

Healing the Wounds

Speech, Identity & Reconciliation in Rwanda and Beyond

A central challenge confronting all societies emerging from genocide, other mass atrocities, or ethnic conflict is establishing durable, trusting relationships across ethnic or religious lines, relationships that can help societies recover from trauma and eliminate incentives to slide back into familiar patterns of violence.

With this report, based on a 2009 conference at the Benjamin N. Cardozo Law School in New York, a distinguished group of scholars and practitioners examines the ways in which individual and group conceptions of identity are defined and enforced through the intervention of law, in particular, the 2008 Rwandan "genocide ideology law" and the political context in which it was born - eliminating distinctions between ethnic groups entirely. Through the eyes of these experts, the strengths and limitations of this legal strategy are examined with implications for policy and practice both by the international community and by governments of states emerging from cycles of severe violence.

The Program in Holocaust and Human Rights Studies,
& the Human Rights and Genocide Clinic, Benjamin N. Cardozo School of Law
In Association with Global Action to Prevent War

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SPEECH, IDENTITY,
& RECONCILIATION IN
RWANDA AND BEYOND

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The Program in Holocaust and Human Rights
Studies, & the Human Rights and Genocide Clinic,
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Acknowledgments

This report is dedicated to the memory of Alison Des Forges, who inspired us all to heed the cries of genocide victims.

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HEALING THE WOUNDS: SPEECH, IDENTITY, & RECONCILIATION IN RWANDA AND BEYOND

Foreword

A central challenge confronting all societies emerging from genocide or ethnic conflict is attempting to establish positive, trusting relationships across racial, ethnic or religious lines. Developing cross-ethnic relationships is necessary to ensure the trust required for reconciliation and a sustainable peace. Many post-conflict countries seek reconciliation through rebuilding a multicultural society based on mutual respect. In Bosnia-Herzegovina, Northern Ireland, and Burundi, to name a few, carefully calibrated power-sharing arrangements coupled with relevant legislation aim to support this multicultural vision.

The government of Rwanda has taken a different approach. The Rwandan government seeks unity and reconciliation with policies and laws that aim to eliminate distinctions between ethnic groups entirely. The government's position is that this policy is necessary in Rwanda because of the nefarious role that ethnic identity played in the lead up to the 1994 genocide. Through promulgating several laws, most prominently laws on 'genocide ideology', the government has made certain speech that evokes ethnicity a criminal offence. Ultimately, the Rwandan government seeks to overcome the ethnic identity categories of the past (Hutu, Tutsi, Twa) by attempting to transform the very way individuals -and Rwandan society as a whole - perceive and define themselves, their culture, and their national history.

Rwanda's idiosyncratic approach presents several challenges to the more common methods of reconciliation in the aftermath of genocide or ethnic conflict. On the one hand, the government's effort, apparently focused on shaping the individual's civic identity, may appeal to the western liberal ideal. To quote Justice John Marshall Harland in his dissent from the United State's Supreme Court's infamous ruling which upheld "separate but equal" railroads for blacks and whites: "There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens." On the other hand, while legal color blindness may be an ideal to aim for, the project to erase ethnic identity in Rwanda goes further than mere anti-discrimination measures – it seeks to erase the very concept from the hearts and minds of the people.

This report, drawing on the insights brought forth at an international, interdisciplinary conference that took place at Cardozo Law School in 2009, examines the interplay of the genocide ideology laws, freedom of expression and identity formation, and their relationship to the reconciliation process. We hope that this report will shed some light for policy makers and scholars alike on the need to deeply consider the delicate balance between preventing ethnic manipulations that can lead to a recurrence of genocide with the need to promote

long term stability and reconciliation. The relevant differences among countries are, of course, substantial, so that lessons learned in one context will not obviously translate into another. Nonetheless, thinking through the Rwandan approach sheds light on similar challenges confronted by other multi-ethnic states torn apart by deep ethnic conflicts and genocide.

Introduction

Since the 1994 genocide, Rwanda has struggled to create a stable society and lasting peace through promoting a program of unity and reconciliation. In pursuit of this objective, the Rwandan government seeks to prevent or eradicate what is termed 'genocide ideology.' From the government's perspective, human beings will not engage in systematic slaughter spontaneously. Mass atrocity begins with hate translated into words and ideas from seemingly rational men – political and religious leaders, intellectuals and journalists— before a single gun is fired or machete is raised. In sum, "without genocide ideology, there is no genocide."¹ Therefore, according to the government and others, to prevent a future genocide, 'genocide ideology' must be abolished.

Genocide ideology is broadly defined with different meanings in law and in popular discourse. A Rwandan Minister has described genocide ideology as a "spirit." A 2006 Rwandan Senate Report defines genocide ideology as "a set of ideas or representations whose major role is to stir up hatred and create a pernicious atmosphere favouring the implementation and legitimization of the persecution and elimination of a category of the population."² The existing law defines genocide ideology as "an aggregate of thoughts characterized by conduct, speeches..." and provides for up to 25 years in prison for first time offenders. Closely related laws on discrimination, sectarianism (divisionism), and negationism pursue similar and overlapping goals as the genocide ideology law. These laws together seek to punish those who espouse genocide ideology. The laws jointly affirm that genocide ideology is characterized by thought, speech or conduct which deny or minimize the 1994 genocide, harms the dignity of the victims of the 1994 genocide, incites to genocide, arouses or indicates hatred toward an ethnic group, or sows the seeds of division within the country. ³ In fact, the preamble to the law on sectarianism stipulates that the law emanates

1 Tharcisse Karagurama, Denial is the Seed of Future Genocide, *Star Tribune*, June 25, 2010 <http://www.startribune.com/opinion/commentary/97195164.html> (last visited Nov. 17 2010).

2 Rwanda: Genocide Ideology and Strategies for its Eradication, Rwanda Senate Report, at 16 (2006) (on file with authors).

3 The Law No 18/2008 of 23/07/2008 Relating to the Punishment of the Crime of Genocide Ideology, states;

Article: 1 Purpose of this law

This Law aims at preventing and punishing the crime of genocide ideology.

Article: 2 Definition of "genocide ideology"

The genocide ideology is an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, color, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war.

Article: 3 Characteristics of the crime of genocide ideology

The crime of genocide ideology is characterized in any behavior manifested by facts aimed at dehumanizing a person or a

from a need to “punish anyone found guilty of fuelling conflicts among Rwandans and sowing division among them.”

Through these laws, the government legislates a very specific narrative of Rwandan history as part of its goal to create a Rwandan identity that overcomes the ethnic categories of the past (Hutu, Tutsi and Twa) in order to prevent a future genocide and facilitate reconciliation. Over the years, these laws have been interpreted in a manner that conflates the concept of genocide ideology with any ethnic based discourse or criticism of the government. As will be explored further, the judicial mechanisms established to punish alleged genocidaires contribute to this official narrative. While it is apparent that Rwanda has legitimate reasons to adopt legal instruments to combat ‘negationism’ and division, some wonder whether the government’s suppression of ethnic identity needlessly suppresses the painful ethnic dialogue that Rwanda requires for reconciliation or even veils other, less noble policy objectives.

On March 30, 2009 the Program in Holocaust and Human Rights Studies at the Benjamin N. Cardozo School of Law held an interdisciplinary, international conference: Healing the Wounds: Speech, Identity, and Reconciliation in Rwanda. The Conference brought together an outstanding diversity of scholars, advocates, and diplomats in the fields of law, psychology, anthropology, political science, and history. The Conference, organized around the 15th anniversary of the Rwandan genocide, examined the relationship between free speech, identity formation, and reconciliation. In particular, it explored the ways in which individual and group conceptions of identity are defined, enforced and managed through the intervention of law. This report presents the proceedings and further examines, using primarily a comparative law approach, the main issues raised. It should be noted that since the conference, Rwanda has recently undertaken a review of its genocide ideology law, with a view toward its amendment.⁴

The authors chose a multi-disciplinary approach to addressing this topic. It is simply not possible to begin to understand the complex situation in Rwanda or other societies facing similar challenges through the lens of any one academic discipline. For example, a lawyer seeking to redress the harms suffered by the people in Rwanda cannot do her job if she cannot name that harm. She cannot name the harm unless she understands the myriad ways

group of persons with the same characteristics in the following manner:

1° threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred;

2° marginalizing, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading, creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred;

3° killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology.

⁴ See Rwandan Cabinet Reviews Genocide Ideology Law, *Radio France Int'l*, (Aug. 11, 2010), www.english.rfi.fr/print/39220?print=now (last visited Nov. 16, 2010).

in which harm was inflicted and continues to traumatize its victims. For that she needs the insight of other disciplines, such as psychology, anthropology, history, and politics to help give meaning and context to both the immense suffering and what is needed to repair that suffering for individuals and the Rwandan society as a whole.

- To explore the multifarious issues subsumed in the context of reconciliation after genocide, the conference and this report sought to address specific questions including:
- What is reconciliation? Is it a process, a goal, or even a misnomer for social co-existence after genocide?
- What role do cultural and national identities play in reconciliation?
- Which identities now seem most salient in contemporary Rwanda?
- What normative role should the law play in shaping individual and collective identities?
- When are governments justified in limiting freedom of speech in the interests of other societal values?
- Is it ever justified for the law to place limits on historical debate?
- If so, can such restrictions fuel future conflict rather than diminish its likelihood?
- What role can domestic and international criminal law play in building identities and fostering reconciliation?

The report is divided into four sections. Section One presents a summary of the conference, *Healing the Wounds: Speech, Identity, and Reconciliation in Rwanda*. Section Two provides an examination of the main themes raised at the conference, incorporating further research and policy developments. Section Three provides a comparative study of legislation promulgated in countries which, like Rwanda, seek to deal with issues of genocide denial, divisionism, and the dignity of genocide victims. Section Four incorporates the preceding sections into specific and general recommendations targeting a wide range of actors.

I. Conference Proceedings Summary

Introduction

Sheri P. Rosenberg, Benjamin N. Cardozo School of Law

In April of 1994 genocide took place in Rwanda taking the lives of 800,000 to 1 million Tutsis and moderate Hutus. Rwanda was a country of approximately 7 million. To slaughter that number of people in that short period of time - utilizing rudimentary tools such as machetes - requires an enormous amount of public participation. Essentially, neighborhoods rose up and people literally slaughtered their neighbors. When the genocide was over Rwanda began the enormous task of rebuilding. Many Tutsi exiles from Uganda and elsewhere returned while many Hutus fled to the Democratic Republic of Congo.

The Rwandan government imprisoned hundreds of thousands of alleged genocidaires. After a period of time it began releasing these alleged perpetrators back into their communities. Now, the perpetrators live side-by-side with survivors who saw their families - husbands, children, mothers - slaughtered by that very same person who now lives approximately two doors away. To deal with this overwhelming situation the government instituted a unique form of trial known as the Gacaca system. You will hear more about this throughout the day, but essentially it is a local form of justice where victims directly confront the accused in front of the community and a panel of lay judges.

Building on my areas of research and work, last January Dean David Rudenstine, Amy Sugin, head of International programs, sixteen Cardozo students and myself traveled to Rwanda and Tanzania to study issues of justice and reconciliation in Rwanda. We remain grateful to members of the Rwandan government and Rwandan civil society who graciously embraced us and gave their time to meet with us and answer our questions.

The trip was transformative, as we soaked in the absolute beauty of the country, its rolling hills, and exuberant spirit. Upon our return, we continued to think, to research and to write about Rwanda. We also have established a relationship with our colleagues, both professors and students, at the University of Butare Law School.

One challenge in Rwanda, of the many we encountered, is the question of how a State goes about re-identifying itself - if you will- after a war and a genocide that literally tore apart the Rwandan people, and divided them physically, spiritually and mentally by ethnic groups,

by language, by status as a returnee after the genocide, by status as perpetrator and survivor, and so on. As we all know, identities are multi-faceted. We all define ourselves and are defined by others in many different ways. In this very complex web of genocide and identity structures, how can a State, and the individuals that make up the State, even begin to define itself in a way that makes co-existence, reconciliation and governance possible? Can the State's efforts to shape a Rwandan civic identity actually mean something to the people who either perpetrated the

genocide, survived it or returned from abroad thereafter? Can people honestly begin to see themselves as one Rwandan people, rather than Hutus, Tutsis or Twa? Or as victims and survivors, which generally translate into Tutsi and Hutu respectively? Or should they even try to toss out ethnic affiliations in the name of a Rwandan identity? Can the two identities co-exist? What role does the law play in this process?

The Rwandan government has taken on this challenge. As seen by its name, the **Government of Unity and Reconciliation**, is working to recreate the Rwandan state by establishing the Ministry of Unity and Reconciliation and the National Commission for the Fight against Genocide, as well as numerous programs at all levels of society to encourage unity and reconciliation. The programs include, the Gacaca and the Ingandos, a kind of solidarity camp established for various populations to attend, which are meant to facilitate the reconciliation process.

A cornerstone of the government's attempts at reconciliation appears to be its interest in creating a Rwandan identity that overcomes the ethnic categories of the past: Hutu, Tutsi and Twa. Toward this goal, the government has promulgated laws dealing with discrimination, sectarianism, and the punishment of genocide ideology.

While we heard quite a bit about 'genocide ideology' while we were in Rwanda, no official we asked could define it precisely, and a Rwandan Minister described it as a "spirit." The 2008 law on genocide ideology gives some content to the term, but it is quite broad, leaving room for arbitrary application.

During the course of the day, we will explore the interplay of these laws and identity and their relationship to reconciliation. This is an intentionally inter-disciplinary endeavor. It is simply not possible to begin to understanding the complex situation in Rwanda through the lens of any one discipline. For example, a legal academic seeking to redress the harms suffered by the people in Rwanda cannot do her job if she cannot name that harm. And we cannot name the harm unless we understand the myriad ways harm was inflicted and continues to traumatize its victims. For that we need other disciplines, such as psychology, anthropology, history, politics to help give meaning and context to both the immense suffering and what is needed to repair that suffering for individuals and the Rwandan society as a whole.

Though fluid terms such as law, identity and reconciliation defy strict categorization, we will attempt to cabin the discussions in the following way: First we explore core concepts of reconciliation after identity-based conflicts, taking account of what victims/survivors themselves view as necessary to healing after mass trauma, a deeper understanding of the concept of reconciliation, and find ways that transitional justice needs to transition.

Our second panel addresses questions of whether it is justified for the law to place limits on historical debates. When are governments justified in limiting freedom of speech in the interest of other societal values, such as preventing genocide in a country that has

just experienced genocide?

Our third panel will focus specifically on the reconciliation process in Rwanda. The participants will look at a very localized level to reveal how daily life is unfolding and isolate which identities now seem salient. The panel will also look to the historical, political and legal context to reveal the ways in which each of these aspects are contributing to the reconciliation process in Rwanda.

Finally, in light of what we have learned during the fourth panel the participants will provide recommendations for moving forward in areas such as women's participation, improvement of legal processes, and the place of multiple discourses in society.

While we may get into relatively high levels of abstraction during the day in order to bear down on some of these questions and seek policy prescriptions, in the end, this conference is aimed at commemorating the victims of the Rwandan genocide. They are always at the center of our thoughts.

Alfred Ndararasa, Second Consular, Rwandan Mission to the UN

Alfred Ndararasa expressed his gratitude that so many people are eager to contribute to a safe and peaceful Rwanda, and pointed out the difficulties the Rwandan government faces in dealing with the aftermath of the 1994 genocide.

Ndararasa stressed that the frenzy and brutality of the killings in 1994 Rwanda will always be incomprehensible, and that countless stories are yet to be told about the inhumanity of Rwandans against their neighbors, relatives, co-workers, old women and children. Ndararasa argued that the Belgian Protectorate entrenched ethnic identities and divisions that climaxed into the 1994 genocide. However, according to Ndararasa, it remains extremely difficult to explain why a mass of people can be driven to such insanity.

Ndararasa explained that it was very difficult to set up a functioning government in the aftermath of the genocide. There was no real infrastructure, and not enough lawyers or other responsible leaders. He also stressed that reconciliation is difficult in Rwanda, as victims and perpetrators are often neighbors, but that reconciliation is the only choice Rwanda has. According to Ndararasa, differences in Rwanda need to be exploited for the common good, which is what the current government attempts to do. He explained that the current government undertakes deliberate reforms to improve the general living conditions for Rwandans. These reforms take place in the educational sector, they address economic challenges in order to reduce poverty, and they intend to improve the accountability of political leaders to the public. Ndararasa emphasized that Rwandans need to take responsibility for themselves. What is important is a genuine attempt to seek solutions based on Rwandan cultural values. Finally, Ndararasa argued that there are dangerous tendencies in Rwandan society to deny and negate the genocide. Ndararasa asserted that

this is a common reaction in post-genocide societies.

Panel I: The Challenges of Reconciliation after Identity-Based Conflict

Moderator:

Jens Meierhenrich (Harvard University)

Panelists:

Yael Danieli (Director, Group Project for Holocaust Survivors and Their Children)

Mark Drumbl (Washington and Lee University School of Law)

Jacqueline Murekatete (Miracle Corners of the World, Rwandan Survivor)

Harvey Weinstein (University of California, Berkeley)

To provide a foundation for the day's proceedings, the first panel examined broadly the challenges of reconciliation after identity-based conflict. The panelists discussed different approaches to, and frameworks for, managing the complexities of reconciliation processes, including the role of law in implementing and facilitating reconciliation processes, the importance of addressing the needs of victims and survivors, and the salience of current conceptions of reconciliation. In general, the panelists agreed that there is no universal definition of reconciliation, making it difficult to measure reconciliation in any meaningful way. Yael Danieli and Harvey Weinstein argued that multidisciplinary and multidimensional approaches are needed to promote reconciliation and social reconstruction in shattered societies. Weinstein also raised doubts about the usefulness of the very concept of reconciliation. Mark Drumbl focused on whether international criminal law and atrocity trials contribute to reconciliation efforts after mass atrocities. Jacqueline Murekatete, herself a genocide survivor, emphasized that addressing the needs of victims and survivors is crucial for the success of reconciliation processes; a point that all panelists agreed upon.

