

WHAT IS THE LEGAL FRAMEWORK FOR
AND BASIS FOR BRINGING A CHARGE RELATED TO
PROPAGANDA UNDER THE RWANDA AND YUGOSLAVIA
TRIBUNALS' STATUTE?

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What is the legal framework and basis for bringing a charge related to propaganda under the Rwanda and Yugoslavia Tribunals' Statute?

"Unless we write the record to this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence."

Robert Jackson ¹

"If humanitarian intervention by war was sometimes justified, humanitarian intervention by international law was even more definitely warranted. Dictators should be warned that if they infringed upon human rights, they acted at their own risk and that international law would condemn them."

Sir Hartley Shawcross ²

I INTRODUCTION

We cannot build safely on shaky foundations and therefore we must ensure that the framework and basis for bringing any charges in this tribunal are firm enough to protect the rights of the accused and sufficient enough to withstand the fiercest opposing elements which sometimes arise in the search for justice.

In the former Yugoslavia, Serbs, Croats and Muslims fought against each other to gain control over specific territories, ³ and in Rwanda the Hutus fought against the Tutsis to completely subjugate them and control the reins of government.⁴ Following a missile attack on a plane in which the Hutu President and his entourage were traveling, the

¹ Report of Robert Jackson to the President on International Military Tribunal, 5 (1945).

² UN. GAOR 1st Sess. at 101, UN. Doc. *NC*. 6/84 (1946).

³ Final Report of the Commission of Experts Pursuant to Security Council Res. 780, UN. SCOR, 49th Sess., Annex, at 3, UN. Doc. S/674 (1994), Paragraphs 129 and 150. (Hereinafter Report of the Commission of Experts for Yugoslavia).

⁴ Final Report of the Commission of Experts Pursuant to Security Council Res. 935 (1994), UN. SCOR, 49th Sess., Annex, at 3, UN. Doc. S/1405 (1994), Paragraph 55. (Hereinafter Report of the Commission of Experts for Rwanda).

Rwanda Ministry of Defense used national radio to broadcast hate messages,⁵ and a privately owned radio station known as Mille Collines exhorted Hutus to kill Tutsis,⁶ resulting in the slaughter of several thousands. The Serbs mass-murdered thousands of Muslims and Croats in an effort to ensure that they would not return to any of those areas which they hoped to make their strongholds, and the Muslims and Croats did the same. Propaganda played a part in both instances.⁷

Those who killed apparently killed with authority. If propaganda was a motivating force, then we need to examine the kinds of propaganda that were in circulation and decide to what degree it was intended to, and did bring about the atrocities that actually took place. When does propaganda cease to be protected free speech and what standards could the tribunal apply to determine whether the propaganda was in fact an incitement to the specific acts that occurred?

Since the risk of the destabilization of Rwanda still exists, the search for justice becomes more pressing in order to re-establish the path of democracy. Section II of this Memorandum will discuss the background and structure of the tribunals generally. Section **III** will address the scope of the offenses with regard to Rwanda. Section IV will discuss the applicability of the law to the facts as they pertain to the atrocities committed in Rwanda and Section V will present some concluding remarks on the effectiveness of the framework.

⁵ Reuters World Service, April 15, 1994. Available in Lexis-Nexis News Library, World News File

⁶ Reuters News Service, Africa, April 4, 1996. Available in Lexis- Nexis News Library, World News File

⁷ Report of the Commission of Experts for Yugoslavia, supra note 3, at paragraph 133.

II

BACKGROUND AND STRUCTURE

A. Background:

The situation in Rwanda and the former Yugoslavia posed a threat to international peace and security which triggered the Security Council's mandatory authority to act under Chapter VII of the U.N. Charter.⁸ By a Resolution dated February 22, 1993⁹, the UN Security Council determined to establish an international war crimes tribunal with the object of prosecuting flagrant violations of international humanitarian law occurring in the territory of the former Yugoslavia. Reports of persistent and systematic mass murders, rape of women and all acts to further the scheme of ethnic cleansing called for the creation of an ad hoc criminal court in the absence of a permanent International Criminal Court. By a Resolution dated November 8, 1994,¹⁰ the Security Council adopted a similar measure with respect to grave human rights violations arising out of the massacre of half a million Tutsis by Hutus in Rwanda. The authority for the tribunals' subject matter jurisdiction over genocide stems from Resolution 96(1) of the General Assembly of the United Nations, dated December 11, 1946,¹¹ which designated genocide a crime under international law. The International Court of Justice has also declared that genocide is a crime under international law.¹²

⁸ Chapter VII, United Nations Charter.

