Amicus Curiae brief in

Ferdinand Nahimana,
Jean-Bosco Barayagwiza and
Hassan Ngeze
v.
The Prosecutor

(ICTR Case No. ICTR-99-52-A)

A Submission from the Open Society Justice Initiative to the International Criminal Tribunal for Rwanda, on behalf of

Cairo Institute for Human Rights Studies (Egypt)
Canadian Journalists for Free Expression (Canada);
Center for Media Freedom and Responsibility (Philippines)
Committee to Protect Journalists (United States)
Fundación Para la Libertad de Prensa (Colombia)
Greek Helsinki Monitor (Greece)
Independent Journalism Center (Moldova)
Instituto Prensa y Sociedad (Peru)
International PEN (United Kingdom)
Media Institute (Kenya)
World Press Freedom Committee (United States)

OPEN SOCIETY
JUSTICE INITIATIVE

I. Introduction

On December 3, 2003, Trial Chamber I of the International Criminal Tribunal for Rwanda (ICTR) rendered its ruling convicting defendants Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze of various crimes relating to the 1994 genocide in Rwanda, including several that arose from radio broadcasts and newspaper publications before and during the genocide. All three defendants were convicted of direct and public incitement to commit genocide, genocide, and crimes against humanity based upon speech-related activities. See Case No. ICTR-99-52-T (Int'l Crim. Trib. for Rwanda Trial Chamber I, Dec. 3, 2003) ("*Nahimana*"). Two of the defendants—Nahimana and Barayagwiza—were convicted of these charges by virtue of their leadership roles in the radio station *Radio Télévision des Mille Collines* (*RTLM*); the other defendant, Ngeze, was convicted of these charges based upon his role as "founder, owner and editor" of the newspaper *Kangura*.

That the defendants were convicted for actions they took as journalists is not, in and of itself, a basis for seeking revision of the Trial Chamber's judgment. Indeed, the judgment was not only persuasive but all but incontestable in its conclusion that *RTLM* broadcasts that urged Hutus to murder Tutsis, provided directions as to where to go to do so and then listed by name those to be killed, could appropriately form the basis of criminal convictions.[1] Moreover, through its account of *RTLM*'s role in the 1994 genocide, the Trial Judg-

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1 Moreover the Trial Chamber's determinations that Barayagwiza personally "supervised roadblocks . . . established to stop and kill Tutsi," *Nahimana*, p. 245, ¶ 719, and that Ngeze ordered the murders of Tutsi civilians, *id*., p. 319, ¶ 955; "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population," *id*., ¶ 956; and "set up, manned and supervised roadblocks . . . that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*," *id*., are among the many findings of fact that fully justify the severe sanctions imposed by the court on the defendants.

ment makes an important contribution to the historical accounting of the 1994 genocide. This, itself, is an important measure of justice. At the same time, however, precisely because the Trial Chamber's opinion relates to a peculiarly sensitive issue—*i.e*., when does the speech of journalists constitute internationally criminal conduct because of the *content* of what they say?—the greatest care must be taken in fashioning legal standards to make this determination. In many respects, the Trial Chamber judgment reflects precisely the kind of careful and nuanced distinctions that are called for in this regard.

This brief *amicus curiae* is prompted, however, by other portions of the trial judgment, which raise substantial concerns and merit the Appeals Chamber's close attention. As we explain below, some portions of the judgment could be interpreted to subsume hate speech[2] under the rubric of "direct and public incitement to commit genocide." While such an interpretation may represent a misreading of the trial judgment, the very fact that ambiguities in the judgment could reasonably give rise to such a reading raises significant concerns. Of particular concern to *amici*, an ambiguous enunciation of what speech constitutes incitement to or instigation of genocide could inadvertently encourage the stifling of speech that offends those in power because it is critical of them.

Other portions of the judgment, including its conclusion that hate speech may constitute the international crime of persecution as a crime against humanity, represent novel interpretations of established law. Hate speech is despicable everywhere; it is illegal in many nations; it is not protected by international human rights law; indeed, States parties to some

2 For purposes of this brief, the term "hate speech" is used to describe communications that encourage or express racial hatred or discrimination but do not contain a call to action of violence or genocide.

treaties are required to prohibit certain forms of hate speech in their domestic law. But hate speech has never been an international crime. Under carefully circumscribed conditions, States are free under customary international law to make hate speech criminal but, crucially, they need not do so. States enjoy no such choice when it comes to permitting individuals to commit any of the international crimes committed to the jurisdiction of the ICTR. No individual may lawfully incite or commit genocide or crimes against humanity.

As we explain below, some portions of the trial judgment blur the distinction between conduct, such as hate speech, that *may* be made illegal by States (and, as noted, must be proscribed in the domestic law of States parties to certain treaties) but which does not constitute an international crime and conduct that is *always* illegal—indeed, criminal—under international law. These portions of the trial judgment have especially disturbing consequences for the media. Too broad a reading of what constitutes a crime against humanity could facilitate the suppression of speech that falls well outside the intended scope of this international crime.

Throughout this brief, we set forth the nature of the legal concerns of the *amici* about elements of the Trial Chamber's analysis that raise these concerns. We emphasize in the next section of this brief the cumulative effect of troublesome portions of the trial judgment, which risk conflating hate speech, incitement to commit genocide and genocide itself. We demonstrate, as well, that the trial judgment improperly relies on events that occurred—specifically, articles published—years before 1994, the only time period encompassed in the temporal jurisdiction of the Tribunal. We then demonstrate that the Trial Chamber erred, as well, in concluding that the hate speech in this case constitutes the crime against humanity of

persecution. These errors imperil defendants' right to be punished only for conduct clearly defined as an international crime. At the same time, as one author aptly put it, they "put limits on the press that ha[ve] the potential to send a frisson through freedom of expression the world over." DINA TEMPLE-RASTON, JUSTICE ON THE GRASS 240 (2005).

These aspects of the trial judgment are of special concern to journalists in Africa, individuals who have dared to speak out critically about their governments in the past and who, in response, have had their speech threatened or their liberties imperiled. According to Joel Simon, then deputy director (now executive director) of the Committee to Protect Journalists, "[m]any governments [in Africa] have exploited the perception that the violence in Rwanda was fueled by the media to impose legal restrictions on the press in their own countries." Joel Simon, "Of Hate and Genocide; In Africa, Exploiting the Past," *Columbia Journalism Review*, Jan.-Feb. 2006. Simon describes a disturbing pattern:

> [S]ince 2002 in Africa events generally play out in a similar way. Reporting on government shortcomings sometimes fuels political protest. Given the nature of African politics, political parties are often arrayed along ethnic lines. The government labels the critical reporting as 'incitement to rebellion' or 'incitement to hatred' and either summarily shuts down the offending media outlet or takes legal action against the journalists. The government invokes the specter of RTLM in Rwanda and its role in stoking the genocide to justify its actions, arguing that it has a legal obligation to take measures against the media outlets because of their capacity to fuel large-scale ethnic violence.
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> The practice is distressingly common, so much so that it has become a major impediment to independent journalism in many parts of Africa. Since 2002, CPJ has documented nearly fifty such cases in such countries as Burundi, the Central African Republic, Togo, Gabon, and Zimbabwe. Rwanda itself is an egregious abuser. There, public incitement to 'divisionism' is a crime punishable by up to five years in prison, heavy fines, or both. The current Tutsi-led regime, which consolidated power

> in the 2003 election, has increasingly used allegations of ethnic 'divisionism' to silence critics instead.

