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### Hagan v. Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law

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# *Hagan v. Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law*

## I. INTRODUCTION

Laws prohibiting hate speech in the international and domestic arenas demonstrate a growing concern with the prevention and punishment of hate speech.<sup>1</sup> Hate speech is “speech designed to promote hatred on the basis of race, religion, ethnicity or national origin.”<sup>2</sup> The word “nigger” falls within the definition of hate speech, as it is used to promote hatred on the basis of race or ethnicity.<sup>3</sup>

*Hagan v. Australia*<sup>4</sup> illustrates the development of customary international law (CIL) regarding the prohibition of hate speech.

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1. See generally Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003) (demonstrating international and domestic reaction to hate speech); see also Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57 (1992) (finding a correlation between the concern over hate speech and the laws prohibiting hate speech).

2. Rosenfeld, *supra* note 1.

3. The Webster's International Dictionary defines “nigger” as “a member . . . of any dark-skinned race.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1527 (Merriam-Webster Inc. 2002). “[The term is] taken to be offensive.” *Id.* An American dictionary defines “nigger” as an offensive slang used as a disparaging term for a black person or a dark-skinned person. THE AMERICAN HERITAGE COLLEGE DICTIONARY 922 (Houghton Mifflin Company 3d ed. 1997). The word “nigger” has been intrinsically associated with the theory of white supremacy and with the subjugation of blacks in the United States as a way to justify the institution of slavery. See Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 TEMP. L. REV. 129, 154-57 (2003). An Australian dictionary identifies the word similarly, as a racist term used to refer to an Australian Aborigine or a member of “any dark-skinned race.” MACQUARIE DICTIONARY, at <http://www.macquariedictionary.com.au/anonymous@CA11959862+0/-/p/dict/slang-n.html> (last visited January 9, 2005). The Australian dictionary's definition of “nigger” reveals a parallel history of subjugation in Australia regarding the Australian Aborigines.

4. *Hagan v. Australia*, U.N. GAOR, Elim. of Racial Discrim. Comm., 62d Sess., U.N. Doc. CERD/C/62/D/26/2002 (2003) [hereinafter *Hagan*].

In *Hagan*, a U.N. Committee held that the word "nigger" displayed on an Australian sports stadium sign was offensive based on "circumstances of contemporary society."<sup>5</sup> The local Aborigine community, which is the local "contemporary society" involved here, however, opposed the removal of the sign.<sup>6</sup> If not the Australian contemporary society, to which "contemporary society" was the Committee referring?

This note will argue that *Hagan's* holding, which contradicts the circumstances of Australian "contemporary society," is an indication of an arising CIL regarding the prohibition of hate speech. Part II will set out the legal background, which includes an overview of *Hagan v. Australia*, and the legal standard this Note applies in finding whether a CIL exists regarding a prohibition of hate speech. Part III will survey the current state of international law, domestic hate speech law of influential nations, and the opinion of jurists, and conclude that there is an arising notion of CIL regarding hate speech.

## II. BACKGROUND

### A. *Hagan v. Australia*

Petitioner Stephen Hagan, of Aborigine descent, brought *Hagan v. Australia* to the Committee on Elimination of Racial Discrimination (the Committee)<sup>7</sup> requesting the removal of the "E.S. 'Nigger' Brown" sign naming a stand in a sports stadium in Toowoomba, Queensland ("Stadium").<sup>8</sup> The stand is named after a famous rugby player of the 1920s<sup>9</sup> that received the nickname either "because of his fair skin and blond hair or because he had a penchant for using 'Nigger Brown' shoe polish."<sup>10</sup> Toowoomba's Aborigine community did not support Hagan's position that the term "nigger" was offensive and that it should be removed from

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5. *Id.* ¶ 7.3.

6. *Id.* ¶ 2.2.

7. The Committee on Elimination of Racial Discrimination is the organ responsible for monitoring compliance with the International Convention on the Elimination of All Forms of Racial Discrimination. THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS, 138 (1998).

8. *Hagan* ¶¶ 1, 2.1.

