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CASE WESTERN RESERVE UNIVERSITY
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INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE #4:
The Reconcilability of the *Nahimana* "Media Case" Decision for Direct and Public Incitement to Commit Genocide and Persecution as a Crime against Humanity with U.S. Free Expression Law

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Spring 2004

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5) Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

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45) Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring).

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46) KENT GREENWALT, LANGUAGE, CRIME AND THE USES OF LANGUAGE, (Oxford University Press, 1992).

47) RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, (West, 1996).

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48) Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L.J. 87 (2001).

49) Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 HARV. J.L. & PUB. POL. 283 (2001).

50) William B. Fisch, *Hate Speech in the Constitutional Law of the United States*, 50 AM. J. COMP. L. 463 (2002).

GLOSSARY

CDR — "Coalition for the Defense of the Republic"; Name of Hutu political organization

Kangura — "Awaken"; Name of newspaper owned and controlled by Ngeze

RTLM — "Radio Television Libre des Milles Collines"; Name of radio station owned and controlled by Nahimana and Barayagwiza

I. INTRODUCTION

Issues

This memorandum addresses two issues.[1] First, is the ICTR decision in the *Nahimana* "media case" regarding direct and public incitement to commit genocide reconcilable with American law on free expression? Second, is the ICTR decision in the *Nahimana* "media case" regarding persecution as a crime against humanity reconcilable with American law on free expression? First, the memorandum presents a brief factual background on the ICTR *Nahimana* decision. Next, the legal discussion section begins with a brief background about the First Amendment and then moves into a discussion on incitement. U.S. cases are reviewed to determine whether the *Nahimana* decision is reconcilable with these principles. This methodology is repeated regarding the issue of persecution as a crime against humanity.

Summary of Conclusions

In regard to the *Nahimana* Chamber's findings on direct and public incitement to commit genocide, the breadth of the ICTR's decision is probably reconcilable with U.S. law on the freedom of expression. As illustrated below, there are a number of U.S. legal principles that are related to the issue of incitement. The link between these principles is that each considers the context in which the speech was made to be of the utmost importance.

However, in regard to the Chamber's findings regarding persecution as a crime against humanity, the breadth of the ICTR's decision is probably not reconcilable with U.S. law on the freedom of expression. Under U.S. law, unless speech falls within a specific, limited range of speech aimed at potentially causing unlawful conduct or intimidation, speech that merely offends the consciousness will not be prohibited.

[1] Issue: "Can the breadth of the ICTR's judgment in the Media case (Nahimana), as to Incitement to Commit Genocide and Persecution as Crime against Humanity, be reconciled with American law as to free expression?"

II. FACTUAL BACKGROUND

On December 3, 2003, the ICTR Chamber published its decision on the judgment and sentence in the *Nahimana* "media case."[2]

In its decision, the ICTR Chamber found Ferdinand Nahimana and Jean-Bosco Barayagwiza guilty of direct and public incitement to commit genocide, under Article 2(3)(c) of the Statute of the International Criminal Tribunal for Rwanda[3] (hereinafter "the Statute"), for their role in Radio Télévision Libres Millenes (hereinafter "RTLM") programming which incited violence against the Tutsi people.[4] Nahimana, a former history professor, and Barayagwiza, a lawyer, effectively controlled RTLM from its foundation through and after April 6, 1994.[5]

The Chamber also found Barayagwiza guilty beyond a reasonable doubt of direct and public incitement to commit genocide, under Article 2(3)(c) of the Statute, for his personal actions in leading the Coalition for the Defense of the Republic (hereinafter "CDR") and for failing to take necessary and reasonable measures to prevent the acts of direct and public incitement to commit genocide caused by other CDR members.[6] "Barayagwiza was one of the principle founders of CDR and played a leading role in its formation and development."[7]

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[2] *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgment and Sentence, No. ICTR-99-52 (Dec. 3, 2003) [Reproduced in the accompanying notebook at Tab 2].

[3] Statute of the International Criminal Tribunal for Rwanda. [Reproduced in the accompanying notebook at Tab 1].

[4] *Id*. at ¶¶ 1033-1034 [Reproduced in the accompanying notebook at Tab 2].

[5] *Id*. at ¶¶ 567-568 and ¶¶ 970-974 [Reproduced in the accompanying notebook at Tab 2].

[6] *Id*. at ¶ 1035; *see also* ¶ 719 ("[Barayagwiza] was present at and participated in demonstrations where CDR demonstrators armed with cudgels chanted '*Tubatsembatsembe*' or 'lets' exterminate them', and the reference to 'them' was understood to mean the Tutsi. Barayagwiza himself said '*tubatsembatsembe*' or 'let's exterminate them' at CDR meetings.") [Reproduced in the accompanying notebook at Tab 2].

[7] *Id*. at ¶ 276 and ¶¶ 975-977A [Reproduced in the accompanying notebook at Tab 2].

The Chamber also convicted Hassan Ngeze, as founder, owner and editor of the *Kangura* newspaper, for direct and public incitement to commit genocide, under Article 2(3)(c) of the Statute, for his role in using the publication to "instill hatred, promote fear, and incite genocide" against the Tutsi people.[8] "Ngeze was the owner, founder and editor of *Kangura*. He controlled the publication and was responsible for its contents."[9]

Ngeze was also convicted of direct and public incitement to commit genocide, under Article 2(3)(c) of the Statute, for his personal role in calling for the extermination of the Tutsi population by driving "around with a megaphone in his vehicle, mobilizing the Hutu population to come to CDR meetings and spreading the message that the [Tutsi] would be exterminated."[10]

In regard to the charges of persecution as a crime against humanity, the ICTR Chamber found Nahimana and Barayagwiza guilty, under Article 3(h) of the Statute, for their responsibility in RTLM broadcasts in 1994 that "advocate[ed] ethnic hatred or incit[ed] violence against the Tutsi population."[11]

The Chamber also found Barayagwiza guilty of persecution as a crime against humanity, under Article 3(h) of the Statute, for his personal acts in leading the CDR that "advocated ethnic hatred or incited violence against the Tutsi population," as well as for having failed "to take necessary and reasonable measures to prevent the advocacy of ethic hatred or incitement of violence against the Tutsi population by CDR members and *Impuzamgambi*."[12]

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[8] *Id*. at ¶ 1038 [Reproduced in the accompanying notebook at Tab 2].

[9] Id. at ¶ 135 [Reproduced in the accompanying notebook at Tab 2].

[10] *Id*. at ¶ 1039; *see also* ¶ 277 ("The Chamber [found] that Ngeze was a founding member of CDR and active in the party, and held the position of adviser to the party.") [Reproduced in the accompanying notebook at Tab 2].

[11] *Id*. at ¶s 1081-1082 [Reproduced in the accompanying notebook at Tab 2].

[12] *Id*. at ¶ 1083 [Reproduced in the accompanying notebook at Tab 2].

The Chamber found Ngeze guilty of persecution as a crime against humanity, under Article 3(h) of the Statute, both for the publication of *Kangura* articles and editorials that "advocated ethnic hatred or incited violence," as well as for his own personal "acts that advocated ethnic hatred or incited violence against the Tutsi population."[13]

III. LEGAL DISCUSSION

Brief Background on U.S. Freedom of Expression Law

In relevant part, the First Amendment of the United States Constitution states that "[c]ongress shall make no law…abridging the freedom of speech, or of the press."[14] It is well-settled that the freedom of speech and the freedom of press are well entrenched among the fundamental liberties protected by the First Amendment of the U.S. Constitution.[15] This liberal protection of free speech has arguably made the U.S. the strongest protector of free speech rights in the world. However, in order to provide an accurate context for assessing whether the ICTR *Nahimana* decision is reconcilable with U.S. freedom of expression law, two limitations should be recognized at the outset. First, the freedom of expression is not absolute.[16] In 1942, the

[13] *Id*. at ¶ 1084 [Reproduced in the accompanying notebook at Tab 2].

[14] U.S. CONST. amend. I [Reproduced in the accompanying notebook at Tab 3].

[15] Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) ("[The] freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.") [Reproduced in the accompanying notebook at Tab 19].