⁹ S.c. Res SOS, UN. SCOR, 48th Sess., 3175th mtg. at 2S, UN. Doc. S/RES/SOS (1994).

¹⁰ S.C. Res 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, UN. Doc. S/RES/955 (1994).

¹¹ S.c. Res 96(1). UN. Doc. S/96 (I) (1946).

¹² Id.

Article 6 of the Nuremberg Charter¹³ defined three categories of crimes over which the International Military Tribunal would have jurisdiction: (a) crimes against peace; (b) war crimes; and (c) crimes against humanity. The Security Council applied Article 6(c) of the Nuremberg Charter and the Genocide Convention,¹⁴ to establish the framework of the Yugoslavia and Rwanda Tribunals. Crimes against humanity are defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war; or other persecutions..... whether or not in violation of the domestic law of the country where perpetrated."¹⁵

Although both the Yugoslavia and Rwanda Tribunals are based on the Genocide Convention and the Nuremberg Charter which establish international jurisdiction, the conflicts in Yugoslavia and Rwanda were not of the same nature. The Yugoslavia conflicts were both of an internal and international character. The Rwanda conflict was essentially internal - a civil conflict. The legal basis for the Tribunals is found in the Security Council resolutions which give the Tribunals power to prosecute persons responsible for serious violations of humanitarian law.

B. Structure (Personal Jurisdiction) Article 6 gives the Tribunal jurisdiction over persons generally¹⁶ and Article 7 gives the Tribunal jurisdiction over persons, not part of

¹³ Charter of the International Military Tribunal, August 8, 1945, 59 Stat. at 1544, 82 UNTS 280 (hereinafter the Nuremberg Charter).

¹⁴ Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 UNTS 277 (entered into force Jan. 12, 1951) (hereinafter the Genocide Convention).

¹⁵ The Nuremberg Charter, supra note 12, art. 6(c).

¹⁶ Article 6: The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present statute.

the government, who shall be individually responsible for violations. This article augments Article 4 which confers jurisdiction over conspiracy, incitement, attempt and complicity with regard to genocide.

Article 7(2) establishes that there shall be no head of state immunity or any other immunity based on the accused's official position. Article 7(3) makes a superior officer responsible for acts committed by subordinates, of which he knew or ought to have known.

iii **PROPAGANDA**

A. As Addressed By The Nuremberg Judgment

A dictionary definition of propaganda is: "the dissemination of ideas, information or rumor for the purpose of helping or injuring an institution, cause or person; doctrines, ideas, arguments, facts or allegations spread by deliberate effort through any medium of communication in order to further one's cause or to damage an opposing cause." ¹⁷

Following World War II an International Military Tribunal in Nuremberg, Germany, was set up to try major German war criminals for the atrocities which took place.

1. Streicher case.

Julius Streicher was one of the 21 accused before the International Military Tribunal, and was indicted on Count 1 - Crimes against peace and Count 4 - crimes against humanity. Crimes against peace are defined as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements

ii Webster's Third New International Dictionary 1817 (3ded. 1986).

or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" - Article 6(a) of the Nuremberg Charter.¹⁸ He was acquitted of Count 1 but found guilty on Count 4 - which includes murder, extermination, deportation and incitement to do such acts.¹⁹ Streicher was viewed by the prosecution as the chief propagandist of anti-Semitism. He was the publisher, editor-in-chief, and eventual owner of the nationally distributed anti-Semitic weekly journal, "Der Stuermer" 1923-1945 ,²⁰ along with a few other local journals. He also developed a substantial crowd of supporters through his own anti-Communist and anti-Semitic speeches in the post World War I years, until he met Hitler and joined the Nazi ranks in 1922.²¹ The banner slogan of "Der Stuermer" was, "The Jews are Our Misfortune." Hitler appointed him to the party rank of Gauleiter for the area of Franconia in Northern Bavaria where he ordered the destruction of the main synagogue and was also accused of a massive "orgy of looting, arson, harassment of Jews and destruction of synagogues, homes and businesses."²² Yet it was his journalism that made him a propagandist.

