged with war crimes. President Al Bashir of Sudan was the first sitting head of state to be charged with genocide: see *Prosecutor v Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (12 July 2010) (International Criminal Court, Pre-Trial Chamber I), online: ICC <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>. Ratko Mladić and Radovan Karadžić, wartime leaders of the Bosnian Serbs, have also been charged with genocide by the International Criminal Tribunal for the former Yugoslavia.

[37] *Nahimana, Barayagwiza, Ngeze v Prosecutor*, ICTR-99-52-A, Appeal Judgment (28 November 2007) (International Criminal Tribunal for Rwanda, Appeals Chamber), online: ICTR <http://www.unictr.org/Portals/0/Case/English/Nahimana/decisions/071128_judgement.pdf> [*Media Case Appeal*].

[38] *Prosecutor v Nahimana, Barayagwiza, Ngeze*, ICTR-99-52-T, Trial Judgment and Sentence (3 December 2003) at paras 5-6, 342 (International Criminal Tribunal for Rwanda, Trial Chamber),

Barayagwiza supervised RTLM's activities, controlled its finances, and were considered the top two individuals in charge.[39] The ICTR Appeals Chamber found that RTLM's broadcasts after 6 April 1994 substantially contributed to the commission of acts of genocide.[40] The radio station broadcast statements about "exterminating the *Inkotanyi* [enemy][41] so as 'to wipe them from human memory', and exterminating the Tutsi 'from the surface of the earth . . . to make them disappear for good.'"[42] The Appeals Chamber also found that Nahimana had effective control over RTLM's journalists and employees both before and after 6 April and therefore upheld his conviction under command responsibility for direct and public incitement to genocide.[43]

Hassan Ngeze founded the newspaper *Kangura* in 1990 and was its owner and editor-in-chief.[44] The tribunal found that Ngeze "controlled the publication and was responsible for its content" during 1994 and convicted him of direct and public incitement to commit genocide based on several articles in the paper, including two that he had written.[45] One of the inflammatory articles, signed by Ngeze, stated,

> Let's hope the *Inyenzi* [cockroaches][46] will have the courage to understand what is going to happen and realize that if they make a small mistake, they will be exterminated; if they make the mistake of attacking again, there will be none of them left in Rwanda, not even a single accomplice.[47]

Ngeze was also convicted of aiding and abetting the commission of genocide for his involvement in setting up and supervising roadblocks in the province of Gisenyi.[48]

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online: ICTR <http://www.unictr.org/Portals/0/Case/English/Nahimana/judgement/Judg&sent.pdf> [*Media Case Trial*]. Barayagwiza was also convicted of genocide because of his activities with the Coalition pour la défense de la République party. *Media Case Appeal*, *supra* note 37 at p 346-47.

[39] *Media Case Appeal*, *supra* note 37 at paras 359, 627-30, 794. The Appeals Chamber, however, found that Barayagwiza did not have superior responsibility at RTLM after April 6, 1994, and that only broadcasts after that date instigated acts of genocide: *ibid* at para 513. Therefore, the chamber overturned Barayagwiza's convictions based on his involvement with RTLM: *ibid* at para 636.

[40] *Ibid* at paras 514-17.

[41] *Ibid* at para 53 ("The Appeals Chamber observes that the assimilation between *Inkotanyi*–recognized explicitly as the 'enemy' in the interview–and the Tutsi ethnic group was frequent in the pro-Hutu media and, more particularly, in RTLM broadcasts.").

[42] *Ibid* at para 756 quoting the *Media Case Trial*, at para 483.

[43] *Ibid* at paras 822, 834.

[44] *Ibid* at paras 884-86.

[45] *Ibid* at para 885 (quoting the Trial Chamber). The Appeals Chamber discusses the specific articles in paragraphs 771-75. *Ibid.* The Appeals Chamber also overturned the conviction of Ngeze for instigating genocide in connection with articles in *Kangura* due to insufficient evidence that the publication "substantially contributed to the commission of acts of genocide . . . ." *Ibid* at para 519.

[46] *Media Case Trial*, *supra* note 38 at para 90 (*Inyenzi*, meaning cockroach); *Media Case Appeal*, *supra* note 37 at para 412 ("*Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority." quoting *Media Case Trial* para 837); see also, Des Forges, *supra* note 11 at 73-74.

[47] *Media Case Appeal*, *supra* note 37 at para 771.

[48] *Media Case Appeal*, *supra* note 37 at paras 670-72.

3. *Mere Hate Speech? Nahimana's Conviction for Persecution*

The convictions for direct and public incitement to commit genocide for the broadcasts from RTLM and articles in *Kangura* were not particularly contentious decisions as they were clearly linked to statements rising to the appropriate level of incitement.[49] Nahimana's conviction for persecution, however, elicited a sharp dissent from Judge Theodor Meron, arguing that the conviction crossed the line by criminalizing "mere hate speech" and failing to directly link Nahimana to widespread and systematic attacks—the unique element needed to sustain a persecution conviction.[50]

Persecution, under the jurisprudence of the ICTR, consists of "an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."[51] The Appeals Chamber found that the cumulative effect of speeches made after April 6 on RTLM, in the context of "a massive campaign of persecution directed at the Tutsi population of Rwanda . . . also characterized by acts of violence," were of sufficient gravity to support the conviction for persecution.[52]

In his dissent, Judge Meron first argued that mere hate speech is not a criminal offense under customary international law or the statute of the Tribunal. Looking at the applicable treaties, he noted that article 20 of the *International Convention on Civil and Political Rights* and article 4 of the *Convention on the Elimination of all Forms of Racial Discrimination* both require states to prohibit certain forms of hate speech.[53] He then looked at the various reservations with respect to these provisions from countries such as France and the United States and found that the "number and extent of the reservations reveal that profound disagreement persists in the international community . . ." and "[s]ince a consensus among states has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech."[54] He went on to look at the drafting history of the *Genocide Convention*, noting that a draft article on hate speech was not included in the final convention[55] and found nothing supporting the idea in the jurisprudence of the ICTR or the International Criminal Tribunal for the Former Yugoslavia.[56]

Judge Meron's main concern was that "criminalizing speech that falls

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[49] *Supra* Section II (2).
[50] *Media Case Appeal*, *supra* note 37 at pp 375-76, 379-80 (Judge Meron dissenting).
[51] *Media Case Appeal*, at para 985 citing *Prosecutor v Milorad Krnojelac*, IT-97-25-A, Appeal Judgment, (17 September 2003) at para. 185 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <http://www.icty.org/x/cases/krnojelac/acjug/en/krn-aj030917e.pdf>; and several other cases.
[52] *Media Case Appeal, ibid* at para 988.
[53] *Media Case Appeal*, *supra* note 37 at p 376 (Judge Meron dissenting).
[54] *Ibid.*
[55] *Ibid* at p 377.
[56] *Ibid* at p 377-78.

short of true threats or incitement chills legitimate political discourse . . . ."[57] This is especially a problem in emerging democracies where the "threat of criminal prosecution for legitimate dissent is disturbingly common . . . ."[58] The Open Society Justice Initiative filed an amicus brief in the case and noted that repressive regimes, such as Ethiopia, the DRC, and Chad, have also explicitly used the example of RTLM to clamp down on legitimate criticism of the government.[59]

In the case of Nahimana, the only connection drawn by the Appeals Chamber between Nahimana's actions and the widespread and systematic attacks was the hate speech.[60] The majority in the Appeals Chamber argued that the underlying acts of persecution did not have to amount to crimes in international law, and therefore, did not address the argument that "mere hate speech" is not a crime.[61] Judge Meron's issue with this approach was that "it fails to appreciate that speech is unique—expression which is not criminalized is protected," and "[t]he Appeals Chamber, even without deciding whether hate speech alone can justify a conviction, nevertheless permits protected speech to serve as a basis for a conviction for persecution."[62]

4. Rwanda After the Genocide

At the end of the fighting in 1994, over a million Hutu refugees from Rwanda crossed the border into eastern DRC.[63] Many of the Hutu responsible for the genocide were among the refugees and they began to re-group and re-arm in the eastern DRC, sparking three cross-border attacks in the subsequent decade by the new Rwandan government.[64] Over the last decade, depending on the political climate, Congolese governments have fluctuated between attempting to eliminate the Hutu militias to fighting alongside or supporting them.[65] The most recent military action started in