Jens Meierhenrich introduced the panelists and the topic of reconciliation. Meierhenrich noted the conceptual difficulties inherent in the concept of reconciliation, such as determining the limits and permits of reconciliation, the desirability of reconciliation, and the challenge in pursuing such a policy while ensuring that it does not lead to a version of coercion that expects too much of victims of mass violence. Lastly, Meierhenrich cautioned that despite these difficulties, one should not assume that reconciliation is impossible or being pursued incorrectly by the Rwandan government.

Yael Danieli stressed in her remarks that achieving reconciliation after massive trauma is an extremely difficult and complex process. Her thesis was that massive trauma causes

such diverse and complex destructions that only a multidimensional, multidisciplinary, and integrated framework is capable of adequately describing and addressing the problems. Moreover, she strongly emphasized that it is crucially important to carefully consider the views and needs of victims and survivors of mass atrocities. According to Danieli, social support and the opportunity to articulate needs are important to victims coping with traumatic stress, whereas judicial remedies can support healing processes only to a limited extent – in fact, judicial approaches might actually contribute to worsening traumas if they are executed poorly.

Danieli therefore suggested a comprehensive framework for dealing with massive trauma, which consists of 4 dimensions: individual, societal, national, and international. She stressed that the various dimensions of this framework should complement one another. The weight accorded to each element should vary according to the specific needs found in different situations and cultures. First, the individual dimension deals with the re-establishment of equality in respect of the victims' values, power, and dignity. This can be accomplished through compensation, restitution, rehabilitation, and commemoration. Second, the societal dimension deals with relieving the victims' stigmatization and separation from society. Such problems can be addressed through commemoration, memorials to heroism, empowerment, and education. Third, on a national level it is important to repair the nation's ability to provide and maintain equality under law and to ensure justice. This is accomplished through prosecutions, apology, securing public records, education, creating national mechanisms for monitoring human rights abuses, conflict resolution, and preventive interventions. Finally, on the international level, the commitment of the international community to combat impunity, to provide and maintain equality under law, and to promote redress has to be asserted. This can be achieved through the creation of ad hoc tribunals as well as permanent mechanisms for prosecution, securing public records, education, creating international mechanisms for monitoring human rights abuses, conflict resolution including the Responsibility to Protect, and preventive interventions. Danieli's main conclusion was that it is only possible to adequately address the complex challenges of reconciliation after identity-based conflict by dealing with these four dimensions simultaneously and in a complementary fashion.

Mark Drumbl approached issues of reconciliation by looking into the intersections between international criminal law, transitional justice, and reconciliation. By discussing developments, objectives, and challenges of international criminal law, he expressed skepticism about the ability of international criminal law to effectively contribute to reconciliation. His main argument was that atrocity trials contribute to the consolidation of the normative value of law, but not equally to reconciliation and other purposes that international criminal law claims to serve. This is especially true since international criminal justice does not adequately address the collective nature of crimes such as genocide.

Drumbl identified four major developments in international criminal law: institution

building, increased judicial and jurisprudential output, the creation of epistemic communities, and political management. Regarding institution building, he noted that several international criminal law institutions have emerged over the past years: the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, hybrid tribunals, national tribunals with international expertise, and the International Criminal Court. Another major development in the field, he explained, is the judicial and jurisprudential output of these institutions. So far, 70 offenders have been prosecuted by the ICTY, 35 have been convicted by the ICTR, the Special Court of Sierra Leone has convicted 8 offenders, and the ICC currently deals with 4 situations. According to Drumbl, the emergence of an epistemic community is another important development. International prosecutions and international law have prodded national jurisdictions to intentionally pursue atrocity trials as one mechanism of post-conflict transitions. In Rwanda alone, at least 10,000 individuals have come before specialized chambers, with many more appearing before the neo-traditional Gacaca proceedings. Universal jurisdiction has emerged and attracted considerable attention. An entire generation of young and mid-stream lawyers have become professionals and specialists in international criminal tribunals. Thus, a transnational and networked epistemic community of international criminal lawyers has emerged. Finally, it is important to recognize the political management role of international criminal institutions that expands well beyond the law itself. International criminal law affects domestic political structures, and promotes the rule of law and transparency. Furthermore, international criminal law might contribute to hollow out reprehensible governments, and is sometimes even used by governments to consolidate their power and stigmatize opponents.

Drumbl, however, raised questions about the ability of international criminal law to promote peace, humanitarian justice, and ultimately reconciliation. He pointed out that the goals that international criminal law ascribes to itself are retribution, deterrence, reconciliation, truth-telling, rehabilitation, re-integration, and the consolidation of the normative value of law. He raised doubts about the capacity of international criminal law to achieve any of those goals, with the exception of consolidating the normative value of the law. In particular, he expressed skepticism about the ability of international criminal law to promote reconciliation, especially when reconciliation is an indeterminate concept. There is no universal definition of reconciliation that could be measured, monitored, or determined.

Hence, Drumbl identified four challenges that international criminal law has to grapple with in order to strengthen its impact on reconciliation processes. First, international criminal law has to go through a process of re-nationalization, meaning that the law must move from technique to context. International criminal law should be better contextualized by taking into consideration local circumstances, including traditional approaches to dispute resolution and integrating the victims' perspectives. The challenge is for the law to revisit its relationship with the domestic in order to promote synergy and foster bottom-up input. Second, there is the challenge of diversity. International criminal law, which focuses on the

individual, does not necessarily speak to the collective nature of atrocity crimes in which the criminality, by and large, is not transgressive but conformist. Hence, other modalities of justice that may be better equipped to deal with the collective nature of atrocity crimes should be considered, like truth commissions, memorialization, public inquiries, traditional re-integrative practices, and community service. Third, scrutiny is important, meaning that the law must move from faith to science. Finally, truth is an important challenge, meaning that the law must move from convenience to discomfort. By prosecuting select individuals, the systematic nature of atrocity crimes – which includes state behavior, the actions of international organizations, transnational capital, and colonial legacies amongst other things - is hidden from view. Thus, elements that provide the foundation for massive and widespread atrocity crimes are neglected. By blaming a few individuals for the murder of scores of people, we assuage ourselves in a convenient truth. Drumbl concluded by saying that there is still very little known about the relationship between atrocity trials and reconciliation, but he is deeply skeptical that international criminal law is currently capable of effectively promoting reconciliation.

Jacqueline Murekatete initially pointed out that, although it has been 15 years since the Rwandan genocide, reconciliation is still a very difficult and sensitive topic to discuss, as the wounds of the genocide are still very fresh for many genocide victims and survivors. Nevertheless, she stressed that reconciliation is certainly something that needs to be discussed in the Rwandan context, as Hutus and Tutsis have to learn to peacefully coexist.

Murekatete stressed that reconciliation is a human process that requires time and has to happen on an individual level, rather than being initiated by the State or even the international community. More attention should be given to the perspective of victims and survivors. She explained that many victims are in search of acknowledgement for their trauma, looking for an apology from the perpetrators. Many survivors still live a life of fear and isolation, thus it is important to re-establish and even elevate the human worth of survivors in society. According to Murekatete, addressing the needs of victims and survivors is crucial for reconciliation to be successful in Rwanda.

Murekatete pointed out that the Rwandan genocide did not happen in a vacuum, but had much precedence. She identified the arrival of colonial powers and the subsequent colonial era as the root cause of the 1994 genocide. Murekatete therefore supported the Rwandan government's dedication to unity, peace, and reconciliation. She stressed the importance of fighting genocide ideology, revisionism and 'negationism' in Rwanda and welcomed steps like the removal of the country's ID system. She emphasized that Rwandans have to learn to peacefully coexist and to see themselves as Rwandans, rather than as Hutus or Tutsis. In conclusion, she reaffirmed that taking the views of victims and survivors seriously as well as promoting unity and a common identity are important factors in reconciliation processes.

Harvey Weinstein's remarks questioned the utility of the very concept of reconciliation, advocating an ecological framework for the reconstruction of societies, which includes

insights from different disciplinary fields and places in society. In the first instance, Weinstein suggested that we should confront the mythology of closure and reconciliation.

Weinstein called the concept of reconciliation a dead end, which has only taken us on a detour away from things that really need to be done in order to rebuild shattered societies, particularly in the long term. He is highly skeptical whether reconciliation and closure are feasible goals to be achieved in post-conflict societies. According to Weinstein, emphasizing the goal of reconciliation only raises the expectation of survivors that their lives can be improved in the short term; that survivors, victims and perpetrators can all easily live together within a common social framework. Given the schisms that still exist in Rwanda, the goal of reconciliation can only be pursued as a long-term strategy and must be based on collective identity and collective memory. Charismatic politicians with the ability to mobilize people can always initiate renewed discord and conflict. And on an individual level, feelings, thoughts, and memories can always come back. Weinstein stressed that one thing people tend to forget is that social breakdown usually occurs over a fairly long period of time. In most cases, clear episodes of violence, political instability, ethnic violence, etc., precede mass atrocities. Likewise, if reconciliation is indeed a viable option, then it is only so in the long term.

Finally, he presented results of research in post-genocide countries, revealing that justice and reconciliation do not seem to be high priorities in these countries. He stressed that we need to pay more attention to what elements are really needed for social reconstruction after mass atrocities, for instance the promotion of empathy. A complex ecological framework is needed which builds upon and integrates insights from different academic disciplines and social sectors.

Panel II: Freedom of Speech and the Legislation of Memory

Moderator:

Edwin Baker (University of Pennsylvania Law School)

Panelists:

Jacqueline Bakamurera (Assistant Attorney General in Rwanda)

Susan Benesch (Georgetown University Law Center)

Peter Molnar (Central European University)

Lars Waldorf (University of London)

Building on the previous conceptual debate, this panel explored the relationship between

law and the formation of identity in Rwanda. In particular, the panelists examined the 2008 Rwandan law on genocide ideology and the related laws on negationism, sectarianism, and revisionism. They further addressed the following questions: Do these legal regulations help foster reconciliation in Rwanda? Can legal restrictions on speech ever be justified? How should one deal with the problems of political abuse of legal provisions regarding speech? Jacqueline Bakamurera identified Rwanda's colonial legacy as the root cause of ethnic conflict and the 1994 genocide, and supports the law on genocide ideology as important to the reconciliation process. Lars Waldorf was slightly more skeptical of the genocide ideology law for defining the crime of genocide ideology too broadly. While Waldorf clearly stated that it is legitimate to have restrictions on speech in a place like Rwanda - a point that all panelists agreed upon - he identified some negative consequences of the vaguely defined Rwandan laws. Peter Molnar tried to establish a compromise between speech restrictions and open discourse, by arguing that prohibitions of speech should be justified on the basis of public danger arguments. Susan Benesch criticized international criminal law regarding speech, arguing that it is incapable of determining which speech should be punishable.

Edwin Baker introduced the panel by asking whether legislation suppressing speech or press freedom is ever an effective or progressive way to deal with past or future problems, or, is it always counter-productive towards achieving its intended goals? He noted that the idea of free speech may clash with legislation that crafts, constructs, or reinforces memory. Baker emphasized the value of memory, as it enables us to honor and learn from the past. However, he noted that at the same time, it is important to create new identities and relationships as a way to move beyond the past.

Jacqueline Bakamurera identified the ethnic differences created by the colonial powers as the root cause of the 1994 genocide, and praised the Gacaca system as well as the law on genocide ideology as important steps in the Rwandan reconciliation process.

She argued that before the arrival of colonial powers, the Rwandan people lived together in harmony. Economically, Rwandans were divided into three classes, but regarding ethnicity they saw themselves as one people. According to Bakamurera, the colonial powers introduced ethnic differences to Rwanda, encouraging ethnicity-based discrimination. The social distinctions that were manufactured during the colonial era led to ethnic tensions that finally resulted in the 1994 genocide. Bakamurera stressed that the genocide left many people – survivors as well as perpetrators – with massive traumas and conflicting ideas about the origins of the genocide. In this context, the Rwandan government started to create a new era in Rwandan history, one that would move beyond the legacies of the colonial era. The government is now trying to remove discrimination and to promote reconciliation, in part through restricting genocidal speech. Bakamurera argued that the law on genocidal speech is an important step contributing to reconciliation in Rwanda, and important for building a common future for Rwandans instead of remaining in a state of trauma.

Susan Benesch critiqued international criminal law regarding incitement to genocide and

hate speech. She argued that the ICTR fails to clearly distinguish between hate speech and incitement to genocide, and questioned whether the law is equipped to determine which types of speech should be punishable.

Benesch explained that before the Rwandan genocide there was scant international criminal law jurisprudence on speech. The Nuremberg Tribunal tried two cases regarding speech, but thereafter there were no developments for more than 50 years until the ICTR handed down the world's first conviction for incitement of genocide in the Akayesu Case in 1998. The ICTR has produced most of the existing international criminal law on speech through numerous indictments and prosecutions. In fact, the ICTR has made speech a key factor of its jurisprudence in general. From the international criminal law perspective, Benesch stated, the idea that poisonous speech helped to bring about the Rwandan genocide has become a core component of the Rwandan genocide narrative.

According to Benesch, however, this narrative is paradoxical in two ways. First, some research conducted since the genocide questions whether speech really played such an important role in catalyzing the genocide. The ICTR was surely correct that RTLM and the newspaper Kangura bore messages of prejudice and fear, but some credible doubts have been raised as to whether those messages did indeed pave the way for genocide to happen. Secondly, the ICTR never needed to establish causation regarding the role of speech in the Rwandan genocide. The crime of incitement to genocide is a so-called 'inchoate' crime, meaning a separate crime that promotes the commission of another crime. The legal reasoning behind the concept of inchoate crimes is precisely to prosecute people for one crime in order to prevent the commission of another and possibly more serious crime. From a legal perspective, to prove that somebody committed incitement to genocide does not necessitate establishing that speech actually caused anyone to commit genocidal acts. Thus, by making speech such a key factor in the genocide narrative, the ICTR unwittingly encouraged the Rwandan government to restrict speech.

Moreover, Benesch argued that the ICTR confused incitement to genocide with hate speech. While incitement to genocide is a crime under international law, codified for the first time by the 1948 Genocide Convention, hate speech is 'only' criminalized under domestic law and in different ways in different countries. There certainly are cases in the Rwandan context that clearly constitute the crime of incitement to genocide. Benesch stressed, however, that it is often extremely difficult to determine incitement to genocide, as social breakdown happens gradually, so that inflammatory speech with catalytic effects must occur well before the actual genocide. Benesch concluded by stating that law is a very clumsy and inadequate instrument for deciding which speech should be criminalized and punishable.

Peter Molnar argued that a 'public danger' argument for regulating speech in Rwanda could help to reconcile the tension between the urge to regulate speech, on the one hand, and open discourse on the genocide and Rwanda's past, on the other.

Molnar made clear that the restriction of public discourse by hate speech laws and the prohibition of sectarianism and genocide ideology are highly controversial issues. According to Molnar, the Committee to Protect Journalists repeatedly criticized the Rwandan government for using the content-based laws to, in fact, suppress political dissent. Moreover, Molnar pointed out that extensive restrictions on Rwandan public discourse, which often prevent people from freely articulating their political opinions, are not helping reconciliation efforts. Unbalanced restrictions of public speech do not contribute to building a healthier society, but might turn out to interfere with such efforts. He stated that empowering survivors and victims by providing enough space for public discussions is crucially important for reconciliation to be successful. However, Molnar also admitted that some restrictions on the Rwandan public discourse are necessary and appropriate.

Hence, Molnar suggested adding another element to the current system of policies and laws regarding speech restrictions, namely a 'public danger' argument. Molnar recommended that restrictions on the public discourse should be justified on the basis that certain speech causes immediate danger to Rwandan society. He stressed that such a danger-related test might help reduce the abuse of legal regulations for political purposes. According to Molnar, a public danger argument could pave the way for a compromise that would keep the public discourse restricted, but would allow Rwandan society to have more open discussions on the genocide at the same time. He particularly emphasized that the education system and educational institutions should be allowed to engage in more open discourse, as a lack of discussion and discourse at that level might prove to be extremely dangerous.

Lars Waldorf stressed the urgent need to have strict laws countering hate speech in a place like Rwanda, but critiqued the Rwandan law on genocide ideology for defining the crime too broadly. He argued that the punishment of genocide ideology should be reserved for a narrow and well-defined crime, as defining genocide ideology broadly has several negative consequences, not only in terms of the potential for political abuse, but also regarding reconciliation efforts and the ability to successfully prosecute genocide suspects in Rwanda.

