

ANNEX I: CONSTITUTIONS – LEGISLATIONS - POLICIES

1) ALGERIA

POLICIES

Some relevant reports of different human rights organizations reveal a real trend of restriction of the human rights in Algeria. That concerns especially the freedom of speech, the freedom of opinion and the freedom of religion. We can notice that the last five years there has been an increase of the number of condemnations regarding religious practice. These condemnations concern people who are accused of breaking fast in Ramadan, or people who are accused of having subversive activities of proselytism that can shake the Muslim faith. The legal basis is article 144 bis 2 of the Criminal code and the article 11 of the Ordinance 06-03.

As example: <http://www.amnesty.org/en/library/asset/MDE28/011/2010/en/ab261eae-ca2d-4446-9aab-9dbf380fd8f1/mde280112010en.html>

http://www.rfi.fr/actufr/articles/101/article_66802.asp

The freedom of speech of some journalists who are frequently condemned because they criticize the authorities, the President, etc. The legal basis is in general one of the different articles of the criminal code (article 144 bis or 144 bis 1) <http://fr.allafrica.com/stories/201005030930.html>

CASES

The only relevant example of jurisprudence concerns unfortunately the restriction of freedom of speech of Algerian journalists. Some journalists as Chawki Amari are frequently condemned. During one of his lectures he explained that he was condemned approximately every six months. Other example:

<http://www.algeriefocus.com/2010/04/17/condamne-pour-delit-dopinion-appel-a-nosamis-journalistes-de-la-presseprivee/>

http://fr.rsf.org/algeriecondamnation-d-un-journalistede-15-07-2009_33367

<http://www.laladdh.org/spip.php?article381>

http://www.ifex.org/algeria/2006/02/16/cartoonist_ali_dilem_sentenced/fr/

Concerning the freedom of religion, in general, decisions restrain it. As mentioned above, the Habiba Kouider case is sadly one of the most famous cases:

<http://lesactualitesdudroit.20minutes-blogs.fr/archive/2008/05/27/laliberte-de-religion-enalgerie.html>

<http://assembly.coe.int/Documents/WorkingDocs/Doc08/FDOC11666.pdf>

<http://www.state.gov/documents/organization/132781.pdf>

Legislation prohibiting incitement to national, racial and religious hatred

Constitution (28/11/1996 modified by the law 08-19)

Article 27: Algeria associates itself with all the peoples fighting for their political and economic liberation, for the right of self determination and against any racial discrimination.

Article 29: All citizens are equal before the law. No discrimination shall prevail because of birth, race, sex, opinion or any other personal or social condition or circumstance.

Article 31: The aim of the institutions is to ensure equality of rights and duties of all citizens, men and women, by removing the obstacles which hinder the progress of human beings and impede the effective participation of all in the political, economic, social and cultural life.

Law 90-07 relating to the information (information code)

Art.40: Dans l'exercice de sa profession, le journaliste professionnel est tenu de veiller au strict respect de l'éthique et de la déontologie.

Il doit notamment : s'interdire de faire de façon directe ou indirecte l'apologie de la race, de l'intolérance et de la violence.

Art. 77: Quiconque offense par écrit, sons, images, dessins ou tous autres moyens directs ou indirects, l'islam et les autres religions célestes est puni d'un emprisonnement de six (6) mois à trois (3) ans et d'une amende de 10.000 à 50.000 DA ou de l'une des deux peines seulement.

Penal Code

Article 298: Toute diffamation commise envers les particuliers est punie d'un emprisonnement de cinq jours à six mois et d'une amende de 150 à 1500 DA ou de l'une de ces deux peines seulement. Toute diffamation commise envers une ou plusieurs personnes qui appartient à un groupe ethnique ou philosophique, ou à une religion déterminée, est punie d'un emprisonnement d'un mois à un an et d'une amende de 300 à 3000 DA, lorsqu'elle a pour but d'exciter à la haine entre les citoyens ou habitants.

Article 298bis: Toute injure commise envers une ou plusieurs personnes appartenant à un groupe ethnique, philosophique ou une religion déterminée est punie d'un emprisonnement de cinq jours à six mois et d'une amende de 150 à 1500 DA ou de l'une de ces peines seulement.

Ordinance 06-03 (28/02/2006)

Article 2: l'Etat algérien dont la religion est l'Islam garantit le libre exercice du culte dans le cadre du respect des dispositions de la Constitution, de la présente ordonnance, des lois et règlements en vigueur, de l'ordre public, des bonnes mœurs et des droits et libertés fondamentaux des tiers L'Etat garantit également la tolérance et le respect entre les différentes religions.

Article 3: les associations religieuses des cultes autres que musulman bénéficient de la protection de l'Etat »

Article 4: il est interdit d'utiliser l'appartenance religieuse comme base de discrimination à l'égard de toute personne ou groupe de personne.

Decree n°07-135 (19/05/2007)

Legislation protecting freedom of speech

Constitution (28/11/1996 modified by the law 08-19)

Article 36: Freedom of creed and opinion is inviolable.

Article 41: Freedom of expression, association and meeting are guaranteed to the citizen.

Law 90-07 relating to the information (information code)

Article 10: Les organes et les titres du secteur public ne doivent en aucune circonstance tenir compte d'influence ou de considération de nature à compromettre l'exactitude de l'information.

Ils assurent l'égal accès à l'expression des courants d'opinion et de pensée.

Art. 59: Il est institué un Conseil supérieur de l'information, autorité administrative indépendante de régulation, jouissant de la personnalité morale et de l'autonomie financière.

A ce titre, il est chargé :

- de préciser les modalités de mise en œuvre des droits à l'expression des divers courants d'opinion; ...
- d'exercer, à la demande des intéressés, des prérogatives de conciliation pour les situations conflictuelles inhérentes à la liberté d'expression et au droit des citoyens à l'information, préalablement à l'engagement, par l'une ou l'autre partie au litige, de toute procédure devant les juridictions compétentes;

Constitution

Art. 29 : Les citoyens sont égaux devant la loi, sans que puisse prévaloir aucune discrimination pour cause de naissance, de race, de sexe, d'opinion ou de toute autre condition ou circonstance personnelle ou sociale.

Art. 32 : Les libertés fondamentales et les droits de l'homme et du citoyen sont garantis.

Art. 41 : Les libertés d'expression, d'association et de réunion sont garanties au citoyen.

L'article 26 du Code de l'information de 1990, qui interdit la publication de tout ce qui est jugé « contraire aux valeurs islamiques et nationales et aux droits de l'homme ou qui fait l'apologie du racisme, du fanatisme ou de la trahison ».

2) ANGOLA

Constitution

Article: 20 “The State shall respect and protect the human person and human dignity. Every citizen shall be entitled to the free development of his or her personality, with due respect for the rights of other citizens and the highest interests of the Angolan nation. The life, freedom, personal integrity, good name and reputation of every citizen shall be protected by law”.

Article: 32

1. Freedom of expression, assembly, demonstration and all other forms of expression shall be guaranteed.
2. The exercise of the rights set out in the foregoing clause shall be regulated by law.
3. Groupings whose aims or activities are contrary to the fundamental principles set out in Article 158 of the Constitutional Law and penal laws, and those that, even indirectly, pursue political objectives through organizations of a military, paramilitary or militarized character, secret organizations and those with racist, fascist or tribalist ideologies shall be prohibited.

3) BENIN

POLITIQUES : La question de la haine raciale ou religieuse ou celle de la liberté d'expression ressortent des droits de l'homme. Et, en la matière, l'Article 3 de la constitution du 11 décembre 1990 dispose : «Toute loi, tout texte réglementaire et tout acte administratif contraires à ces dispositions sont nuls et non avenue. En conséquence, tout citoyen a le droit

de se pourvoir devant la cour constitutionnelle contre les lois, textes et actes présumés inconstitutionnels.».

Cette disposition ouvre le droit de saisine de la haute juridiction à tout citoyen en matière d'atteinte aux droits de l'homme. Dans un contexte où la justice est atteinte par la corruption et paralysée par sa lourdeur et sa lenteur, ce droit de saisine démocratisé est une garantie pour les droits individuels et les libertés publiques compte tenu de la crédibilité de la haute juridiction en la matière.

Legislation prohibiting incitement to national, racial and religious hatred

Constitution (11 December 1990)

Article 26: The State shall provide equality before the law for everyone, without distinction of origin, race, sex, religion, political opinion or social position.

Article 36: Each Benin has a duty to respect and consider his fellow men without any discrimination and to maintain relationships with the others that allow you to save, strengthen and promote respect, dialogue and mutual tolerance for peace and national cohesion.

Legislation protecting freedom of speech

Constitution (11 December 1990)

Article 23: Everyone has the right to freedom of thought, conscience, religion, worship, opinion and expression in respect of public order established by law and regulations. The exercise of religion and expression of beliefs must be in accordance with the secular State. Institutions, religious or philosophical communities have the right to develop without hindrance. They are not subject to supervision by the state. They regulate and administer their affairs autonomously.

Law n° 97-010 (20 August 1997) portant libéralisation de l'espace audiovisuel et dispositions pénales spéciales relatives aux délits en matière de presse et de communication audiovisuelle en République du Bénin.

Constitution

Article 2 - Toute personne a droit à la jouissance des droits et libertés reconnus et garantis dans la présente Charte sans distinction aucune, notamment de race, d'ethnie, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

Article 23

Toute personne a droit à la liberté de pensée, de conscience, de religion, de culte, d'opinion et d'expression dans le respect de l'ordre public établi par la loi et les règlements. L'exercice du culte et l'expression des croyances s'effectuent dans le respect de la laïcité de L'Etat.

Les institutions, les communautés religieuses ou philosophiques ont le droit de se développer sans entraves. Elles ne sont pas soumises à la tutelle de L'Etat. Elles règlent et administrent leurs affaires d'une manière autonome.

Article 24

La liberté de la presse est reconnue et garantie par l'Etat. Elle est protégée par la Haute Autorité de l'Audio - visuel et de la Communication dans les conditions fixées par une loi organique.

Code de déontologie de la presse Béninoise : Préambule

Les associations nationales des professionnels de l'information et de la communication affirment leur volonté de perpétuer les traditions de lutte de la presse béninoise pour la liberté d'expression et le droit du public à l'information des instances africaines d'autorégulation des médias sont similaires.

Elles marquent également leur engagement à promouvoir la culture démocratique en conformité avec la Constitution du 11 décembre 1990 qui garantit la liberté de presse au Bénin.

Article 10 du code déontologie du journalisme : « Le journaliste se refuse à toute publication incitant à la haine tribale, raciale et religieuse. Il doit proscrire toute forme de discrimination. Il s'interdit l'apologie du crime ».

4) BOTSWANA

Constitution

12. Protection of freedom of expression

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) that is reasonably required in the interests of defense, public safety, public order, public morality or public health; or

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television; or

(c) that imposes restrictions upon public officers, employees of local government bodies, or teachers, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

5) BURKINA FASO

POLITIQUES

Le Burkina Faso compte une soixantaine d'ethnies qui cohabitent avec des communautés étrangères bien intégrées. De la coexistence entre la mosaïque de populations vivant au Burkina Faso, il n'a pas été rapporté d'incidents, troubles majeurs du fait d'une discrimination basée sur la race, la religion, les opinions politiques ou la nationalité. Le débat public ne se focalise pas sur des thèmes ou arguments tendant à créer une discrimination à l'égard de l'un quelconque des groupes ethniques ou des communautés étrangères parce cela est interdit et toute organisation qui s'y engagerait est susceptible d'être dissoute et ses dirigeants poursuivis. Cependant, des actes isolés, notamment d'intolérance religieuse (refus de mariage interreligieux, de fréquenter certains membres de la famille pratiquant un autre

culte, divergences d'interprétation des textes religieux...), des conflits liés à l'accès aux ressources naturelles entre agriculteurs et éleveurs, entre agriculteurs résidents et agriculteurs migrants sont rapportés. C'est afin de prévenir de tels conflits que le gouvernement a adopté en 2008 une stratégie nationale de promotion d'une culture de la tolérance et de la paix.

En 2008, le gouvernement a adopté une Stratégie nationale de promotion d'une culture de la tolérance et de la paix au Burkina Faso. La stratégie nationale de promotion de la culture de la tolérance et de la paix répond au souci de se doter d'un mécanisme de prévention et d'alerte précoce en vue de prévenir certains risques de conflits et proposer des pistes de solutions aux situations de violences. Cette stratégie s'inscrit dans le cadre des recommandations de l'Assemblée générale des Nations Unies qui a institué en 1993, l'année internationale des Nations unies pour la tolérance. Cette stratégie est conforme à la politique du gouvernement en matière de promotion des droits humains au Burkina Faso adoptée en 2001 et est un cadre de référence et d'orientation pour la promotion de la culture de la tolérance et de la paix. 4 axes stratégiques ont été développés pour la mise en oeuvre de ladite stratégie parmi lesquels on peut noter, la construction d'une culture nationale sur la base de la diversité culturelle et l'éducation à la culture de la tolérance et de la paix.

Le décret n° 2009-787 du 19 novembre 2009 portant organisation du Ministère de la Promotion des droits humains institue par ailleurs une Direction de la Promotion de la culture de la tolérance et du genre qui a entre autres missions la promotion d'une culture de la tolérance, de la paix et des droits humains et la mise en oeuvre de mesures spécifiques tendant à promouvoir et à consolider les droits catégoriels. Un plan d'action de mise en oeuvre de ladite stratégie est en cours d'élaboration. Le Burkina Faso a également entrepris depuis 2002, de célébrer la journée internationale de la tolérance et la deuxième édition en 2003, célébrée sous le thème « DIRE NON A LA VIOLENCE », a permis l'institution d'un prix pour la tolérance destiné à distinguer une personnalité nationale qui incarne la tolérance et qui servira de modèle aux jeunes générations. Depuis six ans, cette journée est célébrée de façon tournante dans différentes provinces du pays. Pour l'année 2009, la journée a été commémorée sous le thème : "L'éducation, instrument de promotion de la tolérance".

Elle a été une occasion de sensibilisation des autorités locales, des représentants de sensibilités coutumières, religieuses et associatives ainsi que des élèves aux valeurs de la tolérance par le respect des autres, de leurs opinions et de leurs différences. L'organisation annuelle de la journée des communautés au Burkina Faso est également un mécanisme favorable à la tolérance et à la paix. Des études sont aussi en cours pour l'élaboration de curricula d'enseignement des droits humains pour les élèves, mais il est à relever qu'actuellement, les programmes d'enseignements (au niveau du primaire) intègrent des modules sur des thèmes dits émergents parmi lesquels figurent les droits de l'homme.

Legislation prohibiting incitement to national, racial and religious hatred

Constitution du 2 juin 1991

Article 1alinéa 3 :

"Les discriminations de toutes sortes, notamment celles fondées sur la race, l'ethnie, la région, la couleur, le sexe, la langue, la religion, la caste, les opinions politiques, la fortune et la naissance, sont prohibées".

Article 7 : La liberté de croyance, de conscience, d'opinion religieuse, philosophique, d'exercice de culte, la liberté de réunion, la pratique libre de la coutume ainsi que la liberté de cortège et de manifestation, sont garanties par la présente Constitution, sous réserve du respect de la loi, de l'ordre public, des bonnes mœurs et de la personnalité humaine".

Article 13:

Les partis et formations politiques se créent librement. ...

Toutefois, ne sont pas autorisés les partis ou formations politiques tribalistes, régionalistes, confessionnels ou racistes.

Loi n° 042-2008/AN du 23 octobre 2008 portant statut des réfugiés au Burkina Faso Article 2 : "La présente loi s'applique à tout demandeur d'asile et réfugié, sans discrimination, notamment au regard de son genre, de sa religion, de sa race ou de sa nationalité".

Article 10 : "Tous les réfugiés régulièrement installés au Burkina

Faso jouissent des mêmes droits et sont assujettis aux mêmes obligations sans discrimination aucune liée à la race, l'ethnie, la religion ou au pays d'origine".

Article 11 : "Tous les réfugiés régulièrement installés au Burkina Faso bénéficient du même traitement que les nationaux. A ce titre, ils ont les mêmes droits que ceux reconnus ou garantis aux citoyens burkinabè, notamment : la liberté de religion et de culte ; le droit à la propriété ; le droit d'accès à la justice, y compris l'assistance judiciaire ; le droit au travail ; le droit au logement ; le droit à l'éducation, y compris la gratuité de la scolarité dans l'éducation de base et l'accès à l'Université et aux œuvres universitaires ; la liberté de circulation ; le droit au transfert des avoirs ; le droit à l'assistance publique. En outre, ils peuvent jouir, sous les réserves instituées par la réglementation applicable aux étrangers en général, des droits suivants :... le droit d'acquisition de la nationalité burkinabè, conformément à la législation en vigueur ; la liberté d'association pour les activités non politiques. Article 12 : "Pour l'exercice d'une activité professionnelle salariée ou non et sans exonération d'impôts et de taxes ainsi qu'en matière d'avantages sociaux liés à l'exercice d'une telle activité, les personnes reconnues comme réfugiés sont assimilées aux nationaux".

Loi 43-96 ADP du 13 novembre 1996 portant Code pénal

Article 132: "Est puni d'un emprisonnement de un à cinq ans et de l'interdiction de séjour de cinq ans, tout acte de discrimination, toute manifestation contraire à la liberté de conscience et à la liberté de culte susceptible de dresser les personnes les unes contre les autres. Est considéré notamment comme acte de discrimination raciale: toute distinction, exclusion, restriction ou préférence fondée sur la race, la couleur, l'ascendance ou l'origine nationale ou ethnique, qui a pour but ou pour effet de détruire ou de compromettre la reconnaissance, la jouissance ou l'exercice dans des conditions d'égalité, des droits de l'homme et des libertés fondamentales dans les domaines politique, économique, social et culturel ou dans tout autre domaine de la vie publique".

Loi n° 56-93 ADP du 30 décembre 1993 portant code de l'information au Burkina Faso

Article 18: "Aucune publication spécialisée ou d'information générale ne doit comporter ni illustration, ni récit, ni information ou insertion qui porte atteinte à la vie privée du citoyen ou contraire à la morale publique, aux bonnes mœurs et à l'éthique civique ou faire l'apologie du racisme et du tribalisme....".

Article 112 alinéa 2: "La diffamation commise par les mêmes moyens envers un groupe de personnes non visées aux articles 104 et 105 de la présente loi, mais du fait de leur appartenance à une race, une région, une religion sera punie d'un emprisonnement d'un mois à un an et d'une amende de 100 000 à 1 000 000 de francs lorsqu'elle aura pour but d'inciter à la haine entre les citoyens ou habitants".

Loi 028-2008 du 13 mai 2008 portant Code du travail au Burkina Faso

Article 4: "Toute discrimination en matière d'emploi et de profession est interdite. Par discrimination, on entend : 1) toute distinction, exclusion ou préférence fondée notamment sur la race, la couleur, le sexe, la religion, l'opinion politique, le handicap, l'état de grossesse, l'ascendance nationale ou l'origine sociale, qui a pour effet de détruire, d'altérer l'égalité de chance ou de traitement en matière d'emploi ou de profession ; 2) toute autre distinction, exclusion ou préférence ayant pour effet de détruire, d'altérer l'égalité de chance ou de traitement en matière d'emploi ou de profession".

Article 38 : " L'employeur doit s'interdire toute discrimination de quelque nature que ce soit en matière d'accès à l'emploi, de conditions de travail, de formation professionnelle, de maintien dans l'emploi ou de licenciement, notamment par rapport au statut sérologique de l'infection à VIH réel ou apparent".

Loi n° 013-98/AN du 28 avril 1998 portant régime juridique applicable aux emplois et aux agents de la Fonction publique

Article 11: "...l'Administration Publique peut, lorsque les circonstances le justifient, recruter comme contractuels....b) des candidats de nationalité étrangère".

Zatu (ordonnance) VII 13 du 16 novembre 1989 portant institution et application d'un code des personnes et de la famille au Burkina Faso

Article 5: "Les étrangers jouissent, au Burkina Faso, des droits civils, au même titre que les nationaux.

Toutefois, la jouissance d'un droit peut leur être expressément refusée par la loi ou être subordonnée à la réciprocité, sous réserve des dispositions des conventions internationales".

Article 234 : "Le mariage résulte de la volonté libre et consciente de l'homme et de la femme, de se prendre pour époux. En conséquence sont interdits les empêchements et les oppositions à mariage en raison de la race, de la caste, de la couleur ou de la religion".

Loi n° 013-2007 du 30 juillet 2007 portant loi d'orientation de l'éducation

Article 3: "Toute personne vivant au Burkina Faso a droit à l'éducation, sans discrimination aucune, notamment celle fondée sur le sexe, l'origine sociale, la race, la religion, les opinions politiques, la nationalité ou l'état de santé....".

Legislation prohibiting incitement to national, racial and religious hatred

Constitution du 2 juin 1991

Article 8:

Les libertés d'opinion, de presse et le droit à l'information sont garantis. Toute personne a le droit d'exprimer et de diffuser ses opinions dans le cadre des lois et règlements en vigueur.

Article 21:

La liberté d'association est garantie. Toute personne a le droit de constituer des associations et de participer librement aux activités des associations créées.

Loi n° 042-2008/AN du 23 octobre 2008 portant statut des réfugiés au Burkina Faso

Article 11 :

Tous les réfugiés régulièrement installés au Burkina Faso bénéficient du même traitement que les nationaux.... En outre, ils peuvent jouir, sous les réserves instituées par la réglementation applicable aux étrangers en général, des droits suivants :... le droit d'acquisition de la nationalité burkinabè, conformément à la législation en vigueur ; la liberté d'association pour les activités non politiques.

Constitution

Article 1

Tous les Burkinabais naissent libres et égaux en droits. Tous ont une égale vocation à jouir de tous les droits et de toutes les libertés garantis par la présente Constitution.

Les discriminations de toutes sortes, notamment celles fondées sur la race, l'ethnie, la région, la couleur, le sexe, la langue, la religion, la caste, les opinions politiques, la fortune et la naissance, sont prohibées.

Article 7

La liberté de croyance, de non croyance, de conscience, d'opinion religieuse, philosophique, d'exercice de culte, la liberté de réunion, la pratique libre de la coutume ainsi que la liberté de cortège et de manifestation sont garanties par la présente Constitution, sous réserve du respect de la loi, de l'ordre public, des bonnes mœurs et de la personne humaine.

Article 8

Les libertés d'opinion, de presse et le droit à l'information sont garantis. Toute personne a le droit d'exprimer et de diffuser ses opinions dans le cadre des lois et règlements en vigueur.

Lois 56-93/ADP du 30 décembre 1993 portant code de l'information

Articles 45 : Le délit de presse consiste en une manifestation d'opinion ou l'imputation d'un fait constituant un abus de la liberté d'expression commis par voie de presse.

Article 50 : Par dérogation aux dispositions pertinentes du Code Pénal, sont passibles d'une peine de six mois à cinq ans de servitude pénale et d'une amende de 100.000 à 300.000

FBU, le Directeur de publication, le rédacteur en chef, le Secrétaire de rédaction ou le journaliste qui aura publié :

Des communiqués, appels ou annonces tenant à l'apologie du crime, à la réalisation d'un chantage ou d'une escroquerie, à la haine raciale ou ethnique ;

Des informations incitant à la désobéissance civile ou faisant la propagande de l'ennemi de la nation burundaise en cas de guerre.

6) BURUNDI

Constitution

Article 1

Le Burundi est une République indépendante, souveraine, laïque, démocratique, unitaire et respectant sa diversité ethnique et religieuse.

Article 13

Tous les burundais sont égaux en mérite et en dignité. Tous les citoyens jouissent des mêmes droits et ont droit à la même protection de la loi. Aucun burundais ne sera exclu de la vie sociale, économique ou politique de la nation du fait de sa race, de sa langue, de sa religion, de son sexe ou de son origine ethnique.

Article 31

La liberté d'expression est garantie. L'État respecte la liberté de religion, de pensée, de conscience et d'opinion.

7) CAMEROUN

Constitution: Préambule

.....- Nul ne peut être inquiété en raisons de ses origines, de ses opinions ou croyance en matière religieuse, philosophique ou politique sous réserve du respect de l'ordre public et des bonnes mœurs ;

- La liberté de communication, la liberté d'expression, la liberté de presse, la liberté de réunion, la liberté d'association, la liberté syndicale et le droit de grève sont garantis dans les conditions fixées par la loi ;.....

Code de déontologie de journaliste du Cameroun

PREAMBULE « Le droit à l'information, à la libre expression et à la critique est l'une des libertés fondamentales de tout humain (Charte de Munich, novembre 1978). De ce droit du public à connaître les faits et les opinions procède l'ensemble des devoirs et des droits des journalistes ».

8) CENTRAL-AFRICAN REPUBLIC

Constitution

Art 8: La liberté de conscience, de réunion, le libre exercice des cultes sont garantis à tous dans les conditions fixées par la Loi.

Toute forme d'intégrisme religieux et d'intolérance est interdite.

Art 13: La liberté d'informer, d'exprimer et de diffuser ses opinions par la parole, la plume et l'image, sous réserve du respect des droits d'autrui, est garantie.

Le secret de la correspondance ainsi que celui des communications postales, électroniques, télégraphiques et téléphoniques sont inviolables.

Il ne peut être ordonné de restriction aux dispositions ci-dessus qu'en application d'une loi.

La liberté de la presse est reconnue et garantie. Elle s'exerce dans les conditions fixées par la loi.

L'exercice de cette liberté et l'égal accès pour tous aux médias d'Etat sont assurés par un organe indépendant, doté de pouvoir de régulation et de décision dont le statut est fixé par la loi.

La liberté de création intellectuelle, artistique et culturelle est reconnue et garantie. Elle s'exerce dans les conditions fixées par la Loi.

9) COMORES

Constitution

- l'égalité de tous en droits et en devoirs sans distinction de sexe, d'origine, de race, de religion ou de croyance,

- le droit à l'information plurielle et à la liberté de la presse,

- les libertés d'expression, de réunion, d'association et la liberté syndicale dans le respect de la morale et de l'ordre public,

Le Préambule :

Le peuple comorien, affirme solennellement sa volonté de Proclamer :

- l'égalité de tous en droits et en devoirs sans distinction de sexe, d'origine, de race, de religion ou de croyance,

- les libertés d'expression, de réunion, d'association et la liberté syndicale dans le respect de la morale et de l'ordre public,

10) DEMOCRATIC REPUBLIC CONGO

Constitution

Article 22

Toute personne a droit à la liberté de pensée, de conscience et de religion.

