COMMENT

MONKEY READ, MONKEY DO: WHY THE FIRST AMENDMENT SHOULD NOT PROTECT THE PRINTED SPEECH OF AN INTERNATIONAL GENOCIDE INCITER

INTRODUCTION: THE UNITED STATES' PLEDGE TO PREVENT AND PUNISH GENOCIDE

Following the Holocaust, the International Military Tribunal ("IMT") set out to prosecute high ranking Nazis for genocide and crimes against humanity.[1] In fact, use of the term "genocide" "received its first formal, legal recognition in the context of the Nuremburg trials."[2] Throughout the following years, as attempts to codify prohibitions against genocide created a semantic debate,[3] the members of the United Nations General Assembly agreed that they had a duty to ensure that crimes like those of the Holocaust would not go unpunished in the future.[4] In discussions about the creation

1. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 10 (2000). Crimes against humanity are usually defined as having a broader reach than genocide, but both crimes allow prosecution for incitement and the role it can play in persecution:

> The law applicable to atrocities that may not meet the strict definition of genocide but that cry out for punishment has been significantly strengthened. Such offences usually fit within the definition of 'crimes against humanity', a broader concept . . . . [that includes] persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law. . . . [The current crimes against humanity definition is an] 'expanded' definition of genocide that many have argued for over the years.

Id.

2. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 25 (1997).

3. *See infra* Part II.A.

4. *See* Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457, 464 (1998) (quoting *Draft Code of Offences Against the Peace and Security of Mankind*, U.N. GAOR, 9th Sess. Supp. No. 9, at 11, U.N. Doc. A/2693 (1954)) (defining crimes against humanity as "[i]nhuman acts such as murder, extermination, enslavement, deportation or persecution, committed against any civilian population on social, political, racial, religious, or cultural grounds by

of an international statutory prohibition against genocide, "the United States urged . . . [the] prompt adoption of [a genocide] convention."[5] Since then, and in fact "ever since the Holocaust first entered mainstream discourse two decades ago, U.S. leaders have gone out of their way to pledge never again to let genocide happen. Jimmy Carter said it, Ronald Reagan said it, George [H.W.] Bush said it, and, most recently, Bill Clinton said it."[6] And from the beginning of the developing statutory prohibition of genocide, there has been no doubt that the perpetrators can include members of the advertising industry and the mass media.[7]

In the past, the United States has proved more than willing to assist in the prosecution and extradition of genocide perpetrators to other countries to stand trial.[8] In fact, the official position of the United States government bolsters the notion that the country upholds its humanitarian obligations. For example, the United States military stance is that "prosecution and enforcement of the laws of war are obligatory under customary international law."[9] While the military insists upon a customary international human

the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities").

5. *See* SCHABAS, *supra* note 1, at 70.

6. Samantha Power, *Never Again: The World's Most Unfulfilled Promise*, FRONTLINE ONLINE, http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/neveragain.html (last visited Sept. 25, 2008); Interview by Harry Kreisler with Philip Gourevitch, Staff Writer, The New Yorker, in Berkeley, Cal. (Nov. 9, 2000), *available at* http://globetrotter.berkeley.edu/people/Gourevitch/gourevitch-con0.html (explaining that the Genocide Convention acted as a promise that "nations will now act not in self interest, not out of strategic necessity, but to prevent and punish genocide—implying that one would actually launch armies to stop killing inside sovereign states," a promise that Gourevitch says the United Nations "didn't mean" because of its failure to act against genocide post-WWII).

7. Ward Churchill, *Defining the Unthinkable: Towards a Viable Understanding of Genocide*, 2 OR. REV. INT'L L. 3, 3 (2000).

8. *See, e.g.*, Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1010 (Dec. 3, 2003), *available at* http://www.ictrcaselaw.org/docs/doc40472.pdf; Felicity Barringer, *Soviet Reports It Executed Nazi Guard U.S. Extradited*, N.Y. TIMES, July 28, 1987, at A3 (referencing Feodor S. Fedorenko, a former Nazi guard who was deported from the United States in 1984). It is important to note, however, that none of these perpetrators were charged with crimes of incitement. *See, e.g.*, NAZI WAR CRIMINAL RECORDS INTERAGENCY WORKING GROUP, IMPLEMENTATION OF THE NAZI WAR CRIMES DISCLOSURE ACT, AN INTERIM REPORT TO CONGRESS (1999), http://www.archives.gov/iwg/reports/nazi-war-crimes-interim-report-october-1999 [hereinafter DISCLOSURE ACT]; *infra* note 16 and accompanying text

9. Lee A. Steven, Note, *Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425, 444 (1999).

rights duty, the Pentagon, too, has commented that "[p]reventing and prosecuting war crimes, crimes against humanity and genocide is a critically important priority for the U.S. Every nation has the responsibility to prevent and punish war crimes."[10] Since 1979, grounds for extradition and removal from the United States have included "participation in Nazi persecution" and "genocide."[11] This stance on extradition is important when a favored mechanism of perpetrators to avoid prosecution is to immigrate to another country.[12] Not surprisingly, "[t]his tendency became most apparent after World War II, when many Nazis moved to other countries where they hoped to begin new lives in relative obscurity."[13] The United States, along with other nations, vehemently denied refuge to these genocide perpetrators.[14] Of increasing concern, however, is the current trend in which "perpetrators of the Rwandan genocide have sought to avoid retribution at home or prosecution before the international tribunal . . . by seeking refuge in other African countries and in Europe."[15] Unlike the immediate post-World War II response from the United States, denying refuge to more recent perpetrators has not been as closely policed by the United States (or, not coincidentally, as the object of such public concern and attention as the postwar Nazi criminals).[16]

10. *Id.* (quoting Pentagon Memo of Mar. 27, 1998, available from World Federalist Movement (wfm@igc.apc.org)).

11. Sandra Coliver, *Bringing Human Rights Abusers to Justice in U.S. Courts: Carrying Forward the Legacy of the Nuremburg Trials*, 27 CARDOZO L. REV. 1689, 1690 (2006).

12. *See* RATNER & ABRAMS, *supra* note 2, at 212 ("The penchant of gross violators of human rights for escaping justice has led many to flee the site of their atrocities.").

13. *Id.*

14. *See* DISCLOSURE ACT, *supra* note 8.

15. RATNER & ABRAMS, *supra* note 2, at 212.

16. *Compare* DISCLOSURE ACT, *supra* note 8 (describing the frenzied capture and extradition of Nazi war criminals following WWII), *with infra* note 212 and accompanying text (explaining that Elizaphan Ntakirutimana, a Hutu Rwandan minister, sought refuge from prosecution for his role in the Rwandan genocide by entering the United States, where he remained for an extended period before the United States began extradition procedures). The Nazi War Criminal Records Interagency Working Group states that:

> In the United States the process of 'Nazi hunting' was initiated on a comprehensive basis with the creation of the Office of Special Investigations within the Criminal Division of the Department of Justice. . . . The mission . . . was . . . to identify and bring legal proceedings to denaturalize and deport individuals who participated in Nazi- and other Axis-sponsored acts . . . . [E]fforts to date have resulted in the stopping of more than 150 suspected Nazi persecutors at U.S. ports of entry and their exclusion from the United States.

DISCLOSURE ACT, *supra* note 8.

Although the road to the "never again" policy may have begun with humanitarian intentions,[17] issues preventing its implementation arise when the policy conflicts with strongly held United States principles of American jurisprudence. For instance, First Amendment free-speech protections severely complicate the issue when considering extradition for the crime of "incitement to genocide."

In 1930s Germany and 1990s Rwanda, two newspapers became the voices of genocidal regimes.[18] Julius Streicher, a vehement Nazi supporter, was the editor-in-chief of *Der Stuermer*, an anti-Semitic newspaper that called for the persecution and annihilation of European Jews.[19] *Der Stuermer* began operation in the 1920s and continued in major distribution for many years.[20] Nearly fifty years after *Der Stuermer* ceased publication, Hassan Ngeze, a Rwandan Hutu, began publishing the racist *Kangura*, a newspaper that called for the persecution and extermination of Rwandan Tutsis.[21] These two cases, both brought before international tribunals, are the only known examples of newspaper prosecutions for incitement to genocide.[22] These charges of "incitement to commit genocide" did not punish actual *participation* in the murders that became genocides within Germany and Rwanda, but rather punished the speech that significantly contributed to the schools of thought fueling the respective genocides.

Because neither Streicher nor Ngeze sought refuge in the United States, the United States was never forced to come to a definite conclusion about the actions it would take against a genocide inciter. Regardless, within the framework of United States extradition for genocide and the way in which mass media members can be prosecuted for *incitement*, the question becomes whether the United States would exercise its obligation to prosecute or extradite a genocide perpetrator of this nature when the crimes committed by that person are punishable under international customary law, the

17. Gourevitch stated that the United Nations did not mean this when it said it. *See* Gourevitch, *supra* note 6 and accompanying text.

18. *See infra* Part III.A–B.

19. *See infra* Part III.A.

20. *See infra* Part III.A.

21. *See infra* Part III.B.

22. *See infra* Part III; *see also* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 8–10 (Dec. 3, 2003), *available at* http://www.ictrcaselaw.org/docs/doc40472.pdf (identifying the three Rwandan "media" perpetrators, but noting that Ngeze was the only criminal charged for his involvement in printed newspaper speech, while Ferdinand Nahimana and Jean-Bosco Barayagwiza were indicted for their involvement in the propagandist radio station, RTLM).

U.N. Genocide Convention, and the Rome Statute of the International Criminal Court, but are protected by the First Amendment of the United States Constitution.[23]

The perpetrators in these two cases were integral in instituting the hate that led to the killings in their countries.[24] And while their speech did not *immediately* incite the genocides that occurred, for years their words inspired the hate and prejudice that led millions to stand by apathetically while genocide occurred or to participate in the killings. In describing Streicher's capture in 1946, one of his captors spoke of the resounding impact of his hate speech that encouraged Germans to persecute and nearly annihilate the Jewish population of Europe:

> That he succeeded will remain the everlasting shame of the German people. Without him and his fellow propagandists, . . . the general's troops could never have achieved their purpose.
>
> . . . He leaves behind him a whole people poisoned with the lust of hatred, cruelty, and murder. Perverted by him, the German people remain a menace to civilization for generations upon generations to come.[25]

This passage makes clear that words are not harmless, even when lawless action is not *imminent*, as is required for prosecution under the First Amendment.[26] Thus, it is useful to examine what a United States response to an international request to prosecute or extradite a genocide perpetrator would look like when that perpetrator is charged with "incitement to commit genocide" because of hate speech published in the media. Even though neither Streicher nor Ngeze fled to the United States, forcing a decision on this issue, it is surely possible that the United States could find itself in this situation in the future. If this happens, does the United States' vow of "never again" take precedence over the First Amendment?