Streicher was widely known as "Jew-Baiter Number One," because for 25 years he constantly spoke, wrote and preached hatred of the Jews.²³ "Week after week, month

¹⁸ Nuremberg Charter, supra note 13, art. 6(a).

¹⁹ Nuremberg Charter, supra note 13, art. 6(c).

²⁰ The Nuremberg Trial: Official Text of Judgment. 6 Federal Rules Decisions 69, at 161 (hereinafter Nuremberg Judgment).

²¹ Nuremberg Judgment, at 161.

²² Nuremberg Judgment, at 162

²³ Id at 162.

after month, he infected the German mind with the virus of Anti-Semitism and incited the German people to active persecution." "Der Steurmer" contained obscene cartoons, instructions for anti-Jewish campaigns, and lists of Jewish doctors, dentists and shopkeepers whom "Aryans" were advised to avoid. The Prosecution put the defendant's speeches and publications into evidence to illustrate the intensity and quantity of his portrayal of the Jews as the main source of evil, and his insistence on the necessity of their extermination. ²⁴ Between 1938-1941, twenty-three different articles of "Der Steurmer" showed preachings of extermination "root and branch".

A leading article in September 1938 termed the Jew, a germ and a pest, not a human being, but a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interests of mankind. Other articles urged that only when world Jewry was annihilated would the Jewish problem have been solved, and that fifty years hence the Jewish graves will proclaim that this people of murderers and criminals has after all met its deserved fate. ²⁵

May 1939: A leading article stated, "A punitive expedition must come against the Jews in Russia, a punitive expedition which will provide the same fate for them that every murdered and criminal must expect - death sentence and execution. The Jews in Russia must be killed. They must be exterminated, root and branch. ²⁶

²⁴ Id. at 162.

²⁵ Id. at 162

²⁶ Nuremberg Judgment, supra note 20, at 162

In February 1940 Streicher published a letter from one of his "Der Steurmer" readers who compared Jews with swarms of locusts which must be exterminated completely. ²⁷

As the war grew more and more successful, Streicher intensified his efforts to incite Germans against the Jews. Between August 1941 and September 1944, there were twenty-six articles from "Der Steurmer", twelve of which were written by Streicher, demanding the annihilation and extermination in unequivocal terms.

In addition to Streicher's publications there was evidence of his knowledge of the atrocities that were taking place in the occupied Eastern Territory because he continually received current information on the progress of "the final solution." His press photographer was sent to the ghettos in the East in the Spring of 1943 at the time of the destruction of the Warsaw ghetto. ²⁸ There was also evidence that he read a Jewish newspaper, "Israelitisches Wochenblatt," which told of atrocities in the East and said how many Jews had been deported and killed. He quoted verbatim from the source "that the Jews had virtually disappeared from Europe," and he commented, "This is not a Jewish lie." ²⁹

Streicher wrote in his journal that he was aware that his own incitement to extermination had been achieved through the final solution. ³⁰ The Prosecutor noted that

²⁷ Id. at 162

²⁸ Id. at 163

²⁹ Nuremberg Judgment, supra note 20, at 163.

³⁰ Nuremberg Judgment, at 163.

Hitler had also mentioned extermination as a solution in his book, "Mein Kampf,"³¹ but since this was published before the war, it could not be adduced in evidence under Article 6(c) of the Nuremberg Charter - the provision for crimes against humanity, which covered acts done during the war.

Streicher never held high national office, nor did he operate a state sponsored business. During the war years "Der Stürmer's" circulation fell to about 500,000, from about 800,000 before the war. Nevertheless the Prosecution submitted that he made persecution and extermination possible. "Without Streicher and his propaganda, the Kaltenbrunnners, the Himmlers, the General Troops would have had nobody to do their orders."³² The Tribunal found that Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constituted persecution on political and racial grounds in connection with war crimes.³³ "Der Stürmer" would not have continued publication during the war years without Hitler's permission, yet the very nature of the evidence presented against (him) belies the public connection.³⁴ The Nuremberg Tribunal did not explore the role of a private person, operating a private journal which encouraged conduct which was adopted as state policy, and which was instrumental in the killings that occurred. Incitement was not proved. He was found guilty of conspiracy to commit crimes against humanity.

³¹ Nuremberg Judgment, at 163.

³² 4 The Trial of German Major War Criminals, 171 (1946).