Toute personne a le droit de manifester sa religion ou ses convictions, seule ou en groupe, tant en public qu'en privé, par le culte, l'enseignement, les pratiques, l'accomplissement des rites et l'état de vie religieuse, sous réserve du respect de la loi, de l'ordre public, des bonnes mœurs et des droits d'autrui.

La loi fixe les modalités d'exercice de ces libertés.

Article 23

Toute personne a droit à la liberté d'expression. Ce droit implique la liberté d'exprimer ses opinions ou ses convictions, notamment par la parole, l'écrit et l'image, sous réserve du respect de la loi, de l'ordre public et des bonnes mœurs.

Article 24

Toute personne a droit à l'information.

La liberté de presse, la liberté d'information et d'émission par la radio et la télévision, la presse écrite ou tout autre moyen de communication sont garanties sous réserve du respect de l'ordre public, des bonnes mœurs et des droits d'autrui.

La loi fixe les modalités d'exercice de ces libertés.

Les médias audiovisuels et écrits d'Etat sont des services publics dont l'accès est garanti de manière équitable à tous les courants politiques et sociaux. Le statut des médias d'Etat est établi par la loi qui garantit l'objectivité, l'impartialité et le pluralisme d'opinions dans le traitement et la diffusion de l'information.

11) IVORY COAST

Legislation prohibiting incitement to national, racial and religious hatred

La constitution de la cote d'Ivoire 23 juillet 2000

Article 10: Chacun a le droit d'exprimer et de diffuser librement ses idées. Toute propagande ayant pour but ou pour effet de faire prévaloir un groupe social sur un autre, ou d'encourager la haine raciale ou religieuse est interdite.

Article 13: Les Partis et Groupements politiques se librement sous la condition de respecter les lois de la République les principes de la souveraineté nationale et de la démocratie. Ils sont égaux en droits et soumis aux mêmes obligations. Sont interdits les Partis ou Groupements politiques créés sur des bases régionales, confessionnelles, tribales, ethniques ou raciales.

Loi N° 2008-222 du 04 Août 2008 modifiant et complétant les dispositions du code pénal relatives à la répression du racisme, de la xénophobie, du tribalisme et des discriminations raciales et religieuses.

Article 1 : Les articles 199, 200 et 201 du code pénal sont modifiés et complétés ainsi qu'il suit:

Article 199 (nouveau) : Pour l'application des dispositions ci-dessous, est qualifiée de :

1. Racisme : toute forme d'hostilité physique, morale ou intellectuelle ou toute manifestation de haine à l'égard d'un être humain ou d'une communauté en raison de son origine raciale ou de la couleur de sa peau, tous actes, propos ou écrits visant à établir ou à instaurer une hiérarchisation des races, la préservation ou l'exaltation d'une race dite supérieure.

2. Xénophobie: toute manifestation d'hostilité ou de haine à l'égard d'une personne ou d'un groupe de personnes en raison de sa nationalité ou de son origine étrangère.

3. Tribalisme: toute manifestation d'hostilité ou de haine à l'égard d'une personne ou d'un groupe de personnes, fondée exclusivement sur l'Origine ethnique ou tribale, toutes faveurs accordées à une personne ou à un groupe de personnes sur la base de considérations exclusivement tribales ou ethniques.

4. Discrimination raciale: toute distinction, exclusion, restriction ou préférence, fondée sur la race, la couleur, l'ascendance ou l'origine nationale ou ethnique, qui a pour but ou pour effet de détruire ou de compromettre, la reconnaissance, la jouissance ou l'exercice, dans les conditions d'égalité, des droits de l'homme et des libertés fondamentales, dans les domaines politique, économique, social et culturel ou dans tout autre domaine de la vie publique;

5. Discrimination religieuse toute discrimination, exclusion, restriction ou préférence fondée sur la religion qui a pour but ou pour effet de détruire ou de compromettre la reconnaissance, la jouissance ou l'exercice, dans les conditions d'égalité, des droits de l'homme et des libertés fondamentales, dans les domaines politique, économique, social et culturel ou dans tout autre domaine de la vie publique.

Article 200 (nouveau): Quiconque se rend coupable de racisme, de xénophobie, de tribalisme ou de discrimination raciale ou religieuse, est puni d'un emprisonnement de cinq (5) à dix (10) ans et d'une amende de 500.000 à 5.000.000 F CFA. La peine est portée au double si : - l'infraction a été commise par voie de presse écrite ou de tout autre écrit, de radio de télévision, ou de tous autres instruments des nouvelles technologies de l'information et de la communication permettant une diffusion à grande échelle; - l'infraction a été commise à l'occasion ou au cours d'une manifestation publique ou d'un rassemblement à caractère politique ;

Article 200-1 (nouveau): La diffamation, l'injure ou la menace faite dans les conditions prévues par l'article 174 envers un groupe de personnes qui appartiennent par leur origine à une race, à une ethnie ou à une religion déterminée; est punie d'un emprisonnement de cinq (5) à dix (10) ans et d'une amende de 500.000 à 5.000.000 F CFA. Ces peines sont portées au double, si l'infraction a été commise par la voie de presse, de la radio ou de la télévision. Est puni des mêmes peines, quiconque refuse à autrui l'accès, soit aux lieux ouverts au public, soit à un emploi, soit à un logement en invoquant uniquement sa race, son ethnie ou sa religion.

Article 200-3 (nouveau):

Quiconque se rend coupable de diffusion d'informations ou de rumeurs mensongères à relent raciste ou tribaliste, dans l'intention de soulever une communauté contre une autre même si le soulèvement n'a pu avoir lieu, est puni d'un emprisonnement de cinq (5) à dix (10) ans et d'une amende de 500.000 à 5.000.000 F CFA Est puni des mêmes peines, quiconque sans fondement porte dans la presse Etrangère, sur les radios et télévisions étrangères, au moyen des nouvelles technologies de l'information et de la communication permettant, une diffusion à grande échelle, à l'occasion de rencontres internationales, de réunions ou de forums tenus sur le territoire d'un Etat étranger, des accusations de racisme, de xénophobie ou de discrimination raciale ou religieuse.

Legislation prohibiting incitement to national, racial and religious hatred

Constitution de la cote d'Ivoire 23 juillet 2000

Article 1:L'Etat de Côte d'Ivoire reconnaît les libertés, les droits et devoirs fondamentaux énoncés dans la présente Constitution et s'engage à prendre des mesures législatives ou réglementaires pour en assurer l'application effective.

Article 9: La liberté de pensée et d'expression, notamment la liberté de conscience, d'opinion religieuse ou philosophique sont garanties à tous, sous la réserve du respect de la loi, des droits d'autrui, de la sécurité nationale et de l'ordre public.

Article 10: Chacun a le droit d'exprimer et de diffuser librement ses idées. Toute propagande ayant pour but ou pour effet de faire prévaloir un groupe social sur un autre, ou d'encourager la haine raciale ou religieuse est interdite.

Loi N° 2004-643 du 14 décembre 2004 portant régime juridique de la presse Article 1:
" La parution de tout journal ou écrit périodique est libre, sous réserve du respect des conditions prescrites à l'article 6."

Loi N° 2004-644 du 14 décembre 2004 portant régime juridique de la communication audiovisuelle

Article 1: "La communication audiovisuelle est libre. L'exercice de cette liberté ne peut être limité que dans les cas suivants...";

Déontologie ou droits et devoirs du journaliste ivoirien: préambule "Le droit à l'information, à la libre expression et à la critique est l'une des libertés fondamentales de tout être humain..."

12) DJIBOUTI

Constitution

ARTICLE 11 : Toute personne a droit à la liberté de pensée, de conscience, de religion, de culte et d'opinion dans le respect de l'ordre établi par la loi et les règlements.

ARTICLE 15 : Chacun a le droit d'exprimer et de diffuser librement ses opinions par la parole, la plume et l'image. Ces droits trouvent leur limite dans les prescriptions des lois et dans le respect de l'honneur d'autrui.

Lois :

LES DROITS À LIBERTÉ D'EXPRESSION

a) la législation

L'article 15 de la constitution nationale et la loi n°2/AN/92/2 e L relative à la liberté de communication promulguée le 15/09/1992 sont établis pour standardiser et concrétiser le droit à la liberté d'expression à Djibouti. Mais beaucoup d'articles de cette loi desservent l'objectif initial de ce document et sont des freins réels à l'exercice du droit à la liberté d'expression à Djibouti.

Les articles incriminés sont :

- l'article 5 qui parle de la création d'une commission nationale de la communication chargée de veiller au respect du pluralisme de l'information. La composition et les moyens d'assurer l'indépendance de cette commission demeurent flous : ainsi, il n'est pas précisé si des représentants des médias indépendants et libres, de l'opposition, des organisations de défense des droits de l'Homme peuvent ou pas y participer de manière significative. En l'absence de telles dispositions, cet organe apparaît comme un filtre pour endiguer le développement des médias indépendants et libres ;

- l'article 14 qui recommande que « Les propriétaires, associés, actionnaires, commanditaires, bailleurs de fonds ou autres participants à la vie financière d'un organe de presse doivent être de nationalité Djiboutienne » est une disposition discriminatoire afin d'écartier les

investisseurs étrangers et tenir les medias sous le contrôle des autorités. Les opérateurs étrangers ainsi écartés, il suffit au régime de rejeter les initiatives Djiboutiennes libres, comme nous le verrons un peu plus loin. Cet article est en soi un obstacle manifeste à la liberté d'expression et d'information.

- L'article 17 qui exige que le directeur et le co-directeur d'un media résident à Djibouti, dans le cas contraire la société est considérée comme illégal. Cet article est juridiquement nul parce qu'une identité morale ne peut être sanctionnée que pour les violations de la loi qu'elle a commises et non pour les déplacements et la résidence d'une identité physique.

La liberté d'expression est en soi un droit inaliénable qui ne peut être conditionné aux droits de déplacements et de résidence d'une personne physique.

- L'article 29 qui autorise le ministère chargé de la communication d'interdire sur le territoire djiboutien une media étranger. C'est une manière d'empêcher à la population Djiboutienne d'avoir accès à une information autre que celle diffusée par les seuls supports médiatiques admis à exercer à Djibouti, à savoir les medias contrôlés par le parti au pouvoir. C'est de la censure dans sa pure forme que cet article tente de légaliser.

- L'article 47 qui exige que le directeur d'une publication audiovisuelle soit obligatoirement âgé de plus de 40 ans. C'est un article discriminatoire qui limite le droit à la liberté d'opinion et d'expression. Comme il est précisé à l'article 15 que le propriétaire d'un media doit être automatiquement le directeur, les tranches d'âge comprises entre 16 ans et 39 ans n'ont pas la possibilité de jouir notamment de la prérogative consacrée par l'article 19 du pacte international relatif aux droits civils et politiques.

b) les medias audiovisuels

Il n'existe dans le pays qu'une chaîne de télévision et une radio (Radio et Télévision de Djibouti) qui sont des medias dit publics. Il existe aussi société privée audiovisuelle et une seule qui exploite un bouquet de chaînes étrangères en location. Cette société privée est la propriété de dignitaires du régime. De ce fait, quand une émission touchant à la gestion économique, sociale, financière ou politique du pays est programmée sur une des chaînes du bouquet, c'est à un écran noir qu'ont droit les téléspectateurs de cette chaîne.

L'émetteur local de Radio France International qui émettait sur FM est fermé depuis janvier 2005 sur décision politique du régime djiboutien (annexe 01).

Une association des journalistes Djiboutiens indépendants présidés par le directeur de publication du Renouveau, Daher Ahmed Farah, a soumis en octobre 2001 une demande d'ouverture d'une radio libre au gouvernement. En vain. La demande de licence a eu pour seule réponse un article hostile du journal la Nation (annexes 06).

c) les medias écrits

Il n'existe aucune aide ou subvention légalement octroyées pour le développement des medias écrits ; pourtant les trois journaux du parti au pouvoir (la Nation, Al-Qaran et le Progrès) bénéficient d'une subvention régulière. Les deux derniers journaux de l'opposition ont disparu (le Renouveau et la Réalité) en raison du système répressif institué pour mater la liberté d'expression.

Le Renouveau, le journal du parti de l'opposition « Mouvement pour le Renouveau démocratique et le Développement » était le dernier journal indépendant et libre qui paraissait à Djibouti mais il est interdit depuis mai 2007. Comme les plaintes pour diffamations et fausses nouvelles portées par le régime depuis février 2007 se sont révélées infondées, le président Ismaël Omar Guelleh est monté au créneau et mis en avant l'article 17 de la loi n°2/AN/92/2 e L relative à la liberté de communication qui impose au directeur de publication de résider à Djibouti (cf. annexe 01- interview du président de la république de Djibouti au journal Jeune Afrique). Puisque le régime insiste sur l'obligation de résidence, pourquoi ne

pas l'avoir invoquée dès le début au lieu de multiplier procès et saisies de matériel contre le journal et le MRD ? L'objectif, on le devine, est de réduire le Renouveau au silence par tous les moyens.

C'est ainsi que le journal et ses administrateurs ont été plusieurs fois victimes d'acte de déprédation, d'harcèlement et de condamnations judiciaires arbitraires : son matériel de tirage a été, pour la troisième fois en quatre mois, saisi par la police. Dans la ligne de mire du parti au pouvoir depuis plus d'une dizaine d'années, le directeur du journal, Daher Ahmed Farah, avait été arrêté à quatre reprises en 2003 et avait passé, au total, trois mois en prison au cours de l'année. Il se trouve aujourd'hui à l'étranger. Son frère, Houssein Ahmed Farah, avait passé neuf jours en prison, en juin 2004, sous prétexte qu'il aurait "attenté à la vie de la première dame du pays". Alors qu'il circulait en voiture pour aller couvrir une manifestation populaire, il avait dû freiner brusquement pour éviter un convoi officiel.

Depuis février 2007, plusieurs cadres et militants ont été arrêtés pour des périodes plus ou moins brèves. Arrêté le 3 juin, Farah Abadid Hildid, militant du MRD et collaborateur du Renouveau djiboutien a été condamné, le 14 juin 2007, à un mois de prison ferme pour "publication de fausses nouvelles". Houssein Ahmed Farah, quant à lui, a été arrêté et détenu deux fois depuis février 2007, du 7 au 10 février et du 6 au 13 mai. Les vendeurs à la criée du Renouveau ont été régulièrement interpellés et intimidés. Se fondant sur diverses procédures judiciaires ouvertes pour "diffamation" ou "publication de fausses nouvelles", la police Djiboutienne a également procédé à des perquisitions dans les locaux du parti et du journal, ainsi qu'au domicile de Daher Ahmed Farah. Le 7 février, un ordinateur servant à l'édition du Renouveau avait été saisi ; le 29 mars 2007, une nouvelle perquisition de la police avait saisi le matériel d'impression ; et, à nouveau, le 13 mai, le nouveau matériel d'impression avait été confisqué, interrompant une nouvelle fois la parution de l'hebdomadaire.

d) les medias électroniques

Le seul opérateur de l'Internet du pays « DJIBOUTI -TELECOM » est à cent pour cent sous le contrôle de l'État djiboutien. L'Internet est devenu un outil d'information très utilisé à Djibouti et très prisé par la jeunesse. Nombre d'organisations et de partis politiques ont créé leurs sites web pour pouvoir rapidement et à moindre coût informer la population et la diaspora Djiboutiennes. Le parti au pouvoir ayant constaté l'audience croissante auprès de la population de ces nouvelles sources d'informations répondant à ses préoccupations, élargit ses méthodes de censure aux medias électroniques.

13) EGYPT

EGYPTE : CCPR/CO/76/EGY

Le Comité est vivement préoccupé par l'absence d'intervention de l'État partie à la suite de la diffusion dans la presse égyptienne de certains articles très violents dirigés contre les juifs, qui sont de véritables appels à la haine raciale ou religieuse et qui constituent une incitation à la discrimination, à l'hostilité ou à la violence. L'État partie doit prendre toutes les mesures nécessaires afin de sanctionner de tels faits en faisant respecter le paragraphe 2 de l'article 20 du Pacte.

POLICIES:

- The protection of mentioned Penal Code Articles is meant for the three officially acknowledged religions by the State, namely; Islam, Christianity, and Judaism.

Nevertheless, effective protection for the right to freedom of religion and belief is not in place, as some basic elements of religious freedom are missing, such as the freedom to change one's religion or not to follow any religion.

- The State provides protection to certain schools of classical religious thoughts and sometimes resorts to these articles to crackdown on freedom of expression to serve political agendas. Yet, these articles are also used by individuals against expressed ideas in contradiction to their own.

CASES

1- It has been reported that on April 26, 2010, Nagib Gibrail, the president of the Egyptian Union of Human Rights Organization, filed a complaint with the Public Prosecutor against author Youssef Ziedan, accusing him of defaming the Christian religion and mocking the Christian tenets of the trinity, unity, and redemption. Gibrail alleged that some statements made by Ziedan constituted “insult and derision of the Christian faith and Christians.” The Public Prosecutor referred the complaint to the High State Security Prosecutor.

2- It has been reported that on April 17, 2010, a complaint was filed with the Public Prosecutor alleging that “A Thousand and One Nights” contains dialogue that derides religion. The complaint asked the office to confiscate the book and investigate officials at the General Authority for Cultural Palaces for publishing a new edition of it. The Public Prosecutor later closed the INCOMPLETE

3- It has been reported that on October 1, and August 28, 2007, the Minister of Interior used its prerogatives under emergency law to issue a detention order for Mohammed al-Darini and Ahmed Mohammed Subh respectively.

The State Security Prosecutor charged the detainees with propagating extreme Shiite beliefs with the goal of deriding Islam. They were released in late November and early December 2007. Similarly, the Ministry of Interior referred Mohammed Farouq and 11 others to the High State Security Prosecutor because of their affiliation with the Shiite confession in 2009 in what came to be known as the Hassan Shehata case. Their charges include forming an organization to propagate Shiite beliefs that defame Islam.

Although the prosecutor and the State Security Courts issued several orders to release all 12 defendants, the Ministry of Interior refused to implement the orders and issued new detention orders for eight of them.

4- It has been reported that in April 2009, the Administrative Court issued a ruling canceling the license of Ibdaa magazine, after it published a poem allegedly offending divinity. The High Administrative Court temporarily suspended the ruling in June 2009.

5- In 2007 an individual filed a law suit asking that Egyptian writer Nawal al-Saadawi be deprived of her Egyptian citizenship and prohibited from entering the country on the grounds that she had defamed religion and attacked the principles of Islamic law when she wrote a play entitled “God Tenders His Resignation at the Summit Meeting.” Nevertheless, on May 13, 2008, the court refused to deprive Ms. Saadawi of her citizenship.

Legislation prohibiting incitement to national, racial and religious hatred

Penal Code

Article 98: A punishment of imprisonment for 6 months to 2 years or a fine from 500 to 5000 L.E shall be imposed on anyone who uses religion, verbally or in writing or by any other means, to promote or advocate expressed ideologies with a view toward stirring up sedition, undermining or showing contempt for any divinely-revealed religion, or prejudicing national unity and social peace".*

Articles 160 and 161 impose punishment for desecration of religious sites or assaults on religious communities.

Article 176: Shall be punished by imprisonment whoever instigate...discrimination against one of the people's sects because of race, origin, language, or belief, if such instigation is lead to disturb public order.

Article 178: A punishment of imprisonment for 2 years and a fine from 20 to 500 L.E. or one of these punishments shall be imposed on anyone who:

- manufactured or possessed printed materials, manuscripts, advertisements, relieves, engraves, manual or photographic drawings, symbolic signs or any other material or photographs violating public morals
- in case this manufacture or possession was intended to trafficking, adhesion or exhibition.

The same punishment shall be imposed on anyone who:

1. Imported, exported or transferred by himself or by any other person any of the abovementioned materials.
2. Issued an advertisement, publicly exhibited, sold, rented, offered for sale or for rent, even though this was unpublicly affected.
3. Publicly and by direct or indirect means forwarded, even though free of charge and by any means, any of the abovementioned material.
4. Distributed or handed over with intent to be distributed, by any means, any of these materials.
5. Discretely distributed any of these materials, even though free of charge and with intent to corrupt morals.

As well as the fore-cited punishment is to be inflicted to anyone who:

1. Publicly delivered immoral songs, shouting or speeches.
2. Publicly seduced committing debauchery or issued advertisements or messages of any expressions. In case of recidivism the punishment shall be imprisonment and a fine without violating article 50 of this Code.

Legislation protecting freedom of speech

The Constitution

Article 47: freedom of opinion is guaranteed. Every person is entitled to express and disseminate his opinion orally, in writing, graphically or through any other medium of expression, within the limits of the law. Selfcriticism and constructive criticism guarantee sound national development;

Article 48: freedom of the press and of printing, publishing and the information media is guaranteed;

Article 49: the State ensures that its citizens enjoy freedom of scientific research and of literary, artistic and cultural creativity and provides the requisite facilities to encourage them to exercise this freedom;

Article 210: journalists have the right to obtain news and information in the manner prescribed by law. In the discharge of their duties, they are subject to no authority other than that of the law.

EGYPTE : Constitution

Article 40 « Les citoyens sont égaux devant la loi. Ils ont les mêmes droits et les mêmes devoirs publics, sans distinction de race, d'origine, de langue, de religion ou de conviction ».

Article 47 « La liberté d'opinion est garantie. Toute personne a le droit d'exprimer son opinion et de la propager par la parole, par écrit, par l'image ou par tout autre moyen d'expression dans les limites de la loi. L'autocritique et la critique constructive sont les garanties de la sécurité de l'édifice national ».

Article 48 « La liberté de la presse, de l'impression, de l'édition et des moyens d'information est garantie. La censure des journaux est interdite. L'avertissement, la suspension et la suppression des journaux par voie administrative sont interdits.

Toutefois, par exception, en cas d'urgence ou en temps de guerre, il est permis de soumettre les journaux, les imprimés et les moyens d'information à une censure limitée aux questions se rattachant à la sécurité générale ou aux objectifs de la sécurité publique et ce, conformément à la loi ».

CHAPITRE II : sur le pouvoir de la presse

Article 206 « La presse est un pouvoir populaire autonome qui exerce sa mission de la manière énoncée dans la Constitution et la loi ».

Article 207 - La presse exerce sa mission en toute liberté et indépendance au service de la société par les divers moyens d'expression pour exprimer les différentes tendances de l'opinion publique et contribuer à sa formation et à son orientation et cela dans le cadre des éléments de base de la société, de la sauvegarde des libertés, des droits et des devoirs publics, pour le respect de la vie privée des citoyens conformément à la Constitution et à la loi.

Article 208 - La liberté de la presse est assurée et la censure sur les journaux est interdite, de même que leur avertissement, leur suspension ou leur suppression, par la voie administrative et ce, conformément à la Constitution et à la loi.

Article 209 - La liberté d'éditer et de posséder des journaux, par des personnes morales publiques et privées, ainsi que les partis politiques, est assurée conformément à la loi.

La propriété, le financement, et les biens que possède la presse sont soumis au contrôle du peuple de la manière prescrite par la Constitution et la loi.

Article 210 - Les journalistes ont le droit de recueillir les nouvelles et les informations selon les conditions déterminées par la loi.

Leur activité n'est soumise qu'à la loi.

Article 211

Un Conseil Supérieur, dont la loi détermine la composition, les attributions et les rapports avec les pouvoirs de l'Etat, veillera sur les affaires de la presse. Ce Conseil exerce ses attributions de manière à consolider la liberté de presse et son indépendance, à sauvegarder les éléments de base de la société et assurer l'unité nationale et la paix sociale, tel qu'il est stipulé dans la Constitution et la loi.

(1, 2, 3, 4) Ces articles ont été modifiés conformément au résultat du référendum effectué le 22 mai 1980 sur l'amendement de la Constitution.

(5) Cet article a été modifié conformément au vote du peuple, qui s'est manifesté dans le référendum effectué le 22 mai 1980 sur l'approbation de l'amendement de la Constitution.

(6) Ce titre a été annexé conformément au résultat du référendum effectué le 22 mai 1980, sur l'amendement de la Constitution.

14) ERITREA

Constitution

Article 14 : L'égalité selon la loi

1) Tous sont égaux devant la loi.

2) Nul ne peut être victime de discrimination fondée sur la race, l'origine ethnique, la langue, la couleur de la peau, le sexe, la religion, une incapacité, l'opinion politique ou le statut social ou économique, ou tout autre facteur inapproprié.

3) L'Assemblée nationale, conformément aux dispositions du présent article, adoptera les lois pouvant contribuer à l'élimination des inégalités existant dans la société érythréenne.

15) ETHIOPIA

Constitution

Article 25 - Le droit à l'égalité « Tous sont égaux devant la loi et ont droit sans discrimination à la protection égale de la loi. À cet égard, la loi garantira à tous la protection égale et efficace, sans discrimination basée sur des motifs de race, d'ethnie, de nationalité ou d'autre origine sociale, de couleur, de sexe, de langue, de religion, d'opinion politique ou autre, de propriété, de naissance ou d'un autre statut ».

16) EQUATORIAL GUINEA

Art.13.- Tout citoyen jouit des droits et libertés suivantes :

« ...à la libre expression de pensées, d'idées et d'opinions »

Art.15.- Tout acte de partialité ou de discrimination commis pour des motifs tribaux, sexuels, religieux, sociaux, politiques, corruption ou de même nature est punissable' par la loi.

17) GABON

Constitution

ARTICLE PREMIER - La République gabonaise reconnaît et garantit les droits inviolables et imprescriptibles de l'homme, qui lient obligatoirement les pouvoirs publics.

Chaque citoyen a droit au libre développement de sa personnalité dans le respect des droits d'autrui et de l'ordre public. Nul ne peut être humilié, maltraité ou torturé, même lorsqu'il est en état d'arrestation ou d'emprisonnement.

- La liberté de conscience, de pensée, d'opinion, d'expression, de communication, la libre pratique de la religion sont garanties à tous, sous réserve du respect de l'ordre public.

.....Tout acte de discrimination raciale, ethnique ou religieuse, de même que toute propagande régionaliste pouvant porter atteinte à la sécurité intérieure ou extérieure de l'Etat ou à l'intégrité de la République sont punis par la loi.

ARTICLE 94 - La communication audiovisuelle et écrite est libre en République gabonaise, sous réserve du respect de l'ordre public, de la liberté et de la dignité des citoyens.