Waldorf stressed that it is definitely important to have strict hate speech laws in Rwanda, pointing out that there are still genocidaires living amongst survivors and victims. He gave the example of a grenade thrown at the main genocide memorial to demonstrate that there are still unresolved hostile tendencies in Rwandan society. Moreover, 'negationist' propaganda is being preached and pumped out by genocidaires across the border in Eastern Congo, in trials of the ICTR, and by Rwandan exile groups based in Europe. Hence, the Rwandan government has a legitimate reason to adopt several legal instruments to combat negationism, revisionism, and genocide ideology. The problem, however, is that genocide ideology became a catch-all phrase. In 2004, a parliamentary commission issued a report denouncing BBC, Voice of America, and numerous Christian churches as conduits of genocide ideology. The commission also accused Care International, Norwegians

People Aid, and the development arm of the Irish Catholic Churches of “sowing division within the Rwandan population.” Waldorf further explained that a report of a special commission created by the Senate examining the causes and cures for genocide ideology defined genocide ideology very broadly. The report also included what they termed political broadsides such as saying that Rwanda is a totalitarian regime, stating that the government makes accusations of divisionism against political opponents and civil society associations. Thus, the Senate report conflated the concept of genocide ideology with any ethnic-based discourse or political criticism. According to Waldorf, any mention of human rights abuses by the current government would constitute genocide ideology. The law on genocide ideology, which was formally passed in 2008, defines genocide ideology very broadly, opening it to political manipulation. Article 2 and Article 3 of the law are very revealing in this regard.

Waldorf went on to argue that there are at least four negative consequences from defining genocide ideology broadly. First, genocide suspects cannot be transferred for prosecution from the ICTR in Arusha to Rwanda, as they would not be able to receive a fair trial. The primary concern has been that potential defense witnesses might refuse to testify for fear of being accused of genocide ideology. The ICTR already ruled against proposed transfers arguing that the possibility of accusations of genocide ideology would impede a fair trial. Second, defining genocide ideology broadly to encompass activities of human rights activists like Alison de Forge trivializes the fight against genocide ideology. Third, a broad definition reinforces Rwanda’s culture of accusatory practices, and denunciations of genocide ideology engender fear and mistrust amongst the population. Finally, accusations of genocide ideology against some of the most prominent Hutu opponents of the genocide as well as against some of the most well-known Hutu rescuers are counter-productive for building a foundation for long-term coexistence in Rwanda. Hence, Lars Waldorf advocated defining the crime of genocide ideology narrowly and to reserve punishment for this narrowly defined crime.

Terry George, screenwriter and director of the film *Hotel Rwanda*, shared both his professional and personal experience with ethnic conflict and reconciliation. He spoke generally about how Africa has gone from being totally ignored, to the gradual increase in media exposure following various conflicts on the continent. He highlighted the utility of boiling down the various types of internal and external conflicts that the Rwandan genocide forced individuals to encounter in motivating outsiders to begin addressing, considering, and comprehending the true nature of what happened.

George also spoke about his personal experience with reconciliation growing up in Northern Ireland, noting that 20 years ago it seemed to have less of a chance at peaceful co-existence than Israel and Palestine, but suggested that the contemporary structures in place are enabling progress. Although hatred and resentment still exist, and are not likely to go away any time soon, the right leadership could make it possible to move forward regardless. Part of the key to establishing this leadership came from recognizing the differences between

the competing cultures of the British, the Catholics, and the Protestants. He pointed to South Africa as an example of a nation where the victor allowed concessions, rather than imposing absolute dominance, in order to foster reconciliation.

During a question and answer session, George addressed concerns from a Rwandan citizen that in sharing the story of Paul Rusesabinga (the hero of Hotel Rwanda) the film was re-writing history. The Rwandan citizen was also concerned that by sharing his experiences, Rusesabinga was essentially continuing the same ideology that created the conflict. George denounced the idea that Rusesabinga sharing his experiences and ideas was dangerous, and argued that the impact of his story being shared in the United States would have a minimal effect on the situation in Rwanda, despite any media attention it might receive.

The Rwandan speaker said that although he appreciated the story, he didn't agree with Rusesabinga's account of what had happened at the des Mille Collines hotel. George urged the speaker to focus on the goodwill and attention for Rwanda that the film brought, instead of Rusesabinga's account of the story.

On the film's possible shortcomings, George offered the following: "Feature films about non-fiction events are the cognac of a story. You distill it down, you distill it down, you distill it down to its strongest and purest form, and you hope that you keep as much of the reality and the truth as you possibly can."

Panel III: Constructing Post-Genocide Identity in Rwanda

Moderator:

Joyce Apsel (New York University)

Panelists:

Nigel Eltringham (University of Sussex)

Lee Ann Fuji (George Washington University)

Timothy Longman (Vassar College)

Catharine Newbury (Smith College)

Following the discussion of legal restrictions on expression promulgated by the Rwandan government to overcome ethnic divisions and thereby promote unity and reconciliation, the third panel explored the social, political, and historical ways in which identity formation occurs in general, and in Rwanda in particular. The panelists touched on the complexity of Rwandan identities, the role of ethnicity, the political dimensions of identity construction, and how individual and group conceptions of identity are defined and enforced through the

intervention of law. Nigel Eltringham made the point that ethnicity can be an important element in identity construction in post-genocide Rwanda, if Rwandans are allowed to create a psychological narrative that refers to ethnicity in a fair and benign way. Lee Ann Fuji stressed that identity is, in fact, a political category that revolves around power relations. Timothy Longman commented on the linkage between identity, ethnicity, and criminal justice, arguing that the Rwandan way of pursuing criminal justice reinforces the role of ethnicity in identity construction. Finally, Catharine Newbury argued that historically identities in Rwanda have fundamentally been shaped by factors other than ethnicity; for instance rural/urban or rich/poor.

Joyce Apsel noted in her introductory remarks that through all these discussions one cannot help but think about the ways in which genocide and mass atrocity cause transformations and shifts in old identities, and the creation of new identities. Apsel argued that before discussing post-genocide identity in Rwanda, one must consider a few threshold questions: What is reconciliation? What does the term “post-genocide” really mean? What do such terms mean in light of the spillover effects of genocide, and the ongoing formation and shifting of identities after genocide has occurred? Apsel noted that the third panel would explore the context of identity from historical identity, the role of peasants, and the positive and negative aspects of the persistence of identity. She highlighted the fact that “there are a multiplicity of identities being formed, and a multiplicity of narratives, on the local, national, regional, and international levels.”

Nigel Eltringham argued that reference to ethnicity is an important element of a dialogue with the past, which is needed in order to make sense of the present. According to Eltringham, ethnicity can play a positive role in the process of identity construction in post-genocide Rwanda, but only if there is enough space to create a psychological narrative that incorporates a benign concept of ethnicity.

Eltringham stressed that we always locate others and ourselves with reference to the past. In order to understand events or the behavior of others, we situate behavior with reference to its place in a person’s life, or to its place in the history of the social setting. In Rwanda, he highlighted, the government has demarcated an artificial and limited realm in which such a dialogue with the past is permitted. This realm consists of specific physical sites, specialized chambers, Gacaca hearings, or annual commemorations. He further explained that legal regulations prevent and proscribe reference to ethnicity outside of those specific sites. According to Eltringham, however, Rwandans still locate themselves and others by reference to ethnicity. People literally talk about ethnicity all the time in Rwanda. However, instead of promoting a healthy dialogue with the past - which includes ethnicity - the Rwandan government promotes another dialogue with another past, namely the pre-colonial past. This pre-colonial past is outside of people’s own personal recollection. Thus, Rwandans cannot criticize this pre-colonial past on the basis of their own personal experiences. However, the past never exists independently of our relationship with it.

According to Eltringham, it is a myth that the past is a place that exists somewhere else where one can simply return. There are not two worlds – the world of past happenings and the world of our present knowledge of those events -, rather there is only one world, the world of present experience. The present has its own preoccupations, struggles, and interests, which revise the way the past appears to us.

Eltringham went on to argue that in Rwanda, there are many people who are trying to revise their relationship with the past in order to resituate ethnicity in ways that are not necessarily harmful. For him, this is not genocide denial, or revisionism, or ‘negationism,’ but simply an ongoing dialogue with the past, in which the Rwandan government is engaged as well. He stressed that people also create psychological truth, not just historical truth. These psychological truths are important for the needs of the present, regardless of whether they actually reflect reality. What is important, however, is that ethnicity is present in this dialogue with the past - the creation of a new psychological reality -, if only so that ethnicity can then be underplayed. Rather than seeing ethnicity as a static foreign country, one should welcome or at least acknowledge the ability of people to fabricate a better past where ethnicity had only a benign character. According to Eltringham, this could enable Rwandans to include ethnicity as one element in a complex composition of identity, including gender, age, occupation, origin and so forth. He argued that the past always helps people; it functions as a tool to assist people in understanding their present situation and to make informed choices for their future. For Eltringham, this important dialogue with the past, which helps Rwandans make sense of their present situation, requires reference to ethnicity. The Rwandan government, however, appears to only see negative potential in engaging ethnicity and thus prescribes any reference to it. Eltringham argued that as the Rwandan government tries to make connections to Rwanda’s pre-colonial past, it is not keen on people seeing positive ethnic developments prior to 1990, partly because resituating ethnicity as something that is not historically maligned involves placing the main responsibility for the genocide on the shoulders of the political elites who were in Kigali at the time of incitement and genocide. According to Eltringham, that is something that the current government does not want to happen.

Lee Ann Fuji argued that identity is a political concept that revolves around questions of power. According to Fuji, identities in Rwanda are more complex than they are often presented, going well beyond categories of victims/perpetrators or Tutsi/Hutu. Fuji’s central point was that identities are deeply political. Therefore, the identity categories that emanated from the Rwandan genocide – for instance victim and perpetrator - are political as well. Through telling stories about personal encounters in Rwanda, Fuji made the case that it is just too simple to explain Rwandan identities only by reference to Hutu/Perpetrator and Tutsi/Victim. She stressed that Tutsis are not necessarily privileged in post-genocide Rwanda. Some Tutsis suffer from discrimination by other Tutsis, and some Tutsis actually became perpetrators after the genocide ended, simply because they had the power to do so. Fuji explained that power and violence are still heavily intertwined, and

that it is easy for victims to become perpetrators when they get into positions of power. At the same time, she stressed, not all Hutus can or should be classified as perpetrators, as some Hutus were victims as well. In general Rwandans and their identities are not as monolithic as outsiders often think.

The Rwandan government, however, defines 'victim' in a way that precludes the possibility that there are also Hutu victims of the genocide. Moreover, the victim category is normatively loaded, as there is an implicit assumption of innocence. Since only Tutsis are classified as victims, only Tutsis can be called innocent, ignoring the fact that victims can also become perpetrators. Fuji stressed that this uncomfortable reality reminds us that the categories of victims and perpetrators are by no means mutually exclusive. People can inhabit both categories at once. Drawing simple conclusions means ignoring the complexities of identities and realities. Fuji further argued that most returnees belong to a modern and well-educated social class that profits the most from the direction Rwanda has taken. The returnees share a common history that is far different from those of Rwandans who never left. Fuji argued that belonging to this political and cultural class shapes identity more than any ethnic dimensions. According to Fuji, therefore, complexity and politics should be at the heart of the discussion about Rwandan identities.

Timothy Longman addressed the relationship between ethnicity, identity, and the Rwandan justice system. He argued that the post-genocide justice system in Rwanda contributes to reinforcing ethnic identities, rather than to eliminating ethnicity from identity discourses.

Longman started his presentation by pointing out that to talk about ethnicity in Rwanda is not to deny the full impact of genocide; it is not to argue in support of violence; and it is not to completely reject the current government's program. By telling the personal stories of some Rwandans, Longman highlighted the degree to which people in Rwanda have had different experiences with the genocide that affect how they now relate to identity. Because of their particular experiences, some Hutus feel that they are persecuted in contemporary Rwanda, simply because they are Hutu. Other Hutus, however, feel that the current regime is open to many different interests. Likewise with the genocide survivors; some survivors feel that the current government is defending their interests, while others feel that it does not represent them at all. According to Longman, this highlights the importance of the past in constructing identity, and the diversity of identities in the Rwandan context.

Longman went on to argue that one of the purposes of using legal mechanisms in transitional justice processes is to help individualize guilt. Through mechanisms of international criminal justice it is possible to identify and prosecute selected Hutus that are guilty of genocide crimes, rather than holding all Hutus responsible for the genocide. He pointed out, however, that the decision to hold so many people accountable for the Rwandan genocide has actually had the opposite effect. Only genocide crimes can be tried before the Gacaca and domestic genocide courts. Genocide, however, means a crime that was committed specifically because of someone's identity. Thus, the aforementioned courts only

prosecute crimes that were committed by one ethnic group against another. The Rwandan government decided to hold people accountable for genocide even in case of minor crimes; for instance, even property crimes were tied to genocide. At the same time, the Rwandan government decided that the Gacaca courts as well as the special genocide courts cannot deal with crimes that were committed by the Rwanda Patriotic Front. Longman explained that even the smallest crimes committed by Hutus against Tutsis are being tried in these courts, whereas severe crimes committed by Tutsis against Hutus are not. Some government officials said that two million people, in particular Hutu men, should have been put on trial. The assumption is that virtually all Hutu are guilty of genocide crimes. Placing a general cloud of guilt on all Hutus leads to a collectivization of guilt, which is reinforced by the way 'justice' is being pursued and trials are being run.

According to Longman, all of the above contributes to keeping ethnicity alive for many people in Rwanda. If you are a Hutu, you have to live in fear of being accused of genocide crimes, because there is an implicit assumption of guilt. Instead of removing ethnicity as a key factor in the lives of Rwandans, the Rwandan justice system actually helps to reinforce notions of ethnic difference, reinforcing the Hutu/Tutsi divide and perpetuating ethnic-based decision making.

Catharine Newbury argued that conflicts of non-ethnic nature, for instance between north/south, rural/urban, rich/poor played an important role in the lead-up to the Rwandan genocide. By examining Rwandan history, which is an important factor in shaping the identities of Rwandans, she asserted that ethnicity was not always as central to Rwandans as the official narrative would have us believe.

Newbury stressed that it is always processes that lead to genocide, not single moments. Hence, it is important to carefully study the past. Rwandans tend to interpret current events through the prism of past experiences. According to Newbury, those experiences inevitably shape people's identities in the present. Moreover, identities in Rwanda are contextual. She argued that the context of State power, institutions, and policies shapes and determines identities to a significant degree. With a changing context, identities change as well, meaning that identities such as Hutu, Tutsi, and Twa have changed over time. Also, Hutu, Tutsi, and Twa are not the only identities that have been important to Rwandans, or that are important today.

At some moments in Rwanda's history, ethnic identities have been more important than at other times. Newbury noted that in the 1980s ethnicity was not the main problem in Rwanda; there were regional rivalries between the north and the south, between people from rural areas and urban areas, and between the rich and the poor. In particular, the rural population felt that the urban elites did not take their problems seriously, which partly de-legitimized State authority. Newbury argued that the urban-rural problem was an important factor in the lead up to conflict and ultimately genocide. The genocidal events, then, contributed to deepening ethnic divisions in Rwanda explaining why

the post-genocide government seeks to address the question of ethnicity today.

Newbury, however, went on to argue that the Rwandan law on genocide ideology tends to strengthen the importance of ethnicity rather than to diminish it. There is a big danger that the laws against divisionism and genocide ideology could be used to – and in some cases already have been used to – suppress open expression of popular concern. Such an approach could well undermine legitimacy and social peace, rather than enhance it. With the problems of the rural population still not being addressed adequately, this could prove to be an explosive combination.

Panel IV: The Way Forward

Moderator:

Sheri P. Rosenberg (Benjamin N. Cardozo School of Law)

Panelists:

Noel Twagiramungu (PhD Candidate, Fletcher School, Tufts University)

Justine Uvuza (Former Rwandan Ministry of Gender and Women in Development, PhD Candidate, Newcastle University)

Scott Straus (University of Wisconsin)

The fourth panel discussed how to move forward in post-genocide Rwanda. The panelists touched on the crucial role of women in the reconciliation process, the importance of strengthening moderate voices in the political spectrum, and the potential pitfalls of the political path taken by the government currently in Rwanda. Justine Uvuza stressed that the role of women has to be strengthened, as they currently play a predominant role in Rwanda. Noel Twagiramungu emphasized the complexity of Rwandan identities and made recommendations to strengthen voices in the middle. Finally, Scott Straus expressed concern about the political dynamics in contemporary Rwanda, arguing that the laws on genocide ideology and the narrow space allowed for public debate might lead to renewed conflict in Rwanda.

Sheri Rosenberg introduced the fourth and final panel, noting that the day's discussions exemplified the complexity at the heart of these issues. She contrasted, for example, Mark Drumbl, who noted that individual criminal justice, does not quite capture the collective nature of crimes such as genocide, against another panelist who argued that the Gacaca system approximates "something like collective guilt." Rosenberg further highlighted the tensions inherent in restricting speech, emphasizing that individuals have very deeply held points of view about what speech should or should not be protected. Rosenberg suggested an

honest exchange, where different points of view could be negotiated and mediated between all interested parties. Lastly, Rosenberg highlighted the tensions that arose throughout the day around the topic of reconciliation; tension between those advocating for reconciliation, those who feel it is too soon to talk about reconciliation, and those who question the value of discussing it at all.

Justine Uvuza discussed the important role that women can play in the Rwandan reconciliation process, arguing that women have more capacity to work pragmatically towards reconciliation than men.

Uvuza also pointed out that besides the international community's efforts to address problems in post-genocide Rwanda, there are domestic options for resolving this complex and difficult situation that build on Rwandan culture and tradition. She further stressed that for Rwandans, reconciliation is not an option, but an obligation. According to Uvuza deeply entrenched distinctions between 'us' and 'others' were important prerequisites for the perpetration of genocide. Women can play a key role in overcoming this distinction between 'us' and 'others', which is at the heart of genocide ideology and which is still widespread in Rwanda. She stressed that women can help overcome the considerable amount of genocide denial, which is still articulated by perpetrators, their sympathizers, and some in the international community.