[16] Frohwerk v. United States, 249 U.S. 204, 206 (1919) ("The First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language.) [Reproduced in the accompanying notebook at Tab 15]; *see also* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("Although the rights of free speech…are fundamental, they are not in their nature absolute.") [Reproduced in the accompanying notebook at Tab 45]; American Communications Ass'n v. Douds, 339 U.S. 382, 394 (1950) ("[I]t has long been established that [First Amendment rights] themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct, and under some circumstances, against incitements to commit unlawful acts.") [Reproduced in the accompanying notebook at Tab 6]; Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglass, J., dissenting) ("The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale [of Constitutional protection.]") [Reproduced in the accompanying notebook at Tab 14];

Supreme Court wrote that even "[a]llowing the broadest scope to the language and purpose of the [First Amendment] it is well understood 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 have never been thought to raise any Constitutional problem."[17] Second, it is also well established that the freedom of expression does not extend to protect violence.[18] The U.S. government has the right to prohibit and punish speech that fall within certain categories.

DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

Specifically in regard to the charges of direct and public incitement to commit genocide, the *Nahimana* Chamber first considered the international jurisprudence.[19] The Chamber noted Defendant Ngeze's argument that the "United States law, as the most speech protective, should be used as the standard to ensure the universal acceptance and legitimacy of the Tribunal's jurisprudence."[20] In response, the Chamber noted that the U.S. law had also accepted "the fundamental principles set forth in international law and has recognized…that incitement to

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Cohen v. California, 403 U.S. 15, 19 (1971) ("[T]he First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speaker whenever and wherever he pleases or to use any form of address in any circumstances that he chooses.") [Reproduced in the accompanying notebook at Tab 11].

[17] Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571 (1942) [Reproduced in the accompanying notebook at Tab 9].

[18] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence.") [Reproduced in the accompanying notebook at Tab 22]; *see also* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.") [Reproduced in the accompanying notebook at Tab 44]; Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) ("[V]iolence …or other activities that produce special harms distinct from their communicative impact…are entitled to no constitutional protection.") [Reproduced in the accompanying notebook at Tab 28]; Samuels v. Mackell, 401 U.S. 66, 75 (1971) ("Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy.") [Reproduced in the accompanying notebook at Tab 31].

[19] *Nahimana*, No. ICTR-99-52 at ¶¶ 978-1009 [Reproduced in the accompanying notebook at Tab 2].

[20] *Id*. at ¶ 1010 [Reproduced in the accompanying notebook at Tab 2].

violence…[is] among those forms of expression that fall outside the scope of freedom of speech protection."[21] The Chamber then went on to mention examples of U.S. case law supporting its contention.[22] Finally, the Chamber discussed its previous jurisprudence on the issue before applying the relevant legal principles to the defendants.[23]

<u>Distinguishing the Advocacy of Ideas from the Advocacy of Unlawful Conduct</u>

Under U.S. law, there has to be an attempt made to distinguish between the advocacy of abstract ideas from the advocacy of unlawful conduct. Throughout U.S. Supreme Court decisions "there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."[24]

In attempting to make this distinction, one problem that the Supreme Court has recognized is that in some sense "[e]very idea is an incitement. The only difference between the expression of an opinion and an incitement in the narrow sense is the speaker's enthusiasm for the result."[25] Inherent in this distinction is the danger that "[e]loquence may set reason to fire."[26] Along these same lines, it should be recognized that, in the U.S., "the mere abstract teaching [] of

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

[22] *Id*. In the footnotes to ¶ 1010, the *Nahimana* Chamber specifically discussed the U.S. cases of Brandenburg v. Ohio, 395 U.S. 444 (1969) and Virginia v. Black, 123 S. Ct. 1536 (2003). *Brandenburg* and *Black* are also discussed in this memorandum infra.

[23] *Id*. at ¶¶ 1011-15 [Reproduced in the accompanying notebook at Tab 2].

[24] Dennis v. United States, 341 U.S. 494, 545 (1951) (Frankfurter, concurring) [Reproduced in the accompanying notebook at Tab 14].

[25] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J. dissenting) [Reproduced in the accompanying notebook at Tab 17].

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

the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[27]

In the *Nahimana* decision, the Chamber recognized this important distinction and made at least two attempts at articulating the distinction between speech that advocates an idea and speech that advocates or calls for violence. The *Nahimana* Chamber acknowledged that some of the *Kangura* articles and RTLM broadcasts did "convey historical information, political analysis, or advocacy of an ethnic consciousness regarding the inequitable distribution of privilege in Rwanda."[28] The Chamber also explicitly stated that it was "critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred."[29]

The Chamber further recognized that, while the impact of words may even be powerful enough to move listeners to take action, a communication on the discussion of ethnic consciousness, for example, would not constitute incitement because the "impact would be…the reality conveyed by the words rather than the words themselves."[30] In the Chamber's view, publications and broadcasts that discussed 'historical information, political analysis, or [] ethnic consciousness' was in fact the very type of speech that fell "squarely within the scope of speech that is protected by the right to freedom of expression."[31]

The distinction between the advocacy of ideas and the advocacy of unlawful conduct is also evidenced where the Chamber "note[d] that not all of the writings published in *Kangura*…constitute direct incitement" and cited the example of the *Kangura* published article *A*

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[27] Noto v. United States, 367 U.S. 290, 297-298 (1961) [Reproduced in the accompanying notebook at Tab 23].

[28] *Nahimana*, No. ICTR-99-52 at ¶ 1019 [Reproduced in the accompanying notebook at Tab 2].

[29] *Id*. at ¶ 1020 [Reproduced in the accompanying notebook at Tab 2].

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

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

Cockroach Cannot Give Birth to a Butterfly.[32] This article, published in Kangura No. 40 in February 1993, portrayed the Tutsi as biologically inferior and distinct from the Hutu.[33] It also described the Tutsi as inherently malicious and wicked people with their primary "weapons [as] women and money."[34] The Chamber described the article as one "brimming with ethnic hatred" but which failed to call its Hutu "readers to take [violent] action against the Tutsi population."[35]

<u>The Clear and Present Danger Test for Incitement of Unlawful Conduct</u>

The U.S. Supreme Court first articulated the test for incitement to commit unlawful conduct in *Schneck v. United States.*[36] There the Court stated: "The character of every act depends upon the circumstances in which it is done…The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force…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. It is a question of proximity and degree."[37]

The Supreme Court's most recent analysis of the clear and present danger test for incitement is *Brandenburg v. Ohio*.[38] *Brandenburg* involved the conviction of a member of the Ku Klux Klan under a state syndicalism statute for "advocating…violence, or unlawful means of

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[32] *Id*. at ¶ 1087 [Reproduced in the accompanying notebook at Tab 2].

[33] Id. at ¶ 179 [Reproduced in the accompanying notebook at Tab 2].

[34] Id. at ¶ 180 [Reproduced in the accompanying notebook at Tab 2].

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

[36] Schneck v. United States, 249 U.S. 47 (1919) [Reproduced in the accompanying notebook at Tab 32].

[37] *Id*. at 52 [Reproduced in the accompanying notebook at Tab 32].

[38] 395 U.S. 444 (1969) [Reproduced in the accompanying notebook at Tab 7].

terrorism as a means of accomplishing industrial or political reform and for voluntarily assembling [to] advocate the doctrines of criminal syndicalism."[39] Brandenburg's speech, riddled with racial slurs and derogatory statements mainly about blacks and Jews, was filmed during a Klan rally with KKK members in robes and hoods with many carrying rifles.[40]

In *Brandenburg*, the U.S. Supreme Court formulated the current standard regarding incitement in the United States: "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*."[41] The *Brandenburg* Court eventually held that the state statute, mentioned above, under which the defendant was convicted, was violated the First Amendment and was unconstitutional because it "by its own words and as applied, purported to punish mere advocacy…and failed to distinguish mere advocacy from incitement to imminent lawless action."[42]

Under *Brandenburg*, there are three requirements that must be fulfilled before speech will be denied protection under the First Amendment. First, the speech or writing must be "directed

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[39] *Id*. at 444-445 [Reproduced in the accompanying notebook at Tab 7]. The Klu Klux Klan (KKK) is a white-supremacist, anti-Semetic, anti-Catholic, xenophobic organization and probably the best-known hate group in America. It began as a social club in 1866 but changed soon after. They began by fighting the 19th Century U.S. Reconstruction Movement and adamantly opposed the idea of allowing free blacks to participate in the political process. In the early 20th Century, the KKK imposed a "a veritable reign of terror" through the Southern United States employing tactics such as whipping, burning people at the stake, and murder. The Klan's victims included blacks and moderate white from the North and South. The KKK also used cross burnings as a sign of intimidation. *see Virginia v. Black*, 123 S. Ct. 1536 (2003), infra, for a brief discussion on the history of the KKK and cross burning.