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[57] *Ibid* at p 379.
[58] *Ibid* at p 378 citing *Brief for Open Society Justice Initiative as Amicus Curiae on Nahimana, et al v Prosecutor*, at 5-8.
[59] *Brief for Open Society Justice Initiative as Amicus Curiae on Nahimana, et al v Prosecutor*, at 5.
[60] *Media Case Appeal*, *supra* note 37 at paras 988, 995.
[61] *Ibid* at para 985.
[62] *Media Case Appeal*, *supra* note 37 at p 380 (Judge Meron dissenting).
[63] Human Rights Watch, *Renewed Crisis in North Kivu*, *supra* note 26 at 14 (the country was known as Zaire at the time).
[64] *Ibid.* The third military operation started in January 2009: Stephanie McCrummen, "Rwandan Troops Enter Congo to Find Hutu Militia Leaders" *The Washington Post* (21 January 2009), online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/20/AR2009012001045.html>.
[65] Human Rights Watch, *Renewed Crisis in North Kivu*, *supra* note 26 at 15; "Rwanda and the Great Lakes Region: A Pioneer with a Mountain to Climb" *The Economist* (25 September 2008), online: The Economist <http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=12304755>; "UN 'Accuses Rwanda and DR Congo'" *BBC* (11 December 2008), online: British Broadcasting Corporation <http://news.bbc.co.uk/2/hi/africa/7776309.stm>; *Letter dated 2008/12/10 from the Chairman of the Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council,* UN Doc S/2008/773 (12 December 2008) at Section VI (finding violations of the arms embargo by both Rwanda and the DRC for supplying

January 2009, with the Rwandan and Congolese militaries attempting to eradicate both Hutu and Tutsi militia operating in the area.[66] However, the militias continued to commit atrocities even after the governments declared success and Rwandan troops withdrew.[67]

As recently as 1998, the government of Rwanda also did not exercise full control over the internal territory of the country.[68] Large areas in the west and north were still controlled by Hutu rebels.[69] Many genocide survivors, who could be witnesses against the killers, were targeted and murdered and thousands of Hutu were sprung from jail.[70] Over time, the Rwandan army has regained control over its internal affairs and the militias in the DRC no longer pose an existential threat to the current government.[71]

The Rwandan judiciary was also devastated by the genocide. The number of judges fell from around 600 before April 1994 to only 237 in August of that year.[72] There were also similar losses in the ranks of prosecutors, judicial officers, police officers, clerks, and lawyers.[73] While the ministry of justice began recruiting hundreds of new employees it was only able to provide them with minimal training.[74] The war also seriously damaged the judicial ministry building and other court buildings around the country were stripped of furniture and electrical fixtures.[75] It took significant amounts of time to begin getting the judiciary up and running again.[76]

The RPF has remained in power since the end of the genocide.[77] Paul Kagame was the leader of the RPF forces during the civil war between 1990 and 1994, and he was reelected to a second seven-year term as president in 2010 with 93 per cent of the vote.[78] Tension still runs high in the country

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arms to various militias).

[66] McCrummen, *supra* note 64. U.S. State Department, Report, *2010 Country Reports on Human Rights Practices (Rwanda),* (8 April 2011), online: State Department <http://www.state.gov/documents/organization/160139.pdf>.

[67] "35,000 Flee Renewed Clashes in East DR Congo" *Radio Netherlands Worldwide* (25 July 2009), online: Radio Netherlands Worldwide <http://www.rnw.nl/int-justice/article/35000-flee-renewed-clashes-east-drcongo>; Stephanie McCrummen, "Congo, Rwanda Call Joint Offensive a Success" *The Washington Post* (28 February 2009), online: The Washington Post < http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022702873.html?wprss=rss_world>.

[68] Mark A Drumbl, "Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials" (1998) 20 Colum Hum Rts L Rev at 545-8.

[69] *Ibid.*

[70] *Ibid*; Philip Gourevitch, "The Life After, Fifteen Years After the Genocide in Rwanda, the Reconciliation Defies Expectations" *The New Yorker* (4 May 2009) at 39.

[71] *Ibid*; "The Genocide in Rwanda: The Difficulty of Trying to Stop it from Ever Happening Again" *The Economist* (8 April 2009), online: <http://www.economist.com/node/13447279>.

[72] Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda,* (New York: Human Rights Watch, 2008), online: Human Rights Watch <http://www.hrw.org/en/node/62097/section/1> at 12.

[73] *Ibid.*

[74] *Ibid.*

[75] *Ibid.*

[76] *Ibid.*

[77] Central Intelligence Agency, *The CIA World Factbook* (Washington, DC: Central Intelligence Agency, 2008).

[78] *Ibid* (noting that the RPF political party received 78.8% of the vote in the legislative election).

today, as victims and perpetrators of the genocide have to live side-by-side in communities.[79] The community-led *gacaca* courts have, according to official statistics, adjudicated over a million cases related to the genocide, but those who confessed received short prison terms and many perpetrators have already served their time.[80] Many more have been returning from exile in the eastern DRC under an amnesty program.[81] Some veil of normality exists, but only because there has to be.[82] People are still afraid of the perpetrators who live in their communities and perpetrators still remember what it felt like to kill and, at times, seem to express little remorse. However, there is little alternative: Hutu and Tutsi have to coexist.[83]

5. Speech in Rwanda: Genocide Ideology and Divisionism

Rwanda's government has actively limited speech concerning the genocide and ethnic tensions.[84] It has been especially sensitive to accusations that it has not done enough to prosecute war crimes committed by the RPF during the genocide.[85] In addition to the 2002 law criminalizing "sectarianism," Rwanda's 2003 Constitution included a commitment to "fight[ ] the ideology of genocide and all its manifestations" and to the "eradication of ethnic, regional and other divisions and promotion of national unity."[86] Starting around 2007, the government began prosecuting people for the crimes connected to "genocide ideology."[87] It was not until the

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[79] Gourevitch, *supra* note 70 at 36.
[80] *Ibid* at 39.
[81] Stephanie McCrummen, "For Rwandans, Fragile Acts of Faith: Returning From Years in Congo's Bush, Hutu Rebels Seek Their Place in a Homeland Struggling to Forge a New Unity" *The Washington Post* (24 February 2008), online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/23/AR2009022302990.html>.
[82] Gourevitch, *supra* note 70 at 42 ("It's our obligation, and it's our only way to survive, and I do it every day, and I still can't comprehend it."); 43 ("Well, President, I manage because you ask us to manage.")
[83] *Ibid* at 42 ("[The Tutsi] expect it. We felled them like cows . . . 'Yes,' he said, 'For me, it became a pleasure to kill'"). Some stated: "[i]f ever the occasion arose, if there was an opportunity, they would kill again. . . . They only asked pardon because of *gacaca*. Why didn't they ask forgiveness before *gacaca*? It's because of the President that they don't kill. Forgiveness came from a Presidential order." *Ibid* at 41.
[84] See Human Rights Watch, *Law and Reality*, *supra* note 72 at 34-43.
[85] U.S. State Department, Report, *2007 Country Reports on Human Rights Practices (Rwanda),* (11 March 2008), online: State Department <http://www.state.gov/g/drl/rls/hrrpt/2007/100499.htm> ("[d]uring the year the government continued to claim that calls by human rights groups or opposition figures for investigations of alleged RPF war crimes constituted attempts to equate the genocide with abuses committed by RPF soldiers who stopped the genocide"). One of the international community's main criticisms of the ICTR and the Rwandan government has been the lack of serious prosecutions for war crimes committed by the RPF during the genocide. Kenneth Roth, "Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes" (26 May 2009), online: Human Rights Watch <http://www.hrw.org/en/news/2009/05/26/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf-c>; see also Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee – Rwanda, *Report of the UN Human Rights Committee*, UN HRCOR, 95th Sess, UN Doc CCPR/C/RWA/CO/3 (7 May 2009) at para 13.
[86] *Constitution of the Republic Of Rwanda*, OG No Special Of 4 June 2003, as amended by OG No special of 13 August 2008 at art 9.
[87] Amnesty International, *Safer To Stay Silent*, *supra* note 9 at 17 (citing a government report that

following year that the government passed its law defining "genocide ideology" and provided marginal clarification on the charges.[88]