³³ Nuremberg Judgment, supra note 20, at 163.

³⁴ Donna Artz, Nuremberg, Denazification and Democracy: The Hate Speech Problem, 12 N.Y.L. Sch. 1. Hum. Rts. 689, at 720.

Throughout the cross-examination, the Prosecutor, Lieutenant Colonel Griffith-Jones, read out various articles from "Der Steurmer", and Streicher made rambling explanations when questioned. Streicher was a purveyor of spurious ideas but that was his right, the right to think and disseminate his thoughts. There was no evidence that his words and his stated intent actually influenced those who killed. Article 6³⁵ provides that "there shall be individual responsibility" for certain crimes and section (c) mentions murder, extermination etc. There was no evidence that Streicher murdered anybody. He published his ideas; he declared an intent; there were killings. The fact that Hitler mentioned extermination in his book, "Mein Kampf" is indicative of the fact that he also entertained those thoughts and pursued them when he assumed power. Streicher was never part of that power machine. The Prosecution never proved a link between "Der Steurmer's" publications and the killings that took place. Streicher's defense was that he wanted to segregate the Jews. He was convicted of conspiring to commit crimes against humanity. It seems as if his guilt was determined by association since his magazine could not have rallied during the war years without Hitler's support. On the other hand there were others who were closely associated with Hitler yet escaped liability.

2. The Fritzche case.

Hans Fritzche was a government official. He was head of the Home Press Division and also head of the Radio Division in 1942, and was acquitted of crimes against humanity.³⁶ This was surprising since the Radio Division was one of the twelve divisions of the Propaganda Ministry. He was present at Goebbels' daily staff conferences where

³⁵ Nuremberg Charter, supra note 13.

³⁶ The Nuremberg Judgment, supra note 20. at 187.

speeches were of an anti-Semitic nature, but the Court held that there was no evidence that he was aware of the exterminations in the East. There was evidence that he made two unsuccessful attempts to suppress the publication of "Der Steurmer." "It appears that Fritzche sometimes made strong statements of a propagandist 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.... His aim was rather to arouse popular sentiment in support of Hitler and the German war effort." ³⁷ The Dissent of the Soviet Union, ³⁸ questioned lack of responsibility of someone holding such an influential position. The Soviet Judge submitted that as Political Director of German Radio until the end of the war, Fritzche must have been responsible for the false and provocative broadcasts whose aim was to encourage the war effort through propaganda. He was in a position to know and ought to have known, but the Tribunal accepted his defense of lack of knowledge of the exterminations. Morris and Scharf³⁹ express the view that "the Nuremberg Charter did not recognize any defenses to the crimes contained therein other than the right of the defendant to offer an alibi or to refute the charges," and that the Bench acquitted in instances where they determined that the Prosecution failed to prove their case beyond a reasonable doubt. The issue of responsibility is now addressed in Article 7 of the Statute of the International Tribunals for Yugoslavia and Rwanda.

³⁷ Id. at 187

³⁸ Id. at 193

³⁹ Virginia Morris and Michael Scharf, An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia, 104 (1995).

All of the 21 individual defendants on trial before the International Military Tribunal, except Streicher, were in positions of authority in the government, or in the military establishment. The Bench found 17 of them guilty, and ten of those were sentenced to death.⁴⁰ Their crimes were too heinous to escape punishment.

B The Genocide Convention and Freedom of Speech

Article **III** of the Genocide Convention makes the following acts punishable a) genocide; b) conspiracy to commit genocide; c) direct and public incitement to commit genocide.⁴¹ A dictionary definition of to incite is: to stir up, to urge on; to goad; to instigate or encourage others to initiate actions or feelings often questionable.⁴² Propaganda can therefore reach the level where it stirs up someone to act. Article II of the Convention provides the mens rea of genocide which is "the intent to destroy, in whole or in part, a national, ethnic, racial or religious group."⁴³ Therefore the direct and public incitement to commit genocide must be with the intent as stated above.

The drafters of the Convention when considering "incitement to commit genocide" - Article **III** (c), were rather concerned about its effects on free speech. The U.S. Representative, Mr. Maktos, proposed the deletion of the entire paragraph. He expressed the view that incitement to commit genocide should be punishable only if the incitement created an imminent threat to genocide, and in such cases it should be punished as an attempt or as an overt act of conspiracy to commit genocide. He further stated that the

⁴⁰ The Nuremberg Judgment, supra note 20, at 187.