[40] Id. at 446-447 [Reproduced in the accompanying notebook at Tab 7].

[41] *Id*. at 447 (emphasis added) [Reproduced in the accompanying notebook at Tab 7].

[42] *Id.* at 449 [Reproduced in the accompanying notebook at Tab 7].

to" inciting violence or unlawful conduct.[43] Second, there must be speech or writing that is specifically aimed at actually producing 'imminent lawless action.'[44] Finally, it must be shown that the speech or writing will make it more likely than not that 'imminent lawless action' will in fact occur.[45] In assessing whether free speech protection applies under the *Brandenburg* standard, it is imperative to consider both "the *content* and *context* of the speech."[46]

1) 'Directed to' inciting

The first requirement under the *Brandenburg* formulation is that the statement must be 'directed to inciting or producing' some unlawful act.[47] This language references an intent requirement and at the same time "reinforce[s] the constitutional line between mere advocacy and immediate calls to action."[48]

In determining the intent of the speech, the *Nahimana* Chamber considered primarily four factors: 1) the accuracy of the statement; 2) the tone of the statement; 3) the context in which the statement was made, and 4) the positioning of the media.[49]

First, in regard to the accuracy of the statement, the Chamber argued that if a statement was true or was even "information[al] in nature," while it might generate resentment or even "a

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[43] *Id*. [Reproduced in the accompanying notebook at Tab 7].

[44] *Id*. [Reproduced in the accompanying notebook at Tab 7].

[45] *Id.* at 449 [Reproduced in the accompanying notebook at Tab 7].

[46] Rodney A. Smolla, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §10:28 (1996) [Reproduced in the accompanying notebook at Tab 47].

[47] *Brandenburg*, 395 U.S. at 449 [Reproduced in the accompanying notebook at Tab 7].

[48] Smolla, *supra* note 46, at § 10:34 [Reproduced in the accompanying notebook at Tab 47].

[49] *Nahimana*, No. ICTR-99-52 at ¶ 1022 and ¶ 1024 ("In the Chamber's view, the accuracy of the statement is only one factor to be considered in the determination of whether a statement is intended to provoke rather than to educate those who receive it. The tone of the statement is as relevant to this determination as its content…The Chamber also considers the context in which the statement is made to be important." ¶1024: "The positioning of the media with regard to the message indicates the real intent of the message…"). [Reproduced in the accompanying notebook at Tab 2].

want to take action," the impact would be the result of the information conveyed by the statement rather than the statement itself.[50] However, if the statement was false, "the inaccuracy of the statement might then be an indicator that the intent of the statement was not to convey information but rather to promote unfounded resentment and inflame ethnic tensions."[51] The Chamber maintains that a general statement such as "the Tutsi 'are the ones with all the money'" would be distinct from a statement regarding Tutsi owning a particular percentage of the Taxis.[52]

Second, the *Nahimana* Chamber stated that the tone of the statement was equally important to the determination of whether the intent of the statement was to educate or to promote tension.[53] The Chamber believed "[t]hat Nahimana was aware of the relevance of tone to the culpability [as] evidenced by his reluctance to acknowledge the text of the broadcast, 'they are the ones who have all the money,'" but he himself would not have used that language but "would have expressed the same reality in a different manner.[54]

Third, the Chamber considered "the context in which statements [were] made to be important."[55] The Chamber maintained that "[a] statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement."[56]

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[50] *Id*. at ¶ 1020 [Reproduced in the accompanying notebook at Tab 2].

[51] *Id*. at ¶ 1021 [Reproduced in the accompanying notebook at Tab 2].

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

[53] Id. at ¶ 1022 ("The tone of the statement is as relevant to this determination as is its content.") [Reproduced in the accompanying notebook at Tab 2].

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

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

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

Finally, for the *Nahimana* Chamber, it was the actual positioning of *Kangura* and RTLM as advocates of violence which indicated the real intent of the defendant's message.[57] For the Chamber, in situations where the media "disseminates views that constitute ethnic hatred and calls to violence for informative or educational purposes, a clear distancing from these is necessary to avoid conveying an endorsement of the message and in fact to convey a counter-message to ensure that no harm results from the broadcast. The positioning of the media with regard to the message indicates the real intent of the message, and to some degree the real message itself."[58] To the Chamber, because the Defendant's failed to "distance themselves from the message of ethnic hatred," they were endorsing the advocacy of violence against the Tutsi.[59]

In the *Nahimana* decision, the Chamber took the view that the fact that genocide did actually occur in Rwanda supported a finding of the requisite intent for incitement to commit genocide.[60] "Incitement is a crime regardless of whether [or not] it [actually] has the effect it intends to have. In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide [actually] occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect."[61] The ICTR Chamber's rationale regarding the intent of the Defendant's use of *Kangura* and RTLM is probably consistent with the requisite intent element as illustrated in *Brandenburg*.

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[57] *Id*. at ¶ 1024 [Reproduced in the accompanying notebook at Tab 2].

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

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

[60] *Id*. at ¶1029 [Reproduced in the accompanying notebook at Tab 2].

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

2) 'Imminent lawless action'

The second requirement under the *Brandenburg* formulation is that the speech must be directed to 'imminent lawless action.'[62] The imminence requirement aims to establish a link between the speech and the resulting crime.[63] This is the question of 'proximity' mentioned in *Schneck*.[64]

In its decision, the *Nahimana* Chamber held that direct and public incitement to commit genocide is an "inchoate crime which continues until the completion of the acts contemplated."[65] This holding is seemingly, on its face, inapposite to the *Brandenburg* imminence requirement. Although the *Nahimana* Chamber does seem to make the distinction between the advocacy of ideas and advocacy of violence, in the U.S. even the "mere advocacy of the use of force or violence [by itself] does not remove speech from the protection of the First Amendment."[66] Stated another way, the advocacy of violence or use of force – absent the intent <u>and</u> likelihood to produce 'imminent lawless action' – is considered protected speech under American freedom of expression law. Thus, the key to incitement under the *Brandenburg* formulation is the imminence requirement. There are two main viewpoints on the imminence requirement.

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[62] *Brandenburg*, 395 U.S. at 449 [Reproduced in the accompanying notebook at Tab 7].

[63] Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L.J. 87, 105 (2001). [Reproduced in the accompanying notebook at Tab 49].

[64] *Schneck*, 249 U.S. at 52 [Reproduced in the accompanying notebook at Tab 32].

[65] Nahimana, No. ICTR-99-52 at ¶ 1017 [Reproduced in the accompanying notebook at Tab 2].

[66] NAACP v. Claiborne Hardware, 458 U.S. 886, 927 (1982) [Reproduced in the accompanying notebook at Tab 22]; *see also* Rice v. Paladin Enterprises, Inc., 128 F.3d, 233, 243 (4th Cir. 1997) (in discussing the Supreme Court decision in *Brandenburg*, the U.S. Fourth Circuit Court of Appeals explained that "such a right to advocate lawlessness is, almost paradoxically, on of the ultimate safeguards of liberty. Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.") [Reproduced in the accompanying notebook at Tab 27].

One view suggests that speech that is about to cause injury will be protected unless it is actually on the very brink of causing that specific injury.[67] It is argued that because the "imminence and likelihood requirements are the backbone of the *Brandenburg* standard…[the] mere fear that at some future time speech may ripen into harm" would mean that there would be virtually no right to the freedom of speech.[68] There is U.S. case law to support this contention. For example, in applying the *Brandenburg* standard, the U.S. Supreme Court in *Hess v. Indiana*[69] held that "words amounting to nothing more than the advocacy of illegal action at some indefinite future time" was not enough to satisfy the *Brandenburg* imminence requirement.[70] Therefore, the First Amendment would potentially protect speech that explicitly urges specific criminal action as long as the action is not imminent.[71]

Furthermore, under this view, that the imminence standard requires almost immediate action, an opportunity for discussion between the alleged incitement speech and the conduct will negate an incitement claim. It is argued that the danger of speech cannot be understood to be clear and present "unless the incidence of the evil apprehended is so imminent that it may [occur] before there is opportunity for full discussion."[72] Under this approach, "[i]f there [is] time to

[67] Smolla, *supra* note 46, § 10:30 [Reproduced in the accompanying notebook at Tab 47].

[68] *Id*. [Reproduced in the accompanying notebook at Tab 47].

[69] 414 U.S. 105 (1973) (Vietnam war protestor conviction for disorderly conduct reversed where statement that 'We'll take the fucking street later,' was not obscenity within the legal definition, nor could it be considered a 'fighting word' as the statement was "not addressed to any particular person or group.") [Reproduced in the accompanying notebook at Tab 18].