9. Kathy Marks, *Australia to Stand Firm Over Racist Sign*, THE INDEPENDENT (London), April 26, 2003, at 14.

10. *Hagan* ¶ 2.1.

the stand.<sup>11</sup>

In April 2003, the Committee held that the term “nigger” was offensive and recommended that the stadium remove the sign.<sup>12</sup> The Stadium management, however, declined to take down the sign<sup>13</sup> and the Australian government did nothing to force the Stadium to adopt the Committee’s ruling.<sup>14</sup>

### B. Legal Standard

The guidelines set out by modern jurisprudence will guide this Note’s analysis as to whether a CIL regarding a hate speech prohibition exists. CIL results from a “general and consistent practice of states followed by them from a sense of legal obligation.”<sup>15</sup> *Opinio juris* is another term that refers to the “sense of legal obligation” CIL inspires in nations.<sup>16</sup> *Opinio juris* informs a variety of nations’ domestic and international actions. For example, domestic courts apply CIL, domestic governments will comply with CIL and incorporate it into domestic legislation, violations of CIL may cause wars, and international treaties may codify CIL.<sup>17</sup>

Evidence of CIL is in domestic and international actions.<sup>18</sup> A clear way to detect CIL is to see whether all nations act out of a sense of legal obligation regarding a certain norm.<sup>19</sup> It is not clear, however, when a notion becomes CIL and how much state consensus is necessary to indicate *opinio juris*.<sup>20</sup> Even when there is

11. See Hagan ¶ 2.2; Patrick Goodenough, *Australians Shrug off UN Ruling on Offending Word*, CNSNEWS.COM PACIFIC RIM, May 2, 2003, available at <http://www.cnsnews.com/ViewForeignBureaus.asp?Page=/ForeignBureaus/archive/200305/FOR20030502a.html>.

12. Hagan ¶¶ 7.3, 8.

13. Marks, *supra* note 9.

14. AAP, *UN Racism Ruling Ignored*, THE MERCURY (Australia), July 12, 2003, at 15, available at 2003 WLNR 7956161; Darrell Giles, “Beattie a Racist” Charge, SUNDAY MAIL (Queensland, Australia), Aug. 17, 2003, at 28, available at LEXIS, Nexis Library, AUSPUB File.

15. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987).

16. Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 641 (2000) [hereinafter Goldsmith I].

17. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999) [hereinafter Goldsmith II].

18. See *id.* at 1113 (listing the various sources that are “often viewed as evidence of CIL”).

19. See *id.* at 1116 (defining CIL as requiring a “sense of legal obligation”).

20. Goldsmith II, *supra* note 17, at 1114.

no international consensus regarding CIL, there is other evidence that indicates the existence of CIL.

Jurists have found evidence of CIL in treaties, international court decisions, domestic court decisions, domestic legislation, as well as writings of jurists.<sup>21</sup> These are the places where this Note will look for an indication of CIL prohibiting hate speech.

This Note proposes that the *Hagan* Committee's holding is an indication of an arising notion of CIL. Since this notion of hate speech prohibition may be ripening into CIL, sources that present a clear-cut customary international rule against hate speech are not available. Therefore, this Note gathers treaty provisions, an international court's decision, domestic law of several leading nations, and works of jurists to paint a portrait of a growing consensus on the prohibition of hate speech.

### III. ANALYSIS

The post-World War II international community realized that beyond simple communication, hate speech can be an effective tool of racial and ethnic subjugation.<sup>22</sup> In fact, Professor Schabas has argued that "[t]he road to genocide in Rwanda was paved with hate speech."<sup>23</sup> Nations responded by enacting domestic and treaty law to address hate speech and to prevent its harmful effects.<sup>24</sup>

This Note surveys and analyzes evidence of CIL prohibiting hate speech. Upon examining treaties, international court decisions, various domestic laws, and jurists' opinions, this Note will show that the arising CIL prohibiting hate speech compelled the *Hagan* committee to determine that the "nigger" sign should be removed from the stadium.