Uvuza also noted that the majority of the genocide survivors were female. In the aftermath of the genocide, women stood up and became community leaders as well as financial providers. Women were key in keeping families and communities together; they founded homes for orphans and built shelters. According to Uvuza, women also formed community-based associations that brought together survivors and the relatives of the perpetrators, even including those perpetrators who confessed and asked for forgiveness. She further stressed that women are already institutionally involved in reconciliation efforts, for instance through working for Gacaca courts, the Supreme Court, and the Rwandan Human Rights Commission. Women can play - and in many ways already do play - a special role in overcoming ethnic differences. Therefore, she recommended strengthening women's confidence in leadership and 'outspokenness.' According to Uvuza, women are better at reconciliation than men. They are also more pragmatic when they are in leadership positions, and are more willing to see the humanity in the other side. Hence, women have to be put in positions where they can have an impact on public policies. According to Uvuza, this set of public policies should include securing the basic needs of the Rwandan population; if somebody has nothing to eat or nowhere to live, it makes little sense to talk about healing trauma.

Noel Twagiramungu pointed out the complexity of identity categories in Rwanda and advocated that Rwandans acknowledge these complexities, promote debate, and strengthen the voices of those in the middle.

Twagiramungu argued that there are good arguments suggesting that contemporary African States are mere continuations of the colonial States. He stressed that in many African countries, the State is nothing more than an entity at the mercy of various degrees of international recognition. Moreover, some claim that in many African States there is nothing like a 'society' at all, but only social forces competing for State capital. In Rwanda, he explained, there is an intense struggle between Hutu and Tutsi elites, military elites (amongst others) over power, resources, and international support. Currently, there seems to be something like a Tutsi aristocracy emerging, as there is an implicitly held assumption that Tutsi power is a precondition for Tutsi survival. Another Rwandan dilemma that Twagiramungu identified can be framed in terms of democracy versus security. The political competition between Hutus and Tutsis runs along this distinction. Hutu parties advocate democracy, as democracy is based on demographics and the Hutus are the national majority. The Tutsi parties, however, strongly advocate Tutsi rule and control of security, as Tutsis are the minority and feel that they need to protect themselves from the Hutus. This is a difficult political dilemma to deal with.

Twagiramungu stressed that identity categories in Rwanda are complex, meaning that there are no 'black and white' classifications of Hutus and Tutsis. He pointed out that there are some significant differences amongst Tutsis as well as amongst Hutus. There are certain elements that divide Rwandans and other elements that unify them, even within the parameters of the genocide. For the way forward, Twagiramungu therefore recommended that Rwandans acknowledge the complexity of their situation, and promote a debate that particularly strengthens voices in the political middle.

Scott Straus articulated a concern about Rwanda's future, arguing that the long-term effects of the coercive and punitive control over public space that the current government exercises might lead to renewed conflict, instead of reconciliation. He critiqued the controls over just public discourse, and pleaded for a more open and permissive public space, so that debates can be aired without fear of punishment.

Straus questioned whether the law on genocide ideology and related laws are able to accomplish the goals of building a more peaceful and reconciled Rwanda. He expressed his belief that we cannot think about the effects of these laws without thinking about the political context in which they take shape. Straus was also skeptical about whether so-called 'genocide ideology' really existed in a large part of the Rwandan population before the genocide. Moreover, he questioned whether the categories of Hutu, Tutsi, and Twa in and of themselves were the most important factors in the 1994 genocide. He was particularly concerned about three points: political exclusion, the lack of debate about the causes of the genocide, and the need to acknowledge different forms of victimization during and after the genocide.

First, Straus raised concerns about political exclusion in Rwanda, which stems to a large degree from the suppression of any form of criticism in Rwanda. He pointed out that anyone who seriously disagrees with the orthodoxy of the current regime, and openly questions the political establishment, is treated with deep skepticism and might even be accused of genocide ideology. According to Straus, an unequivocal 'instrumentalization' of the memory of the genocide takes place in contemporary Rwanda. This, however, undermines empirical memories of the genocide and works against unity and reconciliation. Straus pointed out that this form of political exclusion is part of a longstanding coercive tradition in Rwanda.

Second, Straus argued that there is the need for a broader discussion on the causes of the genocide in Rwanda. He explained that the political restrictions that have been imposed around public speech reflect a narrow view of the causes of the genocide. This narrow view, however, is not supported by most empirical and micro-level research. According to Strauss, the dynamics of the genocide were considerably more complex at the national, communal, prefectural, and neighborhood levels, than the concept of genocide ideology implies. The causal dynamics involved social networks, power, political opportunity, rivalries, straightforward coercion, horizontal peer pressure, and fear. Straus argued that the dynamics of the civil war, the assassination of the President, and the power of the local state were all critical factors influencing why the genocide ultimately happened. Thus, the genocide was not a simple product of genocide ideology, whatever that actually means. According to Straus, ethnic identities certainly played a role in the genocide, but the approach to the genocide's causes that underpins the current genocide laws is simplistic at best, and is being deliberately manipulated for political ends at worst. He therefore argued that meaningful steps towards reconciliation in Rwanda require an open and honest public discussion of the causal dynamics of the genocide; it requires people from various positions to be able to speak in a permissive political climate about what they saw, what they did, and what they know about what happened in 1994.

Third, Straus stressed that there needs to be broader acknowledgment of the suffering and victimization that occurred in 1994 and onwards. He argued that we should go beyond the persistent claim that to recognize other suffering beyond the genocide is tantamount to claiming a double genocide or denying the genocide. He explained that there was serious victimization on the part of the RPF as it advanced and secured the country in 1994. It did not constitute genocide, but it caused suffering, violence and many deaths. Moreover, there was serious victimization and suffering in the Democratic Republic of the Congo at the hands of Rwandan troops in 1996 and 1997. There was serious victimization in the counter-insurgency campaigns in the northwest of Rwanda, and serious victimization as well in the second major Congo conflict, in which Rwanda was an important player. According to Straus, these are issues that need to be addressed if there are to be realistic prospects for reconciliation in Rwanda. Moreover, he argued that limitations on open discourse undermine the claim that the justice and reconciliation processes were attempts

to reveal the truth, inviting a deep skepticism that might well ultimately harm Rwanda in the longer term.

Straus concluded by saying that Rwanda is on course for short-term stability, but possible long-term disorder. He stressed that resentments building up in the shadow of the military hegemony that has existed for generations will poison prospects for peace and, in fact, may well lead to renewed conflict.

II. Reconciliation: Wrestling with Ethnic Identity

Reconciliation is an objective frequently pursued, yet rarely defined. Often it is not even clear whether scholars and practitioners use the term to identify a goal, a process, or both. Professor Harvey Weinstein does not believe that reconciliation is a useful concept, suggesting that closure is a mythology and reconciliation is an illusion.⁵ Others also advocate jettisoning the term, arguing that societies should pursue 'coexistence' rather than reconciliation during the post-genocide transition.⁶ In spite of these valid reservations, reconciliation is a term often used by policy makers and scholars alike to describe either the process - or goals - of programs and policies that deal with a past characterized by severe conflict. "In the context of the transition from identity based atrocities, such as genocide or ethnic cleansing, to a new democratic state, the term is loosely used to mean people reestablishing connections across racial, ethnic or religious lines."⁷ There are minimalist and maximalist, or "soft" and "hard", notions of reconciliation. In its most modest sense, reconciliation means simply that former enemies obey laws rather than kill one another.⁸ At its maximal conception, reconciliation is understood as mutual healing and mutual forgiveness. It seeks repentance by the perpetrators and requires forgiveness by the victims. In the middle lies the civic view of reconciliation which the International Center for Transitional Justice has defined as creating "the conditions under which citizens can once again trust one another as citizens."

Reconciliation (however it is perceived) proceeds, if at all, on multiple levels. Dr. Danieli sees the entire reconciliation project as one that seeks to promote the healing of identity after trauma. Massive trauma, such as that which occurs during genocide, reflects such diverse and complex destruction that only a multidimensional, integrated framework is adequate to describe it. Thus, Danieli suggests a comprehensive framework for reconciliation that consists of four dimensions: individual, societal, national, and international. The individual dimension deals with the re-establishment of equality and dignity for the victims. The societal dimension deals with the victim's stigma and separation from society. The national dimension seeks to address the nation's ability to provide and maintain equality and justice, while the international dimension deals with the commitment of the international community to help states seek justice and accountability. Regardless of one's conception of

5 See supra Panel IV, Straus argues that reconciliation, by definition, implies that genocide's victims forgive their attackers, something that may not be a realistic expectation in Rwanda. See also Scott Straus, *Origins and Aftermaths: The Dynamics of Genocide in Rwanda and Their Post-Crime Implications*, in *MASS CRIMEs and POST-CONFLICT PEACE BUILDING* 122-141 (Simon Chesterman, Beatrice Pouligny, & Albrecht Schnabel, eds., United Nations University Press 2007).

6 See Aneelah Afzali & Laura Colleton, *Constructing Coexistence: A Survey of Coexistence Projects in Areas of Ethnic Conflict*, in *IMAGINE COEXISTENCE: RE-STORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT* 3 (Antonio Chayes & Martha Minow eds., Jossey-Bass 2003) (hereinafter "Chayes and Minow"). Coexistence has been defined as "[a] relationship between two or more identity groups living in close proximity to one another that is more than merely living side by side but includes some degree of communication, interaction, and cooperation." Eileen F. Babbitt, *Evaluating Coexistence: Insights and Challenges*, Chayes and Minow at 102, 113.

7 Sheri P. Rosenberg, *What's Law Got to Do with it?: The Bosnia v. Serbia Decision's Impact on Reconciliation*, 61 *Rutgers L. Rev.* 131, 138 (2008) (citing Eric Stover & Harvey M. Weinstein, *Introduction: Conflict, Justice and Reclamation*, in *My Neighbor, My Enemy: Justice in the Aftermath of Mass Atrocity* 1, 4 (Eric Stover & Harvey M. Weinstein eds., Cambridge University Press 2004).)

8 Eileen F. Babbitt, *Evaluating Coexistence: Insights and Challenges*, Chayes and Minow at 102, 113.

reconciliation, the key issues facing societies recovering from genocide, and the multinational and international organizations that seek to assist them, are developing mutual trust among previously warring groups and inspiring confidence in the new government.

Identity

Identity refers to peoples' membership in a social group. Such social categories are almost limitless, and include religious, class, gender, sexual orientation, national, and ethnic groups. Identities are important because they give structure to our personal and social lives. Identity is both a psychological and a sociological term. It is psychological because it helps the individual produce order in her personal life. It is social because it situates the individual within the collective and the embrace of a social group. In many societies, identity based on ethnic collectivities has come to form the basis of politically-focused national communities. When ethnic-based forms of social identification are present at a national level, groups use ethnic identification to vie for political power and other benefits of society.

Societies recovering from genocide must confront ethnic identity categories that both pre-existed and were often cemented by the genocide. Such confrontation is a complex project because identity is neither static nor unitary. Rather, identity categories are contextual, socially constructed, and dynamic. Interpretations of history and shared narratives provide the basis upon which individual and collective identities are built.⁹ Likewise, communal identity categories, especially those linked to political structures, are built upon narratives passed on from generation to generation. Narratives are particularly important to 'local' identities that have been re-shaped in large part through national identification.

According to Catherine Newbury, the salience of ethnic identity in Rwanda has ebbed and flowed, taking on more or less importance at different historical points. According to Newbury, for a long time it was not the ethnic divide that mattered in the political or communal sense, but rather the urban-rural divide. As Dr. Joyce Apsel explains, individuals have multifaceted identities. After genocide there is an ongoing formation and transformation of identity structures: This is no less true in the case of Rwanda. Since the genocide several identity categories have arisen: survivor/perpetrator or suspected genocadaire, returnee/local, old caseload refugee/new caseload refugee, Anglophone/Francophone, northerner/southerner. While one may try and dismantle ethnic labels such as Hutu and Tutsi, those complex ethnic realities are often reduced to these now familiar categories. In other words, the new identity formations are a misleading way to label entire groups of people. For example, Anglophones are essentially equated with Tutsis. Over many years, Tutsis suffered severe discrimination, even persecution, in Rwanda. As a result, many had fled to neighboring Uganda where they learned English. At the end of 1994, many Tutsis from Uganda returned to Rwanda and now form the

⁹ Kwame Anthony Appiah, *The Ethics of Identity* 245 (Princeton University Press 2005).

majority of the English speaking population in Rwanda. Similarly, in Rwanda, 'survivor' specifically means a 'survivor of the 1994 genocide against the Tutsis.' In fact, that phrase is the official name given to the genocide memorial week.

Further complicating the matter is what Dr. Fuji describes as the 'politicization of identity.' During the genocidal violence ethnic identity was deeply political; the killings were not entirely based upon ethnic hatred - but also related to power and politics. So identities too, after the genocide continue to be deeply political. Moreover, as Timothy Longman demonstrates with personal narratives from Rwandan citizens, people have lived experiences which effect how they relate to identity. Therefore, 'identity constructs' such as 'survivor' or 'perpetrator' do not represent a clearly defined, monolithic identity group with shared perceptions of identity or political relationships, including relationships with the Rwandan government.

Each society confronts identity structures in the aftermath of the total social breakdown of genocide based upon social and political contingencies in that society before and after the conflict. Rwanda is the most densely populated country in Africa where those who committed crimes and genocide live next door to those who were targeted during the genocide. This is markedly different from, for example, Germany where after the Holocaust there were not many Jews left in the country. Further, the genocide in Rwanda occurred during a civil war. The Tutsi RPF army was victorious, and many Hutus fled to neighboring Congo, where some continue to espouse genocidal intentions. The Rwandan government is now led by President Paul Kagame, the former RPF commander.

Whatever inter or intra-ethnic lines exist in Rwanda today, Rwanda's unity and reconciliation project seeks to substitute references to ethnicity with the identity category of Banyarawanda. Alluding to identities other than the officially sanctioned Banyarawanda is met with public shaming and even legal sanction. And while one may - in fact must - commemorate the 1994 Genocide against the Tutsis, past and present tensions between Hutus and Tutsi have effectively been removed from public discourse.¹⁰ The salient question that emerges from the Rwandan experience is whether policies aimed at eliminating ethnic memories and hence identities can actually dismantle ethnic hatred in pursuit of building the mutual trust necessary for peaceful coexistence or reconciliation?

The Rwandan approach has its skeptics. Generally, they argue that reconciliation requires that a violent past be confronted, not obliterated. Moreover, they argue that because identities are dialogically constructed, it is not possible to dismantle ethnic identification. As Nigel Elthringham noted earlier, one cannot simply erase history: "[The] past is not a concurrent, simultaneous foreign country, which we can freely visit. The past does not exist independently of our relationship to it." Rather, reconciliation requires reckoning with past ethnic cleavages where "recognition of what actually happened - of the victims' experience and the perpetrators' responsibility, and ultimately the broader structures of

¹⁰ Susanne Buckley-Zistel, Remembering to Forget: Chosen Amnesia as a Strategy for Local Coexistence in Post-Genocide Rwanda, 76 J. Int'l Afr. Inst. 132 (2006).

cause and effect – can allow some healing to take place.”¹¹ Most skeptics recognize the very difficult balancing act Rwanda must engage in between salvaging what is good about ethnic identification categories, and ensuring that the worst ethnic manipulations never happen again. Nonetheless, they believe that the current eclipsing of ethnic identification categories, necessarily complimented by proscribed historical narratives, prevents the kind of transformation necessary to render future conflagrations along ethnic lines a thing of the past. In other words, while this policy may lead to short term stability, it may very well lead in the long term to renewed violence. Thus, Noel Twagiramungu urges Rwandans to acknowledge the complex Rwandan identity categories, to debate them, and to promote a middle ground.

¹¹ Eve Hofman, *The Balm of Recognition*, in *Human Rights, Human Wrongs* 280 (Nicholas Owen ed., Oxford University Press 1999).

III. Comparative Analysis of Laws

The Rwandan genocide ideology law encapsulates Rwanda's approach to dealing with the nefarious manipulation of ethnic identity categories that existed during and since the genocide. It is simultaneously retrospective and prospective. It is retrospective in that it looks to the Rwandan government's historical narrative, which perceives the mass participation during the genocide as a result of widespread Hutu indoctrination of hatred against the Tutsi social category.¹² As a result the law is primarily concerned with ensuring that the ethnic identity structures that were fundamental to causing the genocide of 1994 are dismantled. It is also prospective, echoing the government's genuine security concerns stemming from the Hutu diaspora in the DRC, as well as continued genocidal ideations among Hutu intellectuals, educators, and farmers alike.¹³ Thus, it seeks prospectively to root out incitement to a renewal of the cycle of violence, including genocide.

Most agree that Rwanda's history and the role of incitement leading up to the 1994 Rwanda genocide establish a need to legislate against denying the genocide, promoting divisionism, or inciting racial and ethnic hatred. The Rwandan government firmly believes that ideology laws are necessary to prevent a future genocide, to protect the dignity of victims of the genocide, and to prohibit any action that promotes disharmony among groups. Over time genocide ideology has been conflated with reference to ethnic discourse and political criticism. For example, individuals have run afoul of the law by referencing alleged crimes committed by the RPF during the conflict. These individuals have been found guilty of negating the genocide. According to the government's narrative, reference to alleged RPF crimes amounts to arguing that there was a double genocide. Moreover, general criticism of the government can fall under the category of genocide ideology.¹⁴ In the end, the effect, if not the intent, of this law has been an attempt to criminalize and eventually eradicate ethnic identity altogether both as a matter of individual conviction and societal truth.