[70] *Id*. at 109. [Reproduced in the accompanying notebook at Tab 18].

[71] Gopalani, *supra* note 63, at 108 [Reproduced in the accompanying notebook at Tab 48].

[72] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) [Reproduced in the accompanying notebook at Tab 45].

expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech not enforced silence."[73]

The defense in the *Nahimana* case attempted to make this very argument by asserting that *Kangura* publications and RTLM broadcasts were even-handed, as evidenced by *Kangura*'s reprint of the Tutsi *19 Commandments* with the Hutu *Ten Commandments* and through an interview with an Rwandan Patriotic Front ("RPF") leader on RTLM.[74]

However, to the *Nahimana* Chamber, *Kangura*'s rejection of the *19 Commandments* (Tutsi) and its support of the *Ten Commandments* (Hutu) was apparent given the tone and manner in which they were presented.[75] The Chamber thought that the "clear intent" of the publication of the *19 Commandments* of the Tutsi was to spread fear amongst the Hutu about the danger the Tutsis presented.[76] Conversely, the *Ten Commandments* of the Hutu was published to tell the Hutu how to protect themselves from that danger.[77] Likewise, the scornful and contemptuous manner and tone in which RTLM broadcast the interview with the RPF leader was presented with "derogatory references to the tall, milk-drinking Tutsi."[78]

In the Chamber's opinion, *Kangura* and RTLM were far from open or neutral forums for discussion on public issues. Indeed, to the *Nahimana* Chamber, *Kangura* and RTLM "had a well-defined perspective for which they were well known."[79]

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[73] *Id*. [Reproduced in the accompanying notebook at Tab 45].

[74] *Nahimana*, No. ICTR-99-52 at ¶ 1023 [Reproduced in the accompanying notebook at Tab 2].

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

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

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

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

[79] *Id*. [Reproduced in the accompanying notebook at Tab 2]. Furthermore, it may also be important to recognize that unlike the United States, which has a plethora of media outlets such as television, radio, newspapers, and the

Notwithstanding the previous considerations, if the *Brandenburg* imminence strand requires lawlessness occurring at some definite, immediate future time, the *Nahimana* Chamber's holding that direct and public incitement to commit genocide is an "inchoate crime which continues until the completion of the acts contemplated"[80] is probably <u>inconsistent</u> with this aspect of the requirement.

A different view on the *Brandenburg* imminence requirement, however, suggests that the term 'imminence' may not necessarily mean immediate. While "[i]mminence, a function of time, refers to an event which threatens to happen momentarily, is about to happen, or at the point of happening… [T]ime is a relative dimension and imminence is a relative term, and the imminence of an event is related to its nature."[81] In other words, time and imminence must be considered in the context of the surrounding situation. A time span of several days, weeks or even months between the actual speech and the harm may still be enough to establish imminence if placed in the appropriate context. This viewpoint is consistent with the idea in U.S. law that "[t]he character of every act depends upon the circumstances in which it is done."[82] Because imminence is a relative term and not an absolute term, it must always be evaluated in the particular circumstances in which the speech exists.

In the U.S., a specific threat of murder, for example, may be considered imminent for a longer duration of time than other crimes as evidenced by the fact that there is no time limit on

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internet, Rwanda was, and currently is, a developing country which had, and still has, relatively few media outlets in comparison. Therefore, there was little opportunity for discussions countering RTLM or *Kangura*'s powerful messages of incitement and hatred. Gopalani, *supra* note 63, at 110. [Reproduced in the accompanying notebook at Tab 48].

[80] *Nahimana*, No. ICTR-99-52 at ¶ 1017 [Reproduced in the accompanying notebook at Tab 2].

[81] People v. Rubin, 158 Cal. Rptr. 488, 493 (App. Div. 1979) [Reproduced in the accompanying notebook at Tab 24].

[82] *Schneck*, 249 U.S. at 52 (1919) [Reproduced in the accompanying notebook at Tab 32].

when it can be prosecuted.[83] So it may be that as a general matter, "the more serious the crime the greater its time span."[84] Arguably for particularly serious offenses such as murder, defendants should not be allowed to escape liability simply because a relatively short time frame passes between the speech and the crime.[85]

Under this more flexible and context-specific imminence requirement, the Chamber's findings, that incitement is an "inchoate crime which continues until the completion of the acts contemplated,"[86] may be <u>consistent</u> with U.S. law on the freedom of expression. In this sense, for the particularly serious offense of direct and public incitement to commit genocide, Nahimana, Barayagwiza, and Ngeze should not be allowed to escape liability simply because a few days, weeks, or months passed between the incitement and the actual genocide.

One Supreme Court Justice, Justice Holmes, has even suggested that in times of emergency or war, the imminence standard is more flexible: "[The power of the United States Constitution to punish speech] that produces or is intended to produce a clear and imminent danger that it will bring about [] certain substantive evils that the United States constitutionally may seek to prevent…undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times."[87] Likewise, the *Nahimana* Chamber's decision to punish speech may be further justified, and reconciled with U.S. law, to the extent that Rwanda's 'genocidal environment' produced dangers, such as the potential to incite, that did not exist at

[83] *Rubin*, 158 Cal. Rptr. at 493 [Reproduced in the accompanying notebook at Tab 24].

[84] *Id.* [Reproduced in the accompanying notebook at Tab 24].

[85] Smolla, *supra* note 46, at § 10:35 [Reproduced in the accompanying notebook at Tab 47].

[86] *Nahimana*, No. ICTR-99-52, at ¶ 1017 [Reproduced in the accompanying notebook at Tab 2].

[87] Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting) () [Reproduced in the accompanying notebook at Tab 5].

other times.[88] Because this second imminence view encompasses the context, it is the most flexible and under this standard the *Nahimana* Chamber's decision is probably consistent with the *Brandenburg* imminence requirement.

3) Likely to incite or produce 'imminent lawless action'

The third requirement under the *Brandenburg* standard is that the speech must be "likely to incite or produce [imminent lawless action]."[89] This final issue is primarily concerned with the probability of lawless action occurring, the question of 'degree' as mentioned in *Schneck*.[90] As noted before this requirement is concerned with the probability that 'imminent lawless action' will occur. Although there is not much legal discourse on this requirement, at least one U.S. court decision lends support to the proposition that it may be a reasonable inference that a newspaper article or a radio broadcast of a threat may have greater, not lesser, significance to actually incite imminent lawless action than one which is made in private. In *People v. Rubin*[91], the court stated that "serious reportage by respectable news media of a reward for murder tends in some degree to give respectability to what otherwise would remain an underground solicitation of limited credibility addressed to a limited audience, and thereby tends to increase the risk and likelihood of violence."[92]

Although there does not seem to be any evidence of the direct solicitation for genocide through RTLM or *Kangura*, to the *Nahimana* Chamber, "statement[s] of ethnic generalization

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[88] However, it is important to understand that even under this more flexible imminence standard, the timeframe of the *Brandenburg* imminence requirement extends but does not disappear altogether. Unlike incitement in the ICTR, which will continue to the completion of the crime, the crime of incitement in the U.S. will not extend indefinitely to the commission of the crime. The flexibility of the imminence standard, in the U.S., depends strongly upon the specific factual circumstances and context in which the speech is given.

[89] *Brandenburg*, 395 U.S. at 447 [Reproduced in the accompanying notebook at Tab 7].

[90] *Schneck*, 249 U.S. at 52 [Reproduced in the accompanying notebook at Tab 32].

[91] 158 Cal. Rptr. 483 (App. Div. 1979).

[92] Id. at 493.

provoking resentment against" Tutsis had a "heightened impact in the context of a genocidal environment." This type of statement "would be more likely to lead to violence."[93] Arguably, *Kangura*'s and RTLM's publication and broadcasts gave rise to otherwise 'underground' happenings and help give credibility and increased the likelihood of violence against Tutsi.

Notwithstanding the previous considerations, given the *Nahimana*'s Chamber's finding of the requisite intent, the flexibility of the imminence requirement, and the likelihood of producing violence, the Chamber's decision in the *Nahimana* case would probably satisfy the clear and present danger test and *Brandenburg* 'incitement to lawless action' standard.