ARTICLE 95 - Il est institué à cet effet un Conseil national de la communication, chargé de veiller :

- au respect de l'expression de la démocratie et de la liberté de la presse sur toute l'étendue du territoire ;

- à l'accès des citoyens à une communication libre ;

Loi n° 12/2001 du 12 décembre 2001 portant code de la communication audiovisuelle, cinématographique et écrite en République gabonaise

Article 8 Toute censure de la presse, en dehors des cas prévus par la loi, constitue une violation des droits de l'homme.

Article 9 Toute intervention tendant à restreindre ou à suspendre, directement ou indirectement, la liberté de la presse, en dehors des cas prévus par la loi, constitue un délit d'entrave à la liberté de la presse.

Article 26 L'objectivité doit être la seule règle dans la manière de rendre compte des informations.

Article 125 Tout acte de diffamation ou d'injure commis par voie de presse envers une personne ou un groupe de personnes est réprimé conformément aux dispositions des articles 283 à 288 du code pénal.

18) GAMBIA

Relevant policies in relation to incitement to hatred and/or freedom of speech

There are no relevant policies in place to that effect, however, in practice, various human rights abuses as mentioned have been noted and freedom of speech in the Gambia is greatly restricted despite constitutional freedom of speech. Having said this, certain cultural and traditional relationships exist between various tribes in the Gambia that would serve as a tool for the prevention and resolution of conflict. For example, certain tribes would never harm a member of another tribe. This exists quite commonly among many tribes in the Gambia and hence, racial hatred is quite greatly restricted or even prevented.

Legislation prohibiting incitement to national, racial and religious hatred

Constitution (1997)

Chapter IV – Protection of Fundamental Rights and Freedoms Subsection (17) (2): “Every person in The Gambia, whatever his or her race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status, shall be entitled to the fundamental human rights and freedoms of the individual contained in this chapter, but subject to respect for the rights and freedoms of others and for the public interest”. Subsection 25) (1)(c): "Every person shall have the- (c) freedom to practise any religion and to manifest such practice;

Criminal Code

Chapter 10 (117): “Any person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, is guilty of a misdemeanor.

Chapter 10 (118): “Any person who voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremony, is guilty of a misdemeanour”.

Chapter 10 (119): “Any person who, with the intention of wounding the feelings of any person or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or in any place of sepulture, or in any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or to any persons assembled for the purpose of funeral ceremonies, is guilty of a misdemeanor”.

Chapter 10 (120): “Any person who, with the deliberate intention of wounding the religious feelings of any person, utters or writes any word, or makes any sound in the hearing of that

person, or makes any gesture in the sight of that person, or places any object in the sight of that person, is guilty of a misdemeanor, and is liable to imprisonment for a term of one year”.

Legislation protecting freedom of speech

Constitution

Chapter IV - Protection of Fundamental Rights and Freedoms Subsection 25)(1)(a): "Every person shall have the right to-

(a) freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief, which shall include academic freedom;

(c) freedom to practise any religion and to manifest such practice;

(d) freedom to assemble and demonstrate peaceably and without arms;

(e) freedom of association, which shall include freedom to form and join associations and unions, including political parties and trade unions;

(f) freedom to petition the Executive for redress of grievances and to resort to the Courts for the protection of his or her rights.

(a) freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief, which shall include academic freedom;

(c) freedom to practise any religion and to manifest such practice;

(d) freedom to assemble and demonstrate peaceably and without arms;

(e) freedom of association, which shall include freedom to form and join associations and unions, including political parties and trade unions;

(f) freedom to petition the Executive for redress of grievances and to resort to the Courts for the protection of his or her rights.

Other information or observations in relation to public discussion of both.

Within the past years, The Gambia was found wanting in a number of its human rights obligations and freedoms. According to the United States Department reports, the Gambia's human rights problems revolve around government complicity in the abduction of citizens, torture and abuse Gambian flag of detainees and prisoners, including political prisoners. It also cited poor prison conditions, arbitrary arrest and detention of citizens, including incommunicado detention, denial of due process and prolonged pretrial detention.

The Gambian government was also found wanting in limiting the rights of freedom of speech and of the press by intimidation, detention, and restrictive legislation. The President of the Gambia in a radio interview was clearly quoted to have stated on 22 July 2010, that journalists who tarnished the country's image would be "severely dealt with."

Although the independent press practiced self-censorship, opposition views regularly appeared in the independent press, and that there was frequent criticism of the government in the private media.

It was noted that the Gambia Radio and Television Services (GRTS)' biasness in giving limited coverage to opposition activities.

The US state department report noted "The deterioration of the country's media environment continued during the year. The government harassed journalists who wrote articles it considered inaccurate and investigated cases it considered sensitive.

Several journalists reportedly went into hiding from fear of government retaliation," the report said.

Frequent arrest and detention of journalists by the security forces also featured, with well known example being the 15 June arrest of seven journalists and the subsequent conviction of

six of them The report also referenced the 6 August arrest of Jollof News' Gambia Affairs editor, Abdoulie John, who was then Deputy Editor-in-chief and French language columnist at the progovernment Daily Observer newspaper, on charges of refusing to recognize the appointment of a new managing director of the paper. Although the independent press practiced self-censorship, opposition views regularly appeared in the independent press, and that there was frequent criticism of the government in the private media.

It cited GRTS' biasness in giving limited coverage to opposition activities.

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Frequent arrest and detention of journalists by the security forces also featured, with well known example being the 15 June arrest of seven journalists and the subsequent conviction of six of them. There exist certain legal provisions which give certain privileges to the Executive that may empower them from this authority to incite racial/religious hatred. The provision may be construed to give them certain powers to express racial/religious hatred.

Chapter XVII of the Criminal Code (Chapter 10) DEFAMATION states that:

Section 178: Any person who, by print, writing, painting effigy or by any means otherwise then solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person with the intent to defame that other person, is guilty of the misdemeanor termed : "libel".

Section 182 (1) then states that "The publication of defamatory matter is absolutely privileged and no person shall under any circumstances be liable to punishment under this Code in respect thereof, in any of the following cases: (a) if the matter is published by the President or by the Cabinet or the House o Representative, in any official document or proceeding". The subsequent sections further go on to exempt the cabinet or the House of Parliament from libel etc.

Section (2) of the same chapter then goes on to say that "Where a publication is absolutely privileged, it is immaterial for the purposes of this Chapter whether the mater be true or false, and whether it be or be not known or believed to be false, and whether it be or be not published in good faith. The preceding section allows that publication of defamatory matter is privileged if it is published in good faith.

19) GHANA

Relevant policies in relation to incitement to hatred and/or freedom of speech

See the National Media Policy:

<http://www.ict.gov.gh/pdf/NMCMEDIA-POLICY.pdf>

According to BBC news, Ghana enjoys a high degree of media freedom and the private press and broadcasters operate without significant restrictions. The Commonwealth Press Union has described Ghana's media as "one of the most unfettered" on the continent.

The private press is lively, and often carries criticism of government policy. Animated phone in programmes are staple fare on many radio stations. Radio is Ghana's most popular medium, although it is being challenged by increased access to TV.

Scores of private FM stations crowd the dial; many of them are based in the main towns and cities. Most of them are chasing a limited amount of advertising revenue. State-run Ghana

Broadcasting Corporation (GBC) runs national TV and radio networks.

Nearly one third of Ghanaians have access to the internet, and mobile telephones are becoming a significant source of news.

(http://news.bbc.co.uk/2/hi/africa/country_profiles/1023355.stm#media)

In 2001, the country's criminal libel and sedition laws were repealed. This was an important development in the promotion of freedom of speech. The Amendment Bill repealed that part of the Ghana Criminal Code 1960 (Act 29) which deals with criminal libel and also abrogated the sections that gave the President the power to ban organisations at his discretion and that deal with the offence of sedition, defamation of the President and the criminalization of communication of false news.

The removal of these laws from the statute books and the passing of the Whistleblowers Act are unusually progressive in Ghana.

Legislation prohibiting incitement to national, racial and religious hatred

Constitution (1992)

Article 17: (1) All persons shall be equal before the law

(2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.

Article 21(c): All persons shall have the right to freedom to practise any religion and to manifest such practice;

Article 33(5): The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

The Avoidance of Discrimination Act, 1957

GHANA - Constitution

Article: 17(1) All persons shall be equal before the law (2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.

(3) For the purposes of this article, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description which are not granted of persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

Article: 21

(1) All persons shall have the right to-

(a) freedom of speech and expression, which shall include freedom of the press and other media;

(b) freedom of thought, conscience and belief, which shall include academic freedom;

(c) freedom to practise any religion and to manifest such practice;

(d) freedom of assembly including freedom to take part in processions and demonstrations.

(e) freedom of association, which shall include freedom to form or join trade unions or other associations, national and international, for the protection of their interest;

(f) information, subject to such qualifications and laws as are necessary in a democratic society; 3 (e) that is reasonably required for the purpose of safeguarding the people of Ghana

against the teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols and emblems, or incites hatred against other members of the community; except so far as that provision or as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in terms of the spirit of this Constitution.

20) GUINEA BISSAU

Relevant policies in relation to incitement to hatred and/or freedom of speech

See Amnesty International:

Guinea Bissau Submission to the UN Universal Periodic Review Eighth session of the UPR Working Group of the Human Rights Council, May 2010.

http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/GW/AI_UPR_GNB_S08_2010_AmnestyInternational.pdf

Legislation prohibiting incitement to national, racial and religious hatred

Constitution of 1996:

Article 4(4): It shall be prohibited to create [political] parties that are regional or local in nature, which encourage racism or tribalism, or which support violent means in pursuing their goals.

Article 55 (3) – Armed associations are not allowed, nor organisations that promote racism or tribalism.

Article 56 (3) The State guarantees a press, radio and television, regardless of economic and political interests, to ensure the freedom of expression and confrontation of different points of view.

Criminal code (1993)

Article 102 – Racial Discrimination:

Anyone Who:

a) founds an organization or engages in organized propaganda that incites discrimination, hatred or racial violence, or that encourages it, or

b) participates in the organization or the activities mentioned in the paragraph above, or provides them with assistance including financing; is punishable with imprisonment from one to eight years Who in public meeting, in writing, announcement or by any means of social communication, with the intent to incite or encourage racial discrimination cause acts of violence against a person or group of persons because of their race or ethnic origin is punishable by imprisonment of one to five years

Legislation prohibiting incitement to national, racial and religious hatred

LOIS :

La loi L/91/005/CTRN du 23 décembre 1991 portant sur la Liberté de la presse

Article 9 : Les organes de presse doivent notamment en cette période:

1 – S'interdire la diffusion de chansons, jeux, spots, communiqués, proverbes, récits satiriques et caricatures qui sont de nature à inciter à la haine ou à mettre en péril la cohésion nationale.

21) GUINEA CONAKRY

POLITIQUE Relevant policies in relation to incitement to hatred and/or freedom of speech

The freedom of press or expression is confronted with serious problems: i.e. arbitrary arrests or provisional suspensions of agents or press organs, incorrect diffusion of information to the population, misinformation practices of the population. Some Human Rights workers have been arbitrarily arrested for having denounced illegal practices by the Government.

The Republic of Guinea does not possess jurisprudence that could serve as a source of inspiration for national or international courts. Judgements are often based on the French jurisprudence.

Legislation prohibiting incitement to national, racial and religious hatred

Loi Fondamentale (Constitution)

Title I – Article I: La guinée est une République unitaire, indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race, d'ethnie, de sexe, de religion et d'opinion. Elle respecte toutes les croyances ...

The Guinean law (Penal Code, Art 136 & 139) forbids any act qualified as racism, religionism, or even all propaganda with racial, tribal or subversive character.

Punishment: 1 to 10 years imprisonment, including prosecutions for material or moral loss.

Legislation protecting freedom of speech

Loi Fondamentale (Constitution)

Title II - Article 7: Every one is free to believe, think and profess his religious faith, political belief or philosophy. Every one is free to express, to manifest and disseminate his ideas and opinions through speech, writing and image. Every one is free to learn and learn to accessible sources.

Art 7, al.3: Freedom of press is guaranteed and protected. The creation of a press organ or the media for public, economic, social, cultural, sportive, recreative or scientific information is free. Freedom of expression is guaranteed by the law to all citizens.

Other information or observations in relation to public discussion of both.

In Guinea, the law often falls into disuse due to its incorrect application. For what concerns the freedom of religion, there are no concrete elements that could impede the freedom of worship.

However, in practice, and especially in the southern part of the country, different religions are not readily tolerated and accepted. Measures to counter this behaviour are however not adequately taken by the authorities.

22) KENYA

Constitution

Article 70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the

rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and.....

79. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers or upon persons in the service of a local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

23) LESOTHO

Constitution

4. Fundamental human rights and freedoms

(1) Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following -

(a) the right to life;

(b) the right to personal liberty;

(c) freedom of movement and residence;

(d) freedom from inhuman treatment;

(e) freedom from slavery and forced labour;

(f) freedom from arbitrary search or entry;

(g) the right to respect for private and family life;

(h) the right to a fair trial of criminal charges against him and to a fair determination of his civil rights and obligations;

(i) freedom of conscience; freedom of expression;

14. Freedom of expression

(1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, public morality or public health; or
(b) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) for the purpose of imposing restrictions upon public officers.

(3) A person shall not be permitted to rely in any judicial proceedings upon such a provision of law as is referred to in subsection (2) except to the extent to which he satisfies the court that provision or, as the case may be, the thing done under the authority there of does not abridge the freedom guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified in subsection (2)(a) or for any of the purposes specified in subsection (2)(b) or (c).

(4) Any person who feels aggrieved by statements or ideas disseminated to the public in general by a medium of communication has the right to reply or to require a correction to be made using the same medium, under such conditions as the law may establish.

18. Freedom from discrimination

(1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

24) LIBERIA

Legislation prohibiting incitement to national, racial and religious hatred

Constitution

Article 11:

a) All persons are born equally free and independent and have certain natural, inherent and inalienable rights, among which are the right of enjoying and defending life and liberty, of pursuing and maintaining the security of the person and of acquiring, possessing and protecting property, subject to such qualifications as provided for in this Constitution.

b) All persons, irrespective of Art. 27b: In order to preserve, foster and maintain the positive Liberian culture, values and character, only persons who are Negroes or of Negroe descent shall qualify by birth or naturalization to be citizens of Liberia. ethnic background, race, sex, creed, place of origin or political opinion, are entitled to the fundamental rights and freedoms of the individual, subject to such qualifications as provided for in this Constitution.

c) All persons are equal before the law and are therefore entitled to the equal protection of the law.

Legislation protecting freedom of speech

Constitution

Article 14: All persons shall be entitled to freedom of thought, conscience and religion and no person shall be hindered in the enjoyment thereof except as may be required by law to protect public safety, order, health or morals or the fundamental rights and freedoms of others. All persons who, in their practice of their religion, conduct themselves peaceably, not obstructing others and conforming to the standards set out herein, shall be entitled to the protection of the law. No religious denomination or sect shall have any exclusive privilege or preference over any other, but all shall be treated alike; any no religious test shall be required for any civil or military office or for the exercise of any civil right.

Consistent with the principle of separation of religion and state, the Republic shall establish no state religion.

Art. 15(a): Every person shall have the right to freedom of expression, being fully responsible for the abuse thereof. This right shall not be curtailed, restricted, or enjoined by government save during an emergency declared in accordance with this Constitution.

(b) the right encompasses the right to hold opinions without interference and the right to knowledge. It includes freedom of speech and of the press, academic freedom, to receive and impart knowledge and information and the right of libraries to make such knowledge available. It includes noninterference with the use of the mail, telephone and telegraph. It likewise includes the right to remain silent. (c) In pursuant of this right, there shall be no limitation on the public right to be informed without the government and its functionaries. (d) Access to state-owned media shall not be denied because of any disagreement with or dislike of the ideas expressed. Denial of such access may be challenged in a court of competent jurisdiction. (e) This freedom may be limited only by judicial action in proceedings grounded in defamation or evasion of the right of privacy and publicity or in the commercial aspect of expression in deception, false advertising and copy right infringement.

LIBERIA : Constitution

L'article 15 de la Constitution stipule que « Tout individu a droit à la liberté d'expression, étant pleinement responsable des abus y relatifs. Ce droit ne doit pas être entravé, restreint ou interdit par le gouvernement, sauf en cas d'urgence déclarée, conformément à cette Constitution. ... ».

Article 15

a) Every person shall have the right to freedom of expression, being fully responsible for the abuse thereof. This right shall not be curtailed, restricted or enjoined by government save during an emergency declared in accordance with this Constitution.

b) The right encompasses the right to hold opinions without interference and the right to knowledge. It includes freedom of speech and of the press, academic freedom to receive and impart knowledge and information and the right of libraries to make such knowledge available. It includes non-interference with the use of the mail, telephone and telegraph. It likewise includes the right to remain silent.

c) In pursuance of this right, there shall be no limitation on the public right to be informed about the government and its functionaries.

d) Access to state owned media shall not be denied because of any disagreement with or dislike of the ideas express. Denial of such access may be challenged in a court of competent jurisdiction.

e) This freedom may be limited only by judicial action in proceedings grounded in defamation or invasion of the rights of privacy and publicity or in the commercial aspect of expression in deception, false advertising and copyright infringement.

25) LIBYAN ARAB JAMAHIRIA

The Great Green Document on Human Rights

- Principle 16 of the Great Green Document on Human Rights stipulates that: “The society of the Jamahiriya [...] holds humanitarian standards and values sacred and aspires to a humane society without aggression, without wars, without exploitation and without terrorism, a society in which no one is considered to be great or small. All nations, peoples and ethnic groups have the right to live in freedom in the manner that they choose and have a right to exercise self determination and establish their national identity.

Minorities have a right to protection and to the protection of their heritage.

Their legitimate aspirations must not be suppressed nor must force be used to merge them in one nationality or another.”

- Principle 17 of the same Document stipulates that: “The members of the society of the Jamahiriya reject any discrimination between human beings on grounds of their colour, sex, religion or culture.”

Article 318 of the Penal Code concerning intercommunal strife stipulates that:

“Any person who publicly incites to hatred or contempt of any group or groups of persons in a manner conducive to a disturbance of public order shall be punished [...]”

- The following conclusions may be drawn from a comparison between article 20 of the Covenant and the provisions of national legislation.

- Propaganda for war is prohibited by law. The society aspired to in principle 16 of the Great Green Document is a humane society without wars, aggression, exploitation and terrorism. All peoples, nations and nationalities have a right to self determination in full freedom and minorities have a right to protection of their heritage and means of existence. This ideal humane world is fundamentally incompatible with any form of propaganda for war or any advocacy of national, racial or religious hatred that constitutes incitement to discrimination.

- Discrimination among people on the basis of colour, sex, religion or culture is prohibited. This principle, which is set forth in the Great Green Document, is in keeping with the aspiration to a world community based on human fellowship, a community in which great and small, rich and poor are treated equally and without discrimination or distinction on any grounds whatsoever.

- **Article 318 of the Penal Code** prescribes penalties for stirring up intercommunal strife through public incitement to hatred or contempt of any group of persons in a manner that poses a threat to communal stability and security. Article 29 of the Publications Act prohibits the publication or circulation of material conducive to sectarian conflict, the taking of revenge or the promotion of un-Islamic practices.

26) MADAGASCAR

Constitution

Article 8 - Tous les individus sont égaux en droit et jouissent des mêmes libertés fondamentales protégées par la loi sans discrimination fondée sur le sexe, le degré d’instruction, la fortune, l’origine, la race, la croyance religieuse ou l’opinion.

Article 10 - Les libertés d’opinion et d’expression, de communication, de presse, d’association, de réunion, de circulation, de conscience et de religion sont garanties à tous et

ne peuvent être limitées que par le respect des libertés et droits d'autrui et par l'impératif de sauvegarder l'ordre public.

Article 11 - Tout individu a droit à l'information. L'information sous toutes ses formes n'est soumise à aucune contrainte préalable.

La loi et la déontologie professionnelle déterminent les conditions de sa liberté et de sa responsabilité.

27) MALAWI

Constitution

Freedom of conscience 33. Every person has the right to: freedom of conscience, religion, belief and thought, and to academic freedom.

Freedom of opinion 34. Every person shall have the right to freedom of opinion, including the right to hold opinions without interference to hold, receive and impart opinions.

Freedom of expression 35. Every person shall have the right to freedom of expression

Freedom of the press 36. The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.

Code de la presse

L'article 34 garantit à tout individu le droit à la liberté d'opinion, notamment le droit d'avoir des opinions sans ingérence, d'en recevoir et d'en communiquer. Dans la mesure où cette expression peut revêtir plusieurs formes, la Constitution garantit en outre la liberté d'expression, en accordant à tout individu, la liberté de réunion et de manifestation ainsi que celle d'utiliser la langue et de participer à la vie culturelle de son choix.

28) Mali

L'application des lois concernant le respect de la liberté d'expression est effective.

Beaucoup de radios libre et de presses s'expriment librement.

Espace d'interpellation démocratique (EID) est organisée chaque année, ce forum permet aux citoyens d'interpeller le gouvernement sur les questions de droits humains

Le Droit Malien s'inspire beaucoup du droit français de ce fait, les jugements sont souvent basés sur la jurisprudence française.

Le Mali est cité comme l'un des états africains qui malgré sa situation de pauvreté, a réalisé le plus d'avancées démocratiques et de respect des droits humains. L'application des lois Concernant la liberté religieuse exerce librement. Dans le domaine des droits humains, des efforts significatifs ont été consentis. Au nombre de ces progrès, on peut retenir entre autres :

- La relecture en cours du Code des personnes et de la famille par l'Assemblée Nationale et les concertations engagées avec la société civile y compris les organisations religieuses;
- L'adoption d'une loi portant création de la Commission Nationale des Droits Humains ;
- L'adoption du document de politique nationale de droits humains et du plan d'action par Gouvernement ;
- L'adoption par le gouvernement de l'étude sur l'état d'harmonisation de la législation nationale avec les instruments juridiques internationaux et régionaux des Droits Humains ratifiés par le Mali Cependant il existe une absence de renseignements sur les plaintes, les

poursuites et les jugements intervenus pour des faits de discrimination raciale malgré l'existence de l'institution du Médiateur de la République.

Legislation prohibiting incitement to national, racial and religious hatred

Constitution of 1992

Article 2: All Malians are born and remain free and equal in rights and duties. Discrimination based on social origin, color, language, race, sex, religion and political opinion is prohibited.

Legislation protecting freedom of speech

Constitution of 1992

Article 7: Freedom of press is recognized and guaranteed.

This is expressed according to the conditions defined by law.

Equal access for all to the media of the State is assured by an independent organization; that organization shall define the laws which assure such access.

MALI : Constitution

ARTICLE 2/ - Tous les maliens naissent et demeurent libres et égaux en droits et en devoirs.

Toute discrimination fondée sur l'origine sociale, la couleur, la langue, la race, le sexe, la religion et l'opinion politique est prohibée.

ARTICLE 4/ - Toute personne a droit à la liberté de pensée, de conscience, de religion, de culte, d'opinion, d'expression et de création dans le respect de la loi.

ARTICLE 7/ - La liberté de presse est reconnue et garantie. Elle s'exerce dans les conditions fixées par la loi. L'égal accès pour tous aux médias d'Etat est assuré par un organe indépendant dont le statut est fixé par une loi organique.

Loi No 00-046/AN- RM du 7 juillet 2000 portant régime de la presse et délit de presse

Chapitre 6 : Des crimes et délits pouvant être commis par voie de presse ou par tout autre moyen de publication

Section 1 : Incitation aux crimes et délits

Article 42 : L'injure commise par les mêmes moyens envers les corps ou les personnes désignés aux articles 39 et 40 de la présente loi sera punie d'une peine d'emprisonnement de onze jours à trois mois et d'une amende de 50.000 à 150.000 francs ou de l'une de ces deux peines seulement.

L'injure commise de la même manière envers les particuliers lorsqu' elle n'aura pas été précédée de provocation, sera punie d'un emprisonnement de onze jours à un mois et d'une amende de 50.000 à 150.000 francs ou de l'une de ces deux peines seulement. Le maximum de la peine d'amende sera de six mois, celui de l'amende de 500.000 francs si l'injure est commise envers un groupe de personnes qui appartiennent par leur origine, à une race, une région ou une religion déterminée dans le but d'inciter à la haine.

Si l'injure n'est pas publique, elle ne sera punie que de peines de simple police.

29) MAURITANIA

Constitution

ART.4 : La loi est l'expression suprême de la volonté du peuple. Tous sont tenus de s'y soumettre.

ART. 5 : l'Islam est la religion du peuple et de l'Etat.

ART.10 : l'Etat garantit à tous les citoyens les libertés publiques et individuelles, notamment :

- la liberté de circuler et de s'établir dans les parties du territoire de la république ;
- la liberté d'entrée et de sortie du territoire national ;
- la liberté d'opinion et de pensée ;
- la liberté d'expression ;
- la liberté de réunion ;
- la liberté d'association et la liberté d'adhérer à toute organisation politique ou syndicale de leur choix.
- la liberté du commerce et de l'industrie ;
- la liberté de création intellectuelle, artistique et scientifique ;
- la liberté ne peut être limitée que par la loi.

Jurisprudence :

- Le 19 aout 2009, M. Hanevy Ould Dehah a été condamné a six mois de prison ferme pour “publications contraires a l’Islam et aux bonnes mœurs” par la cour correctionnelle du Tribunal de Nouakchott, une peine confirmée en appel le 24 novembre. M. Hanevy devait être libéré le 24 décembre 2009 mais le parquet, qui avait requis une peine de cinq ans de prison et cinq millions d’ouguiyas d’amende (12 500 euros), a demandé a la Cour suprême de surseoir a sa libération en attendant que la chambre pénale de la Cour suprême se prononce sur son pourvoi. En réaction a cette situation,

- M. Hanevy, détenu a la prison de Dar Naim a Nouakchott, a mène une grève de la faim pendant deux semaines, mettant sa sante gravement en danger. Le 14 janvier 2010, la Cour suprême a cassé le jugement et a renvoyé l’affaire devant un juge d’instruction.

30) MAURITIUS

Constitution

Article 12 - De la liberté d'expression

(1) Sauf avec son propre consentement, il ne sera porté aucune entrave au droit de quiconque à la liberté d'expression, c'est à dire la liberté d'opinion, la liberté de recevoir ou de communiquer des informations ou des idées sans ingérence, et le droit au secret de la correspondance.