Rwanda has chosen a particular and unique approach. While pursued through laws that some criticize as vague and overly broad, these laws differ only in scope, rather than in kind, from laws that have been promulgated in other parts of the world. Rwanda has acknowledged that it may need to amend its genocide ideology law. It is in the process of reviewing the law for possible revisions. It is therefore worth examining some of these other laws. The body of laws in Rwanda that have addressed the genocide can be examined under three major headings: genocide denial laws; hate speech laws; and incitement to genocide laws. The following examination introduces some of the approaches taken by States from differing jurisdictions: for a comprehensive analysis of this material, see

¹² Supra panels III & IV, Fuji and Straus, arguing that the genocidal dynamic depended less on inter-ethnic hatred and racist indoctrination than on wartime power struggles in the context of dense human settlement.

¹³ See supra note 2; Rapport d'analyse sur le problème d'idéologie du génocide évoquée au sein des établissements scolaires, Rwanda National Assembly (December 2007); République Rwandaise, Rapport de la Commission Parlementaire ad hoc crée en date du 20 Janvier 2004 par le Parlement, Chambre des Députés, Chargée d'examiner les Tueries Perpétrées dans la Province de Gikongoro, l'idéologie Génocidaire et Ceux qui la Propagent Partout au Rwanda (June 30, 2004); République Rwandaise, Assemblée Nationale, Rapport de la Commission Parlementaire de Contrôle Mise en Place le 27 Decembre 2002 Pour Enquêter sur les Problèmes du MDR (April 14, 2003).

¹⁴ Supra note 2 at 17-18.

Appendix A infra.

Genocide Denial Laws

Many national jurisdictions have enacted legislation to hold individuals civilly or criminally liable for the denial or diminishment of genocide, either generally or as related to specific historical events. Within this range exists quite different approaches to the role of law in addressing acts of denial.

In France, a central objective for the introduction of the Gaysot Law of 1990 was to remove the issue of the 'false contestation of genocide'¹⁵ from the judicial branch in France, which had become an open forum for controversial legal debates on the realities of the Holocaust. This law criminalizes the contestation of the Holocaust without permitting the judicial branch to examine questions concerning the historical validity of the crimes at issue. Instead, the legislative branch has determined such questions surrounding the Holocaust to be facts that are not subject to judicial enquiry. The law states, under Article 24bis, Press Act of July 29 1881 (amended by Act No. 90-615 of July 13 1990, known as the Gaysot Law):

'Those who have disputed, by one of the means stated in Article 23¹⁶, the existence of one or more crimes against humanity as they are defined by the article of the statute of the international military tribunal, annexed to the London Agreement of 8 August 1945, and which were committed by members of an organization declared criminal by the application of Article 9 of the above-mentioned statute or by a person found guilty of such crimes by a French or an international tribunal, will be punished...'

A legal challenge to this law by Robert Faurisson (who had been convicted in France under this law) taken to the Human Rights Committee, which monitors the International Covenant on Civil and Political Rights, found that "[Mr. Faurisson's] conviction therefore did not encroach upon his right to hold and express an opinion in general, rather the court convicted Mr. Faurisson for having violated the rights and reputation of others."¹⁷

In other jurisdictions, the laws have demanded that criminal acts involve an elevated wrongful purpose in the mind of the individual seeking to deny a genocide. The 'Denial of the Holocaust (prohibition) Law, 5746-1986'¹⁸ in Israel states in paragraph 2:

'A person who, in writing or by word of mouth, publishes any statement denying or diminishing the proportions of acts committed in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity, with intent to defend the

¹⁵ See Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study* 37 (Palgrave 2004).

¹⁶ ~~These means must~~ be 'uttered in public places or meetings' or be items 'sold, distributed offered for sale or exhibited in public places or meetings'.

¹⁷ *Faurisson v. France*, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

¹⁸ Denial of Holocaust (Prohibition) Law, 5746-1988, SH No. 1187 p. 196 (Isr.).

perpetrators of those acts or to express sympathy or identification with them, shall be liable to imprisonment for a term of five years.'

To be found guilty of denial or diminishment in Israel, the alleged wrongdoer must possess the 'intent to defend the perpetrators' or show them sympathy. In Portugal, the intent instead is one 'to incite to racial or religious discrimination or to encourage it'.¹⁹ This focus on the mind of the wrongdoer seeks to ensure that ignorant but not harmful individuals will not face the prospect of criminal sanction. In Switzerland, the motive of the speaker must be demonstrated and the denial must have been directed at someone 'because of their race, their ethnic belonging or their religion'.²⁰

A further limiting device that aims to balance respect for the memory of victims of genocide with the value of free speech that may help limit future returns of genocidal violence is seen in German legislation, which limits the criminalization of denial to statements made 'in a way likely to disturb public peace'.²¹ Denial without the risk of disturbance is thus not penalized.

Hate Speech Laws

A common thread throughout these laws is how to balance the value and the danger of freedom of speech. All of the laws from a variety of jurisdictions have attempted not only to protect freedom of speech given its inherent place of honor and value within human rights laws and international instruments, but have also addressed the relative value of free speech legislation and hate speech legislation in regulating ethnic conflict and violence. Free speech in the context of ethnic divisions may be abused, threatening to lead to violence or discrimination against certain groups within a polity. However, the construction of these laws also suggests the value of free speech in bringing divisions to the surface, whereby the assessment and rebuilding of identity can occur in the open. The lines drawn in the context of hate speech laws suggests that many legislatures see open discussion of ethnic differences, perceived or real, as vital to help ensure that the potential for violence or discrimination in society is minimized.

International human rights treaties have permitted restrictions on the freedom of speech in very limited circumstances. For example, Articles 19 and 20 of the International Covenant on Civil and Political Rights state:

19 C.P. 240 2(b). (Article 240 of the Portuguese Penal Code 2(b)).

20 Schweizerisches Strafgesetzbuch [StGB], Code pénal suisse [Criminal Code], June 18, 1993, SR 311, art. 261bis, para. 4 (Switz.).

21 Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Bundesgesetzblatt [bgb], as amended, § 130, para. 3 (Ger.).

'Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

This regulation of hate speech that 'constitutes incitement to discrimination, hostility or violence' ensures that only the most dangerous utterances are prohibited. Likewise, legislation in Austria also limits penal sanctions to speech to one of two specific consequences: either dangerous effects on public order or harm to the human dignity of protected groups.²² India has also set out sanctions for speech that is likely to lead to enmity or ill-will between groups within society.²³ This focus on consequences that might flow from permitting the public dissemination of hatred underscores many states' concerns with hate speech as the catalyst for harm to certain groups, either physical or mental.

The potential value of discussions of ethnic identity is significantly reduced when the intentions of speakers are clearly to demonize an often vulnerable group in society. Under the United Kingdom's Public Order Act 1986, Article 18, paragraph 1(a) states:

'A person who uses threatening, abusive or insulting words or behaviour, or displays any

²² Strafgesetzbuch [StGB] [Penal Code] Bundesgesetzblatt [BGBl] No. 60/1974, as amended, § 283 (Austria) states: Incitement to hostile action –

(1) Whoever, publicly, in a manner likely to endanger public order urges or incites others to commit a hostile act...to a race, nation, tribe or state, shall be punished by imprisonment for up to two years.

(2) The same punishment shall be imposed on anybody who publicly in a manner which violates human dignity stirs up hate against any of the groups referred to in Subsection (1) or insults it or seeks to disparage it.'

²³ See generally The Indian Penal Code, No. 45 of 1860, Pen. Code (1860) §153A

written material which is threatening, abusive or insulting, is guilty of an offence if:

(a) he intends thereby to stir up racial hatred...'

The intentions of the actor may be quite difficult to prove, yet the criteria above are sufficient to separate non-criminal conduct from that warranting legal sanction. Kenya, which has experienced communal violence in the past decade, has included a similar focus on the intentions of the alleged wrongdoer in Article 13 of its National Cohesion and Integration Act (2008).

A common element of these laws across many jurisdictions dealing with genocide denial, hate speech and incitement to genocide is the need to draw a clear distinction between the private and public spheres. This distinction not only respects the value of private thoughts and spaces, but it also recognizes that the likelihood of the harmful consequences of speech (and thus the appropriate legal sanction) is vastly increased in cases when there is broad public dissemination. In response, for example, under Article 163 of the Criminal Code of the Federation of Bosnia and Herzegovina, public incitement and inflammation of hatred can lead to five years imprisonment.²⁴

One method utilized by several states has been to explicitly carve out exemptions from criminal legislation for valid forms of speech that deal with racial, ethnicity, or other protected groups, perhaps the clearest expression of the value of free speech for the promotion of unity among different groups. For example, under Article 18 of the Commonwealth Racial Discrimination Act 1975 (as amended through 2009) in Australia:

'Section 18(C) does not render unlawful anything said or done reasonably and in good faith:...

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest;

or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.'

It is self-evident that the appropriate mix for protecting freedom of speech on the one hand and protecting vulnerable groups by implementing hate speech laws on the other, will depend on the particular circumstances of each nation's history and ethnic characteristics. However, most of these laws seem to uphold firmly held convictions that open discussion on ethnic differences or conflicts can contribute to peaceful coexistence as much if not more than hate speech limitations.

²⁴ '(1) Whoever publicly incites and inflames national, racial or religious hatred, discord or hostility among constituent peoples and others who live in the Federation, shall be punished by imprisonment for a term between one and five years.'

Incitement to Genocide

The line separating criminal sanction for incitement to violence based on group hatred and the more specific crime of incitement to genocide is not easily drawn. While accepting the legal definition of genocide, the distinction between these two acts will depend on the context (both present and historical) in which these statements are made. Marking the distinction between hate speech and the international crime of incitement to genocide is now the subject of a major project of the UN Office of the Special Advisor on the Prevention of Genocide.

The crime of incitement to genocide was first codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), which states in Article 3:

“The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide’.²⁵

Those national jurisdictions that have incorporated ‘incitement to genocide’ into their municipal legislation have generally made direct use of the text from the Genocide Convention.

It has been left primarily to the International Criminal Tribunal for Rwanda (ICTR) to flesh out the contours of the two requirements that the incitement be ‘direct and public’. The Tribunal explained that the public element required an examination of two relevant factors - “the place where the incitement occurred and whether or not assistance was selective or limited.”²⁶ The incitement was public if it was made in a public place, “or to members of the general public at large by such means as the mass media ... radio or television.”²⁷ The Tribunal went on to explain that the direct element should be evaluated according to context and content, as a speech constituting direct incitement in one country might not qualify as direct incitement in another setting.²⁸ The court determined that a case-by-case

²⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Art. 3, Dec. 12. 1948.

²⁶ Id. 556.

²⁷ Id.

²⁸ Id. at 557. In this context, see the current work conducted by the Office of the Special Advisor on the Prevention of Genocide and Dr. Susan Benesch concerning dangerous speech on the road to genocide.

The project’s aims are to (1) design a blueprint for monitoring dangerous speech in countries at risk of genocide and mass atrocities, (2) develop and test a methodology for gauging the dangerousness of specific speech acts, and (3) produce policy response options to limit the effects of dangerous speech.

evaluation was necessary to determine whether, “in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.” (Emphasis added.)²⁹

Level of Criminal Sanction

There are a variety of crimes discussed in this section, each with their own elements and purposes. However, it is notable that the minimum punishment set out in Article 4 of Rwanda’s Genocide Ideology Law for an adult (10 years) is the maximum sentence imposed by any other nation with respect to any of the crimes discussed. As there seems to be a common purpose to Rwanda’s laws and those of other nations examined here, this divergence in sentencing is quite troubling, even conceding the divergent political, social and economic situations of states. There may be additional concerns over the criminalization of speech by children as young as 12 years old under Rwandan law. As Rwanda itself has demonstrated, there are many approaches to address deeply held prejudices that might not directly involve the criminal justice system but those approaches still depend on the equity, transparency and clarity of that system.

²⁹ Id. at 558.

IV. Policy Recommendations

To the Rwandan Government and Other States

While the project that gives rise to genocide ideology laws, specifically the promotion of unity and reconciliation, is laudable, our basic concern remains that any genocide ideology laws, especially loosely crafted laws combined with robust punitive sanctions and a lack of transparency on implementation, can impede speech necessary to healing in the name of speech that can incite further violence. Thus as a general matter, we urge governments to ensure that any incitement related laws are carefully circumscribed, integrate proportionate punitive sanctions and are attached to transparent mechanisms for indictments and prosecutions that can inspire and maintain public confidence. In addition:

Broaden the public discourse. The Rwanda government should ensure that its laws and policies aim to facilitate a broad space for public discourse about the context of the 1994 genocide. Restrictions on discussions that are intended only to explore aspects of the historical narrative and/or to analyze and dissect the past, present and future place for ethnic identity may well be counter-productive in achieving the elimination of genocidal violence that must be the ultimate aim of any such endeavors.

Assess the utility of each law dealing with ethnic identity as linked to the genocide. The Genocide Ideology Law of 2008 has proved especially problematic in its interpretation and application by the judicial authorities in Rwanda. It is somewhat unclear what distinct objectives are being achieved by this law that are not achievable through the existing genocide denial law (No. 33bis/2003) and the law on discrimination and sectarianism (No. 47/2001). It will be important for Rwanda, during its planned re-examination of the 2008 law, to consider how each of these laws operates in relation to the others so as not to create undue discretionary authority for state prosecutors.

(Equally problematic is the open-ended language characteristic of much of the text of the 2008 Law. The use of such vague language within a criminal statute providing for penalties as high as 25 years' incarceration places an unfair burden on Rwandan citizens to divine the speech or conduct that is illegitimate under the legislation.)

Provide increased training and resources on aspects of ethnic-based crimes to the judicial branch and the national prosecuting authority. While there are many potential legislative amendments to current legislation in Rwanda dealing with the ethnic conflicts in a post-genocidal society, judges and prosecutors still find genocide ideology cases to be some of the most difficult cases to handle. As a result, the rationales for decisions whether to prosecute or or whether to convict diverge from case-to-case, increasing confusion about the scope and reach of the law. As part of a review of the law, the Government may wish to consider tasking a person or preferably a panel of persons (and also preferably with involvement by UN or other international experts) with developing guidelines and standards for the prosecution of genocide ideology cases, including independent review of appellate decisions

This may help to alleviate what some perceive as a problem of over-enforcement of cases related to genocide ideology.

To the International Community

Promote post-conflict efforts that are uniquely attentive to the identity categories that existed before, during, and after the conflict. This examination has attempted to highlight the importance of addressing post-genocide conflict situations with due regard to the very particular mix of ethnic identity history, politics and grievances that will occur in a variety of situations. It is simply not possible to create a one-size-fits-all approach to addressing ethnic identity and reconciliation in post-conflict settings.

Identify and increase capacity support for local initiatives that seek to build trust among all identity categories found in Rwanda or other post-conflict settings. Support should be provided to local initiatives that seek to educate individuals about how to frame and address issues of mutual concern through communication, conflict prevention and cooperation. NGOs and others can assist in identifying successful local initiatives in post-conflict settings and in sharing lessons learned and best practices with actors in other global regions.

Place pressure on governments to comply with international human rights and humanitarian law standards. Ensure that post-conflict and conflict funding and support is dependent on achieving 'good faith' compliance with accepted standards of freedom of expression and non-discrimination. Share with governments the best, collective wisdom about how and in which situations genocide ideology and related laws are likely to exacerbate – rather than alleviate – the potential for further ethnic conflict.

Support capacity for legislative drafting: In particular, support states emerging from genocide or identity-conflict in drafting legislation that can help prevent a return to violence, balancing the need to protect identity categories and freedom of expression. In particular, the UN should consider providing an appropriate, voluntary mechanism – perhaps in partnership with Legal Affairs and the Office of Genocide Prevention – to provide expert advice on drafting precise legislation focused on incitement, and related matters. In this instance 'precise' means that the law enables any individual to regulate conduct with a reasonable measure of certainty as to the legal consequences of a given action.

V. Conclusion

In our work on this report, the authors have been humbled by the resilience of the Rwandan people and the strides that Rwanda has made toward seeking a better future. The authors have also been struck by the extraordinary activity taking place worldwide, to map out and address the causes, incitements, and security implications of atrocity crimes. We have also been particularly attentive to the many ways in which countries emerging from genocide and related crimes are seeking remedies – legal, educational, economic, security and more – to prevent a return to the cycles of violence that have already devastated populations.

In the Conference that formed the conceptual basis for this report, the diverse contributions of scholars, government officials, and advocates were focused on finding ways in which the Rwanda experience can be instructional for similar efforts taking place (or contemplated) in other countries. Our motivation is partially tied to curiosity about the nature and effects of genocide denial and hate speech laws, but also tied to our belief that overly broad laws, which seek to severely constrain individual and collective identity, might actually exacerbate tendencies for countries emerging from violence to return to conditions of violence (recidivism). Our work is grounded in a belief that the responsibility to heal ethnic divisions widened by atrocity crimes, and even to weave a new national narrative from diverse regional and cultural strands, is a noble effort, one which genocide denial and hate speech laws should support rather than undermine.

For the many persons worldwide who have been watching and rooting for Rwanda's emergence from the cloud of atrocity crimes, the hope is that the country can continue to steer a course that mitigates the potential for any return to violence steeped in ethnic manipulations.

ANNEX I

COMPARATIVE LEGISLATION

Relevant Rwandan Laws

Constitution of the Republic of Rwanda

As cited in the preamble to the Genocide Ideology Law, Article 9 of the Constitution reflects the fundamental principle sought to be enforced through the Genocide Ideology Law. It states:

‘The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce respect thereof:

Fighting the ideology of genocide and all its manifestations;

Eradication of ethnic, regional and other divisions and promotion of national unity;

Equitable sharing of power;

Building a State governed by the rule of law, a pluralistic democratic government, equality of all Rwandans and between women and men reflected by ensuring that women are granted at least thirty per cent of posts in decision making organs;

Building a State committed to promoting social welfare and establishing appropriate mechanisms for ensuring social justice;

The constant quest for solutions through dialogue and consensus.’