'True Threats'

The ICTR Chamber's decision in *Nahimana* may also be reconcilable with the idea that some of the *Kangura* publications and RTLM broadcasts were 'true threats.' In *Nahimana*, the Chamber explicitly recognized that "[t]he names published [in *Kangura*] and broadcast [on RTLM] were generally done so in the context of a threat that varied in explicitness."[94] The Chamber also noted that although *Kangura* and RTLM published and broadcast some of the names without an explicit call to action, the message was nevertheless the same and being named would bring about tragic consequences.[95] In addition to the incitement of 'imminent lawless

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[93] *Nahimana*, No. ICTR-99-52 at ¶ 1022 [Reproduced in the accompanying notebook at Tab 2].

[94] *Nahimana*, No. ICTR-99-52 at 1028 [Reproduced in the accompanying notebook at Tab 2]; *see also* ¶ 206 ("The list of 123 names…was published by *Kangura* with a call on its readers to take action. The message conveyed was that the government, who had named these people, was incapable of protecting the population from the threat that they represented. Readers were urged to organize self-defense, with the clear implication that they should take action against those named, to save themselves from extermination. By generating fear, providing names, and advocating this kind of pre-emptive strike, *Kangura* clearly intended to mobilize its readers against the individuals named on the list. Witness AHA, who to some extent defended the publication of the list as an official one, nevertheless acknowledged that it may have served those who participated in the massacres. [However,] no evidence was introduced as to the fate of the 123 people named on the list."); and ¶ 487

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

action,' the Supreme Court has recognized 'true threats' as an area of expression that is unprotected by the First Amendment.[96]

"'True threats' encompass those statements "where the speaker means to communicate a serious expression of the intent to commit an act of unlawful violence to a particular individual or group of individuals."[97] As illustrated below, the difficult part in determining what constitutes a 'true threat' is distinguishing it from "an idle threat, political hyperbole, a jest, misconstrued speech, allowable coercion, or legitimate political advocacy."[98]

Supreme Court Cases

i. *Watts v. United States*[99]

In the same year that the court laid down the current standard for incitement of unlawful conduct in *Brandenburg*, the Supreme Court also took up the issue of 'true threats' in *Watts v. United States*.[100] The *Watts* case involved a statement made by an eighteen-year-old African-American student at a public rally on the steps of the Washington Monument in opposition to Vietnam War. The defendant stated: "They always holler at us to get an education. And now I have already received my draft classifications as 1-A and I have got to report for my physical this Monday coming. I am not going. *If they every make me carry a rifle the first man I want to get in my sights is L.B.J.* They are not going to make me kill my black brothers."[101] The crowd

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[96] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) ("[T]hreats of violence are outside the [protection of the] First Amendment.") [Reproduced in the accompanying notebook at Tab 26].

[97] Virginia v. Black, 123 S. Ct. 1536, 1548 (2003) [Reproduced in the accompanying notebook at Tab 41].

[98] Jennifer E. Rothman, *Freedom of Speech and True Threats,* 25 HARV. J.L. & PUB. POL. 283, 294 (2001) [Reproduced in the accompanying notebook at Tab 50].

[99] 394 U.S. 705 (1969) [Reproduced in the accompanying notebook at Tab 42]

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

[101] *Id.* at 706-07 (emphasis added.) (L.B.J. were the initials of the then-president of the United States, Lyndon B. Johnson.) [Reproduced in the accompanying notebook at Tab 42].

laughed in response to this statement but the student was convicted for violating a federal statute that made it a crime to "knowingly and willfully make a threat to take the life of or inflict bodily harm upon the President of the United States."[102] The Supreme Court reversed, finding that given the context at a public-political rally, the defendant's statement was 'political hyperbole' or exaggeration and therefore failed to meet the level of a 'true threat.'[103]

Like the distinction between the advocacy of abstract ideas and the advocacy of unlawful conduct, discussed earlier, the Supreme Court initially stated that "what is a threat must [also] be distinguished from what constitutes constitutionally protected speech."[104] The Supreme Court stated that the speaker's "only offense here was a kind of very crude offensive method of stating a political opposition to the President" especially considering the "expressly conditional nature of the statement" ('if they ever make me carry a rifle') "and the reaction of the listeners" (the audience's response in laughter).[105]

One commentator suggests that the *Watts* Court offered at least four factors that a court should consider in a 'true threats' determination: (1) whether the speech constitutes political or some other type of hyperbole; (2) the overall context in which the statement is made; (3) the reaction of the listeners; and (4) whether the statement was conditional and if so, conditional on an event that was unlikely to occur.[106] However, unlike *Brandenburg*, the Court failed to lay out an express rule on determining what constitutes a threat.

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

[103] *Id*. at 708 [Reproduced in the accompanying notebook at Tab 42].

[104] *Id*. at 707 [Reproduced in the accompanying notebook at Tab 42].

[105] *Id*. at 708 [Reproduced in the accompanying notebook at Tab 42].

[106] Rothman, *supra* note 109, at 295 [Reproduced in the accompanying notebook at Tab 50].

Unlike the statements made in *Watts,* to the *Nahimana* Chamber, the statements broadcast over RTLM and published *Kangura* were arguably more than the 'kind of very crude offensive method of stating a political opposition' to either the specifically named individuals or to the Tutsi people in general. In considering the overall context in which the RTLM broadcasts and *Kangura*'s publications were made, the *Nahimana* Chamber noted that it was a "genocidal environment." Both Tutsi and Hutu were aware of RTLM and *Kangura*. As illustrated by the Chamber's decision, the reaction of the Tutsis or Hutu moderates was far from laughter. Those individuals, Tutsi officials and civilians alike, who were targeted expressed fear while the Hutu listeners felt a sense of anger and hostility against the Tutsi.

ii. *Rogers v. United States*[107]

Rogers v. United States involved the interpretation of a statute for threatening injury or taking the life of the President of the United States.[108] While the majority reversed on grounds not reaching the merits of the case, in a concurring opinion one Supreme Court Justice, Justice Marshall, cautioned that any overly broad construction of a 'true threats' determination contains the "substantial risk of conviction for a merely crude or careless expression of political" opinion, the exact type of expression that was upheld in *Watts*.[109] In his view, an overly broad interpretation of a 'true threat' could in itself be a threat to the "'national commitment to the

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[107] 422 U.S. 35 (1975) (Marshall, J., concurring) [Reproduced in the accompanying notebook at Tab 29].

[108] *Id*. Rogers was a 34-year-old unemployed carpenter with a history of alcoholism who stated, in front of several people including police officers that, among other things, he was Jesus Christ and that he was opposed to President Nixon's trip to China because apparently they had a bomb that only he knew about and he was going to walk from Shreveport, Louisiana to Washington, D.C. to 'whip Nixon's ass,' or to 'kill him in order to save the United States.' Rogers was convicted under a U.S. federal statute, 18 U.S.C. §871, the same statute at issue in *Watts v. United States*, 394 U.S. 705 (1969) (discussed supra) and *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969) (discussed infra) which made it a crime to "knowingly and willfully make a threat to take the life of or inflict bodily harm upon the President of the United States." The majority reversed the conviction on other issues not reaching the merits of the case.) [Reproduced in the accompanying notebook at Tab 29].

[109] *Id*. at 44 (Marshall, J., concurring) [Reproduced in the accompanying notebook at Tab 29].

principle that debate on public issues should be uninhibited, robust, and wide-open' that the First Amendment is intended to protect."[110]

iii. *NAACP v. Claiborne Hardware*[111]

NAACP v. Claiborne Hardware involved a civil suit brought by white storeowners against the black community of Claiborne County and against the National Association for the Advancement of Colored People ("NAACP") for the boycott of their stores. In giving a speech to the black community in Claiborne, the speaker stated, something to the effect, that if anyone in the black community broke the boycott by going into white stores he would "break [their] damn neck."[112] In reversing the state supreme court, the U.S. Supreme Court held the speech was protected and was not a 'true threat.'[113]

Specifically, the Supreme Court took into consideration the fact that the speaker had not had any previous association with violence in either "authorizing, ratifying, or directly threatening acts of violence."[114] However, the Court's language suggests that if the speaker's "language had been [subsequently] followed by acts of violence"[115] there would at least be a question to determine liability. Nevertheless, without any such acts, the statement was therefore protected speech. Again, the Supreme Court recognized that as long as the speaker does not

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[110] *Id*. at 48 (Marshall, J., concurring) (quoting *The New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964)) [Reproduced in the accompanying notebook at Tab 29].

[111] 458 U.S. 886 (1982) [Reproduced in the accompanying notebook at Tab 22].

[112] *Id*. at 902 [Reproduced in the accompanying notebook at Tab 22].