(2) Rien de ce qui est contenu dans une loi ou de ce qui est fait en application d'une loi ne sera tenu comme non conforme ou contraire au présent article, dans la mesure où cette loi prévoit des dispositions -

(a) dans l'intérêt de la défense, de la sécurité publique, de l'ordre public, de la moralité publique ou de la santé publique ;

(b) dans le but de protéger la réputation, les droits et libertés d'autrui ou la vie privée de personnes appelées à un procès, empêchant la divulgation d'informations confidentielles, pour garantir l'autorité et l'impartialité du pouvoir judiciaire ou l'organisation de l'administration technique ou le bon fonctionnement des postes, télégraphes ou téléphones, de la radiodiffusion, de la télévision, des spectacles ou divertissements publics ; ou

(c) pour l'imposition de restrictions à des fonctionnaires publics, sauf s'il est établi que cette disposition ou, selon le cas, son application, n'est pas raisonnablement justifiable dans une société démocratique.

31) Morocco

POLITIQUE: The applicability of the press code provisions is not well received in practice. They are deemed to be unfair when the press reports touch on the sacredness and the king's person. Some Moroccan NGO's have repeatedly called for the revision or the cancellation of number of provisions mainly those relating to sanctions that are considered to be extremely abusive and heavy. The right to freedom of expression is considered by NGO's and number of researchers and political activists to be very repressive and continues to be used to jail critics of the government.

The Law on associations states that an association cannot exist legally if its objectives or aims are deemed "contrary to good morals" or undermine "Islam" or the monarchy, or "the country's territorial integrity" or if it's is deemed to "call for discrimination". The restrictions on undermining Islam, the monarchy, and the country's territorial integrity, are the well understood red lines on free discourse in the country (article 41 of the press code). The law does not elaborate on the meaning of these broad phrases, or on the equally sweeping restrictions on associations whose objectives are "contrary to good morals" or "call for discrimination". These restrictions in Moroccan law far exceed the limits that the applicable international human rights treaties permit on freedom of expression, and provide the authorities with a basis in domestic law for dissolving organizations whose political agenda displeases them.

CASES

A judgment delivered on the 12 January 2007 by a trial court of Ouarzazate, in a context of a lawsuit brought against a journalist for incitement to discrimination. The article published concerned a detrimental to the African populations. The editor, who was questioned by the prosecutor, confirmed an error in the choice of the title of the article published.

The newspaper devoted 3 pages to a letter for apology. The newspaper containing the article was withdrawn from kiosks and bookstores.

Case of a human rights activist "Chakib Al Khayari" convicted on June 24, 2009 and sentenced to three years in prison.

Legislation prohibiting incitement to national, racial and religious hatred

Law 77-00 (press code)

Article 38: Shall be punished as accomplices of an action qualified as a crime or offence, people who, by speeches, shouting or threats uttered in public places or meetings, either in writings or sold printed articles, either distributed, sold or displayed in public places or meetings, by placards or posters displayed in public view, or to the various media audiovisual and electronic media, would have directly provoked the author(s) to commit such action if that provocation has been followed.

This provision shall equally apply where the provocation has led to an attempted crime.

Article 39bis: Whoever by any means set out in Article 38, incites racial discrimination, hatred or violence against a person or persons because of their race, origin, color or ethnicity or religion, or supported the war crimes and crimes against humanity will be punished with

imprisonment from one month to one year and fined 3,000 to 30,000 dirhams or one of these two penalties.

Law 75-00 completed by law 36- 04 relating to the right of Association. Article 3

Article 17

Law 36-04 (2006) relating to political parties

Article 4: Is null and void any grant of a political party founded on a cause or for a purpose contrary to the Constitution and laws or that aims to undermine the Islamic religion, the monarchy or integrity Kingdom's territorial. Is also null and void any grant of a political party based on religious, linguistic, ethnic or regional, or general, on any discriminatory basis, or contrary to human rights.

Penal code Article 721

The labour code Article 9 Article 36 Article 478

Legislation protecting freedom of speech

Law 77-00 (press code)

Article 38: Shall be punished as accomplices of an action qualified as a crime or offence, people who, by speeches, shouting or threats uttered in public places or meetings, either in writings or sold printed articles, either distributed, sold or displayed in public places or meetings, by placards or posters displayed in public view, or to the various media audiovisual and electronic media, would have directly provoked the author(s) to commit such action if that provocation has been followed.

This provision shall equally apply where the provocation has led to an attempted crime.

Article 39bis: Whoever by any means set out in Article 38, incites racial discrimination, hatred or violence against a person or persons because of their race, origin, color or ethnicity or religion, or supported the war crimes and crimes against humanity will be punished with imprisonment from one month to one year and fined 3,000 to 30,000 dirhams or one of these two penalties.

Law 75-00 completed by law 36-04 relating to the right of Association. Art 3Art 17

32) MOZAMBIQUE

Constitution

Article 66 “All citizens are equal before the law. They shall enjoy the same rights, and shall be subject to the same duties regardless of color, race, sex, ethnic origin, place of birth, religion, educational level, social position, the legal status of their parents, or their profession”.

Article 74

1. All citizens shall have the right to freedom of expression and to freedom of the press as well as the right to information.
2. Freedom of expression, which includes the right to disseminate one's opinion by all legal means, and the right to information, shall not be limited by censorship.
3. Freedom of the press shall include in particular the freedom of journalistic expression and creativity, access to sources of information, protection of professional independence and confidentiality, and the right to publish newspapers and other publications.
4. The exercise of the rights and freedoms referred to in this article shall be regulated by law based on the necessary respect for the Constitution, for the dignity of the human person, and for the mandates of foreign policy and national defense.

33) NAMIBIA

Constitution

Article 10- Equality and Freedom from Discrimination

(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 21 - Fundamental Freedoms

(1) All persons shall have the right to:

(a) freedom of speech and expression, which shall include freedom of the press and other media;

34) Niger

ETUDE SUR L'ETAT DE LA LIBERTE D'EXPRESSION AU NIGER. Rapport d'Article 19, Octobre 2007. <http://www.article19.org/pdfs/publications/niger-state-offoefrench.Pdf>

ETUDE SUR L'ETAT DE LA LIBERTE D'EXPRESSION AU NIGER. Rapport d'Article 19, Octobre 2007. <http://www.article19.org/pdfs/publications/niger-state-of-foefrench.Pdf>

Legislation prohibiting incitement to national, racial and religious hatred

Constitution of 1999

Article 8: The Republic of Niger shall be a state founded on law.

Equality shall be assured to everyone under the law without distinctions as to sex or social, ethnic or religious background. All beliefs shall be respected and protected. No religion or belief shall claim political power or interfere in affairs of the state.

The dispensation of any divisive propaganda of a regional, racist or ethnic character, and any display of racial, ethnic, political or religious discrimination shall be punishable by law. While within the territory of the Republic, foreigners shall benefit from the same rights and liberties as citizens of Niger, according to conditions determined by law.

Penal Code of 1961

Art. 102: Any act of racial or ethnic discrimination, and any regionalist propaganda, any event contrary to the freedom of conscience and freedom of worship, likely to pit against each other, will be punished with one to five years of imprisonment and banishment.

When racial discrimination or ethnic or a regionalist propaganda event contrary to the freedom of conscience or religion has had the purpose or effect of the crimes or offenses detrimental to the security of the state or the territorial integrity of the Republic, its author or instigator will continue as co-author or accomplice as appropriate.

Legislation protecting freedom of speech

Constitution of 1999

Article 23: Each person shall have the right to freedom of thought, opinion, expression, conscience, religion, and worship. The state shall guarantee the free exercise of worship and expression of beliefs. These rights shall be applicable in regard to public order, social tranquillity, and national unity.

Constitution

Article 8 : La République du Niger est un État de droit. Elle assure à tous l'égalité devant la loi sans distinction de sexe, d'origine sociale, ethnique ou religieuse.

Elle respecte et protège toutes les croyances. Aucune religion, aucune croyance ne peut s'arroger le pouvoir politique ni s'immiscer dans les affaires de l'État.

Toute propagande particulariste de caractère régionaliste, racial ou ethnique, toute manifestation de discrimination raciale, ethnique, politique ou religieuse, sont punies par la loi.

Article 23 : Toute personne a droit à la liberté de pensée, d'opinion d'expression, de conscience, de religion et de culte.

L'État garantit le libre exercice du culte et l'expression des croyances. Ces droits s'exercent dans le respect de l'ordre public, de la paix sociale et de l'unité nationale.

Ordonnance 99-67 du 20 décembre 1999 portant régime de la liberté de la presse

Code pénal:

Art. 102 : Tout acte de discrimination raciale ou ethnique, de même que toute propagande régionaliste, toute manifestation contraire à la liberté de conscience et à la liberté de culte, susceptible de dresser les uns contre les autres, les citoyens, sera punie de un à cinq ans d'emprisonnement et de l'interdiction de séjour.

Lorsque l'acte de discrimination raciale ou ethnique, la propagande régionaliste ou la manifestation contraire à la liberté de conscience ou de culte aura eu pour but ou pour effet l'un des crimes ou délits attentatoires à la sécurité de l'Etat ou à l'intégrité du territoire de la République, son auteur ou son instigateur sera poursuivi comme coauteur ou comme complice suivant le cas.

35) NIGERIA

NIGERIA CERD/C/NGA/CO/18 1er nov 2005

Le Comité note avec une vive préoccupation que malgré les tentatives pour promouvoir l'unité nationale, les préjugés et les rancoeurs persistent entre certains groupes ethniques, ainsi qu'une discrimination active exercée par les personnes qui se considèrent comme étant les habitants originels d'une région à l'égard des personnes venues d'autres États du pays. Le Comité est particulièrement préoccupé par la persistance de violences interethniques, intercommunautaires et interreligieuses nourries par ces rancoeurs ainsi que par des conflits autour d'intérêts commerciaux et au sujet du contrôle des ressources qui ont déjà fait des milliers de victimes et causé le déplacement d'une bonne partie de la population (art. 2).

Le Comité encourage l'État partie à continuer de surveiller toutes les initiatives et tendances susceptibles de susciter un comportement raciste et xénophobe et à combattre les conséquences néfastes de telles tendances. Le Comité recommande à l'État partie de surveiller de près les effets néfastes des efforts qu'il fait pour promouvoir l'unité nationale à travers des mesures prises au niveau régional et à celui des États et, en particulier, les effets sur les relations au sein et entre les groupes ethnoreligieux.

Il recommande à l'État partie de s'efforcer, en encourageant un dialogue authentique, d'améliorer les relations entre les différentes communautés ethniques et religieuses, de façon à promouvoir la tolérance et à combattre les préjugés et les stéréotypes négatifs. Il invite

l'État partie à effectuer des études en vue d'évaluer d'une manière concrète les cas de discrimination raciale.

POLITIQUE: Incitement to violence through religious and tribal sentiments has been a problem in Nigeria and basis for many conflicts in the country. Politicians in particular have continued to use religious and tribal divides to ensure access or continued control of political positions and power. The position of the Federal government is generally to maintain neutrality on religion in order to avoid taking a position that would further aggravate the polity.

Unfortunately despite the many incidence of religious violence in the country, arrest and prosecution of perpetrators/sponsors have been almost impossible due mainly to a lack of political will. This lack of accountability has greatly contributed to a continued cycle of violence.

Many Northern states have adopted Sharia Law as a state religion which in some instances have resulted in the restrictions of rights of other citizens who are not subject to sharia Law.

However since the adoption by these states there has been a restraint on the part of the Federal Government to take any definitive position on the legality or otherwise, possibly in order to avoid religious violence.

Legislation prohibiting incitement to national, racial and religious hatred 1999 Constitution
Section 38 (1): every person has the right to freedom of thought, conscience and religion including the freedom to change religion or beliefs; and freedom to manifest and propagate his religion or belief in worship, teaching, practice and observance. There are no restrictions or exceptions stated therein.

Legislation protecting freedom of speech

1999 Constitution

Section 39 (1): "every person" shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

NIGERIA - Constitution

22. The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people.

38. (1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

39. (1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

(3) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society -

36) RWANDA

La Constitution de la République du Rwanda garantit en son

Art ; 34 la liberté de presse et la liberté d'information. Ce rappel n'est pas superflu parce que certaines lois fondamentales englobent simplement la liberté de presse dans les libertés publiques. Le fait de l'inscrire dans la Constitution donne à la presse un statut particulier du reste conformément à l'article 19 de la Déclaration universelle des droits de l'homme.

Lois - Enoncée donc dans la Constitution, le législateur l'a codifiée dans la loi No. 18/2002 du 11 mai 2002 régissant la presse en respectant à la lettre l'esprit de la Constitution.

Le régime de la presse rwandaise comme dans toutes les démocraties est libre.

Les articles 10 et 11 de la loi no. 18/2002 sont très explicites sur cet aspect :

- article 10 « La presse est libre. »

- article 11 « La liberté de presse comprend les prérogatives de publier les opinions et celles de collecter, recevoir, diffuser des informations ou des opinions par les moyens de presse. La censure de la presse est interdite. La liberté de la presse n'est soumise qu'aux restrictions expressément prévues par la loi et conventions internationales de protection des droits de l'homme auxquelles l'Etat fait partie. »

L'article 12 reconnaît à toute personne physique ou morale jouissant d'une personnalité physique ou morale de créer une entreprise de presse dans le respect des conditions dictées par la loi.

Au nom de l'intérêt général et de la protection des citoyens, la loi fixe des limites à la liberté de la presse. Mais il se trouve que certaines dispositions visent parfois à restreindre qu'à garantir la liberté de la presse.

Dans la loi rwandaise, on peut indexer dans ce sens le régime des infractions qui est particulièrement sévère.

L'application du code pénal permet à la justice d'envoyer en prison des journalistes pour des délits dont l'interprétation peut être abusive.

Ainsi l'article 84 stipule : « ... La publication de fausses nouvelles, diffamations et injures, ainsi que les publications portant atteinte à l'ordre public ou aux bonnes mœurs sont passibles du maximum de peines prévues par le code pénal. »

37) SENEGAL

POLITIQUE : The State of Senegal has adopted, as part of the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination of 1969, a number of legislative provisions to the effect of strengthening the legal framework to fight against all forms of discrimination based on race.

Legislation has also been significantly enhanced to better protect vulnerable groups against all forms of discrimination.

Example: Law 99-05 of 29 January 1999 to protect the vulnerable against abuse, Law 2005-02 of 29 April 2005 on the fight against trafficking in persons and related practices. Concrete initiatives have been taken with the establishment of institutional mechanisms, including the High Commissioner for Human Rights promotion and Peace, the Senegalese Committee for Human Rights, and the Ombudsman of the Republic. Senegal also has good practices in the fight against racial discrimination, xenophobia and intolerance.

Concerning the freedom of the press; on 12 July 2010, the newspaper published an article on the new press law, intended to provide more protection for information professionals. It deploys an arsenal of repressive sanctions against any offenders and thus poses a constant threat.

For example, Article 277 of the draft code states "all professional communication ... that broadcasts false news, falsified or untruthfully attributed to others, shall be punished by a fine

of 10 million to 30 million CFA francs when the publication, dissemination, disclosure, or reproduction, not made in bad faith, has caused violation of the laws of the country or has undermined the morale of the population or discredited public institutions and their functioning.

Regarding freedom of expression, the report of the National Organization of Human Rights in Senegal (2009) reported increasing violations of the freedom of expression by the Senegalese authorities. The report added that these violations occur repeatedly through untimely notification of the Division of Criminal Investigations (DIC), threats against journalists and opposition politicians, seizures of newspapers, pressure on publishers to stop printing or publishing books or newspapers.

The report of the U.S. State Department on human rights (2009) reports the following "The constitution and law provide for freedom of speech and of the press. However, the Government limits these rights in practice, and security forces and politicians intimidated or harassed journalists during the year...." The world ranking of freedom of the press in 2009 was published on 20 October by the Association of Journalists, "Reporters Without Borders". This report points out again the undermining of freedom of the press. Senegal lost three places from the 86th to the 89th place in the ranking, in comparison to last year.

CASES

No cases have yet been reported either in the press or the courts concerning racial discrimination.

However, as regards to freedom of expression, several journalists have been dragged to court for spreading false news, defamation, and publishing information prejudicial to national security in Senegal.

With regard to racial and ethnic discrimination, there have not yet been reported cases of complaints in the courts. In addition, no cases have been reported either by the national press (which has a reputation to be free) nor by the international press.

Legislation prohibiting incitement to national, racial and religious hatred

Constitution (2001)

Article 5: Any act of racial, ethnic or religious discrimination as well as any regionalist propaganda capable of interfering with the internal security of the state or the territorial integrity of the Republic, shall be punished by law.

Penal Code

Article 166bis: Any officer of the administrative and judicial order, any officer invested with elective office, or local public officer, agent or servant of the state, public institutions, national companies, corporations or mixed economic legal entities receiving financial assistance from the public, who has refused without just cause to an individual or corporation, the benefit of a right due to ethnic, shall be punished by imprisonment for three months to two years and a fine of 10 000 to 2 000 000 francs. law 81-77 of 10 December 1981 concerning the repression of acts of racial, ethnic or religious discrimination; laws 79-02, 79-03 and 81-17, that are all related to the legal framework of associations and political groups

Legislation protecting freedom of speech

Constitution (2001)

The Republic of Senegal guarantees to all citizens their individual fundamental freedoms, economic and social rights as well as group rights. These freedoms and rights are: Civil and

political liberties, freedom of opinion, freedom of expression, press freedom, freedom of association, freedom to hold meetings, freedom of movement, freedom to protest, cultural freedoms, religious freedoms, philosophical freedoms, union freedoms, freedom of enterprise, the right to education, the right to literacy, the right to property, the right to work, the right to health, the right to a healthy environment, and the right to a variety of information. These freedoms and rights shall be exercised under the conditions provided by law.

SENEGAL : Constitution :

Article 8 « Chacun a le droit d'exprimer et de diffuser librement ses opinions par la parole, la plume et l'image. Chacun a le droit de s'instruire sans entrave aux sources accessibles à tous. Ces droits trouvent leurs limites dans les prescriptions des lois et règlements ainsi que dans le respect de l'honneur d'autrui ».

Article 9 « Tous les citoyens ont le droit de constituer librement des associations et des sociétés, sous réserve de se conformer aux formalités édictées par les lois et règlements.

Ce droit ne peut être limité que par la loi.

Les groupements dont le but ou l'activité seraient contraires aux lois Pénales ou dirigés contre l'ordre public sont prohibés ».

Article 11 « Tous les citoyens de la République ont le droit de se déplacer et de fixer librement sur toute l'étendue de la République du Sénégal. Ce droit ne peut être limité que par la loi. Nul ne peut être soumis à des mesures de sûreté sauf dans les cas prévus par la loi ».

LOIS :

- la loi n° 96- 04 du 22 février 1996 relative aux organes de la communication sociale et aux professions de journaliste et de technicien.

- L'arrêté ministériel portant Cahier des charges des entreprises titulaires du droit de diffuser des émissions radiophoniques au Sénégal.

- Statuts de la Radio télévision sénégalaise (RTS) (loi n° 12-02 du 6 janvier 1992) et la Loi n° 92-57 du 3 septembre 1992 relative au pluralisme à la radio télévision.

- la loi n° 33/ 2005 du 21 décembre 2005 portant création du Conseil national de régulation de l'audiovisuel (CNRA) et se substituant à la loi n° 98-09 du 2 mars 1998 créant le Haut conseil de l'audiovisuel (organe de régulation des média audiovisuels).

- Le code pénal et de procédure pénale.

La loi 96-04 du 22 février 1996

La pratique du métier de journaliste est encadrée par une loi votée à l'assemblée nationale par les députés en 1996. Inspirée de la loi française de 1881 et des plus grands textes internationaux comme la déclaration de Munich de 1971, elle est en parfait accord avec le régime libéral de responsabilité adopté par le Sénégal.

38) SIERRA LEONE

POLITIQUE: Notwithstanding the constitutional provisions against discrimination, the 1973 Citizenship Act provides that only persons who are Negroes or of Negro African Descent shall qualify by birth or naturalisation as Sierra Leonean.

In Sierra Leone freedom of expression is respected. It is manifested through the television and various radio and newspaper networks.

Legislation prohibiting incitement to national, racial and religious hatred

1991 Constitution

Section 6:

(1) The motto of the Republic of Sierra Leone shall be Unity, Freedom and Justice.

(2) Accordingly, the State shall promote national integration and unity and discourage discrimination on the grounds of place of origin, circumstance of birth, sex, religion, status, ethnic or linguistic association or ties.

Section 13, e): every citizen shall respect the dignity and religion of other individuals, and the rights and interests of others.

Section 27: 27. (1) Subject to the provisions of subsection (4), (5), and (7), no law shall make provision which is discriminatory either of itself or in its effect. (2) Subject to the provisions of subsections (6), (7), and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the function of any public office or any public authority.

(3) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject, or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision—

a. for the appropriation of revenues or other funds of Sierra Leone or for the imposition of taxation (including the levying of fees for the grant of licenses); or

b. with respect to persons who are not citizens of Sierra Leone; or

c. with respect to persons who acquire citizenship of Sierra Leone by registration or by naturalization or by resolution of Parliament; or

d. with respect to adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law; or

e. for the application in the case of members of a particular race or tribe or customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or

f. for authorising the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency; or

g. whereby persons of any such description as mentioned in subsection (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society; or

h. for the limitation of citizenship or relating to national registration or to the collection of demographic statistics.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to qualifications for service as a public officer or as a member of a defence force or for the service of a local government authority or a body corporate established directly by any law or of membership of Parliament.

(6) Subsection (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provisions of law as is referred to in subsection (4) or (5).

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) may be subjected to any restriction of the rights and freedoms guaranteed by sections

18, 22, 24, 25 and 26 being such a restriction as is authorised by subsection (3) of section 18, subsection (2) of section 22, subsection (5) of section 24, subsection (2) of section 25 or subsection (2) of section 26, as the case may be.

(8) The exercise of any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person under or by this Constitution or any other law shall not be enquired into by any Court on the grounds that it contravenes the provision of subsection (2).

Legislation protecting freedom of speech

1991 Constitution

Section 25(1): "except with one's consent, no person shall be hindered in the enjoyment of his freedom of expression and for the purpose of this section, the said freedom includes, the freedom to hold opinions and to receive and impart ideas and information without interference, freedom from interference with correspondence, freedom to own, establish, operate any medium for the dissemination of information, ideas and opinions and academic freedom in institutions of learning.

Furthermore, Section 11 states that "the press, radio and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this constitution and highlight the responsibility and accountability of government to the people".

Constitution

Les sections 2 et 25 du Chapitre 3 de la Constitution de 1991 de la Sierra Leone prévoient respectivement la liberté d'expression.

11 - The press, radio and television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Constitution and highlight the responsibility and accountability of the Government to the people.

24 Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience and for the purpose of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom either alone or in community with others and both in public and in private to manifest and propagate his religion or belief in worship, teaching, practice and observance.

25 Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purpose of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, freedom from interference with his correspondence, freedom to own, establish and operate any medium for the dissemination of information, ideas and opinions, and academic freedom in institutions of learning:

Provided that no person other than the Government or any person or body authorized by the President shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in the contravention of this section to the extent that the law in question makes provision—

a. which is reasonably required- in the interests of defence, public safety, public order, public morality or public health; or ii. for the purpose of protecting the reputations, rights and freedoms of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the telephony, telegraphy, telecommunications, posts, wireless broadcasting, television, public exhibitions or public entertainment; or

b. which imposes restrictions on public officers or members of a defence force; and except in so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society.

20 Protection of freedom of expression

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection

(1) to the extent that the law in question makes provision—

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of—

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(b) for regulating such schools in the interests of persons receiving instruction therein; except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(5) No person shall be prevented from sending to any school a child of whom that person is parent or guardian by reason only that the school is not a school established or maintained by the State.

(6) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, Thorough fare or similar place which exists for the free passage of persons or vehicles.

LAWS:

Initial reports of States parties due in 1992 - 29/09/1997 - Article 20

The Law and Order Maintenance Act [Chapter 11:07] has a provision prohibiting any propaganda for war. It also regulates political demonstrations, the procedure for carrying out same and permission granting authority.

Section 44 (1) (e) of the Law and Order Maintenance Act prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

39) **SOUTH AFRICA**

Constitution

15. Freedom of religion, belief and opinion

1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
2. Religious observances may be conducted at state or state-aided institutions, provided that
 - a. those observances follow rules made by the appropriate public authorities;
 - b. they are conducted on an equitable basis; and
 - c. attendance at them is free and voluntary.

16. Freedom of expression

1. Everyone has the right to freedom of expression, which includes
 - a. freedom of the press and other media;
 - b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.

2. The right in subsection (1) does not extend to
- a. propaganda for war;
 - b. incitement of imminent violence; or
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Lois AFRIQUE DU SUD

La loi 4 de 2000 pour la promotion de l'égalité et la prévention de discriminations injustes contient la clause suivante : « Personne ne peut publier, diffuser, soutenir ou communiquer de termes qui (...) pourraient démontrer une intention claire de blesser ou inciter à blesser (moralement ou physiquement), promouvoir ou inciter à la haine ».

40) SUDAN

Constitution

Religion au Sud-Soudan

8. (1) Au Sud-Soudan, la religion et l'Etat sont séparés.
- (2) Toutes les religions doivent être traitées également et aucune religion ne doit être déclarée religion officielle du Sud-Soudan, la religion ou les croyances religieuses ne sont pas être utilisés à des fins de division.

Les droits religieux

27. Les religieux droits suivants sont garantis par la Constitution:

- (A) le droit de culte ou de se réunir dans le cadre de n'importe quelle religion ou de conviction et d'établir et d'entretenir des lieux à ces fins;
- (B) le droit d'établir et d'entretenir des confessionnelles; ou humanitaire institutions de bienfaisance;
- (C) le droit d'acquérir, de posséder et propres mobiliers et immobiliers biens et confectionner, d'acquérir et d'utiliser les articles nécessaires et matériaux liés à des rites ou coutumes de la religion ou de conviction;
- (D) le droit d'écrire, de publier et diffuser des publications religieuses;
- (E) le droit d'enseigner la religion ou les convictions dans des endroits appropriés pour ces fins;
- (F) le droit de solliciter et recevoir des volontaires, financières et autres contributions de particuliers, les institutions publiques et privées;
- (G) le droit de former, de nommer, élire ou de désigner par succession appropriées responsables religieux appelés par les exigences et les normes de toute religion ou de conviction
- (H) le droit d'observer les jours de repos, célébrer les fêtes et cérémonies conformément aux préceptes de croyances religieuses; et

La liberté d'expression et les médias

28. (1) Tous les citoyens ont un droit illimité de la liberté d'expression, réception et la diffusion de l'information, la publication et l'accès à la presse sans préjudice de l'ordre, la sécurité ou la moralité publique tel que déterminé par la loi.