In its 2007 Country Report on Human Rights Practices in Rwanda, the U.S. State Department stated, "[w]hile the press regularly published articles critical of senior government officials and government policy, there were increased instances in which the government harassed, convicted, fined, and intimidated independent journalists who expressed views that were deemed critical of the government on sensitive topics . . . ."[89] The State Department also documented three cases where the government prosecuted or expelled members of the press for articles that were found in violation of the divisionism statute, the press law, or some other article of the criminal code.[90] In particular, Agnes Nkusi-Uwimana was charged with divisionism and minimizing the genocide for publishing an article equating revenge killings by the victorious Rwanda Patriotic Army at the end of the 1994 genocide with the genocide itself and being critical of senior members of the government.[91] Nkusi-Uwimana eventually pled guilty to divisionism, among other charges. According to the State Department, "[t]he case was widely interpreted as demonstrating that, while the government tolerated wide-ranging criticism of its policies, explicit ethnic attacks and genocide denial or minimizing of the genocide would be prosecuted."[92]

At the time of the *Media Case*, the Open Justice Society Initiative stated that the initial law was used to intimidate independent journalists, leading to several fleeing the country fearing for their safety.[93] The Human Rights Committee has also noted that journalists critical of the government are being intimidated and that international press agencies have reportedly been threatened with losing their licenses because they employ certain journalists.[94]

The 2010 election was also marred by restrictions on speech and accusations of vote rigging, harassment, and intimidation.[95] The three political parties that were openly critical of the RPF were not allowed to participate.[96] Erlinder and Ingabire were arrested in the lead up to this election. And, according to Human Rights Watch, "[m]ost independent

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listed 1,034 trials as connected to "genocide ideology").

[88] *Ibid* at 13; see also Human Rights Watch, "Rwanda: Country Summary" in Human Rights Watch, *World Report 2009: Events of 2008*, (New York: Human Rights Watch, 2009).

[89] U.S. State Department, *supra* note 85.

[90] *Ibid.*

[91] *Ibid.*

[92] *Ibid*

[93] *Brief for Open Society Justice*, *supra* note 59 at 8.

[94] Concluding Observations – Rwanda, *supra* note 85 at para 20.

[95] "Rwanda: Silencing Dissent Ahead of Elections," *Human Rights Watch* (2 August 2010), online: Human Rights Watch <http://www.hrw.org/en/news/2010/08/02/rwanda-attacks-freedom-expression-freedom-association-and-freedom-assembly-run-presi>; Jeffrey Gettleman and Josh Kron, "Doubts Rise in Rwanda as Election is Held," *The New York Times* (8 August 2010) A4, online: The New York Times <http://www.nytimes.com/2010/08/09/world/africa/09rwanda.html?src=un&feedurl=http%3A%2F%2Fjson8.nytimes.com%2Fpages%2Fworld%2Fafrica%2Findex.jsonp>.

[96] "Rwanda: Silencing Dissent," *ibid.*

journalists [were] silenced, and the two main independent newspapers suspended."[97]

Rwanda has had difficulty differentiating between speech that constitutes legitimate dissent and speech that rises to a level of incitement that could undermine the nation's stability. Drawing the lines on what speech should be criminalized, however, is not easy—as the ICTR's divided opinions in the *Media Case* illustrate. Moreover, Rwanda is far from alone in struggling with how to handle issues of hatred, violence, and speech.

III. Approaches to Hate Speech

Like Rwanda, nations the world over continue to work to strike a balance between citizens' expression and adequately containing speech that calls for violence.[98] But different countries have given these competing concerns different weights in striking their balances, leading to a range of legal regimes governing hate speech. Each nation's unique experiences inform its priorities and the risks it is willing to take in allowing its citizens to speak. And experience with hate speech and genocide understandably exerts major influence on speech laws going forward.

Germany committed a genocide across Europe during the Holocaust of the 1930s and 1940s. Its speech laws reflect active efforts to rein in words and attitudes that Germany's own government once broadcast to the point of saturation. Germany occupies a rare position as a developed state with firsthand knowledge of the power words have to fuel genocide. Its speech laws can be seen, at least in part, as reactions to that power.

In the aftermath of the Holocaust, Israel, and later the European Union, each developed speech laws fueled by those who survived it. Their experiences are distinct from each other in critically important ways. Israel is, in many ways, a nation born of the Holocaust, with a population that included over 400,000 Holocaust survivors by 1951, three years after declaring statehood.[99] Europe includes countries and individuals who orchestrated, complied with, resisted, and were victims of that genocide. But each has emerged with an understanding of the atrocities committed, and

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[97] *Ibid.*

[98] For example, the United Nations' *Universal Declaration of Human Rights* guarantees the right to "freedom of opinion and expression": *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) at art 19. The *Declaration* also, however, contains numerous provisions protecting a person's right to dignity, security, and a life free from discrimination: see e.g. arts 1, 2, 3, 5, 12. These provisions create tension and raise questions of hierarchy and interpretation when one person's expression could be seen as infringing on another's dignity or equality: see Elizabeth F Defeis, "Freedom of Speech and International Norms" (1992) 29 Stan J Int'l L 57 at 76-78.

[99] See Matthew J Gibney and Randall Hansen, eds, *Immigration and Asylum: from 1900 to the Present* (Santa Barbara: ABC-Clio Inc, 2005) at 327 (placing the number of Holocaust survivors who illegally immigrated to Palestine between 1939 and 1945 at 80,000); Jonathan Kaplan, *The Mass Migration of the 1950s Jewish Agency for Israel*, online: Jewish Agency for Israel <http://www.jafi.org.il/JewishAgency/English/Jewish+Education/Compelling+Content/Eye+on+Israel/Society/4%29+The+Mass+Migration+of+the+1950s.htm> (providing the number of immigrants to Israel between 1948 and 1951 by country).

their speech laws have been actively informed by their respective experiences with genocide.

Though it has its own prejudices and history of discriminatory actions, the United States has no firsthand experience of genocide within its borders or population. Its attitude toward hate speech is based largely on guessing at how to avoid harm in the future, rather than reacting to known catalysts from the past. The speech laws developed absent genocidal experiences represent an extreme on the spectrum of permitted violent speech, and serve as a touchstone for evaluating the extent to which nations risk violence in the name of protecting free expression.

The summary that follows provides a snapshot of hate speech laws and freedom of expression in these nations and regions with markedly different experiences of genocide. Looking at them carefully, each of these regimes can serve as a lens through which to view and evaluate Rwanda's genocide ideology legislation.

1. Germany

In Germany, the *Grundgesetz*, or *Basic Law*, serves as the nation's constitution.[100] Among its guarantees is the freedom "freely to express and disseminate . . . opinions in speech, writing, and pictures and to inform [one]self without hindrance . . . ."[101] But under the *Basic Law*, this freedom can be limited by "the provisions of general laws . . . and . . . the right to personal dignity."[102] Personal dignity is particularly important under the *Basic Law*. Article 1, the Law's first provision, provides that "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."[103]

In accordance with its Basic Law, Germany has enacted criminal provisions to punish hate speech. Section 130 of the *Strafgesetzbuch* (StGB), or *Penal Code*, criminalizes "incit[ing] hatred against segments of the population or call[ing] for violent or arbitrary measures against them"[104] or, more generally, "assault[ing] the human dignity of others by insulting, maliciously

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[100] The Basic Law was promulgated in the aftermath of World War II, intended as a temporary measure to govern the Western Sector until a constitution was drafted for a newly unified Germany. Ronald J Krotoszynski, Jr, "A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany" (2004) 78 Tul L Rev 1549 at 1553. Upon Germany's reunification in 1990, the Basic Law came to serve as the country's constitution. President Roman Herzog, *Foreword* to *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany) [*Grundgesetz*].

[101] *Grundgesetz, ibid* art 5(1).

[102] *Ibid* at art 5(2).

[103] *Ibid* at art 1(2)-(3); see also Sionaidh Douglas-Scott, "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches" (1999) 7 Wm & Mary Bill Rts J 305 at 321 (discussing the preeminence of human dignity under German law).