This is not just an academic argument. American lawmakers have debated the incitement to genocide issue in the past, and despite international pressure, the United States has been reluctant to enter treaties designed to handle the evils associated with

23. *See* U.S. CONST. amend. I; G.A. Res. 260 (III), at 174, U.N. Doc. A/810 (Dec. 9, 1948); *infra* Part II.A–B.

24. *See* discussion *infra* Parts III.A.2, III.B.2.

25. Raymond Daniell, *Streicher Called Worst of Germans*, N.Y. TIMES, Jan. 11, 1946, at 6.

26. *See infra* Part IV.A.

"incitement to genocide."[27] The first part of this Comment details the history of this debate. The second part establishes that the policies underlying the First Amendment should not apply to members of a totalitarian society sponsoring genocide. The First Amendment was designed to protect individual autonomy and "the marketplace of ideas" in a free society.[28] Even the Supreme Court has indicated that free speech protections may vary by context.[29] As the German and Rwandan cases of incitement to genocide demonstrate, individual autonomy is not a concern in a genocidal society; one totalitarian regime dominates a less powerful group. Those in power suppress all speech designed to undercut their control while stripping the less powerful of their rights to free expression. Because the First Amendment was designed to protect individual freedom and to increase speech, there is no reason to grant those that incite genocide the protections implicit in strong free speech rights.

II. INTERNATIONAL LAW AND GENOCIDE: PROHIBITIONS AGAINST INCITEMENT

Before conducting an educated criticism of the United States' disapproval of punishing international incitement to genocide, it is important to understand the history and current world view of this problem. Abroad, many countries have recognized that words can be regulated as hate speech.[30] While the First Amendment requires the likelihood of "imminent lawless action" for words to be punishable,[31] the international community has indicated that freedom of speech is much less relevant where one's words take on the ability to permanently silence an entire group of people.

27. *See* Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 507–09 (2008); Ameer F. Gopalani, *The International Standard of Direct and Public Incitement to Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L.J. 87, 87–90 (2001).

28. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

29. *See infra* Part V.B.

30. *See infra* note 170 and accompanying text.

31. *See infra* Part IV.A.

A. The Statutory Role of the U.N.: The Genocide Convention

1. Background: Creating an Incitement Prohibition

With the end of World War II came stirrings of an international mandate to write laws prohibiting incitement to genocide. At the beginning of this international crisis over the realities of the Nazi Holocaust, the United States wanted prosecution of such acts of genocide to require a link to wartime.[32] However, eventually accepting that genocide can occur outside a wartime context, the United States revised its stance only a few days later in July of 1945, allowing prosecution of crimes against humanity before *and* during wartime activities.[33] This was an important step because most historically recognized genocides have occurred *outside* a wartime context.

Following the Nuremberg sentences and the growing consensus that a wartime nexus was no longer required to prosecute genocide, the U.N. General Assembly began drafting the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention") that would invite member states of the U.N. to prosecute human rights offenders within their own borders.[34] The process of drafting the Convention began in 1947, but its definition of the crime of genocide continued to develop into the 1990s.[35] For the purposes of this Comment, I will outline the essential points of

32. *See* SCHABAS, *supra* note 1, at 34–35 (indicating that the international community first considered itself entitled to prosecute World War II crimes against humanity only where there was a "nexus between the war itself and the atrocities committed by the Nazis against their own Jewish populations"); *see also id.* at 35 (indicating that the IMT thought it only had jurisdiction to prosecute the Nazis strictly as a war criminals). "It was on this basis [the nexus between the war and the Jewish atrocities], and this basis alone, that they considered themselves entitled to contemplate prosecution". *Id.* According to the head of the U.S. delegation at the time of the Nuremburg trials, Robert Jackson:

> It has been a general principle of foreign policy of our Government . . . that the internal affairs of another government are not ordinarily our business . . . . The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities.

Id. (quoting REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 331 (1949)).

33. *See* SCHABAS, *supra* note 1, at 36.

34. *See id.* at 43–47; *id.* at 46 ("Resolution 96(I) eliminate[d] any nexus between genocide and armed conflict, the unfortunate legacy of the Nuremburg jurisprudence.").

35. *See, e.g.*, *id.* at 51–101 (noting that many drafts of the Genocide Convention were created before the U.N. delegates could agree).

the Genocide Convention. Ratified in 1947, U.N. Resolution 96(I)[36] "declar[ed] genocide to be a crime under international law."[37] Article I of the resolution "stated that the purpose of the convention was 'to prevent the destruction of racial, national, linguistic, religious or political groups of human beings."[38] Article II, which the United States initially opposed, "asserted that genocide include[d] attempts, preparatory acts, willful participation, direct public incitement and conspiracy."[39] The United States wanted to exclude any reference to hate speech, especially any references to "incitement" to commit genocide.[40] Despite the United States' dissention, by 1948 an ad hoc committee was created to draft the final guidelines that would emerge out of the Genocide Convention, guidelines that would include incitement prohibitions.[41]

2. Punishing Incitement to Genocide: At Odds with the First Amendment?

The "heart of the Convention" is defined by Articles II and III, which "define genocide and enumerate the acts made punishable under the Convention."[42] The clause that eventually caused the United States much chagrin was Article III, which specifically "deal[t] with direct and public incitement to commit genocide."[43] The United States and other delegates "argued for its deletion, fearing it might encroach upon freedom of expression."[44] Commentators have

36. *See* RATNER & ABRAMS, *supra* note 2, at 47 (indicating that as early as 1946, the U.N. General Assembly began drafting 96(I) as an "endorsement . . . of the principles of international law recognized in the IMT Charter").

37. SCHABAS, *supra* note 1, at 51.

38. *Id.* at 53.

39. *Id.*

40. *See id.* at 57.

41. *See id.* at 61.

42. RATNER & ABRAMS, *supra* note 2, at 26; *see also id.* at 27 (defining "genocide" under Article II).

43. SCHABAS, *supra* note 1, at 73.

44. *Id.* Schabas goes on to state that:

> Predictably, the United States, with its strong judicial and political commitment to freedom of expression, was opposed to such a provision: "Under Anglo-American rules of law the right of free speech is not to be interfered with unless there is a clear and present danger that the utterance might interfere with a right of others." The United States proposed that this provision on "incitement" be so qualified.

Id. at 267; *see also* Gopalani, *supra* note 27, at 88 (indicating that a U.S. representative at the drafting of the Genocide Convention "declared the [incitement provision] was a plain infringement on the guarantees of free speech protected by the First Amendment"). Also interesting to note here is the Soviet Union's suggestion, which was ultimately rejected by the ad hoc committee: "additional act of genocide: 'all forms of public propaganda (press,

noted that "many [United States] senators feared that the Genocide Convention would curtail First Amendment freedom of speech rights."[45] While "the unease of the United States with measures restricting freedom of expression was noted,"[46] the draft was eventually submitted to the U.N. General Assembly on December 9, 1948, and all fifty-six nations voted in favor of the Genocide Convention.[47] With this vote, every other U.N. member delegate recognized that propagandists are an essential element in a society that is tolerant of a genocidal regime because they inject poisonous ideas into a genocidal society. And, more importantly, when these propagandists use the mass media to push their ideology, contrary ideas and speech are stifled, and victims of the genocidal regime have no power to prevent the poison from spreading.

Following this vote for the Convention, a majority of forty-three delegates also voted to institute an international criminal tribunal.[48] This idea became the International Criminal Court ("ICC") through the Rome Statute of 1998.[49] Put into force in 2002,[50] the Rome Statute calls upon the international community to punish perpetrators of incitement to genocide, among other crimes, and provides the mechanisms for such prosecution.[51] However, in May of 2002, the current United States administration announced its intention to "unsign" the Rome Statute, effectively unbinding the United States from statutory obligations to prevent genocide and other crimes against humanity.[52] This "unsigning" pejoratively

radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide.'" SCHABAS, *supra* note 1, at 267 & n.49.

45. Gopalani, *supra* note 27, at 88.

46. SCHABAS, *supra* note 1, at 267.

47. *See id.* at 80.

48. *See id.* at 81.

49. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998).

50. *See id.*

51. *See id.* at Art. 25(3)(e).

52. *See* Anup Shah, *United States and the ICC*, GLOBAL ISSUES, Sept. 25, 2005, http://www.globalissues.org/article/490/united-states-and-the-icc; *see also* Paul L. Hoffman & Nadine Strassen, *Enforcing International Human Rights Law in the United States*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 477, 479 (Louis Henkin & John Lawrence Hargrove eds., 1994) (indicating that "the United States has ratified few international human rights treaties . . . and has treated most such treaties as not being enforceable in domestic courts"); *id.* at 480–81 (noting that the U.S. has not ratified nearly forty international human rights provisions, and that there is an implicit U.S. understanding not to abide by many international human rights laws when those laws' provisions "prescribe more protective human rights guarantees than those currently recognized under U.S. law").

symbolized a United States move away from any commitment to international human rights, effectively undoing a step taken roughly only a decade ago when the United States finally agreed to the terms of the Genocide Convention.[53] Keeping in mind the United States' recurring opposition to certain international human rights agreements in the past, some commentators have argued that despite the overwhelming international agreement to establish an international court and to adopt the Rome Statute,[54] "the United States . . . opposed and attempted to undermine the ICC from the birth of its concept."[55] It should be noted that the Genocide Convention lacks force without a statutory mandate to punish inciters of genocide[56] and to protect their victims through the Rome Statute's provision for the ICC. But this fact alone does not mean that the United States would be prevented from prosecuting or extraditing inciters to genocide. The United States could rely on customary law to bring justice to the propagandists supporting and implementing genocide.[57] Unfortunately, as the next section indicates, it is more than likely that the United States would spurn international custom under the view that the First Amendment protects an absolute right to freedom of speech.