Joel Simon, "Hate Speech and Press Freedom in Africa," ("Simon Speech") remarks at conference on "International Criminal Tribunals in the 21st Century," American University Washington College of Law, Sept. 30, 2005, pp. 1-2.

In the view of Julia Crawford, Africa Program Coordinator for CPJ, this pattern has "intensified in the last few years," since the Trial Chamber rendered judgment in *Nahimana*.[3] "Repressive governments in countries with genuine ethnic problems have increasingly used the example of RTLM as an excuse to clamp down on legitimate criticism in the local press and civil society, and to intimidate foreigners who defend them. Since 2003, officials in countries such as Ethiopia, [the Democratic Republic of] Congo and Chad have used the Rwanda example in meetings and conversations with CPJ to justify imprisoning and harassing journalists."[4]

In Rwanda, as well, according to CPJ, "[a]llegations of 'divisionism' and 'genocidal ideology' have been used to intimidate independent journalists, driving several to flee into exile out of fear for their safety."[5] In July 2004, a parliamentary report commissioned by the Rwandan government accused international radio stations, a crucial source of independent reporting in Rwanda, of "genocidal ideology." At a conference in January 2006, Rwanda's Minister of Information and the head of its state information agency publicly criti-

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3 Private communication between CPJ and counsel for *amici*, 27 Sept. 2006.

4 *Id*.

5 *Id*.

cized correspondents for the British Broadcasting Corporation (BBC) and Voice of America (VOA), respectively, following their on-air references to reports by Amnesty International and Human Rights Watch that were critical of the Rwandan government's human rights record. A police spokesman stated that the journalists would be investigated for their "ideology," a warning CPJ believes to be "a clear reference to the parliamentary commission's accusations of 'genocidal ideology' against VOA and BBC."[6] In July 2006, unidentified men assaulted the brother of the VOA correspondent criticized by the Rwandan government, reportedly telling the victim that the attack was in response to his sister's broadcasts.[7]

In addition to the examples cited above, numerous others could be cited. In May, 2005, police in the Democratic Republic of Congo shut down *Radiotélévision debout Kasaï*. The radio station had been providing detailed coverage of riots in the town of Mbuji-Mayi. The rioting was fueled by the lack of potable water and a postponement of the national elections.

When the closure was questioned, Dominique Kanku, the Provincial Governor, insisted that the government's action was a "preventative measure" because the reports had sparked the riots. Kanku rationalized the decision to shutter the station by referencing the role radio had played in the genocide in Rwanda. "Madame, have you not heard of *Radio Télévision Libre des Mille Collines*?" Kanku asked. "We have a duty to protect the population." Simon Speech, p. 1.

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6 *Id*.

7 *Id*.

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In a recent case, at least fourteen Ethiopian journalists have been charged with treason and attempted genocide for conduct that is said to threaten the "constitutional order" but which, in the judgment of CPJ, actually involves writing about the government in a manner its leaders find distasteful. *See* Julia Crawford, *'Poison,' Politics and the Press*, *at* http://www.cpj.org/Briefings/2006/DA_spring_06/ethiopia/ethiopia_DA_spring_06.html. Additionally, the editor-in-chief of an Ethiopian newspaper was charged in 2002 with inciting people to rebellion. The charges grew out of an article in which the secretary-general of the Ethiopian Teachers Association criticized the government's reaction to a student protest in which thirty people were killed. *See* Committee to Protect Journalists, *Attacks on the Press in 2002*, *at* http://www.cpj.org/attacks02/africa02/ethiopia.html. Similarly, Tewodros Kassa, an Ethiopian reporter, was sentenced to two years in prison after a conviction in 2002 arising out of charges that he had "disseminat[ed] false information that could incite people to political violence." The charges were based on an article that reported that the government had fired employees who had supported the government's opposition and replaced them with its supporters, and an article that reported on a failed bomb plot. *See* Letter from The Committee to Protect Journalists to Prime Minister Meles Zenawi, May 22, 2003, *available at* http://www.cpj.org/protests/03ltrs/Ethiopia22may03pl.html.

Similar threats to press freedom have occurred in Chad. Garondé Djarma wrote an article in the private weekly *L'Observateur*, in which he criticized the President for offering a controversial constitutional amendment. Djarma was sentenced to three years in prison and fined for the crimes of defamation and "inciting hatred." The same day that

Djarma was arrested, the editor of *L'Observateur*, Ngaradoumbé Samory, was fined and sentenced to three months in prison on charges of defaming the President and "inciting hatred." He was charged after he published an open letter written on behalf of an ethnic minority group, criticizing their treatment by the President. *See* Committee to Protect Journalists, *2005 News Alert*, *at* http://www.cpj.org/news/2005/Chad18july05na.html.

In September 2006, CPJ reported that Alexis Sinduhije, the head of Radio Publique Africaine (RPA), had been forced into hiding for the second time in less than two months, fearing for his safety, in the face of a "campaign of harassment and intimidation" by the government of Burundi. *See* Committee to Protect Journalists, BURUNDI: Government Harassment Forces Radio Chief into Hiding, *at* http://www.cpj.org/news/2006/africa/burundi28sept06na.html. The government's Communications Minister claims RPA is "like RTLM." *Id.* But Sinduhije, a past recipient of CPJ's International Press Freedom Award, believes that the government stepped up its campaign to silence RPA "in retaliation for its investigative reporting on government corruption and human rights abuses." *Id.*

All of these attacks on freedom of expression in Africa have one thing in common: sweepingly overbroad definitions of what constitutes actionable incitement enabled governments to threaten and often punish the very sort of probing, often critical, commentary about government that is of vital importance to a free society. This is not to suggest that the Trial Chamber's judgment caused these violations of press freedom, but portions of its reasoning could all too easily encourage governments to suppress critical speech.

The examples cited above make clear the need to ensure that any definition of speech that is deemed an international crime be both narrow and precise and that only speech that is clearly violative of applicable international norms be subjected to international criminal sanctions. Significant elements of the *Nahimana* ruling of the Trial Chamber increase rather than assuage these concerns.

II. Key Portions of the Trial Chamber's Analysis Blurred Distinctions Between Hate Speech, Incitement to Commit Genocide, and Genocide

1. In its analysis of the crime of incitement to commit genocide, the Tribunal blurred the distinction between the Genocide Convention's prohibition of "direct and public incitement to commit genocide" and human rights treaties that allow or require States parties to proscribe hate speech in their domestic law.

The ICTR was vested with jurisdiction over the charge of "direct and public incitement to commit genocide" by a provision in its statute, Article 2(3)(c), that is taken directly from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). It is thus the Genocide Convention that offers the most useful guide in analyzing Article 2(3)(c). *See Prosecutor* v. *Krstić*, Case No. IT-98-33, Judgment (Trial Chamber), at ¶ 541 (2 Aug. 2001) ("The Convention on the Prevention and Punishment of the Crime of Genocide . . . adopted on 9 December 1948, whose provisions Article 4 adopts *verbatim*, constitutes the main reference source in this respect."). In its analysis of the crime of incitement to commit genocide, however, the Trial Chamber made only brief mention of this treaty's drafting history, *see Nahimana*, p. 325, ¶ 978, focusing instead on three other human rights treaties—the International Covenant on Civil and Political Rights ("ICCPR"), the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), and the European Convention for the Protection of Human Rights and Fun-

damental Freedoms ("European Convention")—each of which either allows or permits States parties to proscribe hate speech in their domestic law, as well as on the Universal Declaration of Human Rights.[8] See Diane Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial*, 21 AM. U. INT'L L. REV. 557, 563-73 (2006).