[104] *Strafgesetzbuch* [Penal Code] 13 November 1998, *Bundesgesetzblatt* 3322, as amended, at s 130(1) [*Strafgesetzbuch*].

maligning, or defaming segments of the population."[105] The *Penal Code* also includes provisions which limit hate speech forms and messages of particular salience in Germany. Basic Law sections 84 through 86a allow the government to declare certain political parties illegal, to ban their propaganda, and to prohibit symbols associated with such parties.[106] Sections 86 and 130 mention the National Socialist Party by name.[107] Under German law, denying the Holocaust is also a crime if done "publicly or in a meeting approv[ing] of, den[ying] or downplay[ing] an act committed under the rule of National Socialism . . . in a manner capable of disturbing the public peace . . . ."[108]

It is important to note that these statutes do not contain intent and violence requirements. While inciting hatred toward segments of a population is a crime,[109] so too is simply assaulting human dignity or denying the Holocaust.[110] These latter crimes do not require a finding that the speech has created harm or led to violence. Nor do they require any evidence that the speech is likely to do so. Merely speaking is enough—evincing a focus on means rather than ends.[111]

Germany's high court, the *Bundesverfassungsgericht*, or Federal Constitutional Court, has upheld these crimes based upon the primacy Germany affords personal dignity. In 1994 the court considered the case of a conference at which David Irving, a well-known Holocaust-denier, was to speak.[112] The conference organizers were ordered to take steps to ensure that the conference not include content denying Jewish persecution during the Third Reich, including providing warnings about the possibility of this content and immediately stepping in to end such discussion if it occurred.[113] In assessing whether the orders were appropriate, the court looked to the distinction between opinions, which are generally protected, and facts, the protection of which depends on their truth.[114] If a fact is untrue, said the court, it is protected only to the extent opinion is.[115] Because the court found

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[105] *Ibid* at s 130(2).
[106] *Ibid* at ss 84-86a.
[107] *Ibid* at ss 86(4), 130(4).
[108] *Ibid* at s 130(3).
[109] *Ibid* at s 130(1).
[110] *Ibid* at ss 130(2)-(3).
[111] It is interesting to compare the German and United States approaches in how they take into account a speaker's identity and viewpoints in protecting and restricting speech. United States law focuses on content-neutrality (e.g. treating all messages and speakers similarly), while one could argue that German law affords individuals varying levels of "dignity" based on their viewpoints. Though German Penal Code section 130(1) on its face applies to speech aimed at any segment of the population, provisions in sections 130(3) and eighty-four through 86a apply only to citizens espousing specific messages—the citizen who subscribes to the Jewish faith would almost certainly have a greater right to be free from defamation than a citizen who subscribes to socialist political views. See *ibid,* at ss 84-86a, 130(1)-(4); *R.A.V. v City of Saint Paul*, 505 US 377 (1992); Krotoszynski, *supra* note 100 at 1584.
[112] *Bundesverfassungsgericht* [Federal Constitutional Court] 13 April 1994, 90 Entscheidungen des Bundesverfassungsgerichts 241.
[113] *Ibid* at 242.
[114] *Ibid* at 248-49.
[115] *Ibid* at 249.

that Holocaust was a proven fact,[116] it upheld the orders under the general principle that "the protection of the personality will, as a rule, prevail over freedom of opinion in relation to statements of opinion which are to be regarded as 'insult' . . . or abuse."[117] According to this decision, it is clear that under German *Basic Law* even the threat of speech which might insult dignity is proscribable, representing a substantial incursion on freedom of expression.

2. Israel

Similar to Germany, Israel governs and organizes itself according to a set of Basic Laws that comprise its constitution.[118] Israel's civil rights provisions stem from both these *Basic Laws*[119] and the *Declaration of the Establishment of the State of Israel*'s assertions that

> [t]he state of Israel . . . will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice[,] and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture . . . and it will be faithful to the principles of the Charter of the United Nations.[120]

Notably, however, neither the *Declaration of the Establishment of the State of Israel* nor Israel's *Basic Laws* include a right to freedom of speech or expression.[121]

This does not mean that Israel does not value or protect speech. The Israeli Supreme Court has "established freedom of expression as a

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[116] *Ibid*. In making this determination, the court relied in part on a previous decision by the *Bundesgerichtschof* (Federal Court of Justice), which had held that

> [t]he single fact that people were singled out under the so-called Nuremberg laws and were robbed of their identity with a view to their extermination allocates to the Jews living in the Federal Republic [of Germany] a special personal relationship with their fellow citizens . . . . They are entitled, as a matter of their personal identity, to be viewed as belonging to a fatefully selected group, to which others owe a special moral responsibility which is part of their self worth. Respect for their personal identity is for each of them a guarantee against a return to such discrimination and a fundamental condition for their living in Germany.

Bundesgerichtschof [BGH] [Federal Court of Justice] Sept. 18, 1979, 75 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 160 (162) (FRG).

[117] *Ibid* at 248.

[118] The Knesset (State of Israel), Information Release, "Basic Laws - Introduction," (2003), online: Government of Israel <http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm>.

[119] *Basic Law on Human Dignity and Liberty*, 5752-1992 SH 1391 (Israel). While some scholars assert that Israel's Basic Laws do not include civil rights, the *Basic Law on Human Dignity and Liberty* does include provisions protecting liberty, property, and privacy, and disallowing searches without consent. *Compare* Zaharah R Markoe, "NOTE: Expressing Oneself Without a Constitution: The Israeli Story," (2000) 8 Cardozo J Int'l & Comp L 319 at 319, 320 *with Basic Law: Human Dignity and Liberty*; Barak Cohen, "Empowering Constitutionalism With Text From an Israeli Perspective," (2003) 18 Am U Int'l L Rev 585 at 633-36.

[120] *Declaration of the Establishment of the State of Israel* (5708-1948), Official Gazette, No. 1 (14 May 1948) (Israel).

[121] *Ibid*; Basic Law: Human Dignity and Liberty: The Knesset, 5752-1992 S.H. 1391 (Isr.).

fundamental freedom that enjoys 'supra-legal status.'"[122] Speech may be limited, according to the Court, but in determining when limitations are permissible "[t]he guiding principle ought always to be: is it probable that as a consequence of the publication a danger to the public peace has been disclosed; the bare tendency in that direction in the matter published will not suffice to fulfill that requirement."[123]

Israel does, however, limit discriminatory speech. Much like Germany's, Israel's *Basic Law on Human Dignity and Liberty* opens by declaring its purpose "to protect human dignity and liberty."[124] The text forbids "violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[125] These provisions, combined with the lack of a written right to free speech, can clearly be read as emphasizing the primacy of dignity over speech. So too can the explicit laws Israel has passed to deal with hate speech.

The *Israeli Penal Code* defines racism as "persecution, humiliation, degradation, a display of enmity, hostility or violence, or causing violence against the public or parts of the population, merely because of their color, racial affiliation[,] or national ethnic origin."[126] The Knesset has named and criminalized activities involving racism, including: public incitement to racist discrimination, violence, or hatred; public racist insults or threats; and leadership or support of activities carried out by racist groups, political parties, and movements.[127] Other discriminatory activities, including hate speech, criminal offences motivated by hatred, and publicly denying the Holocaust are also crimes.[128]

The Israeli Supreme Court has held that discriminatory speech can also constitute the crime of sedition in certain contexts. In *Kahane v State of Israel*, the Court determined that a Knesset candidate who distributed leaflets calling for the government to bomb an Arab village endangered, to a near certainty, the values of public order by inflaming hostilities and hatred between Jews and Arabs.[129] According to the court, "[w]ords are liable to inflame passions and hatred and to lead to violence, and thereby undermine the minimal level of cohesion society needs."[130] The confluence of this

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[122] Miriam Gur-Arye, "Can Freedom of Expression Survive Social Trauma: The Israeli Experience," (2003) 13 Duke J Comp & Int'l L 155 at 158.
[123] HCJ 73/53, *"Kol Ha'Am" Co. Ltd. v. Minister of the Interior*, [1953] IsrSC 7(1) 871. Notably, the High Court of Justice refers to several United States cases in setting this standard for speech limitations.
[124] *Basic Law on Human Dignity and Liberty*, *supra* note 119 at s 1.
[125] *Ibid* at s 8.
[126] *Penal Law* (5737-1977), 32 LSI s 144A (1978) (Israel).
[127] Memorandum from Israeli Ministry of Justice to the Foreign Relations and Human Rights Department (Jan. 29, 2008), http://www.justice.gov.il/NR/rdonlyres/339B466D-E50D-4091-B5E8-F89616D8767C/9579/AnswerregardingHateCrimes.pdf.
[128] *Ibid*.
[129] CrimA (FH) 1789/98, *The State of Israel v. Kahane*, [2000] IsrDC 54(5) P.D. 145.
[130] *Ibid*; but see Gur-Arye *supra* note 122, at 189-91 (criticizing the extent of the Kahane decision and its stretching the law of sedition to cover discriminatory speech when hate speech charges were inapplicable).

decision, Israel's lack of written law guaranteeing freedom of expression, and the country's *Basic Laws* and *Penal Code* emphasizing dignity and prohibiting hate speech demonstrates Israel's devotion to social order and decorum over individual opinion.