B. Customary International Human Rights Law

Even if a country, such as the United States, has not ratified the U.N. Genocide Convention or the Rome Statute, it may nonetheless have an international obligation to prosecute or extradite international human rights violators. "The status of genocide under customary international law is significant because it determines the obligations of all states regarding genocide, whether

53. *See* Leo Kuper, *The United States Ratifies the Genocide Convention*, INTERNET ON THE HOLOCAUST AND GENOCIDE, Feb. 1989, *reprinted in* FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES, at 422, 422 (1990) (writing in 1989, historian Leo Kuper noted the "jubilation in human rights circles that the United States has finally, after a delay of forty years, ratified the Genocide Convention . . . . The long delay in the ratification is particularly startling, given the dominant role of the United States in the early years of the United Nations").

54. *See* Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1026 (2006).

55. Tomas A. Kuehn, Comment, *Human "Wrongs"?: The U.S. Takes an Unpopular Stance in Opposing A Strong International Criminal Court, Gaining Unlikely Allies in the Process*, 27 PEPP. L. REV. 299, 300 (2000).

56. *See* Steven, *supra* note 9, at 427–29.

57. *See, e.g.*, HANS KELSEN, THE PURE THEORY OF LAW (Max Knight trans. 1967), *reprinted in* ANALYTIC JURISPRUDENCE ANTHOLOGY, at 50, 51 (Anthony D'Amato ed., 1996) (suggesting that certain norms "are 'law' because they are parts of the legal order as a whole").

or not they are party to the Convention."[58]

The idea of customary crimes-against-humanity law continued to develop with the Charter of the International Military Tribunal.[59] Customary law prohibits genocide; but some tribunals also outlaw other farther-reaching crimes against humanity such as *incitement* to genocide. The importance of customary international human rights law is that "[i]n the absence of any authoritative treaty or set of treaties on crimes against humanity, [the meaning of 'genocide'] must be found in customary international law" in order to prosecute speech inciting it.[60]

For our purposes, it is useful to look specifically at the universality principle of customary international law, which "permits a state to exercise jurisdiction over perpetrators of certain offenses considered particularly heinous or harmful to mankind, regardless of any nexus the state may have with the offense, the offender, or the victim."[61] The universality principle assumes that all states have the right to exercise jurisdiction over genocide perpetrators.[62] This assumption, in turn, rests on the premise that "certain offenses are so egregious and universally condemned that all states have an interest in proscribing and punishing the offenses no matter where or by whom they occur."[63] While it is clear that "governments and commentators do not completely concur as to those offenses for which international law confers universal jurisdiction," states have tended to agree that crimes against humanity and genocide[64] are covered by the law. If these crimes are included, one could argue that incitement to genocide is included as well.

While the IMT Charter makes clear that the international custom is to condemn genocide, it is not clear whether a *duty*, or just a mere *right*, exists to prosecute or extradite those convicted of violating it.[65] Critics have argued that the universal jurisdiction created through the universality principle is permissive, not mandatory, indicating that the jurisdiction only "*authorizes*, rather than *obliges* States to prosecute and punish offenders. International

58. RATNER & ABRAMS, *supra* note 2, at 40.
59. *Id.* at 46.
60. *Id.* at 49.
61. *Id.* at 140.
62. *See* Steven, *supra* note 9, at 428.
63. *Id.* at 433.
64. RATNER & ABRAMS, *supra* note 2, at 140; *id.* at 142 (noting that "genocide likely carries universal jurisdiction under customary international law"); *id.* at 143 ("As with genocide, crimes against humanity today are subject to universal jurisdiction.").
65. *See* Steven, *supra* note 9, at 439.

[customary] law does not import a mandatory obligation upon State authorities to undertake prosecution."[66] Looking at customary law in this vein, it is difficult to see how the United States would seek to prosecute or extradite a perpetrator if it is not *bound* by customary international law. This is especially problematic when the United States, as the country hypothetically maintaining custody of the genocide inciter, is entitled to punish that inciter according to the United States law governing that offense,[67] and "incitement" is not theoretically punishable under current United States law because of First Amendment protection.[68] History confirms such fears since, in the past, "U.S. courts have not treated customary international human rights law as binding in [its] domestic litigation."[69] If the United States does not feel compelled to prosecute human rights criminals in its courts to begin with, the United States would very likely not consider itself bound to prosecute a human rights violator who committed an incitement crime by publishing hate speech. Whether or not a *prosecution* would occur under U.S. law, it is still unclear whether the United States would nonetheless consider itself obligated to *extradite* (rather than choose the more involved role of prosecution) when the First Amendment would protect the perpetrator's crime if it had been committed in the United States.

Scholars argue that the duty to prosecute is much different than the duty to extradite.[70] While the duty to prosecute may be permissive,[71] customary law suggests that the duty to extradite is more obligatory[72] "because of the very nature of the universal prohibition of genocide."[73] And while these *jus cogens*[74] norms

66. *Id.* at 440 (quoting LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 114 (1992)).

67. Steven, *supra* note 9, at 434.

68. *See infra* Part IV.A.

69. Hoffman & Strassen, *supra* note 52, at 479–80.

70. *See* Steven, *supra* note 9, at 442.

71. *See id.* at 440 ("[N]o nation has affirmatively taken it upon itself to exercise universal jurisdiction in every situation where such jurisdiction is authorized.").

72. *See id.* at 442 ("All states must 'cooperate in bringing those who commit such offenses to justice.' . . . [There is] a *mandatory*, *affirmative obligation* [to extradite or prosecute] for serious crimes such as war crimes, crimes against humanity, and genocide.").

73. *Id.* at 450.

74. Rafael Nieto-Navia, *International Peremptory Norms (JUS COGENS) and International Humanitarian Law*, ICC NOW 1, Mar. 2001, *available at* http://www.iccnow.org/documents/WritingColombiaEng.pdf (defining "jus cogens" as "peremptory norms in international law" that make up a body of "overriding principles of international law . . . that no State may derogate by way of treaty").

prohibiting genocide are "well established" and "nonderogable in nature,"[75] there is nonetheless a "continuing disparity between the U.S. government's commitment to the application of international human rights norms in the rest of the world and its willingness to accept these obligations fully within its own borders."[76]

Although the United States has clear procedures in place for denaturalizing and deporting human rights abusers, it is not clear that these mechanisms are fully utilized against international human rights violators in every applicable case.[77] In fact, there is still currently "no [government] office . . . that is dedicated to tracking down and deporting modern-day human rights abusers."[78] Generally, the United States has indicated a seemingly limited acceptance of its customary international human rights obligations,[79] particularly when those obligations infringe upon its constitutional protections of freedom of expression.

III. WHEN WORDS BECOME GENOCIDAL: USING *DER STUERMER* AND *KANGURA* TO INCITE MURDER

With the history and scope of the debate defined, the next question is whether the United States *should* protect genocide inciters because of the policies underlying the First Amendment. Before looking at the Supreme Court's vehement protection of the First Amendment in a free society, it is useful to examine the two known cases of incitement to genocide in order to reach an understanding of the effects of hate speech in a genocidal state. These two cases involved Julius Streicher, one of only two Nazis found guilty by the IMT at Nuremburg for inciting the genocide of the Holocaust,[80] and Hassan Ngeze, one of three Rwandan Hutus found guilty of incitement to genocide by the International Criminal Tribunal for Rwanda ("ICTR"). These two men incited genocide through printed hate speech in newspapers and were eventually

75. Sadat, *supra* note 54, at 1025; RATNER & ABRAMS, *supra* note 2, at 40 (indicating that "the prohibition of genocide has achieved the status of a *jus cogens* norm").

76. Hoffman & Strassen, *supra* note 52, at 477.

77. *Compare* RATNER & ABRAMS, *supra* note 2, at 212–13 (discussing the United States' procedures for deporting criminals, especially Nazi war criminals following WWII), *with infra* note 212 and accompanying text (explaining that Elizaphan Ntakirutimana, the Rwandan minister who participated in his country's genocide, evaded denaturalization and/or deportation for an extended period while he lived in the United States).

78. Coliver, *supra* note 11, at 1690.

79. *See* Hoffman & Strassen, *supra* note 52, at 478.

80. *See* International Military Tribunal, *Indictment Against Major Nazi War Criminals*, 19 TEMP. L.Q. 172, 220 (1945).

convicted for incitement to genocide. Their respective cases represent the only examples of perpetrators who committed punishable acts of incitement to genocide through printed hate speech in newspapers.[81]

A. Jew Baiter Number One: Julius Streicher and Der Stuermer

1. Background: Rallying the Troops

Julius Streicher published *Der Stuermer*, an anti-Semitic newspaper, from 1923 until 1945, with the bulk of the publications occurring before 1939.[82] "The aim of *Der Stuermer* was to attack, denounce, and promote discrimination against Jews in every way possible."[83] In German circles, Streicher was known as "Jew-Baiter Number One."[84] Even early on, the publication of *Der Stuermer* was not innocuous. While it began with a circulation of under 20,000 copies, as early as 1935 the circulation had climbed to 500,000.[85] The extent of *Der Stuermer*'s circulation was an important factor for the IMT in convicting Streicher of incitement to genocide, and later became an important factor in the ICTR's conviction of Ngeze.[86] More important was the infiltration of the paper into every social strata of German society. "*Der Stuermer* was widely distributed in Germany and was read by German citizens from all social classes, including Hitler himself."[87] Combined with its circulation, large-scale reproductions of the anti-Semitic propaganda featured in *Der Stuermer* were hung on storefronts throughout Germany, making it

81. *See* Dina Temple-Raston, *A Landmark Case in Rwanda Raises the Issue: Can Words Kill? How Much Press Freedom is Too Much?*, COLUM. JOURNALISM REV. Sept.–Oct. 2002, *available at* http://cjrarchives.org/issues/2002/5/rwanda-temple.asp (specifying that "Ferdinand Nahimana, Hassan Ngeze, and Jean-Bosco Barayagwiza [were] the first journalists to be accused of crimes against humanity since Julius Streicher, the Nazi editor, was sent to the gallows by judges at Nuremberg in 1946").