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

[114] *Id*. at 929 [Reproduced in the accompanying notebook at Tab 22].

[115] *Id*. at 928 [Reproduced in the accompanying notebook at Tab 22].

incite 'imminent lawless action' the speaker should be "free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause."[116]

The ICTR *Nahimana* decision is also distinguishable from the situation in *Claiborne Hardware*. In *Claiborne*, the Supreme Court considered heavily the fact that the speaker had not had a previous history of violence and no violence had occurred immediately after the speech. However, in doing so the Supreme Court suggested that the issue probably would have been decided differently if there was violence. In the *Nahimana* decision, the Chamber placed significant, and arguably accurate, weight on the fact that actual violence actually occurred immediately or soon after the publications and broadcasts. (quote regarding intent)

iv. *Virginia v. Black*[117]

The Supreme Court's most recent analysis of the 'true threats' analysis is *Virginia v. Black*. This case involved the conviction of three individuals for violation of a Virginia state statute prohibiting cross burning.[118] In the U.S., cross burning is a well-known symbol of hate "and when a cross burning used to intimidate, few if any messages are more powerful."[119] In *Virginia v. Black* the Supreme Court while holding that the state statue was unconstitutional as

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

[117] 123 S. Ct. 1536 (2003) [Reproduced in the accompanying notebook at Tab 41].

[118] *Id*. [Reproduced in the accompanying notebook at Tab 41]. Although all three petitioners were convicted under the same state statute it may be helpful to distinguish between the petitioners at the outset of the discussion to fully understand the Supreme Court's holding. One petitioner, Black, was convicted for burning a cross during a Klu Klux Klan rally that occurred next to a state highway but on private property with the permission of the owner who was in attendance. The other two petitioners, Elliott and O'Mara, were convicted under the same statute for burning a cross on their neighbor's yard , who were African-Americans. In its decision for petitioner Black, the Supreme Court affirmed the state supreme court in reversing the conviction because of the unconstitutionality of the statute on its face and in light of its recent decision in *R.A.V. v. City of St. Paul Minnesota*, 505 U.S. 377 (1992) (discussed infra) [Reproduced in the accompanying notebook at Tab]. But for the other two petitioners, Elliott and O'Mara, the Supreme Court remanded the case for further proceedings to determine if their cross burning was done with the intent to intimidate.

[119] *Id*. at 1547 [Reproduced in the accompanying notebook at Tab 41]; *see id*. at 1544-1548 for a thorough background on the history of cross burning in the U.S. and its connection with the Klu Klux Klan; *see* footnote 39, supra, for a brief historical description of the Klu Klux Klan (KKK).

applied because it punished petitioner Black's speech, cross burning at a rally, the Court upheld the statute to the extent that it punished the speech of the other two petitioners, cross burning on a black neighbors lawn, where it is done to intimidate. In defining "[i]ntimidation in the constitutionally proscribable sense," the Court stated, "[it] is a type of true threat, where a speaker directs a threat to a person or a group of persons with the intent of placing the victim in fear of bodily harm or death." Furthermore, there is no requirement that the speaker "actually intent to carry out the threat. [But] rather, a prohibition on true threats 'protects individual from the fear of violence and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur."

Circuit Court of Appeals Cases

Many U.S. Court of Appeals have also dealt with the issue of 'true threats.'[120] However, one circuit court case that has recently received a significant amount of attention in U.S. legal discourse is the Ninth Circuit's recent decision in *Planned Parenthood v. American Coalition of Life Activis*ts.[121] The *Planned Parenthood* case involved a civil suit brought by four physicians and two health centers who provided medical services to women (including abortions) against the ACLA, an anti-abortion activist organization, that was allegedly making threats toward the plaintiffs.[122] In affirming the trial court's finding of liability, the *Planned Parenthood* court held

[120] A few of the more important cases are: Roy v. United States, 416 F.2d 874 (9th Cir. 1969) [Reproduced in the accompanying notebook at Tab 30]; United States v. Kelner, 534 F. 2d 1020 (2d Cir. 1976) [Reproduced in the accompanying notebook at Tab 40]; United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997). (This case is commonly known, in American jurisprudence, as the "Jake Baker" case.) [Reproduced in the accompanying notebook at Tab 36].

[121] 290 F.3d 1058 (9th Cir. 2002) [Reproduced in the accompanying notebook at Tab 25].

[122] In *Planned Parenthood* there were primarily two types of threats at issue: 1) The ACLA circulated "GUILTY" posters identifying physicians who performed abortions shortly after a series of murders of physicians who were previously identified on "WANTED" and "unWANTED" posters; 2) The ACLA posted a website called "the Nuremburg Files" which listed the names, home and business addresses, and home and business telephone numbers

that the ACLA's actions constituted a 'true threat' and was not protected speech under the guise of the First Amendment.

The *Planned Parenthood* court held that 'the threat of force' or violence is "a statement which, in the *entire context* and *under all the circumstances*, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person."[123] The court further rejected the claim [] that 'context' means only the direct circumstances surrounding delivery of the threat, or evidence sufficient to resolve ambiguity in the words of the statement. Rather, courts are required to consider 'all of the circumstances.'[124]

In the *Planned Parenthood* case, the Ninth Circuit found that a public threat that is made about a specific individual or identified group in the same or similar way that has previously resulted in the death of individuals in that group is just as serious as a privately communicated threat.[125] The *Planned Parenthood* court recognized that while the posters might have been publicly distributed, they were personally targeted.

Like the Supreme Court's analysis in *Watts* and *Claiborne Hardware*, an important factor in the Ninth Circuit Court's decision in the *Planned Parenthood* case was the reaction of the

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of various physicians who performed abortions, crossing out the names of those physicians who had been murdered with a black line and highlighting in gray those physicians who had been wounded.

[123] *Id*. at 1077 [Reproduced in the accompanying notebook at Tab 25]. Although almost every U.S. Circuit Court of Appeals has adopted some version of a reasonable person test to determine what actually constitutes a threat, there exists a significant variation as to whether the test should be analyzed from the perspective of the reasonable listener or the reasonable speaker. For a thorough discussion on this issue *see* Rothman, *supra* note 109. However, regardless of whether courts apply a 'reasonable listener' test or a 'reasonable speaker' test the "inquiry stays the same: Could [a reasonable person] have foreseen that the statement he uttered would be taken as a threat by those to whom it is made?" Smolla, *supra* note 46, at §10:43. In other words, as the *Planned Parenthood* Court noted, the difference in the Circuit Courts may not matter "because all consider context." *Id*. [Reproduced in the accompanying notebook at Tab 47].

[124] *Id*. [Reproduced in the accompanying notebook at Tab 25].

[125] *Id.* [Reproduced in the accompanying notebook at Tab 25].

doctors, who were the targeted individuals. Unlike the non-violent reactions among the black community in *Claiborne Hardware*, the *Planned Parenthood* physicians began immediately wearing bullet-proof vests and hiring body-guards, and sometimes stopped working altogether. Threatening speech that is made in public does not mandate "heightened constitutional protection because it is communicated publicly rather than privately."[126] Rather, threats are unprotected speech by the First Amendment no matter how they are communicated.[127]

The *Nahimana* Chamber implicitly made the same rationale as the *Planned Parenthood* court. In its decision, the *Nahimana* Chamber specifically discussed the publishing and broadcasting of individual names in *Kangura* and on RTLM.[128] As in the *Planned Parenthood* case, in the *Nahimana* case, specific individual Tutsis and Hutu moderates were identified and their names publicly disseminated in *Kangura* publications and on RTLM broadcasts. As in *Planned Parenthood*, the threats in *Kangura* and RTLM were also personally targeted.

The Chamber recognized that as media outlets *Kangura* and RTLM did have roles to play in protecting democracy and in mobilizing people for self-defense whenever necessary.[129] In the

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[126] *Id*. at 1076 [Reproduced in the accompanying notebook at Tab 25].

[127] Madesen v. Women's Health Center, Inc., 512 U.S. 753, 773 (1994) ("Clearly, threats… however communicated, are proscribable under the First Amendment.") [Reproduced in the accompanying notebook at Tab 20].

[128] Nahimana, No. ICTR-99-52 at ¶1026 [Reproduced in the accompanying notebook at Tab 2].