While it is often appropriate to interpret one human rights treaty in light of others, the Trial Chamber's approach may, however inadvertently, blur crucial distinctions between the hate speech provisions of the ICCPR and the CERD and the hate speech jurisprudence of the European Convention on the one hand and the Genocide Convention's incitement provision on the other hand. While the first three treaties either permit or require States parties to proscribe hate speech in their domestic law, the drafters of the Genocide Convention explicitly considered—and repeatedly rejected—the notion that hate speech should be criminalized in an international convention on genocide.

The first version of the Genocide Convention, which may have been intentionally over-inclusive,[9] included the following text as draft Article III: "All forms of public propaganda tending by the systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished." See UN ESCOR at 7, UN Doc. E/447 (1947). The commentary accompanying this text indicated the

8 As we discuss below, the Trial Chamber's review of jurisprudence that it considered relevant to the crime of direct and public incitement to commit genocide also included discussion of the ICTR's own case law, as well as a key post-war judgment.

9 *See* UN ESCOR at 16, 19, UN Doc. E/447 (1947) (noting that the first draft was "intended to form a basis of discussion" and thus included some provisions "which perhaps need not be maintained in the final text of the Convention.").

draft Article III was "not concerned with direct and public incitement to any act of genocide, which falls within Article II"—the precursor to the Genocide Convention's provision on direct incitement. Instead, draft Article III would cover "such general propaganda as would, if successful, persuade those impressed by it to contemplate the commission of genocide in a favorable light." If Article III had survived into the final version of the Genocide Convention, it might make sense to interpret its text in light of hate speech law developed under other human rights treaties.

But Article III did not survive in subsequent texts. The next draft of the Genocide Convention, prepared by an Ad Hoc Committee on Genocide convened by the United Nations Economic and Social Council, included a provision that would require States parties to make punishable "[d]irect incitement in public or in private to commit genocide whether such incitement be successful or not." The Soviet delegation sought to broaden the draft convention's criminalization of speech by proposing additional text that would criminalize "[a]ll forms of public propaganda (press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of Genocide." *Ad Hoc Committee on Genocide Report to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from 5 April to 10 May 1948*, 7 UN ESCOR Supp. (No. 6) at 55, 23, UN Doc. E/794 (1948) [hereinafter "Report of Ad Hoc Committee"]. *See also* Orentlicher, at 564-65. This provision was soundly rejected. Opponents of the provision believed that repression of "hateful propaganda" was beyond the scope of the Convention and could be abused to suppress the freedom of expression. *See id*. at 565.

During the next drafting phase, the Soviet delegation reintroduced its hate speech text. Again, the Soviet proposal was rejected by a majority. *See* UN Records of the Third Session of the General Assembly, 3 UN GAOR C.6 (86th mtg.) at 244-45. The records of the debate indicate that the rejected Soviet text would encompass incitement that "took the form of popular education and of moulding public opinion with a view to developing racial, national, or religious hatred"—*i.e.*, hate speech. *See* 3 UN GAOR C.6 (87th Mtg.) at 250 (remarks of Yugoslav delegate).

Opposing the Soviet proposal, several delegates argued that incitement to group hatred was simply beyond the scope of a convention on genocide. The delegate from Greece explained his country's opposition on the ground that "the intention to destroy a specific group, which was an essential part of the definition of genocide, was absent." *Id*. at 245. Although sympathetic to the Soviet proposal, the delegate from France observed that the Sixth Committee "had never considered hatred as a crime." *Id*. at 246. While many delegates believed that hate speech may help cultivate an environment favorable to genocide, a majority believed that the connection between the two was too attenuated to justify making such expression an international crime—particularly in view of the potential threat this would pose to freedom of expression.[10] *See*, *e.g.*, *id*. at 246-52. In sum, then, the drafting history of the Genocide Convention reinforces the plain meaning of its text: only direct incitement to commit genocide—speech that calls on its intended audience to commit genocide—is made pun-

10 In fact, many delegates expressed their concern that criminalizing indirect incitement of genocide would allow oppressive governments to restrict legitimate speech and the freedom of the press. *See* UN Econ. & Soc. Council, Apr. 5-May 1- 1948, *Report of the Ad Hoc Committee on Genocide*, at 9, art. IV(c), UN Doc. E/794.

ishable. *See Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, ¶ 557 ("The 'direct' element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement").

In its sole reference to the drafting history of the Genocide Convention, the trial judgment makes no mention of the drafting history summarized above, citing instead the Soviet delegation's view that it was necessary to include in the draft treaty the crime of incitement to commit genocide in light of "its critical role in the planning of genocide." *See Nahimana*, p. 325, ¶ 978 (quoting *travaux préparatoires* of Genocide Convention cited in *Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 551 (2 September 1998)). Then, noting that the ICTR's previous cases involving incitement to commit genocide did not involve the role of the media in inciting genocide, *id*., ¶ 979, the Trial Chamber proceeded to undertake "a review of international law and jurisprudence on incitement to discrimination and violence" on the ground that this law "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." *Id*., ¶ 980. It was in this context that the trial judgment reviewed at some length the hate speech jurisprudence associated with the ICCPR, CERD, and the European Convention.

As the Trial Chamber noted, the ICCPR and CERD unambiguously require States parties to ban hate speech. The ICCPR provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law." *See Nahimana*, p. 327, ¶ 985 (quoting Article 20(2) of the ICCPR).

(A proposal to require States parties to *criminalize* hate speech was apparently rejected. *See* MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 403, 405 (1987)). CERD requires States parties to "declare 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 as against any race or group of persons . . . ." *See Nahimana*, p. 327, ¶ 985 (quoting Article 4(a) of CERD). Although a third treaty extensively considered in the trial judgment, the European Convention, does not explicitly require States parties to ban hate speech, it has been interpreted to allow parties to punish hate speech under certain circumstances while protecting speech from prosecution under domestic hate-speech laws under others. *See id*. at 329-33, ¶¶ 991-999 (reviewing hate-speech jurisprudence of the European Court of Human Rights).[11]

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11 The cases that the Tribunal cited in relation to these treaties emphasize that this area of analysis focused wholly on the prohibition of hate speech. In *Ross* v. *Canada*—a case in front of the Human Rights Committee and construing the ICCPR—disciplinary action taken against a teacher was upheld. The teacher was 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.'" *Nahimana*, p. 327, ¶ 986.

In *J.R.T. and the W.G. Party* v. *Canada*, the Human Rights Committee found that the ICCPR required Canada to restrict the complainants from using public telephone services 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." *Id*. at 328, ¶ 987.

In *Faurisson* v. *France*, the Human Rights Committee upheld the complainant's conviction for publishing his opinion that gas chambers were not used at Nazi concentration camps for extermination purposes. The French government argued that "'by challenging the reality of the extermination of Jews during the Second World War, the author incites his readers to anti-semitic behavior." The Human Rights Committee agreed. *Id*. at 328, ¶ 988.

None of these cases discuss incitement to genocide, or a call to action of violence of any kind. The only discussion of the application of the ICCPR and the CERD involve hate speech.