(2) Tous les paliers de gouvernement au Sud-Soudan doit garantir la liberté de la presse et autres médias comme doit être réglementé par la loi dans une société démocratique la société.

(3) Tous les médias sont tenus de respecter l'éthique professionnelle.

LOIS :

La loi de 2009 relative aux publications et à la presse règlemente la liberté d'expression.

La Loi de 2009 dispose : « aucune restriction ne saurait être imposée à la liberté de la presse à l'exception des dispositions prévues par la loi pour sauvegarder la sécurité nationale, l'ordre public ainsi que la santé publique ».

Le texte dispose également : « les journaux ne sauraient être saisis, [leurs] bureaux fermés et les journalistes et éditeurs arrêtés pour avoir exercé leur profession si ce n'est dans les cas prévus par la loi ».

41) TANZANIA

Constitution

L'article 18 de la Constitution précise la liberté de l'expression « Without prejudice to expression the law of the land, every person has the right to freedom opinion and expression, and to seek, receive and impart, or disseminate information and ideas through any media regardless national frontiers, and also has the right of freedom of interference with hi communications”.

L'article 19 de religion en Tanzanie. En ce qui concerne la religion, la Tanzanie est un Etat laïc. La profession, la pratique, le culte et la propagation de la religion sont libres et une affaire privée de l'individu, et la conduite et gestion des organismes religieux ne font pas partie des fonctions de l'Etat. Ceci est explicitement prévu par l'article 19 de la Constitution, suite au 14ème amendement de la Constitution.

Sections 43 and 63 of the Penal Code Cap. 16 R.E. 2002 expressly prohibits any propaganda for war, either directly or indirectly, and provides a penalty for the offence. It also penalizes activities that advocate hatred or incitement to violence or the disobedience of lawful authority.

43: Any person who, without lawful authority, carries on or makes preparation for carrying o, or aids in or devises the carrying on of, or preparation for, any war or warlike undertaking with, for by or against any person or body or group of persons in the United Republic, shall be guilty of a felony and shall be liable on conviction to imprisonment for life.

63 and 63 A (repealed, Act 1976 No.3. section 55) and 63 B: Any person who to any assembly makes any statement likely to raise discontent amongst any of the inhabitants of the United Republic or to promote feelings of ill-will between different classes or communities of persons of the United Republic, is guilty of a misdemeanor and is liable to a fine riot exceeding one thousand shillings or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.

The Penal Code in its section 55 (1) further criminalizes incitement to violence and advocacy of national or religious hatred which constitute incitement to discrimination, hostility or violence.

42) TCHAD

Constitution

Article 1

Le Tchad est une République souveraine, indépendante, laïque, sociale, une et indivisible, fondée sur les principes de la démocratie, la règle de la loi et de la justice. Il est affirmé la séparation des religions et de l'Etat.

Article 27

Les libertés d'opinion et d'expression, de communication, de conscience, de religion, de presse, d'association, de réunion, de circulation, de manifestations et de cortèges sont garanties à tous. Elles ne peuvent être limitées que par le respect des libertés et des droits d'autrui et par l'impératif de sauvegarder l'ordre public et les bonnes mœurs. La loi détermine les conditions de l'exercice.

Article 54

Nul ne peut se prévaloir de ses croyances religieuses, ni de ses opinions philosophiques pour se soustraire à une obligation dictée par l'intérêt national.

Loi n° 029 du 12 août 1994 relative au régime de la presse au Tchad l'article 47 et suivants – sur l'incitation à la haine raciale ou ethnique et l'apologie de la violence.

ARTICLE 47 : La diffamation commise envers les particuliers par l'un des moyens énoncés à l'article 39 ci-dessus, sera punie d'un emprisonnement de un (1) mois à six (6) mois et d'une amende de 10.000 à 50.000 F CFA, ou de l'une de ces deux peines. La diffamation commise par les mêmes moyens envers un groupe de personnes non désignées par l'article 45 (*) de la présente loi mais qui appartiennent à une ethnie, à une région ou à une religion déterminée sera punie d'un emprisonnement de un (1) an à trois (3) ans et d'une amende de 100.000 à 500.000 F CFA, lorsqu'elle aura pour but de susciter la haine ou d'inciter à la violence entre les personnes.

43) TOGO

POLITIQUE: There are no policies related to incitement of hatred. However recruitment into the army and civil service does not yet reflect the cultural and ethnic diversity of Togolese society. The ethnic imbalances persist or appear in public service and the group Kabye-Tem-Losso is dominant in the army. This situation of discrimination against other ethnic groups causes discontent and even hatred among the disadvantaged groups and those who are not taken into account. In practice, these freedoms are often not respected.

Demonstrations of the opposition parties are repressed by the police.

CASES: There is no case law. The absence of complaints and lawsuits from victims of racial discrimination may be due to the absence of relevant specific legislation, ignorance of available remedies, fear of social disapproval or lack of willingness of authorities to prosecute.

Legislation prohibiting incitement to national, racial and religious hatred

Constitution

Article 25: Everyone has the right to freedom of thought, conscience, religion, worship, opinion and expression. The exercise of these rights and freedoms is in compliance with the freedoms of others, public order and standards established by law and regulations. The organization and practice of religious beliefs are freely practiced in compliance with the law.

The same applies to philosophical orders. The exercise of religion and beliefs in expression are in compliance with the secularism of the state.

Religious denominations have the right to organize and operate freely in accordance with the law.

Article 26: Freedom of press is recognized and guaranteed by the state. Everyone has the freedom to express and disseminate by word, writing or other means, the opinions or information it holds, in the limits defined by law. The press may not be subject to prior authorization, censorship or other restrictions. The integration of dissemination of any publication may be imposed only under a court order.

Constitution

Art. 11 - Tous les êtres humains sont égaux en dignité et en droit. L'homme et la femme sont égaux devant la loi. Nul ne peut être favorisé ou désavantagé en raison de son origine familiale, ethnique ou régionale, de sa situation économique ou sociale, de ses convictions politiques, religieuses, philosophiques ou autres.

Art. 14 - L'exercice des droits et libertés garantis par la présente Constitution ne peut être soumis qu'à des restrictions expressément prévues par la loi et nécessaire à la protection de la sécurité nationale ou de l'ordre public, de la santé publique, de la morale ou des libertés et droits fondamentaux d'autrui.

Art. 25 - Toute personne a droit à la liberté de pensée, de conscience, de religion, de culte, d'opinion et d'expression. L'exercice de ces droits et libertés se fait dans le respect des libertés d'autrui, de l'ordre public et des normes établies par la loi et les règlements.

L'organisation et la pratique des croyances religieuses s'exercent librement dans le respect de la loi. Il en est de même des ordres philosophiques. Les confessions religieuses ont le droit de s'organiser et d'exercer librement leurs activités dans le respect de la loi.

Art. 48 - Tout citoyen a le devoir de veiller au respect des droits et libertés des autres citoyens et à la sauvegarde de la sécurité et de l'ordre publics. Il oeuvre à la promotion de la tolérance et du dialogue dans ses rapports avec autrui. Il a l'obligation de préserver l'intérêt national, l'ordre social, la paix et la cohésion nationale. Tout acte ou toute manifestation à caractère raciste, régionaliste, xénophobe sont punis par la loi.

LOIS :

Aux termes du Titre III du Code de la presse et de la communication, portant « Dispositions pénales », il existe trois catégories de peines prévues. Les sanctions pécuniaires, les décisions de suspension et les sanctions de privation de liberté.

Les articles 85, 86 et 87 prévoient des sanctions d'emprisonnement pour les délits d'incitation à la haine tribale, l'appel aux forces de l'ordre à se détourner de leurs devoirs envers la patrie et l'appel à la destruction volontaire de biens ou institutions visés à l'article

85. Les peines privatives de liberté prévues, varient entre 3 mois et 2 ans.

L'article 86 dispose que : «Sera puni de trois (03) mois à un an (01) d'emprisonnement et d'une amende de cent mille (100 000) à un million (1 000 000) de francs Cfa, quiconque, par l'un des moyens énoncés à l'article 85 du présent code, aura, soit appelé à la haine inter raciale ou inter ethnique, soit appelé la population à enfreindre les lois de la république. En cas de récidive, le double de la peine maximale peut-être appliqué».

44) TUNISIE

Constitution

Article 5 « La République Tunisienne garantit l'inviolabilité de la personne humaine et la liberté de conscience, et protège le libre exercice des cultes, sous réserve qu'il ne trouble pas l'ordre public ».

Article 8 « Les libertés d'opinion, d'expression, de presse, de publication, de réunion et d'association sont garanties et exercées dans les conditions définies par la loi ».

Le Code pénal

293. L'article 52 bis, ajouté au Code pénal par la loi n° 93-112 du 22 novembre 1993, qualifie D'actes terroristes, les actes d'incitation à la haine ou au fanatisme racial ou religieux quels que soient les moyens utilisés.

Le Code de la presse

294. L'article 44 du Code de la presse, amendé par la loi organique n° 93-85 du 2 août 1993, portant amendement du Code de la presse, pénalise celui qui aura directement, soit incité à la haine entre les races ou les religions ou les populations, soit à la propagation d'opinions fondées sur la ségrégation raciale ou sur l'extrémisme religieux, soit provoqué la commission de l'offense au Président de la République ou envers l'un des cultes dont l'exercice est autorisé, soit incité la population à enfreindre les lois du pays. L'article 53 du même Code dispose aussi que «la diffamation, commise envers un groupe de personnes qui appartiennent, par leur origine à une race ou à une religion déterminée, sera punie d'un emprisonnement d'un mois à un an et d'une amende de 120 à 1200 dinars, lorsqu'elle aura pour but d'exciter à la haine entre les citoyens ou les habitants». Dans le cas de diffamation et injure commises envers les particuliers, les poursuites n'auront lieu que sur la plainte de la personne diffamée ou injuriée. Toutefois, ces poursuites pourront être exercées d'office lorsque la diffamation ou l'injure sont commises envers un groupe de personnes appartenant notamment à une race ou à une religion déterminées dans le but d'inciter à la haine entre les citoyens ou les habitants.

45) UGANDA

Constitution: Protection of freedom of conscience, expression, movement, religion, assembly and association.

Article 29. (1) Every person shall have the right to

(a) freedom of speech and expression, which shall include freedom of the press and other media:

(b) freedom of thought, conscience and belief which shall include academic freedom in institutions of learning;

(c) freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution;

LOIS:

Section 26 prohibits the use of any language which is defamatory, or which constitutes incitement to public disorder, hatred or violence. Violators of this section also are liable to punishment of payment of 1.6 million or maximum of two years or both.

Section 76 B (1) of the Penal Code Act states that any person who incites any person to do an Act of violence against any person by reason of his race, place of his origin, political opinion, colour, creed, sex or office, commits an offence and shall be liable on conviction to imprisonment for a term not exceeding fourteen years.

There is also the Anti-Sectarian Law which seeks to curtail incitements and discriminations based on race, colour, tribe, ethnic group or any other category.

46) ZIMBABWE

Constitution

Art. 20 Protection of freedom of expression

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection

(1) to the extent that the law in question makes provision—

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of—

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter; or

(c) that imposes restrictions upon public officers; except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(3) No religious denomination and no person or group of persons shall be prevented from establishing and maintaining schools, whether or not that denomination, person or group is in receipt of any subsidy, grant or other form of financial assistance from the State.

(4) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection

(3) to the extent that the law in question makes provision—

(a) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or

(b) for regulating such schools in the interests of persons receiving instruction therein; except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(5) No person shall be prevented from sending to any school a child of whom that person is parent or guardian by reason only that the school is not a school established or maintained by the State.

(6) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.

LAWS: Initial reports of States parties due in 1992 - 29/09/1997 - Article 20

The Law and Order Maintenance Act [Chapter 11:07] has a provision prohibiting any propaganda for war. It also regulates political demonstrations, the procedure for carrying out same and permission granting authority.

Section 44 (1) (e) of the Law and Order Maintenance Act prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

ANNEX II:

A – International Criminal Tribunal for Rwanda

HATE SPEECH IN ICTR JURISPRUDENCE

I. NAHIMANA APPEALS JUDGEMENT

1. In Nahimana, the Appeals Chamber found that hate speech can constitute an underlying act of persecution.¹ The Appeals Chamber first recalled that underlying acts of persecution need not be considered crimes in international law.² It then stated:

The Appeals Chamber considers that hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the members of the targeted group as human beings, and therefore constitutes “actual discrimination”. In addition, the Appeals Chamber is of the view that speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security of the targeted group and therefore constitutes “actual discrimination”.³

2. The Appeals Chamber distinguished between two kinds of hate speech:
 - a. “Mere” hate speech directed against a population on ethnic or other discriminatory grounds (which does not necessarily advocate violence); and
 - b. Speech that calls for violence against a population on ethnic or other discriminatory grounds.⁴
3. In the view of the Appeals Chamber, “mere” hate speech may violate the right to human dignity, whereas hate speech that calls for violence may violate the right to security.⁵ The Appeals Chamber noted, however, that hate speech alone could not

1 Nahimana Appeals Judgement, 28 November 2007. paras. 985-988.

2 Nahimana AJ, para. 985.

3 Nahimana AJ, para. 986.

4 Nahimana AJ, paras. 986, 988.

5 Nahimana AJ, para.986.

constitute a violation of the rights to life, to liberty and to physical integrity because speech does not directly kill, imprison or cause physical harm.⁶

4. The distinction between these two forms of hate speech may also have implications for whether the speech reaches the necessary gravity threshold for persecution as a crime against humanity. This threshold requires that the cumulative effect of all underlying acts of persecution be of equal gravity to other crimes against humanity.
5. In this regard, the Appeals Chamber declined to decide upon whether “mere” hate speech (which does not call for violence) could be of sufficient gravity.⁷ However, it found that on the facts before it – where hate speeches were accompanied by calls for genocide in the context of a massive campaign of persecution involving acts of violence – the gravity threshold was met.⁸ The Appeals Chamber stated:

In the present case, the hate speeches made after 6 April 1994 were accompanied by calls for genocide against the Tutsi group and all these speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence (killings, torture and ill-treatment, rapes ...) and of destruction of property. In particular, the speeches broadcast by RTLM – all of them by subordinates of Appellant Nahimana –, considered as a whole and in their context, were, in the view of the Appeals Chamber, of a gravity equivalent to other crimes against humanity. The Appeals Chamber accordingly finds that the hate speeches and calls for violence against the Tutsi made after 6 April 1994 (thus after the beginning of a systematic and widespread attack against the Tutsi) themselves constituted underlying acts of persecution.⁹

6. The Appeals Chamber further stated:

the Appeals Chamber is of the view that hate speeches and direct calls for genocide broadcast by RTLM after 6 April 1994, while a massive campaign of violence against the Tutsi population was being conducted, also constituted acts of persecution.¹⁰

7. In his separate opinion, Judge Pocar stated:

In my opinion, the circumstances of the instance case are, however, a perfect example where a hate speech fulfils the conditions necessary for it to be considered as an underlying act of persecution. Indeed, the hate speeches broadcast on RTML by Appellant Nahimana’s subordinates were clearly aimed at discriminating against the Tutsi and led the population to discriminate against them, thus violating their basic rights. Taken together and in their context, these speeches amounted to a violation of equivalent gravity as other crimes against humanity. Consequently, the hate speeches

6 Nahimana AJ, para.986.

7 Nahimana AJ, para.987.

8 Nahimana AJ, para.988.

9 Nahimana AJ, para.988 (footnotes omitted).

10 Nahimana AJ, para.995 (footnotes omitted).

against the Tutsi that were broadcast after 6 April 1994 [...] were per se underlying acts of persecution.¹¹

II. BIKINDI TRIAL JUDGEMENT

8. In the Bikindi case, an ICTR Trial Chamber followed the Nahimana Appeals Judgement in considering the issue of hate speech as an underlying act of persecution in Bikindi.¹² The Trial Chamber noted that it was an open question whether “mere” hate speech, by itself, could rise to the level of gravity of other crimes against humanity. The Trial Chamber then stated:

However, given that a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds would have to be established in order to support a conviction for persecution under the Tribunal’s Statute, the Chamber considers that the same facts that would lead it to find the existence of such an attack could also support a finding of many other underlying acts of persecution, as both must be committed on discriminatory grounds.¹³

III. EXCERPTS FROM KEY ICTR CASES

I. Prosecutor v. Nahimana et al. (“Media” Trial), Case No. Prosecutor v. Nahimana et al. (“Media” Trial), Case No. Prosecutor v. Nahimana et al. (“Media” Trial), Case No.

963. The present case squarely addresses the role of the media in the genocide that took place in Rwanda in 1994 and the related legal question of what constitutes individual criminal responsibility for direct and public incitement to commit genocide. Unlike Akayesu and others found by the Tribunal to have engaged in incitement through their own speech, the Accused in this case used the print and radio media systematically, not only for their own words but for the words of many others, for the collective communication of ideas and for the mobilization of the population on a grand scale. In considering the role of mass media, the Chamber must consider not only the contents of particular broadcasts and articles, but also the broader application of these principles to media programming, as well as the responsibilities inherent in ownership and institutional control over the media.

11 Nahimana AJ, Partly Dissenting Opinion of Judge Fausto Pocar, para.3.

12 Bikindi TJ, paras.390-395, 433-440. The Trial Chamber ultimately found Bikindi not guilty of persecution by way of hate speech because there was no evidence of him performing or disseminating his songs (which contained the hate speech) in 1994 and there was insufficient evidence to show he had control over the subsequent dissemination and broadcasting of those songs on public radio in 1994. Bikindi TJ, paras.436-440.

13 Bikindi TJ, para.394.

964. To this end, a review of international law and jurisprudence on incitement to discrimination and violence is helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression.

The International Military Tribunal at Nuremberg

Streicher

981. Characterized by the Tribunal in its Akayesu judgment as the “most famous conviction for incitement” and noted in the Tribunal’s Ruggiu judgment as “particularly relevant” is the case of Julius Streicher, who was sentenced to death by the International Military Tribunal at Nuremberg for the anti-Semitic articles that he published in his weekly newspaper *Der Stürmer*. Known widely as “Jew-Baiter Number One”, Julius Streicher was the publisher of *Der Stürmer* from 1923 to 1945 and served as its editor until 1933. In its judgement, the Nuremberg Tribunal quoted Streicher’s own writing, articles he published, and a letter he published from one of the newspaper’s readers, all calling for the extermination of Jews. The Nuremberg judgement found that although in his testimony at trial, Streicher denied any knowledge of mass executions of Jews, in fact he continually received information on the deportation and killing of Jews in Eastern Europe. However, the judgment does not explicitly note a direct causal link between Streicher’s publication and any specific acts of murder. Rather it characterizes his work as a poison “injected in to the minds of thousands of Germans which caused them to follow the National Socialists’ policy of Jewish persecution and extermination”.¹⁴ Although Streicher was found by the Nuremberg Tribunal not to have been within Hitler’s inner circle of advisers or even connected to the formulation of policy, he was convicted of crimes against humanity for his incitement to murder and extermination of Jews, which was found to have constituted the crime of “persecution” as defined by the Charter of the International Military Tribunal.

982. Also charged with incitement as a crime against humanity, Hans Fritzsche was acquitted by the International Military Tribunal. Head of the Radio Section of the Propaganda Ministry during the war, Fritzsche was well-known for his weekly broadcasts. In his defense, Fritzsche asserted that he had refused requests from Goebbels to incite antagonism and arouse hatred, and that he had never voiced the theory of the “master race”. In fact, he had expressly prohibited the term from being used by German press and radio that he controlled. He also testified that he had expressed his concern over the content of the newspaper *Der Stürmer*, published by Julius Streicher, and that he had tried twice to ban it. In its judgement for acquittal, the Tribunal found that Fritzsche had not had control over the formulation of

¹⁴ Nazi Conspiracy and Aggression, Opinion and Judgment (October 1, 1946), OFFICE OF THE U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY 56 (1947).

propaganda policies, that he had merely been a conduit to the press of directives passed down to him. With regard to the charge that had incited the commission of war crimes by deliberately falsifying news to arouse passions in the German people, the Tribunal found that although he had sometimes spread false news, it had not been established that he knew it to be false.

(i) United Nations Conventions

983. International law protects both the right to be free from discrimination and the right to freedom of expression. The Universal Declaration of Human Rights provides in Article 7 that “All are entitled to equal protection against any discrimination . . . and against any incitement to such discrimination.” Article 19 states: “Everyone has the right to freedom of opinion and expression.” Both of these principles are elaborated in international and regional treaties, as is the relation between these two fundamental rights, which in certain contexts may be seen to conflict, requiring some mediation.

984. The International Covenant on Civil and Political Rights (ICCPR) provides in Article 19(2) that “Everyone shall have the right to freedom of expression,” while noting in Article 19(3) that the exercise of this right “carries with it special duties and responsibilities” and may therefore be subject to certain necessary restrictions: “for respect of the rights or reputations of others”, and “for the protection of national security or of public order (ordre public), or of public health or morals”. In its interpretation of this language, in a General Comment on Article 19, the United Nations Human Rights Committee has stated, “It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right.”¹⁵ The Committee also noted in its General Comment that permissible restrictions on the right to freedom of expression “may relate either to the interests of other persons or to those of the community as a whole”.¹⁶

985. By virtue of Article 20 of the ICCPR, certain speech not only may but in fact must be restricted. Article 20(2) provides that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Similarly, Article 4(a) of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) requires States Parties to declare as an offence punishable by law “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.” Article 4(b) of CERD further requires the prohibition of organizations and all other organized propaganda activities that “promote and incite

¹⁵ Human Rights Committee, General Comment 10, para. 3.

¹⁶ *Ibid.*, para. 4.

racial discrimination”, and the recognition of participation in such organizations or activities as an offence punishable by law.

986. The jurisprudence on Article 19 of the ICCPR affirms the duty to restrict freedom of expression for the protection of other rights. In *Ross v. Canada*, the Human Rights Committee upheld the disciplinary action taken against a school teacher in Canada for statements he made that were found to have “denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values”.¹⁷ The Human Rights Committee noted in its views the finding of the Canadian Supreme Court that “it was reasonable to anticipate that there was a causal link between the expressions of the author and the poisoned atmosphere”.¹⁸

987. Another case from Canada, *J.R.T. and the W.G. Party v. Canada*, a complaint alleging a violation of the right to freedom of expression under Article 19, was declared inadmissible by the Human Rights Committee. The authors of the complaint had been precluded from using public telephone services after using them to circulate messages warning of the dangers of international Jewry leading the world

into wars, unemployment and inflation and the collapse of world values and principles. The Human Rights Committee determined that the opinions being disseminated “clearly constitute the advocacy of racial or religious hatred which there is an obligation under art 20(2) to prohibit.”¹⁹ In effect, it found that there was no scope to consider the complaint under the Article 19 right of a state to restrict freedom of expression because in this case the restriction was required under Article 20 of the ICCPR.

988. In *Robert Faurisson v. France*, the Human Rights Committee considered the meaning of the term “incitement” in Article 20(2) of the ICCPR. The author of the complaint challenged as a violation of his right to freedom of expression under Article 19 of the ICCPR his conviction in France for publishing his view doubting the existence of gas chambers for extermination purposes at Auschwitz and other Nazi concentration camps. The French government took the position that “by challenging the reality of the extermination of Jews during the Second World War, the author incites his readers to anti-semitic behaviour”, arguing more generally that “racism did not constitute an opinion but an aggression, and that every time racism was allowed to express itself publicly, the public order was immediately and severely threatened”. The Committee held in the case that the restriction on publication of these views did

¹⁷ *Ross v. Canada* (736/1997, views adopted October 2000), para. 11.5.

¹⁸ *Ibid.*, para. 11.6.

¹⁹ *J.R.T. and the W.G. Party v. Canada*, Case No. 104/1981 (declared inadmissible 6 April 1983).

not violate the right to freedom of expression in Article 19 and in fact that the restriction was necessary under Art 19(3).²⁰

989. A concurring opinion in the Faurisson case highlighted evidence that the motivating purpose of the author of the complaint was not an interest in historical research, as he claimed, and it expressed the view that it was important to “link liability with the intent of the author”.²¹ The opinion noted the “tendency of the publication to incite to anti-semitism”, relying on this tendency to distinguish the author’s work from bona fide historical research that should be protected against restriction “even when it challenges accepted historical truths and by so doing offends people”. Citing the language of the author, such as his references to “particularly Jewish historians” or the “magic gas chamber” and the context, i.e. a challenge to well-documented historical facts with the implication “under the guise of impartial academic research that the victims of Nazism were guilty of dishonest fabrication”, to support its finding of anti-semitic purpose, the opinion concluded: “The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect - the right to be free from incitement to racism or anti-semitism.”

990. While endorsing the state’s right to restrict freedom of expression in this case under Article 19(3) as necessary for the respect of the rights of others, the concurring opinion noted that the crime for which the complainant was convicted did not expressly include the element of incitement, and the statements for which he was convicted did not “fall clearly within the boundaries of incitement, which the State party was bound to prohibit” under Article 20(2) of the ICCPR. Nevertheless, the opinion suggested:

However, there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.²²

(ii) **The European Convention on Human Rights**

991. At the regional level, the European Convention on Human Rights has given rise to extensive jurisprudence on the proper balancing of the right to freedom of expression, guaranteed by Article 10(1) of the Convention, and the right to restrict such freedom inter alia “in the interests of national security” and “for the protection of

²⁰ Robert Faurisson v. France, CCPR/C/58/D/550/1993 (1996).

²¹ Ibid., Concurring Opinion by Elizabeth Evatt and David Kretzmer, joined by Eckart Klein.