82. *See* Martin Imbleau, *Der Stürmer*, *in* ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 247, 247–48 (Dinah L. Shelton ed., 2005).

83. *See id.* at 247.

84. 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, 143 (2004).

85. Imbleau, *supra* note 82, at 247.

86. *See* Recent Case, *U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity*, 117 HARV. L. REV. 2769, 2772 (2004) (indicating that "incitement to genocide" was applied to members of the mass media, and the ICTR noted that relevant factors for this application were "the actual circumstances, the scope of the impact, and the particular importance of protecting political expression") [hereinafter Recent Case, *U.N. Tribunal*].

87. Imbleau, *supra* note 82, at 247.

difficult for passersby to avoid.[88] It should be noted that such banners, as a practical matter, would not be tolerated in the United States, as the persecuted group would find its own medium to counter the propaganda.[89] In Germany, however, there were no publications in which critics of Nazi policies could voice their concerns.[90] Instead, free-thinking Germans could only sit by while the plans for the Final Solution[91] gained strength and support.

The rhetoric propagated by *Der Stuermer* was coupled with gathering-speeches given by Streicher himself, a combination that the IMT at Nuremburg found "infected the German mind with the virus of anti-Semitism and incited the German people to active persecution."[92] As early as 1934, information about *Der Stuermer* was published in the *New York Times*, providing Americans with a glance into the paper's anti-Semitic workings. One of the reports discussed the "Special Ritual Murder Number,"[93] a "special issue" of *Der Stuermer* that called on Germans to annihilate Jews.[94]

Both issues printed immediately after the "Ritual Murder" issue were "as full of anti-Jewish hatred as their predecessors and contain[ed] the usual [anti-Semitic] caricatures and epithets."[95] Among many anti-Semitic messages, these issues urged that "[s]exual intercourse between a Jew and a non-Jewish woman must be punished with death."[96]

88. *Id.* at 248.

89. The ACLU instructs us to counter prejudiced speech with *more speech*. *See infra* notes 196–98 and accompanying text.

90. *See infra* note 211 and accompanying text; *see also* INGE SCHOLL, STUDENTS AGAINST TYRANNY: THE RESISTANCE OF THE WHITE ROSE, MUNICH, 1942–1943, at 52–63 (Arthur R. Schultz trans., Wesleyan Univ. Press 1970) (1952) (detailing the resistance activities, capture, and execution of Hans and Sophie Scholl, along with other members of their Munich-based Nazi resistance group, the White Rose).

91. *See, e.g.*, Jewish Virtual Library, "Final Solution" Euphemisms, http://www.jewishvirtuallibrary.org/jsource/Holocaust/euphemism.html (last visited Nov. 9, 2008) ("The term 'Final Solution' *(Die Endlösung)* was a euphemism. Himmler was fully prepared to talk about killing to his immediate subordinates, but much of the Nazi killing machine was shrouded in bureaucratic euphemism.").

92. Recent Case, *U.N. Tribunal*, *supra* note 86, at 2769 (quoting 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 547, 547 (1948)).

93. *See Frankfurter Zeitung Regrets the 'Ritual Murder Issue,'* N.Y. TIMES, May 11, 1934, at 10.

94. *See Stuermer Pursues Attacks*, N.Y. TIMES, May 12, 1934, at 6.

95. *Id.*

96. *More Laws to Curb Jews Urged in Reich*, N.Y. TIMES, Dec. 15, 1934, at 5; *see also* SCHABAS, *supra* note 1, at 39 (recounting Streicher's messages in *Der Stuermer*: "Julius Streicher described the Jew 'as a germ and a pest, not a

As the war began, the circulation of *Der Stuermer* dropped dramatically due to paper shortages in Germany, but also because the persecution of the Jews had lessened the *need* for such propaganda.[97] The Jews were losing all freedom and political power, and by 1935, calls from within the publication to terrorize and murder Jews came to fruition in the streets of Berlin.

> Terror spread along Berlin's fashionable Kurterstendamm . . . as Jews, with blood pouring down their faces, fled along the street. . . . [A] Jewish ice cream and confectionery shop was completely wrecked, the proprietor was badly beaten, and his girl assistant was knocked unconscious. . . . A member of the British Embassy staff rescued one young man whose eyes became filled with blood so that he could not see where he was running.[98]

Covering the attacks in Berlin, a *New York Times* journalist linked the assault to Streicher's requests in *Der Stuermer*: "Julius Streicher's anti-Semitic battalions . . . have been hard at work in the city. . . . [A]gents selling Mr. Streicher's organ, the Stuermer, went from café to café with placards . . . bearing the customary scurrilous caricatures."[99] Following the attacks, Streicher gave a speech to his parishioners in which "Christ and Hitler were treated as more or less analogous and the devil and Jews as synonymous."[100]

Only a month after the bloody July, 1935 attack, another attack occurred, but with less personal and property damage.[101] Streicher spoke to the German citizens immediately following this second attack, but gave a "strange performance," apparently because only one storefront window had been broken in this second attack, in comparison to the utter pandemonium of the former attack.[102] As time went on, Streicher's calls to annihilate the Jews grew. In 1936, guests at a meeting held by Streicher "heard Mr. Streicher's version of what he really mean[t] by 'solving the Jewish problem.'" At that meeting, Streicher opined that, "in the last analysis extermination

human being, but "a parasite, an enemy, and evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind."'"); *id.* at 40 (describing another *Der Stuermer* sentiment: "The Jews . . . must be killed. They must be exterminated root and branch.").

97. *See* Imbleau, *supra* note 82, at 248.

98. *Jews Are Beaten By Berlin Rioters; Cafes Are Raided*, N.Y. TIMES, Jul. 16, 1935, at 1.

99. *Id.* at 6.

100. Otto D. Tolischus, *Streicher is Heard By 100,000 in Berlin*, N.Y. TIMES, Aug. 16, 1935, at 4.

101. *Id.*

102. *Id.*

[was] the only real solution to the Jewish problem."[103] Streicher made "suggestions for the solution of a 'world problem,'" which would require extermination.[104] He urged that "if a final solution was to be reached, 'one must go the bloody path' . . . . [and that] to secure the safety of the whole world [the Jews] must be exterminated."[105] In 1938, *Der Stuermer* published "a special [issue] devoted to 'racial pollution' and demanding the death penalty for Jews . . . . [which was] captioned in huge red letters."[106] In his indictment by the IMT, evidence against Streicher focused on his words, which included such speech as, "'[t]he sun will not shine on the nations of the earth until the last Jew is dead.'"[107] The tribunal referred to this declaration and others as "avowals and incitements."[108]

2. You Are a Genocide Inciter!: The IMT Findings

The IMT at Nuremburg charged Streicher with the persecution of Jews, [109] a subset of crimes against humanity, a charge that was based on an "incitement" provision. Specifically, the tribunal noted that he was the "editor in chief of the anti-Semitic newspaper Der Stuermer," and that he "authorized, directed, and participated in the crimes against humanity[,] . . . particularly the incitement of the persecution of the Jews."[110] In speaking about Streicher's incitement through *Der Stuermer*, the tribunal noted the far reaching effects of his publications during a time period in which Jews were being deported and murdered.[111] The tribunal commented on Streicher's knowledge of the persecution of Jews occurring at the same time he was writing to encourage it: "[Streicher] regularly received information on the deportation and killing of Jews in Eastern Europe."[112] In finding him guilty, the tribunal specifically said that "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution . . . and constitutes a Crime against Humanity."[113] These publications saturated German society, and the language of persecution rendered Jews and other

103. *Streicher Advises Foreigners on Jews*, N.Y. TIMES, Sept. 16, 1936, at 14.
104. *Id.*
105. *Id.*
106. *Another Stuermer is Seized in Germany*, N.Y. TIMES, Jan. 22, 1938, at 2.
107. International Military Tribunal, *supra* note 80, at 178.
108. *Id.*
109. *See id.* at 209.
110. *Id.* at 220.
111. Gordon, *supra* note 84, at 143–44.
112. *Id.*
113. *Id.* at 144.

Nazi critics powerless to combat the propaganda.

The tribunal made clear that Streicher was being punished for speech that incited the Nazi genocide, indicating that the judgment against him was not based on "a direct causal link between Streicher's publication and any specific acts of murder. Instead, it refer[red] to his work as a poison 'injected in to [*sic*] the minds of thousands of Germans which caused them to follow the [Nazi] policy of Jewish persecution and extermination."[114]

To be clear, Streicher's sentence of death was based on his acts as a genocide *inciter*: "the IMT's conclusions focused more on Streicher's anti-Jewish incitements . . . . [t]he tribunal conclud[ing] that Streicher's incitements to murder and extermination . . . constituted persecution on political and racial grounds in connection with war crimes and thus qualified as a crime against humanity."[115] In fact, a *New York Times* article following the Nuremburg sentences deemed Streicher the "worst of the Germans," citing his "advocacy of the persecution of Jews in the early Nineteen Twenties to his demand for their complete extermination."[116]

B. And Then Came Extremist Hutu Number One: Hassan Ngeze and Kangura

1. Background: Kill Your Oppressors!

In 1990s Rwanda, just as in World War II-era Germany, widespread propaganda inflamed the persecution of the Tutsis.[117] And as had been true with the publication of *Der Stuermer*, the Tutsis never had the ability to stop the propaganda machine because it was the nation's most notable newspaper that fueled the public's hatred. The most notorious newspaper propagandist of this movement was Hassan Ngeze. He was the owner and editor-in-chief from the first to the last issue of *Kangura*,[118] the widely-circulated Rwandan newspaper that ultimately called for the extermination of the Rwandan Tutsi minority.[119] Beginning circulation in 1990, *Kangura* was published for nearly four years, with a hiatus during

114. *Id.*

115. Imbleau, *supra* note 82, at 249.

116. Daniell, *supra* note 25, at 6.

117. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 8–10 (Dec. 3, 2003), *available at* http://www.ictrcaselaw.org/docs/doc40472.pdf (indicating that three Rwandan propagandists were indicted and convicted of genocide, but only Ngeze was convicted for words published in the media).