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21. See *The Paquete Habana*, 175 U.S. 677 (1900) (discussing other sources used as evidence of international law, partially quoting Chancellor Kent); 48 C.J.S. *International Law* § 2 (2004); *International Law*, 1995 CANADIAN ENCYCLOPEDIA DIGEST §13; Goldsmith II, *supra* note 17, at 1117.

22. See Rosenfeld, *supra* note 1, at 1525 (explaining the international community's awareness of the link between racist propaganda and the Holocaust); see also Defeis, *supra* note 1, at 68-69, 71 (showing the connection of hate speech to the Holocaust, and explaining that speech rights "may [not] be asserted to destroy [rights of non-discrimination]").

23. William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141, 144 (2000).

24. See Rosenfeld, *supra* note 1, at 1525.

### A. Treaties

CIL and treaties are the two primary forms of international law.<sup>25</sup> However, international treaties may greatly influence the formation of CIL or even codify CIL. This Note surveys two widely supported treaties that prohibit hate speech.

#### i. ICERD

About 170 nations are parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>26</sup> demonstrating the international community's sweeping support to the treaty. The ICERD is the main tool for the international community to combat racial discrimination.<sup>27</sup> This treaty is valuable because it has universal reach, it is legally binding, and it has self-implementation tools.<sup>28</sup>

Article 4 of the ICERD prohibits hate speech in the form of propaganda that incites racial discrimination.<sup>29</sup> ICERD's Article 4 goes beyond the hate speech prohibition in the International Covenant on Civil and Political Rights (ICCPR) because only Article 4 requires the state parties to criminalize hate speech.<sup>30</sup> The broad support for the treaty demonstrates the international community's commitment to the criminalization of hate speech.<sup>31</sup>

25. Goldsmith II, *supra* note 17, at 1113.

26. Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations, <http://www.ohchr.org/english/countries/ratification/2.htm> (last visited Feb. 27, 2005).

27. Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 283 (1985).

28. *Id.*

29. Article 4 of ICERD states in part:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end...:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination. . . .

International Convention on the Elimination of All Forms of Racial Discrimination art. 4, opened for signature Mar. 7, 1966, 5 I.L.M. 352, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

30. *Id.*

31. During ratification of the treaty, several nations expressed concern that article 4 might unnecessarily impede in the right to freedom of opinion and expression, as illustrated by their interpretations of article 4 and reservations of rights under article 4. Despite these concerns, however, none of the signatory nations chose not to be bound by

## ii. ICCPR

The ICCPR also addresses the problem of hate speech. The ICCPR is an attempt to implement the rights in the Universal Declaration of Human Rights through binding agreements.<sup>32</sup> Article 20(2) prohibits advocacy of racial and national hatred when it constitutes an incitement to discrimination.<sup>33</sup> About 150 countries are parties to the ICCPR, none of whom object to article 20(2),<sup>34</sup> demonstrating the international community's strong support to the prohibition of hate speech.

Both the ICERD and the ICCPR prohibit hate speech. The ICERD goes as far as requiring states to criminalize hate speech.<sup>35</sup> These two treaties demonstrate the international community's growing concern with the prevention and prohibition of hate speech. *Hagan v. Australia* was a result of this growing concern. If the Aborigine community in *Hagan* failed to find the questioned sign offensive, then another reason must underlie the Committee's holding. Within the context of the treaties surveyed above, that reason is the arising CIL prohibiting hate speech.

### *B. International Criminal Tribunal for Rwanda (ICTR)*

The ICTR decided *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, a case that explicitly states that prohibition of hate speech has become CIL.<sup>36</sup> The ICTR, after examining well-established principles of international and domestic law and international and domestic cases, found that "hate speech that expresses. . . discrimination violates the norm of customary international law

article 4. See Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations, <http://www.ohchr.org/english/countries/ratification/2.htm> (last visited Feb. 27, 2005). The nations concerned about article 4 were: Antigua & Barbuda, Australia, Austria, Bahamas, Barbados, Belgium, Fiji, France, Ireland, Italy, Japan, Malta, Monaco, Nepal, Papua New Guinea, Switzerland, Tonga, Thailand, Tonga, and the United Kingdom.