[129] *Nahimana*, No. ICTR-99-52 at ¶ 1025; *see also id*. at ¶ 204 ("The Chamber accepts that some of the lists reprinted in *Kangura* were official lists of suspects. The first two lists of names in *Kangura* No. 7 clearly indicated that the persons named were facing charges and awaiting trial. However, the third list of twelve names in *Kangura* No. 7 was a list created by *Kangura*, and Ngeze himself by his own admission. *Kangura* readers were asked to send information on the people named, and according to Witness EB almost all of the people on the list were subsequently killed. The Chamber notes that *Kangura* did not explicitly call for the commission of acts of violence against these individuals. They were said to be suspect and information about them was solicited. Those named in *Kangura* No. 9, including Witness EB's father, about whom information was sought, were even said to be possibly innocent, although the Chamber notes that the title of the article in which they were mentioned itself indicated that in fact they were being denounced. Many of these people were subsequently killed, but the evidence does not establish a link between the publication of their names in *Kangura* and their subsequent death.") and ¶ 205 ("Similarly, the letter by Tharcisse Renzaho published in Kangura No. 7 effectively named the people listed in it as suspects and called on the government to prosecute them. Although they were apparently not people named on an official list, a basis for naming them as suspects was articulated, namely that they had left the country shortly before

Chamber's opinion, what separated the defendant's specific uses of RTLM and *Kangura* from this legitimate purpose in these circumstances is that they consistently identified the Tutsi population as the enemy.[130] Instead of directing the threatening speech against people who were definitely a danger to a legitimate purpose, *Kangura* publications and RTLM broadcasts targeted the whole Tutsi population, civilian and otherwise.[131] In addition, the fact that after April 6, 1994 *Kangura* was known as the 'bell of death' and RTLM was known as the 'Radio Machete' is certainly relevant and important in determining how Rwandans, specifically the targeted Tutsi population, understood and took the threats.[132]

As the *Nahimana* Chamber noted (and as the Supreme Court also recognized) there is a societal benefit to the publication of official information.[133] In some situations this may include the identification of public officials. But the broadcast or publication has to be for the purpose of serving a legitimate public interest or benefit such as criticism or impeachment. While *Kangura* and RTLM had a legitimate interest in the publication of names, they did not necessarily have the right to publish or broadcast the names with the specific intent or knowledge that the publication or broadcast would cause immediate injury or death to those people.

Conclusion

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the RPF attack. Under these circumstances, the Chamber cannot equate a call for their prosecution with a call for their persecution, as the letter is characterized in the Indictment.") [Reproduced in the accompanying notebook at Tab 2].

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

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

[132] *Id*. at ¶ 1028 [Reproduced in the accompanying notebook at Tab 2].

[133] Id. at ¶ 1026 ("The Chamber accepts that the publication of official information is a legitimate function of the media.") [Reproduced in the accompanying notebook at Tab 2].

While the preceding discussion identifies at least three different possibilities for reconciling U.S. freedom of expression law with the ICTR *Nahimana* "Media Case" decision – the 'Clear and Present Danger Test/*Brandenburg* standard, the 'Aiding and Abetting' of criminal activity and the 'True Threats' analysis – they all share a common factor: each standard or test emphasizes or requires that the determination is context-specific.[134] The speech cannot be

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[134] One area of unprotected speech that was not addressed in this memorandum is the aiding and abetting of criminal activity through the use of speech. Although the *Nahimana* Chamber's decision does not suggest that there was any direct, meticulous teaching of unlawful conduct, aiding and abetting through speech is a closely related issue to incitement that has been addressed in U.S. courts. While incitement may be characterized as the advocacy or support of unlawful conduct, aiding and abetting may be characterized as the assistance of unlawful conduct. Smolla, *supra* note 46, at § 10:35 [Reproduced in the accompanying notebook at Tab 47]. Neither the First Amendment nor the *Brandenburg* standard create a license for the aiding and abetting of criminal activity. *Id*. As early as 1917, in the case of *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (D.C.N.Y. 1917), the court recognized that: "One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state." [Reproduced in the accompanying notebook at Tab 21]. An illustrative example is the case of *Rice v. Paladin Enterprises,* 128 F. 3d 233 (4th Cir. 1997), which involved a wrongful death civil suit brought by the relatives and representatives of murder victims against a magazine that published, *Hit Man: A Technical Manual for Independent Contractors,* which was basically a step-by-step instruction manual for would-be contract killers. *id*. at 235. In rejecting the defendant magazine publisher's attempted First Amendment defense on the basis of the teaching of abstract advocacy or ideas, the court held that the First Amendment did not bar a finding of liability for the aiding and abetting of a third party's contract murder. *Id*. at 243 [Reproduced in the accompanying notebook at Tab 27]. Other U.S. courts that have addressed this issue have also held that even when aiding and abetting is spoken or written, the First Amendment does not necessarily pose a bar to liability. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed…Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws…deemed injurious to society.") [Reproduced in the accompanying notebook at Tab 16]; United States v. Buttorff, 572 F.2d 619, 623-624 (8th Cir. 1978) (in applying the *Brandenburg* "incitement to imminent lawless activity" standard the court found that although the speech did not incite 'imminent lawless activity', it did go beyond mere advocacy.") [Reproduced in the accompanying notebook at Tab 38]; Weirum v. RKO General, Inc., 123 Cal. Rptr. 468 (App. Div. 1975) ("The First Amendment does not sanction the infliction of physical injury merely because [it was] achieved by word, rather than act.") [Reproduced in the accompanying notebook at Tab 43]; United States v. Freeman, 761 F.2d 549, 551-552 (9th Cir. 1985) ("Words alone may constitute a criminal offense, even if they spring from the anterior motive to effect political or social change. Where an indictment is for counseling, the circumstances of the case determine whether the First Amendment is applicable, either as a matter of law or as a defense to be considered by the jury; and there will be some instances where speech is so close in time and substance to ultimate criminal conduct that no free speech defense is appropriate…Counseling is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantial evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.") [Reproduced in the accompanying notebook at Tab 39]; United States v. Barnett, 667 F.2d 835, 841 (9th Circuit) ("An aider and abettor 'is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him'…The First Amendment does not provide a defense to a criminal charge simply because the actor uses words [as opposed to physical actions] to carry out his illegal purpose. Crimes, including

separated from the circumstances in which it takes place. In light of the preceding discussion on incitement and threats, the breadth of the ICTR Chamber's decision in the ICTR *Nahimana* "media case" regarding direct and public incitement to commit genocide <u>is</u> probably reconcilable with American law on free expression.

PERSECUTION AS A CRIME AGAINST HUMANITY

In its decision, regarding persecution as a crime against humanity, the *Nahimana* Chamber initially recognized two distinctions from the crime of direct and public incitement to commit genocide. First, it recognized that "unlike the other crimes [against humanity] enumerated in the Statute…persecution [as a crime against humanity] specifically require[d] a finding of discriminatory intent on racial, political, or religious grounds."[135] The *Nahimana* Chamber determined that persecution as a crime against humanity required "'a gross or blatant denial of a fundamental right reaching the same level of gravity' as the other acts enumerated as crimes against humanity under the Statute."[136]

In the *Nahimana* case, the Chamber was satisfied that the Defendant's speech through *Kangura*, RTLM and CDR, targeting the Tutsis population on the basis of their ethnicity and targeting Hutu and Tutsi moderates on the basis of their politics, reached this level of gravity and therefore constituted persecution under Article 3(h) of the Statute.[137] In the Chamber's opinion, "hate speech [was] a discriminatory form of aggression that destroys the dignity of those in the group under attack…[which] create[d] a lesser status not only in the eyes of the group members

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aiding and abetting, frequently involve the use of speech…") (internal quotes omitted) [Reproduced in the accompanying notebook at Tab 37].

[135] *Id*., at ¶ 1071. [Reproduced in the accompanying notebook at Tab 2].

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

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

themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be irreversible harm."[138]

Persecution as a crime against humanity is most analogous to hate speech in the U.S. "'Hate speech' is the generic term…embrac[ing] the use of speech in attacks based on race, ethnicity, religion, and sexual orientation or preference."[139] While many laws in the U.S. do "prohibit discrimination on the basis of race, color, religion, sex, national origin, or disability," these prohibitions have not generally applied to hate speech outside of the employment area.[140]

In distinguishing between the persecution and incitement as crimes against humanity, the *Nahimana* Chamber noted that "unlike the crime of incitement, which [was] defined in terms of intent, the crime of persecution [was] also defined in terms of impact."[141] In their opinion, since it was the impact which was the actual harm itself there was no need for "a call to action in communications that constitute persecution [nor a showing of a] link between persecution and acts of violence."[142] As a comparative example, the *Nahimana* Chamber cited the *Steicher* Nuremberg case where Julius Steicher was convicted of "persecution as a crime against humanity for [his] anti-semitic writings that significantly predated the extermination of Jews…[but] were understood to be like a poison that infected the minds of the German people

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

[139] Smolla, *supra* note 46, at § 12:2 [Reproduced in the accompanying notebook at Tab 47].