118. *See id.* ¶ 123.

119. Catharine A. MacKinnon, International Decisions, Prosecutor v. Nahimana, Barayagwiza, & Ngeze, 98 AM. J. INT'L L. 325, 327 (2004).

the 1994 period of genocide.[120] Through *Kangura*, Ngeze:

> [E]xplicitly and repeatedly, in fact relentlessly, targeted the Tutsi population for destruction by "[d]emonizing the Tutsi as having inherently evil qualities, equating the ethnic group with 'the enemy' . . . [and by calling] for the extermination of the Tutsi ethnic group as a response to the political threat that [the Hutu] associated with the Tutsi ethnicity.[121]

And like *Der Stuermer*, *Kangura* "was probably the most well known newspaper from Rwanda during that period of time."[122] Just as in Germany, the paper's wide circulation made it difficult for the Tutsis to speak against the paper's views.

2. You Might As Well Have Committed Murder: The ICTR Indictment and Conviction

In prosecuting Ngeze for crimes against humanity and incitement to genocide, the ICTR focused on the *Kangura* articles that urged racism and called upon Rwandan Hutus to "take action."[123] In particular, the Tribunal focused on the "Ten Commandments,"[124] a list published in December of 1990 within an article entitled *Appeal to the Conscience of the Hutu*, identifying this article and its contents as one of the primary speech mechanisms that incited the 1994 genocide.[125] This article referred to the Tutsi as enemy, and called upon the Hutus to take action to exterminate this enemy: "The enemy is still there, among us, and is biding his time to try again . . . to decimate us. . . . Therefore, Hutu, wherever you may be, wake up! Be firm and vigilant. Take all necessary

120. *See* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 122 (Dec. 3, 2003).

121. MacKinnon, *supra* note 119, at 327; *see also* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 129 (Dec. 3, 2003) (indicating that Ngeze wrote all of the articles appearing in the early issues of *Kangura*, and always had "the last word" on all other articles).

122. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 122 (Dec. 3, 2003).

123. *See id.*¶ 137.

124. *See* William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141, 145 (2000) (indicating that the "Ten Commandments of the Hutu" was "Great Lakes Africa's answer to the notorious 'Protocols of the Elders of Zion'"). For an explanation of the anti-Semitic "Protocols," see Anti-Defamation League, *A Hoax of Hate: The Protocols of the Learned Elders of Zion*, http://www.adl.org/special_reports/protocols/protocols_intro.asp (last visited Nov. 9, 2008).

125. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 138 (Dec. 3, 2003).

measures to deter the enemy."[126] The "Ten Commandments" identified the Tutsi as an enemy of the Hutu group, deemed any Hutu who married or interacted with a Tutsi to be a traitor to his people, and finally called upon all Hutus to be "firm and vigilant toward their common Tutsi enemy."[127] Witnesses for the prosecution considered the "Ten Commandments" to be "incitement[s] to hatred . . . meant to prepare the killings," and said that they operated as an instruction manual on "how the Hutus were supposed to get rid of the Tutsis."[128]

In addition to the "Ten Commandments," many *Kangura* articles described the Tutsis as subhuman nuisances requiring extermination. In particular, one 1993 publication referred to the Tutsis as "cockroaches" that needed to be crushed.[129] The ICTR determined that this speech constituted an "incitement to violence," connecting future acts of murder against Tutsis with Ngeze's publication.[130] The ICTR also focused on the cartoons picturing machete-wielding Hutus on the cover of one issue of *Kangura*, which included articles that posed the question of how the Hutus would conquer their enemy.[131] Coincidentally or not, less than four years later machetes would become the primary weapon used for extermination in the genocide.[132]

The ICTR found Ngeze guilty of "direct and public incitement to genocide."[133] The tribunal noted that a "state's right to restrict freedom of expression . . . [w]as necessary for the respect of the rights of others."[134]

The tribunal further made clear that "editors and publishers have generally been held responsible for the media they control."[135] Choosing a more restrictive standard on freedom of expression than that permitted by the United States,[136] the tribunal decided that "the

126. *Id*.

127. *See id.* ¶ 139.

128. *See id.* at ¶¶ 141–42.

129. *Id.* ¶ 179 ("[A] cockroach can only give birth to another cockroach. . . . In our language, a Tutsi is called cockroach . . . . [and a] redoubtable snake whose venom is extremely poisonous.").

130. *See id.* ¶ 158.

131. *See id.* ¶¶ 161–62.

132. *See, e.g.*, Tony Waters, *Conventional Wisdom and Rwanda's Genocide: An Opinion*, AFR. STUD. Q., Nov. 1997, http://web.africa.ufl.edu/asq/v1/3/10.htm (identifying the "means of execution" as "gangs of machete wielders").

133. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1039 (Dec. 3, 2003).

134. *Id.* ¶ 990.

135. *Id.* ¶ 1001.

136. *See id.* ¶ 1010 (explaining that the defendant, Ngeze, requested that the ICTR adopt the American pro-speech standard, a standard that includes the

publication of *Kangura*, from its first issue in May 1990 through its March 1994 issue . . . is deemed to constitute direct and public incitement to genocide."[137] The tribunal focused on how "the writings published in *Kangura* combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population."[138] The contents of *Kangura* were deemed "a litany of ethnic denigration presenting the Tutsi population as inherently evil and calling for the extermination of the Tutsi."[139] For his speech through the mass media, Ngeze was found guilty of direct and public incitement to commit genocide.[140]

The ICTR proved that hate speech can incite murder and thus *can* qualify as a crime against humanity, either under the subsection of "persecution" for which Streicher was found guilty,[141] or here, as a direct and public incitement to commit genocide.[142] Particularly useful in analyzing a United States response to a refuge-seeking genocide inciter is the ICTR's discussion of balancing freedom of expression with the necessary suppression of potentially deadly hate speech. The tribunal fully recognized the dangers of unrestricted expression in times of political unrest,[143] and the

Virginia v. Black decision, which permits a ban on speech "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death" (quoting Virginia v. Black, 538 U.S. 343, 360 (2003))). *But see id.* ¶ 1011 (indicating that the ICTR decided to use *only ICTR precedent*, instead of United States precedent, in order to prosecute for incitement to genocide, defining incitement as "encouragement or provocation to commit an offence").

137. *Id.* ¶ 1017.

138. *Id.* ¶ 1036.

139. *Id.*

140. *See id.* ¶ 1094; *see also* MacKinnon, *supra* note 119, at 327 ("For their words and deeds—in a sense for their words *as* deeds that instigated the killing of Tutsi civilians as such—the three defendants [including Ngeze and the owners of radio station RTLM] were found directly guilty of genocide.").

141. *See supra* Part III.A.2; *see also* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 8–10 (Dec. 3, 2003) (indicating that the ICTR also tried Ngeze for incitement under a subset of "persecution").

142. *See* Recent Case, *U.N. Tribunal*, *supra* note 86, at 2773.

143. *See* Jean Marie Kamatali, *Freedom of Expression and Its Limitations: The Case of the Rwandan Genocide*, 38 STAN. J. INT'L L. 57, 58 (2002) ("In a spasm of unrestricted expression, public and private radio and television stations and newspapers encouraged hatred and called upon people to kill, rape, and injure Tutsi and moderate Hutu."); *see also id.* at 69 (describing how radio station RTLM "called for the killing of Tutsi . . . . [and] provided the names, locations, and situations of Tutsi 'deserving to die' and denounced anybody who stepped in the way of those hunting the enemy. It applauded the heroism of those who killed Tutsi or who revealed where they were hiding.").

genocide that stemmed from Rwanda's print media that was "awash with hateful invective and racist caricatures" in the "first years of the 1990s."[144]

As can be seen from these passages, countries where incitement to genocide is possible are very different from the United States. In both cases discussed, there was one publication with more circulation than all others. Because of this massive circulation, once inciters gained control, the minority had little power to fight the propaganda. In the United States, multiple media outlets likely would have to band together to create such a powerful propaganda machine. As such, there is reason to believe that United States free speech laws should continue to protect Americans using newspapers to promote prejudicial speech or ideas, but should not protect inciters to genocide who have sought refuge in the United States. The next section of this Comment details the United States' free-speech protections and fleshes out the arguments against providing such shelter for incitement to genocide.

IV. FIRST AMENDMENT PROTECTION FOR GENOCIDE INCITERS: AN UNNECESSARY FLOURISHING OF HATE SPEECH?

Before analyzing a response to mass media incitement to genocide under the First Amendment, it is useful to remember that the United States is not bound by the "incitement" provision of the Rome Statute, possibly because of the United States' commitment to free speech at all costs.[145] Critics of the United States' "unsigning" of the Rome Statute suggest that it would not sign on to the ICC because of the seeming contradiction between a provision that urges prosecution for "direct and public incitement to genocide" and the First Amendment.[146] With this in mind, the question is whether the First Amendment would protect a genocide inciter's speech, as defined in the cases of Streicher and Ngeze, either preventing or obliging the United States to prosecute or to extradite.[147] After all, under the theory that the United States' Constitutional mandates supersede its treaty obligations,[148] if particular speech is protected

144. Schabas, *supra* note 124, at 146.

145. *See supra* notes 49–53 and accompanying text.

146. *See supra* Part II.A.2.

147. The First Amendment would not apply, per se, because these perpetrators were not U.S. citizens and thus not afforded Constitutional protection. However, it is clear that the U.S. wanted to consider First Amendment protections when determining its international obligations. *See supra* Part II.A.

148. Gopalani, *supra* note 27, at 98 ("[E]ven if an international tribunal happened to criminalize protected speech under the First Amendment, the United States could simply ignore the decision because ultimately, U.S.

under United States law, then the United States will not extradite someone accused of violating the ICC.