Article 13 is also relevant:

‘The crime of genocide, crimes against humanity and war crimes do not have a period of limitation.

Revisionism, negationism and trivialization of genocide are punishable by law.’

Genocide Ideology Law³⁰

It is necessary to examine the law under examination in this Report in full, but the most relevant Articles are set forth herein:

‘Considering the fact that after the genocide of 1994, the crime of genocide ideology is still persisting in the country;

³⁰ LAW N°18/2008 OF 23/07/2008 RELATING TO THE PUNISHMENT OF THE CRIME OF GENOCIDE IDEOLOGY.

After considering the fact that it necessary to prevent and punish genocide ideology in order not for genocide to be committed again in the country:

Adopts:

[...]

Chapter 1. GENERAL PROVISIONS

Article: 1 Purpose of this law

This Law aims at preventing and punishing the crime of genocide ideology.

Article: 2 Definition of “genocide ideology”

The genocide ideology is an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, color, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war.

Article: 3 Characteristics of the crime of genocide ideology

The crime of genocide ideology is characterized in any behavior manifested by facts aimed at dehumanizing a person or a group of persons with the same characteristics in the following manner:

1° threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred;

2° marginalizing, laughing at one’s misfortune, defaming, mocking, boasting, despising, degrading, creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred;

3° killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology.

Chapter 2. PENALTIES

Article: 4 Sentencing the crime of genocide ideology

Any person convicted of the crime of genocide ideology as mentioned in Articles 2 and 3 of this Law shall be sentenced to an imprisonment of ten (10) years to twenty five (25) years and a fine of two hundred thousand (200.000) to one million (1.000. 000) Rwandan francs.

In case of recidivism, the penalty provided for in the preceding paragraph shall be doubled.'

Law on Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes³¹

This 2003 law sets out the law on negationism and minimization of genocide in Article 4:

'Shall be sentenced to an imprisonment of ten (10) to twenty (20) years, any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimized it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence.

Where the crimes mentioned in the preceding paragraph are committed by an association or a political party, its dissolution shall be pronounced.'

Law on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism³²

Articles 1-5 & 8 provide the relevant substantive law for the purposes of the Report:

'Chapter 1. DEFINITIONS OF TERMS

Article: 1

According to this law:

1° Discrimination is any speech, writing, or actions based on ethnicity, region or country of origin, the colour of the skin, physical features, sex, language, religion or ideas aimed at depriving a person or group of persons of their rights as provided by Rwandan law and by International Conventions to which Rwanda is party;

2° Sectarianism means the use of any speech, written statement or action that divides people, that is likely to spark conflicts among people, or that causes an uprising which might degenerate into strife among people based on discrimination mentioned in article one;

³¹ LAW N° 33 BIS/2003 of 06/09/2003 ON REPRESSING THE CRIME OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES.

³² LAW NO 47/2001 of 18/12/2001 ON PREVENTION, SUPPRESSION AND PUNISHMENT OF THE CRIME OF DISCRIMINATION AND SECTARIANISM.

3° Deprivation of a person of his/her rights is the denial of rights provided by Rwanda Law and by International Conventions to which Rwanda is party.

Chapter 2. GENERAL PROVISIONS

Article: 2

This law aims at punishing any person guilty of the crime of discrimination and sectarianism.

Article: 3

The crime of discrimination occurs when the author makes use of any speech, written statement or action based on ethnicity, region or country of origin, colour of the skin, physical features, sex, language, religion or ideas with the aim of denying one or a group of persons their human rights provided by Rwandan law and International Conventions to which Rwanda is party.

The crime of sectarianism occurs when the author makes use of any speech, written statement or action that causes conflict that causes an uprising that may degenerate into strife among people.

Article: 4

This law does not prevent the state or from taking decisions that give Rwandan nationals powers and rights different from those of foreigners.

Chapter 3. SANCTIONS

Article: 5

Any person guilty of the crime of discrimination or sectarianism mentioned in article 3 of this law, is sentenced to between three months and two years of imprisonment and fined between fifty thousand (50,000) to three-hundred thousand (300,000) Rwandan Francs or only one of these sanctions.

When the offender of the crime of discrimination or sectarianism is a government official, a former government official, a political party official, an official in the private sector, or an official in nongovernmental organization, he/she is sentenced to between one year and five years of imprisonment and fined between five hundred thousand (500.000) to two million (2.000.000) Rwandan Francs or one of those two sanctions.

[...]

Article: 8

Any person who makes public any speech, writing, pictures or images or any symbols over radio airwaves, television, in a meeting or public place, with the aim of discriminating people or sowing sectarianism among them is sentenced to between one year and five years of imprisonment and fined between five hundred thousand (500.000) and two million (2.000.000) Rwandan Francs or only one of these two sanctions.'

Genocide Denial Laws

Comparative genocide denial laws

Austria: Section 3(h) of the Prohibition Act states that:

'A person shall also be liable to a penalty [] if, in print or in broadcast or in some other medium, or otherwise publicly in any manner accessible to a large number of people, if he denies the National Socialist Genocide or other National Socialist crimes against humanity, or seeks to minimize them in a coarse manner or consents thereto or to justify them.'³³

Punishment for this crime is imprisonment for between 1 and 10 years.³⁴ This law requires publication or utterances that are in the public domain and/or accessible to a sufficiently large number of people in order to be applicable. No further acts, consequences or intentions (other than that to deny or minimize) is required on the part of the offender.

Belgium: Article 1 of the Law of 23 March 1995³⁵ states:

'Whoever, in one of the circumstances indicated by Article 444 of the Penal Code, denies, grossly minimizes, tries to justify or approves of the genocide committed by the German National-Socialist regime during the Second World War will be punished by imprisonment of eight days to one year and to a fine of twenty six to five thousand francs.

For application of the former, the term genocide is intended in the sense of Article 2 of the International Convention of 9 December 1948 for the prevention and repression of the crime of genocide.'

The circumstances given in Article 444 of the Belgian Penal Code are as follows: either in public meetings or places; or in the presence of several people, in a place that is not public but accessible to a number of people who are entitled to meet or visit there; or in any place in the presence of the offended person and in front of witnesses; or through documents, printed or otherwise, illustrations or symbols that have been displayed, distributed, sold, offered for sale, or publicly exhibited; or finally by documents that have not been made public but which have been sent or communicated to several people. The law explicitly focuses on one act of genocide, and links the definition of the crime to that of the Genocide Convention 1948.

³³Osterreich, StGBI 13/1945, amended version BCBI 148/1992.

³⁴See N. Osin & D. Porat (eds.), *Legislating against Discrimination: An International Survey of Anti-Discrimination Norms* (Leiden and Boston: Tel Aviv university and Martinus Nijhof, 2005), at p. 87.

³⁵Moniteur Belge No. 7996 of 30 March 1995.

Czech Republic: Article 261(a) of the amended Constitution of 16 December 1992³⁶ states:

‘The person who publicly denies, puts in doubt, approves or tries to justify Nazi or communist genocide or other crimes of Nazis or communists will be punished by prison of 6 months to 3 years.’

This law, as with those set out above, includes attempted justification within the list of acts that are criminalized, expanding the scope of application beyond mere denial. The action must be done ‘publicly’. The Czech Republic has criminalized these acts with respect to all crimes committed by two groups: Nazis and communists. The emphasis is therefore on the actor more than on the crime of genocide itself.

France: Under Article 24bis, Press Act of July 29 1881 (amended by Act No. 90-615 of July 13 1990, known as the Gayssot Law):

‘Those who have disputed, by one of the means stated in Article 23³⁷, the existence of one or more crimes against humanity as they are defined by the article of the statute of the international military tribunal, annexed to the London Agreement of 8 August 1945, and which were committed by members of an organization declared criminal by the application of Article 9 of the above-mentioned statute or by a person found guilty of such crimes by a French or an international tribunal, will be punished...’

A central objective for the introduction of this law was to remove the issue of the ‘false contestation of genocide’³⁸ from the judicial branch in France, which had become an open avenue for controversial legal debates on the realities of the Holocaust. This law criminalizes the contestation of the Holocaust without permitting the judicial branch to examine questions concerning the historical validity of the crimes at issue. A legal challenge to this law taken to the Human Rights Committee that monitors the International Covenant on Civil and Political Rights found that “[his] conviction therefore did not encroach upon his right to hold and express an opinion in general, rather the court convicted Mr. Faurisson for having violated the rights and reputation of others.”³⁹

Germany: Article 130, paragraph 3, of the German Penal Code (amended 1994) states:

‘Whoever publicly, or at a meeting, denies, diminishes, or approves of an act committed under the regime of National Socialism, of the kind described in Article 220A, paragraph

³⁶ This amended section 261(a) was introduced by the 2001 Law Against Support and Dissemination of Movements Oppressing Human Rights and Freedoms.

³⁷ These means must be ‘uttered in public places or meetings’ or be items ‘sold, distributed offered for sale or exhibited in public places or meetings’.

³⁸ See Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study* (Palgrave, New York: 2004) at p. 37.

³⁹ *Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996).

2, in a way likely to disturb public peace shall be punished by imprisonment up to five years, or a monetary fine.’

Article 220A refers to the definition of the crime of genocide. The German criminal provision explicitly limits the reach of this section by requiring that the action by an alleged offender is committed ‘in a way likely to disturb public peace’. The law does not require that the alleged offender intend to disturb the public peace to be held liable.

While the political and sociological explanations for the introduction of this law in Germany are beyond the scope of this Report, the judicial interpretation of this law (and its predecessors) indicates somewhat of a shift in the objective underlying the stated legal purpose of the law. Cases from the 1970s, including the Supreme Court decision in the Zionist Swindle case,⁴⁰ indicate that prosecutions under these laws were intended to stop the moral harm to the Jewish population for whom the Holocaust was a central event of their self-understanding.

As time progressed, the courts in Germany took ‘judicial notice’ (the *Offenkundigkeit* doctrine under German law) of the Holocaust, thereby removing the judicial branch as an avenue for historical debates on the occurrence or otherwise of the Holocaust. These developments, and the amendments set out above, coincided with the rising prominence of right-wing parties and Holocaust denial in the newly-reunified German republic. The objective of the implementation of the law, as illustrated by the “disruption of peace” requirement featured in paragraph 3, therefore focused more on removing Holocaust denial or approval as an activity for civil unrest. However, as recent as 1994 in the Holocaust Denial Case in the Federal Constitutional Court, a focus on Jewish ‘personality’ or dignity was stressed as an important rationale for the necessity of a genocide denial law.⁴¹

Hungary: Amendments to the Hungarian criminal code were passed this year. In March 2010, legislation was passed, making it a criminal offense to ‘publicly hurt the dignity of a victim of the Holocaust by denying or questioning the Holocaust itself, or claim it insignificant.’ Such acts can be punished by a prison sentence of up to three years.⁴² In June 2010, a further bill was passed that equated Communist-era crimes with those of the Holocaust.

Again, the law explicitly focuses on the damage to the dignity of a victim of the Holocaust or Communist era crimes through denial or diminishment of these events. The actions taken must be conducted ‘publicly’.

⁴⁰ BGHZ (Entscheidungen des Bundesgerichtshofes in Zivilsachen) 75 (September 18, 1979).

⁴¹ BVerfG 13 April 1994, 90 BVerfGE 241.

⁴² See <http://www.genocidepreventionnow.org/2010/06/laws-banning-holocaust-denial.html> (last checked 11.08.10).

Israel: The Denial of the Holocaust (prohibition) Law, 5746-1986⁴³ states:

'2. A person who, in writing or by word of mouth, publishes any statement denying or diminishing the proportions of acts committed in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity, with intent to defend the perpetrators of those acts or to express sympathy or identification with them, shall be liable to imprisonment for a term of five years.

3. A person who, in writing or by word of mouth, publishes any statement expressing praise or sympathy for or identification with acts done in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity, shall be liable to imprisonment for a term of five years.

4. The publication of a correct and fair report of a publication prohibited by this Law shall not be regarded as an offence thereunder so long as it is not made with intent to express sympathy or identification with the perpetrators of crimes against the Jewish people or against humanity.'

Israel's laws include several specific elements of relevance in analyzing genocide denial legislation. First, under paragraph 2, in addition to the intent to publish a statement, the alleged wrongdoer must intend to 'defend the perpetrators of those acts or to express sympathy or identification with them'.

Second, this additional element of intent is not included in paragraph 3, which criminalized the publication of a statement 'expressing praise or sympathy for or identification with acts done' during the Nazi era. The difference between paragraphs 2 and 3 suggests that the intent of the actor is important in determining what conduct to criminalize under these auspices.

Third, paragraph 4 protects freedom of speech by ensuring that reports about banned publications are not themselves included as criminal acts, as long as the intent of the publisher is not to further support for those expressing sympathy towards Nazi crimes.

Luxembourg: The crimes of 'negationism or revisionism', set out in Article 457-3 of the revised Criminal Code, permits a prison sentence of between one week and six months for anyone who, in some public manner, 'has contested, minimized, justified or denied the existence of war crimes or crimes against humanity as defined in the statutes of the International Military Tribunal of 8 August 1945 or the existence of a genocide as defined by the Act of 8 August 1985.'⁴⁴ Luxembourg's law is therefore explicitly tied to the framework of an international instrument for its domestic interpretation, although Article 457-3 does only criminalize these acts if justifying the acts of a person 'recognized as guilty

⁴³ Sefer Ha-Chukkim No. 1187 of 9 Tammuz 5746 (16 July 1986), at p. 196.

⁴⁴ See http://www.coe.int/t/dghl/monitoring/ecri/legal_research/national_legal_measures/luxembourg/luxembourg%20sr_EN.asp (last checked on 8.18.10).

by a Luxembourg, foreign or international court' (emphasis added).

Poland: Articles 1 and 55 of the Act of 18 December 1998 on the Institute of National Remembrance Commission for the Prosecution of Crimes against the Polish Nation states:

'Article 55: He who publicly and contrary to facts contradicts the crimes mentioned in Article 1, clause 1 shall be subject to a fine or a penalty of deprivation of liberty of up to three years. The judgment shall be made publicly known.

Article 1: This Act shall govern - I. the registration, collection, access, management and use of the documents of the organs of state security created and collected between 22 July 1944 and 31 December 1989, and the documents of the organs of security of the Third Reich and the Union of Soviet Socialist Republics concerning:

a) crimes perpetrated against persons of Polish nationality and Polish citizens of other ethnicity, nationalities in the period between 1 September 1939 and 31 December 1989:

- Nazi crimes,
- Communist crimes,
- Other crimes constituting crimes against peace, crimes against humanity or war crimes'.

The Polish legislation on genocide denial falls within a much broader legislative scheme encompassing a a period of time defined as approximately 45 years; crimes committed by two sets of actors (Nazis and communists); and an intent to encompass other 'crimes against peace, crimes against humanity or war crimes.' Article 55 further permits the Polish judiciary to undertake examinations of the factual record on such crimes as it requires contradiction of a crime 'contrary to facts', and could thus be defended against by contestation of the empirical reality of any given event.

Portugal: Article 240, paragraph 2(b), states:

'2 - Whoever in a public meeting, in writing intended for dissemination, or by any means of media:

(...)

(b) defames or slanders an individual or group of individuals because of race, color, ethnic or national origin or religion, particularly through the denial of war crimes or against peace and humanity...with the intent to incite racial or religious discrimination or to

encourage it, shall be punished with imprisonment from 6 months to 5 years.'

The legislation of Portugal, under Article 240, paragraph 2(b) of the Penal Code, explicitly links denial of war crimes, crimes against humanity or against peace (which includes genocide for the purposes of this legislation) to both the defamation or slander of an individual and to the necessary intent of inciting racial or religious discrimination. While the denial of genocide would automatically be counted as defamation or slander (though it is facially unclear whether the legislation allows for contestation of the factual matrix of a genocide), the wrongdoer's alleged illegal actions must be intended to incite discrimination, which therefore limits the reach of the law.

Romania: Article 6 of the Emergency Ordinance No. 31 of March 13, 2002 states:

'Denial of the Holocaust in public, or to the effects thereof is punishable by imprisonment from 6 months to 5 years and the loss of certain rights.'

Romania has adopted legislation that is analogous to that in France that is intended not to permit judicial examination of the facts of the Holocaust.

Switzerland: Article 261bis of the Swiss Penal Code, which entered into force on 1 January 1995, states in paragraph 4:

'[He] who, publicly, by word of mouth, in writing, by image, by gesture, by assault or in any other way, belittles or discriminates in a way which affects the human dignity of a person or a group of persons because of their race, their ethnic belonging or their religion or who, for the same reason, denies, grossly minimizes or tries to justify a genocide or other crimes against humanity...shall be punished with imprisonment or a fine.'

The maximum prison sentence under this law is 3 years. The Swiss legislation links the criminalization of denial to the reason of affecting human dignity because of race, ethnicity or religion. Therefore, denial without further motivation is not criminalized.

'Continued support for 'genocidal' organizations'

In specific historical situations involving genocidal crimes, the wrongdoers have been centered on a set of identifiable symbols and affiliations, continued support for which has been explicitly criminalized within certain jurisdictions as either a violation of the dignity of victims or as a necessary measure to ensure that the criminal organization is not allowed to return or reflower. These measures highlight a variety of legal tools available in combating structures that have led to genocide. However, these measures will present greater threats to the freedom of speech, expression and association if the organizational or institutional structures that supported genocide are less clearly defined.