[140] Id. at §§12:4-12:5 [Reproduced in the accompanying notebook at Tab 47].

[141] *Id*. at ¶ 1073 [Reproduced in the accompanying notebook at Tab 2].

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

and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people."[143]

In the Chamber's opinion, "the virulent writing of *Kangura* and the incendiary broadcasts of RTLM functioned in the same way [as the anti-semetic writings in the *Steicher* case in] conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed."[144] And "[s]imilarly, the activities of the CDR, a Hutu party that demonized the Tutsi population as the enemy, generated fear and hatred that created the conditions for extermination and genocide in Rwanda."[145]

In its decision, the *Nahimana* Chamber maintained that the "freedom of expression and [the] freedom from discrimination [were] not incompatible principles of law."[146] The Chamber further asserted that "hate speech [was] not protected speech under international law."[147] In making this assertion the Chamber referred to two specific international treaties – The Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Racial Discrimination.[148] The Chamber stated that "governments had an obligation under the International Covenant on Civil and Political Rights to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Similarly,

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

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

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

[146] *Id*. at ¶ 1074 [Reproduced in the accompanying notebook at Tab 2].

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

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

the Convention on the Elimination of all Forms of Racial Discrimination require[d] the prohibition of propaganda activities that promote and incite racial discrimination."[149]

In regards to the international treatises, mentioned above, the U.S. consistently objected to such provisions in the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Racial Discrimination and attached reservations and provisions rejecting them to the extent they were inconsistent with U.S. freedom of expression law during U.S. ratification.[150]

In addition to these treaties, the Chamber looked to the domestic laws of countries around the world, including Rwanda, that banned the "advocacy of discriminatory hate, in recognition of the danger it represents and the harm it causes."[151] Although the Fourteenth Amendment of the U.S. Constitution states, in relevant part, that "[n]o State shall…deny to any person within its jurisdiction the *equal protection* of the laws."[152] While the First Amendment is applicable to U.S. citizens through the Fourteenth Amendment, the U.S. Supreme Court has <u>not</u> interpreted hate speech to be a *per se* violation of the '*equal protection'* of the Fourteenth Amendment to be free of verbal or written discrimination simply because it is offensive to the general society.

While it seemed clear to the *Nahimana* Chamber that "freedom of expression and freedom from discrimination [were] not incompatible principles of law,"[153] U.S. courts have had a more difficult time reconciling these two competing principles. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an

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

[150] *Gopalani*, *supra* note 63, at 98. [Reproduced in the accompanying notebook at Tab 48].

[151] *Id*. at ¶ 1075 [Reproduced in the accompanying notebook at Tab 2].

[152] U.S. CONST. amend XIV § 1 [Reproduced in the accompanying notebook at Tab 4].

[153] *Id*. at ¶ 1074. [Reproduced in the accompanying notebook at Tab 2].

idea simply because society finds the idea itself offensive or disagreeable."[154] In fact, a central purpose in the freedom of expression "is to [actually] invite dispute."[155] U.S. courts have taken the view that the First Amendment may "indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."[156]

The *Nahimana* Chamber concluded that "hate speech that expresses ethnic and other forms of discrimination violate[d] the norm of customary international law prohibiting discrimination."[157] To the *Nahimana* Chamber, "the prohibition of advocacy of discrimination and incitement to violence [was] increasingly important as the power of the media to harm [was] increasingly acknowledged."[158]

The *Nahimana* Chamber maintained that because it was previously "established that all communications constituting direct and public incitement to genocide were made with genocidal intent…the lesser intent requirement of persecution, the intent to discriminate, ha[d] been met with regard to these communications."[159] The Chamber also found that because the defendant's

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[154] Texas v. Johnson, 491 U.S. 397, 414 (1989) [Reproduced in the accompanying notebook at Tab 35].

[155] Terminello v. Chicago, 337 U.S. 1, 4 (1949) [Reproduced in the accompanying notebook at Tab 34].

[156] *Id. see also* Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971) ("mere public intolerance or animosity cannot be the basis for abridgment of [First Amendment] constitutional freedoms.") [Reproduced in the accompanying notebook at Tab 10]; Street v. New York, 89 S. Ct. 1354, 1366 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") [Reproduced in the accompanying notebook at Tab 33].

[157] *Id*. at ¶ 1076 [Reproduced in the accompanying notebook at Tab 2].

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

[159] *Id*. at ¶ 1077 [Reproduced in the accompanying notebook at Tab 2].

"communications were part of a widespread or systematic attack…these expressions of ethnic hatred constitute the crime against humanity of persecution."[160]

In a similar vein, the *Nahimana* Chamber also maintained that persecution as a crime against humanity was a broader, more encompassing offense, than the crime of direct and public incitement to commit genocide and as such it included the advocacy of other forms of ethnic hatred.[161] The Chamber cited to the examples of the *Kangura* articles, *A Cockroach Cannot Give Birth to a Butterfly* and *The Ten Commandments* (of the Hutu) as speech which did not constitute incitement, but did constitute persecution.[162]

U.S. Case Law

The U.S. Supreme Court's most recent discussion of hate speech is *R.A.V v. City of St. Paul*.[163] *R.A.V.* involved the conviction of a defendant (R.A.V.) for burning a cross on a black family's lawn under a local city ordinance prohibiting the display of a symbol that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender."[164] In reversing the conviction, the Supreme Court held that the ordinance was unconstitutional because it punished individuals on the basis of content. The Supreme Court stated that some types of content-based discrimination are unconstitutional when they allow the prohibition of speech when speakers "express views on disfavored subjects."[165] Most importantly, the Court

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

[161] *Id*., at ¶ 1078 ("The Chamber notes that persecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms.") [Reproduced in the accompanying notebook at Tab 2].

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

[163] 505 U.S. 377 (1992) [Reproduced in the accompanying notebook at Tab 26].

[164] *Id*. [Reproduced in the accompanying notebook at Tab 26].

[165] *Id*. at 391 [Reproduced in the accompanying notebook at Tab 26].

stated that the "First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. *Content-based regulations are presumptively invalid*."[166]

However, it is important to recognize that in *R.A.V.* the Supreme Court did not hold that the First Amendment prohibited all forms of content-based discrimination…" The Supreme Court recognized that in its other cases that there can be restriction of speech in certain areas (i.e. incitement, 'true threats,' etc.) because these areas of speech are "regulated because of their constitutionally proscribable content."[167]

In a Seventh Circuit Court of Appeals case dealing with the issue of hate speech, *Collins v. Smith*, the court stated that "[t]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[168] However, this is not to say that hate speech is protected in all situations. The U.S. government can protect "targeted listeners from offensive speech, but only when the speaker intrudes on the privacy of the home, or [where] a captive audience cannot practically avoid exposure."[169]

It may be true that speech in a public forum may arouse a sense of anger or hatred among the vast majority of a particular community, even the majority of a community. However, under U.S. law this type of anger or hatred would not be sufficient to ban all types of hate speech or

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[166] *Id*. at 382 (emphasis added) (internal quotations omitted) [Reproduced in the accompanying notebook at Tab 26].

[167] *Id*. at 384. ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.") [Reproduced in the accompanying notebook at Tab 26].

[168] Collins v. Smith, 578 F.2d 1197, 1202 (7th Cir. 1978) [Reproduced in the accompanying notebook at Tab 12].

[169] *Id*. at 1206 [Reproduced in the accompanying notebook at Tab 12].

speech that discriminates or causes ethnic or racial tension.[170] Instead, U.S. courts will look at all of "contextual factors that are necessary to decide whether a particular [type of speech] is intended to intimidate,"[171] or whether it violates another area of proscribable speech like the aiding and abetting of criminal activity or aimed at the incitement of 'imminent lawless action.'

Conclusion

In light of the preceding discussion, the ICTR Chamber's decision in the *Nahimana* "media case," regarding persecution as a crime against humanity, is probably not reconcilable with American law on free expression.

[170] *See* Virginia v. Black, 123 S. Ct. 1536 (2003) [Reproduced in the accompanying notebook at Tab 41].

[171] *Id*. at 1548 [Reproduced in the accompanying notebook at Tab 41].