²² Ibid., para. 4.

the reputation or rights of others”, pursuant to Article 10(2) of the Convention. The approach to this balancing test, much like the one used for the ICCPR, review (i) whether the restrictions are prescribed by law; (ii) whether their aim is legitimate; and (iii) whether they can be considered necessary in a democratic society, taken to imply the existence of a “pressing social need” and an intervention “proportionate to the legitimate aims pursued”. While the language of Article 10 of the European Convention is comparable to the language of Article 19 of the ICCPR, the European Convention has no provision comparable to Article 20 of the ICCPR, prohibiting incitement of discrimination, hostility or violence based on national, racial or religious grounds. Nevertheless, many of the cases that have been adjudicated by the European Court of Human Rights under Article 10 arise in connection with national laws that prohibit such incitement.

992. A number of the European Court cases address the role of journalists, as well as editors and publishers, and their responsibility for the dissemination of views promoting discrimination. In *Jersild v. Denmark*²³, the Court overturned the conviction of a journalist for the Danish Broadcasting Corporation, based on his interview of three “Greenjackets”, members of a racist youth group in Denmark. The interview was broadcast on Sunday News Magazine, described by the Court as a “serious television programme intended for a well-informed audience, dealing with a wide range of social and political issues, including xenophobia, immigration and refugees”. In the interview, the Greenjackets identified themselves as racist and made extremely offensive remarks about black people and immigrants. Together with them, the journalist who interviewed them was convicted by Denmark under its law prohibiting “dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...” In the interview, the journalist had asked one or two questions suggesting that there were very accomplished black people and in the introduction the youth had been clearly identified as racist. The program was presented as an exploration of their thinking and background, but there was no explicit condemnation of them.

993. In the decision of the Court holding that the journalist’s conviction violated Article 10 of the European Convention, the program’s introduction was a critical factor. The Court stated, “an important factor in the Court’s evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.” The Court cited the introduction and expressed the view that with regard to the journalist the program “clearly disassociated him from the persons interviewed”, noting that he described them as “extremist youths” and that he rebutted some of their statements. Using the same analytical framework, two dissenting opinions expressed the view that the conviction of the journalist should be upheld, as not enough was said in the program to condemn the racist views of the youth. While the majority decision

23 *Jersild v. Denmark*, European Court of Human Rights (ECHR), Judgment of 22 August 1994.

affirmed that it was “undisputed that the purpose of the applicant in compiling the broadcast in question was not racist”, the decisive issue in the case was how much he distanced himself from the racist views and condemned them. One dissenting opinion stated, “Neither the written text of the interview... nor the video film we have seen makes it clear that the remarks of the Greenjackets are intolerable in a society based on respect for human rights.”²⁴ The other dissent concluded that the statements made “without any significant reaction on the part of the commentator, did indeed amount to incitement to contempt... While appreciating that some judges attach particular importance to freedom of expression, ... we cannot accept that this freedom should extend to encouraging racial hatred, contempt for races other than the one to which we belong, and defending violence against those who belong to the races in question.”²⁵

994. The European Court of Human Rights has also considered extensively in its jurisprudence the extent to which national security concerns justify restrictions on the right to freedom of expression. In a series of cases from Turkey, the Court has explored the extent to which Article 10 of the European Convention protects the right to express support for, and to disseminate expression of support for, political goals that are identified with violent means used in an effort to attain them. In *Zana v. Turkey*²⁶, the Court considered the “fair balance” between an individual’s right to freedom of expression and a democratic society’s right to protect itself from the activities of terrorist organizations. The court upheld the conviction of the applicant, a former mayor of Diyarbakir in south-east Turkey, an area under emergency rule where violent clashes were raging between security forces and the members of the Workers’ Party of Kurdistan (PKK). From prison Zana made the following statement: “I support the PKK national liberation movement, on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake”, which was published in the national daily newspaper and coincided with the killing of civilians by PKK militants. The Court noted that Zana’s words were contradictory and ambiguous in simultaneously supporting the PKK, a terrorist organization, and opposing massacres, and in disapproving the massacre of women and children while at the same time suggesting that these are mistakes anyone could make. The Court took into account in its decision the fact that Zana was a former mayor quoted in a major national daily newspaper, coinciding with attacks. In these circumstances, the Court concluded that the statement “had to be regarded as likely to exacerbate an already explosive situation in that region”.

995. In *Incal v. Turkey*²⁷, the European Court upheld the publication of a People’s Labour Party leaflet, complaining of hostility towards citizens of Kurdish origin in İzmir and suggesting that certain measures that had been taken ostensibly to clean up the city and ease traffic congestion, such as operations against street traders, were

24 Ibid., Dissent of Judges Ryssdal, Bernhardt, Spielmann and Loizou.

25 Ibid., Dissent of Judges Gölcüklü, Russo and Valticos.

26 *Zana v. Turkey*, ECHR, Judgment of 25 November 1997.

27 *Incal v. Turkey*, ECHR, Judgment of 9 June 1998.

directed against them in particular, to force them to leave the city. The applicant argued that the opinions expressed in the leaflet were based on actual events and were limited to “criticism of the discriminatory administrative and economic pressure brought to bear on citizens of Kurdish origin”. The Government argued that its operations had no purpose other than prevention of disorder and that the “racial perspective of the leaflet”, presenting these operations as targeting Kurdish people, was “likely to incite citizens of ‘Kurdish’ origin to believe that they suffered from discrimination and that, as victims of a ‘special war’, they were justified in acting in self-defence against the authorities by setting up ‘neighbourhood committees’”. The Court acknowledged the phrases urging people of Kurdish origin “to band together to raise certain political demands”, and while characterizing the reference to “neighbourhood committees” as “unclear”, it determined that these appeals could not, “if read in context, be taken as incitement to the use of violence, hostility or hatred between citizens”. The Court noted that in other circumstances, one cannot rule out the possibility that “such a text may conceal objectives and intentions different from the ones it proclaims”, but it found no evidence in the case “of any concrete action which might belie the sincerity of the aim declared by the leaflet’s authors” and therefore no reason to doubt it. As well as highlighting the particular importance of protecting the freedom of expression of political parties, and the need for “the closest scrutiny” in cases involving opposition parties, the Court noted that criticism of the government should be given additional latitude.

996. The European Court further explored these issues in a series of cases from Turkey decided in July 1999, which clarify the standards of review applicable to the reporting of news relating to armed insurrection. In *Arslan v. Turkey*²⁸, the Court considered the contents of a book entitled *History in Mourning*, 33 bullets, for which its author had been convicted of disseminating separatist propaganda. The applicant argued that his book related to events that pre-dated the conflict in south-east Turkey and the creation of the PKK, and that no link could be established between his book and that conflict, that his writings did not promote secessionism, did not contain opinion tinged by hate and was not likely to arouse people against the government. The Government argued that the applicant had described the Turkish state as an aggressor, had incited readers of Kurdish origin to take up arms, and had publicly defended a terrorist organization. Noting that the book was written in the form of a “literary historical narrative,” the Court found it “obvious that this was not a ‘neutral’ description of historical facts” and was intended to criticize the actions of Turkish authorities. Nevertheless, the Court again noted that there is little scope for restrictions on political speech or on debate on questions of public interest and that criticism of the Government must be given more latitude. While recalling that where statements incite to violence, there is a “wider margin of appreciation” for interference with freedom of expression, the Court held that with regard to the book, although certain passages were “particularly acerbic” and “paint an extremely negative picture of the population of Turkish origin”, they did not constitute incitement to violence,

28 *Arslan v. Turkey*, ECHR, Judgment of 8 July 1999.

armed resistance or uprising, which the Court characterized as “a factor which it is essential to take into consideration”. The Court also distinguished the book as a literary work rather than mass media, as a factor limiting the potential impact on national security and public order.

(iii) 997. In *Sürek and Özdemir v. Turkey*²⁹, the European Court upheld the right of a weekly review to publish an interview with the leader of the PKK, explaining the goals of the organization, the reasons it had turned to violent means in pursuing its objectives, and proclaiming its determination to continue fighting. The review also published a joint statement of several organizations, representing a call “to unite forces” against state terrorism, repression of Kurdish people, unemployment, sex discrimination, etc. Sürek, a major shareholder of the weekly review, and Özdemir, its Editor-in-Chief, maintained that neither they nor the review had any links with the PKK. They did not praise the organization or comment favorably on it, and asserted that the review was written with objectivity and in accordance with the principles of journalism, to inform the public about the PKK. They asserted that the interview did not promote terrorism or threaten public order. Sürek also pleaded that as owner of the review he had no editorial responsibility for its content. In its decision, the Court characterized statements from the interview such as “The war will go on until there is only one single individual left on our side” as a reflection of the resolve of the PKK to pursue its goals and commented: “Seen in this vein, the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict.” Noting the delicate balance of rights and responsibilities in situations of conflict and tension, the Court expressed the following view:

(iv) Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.³⁰

998. In a concurring opinion, five judges of the Court suggested that less attention should be given to the form of the words used and more attention to the general context in which the words were used and their likely impact. The key questions put forward by the concurring opinion were, “Was the language intended to inflame or incite to violence?” and “Was there a real and genuine risk that it might actually do so?”

29 *Sürek and Özdemir v. Turkey*, ECHR, Judgment of 8 July 1999.

30 *Ibid.*

- (v) 999. In contrast, in *Sürek v. Turkey (No.1)*³¹, the European Court of Human Rights upheld the conviction of Sürek for the publication in his weekly review of two letters from readers, vehemently condemning the military actions of the authorities in south-east Turkey and accusing them of brutal suppression of Kurdish people. One letter entitled “Weapons cannot win against freedom” referred to two massacres that the writer claimed were intentionally committed by the authorities as part of a strategic campaign to eradicate the Kurds and concluded by reaffirming the Kurds’ determination to win their freedom. The second letter, entitled “It is our fault” alleged that the Turkish authorities connived in imprisonment, torture and killing of dissidents in the name of the protection of democracy and the Republic. In its judgment in this case, the Court found a clear intent to stigmatise the authorities through use of labels such as “the fascist Turkish army”, the “TC murder gang” and “the hired killers of imperialism”, and determined that strong language in the letters such as “massacres”, “brutalities”, and “slaughter” amounted to “an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence”. Noting that one of the letters “identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence”, the Court reiterated that while the mere fact that information or ideas offend, shock or disturb does not justify restriction on freedom of expression, at issue in the case was “hate speech and the glorification of violence”. The Court addressed the question of shareholder responsibility as well, holding:

While it is true that the applicant did not personally associate himself with the views contained in the letters, he nevertheless provided their writers with an outlet for stirring up violence and hatred. The Court does not accept his argument that he should be exonerated from any criminal liability for the content of the letters on account of the fact that he only has a commercial and not an editorial relationship with the review. He was an owner and as such had the power to shape the editorial direction of the review. For that reason, he was vicariously subject to the “duties and responsibilities” which the review’s editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension.³²

Discussion of General Principles

1000. A number of central principles emerge from the international jurisprudence on incitement to discrimination and violence that serve as a useful guide to the factors to be considered in defining elements of “direct and public incitement to genocide” as applied to mass media.

Purpose

1001. Editors and publishers have generally been held responsible for the media they control. In determining the scope of this responsibility, the importance of intent, that is the purpose of the communications they channel, emerges from the

31 *Sürek v. Turkey (No.1)*, ECHR, Judgment of 8 July 1999.

32 *Ibid.*

jurisprudence – whether or not the purpose in publicly transmitting the material was of a bona fide nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities). The actual language used in the media has often been cited as an indicator of intent. For example, in the Faurisson case, the term “magic gas chamber” was seen by the UN Human Rights Committee as suggesting that the author was motivated by anti-Semitism rather than pursuit of historical truth. In the Jersild case, the comments of the interviewer distancing himself from the racist remarks made by his subject were a critical factor for the European Court of Human Rights in determining that the purpose of the television program was the dissemination of news rather than propagation of racist views.

1002. In the Turkish cases on national security concerns, the European Court of Human Rights carefully distinguishes between language that explains the motivation for terrorist activities and language that promotes terrorist activities. Again, the actual language used is critical to this determination. In *Sürek* (No.1), the Court held a weekly review responsible for the publication of letters from readers critical of the Government, citing the strong language in these letters, which led the Court to view the letters as “an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices...” In contrast, in *Sürek and Özdemir* the European Court upheld the right of the same weekly review to publish an interview with a PKK leader, in which he affirmed his determination to pursue his objective by violent means on the grounds that the text as a whole should be considered newsworthy rather than as “hate speech and the glorification of violence”. The sensitivity of the Court to volatile language goes to the determination of intent, as evidenced by one of the questions put forward in a concurring opinion in this case: “Was the language intended to inflame or incite to violence?”

1003. In determining the scope of liability for editors and publishers, the content of a text is taken to be more important than its author. In *Sürek* (No.1), even letters from readers are treated without distinction as subject to liability. Moreover, publishers and editors are regarded as equally responsible on the grounds that they are providing a forum and that owners have “the power to shape the editorial direction...” A critical distance was identified as the key factor in evaluating the purpose of the publication.

(vi) Context

1004. The jurisprudence on incitement highlights the importance of taking context into account when considering the potential impact of expression. In *Faurisson*, the Human Rights Committee noted that, in context, the impact of challenging the existence of gas chambers, a well-documented historical fact, would promote anti-Semitism. Similarly in the *Zana* case, the European Court of Human Rights considered the general statement made about massacres by the former mayor of Diyarbakir in the context of the fact that massacres were taking place at that time,

which in the Court's view made the statement "likely to exacerbate an already explosive situation..."

1005. In several cases, as in the *Incal* decision of the European Court, it is noted that a text may "conceal objectives and intentions different from the ones it proclaims". In that case, where distribution of a leaflet highlighting the particular impact on Kurdish people of regulatory measures taken by the authorities was at issue, the Court found no evidence on which to challenge the sincerity of the author. Nevertheless, the Court acknowledged the theoretical possibility that such expression might in fact be intended to inflame terrorist activity taking place elsewhere in furtherance of the aims of Kurdish independence. It is a question of evidence and judicial determination of the actual intent of the expression, taking the context into account.

1006. Other factors relating to context that emerge from the jurisprudence, particularly that of the European Court, include the importance of protecting political expression, particularly the expression of opposition views and criticism of the government. On the other hand, in cases where there are issues of national security and where statements incite to violence, a "wider margin of appreciation" is given to the discretion of authorities to restrict freedom of expression. The context is taken into account in determining the potential impact on national security and public order. In *Arslan*, for example, the Court distinguished the publication of a book from mass media, suggesting that a literary work would have less of an impact.

(vii) Causation

1007. In considering whether particular expression constitutes a form of incitement on which restrictions would be justified, the international jurisprudence does not include any specific causation requirement linking the expression at issue with the demonstration of a direct effect. In the *Streicher* case, there was no allegation that the publication *Der Stürmer* was tied to any particular violence. Much more generally, it was found to have "injected in to the minds of thousands of Germans" a "poison" that caused them to support the National Socialist policy of Jewish persecution and extermination. In the Turkish cases considered by the European Court of Human Rights, no specific acts of violence are cited as having been caused by the applicant's expression. Rather, the question considered is what the likely impact might be, recognizing that causation in this context might be relatively indirect.

1008. The Chamber notes that international standards restricting hate speech and the protection of freedom of expression have evolved largely in the context of national initiatives to control the danger and harm represented by various forms of prejudiced communication. The protection of free expression of political views has historically been balanced in the jurisprudence against the interest in national security. The dangers of censorship have often been associated in particular with the suppression of political or other minorities, or opposition to the government. The special protections developed by the jurisprudence for speech of this kind, in

international law and more particularly in the American legal tradition of free speech, recognize the power dynamic inherent in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government. These circumstances do not arise in the present case, where at issue is the speech of the so-called “majority population”, in support of the government. The special protections for this kind of speech should accordingly be adapted, in the Chamber’s view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered.

1009. Similarly, the Chamber considers that the “wider margin of appreciation” given in European Court cases to government discretion in its restriction of expression that constitutes incitement to violence should be adapted to the circumstance of this case. At issue is not a challenged restriction of expression but the expression itself. Moreover, the expression charged as incitement to violence was situated, in fact and at the time by its speakers, not as a threat to national security but rather in defence of national security, aligning it with state power rather than in opposition to it. Thus there is justification for adaptation of the application of international standards, which have evolved to protect the right of the government to defend itself from incitement to violence by others against it, rather than incitement to violence on its behalf against others, particularly as in this case when the others are members of a minority group.

1010. Counsel for Ngeze has argued that United States law, as the most speech-protective, should be used as a standard, to ensure the universal acceptance and legitimacy of the Tribunal’s jurisprudence. The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards. The Chamber notes that the jurisprudence of the United States also accepts the fundamental principles set forth in international law and has recognized in its domestic law that incitement to violence, threats, libel, false advertising, obscenity, and child pornography are among those forms of expression that fall outside the scope of freedom of speech protection.³³ In *Virginia v. Black*, the United States Supreme Court recently interpreted the free speech guarantee of the First Amendment of the Constitution to permit a ban on cross burning with intent to intimidate. The historical terrorization of African Americans by the Ku Klux Klan

33 *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941); *Watts v. United States*, 394 U.S. 705 (1969); *Miller v. California*, 413 U.S. 15 (1973); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-73 & n. 24 (1976); *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *New York v. Ferber*, 458 U.S. 747 (1982); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978); *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952).

through cross burnings, in the Court's view, made the burning of a cross, as a recognized symbol of hate and a "true threat", unprotected as symbolic expression. Intimidation was held to be constitutionally proscribable "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".³⁴ In the immigration context, adherents of National Socialism have been stripped of citizenship and deported from the United States on the basis of their anti-semitic writings.³⁵

ICTR Jurisprudence

1011. The ICTR jurisprudence provides the only direct precedent for the interpretation of "direct and public incitement to genocide". In *Akayesu*, the Tribunal reviewed the meaning of each term constituting "direct and public incitement". With regard to "incitement", the Tribunal observed that in both common law and civil law systems, "incitement", or "provocation" as it is called under civil law, is defined as encouragement or provocation to commit an offence. The Tribunal cited the International Law Commission as having characterized "public" incitement as "a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television".³⁶ While acknowledging the implication that "direct" incitement would be "more than mere vague or indirect suggestion", the Tribunal nevertheless recognized the need to interpret the term "direct" in the context of Rwandan culture and language, noting as follows:

...[T]he Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as 'direct' in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit....

The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.³⁷

1012. In *Akayesu*, the Tribunal defined the mens rea of the crime as follows:

The mens rea required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the

34 *Virginia v. Black*, 123 S. Ct. 1536 (2003).

35 *United States v. Sokolov*, 814 F.2d 864 (1987); *United States v. Ferenc Koreh*, *aff'd.*, 59 F.3d 431 (2d Cir., 1995).

36 *Akayesu* (TC) footnote 126.

37 *Akayesu* (TC) paras. 557-558.

minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.³⁸

1013. The Akayesu judgement also considered whether the crime of direct and public incitement to commit genocide can be punished even where such incitement was unsuccessful and concluded that the crime should be considered as an inchoate offence under common law, or an infraction formelle under civil law, i.e. punishable as such. The Tribunal highlighted the fact that “such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results” and held that “genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator”.³⁹

1014. In determining more precisely the contours of the crime of direct and public incitement to commit genocide, the Trial Chamber notes the factual findings of the Tribunal in Akayesu that the crowd addressed by the accused, who urged them to unite and eliminate the enemy, the accomplices of the Inkotanyi, understood his call as a call to kill the Tutsi, that the accused was aware that what he said would be so understood, and that there was a causal relationship between his words and subsequent widespread massacres of Tutsi in the community.

1015. In Akayesu, the Tribunal considered in its legal findings on the charge of direct and public incitement to genocide that “there was a causal relationship between the Defendant’s speech to [the] crowd and the ensuing widespread massacres of Tutsis in the community”. The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement. As set forth in the Legal Findings on Genocide, when this potential is realized, a crime of genocide as well as incitement to genocide has occurred.

Charges Against the Accused

1016. Count 3 of the Nahimana Indictment and Count 4 of the Barayagwiza and Ngeze Indictments charge the Accused with direct and public incitement to commit genocide pursuant to Article 2(3)(c) of the Statute, in that they are responsible for direct and public incitement to kill and cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such.

38 Ibid., para. 560.

39 Ibid., para. 562.

1017. The Chamber notes, as discussed in paragraphs 100-104, that the crime of direct and public incitement to commit genocide, like conspiracy, is an inchoate offence that continues in time until the completion of the acts contemplated. The Chamber accordingly considers that the publication of Kangura, from its first issue in May 1990 through its March 1994 issue, the alleged impact of which culminated in events that took place in 1994, falls within the temporal jurisdiction of the Tribunal to the extent that the publication is deemed to constitute direct and public incitement to genocide. Similarly, the Chamber considers that the entirety of RTLM broadcasting, from July 1993 through July 1994, the alleged impact of which culminated in events that took place in 1994, falls within the temporal jurisdiction of the Tribunal to the extent that the broadcasts are deemed to constitute direct and public incitement to genocide.

1018. The Chamber further notes, as found in paragraph 257, that the competition published in Kangura twice in March 1994 was intended to direct the attention of readers to back issues of the publication and effectively brought back these back issues into circulation in Rwanda in March 1994.

1019. In its review of Kangura and RTLM, the Chamber notes that some of the articles and broadcasts highlighted by the Prosecution convey historical information, political analysis, or advocacy of an ethnic consciousness regarding the inequitable distribution of privilege in Rwanda. Barayagwiza's RTLM broadcast of 12 December 1993, for example, is a moving personal account of his experience of discrimination as a Hutu. Prosecution Expert Witness Alison Des Forges, in cross-examination, would not comment on the propriety of this particular broadcast, citing as her concern the repeated emphasis and priority given to ethnicity, rather than any single broadcast. She stated her view that undue emphasis on ethnicity and presentation of all issues in ethnic terms exacerbated ethnic tensions.⁴⁰

1020. The Chamber considers that it is critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred. This broadcast by Barayagwiza is the former but not the latter. While the impact of these words, which are powerful, may well have been to move listeners to want to take action to remedy the discrimination recounted, such impact would be the result, in the Chamber's view, of the reality conveyed by the words rather than the words themselves. A communication such as this broadcast does not constitute incitement. In fact, it falls squarely within the scope of speech that is protected by the right to freedom of expression. Similarly, public discussion of the merits of the Arusha Accords, however critical, constitutes a protected exercise of free speech.

1021. The Chamber considers that speech constituting ethnic hatred results from the stereotyping of ethnicity combined with its denigration. The Accused have maintained in their defence that certain communications made by them about the Tutsi population were simply true, for example the broadcast stating that 70% of the taxis

40 T. 27 May 2002, pp. 28-29.

in Rwanda were owned by people of Tutsi ethnicity. The accuracy of this statement was not established one way or the other by the evidence presented, but the statement is informational in nature. Its impact, if true, might well be to generate resentment over the inequitable distribution of wealth in Rwanda. However, this impact, in the Chamber's view, would be a result of the inequitable distribution of wealth in Rwanda, the information conveyed by the statement rather than the statement itself. If it were not true, the inaccuracy of the statement might then be an indicator that the intent of the statement was not to convey information but rather to promote unfounded resentment and inflame ethnic tensions. The RTLM broadcast stating about the Tutsi that "they are the ones who have all the money" differs from the statement about taxi ownership in that it is a generalization that has been extended to the Tutsi population as a whole. The tone of the broadcast is different and conveys the hostility and resentment of the journalist, Kantano Habimana. While this broadcast, which does not call on listeners to take action of any kind, does not constitute direct incitement, it demonstrates the progression from ethnic consciousness to harmful ethnic stereotyping.

1022. On cross-examination, Ferdinand Nahimana said he could not judge a statement made in Nazi Germany that the Jews have all the money, suggesting that his judgement would depend on the facts and accordingly the accuracy of the statement. In the Chamber's view, the accuracy of the statement is only one factor to be considered in the determination of whether a statement is intended to provoke rather than to educate those who receive it. The tone of the statement is as relevant to this determination as is its content. That Nahimana was aware of the relevance of tone to culpability was evidenced by his reluctance to acknowledge the text of the broadcast, "they are the ones who have all the money", when he was questioned on it. Eventually, he said about it that he would not have used such language but would have expressed the same reality in a different way. The Chamber also considers the context in which the statement is made to be important. A statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement.

1023. Even-handedness was presented in defence of both Kangura and RTLM. That Kangura reprinted the 19 Commandments of the Tutsi and that RTLM broadcast an interview with an RPF leader were cited by Defence as distancing the channel of communication from the harmful effects attributed to it. The Chamber notes that in both of these cases, the examples cited do not in fact establish the even-handedness suggested, largely due to the tone and manner in which they were presented. As published, the 19 Commandments and The Ten Commandments are greatly differentiated; Kangura's rejection of the former is as apparent as its support of the latter. The clear intent of the publication is through the 19 Commandments to spread the fear that the Tutsi endanger the Hutu, and then in The Ten Commandments to tell the Hutu how to protect themselves from that danger. The message, and the

denigration of the Tutsi population, is the same. Similarly, the manner in which RTLM journalist Kantano Habimana presented the RPF, with derogatory references to the tall, milk-drinking Tutsi, hardly suggests even-handedness. The journalist exudes scorn and contempt for the Tutsi while boasting that “even” the Inkotanyi can speak on RTLM. Kangura and RTLM were not open or neutral fora. They had a well-defined perspective for which they were known.

1024. The Chamber recognizes that some media are advocacy-oriented and considers that the issue of importance to its findings is not whether the media played an advocacy role but rather the content of what it was actually advocating. In cases where the media disseminates views that constitute ethnic hatred and calls to violence for informative or educational purposes, a clear distancing from these is necessary to avoid conveying an endorsement of the message and in fact to convey a counter-message to ensure that no harm results from the broadcast. The positioning of the media with regard to the message indicates the real intent of the message, and to some degree the real message itself. The editor of Kangura and the journalists who broadcast on RTLM did not distance themselves from the message of ethnic hatred. Rather they purveyed the message.

1025. The Accused have also cited in their defence the need for vigilance against the enemy, the enemy being defined as armed and dangerous RPF forces who attacked the Hutu population and were fighting to destroy democracy and reconquer power in Rwanda. The Chamber accepts that the media has a role to play in the protection of democracy and where necessary the mobilization of civil defence for the protection of a nation and its people. What distinguishes both Kangura and RTLM from an initiative to this end is the consistent identification made by the publication and the radio broadcasts of the enemy as the Tutsi population. Readers and listeners were not directed against individuals who were clearly defined to be armed and dangerous. Instead, Tutsi civilians and in fact the Tutsi population as a whole were targeted as the threat.