Under Article 21, paragraph 2, of the Grundgesetz (Basic Law) of the Federal Republic of Germany, the Constitutional Court has the power to rule on the constitutionality of political parties that 'by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany...' The German Strafgesetzbuch (or Penal Code) outlaws the 'dissemination of means of propaganda of unconstitutional organizations'⁴⁵ and the 'use of symbols of unconstitutional organizations'.⁴⁶ These bans are cabined quite strictly however, as seen in the text of each section:

'Section 86

Whoever domestically disseminates or produces, stocks or imports or exports or makes publicly accessible media for dissemination domestically or abroad, means of propaganda:

of a party which has been declared to be unconstitutional by the Federal Constitutional Court or a party or which it has been determined, no longer subject to appeal, that it is a substitute organization of such a party;

[...]

means of propaganda, the contents of which are intended to further the aims of a former National Socialist Party shall be punished with imprisonment for not more than 3 years or a fine.

Means of propaganda within the meaning of subsection (1) shall only be those writings which are directed against the free, democratic constitutional order or the idea of international understanding.'

Section 86a bans the use of symbols of those organizations listed in Section 86, in particular 'flags, insignia, uniforms, slogans' and similar symbols that will be mistaken for offensive ones. There is, under Section 86a(3) and 86(3), the possibility of interpreting an exemption to this blanket ban in cases in which the propaganda or symbol was used 'to further civil enlightenment, to avert unconstitutional aims, to promote art or science, research or teaching, reporting about current historical events or similar purposes', and the German Constitutional Court's jurisprudence on this issue suggests an increasing unwillingness to find violations of this law for cases in which the intention of the alleged wrongdoer was not to support the purposes of banned organizations.⁴⁷

Article 269/B of the Hungarian Penal Code includes a similar provision, stating:

⁴⁵ Section 86.

⁴⁶ Section 86a.

⁴⁷ See generally Nazi Symbols case, BGH, March 15 2007, 51 Entscheidungen des Bundesgerichtshofes in Strafsachen.

'(1) The person who

Distributes;

Uses before a large number of people;

Exhibits in public;

a swastika, the SS sign, an arrow-cross, sickle and hammer, a five-pointed red star or a symbol depicting the above...shall be punishable with a fine.

(2) The person who commits the act defined in subsection (1) for the purposes of the dissemination of knowledge, education, science, or art, or with the purpose of information about the events of history or the present time, shall not be punishable.'

The exemptions to the application of this law under subsection (2), as well as the requirements of paragraphs (a)-(c) are that the usage be made in clearly public settings, ensures that prohibitions are only placed on illegitimate intentions.

Regional instruments

The Council of the European Union has addressed denial and minimization within the framework of combating racism and xenophobia. Council Framework Decision 2008/913/JHA on 'combating certain forms and expressions of racism and xenophobia by means of criminal law' sets out the offences concerning racism and xenophobia in Article 1, where paragraphs (c) and (d) provide:

'1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, 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 when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

2. For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

[...]

4. Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.'

The final sentence of paragraph 1(c) was introduced over concerns that the breadth of the law required further limitation. Acts of denial must be intentional and likely to incite violence or hatred against the targeted group. As demonstrated in paragraph 2, increasing the possibility for Member States to limit which acts they criminalize expresses the concern that public condonation, trivialization or denial, without further intent or consequences flowing from these utterances, is not sufficiently respectful of free speech concerns, and is not sufficient 'wrongdoing' to lead to criminal sanction. The penalties for these actions in Article 3 are intended to be 'effective, proportionate and dissuasive'.

A preceding Council of Europe Protocol – the Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (2003) – included Article 6 on Denial, gross minimization, approval or justification of genocide or crimes against humanity:

1. Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right:

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

2. A Party may either

a. require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise

- b. reserve the right not to apply, in whole or in part, paragraph 1 of this article.

Paragraph 2 highlights the concerns of some States that a blanket criminalization of this form of action, whereby a speech act is criminalized with no further intent or actions, is too restrictive upon the rights to free speech and free expression. Permitting States to require the denial/minimization to be accompanied with intent to incite hatred, discrimination or violence permits the law to focus on an objective of stopping denial's utilization as a tool for ethnic hatred.

The European Court of Human Rights however has found that even non-contestation laws as streamlined as that of France (see supra on the Gayssot Law) do not violate Article 10 on freedom of expression. Most recently, in *Garaudy v. France*,⁴⁸ the Court held that the Gayssot Law criminalizing Holocaust denial was not a violation of the Convention because to permit this category of historical fact to be denied is an acceptance of an abuse of rights, which is not permitted under Article 17⁴⁹ of the Convention. In addition, such limitations would be permitted under the limitations clause of Article 10, paragraph 2.⁵⁰

'Hate Speech' and Incitement to Violence Laws

International law standards

The International Covenant on Civil and Political Rights (ICCPR) sets out the core elements of the freedom of speech and expression, as well as the legitimate limitations on this right under this instrument:

'Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;

⁴⁸ Case No. 65831/01 of 24 June 2003 (Grand Chamber).

⁴⁹ 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

⁵⁰ 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

Paragraph 3 of Article 19 clearly permits States to implement 'certain restrictions' on the rights of freedom of expression. However, as the Human Rights Committee set out in its General Comment No. 10 on Article 19: '[When] a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes.'⁵¹ The scope of these limitations clause should additionally be narrowly interpreted given the explicit requirement in Article 20 that certain forms of conduct must be prohibited under a State's laws. The prohibition on 'advocacy of national, racial or religious hatred' under paragraph 2 must constitute 'incitement to discrimination, hostility or violence' to fall under the mandatory ban; while this may seem unduly limited in prohibiting hatred, it displays the tension between protecting vulnerable populations and maintaining the core rights of free speech and expression.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) sets out key measures that States should adopt to ensure the eradication of theories and practices of racial superiority and hatred:

'Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial

⁵¹Human Rights Committee, General Comment 10, Article 19 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994).

superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.'

The promotion of prohibitions of conduct that supports racial superiority or discrimination must take into account the Convention's definition of 'racial discrimination', set out in paragraph 1 of Article 1: 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' It is clear that merely referencing or recognizing ethnic or racial differences – whether based on an empirical grounding or a social construct – does not constitute racial discrimination, and is therefore not covered by the Convention. Article 4 is carefully drawn to require prohibitions of actions that are either sufficiently possessive of racial hatred as to permit immediate action, or to be accompanied with the requisite intent to incite hostility or discrimination that is itself of legitimate concern for a State.⁵²

Each of the regional human rights instruments addresses freedom of expression and accompanying conceptions of legitimate restrictions on this right. The American Convention on Human Rights prohibits any 'advocacy of national, racial or religious hatred that constitutes incitements to lawless violence or to any other similar action'; there is also a limitations clause on the right of freedom of expression, carefully drawn as in the ICCPR.⁵³

⁵² See CERD General Comment No. 15, paragraph 3: 'Article 4 (a) requires States parties to penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts.' Committee on the Elimination of Racial Discrimination, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 204 (2003).

⁵³ 'Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private con-

The African Charter on Human and Peoples' Rights includes the right to free expression as well the duty 'to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.'⁵⁴

Article 10 of the European Convention on Human Rights addresses freedom of expression and its legally valid limitations:

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

It is clear that paragraph 2 of Article 10 sets out limitations on this right which may be necessary in a democratic society. It is thus a high bar to justify the imposition of a restriction on freedom of expression, and one that ought not to be taken without precision and clarity. The ECtHR has made it clear that any legal restrictions on free speech in the name of regulating hate speech must include an intent requirement – i.e. that the speaker intended to stir up racial hostility through their speech, and was not merely discussing or presenting views that themselves may be offensive. See, for example, *Jersild v. Denmark*,⁵⁵ which stated that a journalist's presentation of the racist views of others could not be criminalized, as it was "undisputed that the purpose of the applicant in compiling the broadcast in question was not racist."⁵⁶

The Council of Europe Framework decision set out above on combating racism and xenophobia by means of criminal law also addresses incitement to violence or hatred against certain defined groups:

controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.'

⁵⁴ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, Articles 9 and 28.

⁵⁵ Application no. 15890/89, Grand Chamber Judgment, 23 September 1994.

⁵⁶ *Id.* at para. 36.

'1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

(a) 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;

(b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

2. For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.'

The Framework decision is alert to the necessity of maintaining the distinction between the public and the private dissemination of prohibited viewpoints. Additionally, the prohibited act must be to incite 'violence or hatred' against one of the defined groups, a standard that will ensure a distinction is drawn between higher and lower level conduct for criminal sanctions to apply. Paragraph 2 of Article 1 permits States to require an even higher burden before criminalizing conduct in this arena.

Comparative laws on hate speech and incitement

The following section presents and analyzes a selection of national laws addressing hatred and incitement against ethnic or racial groups within national borders, and is intended to present examples from jurisdictions that have confronted heightened tensions in this respect. It is neither comprehensive nor exhaustive, but meant to illustrate instructive examples.

Australia: Article 18 of the Commonwealth Racial Discrimination Act 1975 (as amended through 2009) addresses behavior directed at individuals or groups because of their membership of a racial, national or ethnic group. Under Article 18(B), if one of the reasons why an act is done is the race or ethnic origin of the person being addressed or who the focus of the behavior is, then the act considers the behavior to have been done for the malign and illegitimate reason. Article 18(C) and (D) set out that public acts or comments, if 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' and the act is done because of the race of the person or people in the group, is illegal. Article 18(C)(2) makes it clear that these acts must be done in public: they must be communicated to the public; done in a public place; or done 'in the sight or hearing of people who are in a public place.' The exemptions to this sanction are set out in Article 18(D):

'Section 18(C) does not render unlawful anything said or done reasonably and in good

faith:...

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.'

The distinction between a fair comment on an event or matter which is a sincerely held and genuine belief – which is not unlawful – as compared to the acts in Article 18(C) that are prohibited must be carefully calibrated and delineated by the judicial branch. The attempt to harmonize concerns for racial equality and the security of ethnic or racial groups is balanced against demands for free expression.

Austria: Article 283 of the Penal Code states:

'Incitement to hostile action –

(1) Whoever, publicly, in a manner likely to endanger public order urges or incites others to commit a hostile act...to a race, nation, tribe or state, shall be punished by imprisonment for up to two years.

(2) The same punishment shall be imposed on anybody who publicly in a manner which violates human dignity stirs up hate against any of the groups referred to in Subsection (1) or insults it or seeks to disparage it.'

Paragraph 2 of Article 283 is the more open-ended of the two aspects to this criminal punishment. The action must take place 'publicly'; it must violate the human dignity of the intended target or targets; and the language used must stir up hatred or be insulting or disparaging. The objective of this legislation is focused on the dignity of the individuals threatened by the words used in paragraph 2, and for public order in paragraph 1. Separating these two objectives may assist in clarifying the interpretation of each section as these measures are applied.

Federation of Bosnia and Herzegovina: Self-evident parallels can be drawn between the recent histories of Rwanda and Bosnia. The Criminal Code of the Federation sets out the criminalization of 'inciting national, racial or religious hatred, discord or hostility' in Article 163:

'(1) Whoever publicly incites and inflames national, racial or religious hatred, discord or hostility among constituent peoples and others who live in the Federation, shall be punished by imprisonment for a term between one and five years.

(2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article by employing duress and abuse, jeopardizing the safety, exposing national, ethnic or religious symbols to derision, damaging other people's belongings, desecrating monuments or graves, shall be punished by imprisonment for a term between one and eight years.

(3) By the punishment referred to in paragraph 2 of this Article shall be punished whoever perpetrates the criminal offence referred to in paragraph 1 of this Article by abusing his official post or authority or if that act resulted in riots, violence and other grave consequences to life of constituent peoples and others who live in the Federation.

(4) Whoever perpetrates the criminal offence referred to in paragraph 2 of this Article by abusing his official post or authority or if that act resulted in riots, violence and other grave consequences to life of constituent peoples and others who live in the Federation, shall be punished by imprisonment for a term between one and ten years.'

The Article exhibits a graduated list of acts, so that additional elements of unlawful behavior or consequences are open to higher levels of criminal penalty. Exclusively verbal acts that focus on inciting and inflaming hatred are set out in paragraph 1, and are separated from the use of duress or abuse, or if acts result in riots or violence. Paragraph 1 does indicate that penal sanctions of up to 5 years can be meted out to those publicly inciting hatred to racial groups. Greater sanctions are open to those who abuse their official post or authority, or if the actions result in 'riots, violence and other grave consequences'.

Canada: Articles 319 of the Canadian criminal code addresses incitement of hatred:

'319

(1) Everyone who, by communicating statements in a public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years;
or

(b) an offence punishable on summary conviction.

(2) Everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against an identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years;
or

(b) an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.'

The placing of this Article directly following that of incitement to genocide indicates somewhat that the Canadian legislative branch recognized the close connection between incitement of racial hatred and incitement to genocide at the extreme of hate-speech. Article 319, paragraph 1, requires that the incitement to hatred be 'likely to lead to a breach of the peace' to criminalize the action. Under paragraph 2, publicly communicating statements to promote hatred is indictable if one of the exemptions under paragraph 3 is not present. These broad set of exemptions under paragraph 3 indicate the law's objective to go as far as protecting populations from hatred, but to leave ample room for free discussion and expression on issues of race, ethnicity, nationality and religion. Ensuring that mere discussion of race or ethnicity in negative ways is not criminalized is central to the Canadian approach.

France: A range of legislative enactments address racial or ethnic hatred within France, including Articles 23, 24, 29, 32, & 42 of the Law of July 29 1881 (Press Act); and R624-3 and R625-7 of the French Penal Code. Most relevant are Articles 23 and 24(5):

'Article 23: Persons who by speeches, cries or threats uttered in public places or meetings, or by writings, printed matter, drawings, engravings, paintings, emblems, pictures or any other medium for writing, words or pictures sold, distributed, offered for sale or exhibited in public places or meetings, or by posters or notices exhibited to the public, directly incite a person or persons to commit an act constituting a crime or an incitement is followed by an overt act, as accessory thereto.

Article 24(5): Anyone who, by one of the means listed in Article 23, has incited to

discrimination, hatred or violence against a person or group of persons on account of their origins or their membership or non-membership of a given ethnic group, nation, race or religion will be punished by a term of imprisonment of one month to one year and a fine of 2000 to 300000 francs, or one only of these two penalties.'

These articles present the criminalization, with penalties of both fines and up to one year imprisonment possible, of the public utterance of words or dissemination of written material that has incited discrimination, hatred or violence against an ethnic or racial group. A prosecution would therefore need to show that the words or deeds of the alleged wrongdoer have led to the negative results set out in Article 24(5).

Germany: The same section that sets out the Holocaust denial laws examined in Section III above provides for the following laws on criminalizing public incitement to hatred or violence:

'(1) Whosoever, in a manner likely to disturb the public peace

incites hatred against segments of the population or calls for violent or arbitrary measures against them; or

assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population,

shall be liable to imprisonment from three months to five years.

(2) Whosoever

with respect to written materials (section 11 (3)) which incite hatred against segments of the population or a national, racial or religious group, or one characterised by its ethnic customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group

(a) disseminates such written materials;

(b) publicly displays, posts, presents, or otherwise makes them accessible;

(c) offers, supplies or makes them accessible to a person under eighteen years; or

(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of

Nos. (a) to (c) or facilitate such use by another; or

disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication services shall be liable to imprisonment of not more than three years or a fine.'

Under paragraph 1, the incitement of hatred or the assault on human dignity of 'parts of the population' (a term left undefined in the legislation) must be committed in a 'manner likely to disturb the public peace'. Paragraph 2 addresses the dissemination (through a variety of means that ensure they are presented to a wider public audience) of written materials inciting hatred, or through the use of 'telecommunication services', and those convicted under this provision may face imprisonment of no more than three years or a fine. The distinction between the two paragraphs and the amount of punishment appears to primarily depend on the risk to public peace, indicating again the dual objectives in the legislation of reducing threats to public peace and to protecting the human dignity of these protected populations.

India: The federal Indian Penal Code addresses concerns over racial, religious or ethnic divisions, superiority and hatred. Articles 153A and B state:

'153A: Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintain harmony.-

(1) Whoever

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on ground of religion, race, place of birth, residence, language, caste or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, or

(c) organizes any exercise, movement, drill or other similar activity intending that violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will be used or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.'

Article 153A broadly penalizes any action likely to promote 'enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities', a very broad measure set against a nation with a history of ethnic and religious divisions at select points. There does not appear to be a limitation to public dissemination or comment, but the Indian Supreme Court has indicated that the alleged wrongdoer must intend to achieve the result of enmity to be held liable under Section 153(A).⁵⁷

'153B. Imputations, assertions prejudicial to national-integration.-

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,-

(a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or

(b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India, or

(c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being member of any religious, racial language, regional group, cast or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.'

Article 153B is even broader in its protections of social harmony through promoting equality of citizenship through criminal sanctions. Any assertion of 'differences' with respect to ability to participate in the life of India is open to 3 years imprisonment; yet any assertion of mere difference or the presence of distinctions is not sufficient to fall under this Article. There is a notable absence in the statutory language of a requirement of public utterance to be held liable.