⁴¹ The Genocide Convention, supra note 14.

⁴² Black's Law Dictionary 762 (6th ed. 1990).

⁴³ The Genocide Convention, supra, note 40

provision was so broad that "any newspaper article criticizing a political group, or suggesting certain measures with regard to such group for the general welfare, might make it possible for certain States to claim that a Government was committing an act of genocide; and yet such an article might be nothing more than the mere exercise of the right of freedom of the press." ⁴⁴ His proposed deletion of paragraph (c) was defeated.

The Soviet Union proposed adding a sub-paragraph (f) to Article III which prohibited "all forms of public propaganda (press, radio, cinema etc.) aimed at inciting racial, national and religious enmities or hatreds or at provoking the commission of acts of genocide." ⁴⁵ The Czechoslovakian representative argued in support that it was better to provide for preventive measures in the Convention than to wait for thousands of human lives to be sacrificed and then take punitive measures. Mr. Maktos for the United States and Mr. Fitzmaurice for the United Kingdom respectively argued that prohibition of propaganda inciting group hatred or provoking genocide could be used as a pretext for controlling freedom of the press, and that it would make it difficult for those States to ratify the Convention which recognized the right of any organization, whether political or not, to hold meetings and to express its opinions freely.⁴⁶ The supporters of the Soviet Union, particularly Mr. Lachs of Poland and Mr. Demesmin of Haiti were of the opinion that prevention of genocide was more important than the basic rights of freedom of the press that was being sacrificed. Mr. Lachs did not think that US. concern for freedom of

⁴⁴ U.N. GAOR, 3rd Sess., Pt. 1, 213 (1948).

⁴⁵ *Id.* at 234.

⁴⁶ U.N. GAOR, 3rd Sess. *supra* note 43, at 251.

the press was appropriate in this case, for that freedom was not so great to permit the press to engage in incitement to genocide. Mr. Maktos affirmed that a clear line had to be drawn between acts which were punishable and those which were not. The Soviet proposal was defeated. The US. representative's arguments were based on the distinction made in US. jurisprudence between freedom of speech and incitement.

C. American Jurisprudence and Freedom of Speech

The First Amendment of the US. Constitution states, "Congress shall make no lawabridging the freedom of speech or of the press;..."⁴⁷ Freedom of speech and freedom of the press are basic rights in the US. jurisprudence. However freedom of speech is not absolute. The case of Chaplinsky v. New Hampshire⁴⁸ established the bounds between free speech and fighting words or incitement.

The defendant in this case was distributing religious literature in a public place when he began to denounce all religion as a "racket." This annoyed the local people who complained to the City Marshall. There was a disturbance and it seemed as if a riot was under way. When the City Marshall warned the defendant about his comments he began calling him names. He was arrested and later convicted under a local law which prohibited addressing any person lawfully in the street or in any other public place by any offensive or derisive name with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation. On appeal, the Supreme Court stated that the right to free speech is not absolute. "Insulting or fighting words - those which by their very

⁴⁷ First Amendment, U.S. Constitution.

⁴⁸ Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766 (1942)

utterance inflict injury or tend to incite an immediate breach of the peace,,⁴⁹ are not protected. Such speech did not contribute to the market place of ideas. However insulting the language it must "tend to incite an immediate breach of the peace."

The Nuremberg Tribunal recognized "Der Steurmer" not only as a forum for the expression of ideas, but of ideas which were clearly meant to urge its readers to commit acts of violence. They identified this as the point where propaganda crossed the threshold and became a blatant incitement to kill.

Speech can be denoted by action and despite the fact that flag-burning in the U. S. tends to cause anger in many, the Supreme Court held in Texas v. Johnson⁵⁰ that the defendant's burning a flag during a protest rally was an expression of his views and was protected by the First Amendment. The State of Texas argued that flag burning is likely to cause a breach of the peace and therefore they had an interest in preventing such breaches. **In** fact no such breach occurred when the defendant burned the flag in violation of a Texas statute. The court said that the State's interest could not override the defendant's right to express his views. "We have not permitted the government to assume that every expression of a provocative idea will incite a riot,,⁵¹

American jurisprudence protects propaganda even when it manifests itself as hate speech, since it is an expression of a viewpoint contributing to the marketplace of ideas, however revolting to the ear or eyes of some people. Any laws purporting to protect any group of people from this kind of conduct have been held to be unconstitutional, as was

⁴⁹ Chaplinsky, supra note 47, at 571

⁵⁰ Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533 (1989).