Although, as already noted, the Trial Chamber introduced its review of this body of law in terms that suggested the aforementioned human rights treaties are highly relevant guides in interpreting the incitement provision of the Genocide Convention[12]—a view that would be problematic, unless appropriately qualified, in light of the drafting history of the latter convention—it is unclear to what degree the Trial Chamber's review of hate speech law impacted its actual rulings. When the Trial Chamber turned from its general discussion of hate speech law to the specific charges against the accused, it drew appropriate distinctions between events that might properly be characterized as incitement of genocide, *see*, *e.g.*, *Nahimana*, p. 343, ¶ 1032 (citing *RTLM* broadcasts that called "on listeners to exterminate the *Inkotanyi*, who would be known by height and physical appearance"); *id*., p. 344, ¶ 1037 (noting "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.").[13] Thus while key passages in the trial judgment might be read to equate the

12 *See Nahimana*, p. 336, ¶ 1010 (asserting that "international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, [is] the point of reference for [the Trial Chamber's] consideration of these issues").

13 In a separate section of the trial judgment, which considered the charge of genocide itself, the Trial Chamber recognized that "a public call to commit genocide" is "an element at the core of the crime of public and direct incitement to commit genocide." *Nahimana*, p. 342, ¶ 1030. Other passages in the section of the trial judgment addressing the charge of incitement to commit genocide compounded the previously-noted ambiguities, however. For example, in characterizing certain broadcasts, the Trial Chamber drew a distinction between "the discussion of ethnic consciousness and the promotion of ethnic hatred," suggesting that the former "falls squarely within the scope of speech that is protected by the right to freedom of expression." *Nahimana*, p. 339, ¶ 1021. Because this passage occurs in the Trial judgment's discussion of the charge of incitement to commit genocide, it could be read to imply that "promotion of ethnic hatred" falls within the zone of speech proscribed by the Genocide Convention's incitement provision. As noted above, other passages seem to counter this impression, but these ambiguities are themselves problematic.

hate speech law associated with several human rights treaties with the incitement provision of the Genocide Convention, others are broadly consistent with the plain meaning and negotiating history of the latter.[14]

This very ambiguity is inimical to the principle of legality, which requires that the law provide clear guidance as to the elements of crimes. That the Trial Chamber's judgment could reasonably be construed—even if reasonably *mis*construed—to conflate hate speech and incitement to commit genocide is particularly worrying because of its implications for freedom of expression. Governments already bent upon suppressing press freedom can all too readily cite the trial judgment's discussion of hate speech jurisprudence to justify their suppression of speech that, far from constituting a crime, enjoys the highest protection under international law. *See*, *e.g.*, *Jersild* v. *Denmark*, 298 Eur. Ct. H.R. (ser. A), ¶ 31 (1994) ("reiterat[ing]," in case holding that Denmark's conviction of broadcast journalist on hate speech charges violated Article 10 of the European Convention, that "freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance").

In light of both considerations, the Appeals Chamber should take this opportunity to clarify the distinction between the treatment of hate speech in various human rights treaties on the one hand and the international crime of incitement to commit genocide on the

14 In addition to the passages noted above, other sections of the trial judgment may be read to imply that the Trial Chamber's review of hate speech jurisprudence was relevant to discrete aspects of incitement law, such as causation and intent. *See Nahimana*, pp. 334-37. Even these sections, however, include passages that appear to conflate hate speech law in general with the incitement law of genocide. *See*, *e.g.*, *id.*, p. 336, ¶ 1010.

other hand. More particularly, the Appeals Chamber should reaffirm that speech that encourages or expresses racial hatred or discrimination but which does not incite its audience to commit genocide does not constitute the internationally criminal conduct of "direct and public incitement to commit genocide."

2. The approach taken in some portions of the judgment blurred the distinction between human rights treaty obligations and international crimes

In broader perspective, to the extent that the trial judgment can be read to suggest that hate speech law strikes virtually the same balance between protected and unprotected speech as the crime of incitement to commit genocide, it would obscure the fundamental difference between the Genocide Convention—from which the ICTR Statute's genocide-incitement provision took its language—and the treaties that figured prominently in the Trial Chamber's discussion of jurisprudence it considered relevant in interpreting the crime of "direct and public incitement to commit genocide."

The Genocide Convention defines conduct that constitutes a crime under customary international law. By its nature, such conduct is criminal regardless of the law of any particular State. While many provisions of the ICCPR and CERD also reflect customary law, these treaties' hate-speech provisions do not. *See Prosecutor* v. *Kordić*, Case No. IT-95-14/2-T, Judgment (Trial Chamber), ¶ 209 n.272 (26 Feb. 2001) ("[C]riminal prohibition of [encouraging and promoting hatred on political grounds] has not attained the status of customary international law."). In *Kordić*, an ICTY Trial Chamber noted that there is a "sharp split over treaty law" on the subject of criminalizing speech, and the lack of international consensus "is indicative that such speech may not be regarded as a crime under customary international law." *Id.* n.272.

This conclusion is further buttressed by the fact that States are permitted to enter reservations to the hate-speech provisions of treaties that require States parties to ban such speech. According to the ICTY's trial judgment in *Kordić*, "[a] significant number of States have attached reservations or declarations of interpretations to these provisions." *Kordić*, ¶ 209 n.272. For non-reserving States, the duty imposed by the ICCPR is to prohibit or, in the case of CERD, to penalize hate speech in their domestic law. This is hardly the same thing as establishing hate speech as an international crime that supercedes inconsistent State law.

In view of portions of the trial judgment that unfortunately obscure this point, the Appeals Chamber should make once again clear that hate speech—*i.e.*, speech that expresses or encourages racial hatred or discrimination without a call to violent action—does not constitute incitement to commit genocide.

3. The Difficulties with the Trial Chamber's Substantive Analysis Are Exacerbated by the Fact that the Trial Chamber Improperly Relied on Pre-1994 Events.

The temporal jurisdiction of the Tribunal is limited by the ICTR Statute to events that occurred between January 1, 1994 and December 31, 1994. *See* ICTR Statute, Article 1. Earlier litigation in this case confirmed that actions that occurred before January 1, 1994 were to be referred to only for informational or historical purposes. *See Nahimana*, pp. 26-27, ¶ 100 (quoting September 2000 decision of ICTR Appeals Chamber). Despite this limitation, much of the evidence used to convict Hassan Ngezi was taken from pre-1994 issues of *Kangura* articles published well before the genocide itself and, indeed, well before the jurisdiction of the court attached. *Kangura* was first published in May of 1990. It continued

publishing in Rwanda until March of 1994, one month before the genocide that transpired in April of that year.

The Tribunal erred in its attempt to justify the use of these earlier events as evidence against Ngeze on two grounds, both of which are flawed.

(a) The Tribunal Incorrectly Determined that the Crime of Incitement Continued Until the Time of the Commission of the Acts Incited.

First, the Trial Chamber concluded that its temporal jurisdiction includes "inchoate offenses that culminate in the commission of acts in 1994." *Id*., p. 28, ¶ 104. Characterizing incitement as an inchoate offense, the Trial Chamber concluded that incitement is an act that "continues to the time of the commission of the acts incited." *Id*.; *see also id*., p. 338, ¶ 1017. Accordingly, it concluded, "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." *Id*., p. 339, ¶ 1017. The Chamber reached a similar conclusion with respect to "the entirety of RTLM broadcasting, from July 1993 through July 1994." *Id*.