Kenya: Having experienced several incidents of large-scale violence along ethnic, racial or tribal lines in recent years, Kenyan legislation is worthy of comparison. Article 13 of the National Cohesion and Integration Act (2008) explicitly targets 'hate speech':

'(1) A person who-

(a) uses threatening, abusive or insulting words or behaviour, or displays any written material;

(b) publishes or distributes written material;

(c) presents or directs the performance the public performance of a play;

(d) distributes, shows or plays, a recording of visual images; or

(e) provides, produces or directs a programme;

which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behaviour commits an offence if such person intends thereby to stir up ethnic hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.

(2) Any person who commits an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

(3) In this section, "ethnic hatred" means hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.'

Article 13 requires that the alleged act be done in some form of public manner, and be 'threatening, abusive or insulting'. In addition, the actor must intend to stir up ethnic hatred, or it must be very likely to be stirred up in all the circumstances. The maximum penalty is 3 years imprisonment. There are thus several requirements in order to find an individual criminally liable under this statute.

Kenyans also endorsed the proposed Draft Constitution in a referendum in August 2010. Article 33 on Freedom of Expression states:

'(1) Every person has the right to freedom of expression, which includes—

(a) freedom to seek, receive or impart information or ideas;

(b) freedom of artistic creativity; and

(c) academic freedom and freedom of scientific research.

(2) The right to freedom of expression does not extend to—

(a) propaganda for war;

(b) incitement to violence;

(c) hate speech; or

(d) advocacy of hatred that—

(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination mentioned or contemplated in Article 27

(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.'

The Constitution clearly states that prohibitions on incitement, hate speech, and certain forms of 'advocacy of hatred' do not violate the right to freedom of expression, ensuring that the National Cohesion and Integration Act remains constitutional.

South Africa: In the radical legal transformation that emerged with the end of apartheid, a series of legislative measures have been implemented to eradicate the racial divisionism that cemented apartheid for such a significant period of time. First, the Films and Publications Act 65 of 1996 states in Article 29:

'(1) Any person who knowingly distributes a publication which, judged within context-

(a) amounts to propaganda for war;

(b) incites to imminent violence; or

(c) advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm, shall be guilty of an offence.

(2) Any person who knowingly broadcasts, exhibits in public or distributes a film which, judged within context-

(a) amounts to propaganda for war;

(b) incites to imminent violence; or

(c) advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm, shall be guilty of an offence.

(3) Any person who knowingly presents an entertainment or play in public which, judged within context-

(a) amounts to propaganda for war;

(b) incites to imminent violence; or

(c) advocates hatred that is based on race, ethnicity, gender or religion, and which constitutes incitement to cause harm,

shall be guilty of an offence.

(4) Subsections (1), (2) and (3) shall not apply to-

(a) a bona fide scientific, documentary, dramatic, artistic, literary or religious publication, film, entertainment or play, or any part thereof which, judged within context, is of such nature;

(b) a publication, film, entertainment or play which amounts to a bona fide discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or

(c) a publication, film, entertainment or play which amounts to a bona fide discussion, argument or opinion on a matter of public interest.'

Article 29 contains two key limitations to the scope of the prohibited conduct. First, for advocacy of hatred, it must constitute 'incitement to cause harm' to be penalized under this legislation. Interpreted in combination with the subsections (a) and (b) of each of paragraphs 1-3, it is evident that South Africa's objectives is penalizing speech acts that are intended to lead to social unrest and physical violence of some sort. Given the institutional racism that persisted for so long, and the continuing realities of race within the society, it would appear especially prudent to ensure that legislation does not constrain speech that deals and discusses race. Second, the list of exemptions is both deep and broad in

paragraph 4 of Article 29. Although there may be some concern over the power given to the judicial branch in interpreting quite open-ended terminology as 'bona fides' in this context, paragraph 4 serves to protect the legitimate sphere of debate in difficult areas such as race, nationality and religion within a recently polarized society such as South Africa.

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (amended 2003) also deals with the dissemination of theories or racial inferiority in Article 7:

'[No] person may unfairly discriminate against any person on the ground of race, including—

(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;

(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race...'

This Act, while not a criminal statute, prohibits a broad spectrum of ideas based on racial superiority which could lead to civil sanctions and penalties. The wide range of discretionary reparation measures available to the judicial branch in matters such as these permits flexibility in response that is not present if automatic penal sanctions are applied.

United Kingdom: The Public Order Act 1986 sets out to ensure that words or behavior with illegitimate motivations are criminalized. Under Article 18:

'(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4) In proceedings for an offence under this section it is a defence for the accused to prove

that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.'

As observed in the preceding statutory instruments addressing incitement or hatred against ethnic or racial groups, the UK requires further intent or negligence on behalf of the alleged wrongdoer to hold them liable. In this instance, incitement of racial hatred is the key determinative factor as to culpability. That same element of the offense is included in Articles 19-23 that address the publication or distribution of written materials; the performance of a play; the broadcast of a program (television or radio); and even the possession of racially inflammatory material. The legislation does not require that such racial hatred has been stirred up (or has in turn led to any acts of violence or discrimination), but it does ensure that benign uses of these materials or benign utterances are not criminalized.

United States of America: The First Amendment of the US Constitution regulates freedom of speech, and states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The contours of this right to freedom of speech have been extensively examined by the Supreme Court of the United States, and it is impossible to set out all the complexities of their decisions. Nevertheless, the seminal case of *Brandenburg v. Ohio*⁵⁸ made it clear that when speech crosses into calling for imminent unlawful action and is likely to produce such an event then restrictions may be placed on this right.⁵⁹

Switzerland: Article 261bis sets out extremely broad terminology on the criminalization of racial discrimination and genocide denial:

'He who, publicly, incites hatred or discrimination toward a person or group of persons because of their racial, ethnic or religious adherence;

He who, publicly, propagates an ideology with the intention to belittle or denigrate in a systematic manner members of a race, ethnic group or a religion;

He who, for the same reason, organizes or encourages actions of propaganda or participates in them;

⁵⁸ 395 U.S. 444 (1969).

⁵⁹ "[The principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (Emphasis added.) *Id.* At 447.

He who, publicly, by word of mouth, in writing, by image, by gesture, by assault or in any other way, belittles or discriminates in a way which affects the human dignity of a person or a group of persons because of their race, their ethnic belonging or their religion or who, for the same reason, denies, grossly minimizes or tries to justify a genocide or other crimes against humanity...shall be punished with imprisonment or a fine.'

The maximum punishment for any of these crimes is a fine or three years in prison. Paragraph 2 is the most particular aspect of this legislation, focusing on 'ideology'; however, the intention of this propagation must be to 'belittle or denigrate in a systematic manner' members of certain groups. How to recognize these intentions from coded messages is a difficult judicial endeavor, but the qualifiers included in this criminal legislation will decrease the likelihood of penalizing fair and open debate on difficult topics.

Incitement to Genocide

International and comparative laws

The crime of incitement to genocide was first codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), which states in Article 3:

‘Article 3

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.⁶⁰

Article 3 was the basis for the provisions on incitement to genocide in the statutes for the International Criminal Tribunal for the Former Yugoslavia (“ICTY”),⁶¹ and the International Criminal Tribunal for Rwanda (“ICTR”),⁶² and the Rome Statute for the International Criminal Court (“ICC”).⁶³ As the select jurisprudence will show below, it has primarily been within international tribunals that the contours and requirements of this criminal activity have been defined. Canada’s detailed provisions on incitement to genocide parallel the concerns of the Genocide Convention, and seek to enforce Canada’s international obligation that each State criminalizes incitement to genocide.

‘318

(1) Everyone who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

⁶⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Art. 3, Dec. 12, 1948.

⁶¹ “Article 4, Genocide: 1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article. ... 3. The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art 4, May 25 1993.

⁶² “Article 2, Genocide: 1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article. 3. The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. Statute of the International Criminal Tribunal for Rwanda, art. 2, July 1, 1994.

⁶³ Article 25, Individual criminal responsibility 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide. Rome Statute of the International Criminal Court, art. 25, Nov. 10, 1998.

(2) In this section, “genocide” means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely

(a) killing members of the group; or

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

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

(4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion or ethnic origin.’

Article 318, paragraph 2, incorporates only two of the five acts listed in Article 2 of the Genocide Convention, limiting the scope of the Convention’s application in Canada. The penal sanction is a maximum term of five years.

The most common method that municipal systems have utilized in criminalizing all forms of genocide (as required under the Genocide Convention) is through directly implementing the text of the Genocide Convention into national law. For example, the United Kingdom stated in its Genocide Act 1969, Article 1, paragraph 1: “A person commits an offence of genocide if he commits any act falling within the definition of ‘genocide’ in Article II of the Genocide Convention...”⁶⁴ In addition, many nations will address such speech acts under the umbrella legislation dealing with hate speech and incitement to violence – see, for example, the text of the German laws set out in the preceding section.

Jurisprudence on the incitement to genocide⁶⁵

The earliest prosecutions for acts ‘tantamount to incitement to genocide’⁶⁶ involved Julius Streicher at the Nuremberg Tribunal following the end of World War II. The International Military Tribunal found Streicher guilty for speeches and publications in the *Der Stürmer* newspaper that “infected the German mind with the virus of anti-semitism, and incited the German people to active persecution ... for the extermination of the Jewish race”.⁶⁷

A significant number of cases have been tried at the International Criminal Tribunal for Rwanda. The most foundational for assessing the contours of the crime of incitement to genocide is set out in the Akayesu judgment of 1998. On April 19th, 1994, Akayesu gave a speech at a public meeting, for which he was accused of direct and public incitement to

64 Halsbury’s Statutes, 4th ed., vol. 12, p. 530. See similar implementation in the United States

65 For a cogent discussion on the jurisprudence related to the crime of incitement to genocide, see Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 *Va. J. Int’l L.* 485 (2008); Gregory S. Gordon, *A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 *Va. J. INT’L L.* 139 (2004);

66 Benesch, *supra* note 59, at 14.

67 *Famous World Trials: Nuremberg Trials, 1945 – 1949, Julius Streicher*, Univ. of Missouri-Kansas City School of Law, <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergStreicher.html>, (last visited Oct. 13, 2010).

genocide.⁶⁸ The Tribunal found Akayesu guilty of incitement to genocide,⁶⁹ and defined the three relevant elements of the crime in their judgment.⁷⁰ The Tribunal explained that the public element required an examination of two relevant factors - “the place where the incitement occurred and whether or not assistance was selective or limited.”⁷¹ The incitement was public if it was made in a public place, “or to members of the general public at large by such means as the mass media ... radio or television.”⁷² In determining the scope of the public element, the Tribunal looked at the drafting history of the Genocide Convention, and noted that the drafters deliberately excluded private conversation conducted in seemingly public arenas, even though many civil law systems “would regard words as being public where they were spoken aloud in a place that were public by definition.”⁷³

The Tribunal went on to explain that the direct element should be evaluated according to context and content, as a speech constituting direct incitement in one country might not qualify as direct incitement in another setting.⁷⁴ The court determined that a case-by-case evaluation was necessary to determine whether, “in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.” (Emphasis added.)⁷⁵

The Tribunal noted that the mens rea element required the accused to have “the intent to directly prompt or provoke another to commit genocide.”⁷⁶ Therefore, the inciter intends to provoke others to commit genocide, and “must have himself the specific intent to commit genocide”.⁷⁷

The court also addressed causation. They noted that incitement to genocide is an inchoate crime, and decided that a direct causal link was not necessary for one to be guilty of incitement, as “genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such

68 “The morning of April 19, 1994, following the murder of Sylvere Karera, Jean Paul Akayesu led a meeting in Gishyeshye sector at which he sanctioned the death of Sylvere Karera and urged the population to eliminate accomplices of the RPF, which was understood by those present to mean Tutsis. Over 100 people were present at the meeting. The killing of Tutsis in Taba began shortly after the meeting.” Akayesu Indictment, ¶¶ 14 & 15.

69 Prosecutor v Akayesu, Case No. 96-4-T, Judgment, (Akayesu Judgment, (Sept 2, 1998), ¶ 674.

70 Id. ¶¶ 552-556.

71 Id. ¶ 556.

72 Id.

73 Id. “According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television. It should be noted in this respect that at the time Convention on Genocide was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime, thereby underscoring their commitment to set aside for punishment only the truly public forms of incitement.”

74 Id. at ¶ 557. In this context, see the current work conducted by the Office of the Special Adviser on the Prevention of Genocide and Dr. Susan Benesch concerning dangerous speech on the road to genocide. The project’s aims are to (1) design a blueprint for monitoring dangerous speech in countries at risk of genocide and mass atrocities, (2) develop and test a methodology for gauging the dangerousness of specific speech acts, and (3) produce policy response options to limit the effects of dangerous speech.

75 Id. at ¶ 558.

76 Id. at ¶ 560.

77 Id.

incitement failed to produce the result expected by the perpetrator.”⁷⁸

The ICTR has also found individuals involved with the broadcast media guilty of incitement to genocide. In *Prosecutor v Nahimana* (“The Media Case”), all three defendants were found guilty of direct and public incitement to commit genocide.⁷⁹⁻⁸⁰

In assessing their

culpability, the court noted “the importance of taking context into account when considering the potential impact of expression.”⁸¹ The court looked to international jurisprudence from the United States and the European Court of Human Rights, to determine whether the speeches at issue constitute protected free speech, or incitement falling “outside the scope of freedom of speech protection.”⁸² In analyzing the defendants’ speeches and publications, the court examined their purpose, text, and context.⁸³ In determining purpose, the court examined whether the articles and broadcasts conveyed “historical information, political analysis, or advocacy of an ethnic consciousness regarding the inequitable distribution of privilege in Rwanda.”⁸⁴ Where the purpose is “ethnic consciousness [and not] the promotion of ethnic hatred”,⁸⁵ the speech or publication does not constitute incitement.⁸⁶ In analyzing the text, the court noted that “the actual language used in the media has often been cited as an indicator of intent.”⁸⁷ The court referred to *Faurisson v France*,⁸⁸ where the Human Rights Committee found that use of the term “magic gas chamber” suggested an anti-Semitic intent, rather than “bona fide historical research.”⁸⁹

78 Id. ¶ 560 -561.

79 *Prosecutor v Nahimana*, Case No. ICTR 99-52-T, Summary, (Dec. 3, 2003), (“Nahimana Summary”), Judgment.

80 Nahimana Summary, supra note 14, verdict. Hassan Ngeze, the former Editor-in-Chief of the virulently anti-Tutsi newspaper “Kangura”, Ferdinand Nahimana and Jean Bosco Barayagwiza, the co-founder and board member of the RTLM, respectively, were convicted based on their responsibility for the media they controlled. Id. ¶ 87.

81 Id. ¶ 88.

82 “The jurisprudence on incitement also highlights the importance of taking context into account when considering the potential impact of expression. Other factors relating to context that emerge from the jurisprudence, particularly that of the European Court of Human Rights, include the importance of protecting political expression, particularly the expression of opposition views and criticism of the government.” Id. See also, Gordon, supra note 6 at 15.

83 Gordon, supra note 6 at n.139. Gordon notes that purpose and text, analyzed simultaneously by the court, should be considered separately. Additionally, Gordon creates a new category, “relationship between the speaker and the subject,” which he suggests the court looks at in rendering a decision, “The special protections developed by the jurisprudence for speech of this kind recognize the power dynamic inherent in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government. The special protections for this kind of speech should accordingly be adapted, in the Chamber’s view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defense are not endangered. *Prosecutor v Nahimana*, Case No. ICTR 99 - 52 - T, Judgment and Sentence, (Dec. 3, 2003), (Nahimana Judgment), ¶ 1008.

84 supra note 33 ¶ 93

85 Id.

86 Id.

87 Nahimana Judgment, supra note 37 ¶ 1001

88 *Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996).

89 “A concurring opinion in the Faurisson case highlighted evidence that the motivating purpose of the author ... was not an interest in historical research ... [and] noted the ‘tendency of the publication to incite to anti-semitism,’ relying on this tendency to distinguish the author’s work from bona fide historical research that should be protected against restriction ‘even when it challenges accepted historical truths and by so doing offends people’ ... his references to ... the ‘magic gas chamber’ and the context, i.e. a challenge to well-documented historical facts with the implication ‘under the guise of impartial academic research that the victims of Nazism were guilty of dishonest fabrication,’ to support its finding of anti-semitic purpose, the opinion concluded: ‘The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect - the right to be free from incitement to racism or anti-semitism;’ Nahimana Judgment, supra note 41 ¶ 989.

In analyzing context, the court looked at “the tone of the statement”,⁹⁰ and the environment in which the statement was made. The court noted 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.”⁹¹ A speech made in this environment indicates that incitement to violence was the intent of the statement.⁹²

The national prosecution of incitement to genocide has been quite limited. In November 1992, Leon Mugasera, former Vice President of the Gisenyi MRND party in Rwanda, made an inflammatory speech, which “eventually led the Rwandan authorities to issue the equivalent of an arrest warrant”,⁹³ and in 1993 Mugasera fled to Canada. In 1995, the Canadian Minister of Immigration “commenced proceedings ... to deport [Mugasera] on the basis that by delivering his speech, he had incited to murder, genocide and hatred, and had committed a crime against humanity.”⁹⁴ In upholding the validity of the deportation order, the Canadian Supreme Court noted that no “direct causal link between the speech and any acts of murder or violence” need be established to support an allegation of incitement to genocide.⁹⁵ They explained that there are two requirements for an action to be considered incitement to genocide, “the act of incitement must be direct and public.”⁹⁶ The interpretation of these elements by the Supreme Court was essentially identical to that of the ICTR in the Akayesu judgment.

⁹⁰ *supra* note 37, ¶ 94.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Mugasera v Canada*, [2005] S.C.R. 100, 4 (Can.).

⁹⁴ *Id.*

⁹⁵ *Id.*

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