32. Defeis, *supra* note 1, at 78.

33. Article 20(2) states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility to violence shall be prohibited by law." International Covenant on Civil and Political Rights art. 20(2), *adopted* Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171[hereinafter ICCPR].

34. Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations *available at* <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited Feb. 27, 2005).

35. ICERD art. 4.

36. *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 1076 (Dec. 3, 2003), *available at* <http://65.18.216.88/default.htm>.

prohibiting discrimination.”<sup>37</sup>

The ICTR’s decision reflects the position of the international community. The United Nations Security Council created the ICTR,<sup>38</sup> which demonstrates the ICTR is an organ backed by the international community. This influential international organ has spoken about hate speech prohibition as a matter of CIL. This is further support that the *Hagan* Committee’s holding is justified by an arising CIL prohibiting hate speech.

### C. Domestic Law<sup>39</sup>

CIL is a norm that states follow in a consistent manner out of a sense of legal obligation.<sup>40</sup> It is unclear, however, how consistent state practice must be and which states must follow the norm for it to be accepted as CIL.<sup>41</sup> Some scholars believe that a survey of nations should include only “major powers and interested nations.”<sup>42</sup> The nations surveyed in this Note are the United States, Canada, the United Kingdom, Germany and Russia. Although not a comprehensive list,<sup>43</sup> this list includes major nations in terms of political influence and economic power. These states are also “interested nations” in the sense that they have experienced the harmful effects of hate speech in varying degrees.

#### i. United States

Freedom of speech, beyond being one of the most respected constitutional guarantees, is also “one of America’s foremost cultural symbols.”<sup>44</sup> Unlike other Western nations, where hate speech is prohibited entirely, the American approach may in fact

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37. *Id.*

38. Stuart Beresford, *In Pursuit of International Justice: The First Four-Year Term of the International Criminal Tribunal for Rwanda*, 8 TULSA J. COMP. & INT’L L. 99, 104-05 (2000).

39. A survey of the current practices regarding hate speech in each nation of the world is beyond the scope of this Note. Therefore, this Note’s analysis of domestic law focuses solely on international trends of hate speech law seen in the law of a variety of influential nations’ domestic law.

40. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987).

41. Goldsmith II, *supra* note 17, at 1114.

42. *Id.*

43. Outside of the nations surveyed in this Note, other nations have adopted hate speech legislation, including Brazil, China, Colombia, Cuba, France, Senegal and Sweden. Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 9 n.46 (1996).

44. Rosenfeld, *supra* note 1, at 1529.



allow some types of hate speech under the protection of freedom of speech.<sup>45</sup> Out of the nations this Note surveys, the American approach to the prohibition of hate speech is the most attenuated. This approach reflects the constant conflict between freedom of speech and protection against discrimination.

In *R.A.V. v. City of St. Paul*,<sup>46</sup> the Supreme Court struck down a city ordinance prohibiting cross-burning that is intended to "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."<sup>47</sup> The Court held that the ordinance was impermissibly selective in its application of the ordinance; that it only applied to fighting words that insult or provoke violence on the basis of race, color, creed, religion or gender."<sup>48</sup> By implication, fighting words used in connection with other ideas, such as hostility based on political affiliation, are not covered.<sup>49</sup> The Court's holding in this case seems to indicate the United States is more committed to freedom of speech, to the detriment of hate speech law.

A subsequent case, however, seems to modify this position. The Supreme Court has indicated that the legislature may regulate certain types of speech, including certain hate speech.<sup>50</sup> In *Virginia v. Black*,<sup>51</sup> the Supreme Court gave new hope to anti-hate speech law proponents.<sup>52</sup> The Court in *Virginia* found that cross burnings performed on someone's lawn is a form of unprotected intimidation rather than protected speech.<sup>53</sup> *Virginia* allowed hope for proponents of hate speech regulation that was not thought possible after the *R.A.V.* holding.<sup>54</sup>

The Supreme Court's move from *R.A.V.* to *Virginia* shows that, even in a nation where freedom of speech is held as one of the most sacred Constitutional guarantees, hate speech law is an arising concern.