The Trial Chamber's characterization of incitement as an inchoate crime is not controversial. *See Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 562 (2 September 1998); *Mugesera* v. *Canada*, 2005 S.C.R. 40, 94-95, at 66; WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 257 (Cambridge Univ. Press, 2000). Yet this characterization seems at odds with the Trial Chamber's apparently unqualified conclusion that incitement is a crime that "continues to the time of the commission of the acts incited." *Nahimana*, p. 28, ¶ 104. As an inchoate offense, "direct and public incitement to commit

[genocide] must be punished as such, even where such incitement failed to produce the result expected by the perpetrator." *Id*., p. 338, ¶ 1013, quoting *Akayesu* (Trial Judgment), p. 228, ¶ 562. *See also Nahimana*, p. 342, ¶ 1029. Moreover a causal relationship between speech and genocide "is not a requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement." *Id*., p. 338, ¶ 1015. It follows, then, that the crime of incitement to commit genocide is complete when a person publicly calls on his or her audience to commit genocidal acts with the intent to cause them to commit genocide.[15]

Deeming the crime of incitement to commit genocide to have occurred at the time of the criminal utterances advances one of the principal aims of the Genocide Convention. The negotiating history makes clear that a key reason why incitement to commit genocide was made punishable was to advance the treaty's goal of *preventing* genocide.[16] If con-

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15 Perhaps to overcome this implication, the Trial Chamber incorrectly analogized incitement and conspiracy, another inchoate crime. *See id*. at p. 28, ¶ 104; p. 338, ¶ 1017. But the two crimes are fundamentally different. Conspiracy is a continuing offense because, by its very nature, the crime is not complete upon the initial agreement. As explained by Judge Shahabuddeen in a concurring opinion in pre-trial proceedings relating to *Nahimana*, with conspiracy, "so long as the parties continue to adhere to the agreement, they may be regarded as constantly renewing it up until the time of the acts contemplated by the conspiracy. Therefore, a conspiracy agreement made prior to but continuing into the period of 1994 can be considered as falling within the jurisdiction of the Tribunal." *Nahimana*, p. 27, ¶ 101 (quoting concurring opinion of Judge Shahabuddeen in the Appeals Chamber's "Decision on the Interlocutory Appeals," Sept. 2000). The conspiracy is constantly renewed by its participants' involvement in the arrangement, and will end as soon as a participant no longer adheres to the agreement. It is not conspiracy's inchoate nature that results in its classification as a continuous offense, but rather the participants' actions in constantly renewing the conspiracy. Incitement, in contrast, is not by its nature a continuous offense. Much like the crime of solicitation, it is a discrete offense that is complete at the moment inciting words are uttered.

16 *See supra* lines 274-80, p. 13. *See also* UN GAOR C.6 (84th and 85th mtgs.) at 208 (statement by Mr. Pérez Perozo, Venezuela); *id.* at 215 and 228 (statements by Mr. Lachs, Poland); *id.* at 216 (statement by Mr. Bartos, Yugoslavia); *id.* at 219 (statement by Mr. Dihigo, Cuba); *id.* at 219, 227, 230 (statements by Mr. Morozov, the Union of Soviet Socialist Republics); *id.* at 220 (statement by Mr. Federspiel, Denmark); *id.* at 222 (statement by Mr. Manini y Ríos, Uruguay); *id.* at 223 (statement by Mr. Raafat,

Footnote continued on next page.

duct that may causally contribute to genocide is made punishable before it achieves its aim—that is, regardless of whether it succeeds in causing people to commit genocide—the Genocide Convention could help prevent genocide and not merely ensure that it is punished after it occurs.[17]

While this may not, by itself, foreclose States parties from treating successful and unsuccessful incitement differently,[18] the Security Council debate surrounding adoption of the ICTR Statute supports the view that pre-1994 utterances fall outside the ICTR's temporal jurisdiction over the international crime of direct and public incitement to commit genocide. Although the genocide that is the central focus of the ICTR's work commenced on 6 April 1994, the Security Council extended the Tribunal's temporal jurisdiction backward in

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Footnote continued from previous page.

Egypt).

17 An early version of the Genocide Convention explicitly made incitement to commit genocide punishable "whether such incitement be successful or not." *See Ad Hoc Committee on Genocide Report to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from 5 April to 10 May 1948*, 7 UN ESCOR Supp. (No. 6) at 20, UN Doc. E/794 (1948). This phrase was deleted pursuant to a proposal introduced by Belgium, UN Doc. A/C.6/217 (1948). In offering the amendment, Belgium's principal aim was to avoid deterring States from ratifying the convention because their municipal law did not recognize the crime of unsuccessful incitement. Its amendment, the Belgian delegate explained, "would allow the legislatures of each country to decide, in accordance with its own laws on incitement, whether incitement to commit genocide had to be successful in order to be punishable." 3 UN GAOR C.6 (85th mtg.) at 220-221. While some delegations were concerned that the Belgian amendment would have the effect of criminalizing incitement to commit genocide only when the crime succeeded in its deadly aim, others countered that deleting the phrase "whether such incitement be successful or not" had no such implication. Rather, they said, the phrase was superfluous since it was clear that incitement to commit genocide could be punished regardless of whether genocide occurred. *See*, *e.g.*, 3 UN GAOR C.6 (85th mtg.) at 231 (remarks of UK delegate); *id*. (remarks of Polish delegate); *id.* at 232 (remarks of South African delegate). Thus the overall thrust of debate surrounding the Belgian amendment is that the Genocide Convention would allow but not explicitly require States parties to penalize unsuccessful incitement to commit genocide.

18 As noted, in note 17, *supra*, the preparatory work of the Genocide Convention indicates that the drafters sought to enable each State party to approach the question of unsuccessful incitement in a manner consistent with its national law.

time to 1 January 1994 in order "to take into account possible acts of planning and preparation of [the] genocide" that commenced in April 1994.[19] While the Security Council thus decided that the ICTR should be able to exercise jurisdiction over conduct that was preparatory to the 1994 genocide, including conduct constituting incitement to commit genocide, it quite consciously determined to extend the Tribunal's jurisdiction backward in time only to 1 January 1994—and no earlier.

That the ICTR's jurisdiction would not capture pre-1994 conduct was first among several reasons cited by the Rwandan government, which held a rotating seat on the Security Council when the Tribunal was established, for voting against the resolution establishing the ICTR even though the Rwandan government had urged the UN to create such a court. Explaining its vote, the Rwandan delegate began: "First, my delegation regards the dates set for the *ratione temporis* competence of the International Tribunal for Rwanda . . . as inadequate. In fact, the genocide the world witnessed in April 1994 was the result of a long period of planning during which pilot projects for extermination were successfully tested."[20] In the Rwandan government's view, the ICTR's temporal jurisdiction should have encom-

19 UN Doc. S/PV.3453, p. 3 (8 Nov. 1994) (remarks of French delegation). *See also id*., p. 4 (remarks of New Zealand delegation, quoting conclusion of Commission of Experts making clear that the 1994 genocide was the result of an operation "planned months in advance of its actual execution"); *id*., p. 5 (recalling that the "temporal jurisdiction of the Tribunal has been expanded backwards, from April, as originally proposed, to January 1994, so as to include acts of planning for the genocide that occurred in April).