1026. Both Kangura and RTLM, as well as CDR in its communiqués, named and listed individuals suspected of being RPF or RPF accomplices. In their defence, the Accused stated that these individuals were, at least in some cases, RPF members. Nahimana pointed out that the RTLM broadcast of 14 March 1994 included reading from a letter explicitly addressed to an RPF brigade. The letter does indicate, as he noted, that RPF brigades existed. This is not contested. In this broadcast, it was the naming of family members, who were subsequently killed, that was at issue, and even Nahimana conceded that he did not like the practice of broadcasting names, especially when it might bring about their death. Ngeze established with regard to some of the lists published in Kangura that the names came from government sources and were therefore official suspects. The Chamber accepts that the publication of official information is a legitimate function of the media. Not all lists and names published or broadcasts came from such sources, however. To the contrary, the evidence reviewed by the Chamber indicates a pattern of naming people on

vague suspicion, without articulated grounds, or in those cases where the grounds were articulated they were highly speculative or in some cases entirely unfounded. In these cases, the only common element is the Tutsi ethnicity of the persons named, and the evidence in some cases clearly indicates that their ethnicity was in fact the reason they were named.

1027. Both Nahimana and Ngeze professed a commitment to the truth and defended their communications on that basis. The Chamber questions this commitment and notes the testimony of Nahimana regarding the false RTLM report of the death of Kanyarengwe and Bizimungu. “When there is war, there is war”, he said, “and propaganda is part of it”. Ngeze’s relationship to the truth is reviewed in detail by the Chamber in its discussion of his testimony in paragraphs 875-878. The Chamber considers that the Accused understood their media initiative in the context of war propaganda, and the truth was subservient to their objective of protecting the population from the RPF through the destruction of the Tutsi ethnic group.

1028. The names published and broadcast were generally done so in the context of a threat that varied in explicitness. An official list of 123 names of suspects was published in Kangura No. 40 with an express warning to readers that the government was not effectively protecting them from these people and that they needed to organize their own self-defence to prevent their own extermination. This message classically illustrates the incitement of Kangura readers to violence: by instilling fear in them, giving them names to associate with this fear, and mobilizing them to take independent, proactive measures in an effort to protect themselves. In some instances, names were mentioned by Kangura without such an explicit call to action. The message was nevertheless direct. That it was clearly understood is overwhelmingly evidenced by the testimony of witnesses that being named in Kangura would bring dire consequences. François-Xavier Nsanzuwera called Kangura “the bell of death” (see paragraph 237). Similarly, RTLM broadcast a message of fear, provided listeners with names, and encouraged them to defend and protect themselves, incessantly telling them to “be vigilant”, which became a coded term for aggression in the guise of self-defence.

1029. With regard to causation, the Chamber recalls that incitement is a crime regardless of whether it has the effect it intends to have. In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect.

1030. The ICTR Appeals Chamber has affirmed that distinct crimes may justify multiple convictions, provided that each statutory provision that forms the basis for a conviction has a materially distinct element not contained in the other.⁴¹ With regard to incitement, the Chamber notes that instigation as an act of commission of

41 Musema (AC) paras. 361-363.

genocide, pursuant to Article 6(1) of the Statute, does not necessarily require the existence of a public call to commit genocide, an element at the core of the crime of public and direct incitement to genocide.

RTLM

1031. RTLM broadcasting was a drumbeat, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase “heating up heads” captures the process of incitement systematically engaged in by RTLM, which after 6 April 1994 was also known as “Radio Machete”. The nature of radio transmission made RTLM particularly dangerous and harmful, as did the breadth of its reach. Unlike print media, radio is immediately present and active. The power of the human voice, heard by the Chamber when the broadcast tapes were played in Kinyarwanda, adds a quality and dimension beyond words to the message conveyed. In this setting, radio heightened the sense of fear, the sense of danger and the sense of urgency giving rise to the need for action by listeners. The denigration of Tutsi ethnicity was augmented by the visceral scorn coming out of the airwaves - the ridiculing laugh and the nasty sneer. These elements greatly amplified the impact of RTLM broadcasts.

1032. In particular, the Chamber notes the broadcast of 4 June 1994, by Kantano Habimana, as illustrative of the incitement engaged in by RTLM. Calling on listeners to exterminate the Inkotanyi, who would be known by height and physical appearance, Habimana told his followers, “Just look at his small nose and then break it”. The identification of the enemy by his nose and the longing to break it vividly symbolize the intent to destroy the Tutsi ethnic group.

1033. The Chamber has found beyond a reasonable doubt that Ferdinand Nahimana acted with genocidal intent, as set forth in paragraph 969. It has found beyond a reasonable doubt that Nahimana was responsible for RTLM programming pursuant to Article 6(1) and established a basis for his responsibility under Article 6(3) of the Statute, as set forth in paragraphs 970-972. Accordingly, the Chamber finds Ferdinand Nahimana guilty of direct and public incitement to genocide under Article 2(3)(c), pursuant to Article 6(1) and Article 6(3) of the Statute.

1034. The Chamber has found beyond a reasonable doubt that Jean-Bosco Barayagwiza acted with genocidal intent, as set forth in paragraph 969. It has found beyond a reasonable doubt that Barayagwiza was responsible for RTLM programming pursuant to Article 6(3) of the Statute of the Tribunal, as set forth in paragraph 977. Accordingly, the Chamber finds Jean-Bosco Barayagwiza guilty of direct and public incitement to genocide under Article 2(3)(c), pursuant to Article 6(3) of its Statute.

CDR

1035. As found in paragraph 276, Jean-Bosco Barayagwiza was one of the principal founders of CDR and played a leading role in its formation and development. He was a decision-maker for the party. The killing of Tutsi civilians was promoted by the CDR, as evidenced by the chanting of “tubatsembatsembe” or “let’s exterminate them”, by Barayagwiza himself and by CDR members and Impuzamugambi in his presence at public meetings and demonstrations. The reference to “them” was understood to mean the Tutsi population. The killing of Tutsi civilians was also promoted by the CDR through the publication of communiqués and other writings that called for the extermination of the enemy and defined the enemy as the Tutsi population. The Chamber notes the direct involvement of Barayagwiza in this call for genocide. Barayagwiza was at the organizational helm of CDR. He was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for the killing of Tutsi civilians. For these acts, the Chamber finds Jean-Bosco Barayagwiza guilty of direct and public incitement to genocide under Article 2(3)(c) of its Statute, pursuant to Article 6(1) of its Statute. The Chamber found in paragraph 977 above that Barayagwiza had superior responsibility over members of CDR and the Impuzamugambi. For his failure to take necessary and reasonable measures to prevent the acts of direct and public incitement to commit genocide caused by CDR members, the Chamber finds Barayagwiza guilty of direct and public incitement to commit genocide pursuant to Article 6(3) of its Statute.

(viii) Kangura

1036. Many of the writings published in Kangura combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population, who were characterized as the enemy or enemy accomplices. The Appeal to the Conscience of the Hutu and the cover of Kangura No. 26 are two notable examples in which the message clearly conveyed to the readers of Kangura was that the Hutu population should “wake up” and take the measures necessary to deter the Tutsi enemy from decimating the Hutu. The Chamber notes that the name Kangura itself means “to wake up others”. What it intended to wake the Hutu up to is evidenced by its content, a litany of ethnic denigration presenting the Tutsi population as inherently evil and calling for the extermination of the Tutsi as a preventive measure. The Chamber notes the increased attention in 1994 issues of Kangura to the fear of an RPF attack and the threat that killing of innocent Tutsi civilians that would follow as a consequence.

1037. The Chamber notes that not all of the writings published in Kangura and highlighted by the Prosecution constitute direct incitement. A Cockroach Cannot Give Birth to a Butterfly, for example, is an article brimming with ethnic hatred but did not call on readers to take action against the Tutsi population.

1038. As founder, owner and editor of Kangura, Hassan Ngeze directly controlled the publication and all of its contents, for which he has largely acknowledged

responsibility. The Chamber has found that Ngeze acted with genocidal intent, as set forth in paragraph 969. Ngeze used the publication to instill hatred, promote fear, and incite genocide. It is evident that Kangura played a significant role, and was seen to have played a significant role, in creating the conditions that led to acts of genocide. Accordingly, the Chamber finds Hassan Ngeze guilty of direct and public incitement to genocide, under Article 2(3)(c) and in accordance with Article 6(1) of the Statute.

Acts of Hassan Ngeze

1039. As set forth in paragraph 837, Hassan Ngeze often drove around with a megaphone in his vehicle, mobilizing the Hutu population to come to CDR meetings and spreading the message that the Inyenzi would be exterminated, Inyenzi meaning, and being understood to mean, the Tutsi ethnic minority. For these acts, which called for the extermination of the Tutsi population, the Chamber finds Hassan Ngeze guilty of direct and public incitement to genocide, under Article 2(3)(c) and in accordance with Article 6(1) of the Statute.

II. Prosecution v. Nahimana et. Al. (“Media” Trial), Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, paras. 692-715

Hate speech and direct incitement to commit genocide

692. The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion.⁴² In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute. This conclusion is corroborated by the travaux préparatoires to the Genocide Convention.⁴³

⁴² Kajelijeli Trial Judgement, para. 852; Akayesu Trial Judgement, para. 557; Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40, para. 87. See also Comments of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind, p. 22: “The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.”

⁴³ Articles 2(2) and (3) of the Statute reproduce Articles 2 and 3 of the Genocide Convention. The travaux préparatoires of the Genocide Convention can therefore shed light on the interpretation of Articles 2(2) and (3) of the Statute. In particular, the travaux préparatoires demonstrate that Article 3(c) (Article 2(3)(c) of the Statute of the Tribunal) is intended to criminalize only direct appeals to commit acts of genocide and not all forms of incitement to hatred. Indeed, the first draft of the Convention, which was prepared by a group of experts on behalf of the United Nations Secretary General (UN Doc. E/447), contained

693. The Appeals Chamber therefore concludes that when a defendant is indicted pursuant to Article 2(3)(c) of Statute, he cannot be held accountable for hate speech that does not directly call for the commission of genocide. The Appeals Chamber is also of the opinion that, to the extent that not all hate speeches constitute direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide. However, it is not entirely clear if the Trial Chamber relied on this jurisprudence in defining direct incitement to commit genocide. The Trial Chamber held:

The present case squarely addresses the role of the media in the genocide that took place in Rwanda in 1994 and the related legal question of what constitutes individual criminal responsibility for direct and public incitement to commit genocide. Unlike Akayesu and others found by the Tribunal to have engaged in incitement through their own speech, the Accused in this case used the print and radio media systematically, not only for their own words but for the words of many others, for the collective communication of ideas and for the mobilization of the population on a grand scale. In considering the role of mass media, the Chamber must consider not only the contents of particular broadcasts and articles, but also the broader application of these principles to media programming, as well as the responsibilities inherent in ownership and institutional control over the media.

provisions criminalizing not only direct and public incitement to commit genocide (Article II(II) (2.)), but also all forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as necessary, legitimate or excusable (Article III). The second draft of the Convention (prepared by the Ad Hoc Committee of the Economic and Social Council, UN Doc. E/794), contained only one provision criminalizing direct and public incitement to commit genocide, regardless of whether it was made in public or in private, and of whether it was successful or not (Article IV(c)). The Soviet delegate had suggested the inclusion of a provision criminalizing hate propaganda and propaganda tending to incite acts of genocide, but the suggestion was rejected by the majority of the Ad Hoc Committee (UN Doc. E/794, p. 23). Later, the Soviet delegate again suggested to the 6th Committee of the General Assembly an amendment of Article III (UN Doc. A/C.6/215/Rev. 1) criminalizing “all forms of public propaganda (press, radio, cinema, etc.) that tend to incite racial, national or religious hatred” and “all forms of propaganda that are aimed at provoking the commission of acts of genocide”. The amendment was rejected (UN ORGA, 6th Committee, 3rd Session, 87th meeting, p. 253). The reasons for rejecting the two parts of the amendment seem to have been the same as those for rejecting the Soviet amendment presented to the Ad Hoc Committee: the first part of the amendment fell outside the framework of the Genocide Convention (see addresses of the delegates of Greece, France, Cuba, Iran, Uruguay and India) while the second part was a duplication of the provision prohibiting incitement of direct and public incitement to commit genocide (see addresses of the delegates of Greece, Cuba, Iran, Uruguay, Egypt, the United States of America). See UN ORGA, 6th Committee, 3rd Session, 86th meeting, UN Doc. A/C.6/3/CR. 86, 28 October 1948, pp. 244-248, and UN ORGA, 6th Committee, 3rd Session, 87th meeting, UN Doc. A/C.6/3/CR. 87, 29 October 1948, pp. 248-254.

To this end, a review of international law and jurisprudence on incitement to discrimination and violence is helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression.⁴⁴

694. After recalling the jurisprudence of the IMT, the United Nations Human Rights Committee and the European Court of Human Rights, the Trial Chamber held that:

- Editors and publishers have generally been held responsible for the media they control;⁴⁵
- It is necessary to review whether the aim of the discourse is a lawful one, having regard, for example, to the language used and to the content of the text (in particular, whether it is intended to establish a critical distance from the words of others);⁴⁶
- The speech must be considered in its context when reviewing its potential impact;⁴⁷
- It is not necessary to prove that the speech at issue produced a direct effect.⁴⁸

695. Although the Trial Chamber then characterised these elements as “a number of central principles [...] that serve as a useful guide to the factors to be considered in defining elements of ‘direct and public incitement to genocide’ as applied to mass media”,⁴⁹ it did in fact articulate certain broad guidelines for interpreting and characterizing media discourse. The Appeals Chamber considers that the Trial Chamber did not alter the constituent elements of the crime of direct and public incitement to commit genocide in the media context (which would have constituted an error).

696. Furthermore, the Appeals Chamber notes that several extracts from the Judgement demonstrate that the Trial Chamber drew a distinction between hate speech and direct and public incitement to commit genocide, for example:

44 Judgement, paras. 979-980.

45 Ibid., paras. 1001 and 1003.

46 Ibid., paras. 1001-1003.

47 Ibid., paras. 1004-1006.

48 Ibid., para. 1007.

49 Ibid., para. 1000.

- The Trial Chamber held that one RTLM broadcast constituted hate speech, but that “this broadcast, which does not call on listeners to take action of any kind, does not constitute direct incitement”;⁵⁰
- After holding that the RTLM broadcasts as a whole denigrated the Tutsi,⁵¹ the Trial Chamber cited a broadcast which, in its view, did constitute public and direct incitement to commit genocide;⁵²
- The Trial Chamber concluded that “[m]any of the writings published in Kangura combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population, who were characterized as the enemy or enemy accomplices”.⁵³ It then noted that “not all of the writings published in Kangura and highlighted by the Prosecutor constitute direct incitement”, citing the example of an article “brimming with ethnic hatred but [that] did not call on readers to take action against the Tutsi population”.⁵⁴

697. The Appeals Chamber will now turn to the Appellants’ submissions that the Trial Chamber erred (1) in considering that a speech in ambiguous terms, open to a variety of interpretations, can constitute direct incitement to commit genocide, and (2) in relying on the presumed intent of the author of the speech, on its potential dangers, and on the author’s political and community affiliation, in order to determine whether it was of a criminal nature. The Appellants’ position is in effect that incitement to commit genocide is direct only when it is explicit and that under no circumstances can the Chamber consider contextual elements in determining whether a speech constitutes direct incitement to commit genocide. For the reasons given below, the Appeals Chamber considers this approach overly restrictive.

Speeches that are open to several interpretations

698. In conformity with the Akayesu Trial Judgement, the Trial Chamber considered that it was necessary to take account of Rwanda’s culture and language in determining whether a speech constituted direct incitement to commit genocide.⁵⁵ In this respect, the Trial Chamber quotes the following excerpts from the Akayesu Trial Judgement:

50 Ibid., para. 1021.

51 Ibid., para. 1031.

52 Ibid., para. 1032. See also, for example, Judgement, para. 483, which identifies broadcasts that explicitly called for extermination.

53 Ibid., para. 1036.

54 Ibid., para. 1037.

55 Ibid., para. 1011.

However, the Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as “direct” in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit. [...]

The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.⁵⁶

699. The Appeals Chamber notes that this approach has been adopted in several other judgements⁵⁷ and by the Supreme Court of Canada in *Mugesera*.⁵⁸

700. The Appeals Chamber agrees that the culture, including the nuances of the Kinyarwanda language, should be considered in determining what constitutes direct and public incitement to commit genocide in Rwanda. For this reason, it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message.⁵⁹

701. The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide.

702. The Appeals Chamber is not persuaded that the *Streicher* and *Fritzsche* cases demonstrate that only discourse explicitly calling for extermination, or discourse that is entirely unambiguous for all types of audiences, can justify a conviction for direct and public incitement to commit genocide. First, it should be recalled that *Streicher* and *Fritzsche* were not charged with direct and public incitement to commit genocide,

56 *Akayesu Trial Judgement*, paras. 557-558 (footnote omitted).

57 *Muvunyi Trial Judgement*, para. 502; *Kajelijeli Trial Judgement*, para. 853; *Niyitegeka Trial Judgement*, para. 431.

58 *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40, paras. 87 and 94. The Appeals Chamber summarily dismisses Appellant Nahimana’s submission that the contrary conclusions of the Federal Court of Appeal and the Supreme Court of Canada demonstrate the uncertainties and dangers of seeking to interpret speech, the Judgement of the Supreme Court of Canada having reversed that of the Federal Court of Appeal.

59 In this respect, while it is not necessary to prove that the pronouncements in question had actual effects, the fact that they did have such effects can be an indication that the receivers of the message understood them as direct incitement to commit genocide. Cf. *infra* XIII. A. 3. (c) (i) .

as there was no such crime under international law at the time. Second, it should be noted that the reason Fritzsche was acquitted is not because his pronouncements were not explicit enough, but rather because they did not, implicitly or explicitly, “[intend] to incite the German people to commit atrocities on conquered peoples”.⁶⁰ 703. The Appeals Chamber therefore concludes that it was open to the Trial Chamber to hold that a speech containing no explicit appeal to commit genocide, or which appeared ambiguous, still constituted direct incitement to commit genocide in a particular context. The Appeals Chamber will examine below if it was reasonable to conclude that the speeches in the present case constituted direct and public incitement to commit genocide of the Tutsi.⁶¹

60 Nuremberg Judgement, pp. 161-163:

War crimes and crimes against humanity

The prosecution has asserted that Fritzsche incited and encouraged the commission of war crimes, by deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities under Counts Three and Four. His position and official duties were not sufficiently important, however, to infer that he took part in originating or formulating propaganda campaigns.

Excerpts in evidence from his speeches show definite anti-Semitism on his part. He broadcast, for example, that the war had been caused by Jews and said their fate had turned out “as unpleasant as the Fuehrer predicted”. But these speeches did not urge persecution or extermination of Jews. There is no evidence that he was aware of their extermination in the East. The evidence moreover shows that he twice attempted to have publication of the anti-Semitic “Der Sturmer” suppressed, though unsuccessfully.

In these broadcasts Fritzsche sometimes spread false news, but it was not proved he knew it to be false. For example, he reported that no German U-boat was in the vicinity of the "Athenia" when it was sunk. This information was untrue; but Fritzsche, having received it from the German Navy, had no reason to believe it was untrue.

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

61 In particular, the Appeals Chamber will examine whether it was reasonable for the Trial Chamber to find that the words Inkotanyi and Inyenzi as used in certain RTLM broadcasts referred to the Tutsi population as a whole.

Reliance on the intent of the speech's author, its potential dangers and the author's political and community affiliation

Intent

704. Referring to paragraphs 1000 to 1002 of the Judgement, Appellants Nahimana and Ngeze contend that the Trial Chamber erred in holding that speech containing no direct appeal to extermination could nevertheless constitute the actus reus of the crime of incitement simply because its author had a criminal intent.⁶²

705. The Appeals Chamber is not satisfied that the Trial Chamber held that speech containing no direct appeal to commit genocide constituted direct and public incitement to commit genocide simply because its author supposedly had a criminal intent. The relevant paragraphs of the Trial Judgement read as follows:

1001. Editors and publishers have generally been held responsible for the media they control. In determining the scope of this responsibility, the importance of intent, that is the purpose of the communications they channel, emerges from the jurisprudence – whether or not the purpose in publicly transmitting the material was of a bona fide nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities). The actual language used in the media has often been cited as an indicator of intent. For example, in the Faurisson case, the term “magic gas chamber” was seen by the UN Human Rights Committee as suggesting that the author was motivated by anti-Semitism rather than pursuit of historical truth. In the Jersild case, the comments of the interviewer distancing himself from the racist remarks made by his subject were a critical factor for the European Court of Human Rights in determining that the purpose of the television program was the dissemination of news rather than propagation of racist views.

1002. In the Turkish cases on national security concerns, the European Court of Human Rights carefully distinguishes between language that explains the motivation for terrorist activities and language that promotes terrorist activities. Again, the actual language used is critical to this determination. In *Sürek* (No.1), the Court held a weekly review responsible for the publication of letters from readers critical of the Government, citing the strong language in these letters, which led the Court to view the letters as “an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices...” In contrast, in *Sürek* and *Özdemir* the European Court upheld the right of the same weekly review to publish an interview with a PKK leader, in which he affirmed his determination to pursue his objective by violent means on the grounds that the text as a whole should be considered newsworthy rather than as “hate

62 Nahimana Appellant's Brief, paras. 208-210; Ngeze Appellant's Brief, paras. 238-239. The Appeals Chamber notes that Appellant Nahimana also makes references to paragraph 1029 of the Judgement, but considers that this paragraph raises a different issue, which is addressed below.

speech and the glorification of violence”. The sensitivity of the Court to volatile language goes to the determination of intent, as evidenced by one of the questions put forward in a concurring opinion in this case: “Was the language intended to inflame or incite to violence?”

706. It is apparent from Paragraph 1001 of the Trial Judgement that the Trial Chamber employed the term “intent” with reference to the purpose of the speech, as evidenced, *inter alia*, by the language used, and not to the intent of its author.⁶³ The Appeals Chamber is of the opinion that the purpose of the speech is indisputably a factor in determining whether there is direct and public incitement to commit genocide, and it can see no error in this respect on the part of the Trial Chamber. It is plain that the Trial Chamber did not find that a speech constitutes direct and public incitement to commit genocide simply because its author had criminal intent.

707. Appellants Barayagwiza and Ngeze further submit that the Trial Chamber erred in finding in paragraph 1029 of the Judgement that the media’s intention to cause genocide was evidenced in part by the fact that genocide did occur.⁶⁴ The Prosecutor responds that the Trial Chamber committed no error and submits that the fact that genocide was perpetrated can be one of many indices of *mens rea*.⁶⁵

708. Paragraph 1029 of the Trial Judgement reads as follows:

With regard to causation, the Chamber recalls that incitement is a crime regardless of whether it has the effect it intends to have. In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect.

709. The Appeals Chamber is not persuaded that the mere fact that genocide occurred demonstrates that the journalists and individuals in control of the media intended to incite the commission of genocide. It is, of course, possible that these individuals had the intent to incite others to commit genocide and that their encouragement contributed significantly to the occurrence of genocide (as found by the Trial Chamber), but it would be wrong to hold that, since genocide took place, these individuals necessarily had the intent to incite genocide, as the genocide could have been the result of other factors.⁶⁶ However, the Appeals Chamber notes that paragraph 1029 of the Judgement concludes that the fact that “the media intended to

63 See also Judgement, para. 1003 (“A critical distance was identified as the key factor in evaluating the purpose of the publication”).

64 Barayagwiza Appellant’s Brief, paras. 132-133; Barayagwiza Brief in Reply, para. 87; Ngeze Appellant’s Brief, paras. 277-278.

65 Respondent’s Brief, para. 499. At paragraph 500, the Prosecutor cites several elements which, in his view, demonstrate that it was reasonable for the Trial Chamber to find that Appellant Barayagwiza had the requisite criminal intent.

[cause genocide] is evidenced in part by the fact that it did have this effect". The Appeals Chamber cannot conclude that this reasoning was erroneous: in some circumstances, the fact that a speech leads to acts of genocide could be an indication that in that particular context the speech was understood to be an incitement to commit genocide and that this was indeed the intent of the author of the speech. The Appeals Chamber, notes, however, that this cannot be the only evidence adduced to conclude that the purpose of the speech (and of its author) was to incite the commission of genocide.

Potential dangers

710. As noted above, Appellant Nahimana contends that the Trial Chamber erred in relying on the potential dangers of a speech in determining whether it constitutes direct incitement to commit genocide.⁶⁷ He argues that, even though some speeches inciting hatred may contain inherent dangers, they do not necessarily qualify as direct and public incitement to commit genocide, which, he contends, presupposes an unequivocal call for extermination.⁶⁸

711. The Appeals Chamber is not persuaded that the Trial Chamber took the view that any potentially dangerous hate speech constitutes direct incitement to commit genocide. The Trial Chamber referred to the possible impact of certain remarks in its analysis of the context in which such remarks were made. As explained above, the meaning of a message can be intrinsically linked to the context in which it is formulated. In the opinion of the Appeals Chamber, the Trial Chamber was correct in concluding that it was appropriate to consider the potential impact in context – notably, how the message would be understood by its intended audience – in determining whether it constituted direct and public incitement to commit genocide.⁶⁹ The appeal on this point is dismissed.

Political or community affiliation

712. Appellant Nahimana submits that the Trial Chamber erred in evaluating the criminal character of a speech on the basis of the political or community affiliation of

66 For example: the fact that many civilians were killed in the course of a military offensive does not necessarily mean that the attackers intended to target civilians, as civilians could have been killed as a result of misdirected fire.

67 Nahimana Appellant's Brief, paras. 211-213, referring to the Judgement, paras. 1004, 1006, 1007, 1015, 1022.

68 Ibid., para. 212.

69 In this respect, the Appeals Chamber points out that the crime of direct and public incitement to commit genocide is punishable as such precisely because of the potential dangers inherent in discourse directly and publicly inciting the commission of genocide.

its author.⁷⁰ He bases his submission on paragraphs 1008 and 1009 of the Judgement:

1008. The Chamber notes that international standards restricting hate speech and the protection of freedom of expression have evolved largely in the context of national initiatives to control the danger and harm represented by various forms of prejudiced communication. The protection of free expression of political views has historically been balanced in the jurisprudence against the interest in national security. The dangers of censorship have often been associated in particular with the suppression of political or other minorities, or opposition to the government. The special protections developed by the jurisprudence for speech of this kind, in international law and more particularly in the American legal tradition of free speech, recognize the power dynamic inherent in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government. These circumstances do not arise in the present case, where at issue is the speech of the so-called “majority population”, in support of the government. The special protections for this kind of speech should accordingly be adapted, in the Chamber’s view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered.