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45. *Id.*

46. 505 U.S. 377 (1992).

47. *Id.* at 380.

48. *Id.* at 391.

49. *Id.*

50. See Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL'Y 273, 315 (2004).

51. 538 U.S. 343 (2003).

52. See Demaske, *supra* note 50, at 315.

53. 538 U.S. at 362-363; see also Demaske, *supra* note 50, at 314.

54. Demaske, *supra* note 50, at 315.

## ii. Canada

Over the past seven years, hate speech regulation in Canada has expanded and strengthened.<sup>55</sup> The Parliament has recently expanded hate speech regulation to include a prohibition of hate speech based on sexual orientation.<sup>56</sup> The number of prosecutions of hate speech crimes has also increased in the past seven years,<sup>57</sup> which shows a greater government commitment to prosecuting such crimes.

In *Regina v. Keegstra*,<sup>58</sup> the Canadian Supreme Court created the momentum necessary to boost the anti-hate speech regulation Canada has witnessed in the past few years. In *Keegstra*, the Supreme Court upheld the criminal conviction of a teacher who made anti-Semitic statements to his students.<sup>59</sup> The criminal statute under which *Keegstra* was convicted, prohibited “promotion of hatred . . . towards any section of the public distinguished by colour, race, religion or ethnic origin.”<sup>60</sup> The *Keegstra* holding and the subsequent governmental actions reaffirm Canada’s commitment to hate speech prohibition.

## iii. United Kingdom

Unlike the other nations this Note surveys, the United Kingdom has criminalized hate speech for centuries.<sup>61</sup> Since the seventeenth century, there have been generations of British regulations addressing hate speech.<sup>62</sup> The first generation of hate speech regulation punished individuals the government believed posed a threat to the monarchy.<sup>63</sup> The government, however, also applied these same regulations to criminalize speech intended to bring hatred against racial and ethnic minorities.<sup>64</sup>

The regulations evolved over the years to the current body of hate speech law. Today the government has a broad range of tools

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55. Terry Heinrichs, *Hate Speech, Broadly Defined*, NATIONAL POST, July 21, 2004, at A14.

56. *Id.*

57. *Id.*

58. [1990] 3 S.C.R. 697 (Can.).

59. *Id.* at 698; Rosenfeld, *supra* note 1, at 1542.

60. Criminal Code, R.S.C., ch. C-46, § 319(2) (1980) (Can.).

61. Rosenfeld, *supra* note 1, at 1544-45.

62. *Id.* at 1545.

63. *Id.*

64. See *id.* (explaining that the seditious libel offense also punished statements which promoted “hostility between different classes”).

to fight hate speech, including the ability to punish speech that promotes "hatred through persuasion of non-target audiences" and speech that amounts to "harassment of a target group or individual."<sup>65</sup> The United Kingdom's hate speech law history demonstrates the nation's commitment to prohibiting hate speech.

#### iv. Germany

Germany developed a stronger and more encompassing body of law than the other domestic laws surveyed in this Note. German hate speech laws are born out of the desire to address the country's Nazi past and to prevent a revival of such movements.<sup>66</sup> The German hate speech laws include criminal and civil regulations that "protect against insult, defamation and other forms of verbal assault, such as attacks against a person's honor or integrity, damage to reputation, and disparaging the memory of the dead."<sup>67</sup>

The German government's strong commitment to address hate speech has resulted in the controversial prohibition of Holocaust denial.<sup>68</sup> The German Constitutional Court sees Holocaust denial as a denial of the personal worth of the Jewish people.<sup>69</sup> Professor Rosenfeld considers Holocaust denial as breaching society's duty to maintain an environment in which Jews can feel part of the community.<sup>70</sup> Germany, with its well-developed body of hate speech law, represents yet another instance of a nation taking initiative to prohibit hate speech.