20 *Id*. at 14 (remarks of Rwanda delegation).

passed the period beginning 1 October 1990—but clearly excluded conduct occurring during this period.[21]

Not surprisingly in light of the Security Council debate and Genocide Convention drafting history noted above, international legal scholars writing before the *Nahimana* Trial Judgment was issued concluded that the ICTR would not be able to exercise jurisdiction over pre-1994 conduct constituting incitement to commit genocide. One scholar, speculating that pre-1994 acts constituting complicity in the genocide that occurred in 1994 might be argued to fall within the ICTR's temporal jurisdiction, observed:

> Nevertheless, even if that liberal interpretation of accomplice liability is adopted by the ICTR, there are certain crimes that the Statute's temporal limitation will indeed exclude. For example, killings and other crimes committed in massacres prior to 1994 would be excluded. In addition, *significant acts of incitement would not be covered*. It appears that incitement to commit genocide is punishable under the ICTR Statute even without proof that the incitement actually led to subsequent acts of genocide. Unlike planning or aiding and abetting, which form the basis for criminal liability only when they can be linked to a completed crime, it appears under the ICTR Statute that incitement to genocide is a crime itself. *Here, the temporal jurisdiction limit of the ICTR would be significant: incitements to genocide that occurred prior to 1994 (and they did) would be excluded from the prosecutorial scope of the International Tribunal*.

Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 354-55 (1997) (footnotes omitted) (emphasis added).

Noting the Rwandan government's decision to vote against the Security Council resolution establishing the ICTR, another scholar observed that the Tribunal's limited temporal jurisdiction "is inadequate to embrace the intricate events involved in planning, *inciting*,

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21 *Id*. at 15.

and eventually implementing a genocidal campaign that surpassed Hitler's campaign in terms of speed and efficiency." Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 345 (2000) (footnotes omitted) (emphasis added).

(b) The Contest Published in *Kangura* Did Not Constitute a Republication of All Past Issues of that Newspaper.

In addition to its erroneous approach to incitement as a continuing offence, the Trial Chamber sought to justify its reliance on pre-1994 publications by pointing to (and relying heavily on) a contest that was published in *Kangura* in 1994. The contest promised to award prizes to ten contestants who scored highest in correctly responding to questions about past issues of *Kangura*, published years before. The Trial Chamber found that the competition was "designed to direct participants to any and all of these issues of the publication and that in this manner in March 1994 *Kangura* effectively and purposely brought these issues back into circulation." *Nahimana*, p. 83, ¶ 257.

Although the Trial Chamber thus sought to justify its repeated emphasis on pre-1994 articles, the justification rings hollow. No issues of *Kangura* from 1990 and 1991 were republished in 1994. The Trial Chamber provided no evidence as to how many people, in a nation described by the Trial Chamber as one in which slightly more than 30% of the public was literate, *Nahimana*, p. 76-77, ¶¶ 235-236, retained or otherwise obtained three- and four-year old copies of the newspaper. No evidence was cited by the Trial Chamber as to how many people entered the competition, or, indeed, if anyone did so. Indeed, the Trial Chamber did not even focus on the alleged impact of the contest in March of 1994, a month before the genocide began. Instead, it concentrated solely on the impact of the pre-1994 is-

sues of *Kangura at the time of each issue's publication*, years before. *See e.g., id.* at p. 48, ¶ 142 ("Witness Philippe Dahinden . . . testified that a few weeks before his arrival in Rwanda in January 1991, *The Ten Commandments* . . . had appeared in *Kangura* and 'sent a shock wave among the people' and the whole of Kigali was talking about it."); *id*. at p. 56, ¶ 168 ("Witness François-Xavier Nsanzuwera . . . testified that the cover of *Kangura* No. 26 was distributed free of charge in February 1992 and played an important role in the Bugesera killings that took place in March 1992."); *id*. at p. 47, ¶ 141; ("Witness AHA . . . testified that the effect of the publication of *The Ten Commandments* was that the Hutu started perceiving the Tutsi as enemies instead of seeing them as citizens, and the Tutsi also started seeing the Hutu as a threat."); *id.* at p. 63, ¶ 191 ("Witness EB recalled seeing this list in *Kangura* No. 7 . . ."). The Chamber thus failed to lay the necessary foundation for its conclusion that the pre-1994 publications fell under its temporal jurisdiction or that they should be considered at all.

The Trial Chamber's heavy reliance on "two notable examples" of material in *Kangura* to justify the convictions of Hassan Ngeze for incitement to commit genocide and genocide itself, *see Nahimana*, p. 344, ¶ 1036, illustrate the risks associated with this approach. One is an article in the issue of December 1990 entitled "Appeal to the Conscience of the Hutu," *see Nahimana*, pp. 45-53, 318, 344, ¶¶ 138-158, 950, 1036A; the second is the cover of *Kangura* No. 26, published in November 1991 under the headline "THE BATUTSI, GOD'S RACE!" *See Nahimana* pp. 53-58, 318, 344, ¶¶ 160-172, 950, 1036.

These issues were published in December, 1990 and November, 1991, respectively—years before the 1994 genocide. Even taking account of the *Kangura* contest in the Spring of 1994, which directed contestants' attention back to earlier articles, the trial judg-

ment offers no proof that the articles had any effect in 1994. Given the requirement, acknowledged by the Trial Chamber itself, that speech can only be actionable as incitement to genocide, *inter alia*, if it would be understood as a call to action, the absence of proof to that effect should constitute an insuperable barrier to a determination of criminal responsibility within the temporal jurisdiction of the ICTR.

III. The Trial Chamber Erred in Concluding That Hate Speech Can Constitute the Crime Against Humanity of Persecution

1. The Tribunal Concluded That Hate Speech Can Constitute Persecution[22]

All three defendants were convicted of persecution as a crime against humanity based upon conduct constituting hate speech. *See Nahimana*, p. 353-54, ¶ 1081-84. The Trial Chamber's discussion made clear that, in its view, speech expressing ethnic hatred could constitute the crime against humanity of persecution even if the speaker did not advocate ethnic violence.

To understand the basis of the Trial Chamber's conclusion, it is useful to recall the definition of crimes against humanity set forth in the ICTR Statute. Article 3 establishes the Tribunal's jurisdiction over "the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

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22 The Trial Chamber also convicted defendants of the crime against humanity of extermination based on what appear to be the same facts supporting its conclusion that the defendants were guilty of persecution as a crime against humanity.

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts."

In contrast to most other crimes against humanity, such as murder, extermination, and torture, "persecution" by its nature is open to broad interpretation. Mindful of the attendant risks to defendants' rights, international courts have sought to ensure the "careful and sensitive development" of the crime of persecution "in light of the principle of *nullem crimen sine lege*." *Prosecutor* v. *Kordić and Čerkez*, Case No. IT-95-14/2-T, at ¶ 192. One interpretive rule that has been well established in the jurisprudence of the ICTR and ICTY is that conduct constituting the crime against humanity of persecution must involve "[t]he gross or blatant denial, on discriminatory grounds, of a fundamental right, laid out in international customary or treaty law, reaching the same level of gravity as the other acts" that potentially constitute crimes against humanity—including murder, extermination, and enslavement. *Kupreškić*, Trial Judgment, ¶ 621.

Applying this test in *Nahimana*, the Trial Chamber "consider[ed] it evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute." *Nahimana* at p. 351, ¶ 1072. The Chamber explained:

> Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.