1009. Similarly, the Chamber considers that the “wider margin of appreciation” given in European Court cases to government discretion in its restriction of expression that constitutes incitement to violence should be adapted to the circumstance of this case. At issue is not a challenged restriction of expression but the expression itself. Moreover, the expression charged as incitement to violence was situated, in fact and at the time by its speakers, not as a threat to national security but rather in defence of national security, aligning it with state power rather than in opposition to it. Thus there is justification for adaptation of the application of international standards, which have evolved to protect the right of the government to defend itself from incitement to violence by others against it, rather than incitement to violence on its behalf against others, particularly as in this case when the others are members of a minority group.

713. The Appeals Chamber has a certain difficulty with these paragraphs. It notes, on the one hand, that the relevant issue is not whether the author of the speech is from the majority ethnic group or supports the government’s agenda (and by implication, whether it is necessary to apply a stricter standard), but rather whether the speech in question constitutes direct incitement to commit genocide. On the other hand, it recognises that the political or community affiliation of the author of a speech may be regarded as a contextual element which can assist in its interpretation.

⁷⁰ Nahimana Appellant’s Brief, paras. 214-216.

714. In the final analysis, the Appeals Chamber is not persuaded that the Trial Chamber was in effect more inclined to conclude that certain speeches constituted direct incitement to commit genocide because they were made by Hutu or by individuals speaking in support of the Government at the time. In this respect, the Appeals Chamber notes that, in its analysis of the charges against the Appellants, the Trial Chamber made no reference to their political or community affiliation.⁷¹ The Appeals Chamber concludes that no error has been shown.

Conclusion

715. The Appeals Chamber is of the opinion that the Trial Chamber did not confuse mere hate speech with direct incitement to commit genocide. Moreover, it was correct in holding that the context is a factor to consider in deciding whether discourse constitutes direct incitement to commit genocide. For these reasons, the Appeals Chamber concludes that the Trial Chamber committed no error with respect to the notion of direct incitement to commit genocide.

III. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgement (TC), 2 December 2008, paras. 378-396

CHAPTER III: FREEDOM OF EXPRESSION BEFORE THE TRIBUNAL

378. Simon Bikindi has been charged with offences based upon acts of expression, namely musical compositions, musical disseminations using a vehicle outfitted with a public address system, as well as musical performances and speeches given both in person and broadcast over the radio.⁷² In this chapter, the Chamber will consider the customary international law on freedom of expression and the restrictions on this right before discussing how the law as discussed relates to the charges against Bikindi, specifically whether certain forms of expression are criminalised under the Statute.

FREEDOM OF EXPRESSION, THE RIGHT AND ITS LIMITS

379. There is a right to freedom of expression under customary international law. This is demonstrated by numerous international instruments which incorporate the right to freedom of expression, the widespread integration of such protections into domestic legal systems and the dispositions of numerous international, regional, and domestic courts that have interpreted such a right. Notably, all of the following international and regional instruments contain provisions protecting freedom of

71 Judgement, paras. 1016-1039.

72 Indictment, paras. 31-41, 48.

expression: the Universal Declaration of Human Rights (“UDHR”);⁷³ the International Covenant on Civil and Political Rights (“ICCPR”);⁷⁴ the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”);⁷⁵ the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”);⁷⁶ the American Convention on Human Rights (“ACHR”);⁷⁷ and the African Charter on Human and Peoples’ Rights (“ACHPR”).⁷⁸ These provisions have been widely incorporated into numerous domestic legal systems, and there exists widespread domestic jurisprudence supporting the right to freedom of expression.⁷⁹

380. However, this right is not absolute. It is restricted by the very same conventions and international instruments that provide for it. For example, the UDHR states that everyone should be free from incitement to discrimination.⁸⁰ Similarly, the ICCPR prohibits war propaganda, as well as the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence,⁸¹ and the CERD aims to outlaw all forms of expression that explicitly lead to discrimination.⁸² Each of the regional conventions mentioned above also restrict the freedom of expression: the ECHR recognises that there are “duties and responsibilities” that accompany the freedom of expression and thus limit its application;⁸³ the ACHR allows for legal liability regarding acts that harm the rights or reputations of others, or that threaten the protection of national security, public order, or public health or morals and considers as offences punishable by law any propaganda for war and advocacy of national, racial or religious hatred that constitute incitements to lawless violence;⁸⁴ and the ACHPR restricts the right to that which is “within the law”.⁸⁵ The Chamber notes that the restrictions on this right have been interpreted in the jurisprudence of the various adjudicating bodies created from the

73 Universal Declaration of Human Rights, A/RES/217, 10 December 1948, second paragraph of the Preamble and Article 19. While not binding, this Declaration is considered evidence of customary international law.

74 International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Article 19.

75 International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res 2106 (XX), Annex, 20 U.N. GAOR Supp. (No.14), U.N. Doc A/6014 (1966), 660 U.N.T.S. 195, Article 5. See also United Nations Declaration on the Elimination of All Forms of Racial Discrimination, G.A. res. 1904 (XVIII), 20 November 1963, Article 9.

76 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222, 312 ETS 5, as amended by Protocol No. 11 of 11 May 1994, Article 10(1).

77 American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, Article 13(1).

78 African Charter on Human and Peoples’ Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 U.N.T.S. 217, Article 9.

79 The Chamber finds it unnecessary for the purposes of this Judgement to exhaustively recite the jurisprudence based upon these provisions to support the fairly uncontroversial principle described herein.

80 UDHR, Article 7.

81 ICCPR, Article 20.

82 CERD, Article 4.

83 ECHR, Article 10(2).

84 ACHR, Articles 13(2) and (5).

85 ACHPR, Article 9(2). See also Articles 27(2), 28.

international⁸⁶ and regional instruments above.⁸⁷ The Chamber also notes that a large number of countries have banned the advocacy of discriminatory hate in their domestic legislation.⁸⁸

381. Prohibited expression can take different forms including incitement to hatred alone, to discrimination, or to violence. Given the varied approaches cited above, for the purposes of this Judgment the Chamber will use “hate speech” as an umbrella term for these forms of expression.

382. Hate speech is not criminalised per se under the Statute of the Tribunal, and the Chamber recognises the importance of protecting the right to freedom of expression. Protecting free expression is widely considered to allow for open debate on societal values, encourage artistic and scholarly endeavours, and lead to freedom of conscience and self-fulfilment. Due to such benefits, freedom of expression is widely considered to be the very foundation of successful democracies. In fact, a failure to protect expression may allow repressive regimes to flourish.⁸⁹

383. Nevertheless, the Chamber is of the opinion that there is a discernable hierarchy of expression, one which requires the Chamber to treat different forms of expression differently. Whereas most forms of expression clearly remain within the limits of the legality, others are unequivocally of a criminal nature and should be sanctioned as such.

384. The Chamber considers that international definitions of expression and speech are broad enough to include artistic expression such as songs. Expression has been defined as the freedom to “impart information and ideas”,⁹⁰ “either orally, in writing or in print, in the form of art, or through any other media of his choice”;⁹¹ and

86 See, for example, the following jurisprudence from the Human Rights Committee on Articles 19 and 20(2) of the ICCPR: *Ross v. Canada*, Communication No. 736/1997, UN Doc. CCPR/C/70/D/736/1997 (2000), Views of 18 October 2000; *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, UN Doc. CCPR/C/OP/2 at 25 (1984), Decision on admissibility of 6 April 1983; *Faurisson v. France*, Communication No. 550/1993, UN Doc. CCPR/C/58/D/550/1993 (1996), Views of 8 November 1996. See also the following jurisprudence from the Committee on the Elimination of Racial Discrimination on Article 14 of the CERD: *Hagan v. Australia*, Communication No. 26/2002, CERD/C/62/D/26/2002 (2003); *L.K. v. The Netherlands*, Communication No. 4/1991, CERD/C/42/D/4/1991 (1993).

87 See, for example, the following jurisprudence from the European Court of Human Rights on Article 10 of the ECHR: *Arslan v. Turkey*, Application No. 23462/94, Judgement of 8 July 1999; *Sürek and Özdemir v. Turkey*, Application No 23927/94, 24277/94. Judgement of 8 July 1999; *Incal v. Turkey*, Application No. 22678/93, Judgement of 9 June 1998; *Zana v. Turkey*, Application No. 19854/91, Judgement of 25 November 1997; *Jersild v. Denmark*, Application No. 15890/89, Judgement of 22 August 1994. See also the following jurisprudence from the Inter-American Court on Article 13 of the ACHR: *Olmedo Bustos et al. case*, Judgement of 5 February 2001, Inter-Am. Ct. H.R. (Ser. C.) No. 73 (2001). See also the following from the African Commission on Human and Peoples’ Rights on Article 9(2): *Amnesty International v. Zambia*, Communication No. 212/98 (1999); *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communication No. 102/93 (1998).

88 See *Nahimana et al.*, Judgement (TC), para. 1075, citing legislation banning hate speech from Germany, Vietnam, Russia, Finland, Ireland, Ukraine, Iceland, Monaco, Slovenia and China.

89 Cf. *Nahimana et al.*, Judgement (AC), Partly Dissenting Opinion of Judge Meron, para. 10: “overly permissive interpretations of incitement can and do lead to the criminalization of political dissent.”

90 UDHR, Article 19; ICCPR, Article 19(2); ECHR, Article 10(1); ACHR, Article 13(1).

91 ICCPR, Article 19(2); ACHR, Article 13(1).

“express and disseminate his opinions”.⁹² The speech prohibited has been defined broadly as “propaganda”,⁹³ “advocacy of [...] hatred”,⁹⁴ and the “dissemination of ideas”.⁹⁵ The Chamber therefore considers that the words accompanying a score of music are comparable from a legal perspective to the words used in a speech.

CRIMINALISATION UNDER THE STATUTE

385. The Prosecution alleges that Bikindi’s music and speeches constitute a gross and blatant violation of international norms on incitement to discrimination and violence.⁹⁶ The Chamber, however, is not concerned with the violation of general international legal principles, but whether an accused has committed the crimes with which he has been charged, and over which the Tribunal has jurisdiction.

386. The Chamber will therefore consider whether and how hate speech can constitute the crimes of direct and public incitement to commit genocide and persecution as a crime against humanity. The Chamber notes that under certain circumstances, a song or speech could be considered participation in a crime such as genocide or murder through aiding or abetting, inciting or even ordering the crime or evidence of conspiracy to commit genocide. However, the Chamber will not address this issue here, as this section is concerned with whether hate speech can constitute the actus reus of a crime in itself.

Hate Speech and Direct and Public Incitement to Commit Genocide

387. In order to be considered direct and public incitement to commit genocide, a speech must be a public and direct appeal to commit an act referred to in Article 2(2) of the Statute; it must be more than a vague or indirect suggestion.⁹⁷ To determine whether a speech rises to the level of direct and public incitement to commit genocide, context is the principal consideration,⁹⁸ specifically: the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience, i.e. whether the members of the audience to whom the message was directed understood its implication.⁹⁹ A direct appeal to genocide may be implicit; it need not explicitly call for

92 ACHPR, Article 9(2).

93 CERD, Article 4.

94 ICCPR, Article 20(2); ACHR, Article 13(5).

95 CERD, Article 4(a).

96 See Prosecution Closing Brief, paras. 240, 246.

97 Nahimana et al., Judgement (AC), para. 692, affirming Kajelijeli, Judgement (TC), para. 852, and Akayesu, Judgement (TC), para. 557. See also Report of the International Law Commission on the work of its Forty-Eight Session to the General Assembly, 51 UN ORGA, Supp. No. 10, UN Doc. A/51/10 (1996), Draft Code of Crimes Against the Peace and Security of Mankind, Article 2(3)(f), p. 26: “The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.”

98 Nahimana et al., Judgement (AC), paras. 701, 715.

99 Nahimana et al., Judgement (AC), paras. 700, 711, and 713; Niyitegeka, Judgement (TC), para. 431; Akayesu, Judgement, (TC), paras. 557-558.

extermination, but could nonetheless constitute direct and public incitement to commit genocide in a particular context.¹⁰⁰

388. While most direct and public incitements to commit genocide would be preceded or accompanied by hate speech, only the former, which actually calls for genocide, is punishable under Article 2(3)(c) of the Statute.¹⁰¹ The travaux préparatoires of the Genocide Convention supports this conclusion as the Genocide Convention was only intended to criminalise direct appeals to commit acts of genocide and not all forms of incitement to hatred.¹⁰²

389. Depending on the nature of the message conveyed and the circumstances, the Chamber does not exclude the possibility that songs may constitute direct and public incitement to commit genocide.¹⁰³

Hate Speech and Persecution as a Crime against Humanity

390. In contrast to the crime of direct and public incitement to commit genocide above, hate speech that does not directly call for genocide may, in certain contexts, constitute persecution as a crime against humanity.

391. The crime of persecution consists of an act or omission that discriminates in fact and that denies or infringes upon a fundamental right laid down in international customary or treaty law, and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.¹⁰⁴

392. Underlying acts of persecution need not be considered crimes in international law.¹⁰⁵ For example, harassment, humiliation, psychological abuse,¹⁰⁶ as well as denial of the rights of employment, freedom of movement, proper judicial process,

100 Nahimana et al., Judgement (AC), para. 703.

101 Nahimana et al., Judgement (AC), para. 692.

102 See Travaux préparatoires of the Genocide Convention, UN ORGA, 6th Committee, 3rd Session, 86th meeting, UN Doc. A/C.6/3/CR. 86, 28 October 1948, pp. 244-248, and UN ORGA, 6th Committee, 3rd Session, 87th meeting, UN Doc. A/C.6/3/CR. 87, 29 October 1948, pp. 248-254.

103 The Chamber notes that the language used in the Tribunal's jurisprudence on direct and public incitement to commit genocide, referring to a "direct appeal" and a "message" is broad enough to include song within incitement. The Chamber also notes the convictions in the Nahimana et al. trial for direct and public incitement to commit genocide were based on different media of speech, namely radio (RTL M programming) and print (Kangura newspaper). The Chamber emphasises the inclusive wording of Article 2(3)(f) of the Draft Code of Crimes Against the Peace and Security of Mankind according to which public incitement is characterised by a call for criminal action to a number of individuals in a public place or to members of the general public at large: Report of the International Law Commission to the General Assembly, 51 U.N. ORGA Supp. (No. 10), at 26, U.N. Doc. A/51/10 (1996). Lastly, the Chamber observes that in paragraph 283 of its Closing Brief, the Defence recognised that a song could incite killing if the composer's requisite intention to do so was clearly evident in the song.

104 Nahimana et al., Judgement (AC), para. 985, citing Krnojelac, Judgement (AC), para. 185 (citing with approval Krnojelac, Judgement (TC), para. 431); Simić, Judgement (AC), para. 177; Stakić, Judgement (AC), para. 327-328; Kvočka et al., Judgement (AC), para. 320.

105 The Chamber notes that although two judgements from the ICTY Appeals Chamber have stated that the underlying act of persecution must be considered a crime at international law (Blaškić, Judgement (AC), para. 139; Kordić and Čerkez, Judgement (AC), para. 103), this is inconsistent with more recent case law of the ICTR and ICTY Appeals Chambers (Nahimana et al., Judgement (AC), para. 985; Brđanin, Judgement (AC), para. 296; Kvočka et al., Judgement (AC), para. 323).

106 Kvočka et al., Judgement (AC), para. 325.

and proper medical care have been recognised as underlying acts of persecution.¹⁰⁷ It follows that it is not necessary to find that certain hate speech was in and of itself a crime under international law in order to regard such a speech as an underlying act of persecution. The Chamber is satisfied that hate speech may in certain circumstances constitute a violation of fundamental rights, namely a violation of the right to respect for dignity when that speech incites to hate and discrimination,¹⁰⁸ or a violation of the right to security when it incites to violence.¹⁰⁹

393. The Appeals Chamber recently recalled that the underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of equal gravity to the crimes listed under Article 3 of the Statute.¹¹⁰ It also held that hate speeches may be considered of equal gravity to the crimes listed under Article 3 of the Statute if they occur as part of a larger campaign of persecution.¹¹¹ In its determination, the Appeals Chamber considered the cumulative effect of all the underlying acts of the crime of persecution, namely the cumulative effect of the hate speeches and the direct calls to commit genocide broadcast in the context of a campaign of anti-Tutsi violence.¹¹²

394. The question remains as to whether hate speech occurring in isolation could be considered to be of equal gravity to the other crimes listed under Article 3.¹¹³ In such a scenario, the hate speech would occur without any other underlying acts of persecution, and as such, would be the only act discriminating against the group. However, given that a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds would have to be established in order to support a conviction for persecution under the Tribunal's Statute, the Chamber considers that the same facts that would lead it to find the existence of such an attack could also support a finding of many other underlying acts of persecution, as both must be committed on discriminatory grounds.¹¹⁴

107 Brđanin, Judgement (AC), paras. 295-297.

108 Nahimana et al., Judgement (AC), para. 986, citing the UDHR, the Preamble of which expressly refers to the recognition of dignity inherent to all human beings, while the Articles set out its various aspects. See also Kvočka et al., Judgement (AC), paras. 323-325, in which the Appeals Chamber found that violations to human dignity (harassment, humiliation, and psychological abuse) could, if sufficiently serious, constitute acts of persecution.

109 Nahimana et al., Judgement (AC), para. 986, citing Article 3 of the UDHR ("Everyone has the right to life, liberty and security of the person").

110 Nahimana et al., Judgement (AC), paras. 985, 987. See also Brđanin, Judgement (AC), para. 296; Simić, Judgement (AC), para. 177; Kvočka et al., Judgement (AC), para. 321.

111 See Nahimana et al., Judgement (AC), paras. 985, 987.

112 Nahimana et al., Judgement (AC), para. 987.

113 The Chamber notes that the Appeals Chamber alluded to this issue in Nahimana et al., Judgement (AC), para. 987: "The Appeals Chamber is of the view that it is not necessary to decide here whether, in themselves, mere hate speeches not inciting violence against the members of a group are of a level of gravity equivalent to that for other crimes against humanity."

114 While the Chamber acknowledges a conceivable scenario in which the victims of the widespread or systematic attack differed based on discriminatory grounds from those targeted in the act of persecution (if the widespread or systematic attack were committed on national grounds, this would differ from the three grounds on which persecution may be committed, namely political, racial or religious grounds), the Chamber deems it unnecessary to discuss such a scenario in great detail given the circumstances of the cases of which the Tribunal is seized.

Finally, depending on the message conveyed and the context, the Chamber does not exclude the possibility that songs may constitute persecution as a crime against humanity.¹¹⁵

CONCLUSION

395. The Chamber appreciates the precarious nature of restricting speech and discouraging political opinion through the criminalisation of certain kinds of expression. Although the Statute does not criminalise acts of expression per se, the inclusion of expressive acts within the underlying elements of the crimes under the jurisdiction of the Tribunal comes close to having such an effect. However, the Chamber is of the opinion that there is a discernable hierarchy of expression, one which requires the Chamber to treat different forms of expression differently. In fact, because of the serious nature of the crimes involved – persecution as a crime against humanity and direct and public incitement to commit genocide – it would be injudicious for the Chamber to treat the seeds of such grievous acts in the same fashion as any other act of expression, especially when accompanying a recognisable campaign of ongoing persecution or genocide.

396. While there is murky ground between some forms of expression, at some point, in the words of Judge Shahabuddeen, “[n]o margin of delicate appreciation is involved.”¹¹⁶ There are cases that are made up of simple criminality, in which the perpetrators know what they are doing and why they are doing it.¹¹⁷ These are the cases that will be punished under the Statute, no less.

ANNEXE - II

115 The Chamber notes the definition of persecution is broad enough to include music, as the actus reus of persecution is merely defined as an act or omission which discriminates in fact and which denies or infringes upon a fundamental right. See also the Nahimana, et al., Judgement (TC), paragraph 1081 in which Ferdinand Nahimana was convicted of persecution based on the programming of the radio station, RTLM, under Articles 6(1) and 6(3) (only Article 6(3) liability affirmed by the Appeals Chamber).

116 Nahimana et al., Judgement (AC), Partly Dissenting Opinion of Judge Shahabuddeen, para. 73.

117 Nahimana et al., Judgement (AC), Partly Dissenting Opinion of Judge Shahabuddeen, para. 73.

B - AFRICAN CONVENTION ON HUMAN AND PEOPLES' RIGHTS

Charte Africaine des droits de l'homme et des peuples, adoptée le 27 juin 1981 à Nairobi, Kenya, lors de la 18^e Conférence de l'Organisation de l'Unité Africaine (OUA). Entrée en vigueur le 21 octobre 1986, après ratification de la Charte par 25 Etats.

Préambule : « ...Conscients de leur devoir de libérer totalement l'Afrique dont les peuples continuent à lutter pour leur indépendance véritable et leur dignité et s'engageant à éliminer le colonialisme, le néocolonialisme, l'apartheid, le sionisme, les bases militaires étrangères d'agression et toutes formes de discrimination, notamment celles fondées sur la race, l'ethnie, la couleur, le sexe, la langue, la religion ou l'opinion politique ».

Article 2: « Toute personne a droit à la jouissance des droits et libertés reconnus et garantis dans la présente Charte sans distinction aucune, notamment de race, d'ethnie, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation ».

Article 8: « La liberté de conscience, la profession et la pratique libre de la religion, sont garanties. Sous réserve de l'ordre public, nul ne peut être l'objet de mesures de contrainte visant à restreindre la manifestation de ces libertés ».

Article 9: « 1. Toute personne a droit à l'information. 2. Toute personne a le droit d'exprimer et de diffuser ses opinions dans le cadre des lois et règlements ».

Article 19: « Tous les peuples sont égaux ; ils jouissent de la même dignité et ont les mêmes droits. Rien ne peut justifier la domination d'un peuple par un autre ».

Article 28: « Chaque individu a le devoir de respecter et de considérer ses semblables sans discrimination aucune, et d'entretenir avec eux des relations qui permettent de promouvoir, de sauvegarder et de renforcer le respect et la tolérance réciproques ».

ANNEX II

C – MANDEN CHARTER

Traduction de Youssouf Tata Cissé et Jean-Louis Sagot-Duvaurox extraite de l'ouvrage
d'Aboubakar Fofana aux Editions Albin Michel (Paris, 2003)

Le Mandé fut fondé sur l'entente et la concorde, l'amour, la liberté et la fraternité. Cela signifie qu'il ne saurait y avoir de discriminations ethnique ni raciale au Mandé. Tel fut l'un des buts de notre combat. Par conséquent, les enfants de Sanéné et Kontron font, à l'adresse des douze parties du monde, et au nom du Mandé tout entier, la proclamation suivante :

Les enfants de Sanéné et Kontron déclarent :

Toute vie humaine est une vie.

Il est vrai qu'une vie apparaît à l'existence avant une autre vie,

Mais une vie n'est pas plus « ancienne »,

Plus respectable qu'une autre vie,

De même qu'une vie ne vaut pas mieux

Qu'une autre vie.

Les enfants de Sanéné et Kontron déclarent :

Toute vie étant une vie,

Tout tort causé à une vie exige réparation.

Par conséquent,

Que nul ne s'en prenne gratuitement à son voisin,

Que nul ne cause du tort à son prochain,

Que nul ne martyrise son semblable.

Les enfants de Sanéné et Kontron déclarent :

Que chacun veille sur son prochain,

Que chacun vénère ses géniteurs,

Que chacun vénère ses enfants,

Que chacun pourvoie aux besoins

Des membres de sa famille.

Les enfants de Sanéné et Kontron déclarent :

Que chacun veille sur la terre de ses pères.

Par patrie, pays, ou terre des pères,

Il faut entendre aussi et surtout les hommes :

Car tout pays, toute terre qui verrait les

Hommes disparaître de sa surface

Connaîtrait le déclin et la désolation.

Les enfants de Sanéné et Kontron déclarent :

La faim n'est pas une bonne chose,

L'esclavage n'est pas non plus une bonne chose ;

Il n'y a pire calamité que ces choses-là,

Dans ce bas monde.

Tant que nous disposerons du carquois et de l'arc,

La famine ne tuera personne dans le Mandé,

Si d'aventure la famine survient.

La guerre ne détruira plus jamais de village

Pour y prélever des esclaves ;

C'est dire que nul ne placera désormais
 Le mors dans la bouche de son semblable
 Pour aller le vendre ;
 Personne ne sera non plus battu au Mandé,
 A fortiori mis à mort,
 Parce qu'il est fils d'esclave.
 Les enfants de Sanéné et Kontron déclarent :
 L'essence de l'esclavage est éteinte ce jour,
 « D'un mur à l'autre »,
 D'une frontière à l'autre du Mandé ;
 Les razzias sont bannies
 A compter de ce jour au Mandé ;
 Les tourments nés de ces horreurs
 Disparaîtront à partir de ce jour au Mandé.
 Quelle horreur que la famine !
 Un affamé ignore
 Toute pudeur, toute retenue.
 Quelle souffrance épouvantable
 Pour l'esclave et l'affamé,
 Surtout lorsqu'ils ne disposent
 D'aucun recours.
 L'esclave est dépouillé
 De sa dignité partout dans le monde.
 Les gens d'autrefois nous disent :
 « L'homme en tant qu'individu
 Fait d'os et de chair
 De moelle et de nerfs,
 De peau recouverte de poils et de cheveux
 Se nourrit d'aliments et de boissons ;
 Mais son âme, son esprit vit de trois choses :
 Voir ce qu'il a envie de voir,
 Dire ce qu'il a envie de dire,
 Et faire ce qu'il a envie de faire.
 Si une seule de ces choses
 Venait à manquer à l'âme,
 Elle en souffrirait,
 Et s'étiolerait sûrement. »
 En conséquence, les enfants
 De Sanéné et Kontron déclarent :
 Chacun dispose désormais de sa personne,
 Chacun est libre de ses actes,
 Dans le respect des « interdits »,
 Par la loi de sa patrie.
 Tel est le Serment du Mandé
 A l'adresse des oreilles du monde tout entier.