It is important to note that the First Amendment does not protect speech that incites others to commit a crime.[149] At first, this notion seems to coincide with the underlying principles of customary and U.N. statutory law. However, the definition of "incite" in the United States differs greatly from that which international tribunals applied to both Streicher and Ngeze's speech. In the United States, in order to circumvent First Amendment protection, the speech must include the element of *imminence*.[150] This ruling came down in 1967 in the United States Supreme Court decision *Brandenburg v. Ohio*. However, the U.S. Supreme Court's discourse on First Amendment protection, as it relates to genocide incitement, began in 1942 with *Chaplinsky v. New Hampshire*.[151]

The *Chaplinsky* Court deemed "fighting words" unprotected speech under the First Amendment.[152] The Court defined "fighting words" as words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[153] In theory, it seems as though *Chaplinsky's* "fighting words" prohibition would cover the hate speech of Streicher and Ngeze.[154]

However, there are two wrinkles that prevent the application of "fighting words" to these perpetrators' speech. First, scholars have implied that the *Chaplinsky* decision suggests that the "fighting words" doctrine only applies to face-to-face communication.[155] Such a necessary context would prevent its application to Streicher and Ngeze, as both perpetrators were punished for the speech they published in the mass media, which did not involve face-to-face communication with their readers or listeners.

Further, post-*Chaplinsky* cases have struck down hate speech bans, deeming them unconstitutionally vague or overbroad.[156]

constitutional standards supercede treaty obligations."); *see also* Reid v. Covert, 354 U.S. 1, 4 (1957) (indicating that Constitutional protections take precedence over "custom and tradition").

149. *See* Gopalani, *supra* note 27, at 102.

150. Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

151. 315 U.S. 568 (1942).

152. *See id.* at 571–72.

153. *Id.* at 572.

154. *See* Beauharnais v. Illinois, 343 U.S. 250, 258 (1952) (suggesting that hate speech may be banned as group libel if that punishment is rationally related to preserving the peace). Like the decision in *Chaplinksy*, however, this too was later struck down by *R.A.V*. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

155. *See* American Civil Liberties Union, *Hate Speech on Campus* (Dec. 31, 1994), http://www.aclu.org/studentsrights/expression/12808pub19941231.html.

156. *See, e.g.*, EDWARD CLEARY, BEYOND THE BURNING CROSS 172–90 (1994).

Hence, even if the government tried to prosecute or extradite a mass-media perpetrator based on a fighting-words rationale, that decision would not withstand scrutiny if inciters to genocide are to be judged under the protections of the First Amendment.

Following *Chaplinsky*, commentators noted that the latter half of twentieth-century First Amendment jurisprudence was marked by its support of free expression over any kind of hate speech restrictions.[157] Because incitement to genocide could be characterized as hate speech, it appears that this line of cases would protect the propagandists. Within the context of this jurisprudence arose *Brandenburg*, the landmark decision in which the Supreme Court held that speech can only be criminalized where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[158] The *Brandenburg* standard makes clear that incitement and advocacy may only be punished when a crime is *imminent*.[159] The Court even extended First Amendment protection to advocacy, which was defined as "all urgings of the appropriateness of illegal action."[160] The speech in Streicher's and Ngeze's respective newspapers would fail a *Brandenburg* analysis: neither of the perpetrators' printed speech incited *imminent* action. In fact, both began their publications *years* before any killings occurred, and both newspapers nearly shut down production as the killings peaked.[161]

Combining the Supreme Court's ruling in *Brandenburg* with its more recent decision in *R.A.V. v. City of St. Paul*,[162] it becomes very

157. *See* Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 730 (2000).

158. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

159. *See* Gopalani, *supra* note 27, at 102; s*ee also* Feiner v. New York, 340 U.S. 315, 321 (1951) (describing the difference between punishing simply content-based speech and imminently dangerous speech: "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace"). Thus this also would not apply to Streicher or Ngeze because of the "imminence" factor. *Brandenburg*, 395 U.S. at 447–48 (holding that a state may proscribe speech "directed to inciting imminent lawless action").

160. *See* Gopalani, *supra* note 27, at 102–03.

161. *See supra* Parts III.A.1, III.B.1.

162. 505 U.S. 377, 380–81 (1992) (holding that in the United States, an ordinance that prevents a citizen from placing a "symbol, object, appellation, characterization or graffiti . . . which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" is "facially unconstitutional in that it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech

clear that both Streicher's and Ngeze's speech would likely be protected under the First Amendment if Streicher and Ngeze had published in the United States. In *R.A.V.*, the Supreme Court held that all antihate speech laws were "content based," and thus unconstitutional.[163] Under *R.A.V.*, a ban on the printed speech of the anti-Semitic *Der Stuermer* and the anti-Tutsi *Kangura* would clearly be a content-based regulation, which would fail the *R.A.V.* test: because we do not like the racist *content* of the speech, it will be banned.[164] By prohibiting content-based regulations, some scholars have suggested that "[i]n assuring persons the freedom to verbally express their views, the Court has focused on protecting the speakers' liberties, while neglecting considerations about the negative impact of hate speech on members of historically oppressed racial and ethnic groups."[165] This equality-based assessment raises the question of whether the United States' vehement protection of hate speech, when that speech does not pose issues of imminent incitement, is well-founded when considering the potential harm of that speech upon historically oppressed groups.

This Comment ultimately rejects the equality-based free-speech argument mentioned above and instead supports the strong free-speech view that the words of Streicher and Ngeze *should be protected* when spoken or printed in a free society like the United States, but *should not be protected* in a totalitarian regime like that of Nazi Germany or early-1990s Rwanda. However, the equality-based argument to limit the type of hate speech that Streicher and Ngeze disseminated is useful to analyze, particularly in connection with antihate-speech laws in countries other than the United States.

V. DON'T YOU DARE: THERE IS NO FREE SPEECH RIGHT TO INCITE GENOCIDE

A. International Discrepancies: The United States Got It Wrong

It is possible that the United States should not afford a strong free-speech right to incite genocide internationally, considering that

addresse[d]). The majority opinion said that the current limitations on the First Amendment are applicable in "our society, like other free but civilized societies." *Id.* at 382.

163. *See supra* note 162 and accompanying text; *see also R.A.V.*, 505 U.S. at 382 ("The First Amendment generally prevents government from proscribing speech or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (citations omitted)).

164. *But see id.* at 381 (implying that if there is no suppression of ideas and the only issue is supposed overbreadth, the *R.A.V.* holding is inapplicable).

165. Tsesis, *supra* note 157, at 730.

the United States appears to be behind the curve in comparison to other countries in its efforts to combat genocide through bans on hate speech. Surely it must be recognized that, in certain contexts and times, "hate speech is not only dangerous when it poses an immediate threat of harm, but also when it is systematically developed and thereby becomes part of culturally acceptable dialogue."[166] Critics have noted the growing discrepancy between international bans on hate speech and the United States' refusal to follow suit.[167] While United States courts have continued to hold that "[a]s long as speech remains a generalized argument for a notional idea or even a course of action, it is protected by the First Amendment,"[168] other Western countries have adopted bans on hate speech in response to atrocities such as those committed during World War II.[169] The United States' policy on protection for international speech appears almost uninformed in comparison with other Western nations' reasoning behind hate speech bans. Of particular note is Canada's regulation of hate speech for the purposes of preventing genocide.[170] The Canadian Supreme Court articulated its position this way: "Freedom of speech . . . does not mean the right to vilify. Insofar as hate propaganda has no redeeming social value and is inherently harmful . . . restrictions on freedom of expression explicitly designed to curb hatemongering

166. *Id.* at 731.

167. John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN. ST. L. REV. 539, 542–43, 557 (2006) ("The divide between the U.S. approach and the growing international consensus on hate speech is substantial. . . . The United States has a long history of committing human rights atrocities, yet it has not embraced hate speech codes to the same extent as its Western counterparts. In fact, courts in the United States seem increasingly unwilling to impose restraints on the 'freedom of speech,' even though it has a troubled, highly emotional history of interracial violence and suppression.").

168. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 378 (2003).

169. Knechtle, *supra* note 167, at 541 (indicating that countries such as the United Kingdom, Australia, Canada, and Germany have enacted hate speech regulations, and an increasing number of countries are beginning to enact similar regulations); *id.* at 542 (noting that the European Court of Human Rights "has consistently decided that hate speech regulations do not violate freedom of expression" and has recognized "limitations on free speech when hate speech does not provide for 'the protection of the reputation or rights of others'").

170. *See, e.g.*, Anti-Defamation League, *Ernst Zundel: Holocaust Denier, Neo-Nazi Propagandist*, http://www.adl.org/learn/Ext_US/zundel.asp?xpicked=2&item=zundel (last visited Nov. 9, 2008) (documenting that Ernst Zundel, a prominent Holocaust denier, was tried and convicted in Canada for anti-Semitic speech, though the conviction was later overturned).

represent 'reasonable limits.'"[171] This interpretation of free expression also includes the understanding that "[i]nternational human rights instruments, as moral guidelines, call for antihate propaganda legislation."[172] Countries that have adopted this notion accept that genocide cannot happen without inciters[173] and understand that "the uncontrolled advocacy of hatred of target groups could sow the seeds of racial prejudice from which more widespread racism could flourish."[174]

Within the concern about widespread racism lies the knowledge that "human beings, particularly in times of stress, can be swept away by the emotional appeals of false, defamatory propaganda against identifiable target groups."[175] In other words, if hate speech is disseminated through the mass media in a nation like 1930s Germany or 1990s Rwanda, there exists the possibility—which has proven itself very real—that ordinary citizens can be influenced and encouraged by such speech to commit atrocities upon another racial or ethnic group.

Especially after the ICTR, more critics of United States hate-speech protections have urged that words alone, when dispersed through the mass media, can constitute incitement to genocide and can very much *cause* killings, [176] regardless of any link in time between the speech and the killing. This causal link in time and space between speech and killing was really a critical outgrowth of *Brandenburg*'s "imminent action" requirement and was deemed an unnecessary link in the ICTR's conviction of Ngeze when it found his actions punishable because they constituted incitement to commit genocide. Clearly, the Ngeze decision "goes a long way toward answering significant questions regarding the proper legal standard for distinguishing between permissible speech and criminal advocacy in the context of massive violations of international humanitarian law."[177] When an international tribunal has spoken on the issue of hate speech constituting "incitement to genocide" without a direct link between speech and killing, it seems difficult to understand why the United States would not take a similar stance with respect to international speech. The United States' failure to approve of a prosecution for incitement to genocide is especially

171. Evelyn Kallen, *Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation*, 11 WINDSOR Y.B. ACCESS JUST. 46, 48 (1991).