3. The European Union

The EU has undertaken to develop shared values and legal regulation for speech among its member states. Under the EU's *Charter of Fundamental Rights*, "[e]veryone 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 . . . ."[131] EU member nations, however, have previously enacted laws limiting certain forms of hate speech,[132] and, notwithstanding the language in its *Charter of Fundamental Rights*, the EU has adopted legislation which requires its members to criminalize "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin."[133] The EU addresses any tension between these provisions by asserting that "[r]acism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law[.]"[134]

Article 10 of the *Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms* (commonly known as the *European Convention on Human Rights*)[135] guarantees "the right to freedom of expression . . . includ[ing the] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[136] The *Convention* allows certain limitations on expression, however, among them restrictions designed to preserve public safety, prevent disorder or crime, or protect others' reputations or rights.[137] In addition, under the *Convention*, no person, group, or State may "engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for . . . ."[138]

The European Court of Human Rights (ECHR), which hears cases

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[131] EC, *Charter of Fundamental Rights of the European Union,* [2000] OJ C 364/01 2000/C at art 11.
[132] See John J Garman, "The European Union Combats Racism and Xenophobia by Forbidding Expression: An Analysis of the Framework Decision," (2008) 39 U Tol L Rev 843 at 846 (discussing EU members' hate speech laws ante-dating the EU's framework decision on racism and xenophobia); Douglas-Scott, *supra* note 103 at 317-19 (discussing approaches to hate speech legislation in several European countries).
[133] EC, *Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*, [2008] OJ, L 328/55 at art 1(1)(a).
[134] *Ibid* at art 1(1); see also Garman, *supra* note 132 (providing an overview of European legislation concerning fundamental rights, freedom of expression, and justifications for the framework decision).
[135] See e.g. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, 4 November 1950, 213 UNTS 222, at art 10(1).
[136] *Ibid* at art 10(1).
[137] *Ibid* at art 10(2).
[138] *Ibid* at art 17.

relating to claims that the *Convention* has been violated,[139] has made a number of determinations about the extent to which member countries can limit expression. Although the ECHR has no set definition of hate speech,[140] it has considered cases dealing with traditional hate speech categories ranging from racist speech[141] to speech critical of religious and political groups[142] to speech dealing with Holocaust complicity and denial.[143] Its case law has established some basic principles and guidelines for the extent to which freedom of speech is protected in such potentially offensive cases.

According to the ECHR, political criticism generally deserves protection for its role in maintaining democracy,[144] and the ECHR takes into account context and the actual likelihood of a threat or violence when judging a speech restriction.[145] But its analysis also parallels Germany's in distinguishing between facts and opinion.[146] In *Garaudy v France*, the ECHR

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[139] Council of Europe, *Council of Europe in Brief: How We Work?*, online: Council of Europe <http://www.coe.int/aboutCoe/index.asp?page=CommentTravaillonsNous&l=en>.
[140] See Anne Weber, *Manual on Hate Speech* (Strasbourg: Council of Europe Publishing, 2009) at 3.
[141] See e.g. *Jersild v Denmark* (1994), 298 ECHR.
[142] See e.g. *I.A. v. Turkey*, no 42571/98, [2005] VIII ECHR (noting that the Turkish government had convicted a book author because the work "contained an abusive attack on religion, in particular Islam, and had offended and insulted religious feelings. They argued in that connection that the criticism of Islam in the book had fallen short of the level of responsibility to be expected of criticism in a country where the majority of the population were Muslim."); *Gündüz v. Turkey*, no 59997/00, [2003] XI ECHR (ruling on the speech rights of a critic who advocated shariah law and called government institutions impious on a television program); *Erdogdu v. Turkey*, no 25723/94, [2000] VI ECHR (deciding the issue of a magazine publisher who had been charged with "disseminating propaganda, through the medium of a periodical, against the territorial integrity of the State and the indivisible unity of the Turkish nation" by publishing a piece supporting Kurdish separatists).
[143] See e.g. *Garaudy v. France*, no 65831/01 [2003] IX, ECHR (declaring inadmissible the application of a book author who petitioned the court to consider his conviction for denying crimes against humanity (i.e. the Holocaust) on freedom of expression grounds); *Lehideux and Isorni v. France* (1998), 92 ECHR (dealing with the case of two individuals involved in publishing an advertisement aiding and abetting the crimes of Marshal Philippe Pétain, convicted and sentenced to death for colluding with the Germans during World War II).
[144] See e.g. *Erdogdu*, *supra* note 142 at para 62 ("[T]here is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest.").
[145] *Ibid* ("Where a publication cannot be categorised as inciting to violence, contracting States cannot with reference to the prevention of disorder or crime restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media." [citation omitted]); *Lehideux*, *supra* note 143 at para 55 ("[T]he events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately.").
[146] *Compare Lehideux*, *ibid* at para 52 ("With regard . . . to the content of the publication, the Court notes its unilateral character. Since the text presented Philippe Pétain in an entirely favourable light and did not mention any of the offences he had been accused of, and for which he had been sentenced to death by the High Court of Justice, it could without any doubt be regarded as polemical. In that connection, however, the Court reiterates that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed" [citation omitted]); and *Garaudy*, *supra* note 143 ("Relying on numerous quotations and references, the applicant questions the reality, extent[,] and seriousness of [the Nazi regime, the Holocaust, and the Nuremberg Trials] that are not the subject of debate between historians, but on the contrary are clearly established."), with *supra* notes 112-117 and accompanying text.

turned down a Holocaust-denier's appeal claiming that French law violated his Article 10 right to expression.[147] It noted that

> [t]here can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does . . . does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.[148]

Both the EU and the ECHR work from foundation documents asserting freedom of expression and speech. At the same time, however, both bodies are willing to curtail these freedoms when they cross a line into hatred or presenting topics in ways that might lead to hatred. As a group of states, then, Europe has embraced an approach to speech that privileges dignity and an agreed truth over debate when violence or offense may result.

4. The United States

In the United States, all speech regulations must be evaluated with reference to the touchstone of the First Amendment to the *Constitution of the United States*. On its face, the amendment's language is absolute: "Congress shall make no law . . . abridging the freedom of speech . . . ."[149] However, the United States Supreme Court has asserted that "the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[150] Among these, according to the Court, are "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[151]

The Supreme Court has further stated that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[152] This declaration, on its face, seems to imply that the Court recognizes a carve-out within the absolutist language of the Constitution for personal dignity, a sort of unspoken protection in keeping with the principles of explicitly declared restrictions in German, Israeli, and European law.[153] However, the Court's decisions have never prioritized or enforced such a protection, instead providing strong safeguards even for speakers who resort to discriminatory and incendiary messages.

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[147] *Garaudy*, *ibid*.
[148] *Ibid*.
[149] US Const amend I.
[150] *Chaplinsky v New Hampshire*, 315 US 568 at 57-72 (1942).
[151] *Ibid* at 572.
[152] *Cantwell v Connecticut*, 310 US 296 at 309-10 (1940).
[153] See *supra* notes 102-103, 124, 132-134 and accompanying text.