⁵¹ Texas v. Johnson, supra note 50, at 408.

held in R.A.y. v. St. Paul ⁵² where a local ordinance prohibited placing on private property any symbol or object or graffiti "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender...⁵³ This case did not involve speech in the form of words but activity which symbolized words. The courts have held that nonverbal expressive activity can be banned because of the action it entails but not because of the ideas it expresses. Symbols which deride a group of people are similar to hate speech. They are protected. The ordinance in this case not only proscribed speech, but it did so on a selective basis. This was an example of content and viewpoint discrimination. The law prohibited "fighting words" because they were based on virulent notions of racial supremacy ⁵⁴.

The Court reiterated that fighting words are not protected, because of their content - however intolerable- but because they communicate ideas in a threatening manner. The drafters of the Convention were made aware of the difference between propaganda and incitement. Since the Rwanda Statute was based on the Genocide Convention its interpretation will reflect in part the concepts of propaganda reflected in the Convention.

C. The 1994 Rwanda Massacres and Ethnic Cleansing in the former Yugoslavia

On April 6 1994 the Rutu President and his entourage were killed when their plane was attacked. This event served as the catalyst for the large scale violations against

⁵² RAVv. 51. Paul, Minnesota, 505 U.S. 377,112 S. Cl. 2538 (1992)

⁵³ Id at 379

⁵⁴ Id. at 391

international humanitarian law that followed.⁵⁵ The murders began almost immediately. A privately owned radio station, Radio Mille CoUines exhorted Hutus to kill “cockroaches,” a term of abuse for Tutsis, and urged them to fill “half empty graves” with Tutsis. Tens of thousands of Rwandans complied. “Pick up your machetes, pick up your guns. Remember that our movement starts from the smallest cell, from villages. Crush the cockroaches. Fight them and pound them. Take your spears, guns, clubs, swords, stones, everything. Sharpen them. Hack those enemies, those cockroaches.” Radio Rwanda, as late as July 1994, was also conducting hate messages and sometimes denying that the massacres were taking place. These radio hate messages intensified the house to house slaughter.⁵⁶

These messages were not merely disparaging views of Tutsis - referring to them as “cockroaches”, they exhorted the listeners to kill. Under the Nuremberg Charter such broadcasts were seen as a conspiracy to incitement. The Genocide Convention prohibited the use of the press for hate messages. The Hutu broadcasts were meant to foment the existing hatred for Tutsis and in the aftermath of the assassination of their President, there was likely to be a break down of law and order.

The situation in Yugoslavia was more organized and drawn out. Propaganda was indeed used. **In** the region of Opstina-Prijedor which the Serbs gradually took over from the Muslims, the local media, Radio Prijedor and Kozarski Vjesnik, joined in the anti-non-Serb propaganda. The media slandered former non-Serbian leaders by criticizing

⁵⁵ Supra, note 2, paragraphs 56, 58

⁵⁶ Reuter's News Service - Africa: April 4, 1996. Lexis- Nexis News.

everything from their alleged lack of efficiency to their private lives. The media also fomented hatred and fear against the Muslims by claiming that groups were in the area planning genocide against the Serbs.⁵⁷ Paramilitary units were also operative amongst all groups i.e. Serbs, Croats, and Muslims and did the bidding of their local leader, sometimes with the approval of senior political officials.⁵⁸ Hence the military were largely in charge of the widespread rape and atrocities in pursuit of ethnic cleansing.

IV LEGAL DISCUSSION OF THE TRIBUNAL STATUTES AS APPLIED TO RWANDA AND YUGOSLAVIA.

The radio broadcasts urging Hutus to kill come within the definition of genocide in Article 4, because of the overall intent to destroy, in whole or in part, people of an ethnic group. Article 4 Sec. 3(c) provides for a direct and public incitement to commit genocide.⁵⁹ The radio messages were a public form of address, to a specific group, the Hutus; and they incited them to kill the Tutsis, not selectively, but all Tutsis. Those who conveyed those messages did so with intent that their listeners would act upon them. As stated in Chaplinsky, those messages were "fighting words." They evoked an immediate response leading to a breakdown of law and order. As discussed in R.A.V. v. Sf. Paul, it is not because of the rhetoric about the Tutsis but because of the threatening tenor of the messages. The commands were instant, requiring immediate action. They were directed to the public at large and they were capable of being acted upon. While the messages were merely disparaging Tutsis, however painful and shocking to that group and others,

⁵⁷ The Report of the Commission of Experts for Yugoslavia, supra note 3, paragraph 162.