172. *Id.* at 49; *see also supra* note 169 and accompanying text.

173. *See* Gopalani, *supra* note 27, at 94.

174. Kallen, *supra* note 171, at 50.

175. *Id.* at 49–50.

176. *See* Recent Case, *U.N. Tribunal*, *supra* note 86, at 2774.

177. Gordon, *supra* note 84, at 141.

misplaced when, under current United States free-speech protections, incitement to genocide could not occur as it did in Nazi Germany and genocidal Rwanda. Further, it seems natural to assume that when an opinion is "expressed repeatedly and in a context from which it was reasonable to infer that by articulating these views the speaker meant to encourage another to harm," and when there was no avenue to combat that harmful speech, holding that speaker accountable for the eventual harm committed is justified.[178]

B. Mixed Messages: First Amendment Protections During American Wartime

Even if the Supreme Court does not want to question the reasonableness of its previous pro-speech decisions in light of an equality-based free-speech argument, there is precedent that could limit an inciter's rights during a time of genocide. Although this Comment does not advocate that the following series of Supreme Court cases were rightly decided, this Comment cites these cases as examples of the United States acting against vehement free-speech protections in order to combat a real, perceived harm. By discussing these cases, this Comment urges that the United States recognize speech inciting genocide as a real harm—as it recognized certain wartime speech—that requires attention and a willingness to curtail First Amendment protections for speakers operating outside a pro-speech society in order to prosecute and/or extradite.

During World War I, the Supreme Court made clear that the freedom of expression *can* be curtailed depending on the circumstances in which the speech was made. In 1919, a series of Supreme Court cases developed a "clear and present danger" test for evaluating the constitutionality of wartime speech.[179] In these cases, the Court determined that certain categories of "incitement" speech could be punished during wartime if that speech created a "clear and present danger" of inciting illegal activity,[180] suggesting that the United States is not *actually* as protective of free expression during times of national tension. If this is the case, then the United States could find a way to endorse prosecution for incitement to commit genocide through media hate-speech when that hate speech was expressed during a time of national unrest and/or genocide.

United States v. Schenk was the first of these World War I-era

178. Brenner, *supra* note 168, at 370.

179. *See* Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenk v. United States, 249 U.S. 47 (1919).

180. *See Schenk*, 249 U.S. at 52.

cases. It concerned the Espionage Act of 1917, which made physical draft resistance a crime.[181] The defendant handed out leaflets that pressed for draft opposition, and although he never *actually* obstructed the draft, he was convicted under the Espionage Act for his speech.[182] The Court clarified that "the character of every act depends upon the circumstances" and that in cases dealing with incitement, the issue becomes "whether the words used are used in such circumstances [as wartime] and are of such a nature as to create a clear and present danger that they will bring about [illegal acts]."[183] The Court further suggested that the protection of speech is different when a nation is at peace than when a nation is at war.[184] Like *Schenk*, *United States v. Debs*[185] also dealt with antidraft speech during World War I. Just as the court found the antidraft speech unprotected in *Schenk*, it also found the *Debs* speech unprotected for the same reasons, under the "clear and present danger" test.[186]

Similarly, in *United States v. Frohwerk*,[187] the defendant published a newspaper during World War I that expressed his negative attitude toward the war. Among many comments made that condemned the United States for sending soldiers to Europe, he ended an article with a command and a plea to end the war: "We say therefore, cease firing."[188] Again, the Court noted the *circumstances* in which the speech was made,[189] finding that it created a clear and present danger of illegal activity during wartime.[190]

Also relevant is the final World War I speech case, *United States v. Abrams*.[191] In *Abrams*, the defendants were Russian-born anarchists who, concerned with the war's threat to the Russian Revolution, used printed leaflets to urge New Yorkers to stop participating in ammunitions manufacturing.[192] As in the

181. *Id.* at 48–49.

182. *Id.* at 49.

183. *Id.* at 52.

184. *Id.* ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").

185. 249 U.S. 211 (1919).

186. *Id.* at 215.

187. 249 U.S. 204 (1919).

188. *Id.* at 207.

189. *Id.* at 208 ("It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the Country is at war.").

190. *Id.* at 208–09.

191. 250 U.S. 616 (1919).

192. *Id.* at 617–18. In laying out the case against the defendants, the Court

aforementioned cases, the Court focused on the fact that the defendants' speech had occurred during wartime, finding again that the printed speech posed a clear and present danger to American wartime activities.[193] Most important then, perhaps, is the *context* in which speech occurs for determining whether the speaker is liable for incitement. This idea of context introduces the issue of whether the hate speech in *Der Stuermer* and *Kangura* actually *should* violate the First Amendment when both newspapers were published during tyrannical, genocidal regimes during which free expression was banned.[194]

VI. THE BIG DIFFERENCE: FREE EXPRESSION INSIDE AND OUTSIDE TYRANNY

Although this Comment does not advocate that the policies underlying the First Amendment should ever permit the suppression of general American wartime speech, there is, regardless, no doubt that the First Amendment was only intended to protect free expression within a free society. The American Civil Liberties Union ("ACLU") ardently supports free speech, indicating that it "has fought for the free expression of all ideas, popular or unpopular . . . . [because] [t]hat's the constitutional mandate."[195] The ACLU makes clear that, in a free society, we must all value the right to speak freely, regardless of the offensive qualities of any one person's views.[196] The correct response to offensive [hate] speech,

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stated:

> The charge . . . was that the defendants conspired "when the United States was at war with the Imperial German Government, . . . unlawfully and willfully, by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war."

Id. at 617.

193. *Id.* at 623 ("[T]he plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe.").

194. *See supra* Part III; *see also* SCHOLL, *supra* note 90, at 90 (describing the words on Nazi-resistance leaflets that pleaded for "[f]reedom of speech, freedom of religion, [and] the protection of individual citizens from the arbitrary will of criminal regimes of violence").

195. American Civil Liberties Union, *supra* note 155.

196. *See id.* The ACLU states:

> How much we value the right of free speech is put to its severest test when the speaker is someone we disagree with most. Speech that deeply offends our morality or is hostile to our way of life warrants the same constitutional protection as other speech because the right of free speech is indivisible: When one of us is denied this right, all of us are denied.

according to the ACLU, is *more speech* as a counteractive measure: "[w]here racist, sexist and homophobic speech is concerned, the ACLU believes that more speech—not less—is the best revenge."[197] This Comment maintains that, in the United States, the ACLU's position is the proper one. However, this method of counteraction is only effective when free expression of all viewpoints *is* permitted or possible. To understand the effects of hate speech in a free society versus in a tyrannical society, it is useful to look at an example counter to Streicher's and Ngeze's speech.

A. Nazism Comes to the United States: Kuhn and the German American Bund

Prior to World War II, a small U.S.-based Nazi faction called the "Bund"[198] arose under the leadership of the German national Fritz Kuhn.[199] Like many citizens of Germany who were drawn to the anti-Semitic speech of the Nazi party, membership in the Bund "was drawn from the young disaffected lower middle class artisans . . . [m]any [of whom] had experienced Germany's starving time and had been active in right-wing politics."[200] Commentators have noted an even closer comparison between the young Nazis in America and Germany: "[the Bund members] were in fact the same youth cohort who were attracted to the party in Germany, and they joined for much the same reason."[201] The Bund's propaganda was laden with anti-Semitic words and images, terming the FDR administration's New Deal a "Jew Deal" and plastering the faces of American government with pejorative stars of David.[202] Like the Nazi Youth

Id.

197. *Id.*

198. Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/bundist (defining "Bund" as "a pro-Nazi German-American organization of the 1930s").

199. Jim Bredemus, *American Bund: The Failure of American Nazism: The German-American Bund's Attempt to Create an American "Fifth Column,"* TRACES, http://www.traces.org/americanbund.html (last visited Nov. 9, 2008) (indicating that the Munich-born Kuhn was granted American citizenship in 1934).

200. Henry L. Feingold, *The Limits of Hyphenate Power: Nazism in America*, 2 REVIEWS IN AM. HIST. 563, 564 (1974).

201. *Id.*

202. Leland V. Bell, *The Failure of Nazism in America: The German American Bund, 1936–1941*, 85 POL. SCI. Q. 585, 588 (1970) (noting the "hysterical anti-semitism" of the Bund propaganda); *id.* at 587 ("[Bundists] assumed that by glorifying Hitler and National Socialist Germany, they could exploit these alleged second class citizens. This message was promoted through such propaganda vehicles as the Bund newspaper, Nazi films—notably *The Triumph of the Will*—Hitler's *Mein Kampf*, and numerous Bund pamphlets.");

camps in Germany, the Bund also created camps throughout the mid-Atlantic, where invited speakers "harangued their audiences about Jews . . . and the need for a united front to save Germany and America."[203] Most problematic, perhaps, were the Bund's Nazi rallies. At the Bund's 1938 National Convention and 1939 rally at Madison Square Garden, Kuhn displayed banners to over 20,000 people, calling on them to "smash Jewish communists."[204] Commentators at the scene indicated that "this program was blatantly racist, calling for the establishment of a racial state similar to the Third Reich with rigid restrictions placed on the mobility of Jews and on their admission to important positions in all areas of power in American society."[205]

The Nazi propaganda in America was very similar to that existing in the early years of the Third Reich.[206] Regardless, scholars have made clear that the Bund "[n]ever presented a threat to American institutions."[207] The ACLU's vehement protection of free expression explains why. The ACLU notes that "[f]ree speech rights are indivisible[,]. . . . [r]estricting the speech of one group or individual jeopardizes everyone's rights because the same laws or regulations used to silence bigots can be used to silence you."[208] And this is just the point. In a society where free expression is undeniably permitted and possible, the hate speech of a fringe group likely does not pose an *actual* threat of physical harm or impending genocide.[209] Other groups can simply stand up to the hostile fringe

see also Bredemus, *supra* note 199. The Bund:

> [O]rganization brashly promoted the same anti-Semitism of the Third Reich: it handed out Aryan pamphlets outside Jewish-owned establishments and by campaigned [*sic*] in the 1936 presidential election against Franklin Delano Roosevelt—who they charged was part of the Jewish-Bolshevik 'conspiracy.' The Bund even spawned several incidents of violence against Jewish-Americans and Jewish-owned businesses. An opinion poll taken in the late 1930's [*sic*] named Fritz Kuhn as the leading anti-Semite in America.