In *Brandenburg v Ohio*,[154] the defendant, a Ku Klux Klan member, spoke at a rally of Klansmen, some of whom were armed,[155] and stated that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[156] The defendant was convicted under a state statute that, *inter alia*, criminalized advocating or teaching "the duty, necessity, or propriety" of violence "as a means of accomplishing . . . political reform."[157] But the Supreme Court reversed his conviction,[158] holding that the First Amendment requires a distinction between advocating a point of view and inciting immediate violent action.[159] The Court held 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*."[160]

While *Brandenburg* addresses speech advocating unlawful conduct generally—whether based on discriminatory viewpoints or not—the Supreme Court has also addressed regulations on speech specifically motivated by an intent to attack or disparage a person based on his/her race, gender, religion, etc.—hate speech. In *RAV v City of Saint Paul*,[161] the Court determined that a statute aimed at preventing discriminatory speech was content-based viewpoint discrimination.[162] The City of Saint Paul, Minnesota charged a juvenile who burned a cross on a neighbor's yard under a city ordinance criminalizing "plac[ing] on public or private property a symbol . . . which one knows or has reasonable grounds to know arouses anger, alarm[,] or resentment in others on the basis of race, color, creed, religion[,] or

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[154] 394 US 444 (1969).
[155] *Ibid* at 447.
[156] *Ibid* at 446.
[157] *Ibid* at 448.
[158] *Ibid* at 445.
[159] *Ibid* at 449.
[160] *Ibid* at 447 (emphasis added); see also *NAACP v Claiborne Hardware Co*, 458 US 886 at 927 (1982) ("This Court has made clear . . . that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.") (emphasis in original). *Brandenburg*'s "Imminent Lawless Action" Test has its roots in the "Clear and Present Danger Test" from Justice Oliver Wendell Holmes' opinion in *Schenck v United States*, 249 US 47 at 52 (1919) ("The question in every case is whether the words used 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."). After *Schenck*, the Court experimented with many other tests for speech advocating violence, including whether the speech in question has a bad tendency or might "kindle a flame" of violence at some point. See e.g. *Frohwerk v United States*, 249 US 204 (1919); *Debs v United States*, 249 US 211 (1919); *Abrams v United States*, 250 US 616 (1919); *Whitney v California*, 274 US 357 (1927). The Court eventually adopted a modified and weakened version of the "Clear and Present Danger Test" in *Dennis v United States* before strengthening the test to its current version in *Brandenburg*. *Dennis v United States*, 341 US 494 (1951); *Brandenburg v Ohio*, 394 US 444 (1969). See generally Thomas Healy, "*Brandenburg* in a Time of Terror" (2009) 84 Notre Dame L Rev 655 at 663-68 (2009) (discussing the "Clear and Present Danger Test's" evolution and how hate speech is currently evaluated under United States jurisprudence).
[161] 505 US 377 (1992).
[162] *Ibid* at 391.

gender."[163] However, the Supreme Court held that even if the statute were construed to apply only to proscribable "fighting words,"[164] and even if it's purpose was "to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish",[165] its language still violated the First Amendment.[166] The municipal ordinance's language criminalized placing symbols that arouse anger based on race, color, creed, religion, or gender, while symbols that arouse anger based on other characteristics (e.g., sexual orientation or political affiliation) were not covered.[167] The Court held that this "content limitation" showed "special hostility towards the particular biases . . . singled out"—"precisely what the First Amendment forbids."[168]

Taken together, the First Amendment, *Brandenburg*, and *RAV* essentially eliminate hate speech regulation in the United States. States may punish speakers who intend to and are likely to incite imminent violence, but cannot punish those who merely advocate discriminatory viewpoints. In addition, states may not punish speech differently based on the *reason* it intimidates or incites violence; singling out certain viewpoints as particularly volatile or worthy of punishment is impermissible. Under this regime, the law does not recognize or address discriminatory speech harming a country's social fabric absent any direct call to violence.[169] United States law focuses on the ends

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[163] *Ibid* at 379-80.
[164] *Ibid* at 391.
[165] *Ibid* at 395.
[166] *Ibid* at 391.
[167] *Ibid*.
[168] *Ibid* at 396.
[169] *Cf.* Kathleen Mahoney, "Hate Speech, Equality, and the State of Canadian Law" (2009) 44 Wake Forest L Rev 321 at 327 (discussing Canadian hate speech laws, specifically the Canadian Human Rights Act, and asserting that "the purpose of human rights limitations on hate speech is not to condemn and punish the person who committed a hate propaganda offence. Its main purpose is to prevent or rectify discriminatory practices or to compensate the victims of discrimination for the harm they have suffered . . . . [T]he focus of human rights laws is on the effect of the act on the victim and not the intention with which it was performed."). In contrast, United States law evaluates speech on whether it is "directed" to "incite violence" and the ideas that drive speakers to use "fighting words"– specifically turning on the speaker's motive rather than the effect on the hearer. *Brandenburg*, *supra* note 154 at 447; *RAV*, *supra* note at 391 (1992). The Court most recently affirmed the speech classification scheme differentiating between hateful speech and hateful speech that incites violence in *Snyder v. Phelps*, 562 US 09 (2011). In *Snyder*, a slain Marine's father sued members of the Westboro Baptist Church for picketing at his son's funeral. The church "believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military, [and] frequently communicates its views by picketing, often at military funerals." A jury found that the congregants had intentionally inflicted emotional distress, that is, "intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress." Writing for the Court in an 8-1 decision, Chief Justice John Roberts affirmed the appeals court's decision to reverse the jury verdict, noting that the First Amendment prohibits holding speakers liable for speech on matters of public concern. According to the Court, while Phelps and his followers' "messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import." Despite the fact that the setting the church chose to convey its message was "particularly hurtful," the fact that it spoke on public land and did not call for or cause violence

rather than the means—violence rather than the reason for it[170]—and thus protects a broad range of discriminatory speech.

IV. Finding the Right Way for Rwanda

1. Rwanda's Approach: Vague and Overbroad

The government of Rwanda has tended towards the opposite extreme from the United States and has actively limited speech, especially concerning the genocide and ethnic tensions.[171] And it has some legitimate concerns justifying speech restrictions. The country has a history of the media playing a prominent role in violence via outlets such as RTLM and *Kangura*.[172] The government has stated that it wants to allow as much press freedom as possible, but is concerned because "the forces that had sparked the genocide [are] hovering close by in the Democratic Republic of the Congo and even inside Rwanda," and there are still valid concerns over the potential for renewed ethnic violence in the country. [173] The Rwandan government isn't alone in its concerns over the nation's speech—the ICTR acknowledged the gravity associated with genocide-related speech in Rwanda in its *Media Case* decision.

Rwanda's genocide ideology law, however, is too vague and overbroad and the government has been criticized for using it against people with dissenting views. In addition to the concerns the U.S. State Department expressed over freedom of the press and reporters,[174] Human Rights Watch (HRW) has found that the "current definition is vague, requires no link to any genocidal act, and prohibits speech protected by international conventions."[175] HRW has also noted hundreds of cases prosecutors brought involving "genocide ideology" before the charge was actually defined by law in June 2008.[176] Before the 2008 law, not a single judge interviewed by HRW was able to define "divisionism," despite having adjudicated and convicted

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led the court to protect its right to speak. The Chief Justice stated:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro [. . .].

But c.f. Robert C Post, *Community and the First Amendment*, (1997) 29 Ariz St L J 473 at 479 (asserting that government can limit freedom of speech by balancing the autonomy interests of the speaker and the hearer).

[170] See John C Knechtle, "When to Regulate Hate Speech" (2006) 110 Penn St L Rev 539 at 549.

[171] See Human Rights Watch, *Law and Reality*, *supra* note 72 at 34-43.

[172] See *supra* Section II (2).

[173] UN Human Rights Committee, Press Release, HR/CT/705, "Rwanda's History Stained by Massive Human Rights Violations, but Rule of Law System Painstakingly Constructed to Tackle Forces Seeking to Sow Division, Committee Told," 19 March 2009, online: UN <http://www.un.org/News/Press/docs/2009/hrct705.doc.htm>.

[174] See *supra* notes 89-92 and accompanying text.

[175] Human Rights Watch, "Country Summary: Rwanda," *supra* note 88.