#### v. Russia

In response to the growing issue of ethnic and nationalist violence, Russia recently enacted the Federal Law on Countering Extremist Activity (the Extremist Law).<sup>71</sup> A component of the Extremist Law is the prohibition of hate speech that addresses social, racial, nationalistic, and religious animosity.<sup>72</sup> The Extremist Law is a reflection of international human rights norms, such as

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65. *Id.* at 1547.

66. *Id.* at 1550.

67. *Id.* at 1551.

68. *Id.*

69. *Id.* at 1552.

70. *Id.*

71. J. Brian Gross, *Russia's War on Political and Religious Extremism: An Appraisal of the Law "On Counteracting Extremist Activity,"* 2003 BYU L. REV. 717, 717 (2003).

72. *Id.* at 738.

those listed in the ICCPR.<sup>73</sup>

Russia, a nation with a history of government oppression and human rights violations,<sup>74</sup> has attempted to address some of these abuses by enacting the Extremist Law. Russia's initiative demonstrates that a very influential non-western country is moving to address the hate speech problem. Russia's criminalization of hate speech adds to the international community's growing concern with hate speech.

Hate speech can be very effective as a tool to disseminate the idea of racial superiority, to incite violence, and to reinforce stereotypes. Several nations, including the ones this Note surveys, have taken notice of this problem and have addressed it through legal action. The United States' approach is to balance the right to free speech with prohibitions of hate speech.<sup>75</sup> Recent case law demonstrates there is hope for hate speech legislation in the United States.<sup>76</sup> The Canadian approach shows judicial and legislative commitment to prohibiting hate speech.<sup>77</sup> The United Kingdom has an old and comprehensive tradition of anti-hate speech laws.<sup>78</sup> Germany, in response to its Nazi past, has developed an extensive body of hate speech law.<sup>79</sup> Finally, Russia has prohibited hate speech in an attempt to fight political extremism.<sup>80</sup>

The domestic laws this Note surveys shows several examples of how nations act out of a sense of legal obligation. These nations believed hate speech was enough of a concern to take action to prevent such speech. These nations' domestic laws evidence that the prohibition of hate speech has become a CIL.

#### D. Jurists

Jurists have set forth their views about the dangers of hate speech and the importance of preventing such speech from gaining momentum. Jurists point out that hate speech may result in discrimination or, at its worst, genocide.<sup>81</sup> Professor Mari

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73. See *id.* at 738-740.

74. See William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249, 278-79 (2004).

75. See *supra* Part II.C.i.

76. See Demaske, *supra* note 50, at 315.

77. See *supra* Part II.C.ii.

78. Rosenfeld, *supra* note 1, at 1544-45.

79. *Id.* at 1550-51.

80. Gross, *supra* note 71, at 717.

81. See, e.g., Schabas, *supra* note 23, at 144 (finding the link between hate speech and

Matsuda,<sup>82</sup> a leading race theorist, has recognized there is an "emerging international standard outlawing hate speech."<sup>83</sup> Professor Matsuda characterizes racist speech as a tool for subordination, which reinforces a "historical vertical relationship" between whites and blacks.<sup>84</sup> Professor Matsuda adopts the suggestion made by Professor Richard Delgado in his breakthrough article *Words that Wound*,<sup>85</sup> proposing a tort remedy for injury from hate speech as well as criminal restrictions.<sup>86</sup>

Other jurists have stressed the need for States to prevent hate speech. Professor William Schabas<sup>87</sup> contends that preventing hate speech is the key to preventing genocide.<sup>88</sup> Furthermore, Professor Schabas argues that hate speech is the most efficient tool in motivating the "willing executioners" to commit genocide.<sup>89</sup> Professor Stephanie Farrior<sup>90</sup> also argues for hate speech restrictions.<sup>91</sup> According to Professor Farrior, a violation of hate speech restrictions is a matter of international law because "failure to restrict hate speech [constitutes] a failure to fulfill a state's obligation to give effect to the right to equality and non-discrimination."<sup>92</sup> Professor Kevin Boyle<sup>93</sup> also warns about the potential dangers of hate speech and advocates the position that individuals should take a stand in fighting it.<sup>94</sup>

Jurists do not dictate international law. Jurists do, however, influence the evolution of CIL or may reflect CIL in their works.<sup>95</sup> These jurists' opinions explain some of the legal reasoning behind

genocide in Rwanda).