Id. Reasoning that the crime of persecution "is not a provocation to cause harm" but "is itself the harm," the Trial Chamber found that "there need not be a call to action in communications that constitute persecution." *Id*. at p. 351, ¶ 1073. Rather, hate speech itself can constitute persecution as that term is defined in Article 3(h) of the ICTR Statute.

2. The Conclusion That Hate Speech Can, in and of Itself, Constitute Persecution Was Improper.

Although the *Nahimana* judgment purported to apply the legal standard enunciated in *Kupreškić* and other decisions relating to persecution as a crime against humanity, its conclusion represented a significant expansion of established law. No international criminal tribunal had previously held that speech advocating ethnic hatred but not violence could constitute this international crime.

The leading precedent on this subject is the judgment of the International Military Tribunal (IMT) convicting Julius Streicher of persecution as a crime against humanity based upon his role as publisher of the virulently anti-Semitic weekly newspaper *Der Stürmer*, in whose pages Streicher explicitly advocated the extermination of Jews ("If the danger of the reproduction of that curse of God in the Jewish blood is to finally come to an end, then there is only one way—the extermination of that people whose father is the devil."). *Nazi Conspiracy and Aggression, Opinion and Judgment* (1 October 1946), United States Government Printing Office, p. 130 (1947) ("Nuremberg Judgment"). The Trial Chamber recog-

nized the central importance of the *Streicher* precedent, which it cited in support of its own conclusions. *See Nahimana*, p. 351-52, ¶¶ 1073, 1076. But its interpretation of *Streicher* was deeply flawed.

Asserting, incorrectly, that Streicher was convicted "for anti-semitic writings that significantly predated the extermination of Jews in the 1940s",[23] *id*., p. 351, ¶ 1073, the Trial Chamber went on to observe that these publications "were [nonetheless] understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people." *Id*. The Chamber analogized Streicher's publications as it had characterized them to Kangura publications and *RTLM* broadcasts that "condition[ed] the Hutu population and creat[ed] a climate of harm . . . ." *Id*.

Yet Streicher's persecution conviction was based squarely on his "incitement to murder and extermination at the time when Jews in the east were being killed under the most horrible conditions," *see Nuremberg Judgment*, p. 131, not, as the Trial Chamber implied, on prewar publications that stopped short of calling for extermination. *See Nahimana*, p. 351, ¶ 1073. Significantly as well, the Trial Chamber omitted a crucial phrase from the IMT's judgment when it wrote that Streicher's publications were "understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people"—a claim apparently meant to but-

23 As one of the U.S. prosecutors at Nuremberg recalled, "the entire basis of Streicher's guilt rested on his actions from September 1, 1939, until the end of the war . . . ." TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 590 (1992).

583 tress the Trial Chamber's conclusion that "there need be no link between persecution and acts
584 of violence." *Id*. The passage in the Nuremberg judgment paraphrased by the Trial Chamber
585 reads in full: "Such was the poison Streicher injected into the minds of thousands of Germans
586 which caused them to follow the National Socialist policy of Jewish persecution and extermi-
587 nation."[24] *See Nuremberg Judgment*, p. 130 (emphasis added). And so, while the Trial
588 Chamber correctly found that persecutory acts need not entail physical violence, *see Ku-*
589 *preškić*, Trial Judgment, ¶ 568 ("persecution may take diverse forms, and does not necessarily
590 require a physical element"), *Streicher* does not support its conclusion that *speech expressing*
591 *ethnic hatred* can constitute persecution regardless of whether it includes a call to action.[25]
592 *Streicher* instead stands for the unexceptionable proposition that speech *that*
593 *includes a call to violent action* can constitute a crime against humanity. This interpretation
594 of the Nuremberg precedent is reinforced by the fact that Streicher, who advocated murder
595 and extermination, was convicted of crimes against humanity while another Nuremberg de-

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24 In other passages, however, the Trial judgment included this phrase. See, e.g., *Nahimana*, p. 326, ¶ 981, p. 335, ¶ 1007.

25 Of course, hate speech can be considered as evidence of the discriminatory intent that constitutes the *mens rea* of persecution as a crime against humanity. As a factual matter, moreover, virulent forms of hate speech, particularly when carried out on a sustained basis in the context of broader persecutory policies, have often been an integral and noxious dimension of such policies. Thus a portion of the Nuremberg Judgment dealing generally with the subject of "Persecution of the Jews" includes the following observation in its review of pre-war anti-Jewish policies: "'Der Stuermer' and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt." *Nuremberg Judgment*, p. 78. But while this passage can fairly be read to suggest that hate speech occupied a notable place in Nazi policies of persecution, that suggestion should not be confused with the Trial Chamber's more far-reaching conclusion that hate speech itself can constitute the criminal act of persecution. As noted above, the operative portions of the IMT's judgment—the sections applying the law of the Nuremberg Charter to evidence of each defendant's personal guilt—made clear that Julius Streicher's conviction on the charge of persecution as a crime against humanity was based squarely on his advocacy of extermination of the Jews.

fendant charged with speech-related crimes, Hans Fritzsche, was acquitted. The IMT acquitted Fritzsche, a radio commentator who spread Nazi propaganda and whose broadcasts were often anti-Semitic ("He broadcast . . . that the war had been caused by Jews and said their fate had turned out 'as unpleasant as the Fuehrer predicted'"), explaining:

> 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.

Nuremberg Judgment (emphasis added).[26]

The *Nahimana* trial judgment cited only one other case in support of its conclusion that hate speech can constitute persecution as a crime against humanity, *Prosecutor* v. *Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence (1 June 2000), which was the ICTR's first decision concerning persecution as a crime against humanity. As noted earlier, the *Nahimana* trial judgment's core claim in support of its holding that hate speech can constitute persecution was the Trial Chamber's view that "hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches [the same] level of gravity" as other acts enumerated as crimes against humanity. *Nahimana*, p. 351, ¶ 1072. The Chamber continued: "In *Ruggiu*, the Tribunal so held, finding that the radio broadcasts of RTLM, in

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26 It is notable, as well, that in what is perhaps the most fully developed international judicial discussion of the crime against humanity of persecution, an ICTY Trial Chamber made no mention of hate speech in its review of conduct found to constitute persecution in postwar prosecutions, *see Kupreškić*, ¶¶ 610-612, although the Trial Chamber discussed the *Streicher* precedent to illuminate other aspects of postwar case law concerning persecution as a crime against humanity. *See id*., ¶ 625.

singling out and attacking the Tutsi ethnic minority, constituted a deprivation of 'the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society.'" *Id*.

But *Ruggiu* cannot bear the weight placed on it by the *Nahimana* trial judgment. Immediately after the passage quoted by the Trial Chamber in *Nahimana*, the *Ruggiu* judgment continued: "The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself." *Ruggiu*, ¶ 22. To find, as the Trial Chamber's judgment did, that the crime against humanity of persecution encompasses speech that does not have human destruction as its aim reaches far beyond the *Ruggiu* precedent.