[176] *Ibid.*

defendants on that charge.[177] The law, while protecting against potentially incendiary speech, is too vague and open to abuse to adequately protect legitimate expression and valid differences of opinion.

2. Why the United States' Approach Won't Work

Given the challenges Rwanda continues to face as a result of its genocidal history, attempting to implement a legal regime like the United States', in which freedom of speech is preeminent, could threaten Rwanda's fragile peace just as the overly-repressive genocide ideology law does—albeit in a different way. America's free speech regime is generally considered exceptional among even developed Western democracies.[178] This was not always so. At the time of passage, the *Bill of Rights* and First Amendment were seen to enshrine existing concepts of freedom and liberty[179]—far less important than establishing a working government structure for the fledgling United States.[180] It is only in the ensuing centuries, during which the First Amendment has been applied to state governments as well as the federal,[181] and during which the court has increasingly protected individuals' speech rights[182] that speech in the United States has come to be seen as sacrosanct.

This "free expression theory may be a good fit for the robust democracy of the modern United States, [but] it may be a wholly inadequate model for the more fragile democratic orders of post-conflict democracies."[183] While America has certainly experienced civil war and conflicts driven by discrimination, it has never experienced widespread conflict in which an ethnic, racial, religious, or national group has been systematically targeted for destruction.[184] The "Imminent Lawless Action Test" the United States

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[177] Human Rights Watch, *Law and Reality, supra* note 72 at 34.
[178] Guy E Carmi, "Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification" (2007) 9 U Pa J Const L 957 at 960-61.
[179] See Robert J Reinstein, "Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment" (1993) 66 Temp L Rev 361 at 364-65; see generally George Anastaplo, "Amendments to the Constitution of the United States: A Commentary" (1992) 23 Loy U Chi LJ 631 (providing a historic analysis of Bill of Rights ratification generally, and addressing the amendments contained individually).
[180] See Reinstein, *supra* note 179 at 364-65.
[181] *Gitlow v New York*, 268 US 652 at 666 (1925). *Gitlow* did not explicitly incorporate this right, but "assumed" that "freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States" for purposes of the case. Since *Gitlow*, the Court has never refuted this assumption.
[182] See *supra* Section II (1).
[183] Laura R Palmer, "A Very Clear and Present Danger Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo" (2001) 26 Yale J Int'l L 179 at 182.
[184] It is interesting to note that even in the United States' speech-protective legal regime, the Supreme Court has allowed the greatest limitations on speech based on the country's conflicts, See *Frohwerk v United States*, 249 US 204 (1919); *Debs v United States*, 249 US 211 (1919); *Abrams v United States*, 250 US 616 (1919) for examples of the Court applying less intensive scrutiny to government regulations on political speech during World War I. *Dennis v United States*, 341 US 494 (1951) shows the Court applying less intensive scrutiny to government regulations on political speech in the Cold War aftermath of World War II. The Supreme Court has also

uses to evaluate speech restrictions is designed to operate on a case-by-case basis. [185] But post-genocide countries are not experiencing isolated incidents of incitement or intimidations—these elements are ever-present. As one scholar has noted regarding speech rights and government in post-genocide Kosovo,

> '[i]ncitement . . . is a contextual matter. Whether an utterance will lead to a more dangerous act depends on the political and social climate as well as the circumstances of a particular setting. The United States, with its history free of true threats from totalitarian alternatives, can adhere to a system of tolerance, confident in its ability to repel threats through open discourse.' . . . . In Kosovo, given the current political situation of an uneasy truce between ethnically-charged elites on both sides, calls for attacks on minorities or revenge against political rivals are not merely fighting words or insults; they are direct threats to the foundation of a post-conflict

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allowed the government to curtail other civil rights during times of conflict: See e.g. *Korematsu v United States,* 323 US 214 (1944). It is also notable that in the realm of hate speech the Supreme Court has specifically upheld a regulation banning cross-burning with intent to intimidate. *Virginia v Black,* 538 US 343 (2003). The Court held that such a regulation was permissible because, unlike the ordinance at issue in *RAV*, cross burning was outlawed "whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality.'" *Ibid* at 362. However, the Court's opinion included a specific section on cross burning's history, focused almost exclusively on cross burnings and the Klu Klux Klan, and showing that the Court specifically considered the role cross burning has played in America's history of racial discrimination when upholding the ordinance. *Ibid* at 352-57, see generally Jeannine Bell, "Oh Say, Can You See: Free Expression by the Light of Fiery Crosses" (2004) 39 Harv CR-CLL Rev 335 (analyzing *Virginia v Black* and cross-burning as hate speech).

In addition to less-strictly scrutinizing its own speech restrictions in times of conflict, America has supported and been involved in other countries' needs to restrict speech in the aftermath of genocidal conflict. Following the fall of Germany after World War II, American forces purged libraries and participated with other Allied powers to take command of the German press in order to keep it from being controlled by fascist elements. See Palmer, *supra* note 183 at 198-99. British and American experts implemented a plan to reestablish the German press, which called for publishing only Ally-approved information and United States forces screening publications. In late 1945 the United States determined that sufficient progress had been made to allow Germany to regulate its own press; only at this point did it cease prior restraint on the German press.

More recently, in post-genocide Kosovo, the United States, as a member of the Organization for Security and Cooperation in Europe (OSCE) worked to reestablish a free press in Kosovo by establishing boards and commissions to oversee and set standards for the country's press corps. *Ibid* at 181,184-86; see also Conference on Security and Co-Operation in Europe Final Act, Aug. 1, 1975, 14 I.L.M. 1292. According to the OSCE, the goal was to promote reconciliation, democratization, and law and order in Kosovo. Palmer, *supra* note 183 at 186. But one tool involved in the OSCE's proposal was a Media Monitoring division, responsible for analyzing content. *Ibid.* Following protests, the OSCE withdrew its plans for a Media Regulatory Commission, however, it did create a Temporary Media Commissioner with a mandate to order media outlets to refrain from publishing personal information that "would pose a serious threat to the life, safety[,] or security of any such person through vigilante violence or otherwise." *Ibid* at 186, 194; United Nations Mission in Kosovo, Regulation No. 2000/37, "On the Conduct of the Print Media in Kosovo", (17 June 2000). According to an OSCE report in 2002, "all the premises lying at the foundation of Regulation 2000/37 and the Temporary Code of Conduct for the Print Media are still valid, three years after their promulgation as extraordinary and temporary measures" due to Kosovo's continued instability. The Kosovo Temporary Media Commissioner, *Annual Report 2002*, (Prishtinë/Priština, Kosovo: Office of Temporary, Media Commissioner, 2002) at 6, online: TMC <http://www.osce.org/kosovo/32386>.

[185] See *supra* text accompanying notes 154-160.

representative democracy.[186]

Like Kosovo, Rwanda is still struggling daily with a volatile peace, wherein the government has little control and the population is constantly threatened with the idea that widespread violence may break out again.[187] Under these circumstances, we can understand that there is a *constant* danger of "imminent lawless action." And it is aimed not at individuals, or even a single group, but against Rwandan society and government as a whole. A case-by-case test is unequal to addressing constant threats in a post-genocide society.

Rwanda faces more than threats and the United States's hands-off approach to other dangerous forms of speech would fail to protect Rwanda from the risks of more surreptitiously hazardous speech. In Rwanda's current climate, denying the genocide jeopardizes the country's ability to deal with and move beyond its violent past. Individuals who spout hateful opinions that fall short of direct threats may still foment underlying tensions. Rwanda's experiences demonstrate a need to be mindful that a wider range of ideas and expressions could reignite widespread violence.

3. Finding a Middle Ground

Rwanda's existing genocide ideology law and the United States' absolutist speech protections represent two ends of the continuum of protecting/regulating speech; neither is a workable option for Rwanda. Germany, Israel, and the EU represent more moderate approaches by countries and regions that have also experienced genocide. By drawing on their examples, we can explore the issues of constraining hate speech in the context of Rwanda.