Id.

203. Bell, *supra* note 202, at 590.

204. *Id.* at 592.

205. *Id.*

206. *See supra* notes 92–107 and accompanying text.

207. Bell, *supra* note 202, at 585 ("Recent studies on Nazi activities in America and an examination of Bund papers reveal that the Bund neither warranted the attention it received nor ever presented a threat to American institutions.")

208. American Civil Liberties Union, *supra* note 155.

209. *Id.* The ACLU states that hate speech cannot flourish and be widely accepted in the U.S. because of the numerous methods Americans have to counteract such speech. Among these methods, the ACLU urges Americans to:

> [S]peak out loudly and clearly against expressions of racist, sexist, homophobic and other bias, and react promptly and firmly to acts of

group through their own media outlets. Because it is extremely unlikely that a group seeking racial extermination could ever gain control of the major media outlets in the United States, it is simply not possible for incitement to genocide to occur. Where, then, does this leave First Amendment jurisprudence in relation to genocidal regimes, under which the freedom of expression is not valued at the utmost as a right afforded regardless of one's social power, but rather as a right than can be suppressed in order to incite genocide?

B. Free Expression, Tyrannical Suppression, and the Need for a New Middle Ground in Cases of Genocide Incitement

Proponents of maintaining the stringent standards of the First Amendment, even in relation to genocide perpetrators, do not take into account the suppression of speech under a totalitarian regime. Presumably, in the United States, the words published in newspapers like *Der Stuermer* and *Kangura* would not incite genocide, as is made clear by looking at the effect of the Bund's speech in America in the 1930s. However, the only forms of speech that could combat Streicher's words in Nazi Germany—the appropriate method suggested for combating hate speech—were suppressed and any likely speakers eventually punished with death.[210] Where education to combat hate speech is impermissible,

> discriminatory harassment; create forums and workshops to raise awareness and promote dialogue on issues of race, sex and sexual orientation; intensify their efforts to recruit members of racial minorities on student, faculty and administrative levels; and reform their institutions' curricula to reflect the diversity of peoples and cultures that have contributed to human knowledge and society, in the United States and throughout the world.

Id. Compare id. (describing how the "indivisibility principle was . . . illustrated in the case of Neo-Nazis whose right to march in Skokie, Illinois in 1979 was successfully defended by the ACLU. At the time, then ACLU Executive Director Aryeh Neier, whose relatives died in Hitler's concentration camps during World War II, commented: 'Keeping a few Nazis off the streets of Skokie will serve Jews poorly if it means that the freedoms to speak, publish or assemble any place in the United States are thereby weakened'"), *with* SCHOLL, *supra* note 90, at 45 (noting that the newspapers in Nazi Germany "were laconic and noncommittal . . . . [i]t was their task to aid in the total quenching of the German intellect").

210. SCHOLL, *supra* note 90, at 17 (recording the ideas and actions of her brother and sister, Hans and Sophie Scholl, who were executed by the Nazi party in 1943 for speaking out against their government). Scholl noted the complete suppression of speech in 1940s Germany:

> The viselike rule of naked force was becoming tighter and ever more unbearable. Each day of liberty was a gift, for no one was secure against arrest; one might be arrested in the street, because of some trivial remark, and disappear, perhaps for ever. . . . Hans knew, of course, that he was but one of millions in Germany who felt as he did.

there is no legitimate reason to grant free speech rights. This is a context where free speech rights must be curtailed. As such, the United States should recognize and stand against acts of genocide by ultimately prosecuting or extraditing *inciters* to genocide. Any argument in favor of protecting these perpetrators must be based on a flawed interpretation of the First Amendment devoid of any analysis of the policies underlying its application in a free society.

CONCLUSION

The issue of freedom of expression has in the past,[211] and could in the future, prevent the United States from bringing justice to victims of genocide when the perpetrators' crimes include incitement to genocide, an offense that is protected—and actually not an offense at all—under the First Amendment. If a genocide perpetrator whose crimes were committed through printed newspaper speech were to seek refuge in the United States, would the United States exercise a duty to prosecute or extradite? Such a proposition seems unlikely based upon current United States protections of law and the United States' continued failure to agree to any international

> But woe to him who dared to speak freely and openly. He would surely be shipped off to prison. Woe to the mother who gave vent to her feelings and cursed the war. . . . [a]ll of Germany was spied upon, and secret ears listened everywhere.

Id.; *see also id.* at 44 (indicating that "[m]ore and more frequently newspapers ran brief notices of death sentences meted out . . . to isolated individuals who had opposed the demonic tyrants of the people, even if only in their utterances"). Scholl also describes the contents of philosophy Professor Jurt Huber's posthumous papers, a Munich-based professor who was executed in 1943 for verbal resistance to the Nazi party:

> As a German citizen, as a German professor, and as a political person, I hold it to be not only my right but also my moral duty to take part in the shaping of our German destiny, to expose and oppose obvious wrongs. . . . What I intended to accomplish was to rouse the student body, not by means of an organization, but solely by my simple words; to urge them, not to violence, but to moral insight into the existing serious deficiencies of our political system. . . . That is not illegal; rather, it is the restitution of legality. . . . A state which suppresses free expression of opinion and which subjects to terrible punishment every—yes, any and all—morally justified criticism and all proposals for improvement by characterizing them as "Preparation for High Treason" breaks an unwritten law, a law which has always lived in the sound instincts of the people and which will always have to remain alive. . . . I have pledged my life. I demand the return of freedom for our German people.

Id. at 63–65.

211. *See* Kamatali, *supra* note 143, at 70 (arguing that "legal and political thinkers in the U.S. customarily associate free speech with better and stronger liberties, [which] may have further complicated the Rwandan [media] case for U.S. observers").

law that punishes the offense of "incitement" as it was defined in the cases of Streicher and Ngeze.[212] Critics of the United States' position fervently contend that genocide could not occur without inciters,[213]

212. *See* Coliver, *supra* note 11, at 1690 (indicating that it has been hard enough to extradite someone whose crimes fall within punishable acts under U.S. law. For example, it has been difficult enough for the United States to exercise its duty to prosecute or extradite genocide perpetrators in the past even when those crimes committed *would* violate U.S. law); *id.* (indicating that within immigration statutes ratified by the U.S., "participation in crimes against humanity, war crimes and other human rights offenses are still not explicitly covered" as reasons for denaturalization and deportation); *id.* at 1694 (noting that "several hundred human rights [abusers] with substantial responsibility for heinous atrocities . . . now live in the United States, ... have[ing] come from more than seventy countries. Only a few dozen have been deported, in addition to the approximately one hundred who were denaturalized, deported, or extradited for Nazi-era crimes"); *id.* at 1696 (suggesting that the "U.S. government lacks the political will to prosecute many abusers"). A primary example is the case of Elizaphan Ntakirutimana, the Rwandan minister who led killers to the site of his church—a place he had promised his hiding parishioners that they would be protected—and presided over their murders. *See* Interview by Harry Kreisler with Philip Gourevitch, *supra* note 6. Gourevitch describes the incident:

> [T]he church president was a Hutu, his name is Elizaphan Ntakirutimana. He was a man in his late sixties at the time. He was the authority figure in the town and he had been directing people to go to the church. So they wrote to him and they said, 'Dear Our Leader. We wish you to be strong in these difficult times we are facing. We hope that you are okay. We wish to inform you that we have heard that tomorrow we will be killed with our families, and we ask you in the name of the Lord to intercede on our behalf, just as Esther saved the Jews,' meaning the book of Esther in the Bible. 'And we ask you to intercede with the authorities,' again, 'in the name of the Lord. Thank you very much.' And all seven of them signed it, a kind of extraordinarily restrained, polite, deferential letter from people about to die. But instead the pastor said, 'I can do nothing, you must die.' And extraordinarily elaborate testimony has been collected showing that in fact, he ended up presiding over the massacre. And these people were right, they were killed the next day.

Id. For quite awhile, Ntakirutimana found refuge in Texas with his son. U.S. attempts to extradite him to the ICTR failed because the extradition treaty between the U.S. and the ICTR was invalid. The treaty had not been ratified by U.S. law. Steven, *supra* note 9, at 465; *see also* Interview by Harry Kreisler with Philip Gourevitch, *supra* note 6. Commentators note that the U.S. is currently prevented from quickly extraditing international human rights violators like Ntakirutimana, as the U.S. cannot extradite unless there is an extradition treaty in force with that perpetrator's country. *See* Steven, *supra* note 9, at 464–65. Further complicating this issue is the U.S. understanding not to abide by ICC protocol for extradition when the provisions connected to these international prosecutions "prescribe more protective human rights guarantees than those currently recognized under U.S. law." Hoffman & Strassen, *supra* note 52, at 481.

213. *See* Gopalani, *supra* note 27, at 93.

but this argument has not yet changed the United States' policy on the issue.

While international commentators insist that "'the State in which the guilty person lives ought not to obstruct' [a] right to punish,"[214] at the same time, a historical examination of First Amendment jurisprudence suggests that we cannot—and likely *should not*—expect the United States to alter its current, general application of the First Amendment. However, these positions do not have to be mutually exclusive. We can be ardently in favor of free expression in a free society, but we must urge United States courts and legislators to recognize the difference between free expression in the United States and free expression in the face of impending genocide.

To fulfill its international humanitarian obligations, the United States must find a way to reconcile protecting free speech in a free society with the lack of free expression in states of tyranny. Moreover, recognizing hate speech as a crime under certain genocidal circumstances would not chip away at the rights of free expression that have been constitutionally guaranteed, because a genocidal society is not a free society. Such a recognition is important. Without it, it is difficult to understand under what circumstances the United States would prosecute or extradite a perpetrator of incitement to genocide when it has refused to commit to international laws that make such "incitement" a crime as long as those laws conflict with First Amendment protections. And without such recognition, the United States' pledge to prevent, condemn, and punish acts of genocide cannot become a reality.

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214. Steven, *supra* note 9, at 445; *see also* Knechtle, *supra* note 167, at 571 (suggesting that the First Amendment should prohibit threats of unlawful acts, rather than just *imminent* threats).

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