While misconstruing *Streicher* and *Ruggiu*, the *Nahimana* Trial Chamber made no mention of one other precedent that was very much on point, the judgment of an ICTY Trial Chamber in *Prosecutor* v. *Kordić and Čerkez*. Case No. IT-94-14/2-T, Judgment (26 Feb. 2001). In this case the Trial Chamber had to determine whether "[e]ncouraging and promoting hatred on political etc. grounds" constituted the crime against humanity of persecution. *Kordić*, ¶ 208. Noting that Dario Kordić's indictment was the "first . . . in the history of the International Tribunal to allege this act as a crime against humanity," the Trial Chamber concluded that promoting hatred, by itself, did not constitute an international crime:

> It is not enumerated as a crime elsewhere in the International Tribunal Statute, but most importantly, *it does not rise to the same level of gravity as the other acts enumerated in Article 5* [of the ICTY's Statute, defining crimes against humanity]. Furthermore, the criminal prohibition of this act has not attained the status of customary international law. Thus, to convict the accused for such an act as is alleged as persecution would violate the principle of legality.

Id. (emphasis added).

This portion of the *Kordić* trial judgment apparently was not addressed on appeal, and of course the Appeals Chamber is not bound to follow the *Kordić* Trial Chamber's approach. Yet any expansion of the crime of persecution to encompass hate speech—and as the foregoing review of relevant case law makes clear, this aspect of the *Nahimana* trial judgment *does* expand the law of persecution beyond its previous ambit—must satisfy the stringent criteria for recognizing conduct as persecution that the ICTR and ICTY have repeatedly affirmed.

"In determining whether particular acts constitute persecution," various trial chambers have asserted, persecutory acts "must be evaluated not in isolation but in context, by looking at their cumulative effect." *Kupreškić*, ¶ 622; *see also Kordić*, ¶ 199. If hate speech could ever constitute the international crime of persecution as a crime against humanity, such a determination should at the very least turn upon contextual factors that were not explored by trial judgment. Such factors might include consideration of whether the speech in question was the functional equivalent of government speech broadcast, for example, by ruling party leaders and thus carrying the backing of State security forces and related militia. The Trial Chamber's judgment sweeps far more broadly, however, effectively ruling *any* "hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds," to constitute persecution within the meaning of Article 3(h) of the ICTR Statute. *Nahimana* at p. 351, ¶ 1072. While such speech is abhorrent, "not every denial of a human right may constitute a crime against humanity." *Kupreškić*, ¶ 618. Under the *Nahimana* trial judgment's standard, governments could far too easily seek to suppress any speech that could be classi-

fied as divisive—the perilous path that, as we have previously observed, too many States in Africa have already begun to walk.

ANNEX I

Background Information on Amici

Open Society Justice Initiative: The Open Society Justice Initiative, an operational program of the Open Society Institute (OSI), pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the following priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. Its offices are in Abuja, Budapest and New York.

Cairo Institute for Human Rights Studies (Egypt): The Cairo Institute for Human Rights Studies (CIHRS) is an independent regional non-governmental organization founded in 1994. It works on analyzing and interpreting the consequences of the difficulties facing the application of International Human Rights Law, human rights education and the promotion of respect for principles of human rights and democracy both in Egypt and the Arab Region. The CIHRS enjoys a consultative status in the United Nations ECOSOC, and an observer status in the African Commission on Human and Peoples' Rights. The CIHRS is also a member of the Euro-Mediterranean Human Rights Network (EMHRN) and the International Freedom of Expression Exchange (IFEX).

Canadian Journalists for Free Expression (Canada): The CJFE is a Canadian non-governmental organization supported by Canadian journalists and advocates of free expression. The purpose of the organization is to defend the rights of journalists and contribute to the development of media freedom throughout the world. CJFE recognizes these rights are not confined to journalists and strongly supports and defends the broader objective of freedom of expression in Canada and around the world.

Center for Media Freedom and Responsibility (Philippines): CMFR was organized in 1989 as a private, non-stock, non-profit organization involving different sectors in the task of building up the press and news media as a pillar of democratic society. Its programs uphold press freedom, promote responsible journalism and encourage journalistic excellence. CMFR is a founding member of the Southeast Asian Press Alliance (SEAPA) and the Freedom Fund for Filipino Journalists. It is also a member of the International Freedom of Expression eXchange (IFEX).

Committee to Protect Journalists (United States): The Committee to Protect Journalists is an independent, nonprofit organization founded in 1981. It promotes press freedom worldwide by defending the rights of journalists to report the news without fear of reprisal. By publicly revealing abuses against the press and by acting on behalf of imprisoned and threatened journalists, CPJ effectively warns journalists and news organizations where attacks on press freedom are occurring. CPJ organizes vigorous public protests and works through diplomatic channels to effect change.

Fundación Para la Libertad de Prensa (Colombia): FLIP's mandate is to develop activities that promote press freedom, access to information and the protection of journalists' safety and integrity; analyse the relationship between the media and society to strengthen the democratic process; provide advice on methods and techniques of communication; carry out activities that defend journalists' professional codes and ethics; participate in national and international bodies that promote and defend

press freedom and promote the presentation of a legislative platform that establishes effective mechanisms for protecting a free press.

Greek Helsinki Monitor (Greece): Greek Helsinki Monitor (GHM), founded in 1993, monitors, publishes, lobbies, and litigates on human and minority rights and anti-discrimination issues in Greece and, from time to time, in the Balkans. It also monitors Greek and, when opportunity arises, Balkan media for stereotypes and hate speech. It issues press releases and prepares (usually jointly with other NGOs) detailed annual reports; parallel reports to UN Treaty Bodies; and specialized reports on ill-treatment and on ethno-national, ethno-linguistic, religious and immigrant communities, in Greece and in other Balkan countries.

Independent Journalism Center (Moldova): The Independent Journalism Center (IJC) is a non-governmental organization (NGO) that provides assistance to journalists and media institutions in the Republic of Moldova. IJC sees its mission in supporting professional journalism and aims at contributing to the consolidation of a qualitative, independent and impartial press.

Instituto Prensa y Sociedad (Peru): Founded in 1993, the Institute for Press and Society (Instituto Prensa y Sociedad, IPYS) is one of the only non governmental organizations in Latin America comprised solely of active journalists. IPYS promotes the freedom to inform and defends the need for an independent press. It produces reports on situations in various countries, elaborates specialized studies, and encourages debate about the role of the press in society. It is a group without any commitments to economic, political or ideological groups. IPYS administers a network of monitors in 10 countries in Latin America, whose reports are published both as Action Alerts or articles on the electronic bulletin Interprensa.

International PEN (United Kingdom): International PEN is the only worldwide association of writers. It exists to promote friendship and intellectual co-operation among writers everywhere, regardless of their political or other views; to fight for freedom of expression and to defend vigorously writers suffering from oppressive regimes. PEN is strictly non-political. It is composed of centers, each of which represents its membership and not its country.

Media Institute (Kenya): The Media Institute was founded in 1996 to advance and defend freedom of expression and promote journalistic excellence in Kenya. It monitors media performance and conducts training and research. The Institute stands at the intersection of media, democracy and human rights in Kenya and is the most visible campaigner for press freedom.

World Press Freedom Committee (United States): The World Press Freedom Committee is an international coordination organization that includes 45 journalistic groups -- print and broadcast, labor and management, journalists, editors, publishers and owners on six continents -- united in the defense and promotion of press freedom. Its goal is to strengthen and secure a global environment in which the news media can be free and independent. To this end, it works to reduce the ways and occasions in which governments, intergovernmental organizations or others try to legitimize restrictions on the press. Serving as a watchdog for free news media, the WPFC emphasizes its roles of monitoring press freedom issues and of coordinating of responses to press freedom threats or restrictions.

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