In the wake of their own genocide experiences, both Israel and Germany have criminalized Holocaust denial in their penal codes.[188] The EU's *Framework Decision on Racism* requires members to criminalize "publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity[,] and war crimes"[189] or instigating such conduct.[190] The UN General Assembly has also strongly condemned denying the Holocaust.[191]

Given Rwanda's continued ethnic tensions, criminalizing genocide denial represents a strong starting point for Rwanda's hate speech laws. The facts of Rwanda's genocide have been thoroughly adjudicated at the ICTR, and the Tribunal eventually took judicial notice of the genocide, relieving the

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[186] Palmer, *supra* note 183, at 213 quoting Donna E Artz, "Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal" (1995) 12 NYL Sch J Hum Rts 689 at 753.
[187] *Compare ibid* at 183, with *supra* Section II (5).
[188] *Strafgesetzbuch*, *supra* note 104 at s 130(3); *Denial of Holocaust (Prohibition) Law* (5746-1986), 1187 LSI 196 (1986) (Israel).
[189] EC, Council Framework Decision 2008/913/JHA, *supra* note 133 at art 1(1)(c).
[190] *Ibid* at art 2(1).
[191] "UN Assembly Condemns Holocaust Denial by Consensus; Iran Dissociates Itself," *UN News Centre* (26 January 2007), online: UN News Centre <http://www.un.org/apps/news/story.asp?NewsID=21355&Cr=holocaust&Crl>.

prosecutor from proving that it had occurred in each case.[192] Rwanda is only fifteen years removed from the conflict, with Hutu militias continuing to act as a destabilizing force just over the border in the DRC. Given the short passage of time and the existence of militant groups that deny the genocide, a statute specifically outlawing genocide denial, similar to those found in Germany, Israel, and the EU, would be an important tool to help Rwanda overcome the racist attitudes that have fueled its violent past.

Such a law should include a renewal provision that would prevent the restriction on speech from ossifying. Given that the genocide occurred relatively recently, an initial renewal provision could be set thirty or more years into the future in order to provide sufficient time to heal, with more periodic votes established as needed. The psychological trauma to Rwandans who experienced genocide in their country runs deep, and the continued threat of violence could remain for a long time into the future. President Kagame has noted that "[p]eople's hearts and minds need some time to heal. A very long time indeed. They will need a whole generation, and the memories will keep lingering."[193] Building in a renewal clause would ensure continued public debate on the law, and whether Rwanda still needs to outlaw genocide denial to safeguard peace. The goal is for society to stabilize to the point that an outright ban on a specific category of speech is no longer an existential threat to the country. At that time, Rwanda may be able to embrace and maintain a more open environment for speech.

If Rwanda criminalizes denying genocide, the next logical step is dealing with speech which perpetuates the ideas and ethnic hatred that led to the genocide in the first place. Germany, Israel, and the EU all criminalize incitement to hatred in some contexts.[194] Germany and Israel also criminalize certain insults against personal dignity.[195] In the *Media Case*, the ICTR criminalized mere hate speech uttered in the wider context of the violence and persecution against the Tutsi during the Rwandan conflict.[196] In Rwanda's fragile peace is hate speech alone dangerous enough to warrant prohibition? The answer depends on the context of that speech, so the solution must take context into account. As such a case-law standard is most appropriate for evaluating the danger a speaker's message poses to post-conflict Rwanda. One good option for the court's standard would be to protect expression up to the point that an attack on personal dignity presents a broader danger to the public peace.

Hinging the level of protection for speech on the environment in which

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[192] *Karemera*, *supra* note 24 at para 35 (recognizing that "[t]he fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a 'fact of common knowledge'.").
[193] Gourevitch, *supra* note 70 at 42.
[194] See *supra* notes 104, 127, 133 and accompanying text.
[195] *Strafgesetzbuch*, *supra* note 104 at s 130(2); State of Israel Ministry of Justice, "Memorandum from Israeli Ministry of Justice to the Foreign Relations and Human Rights Department" (29 January 2008), online: Isreali Ministry of Justice <http://www.justice.gov.il/NR/rdonlyres/3C141812-1E86-446D-A393-0B309E228182/19775/%D7%9E%D7%A2%D7%A0%D7%94%D7%91%D7%A0%D7%95%D7%A9%D7%90hatecrimes.pdf>.
[196] *Media Case Appeal*, *supra* note 37 at para 988.

that speech is uttered walks the line between punishing hatred and protecting hateful expression that could destabilize the country. Including language that focuses on human dignity sends a message that the nation respects individuals and will work to avert the danger that personal attacks may spill over into group persecution—a danger that is particularly imminent in Rwanda's post-conflict society. Linking personal dignity and widespread danger works on both micro and macro levels, protecting individuals from persecution and the overall stability of society, in addressing the particularized issues hate speech in Rwanda poses. Over time, courts can adjust the weight of each element in the case-law standard to account for decreased risk that free expression poses to a stronger society. Rwanda's courts can grant its people more freedom to speak as their society makes progress and the danger of a return to violence fades.

Further developing an independent judiciary to implement the rule of law in Rwanda remains one of the most important building blocks for effectively and appropriately restricting dangerous speech—while protecting important freedom of expression and dissent. Effectively implementing a case-law-driven standard requires a strengthened judicial branch with public support and confidence. Given the level of devastation to Rwanda's judiciary and society as a whole, it has taken a long time to rebuild state and judicial institutions to their current level, and they are still weak and potentially open to political influence.[197] The judiciary's role in allowing Rwanda's government to use the vaguely worded genocide ideology law to suppress government criticism[198] is evidence that the country's courts are currently not up to the challenge of providing a meaningful check on other branches of government. They are, instead, typifying the concerns over squelching legitimate dissent that Judge Meron voiced in his *Media Case* dissent.[199] At the same time, the country cannot sit idle on the issue of hate speech while the judiciary improves; enacting speech laws swiftly may be necessary to prevent the return to civil war.

Strengthening Rwanda's constitutional protections for speech would be a further check on the government abusing speech restrictions. Rwanda's constitution currently protects the freedom of the press, but only protects freedom of speech and information to the extent that they "shall not prejudice public order and good morals, the right of every citizen to honour, good reputation, and the privacy of personal and family life."[200] Including a more robust protection would recognize the value of expression in contributing to individual autonomy, available information, and public debate. By recognizing these aims, Rwanda's constitution would guide and act as an important check on laws passed by the legislature and legal standards developed by the courts.

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[197] See *supra* notes 72-76 and accompanying text.
[198] See *supra* notes 90-92 and accompanying text.
[199] *Media Case Appeal*, *supra* note 37 at 378-79 (Judge Meron dissenting) citing *Nahimana, et al v Prosecutor*, ICTR-99-52-A, "Brief for Open Society Justice Initiative as Amicus Curiae" at 5-8.
[200] *Constitution of the Republic Of Rwanda*, *supra* note 86 at art 34.

V. Conclusion

Freedom of expression is a fundamental human right, but this right is of limited value in a society that is falling apart and where individuals constantly fear for their safety and security. In Rwanda, as in other post-genocide and post-conflict countries, the government must strike a balance—protecting legitimate dissent and opinions while addressing the speech that could lead the nation back into brutal and deadly conflict. Rwanda's current genocide ideology law, however, is too vague and overbroad to protect constructive political speech. Dissenting viewpoints, among them Victoire Ingabire's calls for investigating alleged Tutsi war crimes, need to be heard for a healthy, vibrate democracy to thrive. At the same time, an absolutist law in the mold of the United States runs too high a risk of allowing discriminatory speech that will again foment violence and break down the country's fragile foundation.

In order to rise above its violent history, Rwanda must seek a middle ground for addressing speech that perpetuates hate and encourages violence. Speech laws from other societies that have overcome genocidal pasts can provide guidance for Rwanda in developing its own workable restrictions. Ultimately, however, Rwanda must strike its own balance in dealing with speech as it continues to rebuild its society and attempts to move beyond its tragic and violent past. Criminalizing genocide denial, developing an effective case-law standard to protect freedom of speech, and strengthening constitutional protections would be valuable steps for Rwanda to take towards a more balanced environment for speech. A post-genocide society must be more attuned to the dangers that speech will reignite simmering hatred and return the country to violence. But as a nation rebuilds, government must begin to show that it trusts its people to conquer their past hatred, to preserve themselves and their country. It is by trusting citizens to share an open dialogue and reject intolerant opinions and violence that Rwanda can best ensure its survival.