⁵⁸ The Report of the Commission of Experts for Yugoslavia, supra note 3, paragraph 121.

⁵⁹ The Genocide Convention, Supra note 14.

that was propaganda, but the moment those messages became capable of being turned into instant action, they became "fighting words." However in the spirit of the Genocide Convention, Article III (c), there is no distinction between the promulgation of hate messages and hate messages which evoked an immediate response in the massacres. Therefore under Article 4 Sec.3(c) any public broadcast of a hate message, regardless of its effects, constitutes an incitement to commit genocide. Any inflammatory statements may qualify. This is what the U.S. representative was arguing against in the drafting debates. The scope is indeed wide to prosecute those who made mindless statements whether or not they were capable of creating a threat to the peace. Under this section anybody broadcasting messages not acceptable to those in authority will be liable.

Article 7(2) makes each person liable for his or her part in broadcasting a hate message, and if that person was in the military or a government official, he cannot claim head of state immunity or any other immunity. This is in the spirit of both the Nuremberg Charter and the Genocide Convention. Hans Fritzche⁶⁰ was acquitted because there was no evidence that he was aware of the extermination of the Jews in the East, and hence his encouraging words in support of Hitler and the war effort were deemed to be propaganda. Article 7(3) closes the gap for such a defense. Those who are in positions of authority are as liable as their subordinates who carry out criminal acts officially. There were other radio broadcasters under Fritzche's control who were disseminating false and provocative messages. The fact that he appeared not to know what was going on should not have absolved him. The owners of the Hutu radio station, Radio Mille Collines, need not have

⁶⁰ Nuremberg Judgment, Supra note 35.

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uttered one word in condemnation of the Tutsis but the fact that they had de facto control puts them in a position where they ought to have known what was indeed going on.

In Yugoslavia those who were in control of the media, usually the military, when various areas were taken over, will be individually responsible for incitement where proved. The radio broadcasts criticizing non-Serb leaders may be deemed as incitement under Article 4 Sec.(c), depending on whether these were construed as hate messages. There is no need to demonstrate an intent to kill or proof that the messages will result in an immediate threat to the peace. Claims that Muslims were preparing to carry out genocide, were claims that instilled fear. It is not clear whether these reports were construed as hate messages which were disparaging to the Serbs. There is much room for subjective argument in Article 4 Sec. (c).

Article 7(3) - command responsibility makes any person in a position of authority whether military, political or bureaucratic, responsible for the acts or omissions of his subordinates, providing he knew or ought to have known what the subordinate was doing. "The doctrine of command responsibility is normally viewed in the literature as essentially applicable to military commanders and as a failure to act but it is now expanded to include civilians. In the case of Yugoslavia, since most of the atrocities were directed by military and paramilitary groups, responsibility lies with those army personnel who were in charge and in the case of satellite paramilitary groups, their leaders as well as the senior politicians who gave them support.

Article 5 of the Statute deals with crimes against humanity such as :- a) murder, b) extermination; h) persecutions on political, racial and religious grounds; and i)

other inhumane acts. This Article is aimed at those who actually did the killing, but anyone who encouraged another to kill by justifying such acts by making negative assertions about Tutsis, could be also liable.

CONCLUSION

Both the Rwanda and the Yugoslav Tribunals were established to demonstrate justice and in so doing to show the world that those who engage in mass killings would not get away with it. Justice leads to peace and democracy. Without the cooperation of other states in the arrest and extradition of these war criminals, the grand ideals of the Tribunals will not be fulfilled. None of the Serbian perpetrators of the massacres have been brought to trial in the Yugoslavia Tribunal. In Rwanda three officials are currently in custody, while many others remain at large. Even if these leaders emerge to face trial, their harshest sentence would be life imprisonment, whereas, their subordinates facing trial in local courts, are likely to face the death penalty. The sentencing disparity is unfair, but failure to deliver up the real perpetrators of atrocities will be doubly unjust and unfair to all concerned.