82. Professor of Law at Georgetown University School of Law.

83. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989).

84. *Id.* at 2358.

85. 17 HARV. C.R. - C.L. L. REV. 133 (1982).

86. Matsuda, *supra* note 83, at 2360.

87. Professor of Human Rights Law, National University of Ireland, Galway; Director, Irish Centre for Human Rights.

88. *See* Schabas, *supra* note 23, at 144, 171.

89. *See id.* at 171.

90. Professor of Law at Pennsylvania State University, Dickinson School of Law.

91. *See* Farrior, *supra* note 43, at 96-98.

92. *Id.* at 97.

93. Professor of Law and Director of the Human Rights Centre at the University of Essex in Colchester, England. Professor Boyle practices regularly before the European Court of Human Rights in Strasbourg.

94. *See* Kevin Boyle, *Hate Speech - The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 501-02 (2001).

95. *See* Goldsmith II, *supra* note 17, at 1117.

the *Hagan* holding and demonstrate the emerging CIL prohibiting hate speech.

The state of international law, domestic law, and the opinions of jurists demonstrate that the international community recognizes an arising CIL prohibiting hate speech. If the Committee, which is an international body, considered the views and legal norms of the contemporary international society in its holding, then the holding was justified.

#### IV. CONCLUSION

The Committee in *Hagan v. Australia* held the word “nigger” is offensive within the “circumstances of contemporary society.”<sup>96</sup> Since Australian Aboriginal society did not deem the sign offensive, which “contemporary society” was the Committee considering?

This Note proposed that the *Hagan* Committee based its holding on circumstances of international contemporary society. As shown in this Note, international contemporary society recognizes that hate speech is prohibited as a matter of CIL. CIL arises out of international norms that ripen into law, and international treaties, international courts’ decisions, domestic law, opinions of jurists, all amount to evidence that a CIL exists. In this Note, international treaties, the decision of an international court, domestic law of nations, and jurists’ works were analyzed to determine whether a CIL regarding hate speech exists.

The ICCPR and the ICERD both prohibit hate speech. The ICTR recognized hate speech is a violation of the CIL that prohibits discrimination. The actions of these international organs demonstrate the international community’s condemnation of hate speech. Beyond simple condemnation, however, the treaty provisions show that the international community is also ready to punish and prevent the propagation of hate speech. Nations, however, do not always follow international treaties.<sup>97</sup> Therefore, to find out whether nations follow the prohibition of hate speech out of a sense of legal obligation, the Note surveyed several nations’ domestic laws regarding hate speech.

The nations surveyed were the United States, Canada, the

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96. *Hagan* ¶ 7.3.

97. See, e.g., Marks, *supra* note 9 (showing how the Australian government refused to comply with the terms of a treaty as interpreted by the United Nations).

United Kingdom, Germany, and Russia. These nations are influential in the legal and political arenas. Nations such as the United States and Canada do not have a well-developed body of law prohibiting hate speech. However, these nations do show commitment to anti-hate speech law by giving room to this type of law in judicial decisions and legislation. Nations such as the United Kingdom, Germany and Russia have a well-developed body of hate speech law that reflects their dedication to eradicating hate speech. The fact these nations chose to address hate speech indicates that they may be acting out of a sense of legal obligation.

Jurists have also condemned hate speech and asked for the prohibition of such speech. Jurists warned that hate speech may result in discrimination and even genocide. These scholars suggested a variety of methods to address hate speech, including the creation of a tort remedy and criminal sanctions. The jurists' attention to hate speech demonstrates that a prohibition of hate speech has in fact become CIL.

If in fact there is an emerging CIL prohibiting hate speech, the issue remains as to whether there is speech that is universally "hate speech," since specific guidelines of what is "hate speech" may be a cultural construct. The international community must draft an international agreement specifying the universal definition of hate speech as well as how, if at all, hate speech should be prevented and punished.

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