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Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana

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CRIMINALIZING HATE SPEECH IN THE CRUCIBLE OF TRIAL: *PROSECUTOR V.* *NAHIMANA*

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INTRODUCTION

On December 3, 2003, a trial chamber of the International Criminal Tribunal for Rwanda (“ICTR”) rendered the most important judgment relating to the law of incitement in the context of international criminal law since the judgment of Nuremberg more

^{*} Professor of International Law, American University. This article is an expanded version of remarks presented at a conference on “International Criminal Tribunals in the 21st Century” hosted by the War Crimes Research Office (“WCRO”) of the Washington College of Law, American University, on September 30, 2005. Another version of this article appears in the *New England Journal of International and Comparative Law*. I am grateful to Morton H. Halperin, Kelly Dawn Askin and Sandra Coliver for comments on an earlier draft and for other contributions, and to Christian De Vos, Jonathan Forman, Larken Kade and Bill Ryan for research assistance. I am also indebted to several individuals who provided research for two projects relating to the *Media Case* in which I have been involved and which informed portions of my analysis here: Ewen Allison, who undertook research for the Open Society Justice Initiative, which is planning to submit an *amicus* brief before the Appeals Chamber of the International Criminal Tribunal for Rwanda in connection with the *Media Case*; Diego Ibarguen, who undertook research for Cahill Gordon & Reindel LLP, which is providing pro bono assistance to this effort; and Anita Sharma, who undertook research for the WCRO under the direct supervision of John Cerone, then Executive Director of the WCRO.

than fifty-seven years earlier. In its long awaited judgment in *Prosecutor v. Nahimana*¹ (“*Nahimana*” or “*Media Case*”), the ICTR’s Trial Chamber I convicted three defendants of (1) genocide; (2) direct and public incitement to commit genocide; and (3) persecution as a crime against humanity based upon the defendants’ responsibility for incendiary radio broadcasts and newspaper articles. The chamber convicted two defendants, Ferdinand Nahimana and Jean-Bosco Barayagwiza, based upon their respective roles in *Radio Télévision Libre des Mille Collines* (“RTLM”), which is deservedly infamous for its role in inciting and directing the 1994 genocide in Rwanda. It convicted the third defendant, Hassan Ngeze, for his role as editor-in-chief of the newspaper *Kangura*.² An appeal of this decision is now pending before the ICTR’s Appeals Chamber.

This article explains how and why I hope that the Appeals Chamber will adopt a different approach to speech-related charges than that taken by the trial chamber. Since this article focuses upon problematic aspects of *Nahimana*, I would like to make clear at the outset my appreciation for the trial chamber’s valuable contributions, not least in providing a detailed record of the key role of the media, particularly RTLM, in fanning the flames of ethnic violence in Rwanda.³ This historical accounting is itself a measure of justice. I

1. Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003).

2. Although the *Media Case* involved additional charges, this article focuses upon those stemming from the RTLM broadcasts and *Kangura* publications. Even with respect to these charges, this commentary is hardly exhaustive but instead focuses upon several aspects of the trial chamber’s judgment. For assessments that touch upon other aspects of *Nahimana*, see H. Ron Davidson, *The International Criminal Tribunal for Rwanda’s Decision in The Prosecutor v. Ferdinand Nahimana et al.: The Past, Present, and Future of International Incitement Law*, 17 LEIDEN J. INT’L L. 505 (2004); Catherine A. MacKinnon, *International Decisions: Prosecutor v. Nahimana, Barayagwiza & Ngeze*, 98 AM. J. INT’L L. 325 (2004); and Recent Cases, *International Law—Genocide—U.N. Tribunal Finds that Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity—Prosecutor v. Nahimana*, 117 HARV. L. REV. 2769 (2004).

3. Joel Simon cautions, however, that “[w]hile RTLM certainly broadcast hate-filled messages, the genocidal violence was not a spontaneous reaction to its programming. The media were only one component in a coordinated government campaign that included arming civilians, mobilizing the population, and organizing militias.” Joel Simon, *Of Hate and Genocide: In Africa, Exploiting the Past*, COLUM. JOURNALISM REV., Jan./Feb. 2006, at 9.

also want to make clear that, in my view, each of the defendants in the *Media Case* deserved to be convicted for his proven role in the 1994 Rwandan genocide. In particular, the defendants who were responsible for RTLM's broadcasts undoubtedly deserved to be convicted of inciting genocide. Indeed, I know of no one who disagrees with this.

But Trial Chamber I also convicted the defendants for conduct that does not clearly fall within the ICTR's subject-matter jurisdiction. For example, in a departure from established jurisprudence, the chamber convicted all three defendants of persecution as a crime against humanity based upon speech that constitutes incitement to racial hatred but does not necessarily constitute incitement to racial violence.⁴

More generally, several aspects of the *Nahimana* judgment raise troubling issues that warrant corrective attention by the Appeals Chamber. To begin, portions of the judgment suggest that Trial Chamber I may have grafted the law associated with three other human rights treaties onto the incitement provision of the Genocide Convention.⁵ As I will explain shortly, a reinterpretation along these lines would flout the unambiguous intention of those who drafted the Genocide Convention and breach the defendants' right to be punished only for conduct clearly established as a crime committed to the jurisdiction of the ICTR.⁶ In another innovation, portions of the *Nahimana* judgment suggest that individuals may be convicted of committing genocide (not just inciting others to do so) based upon their relationship to media organizations.⁷

Through unpersuasive reasoning, moreover, Trial Chamber I convicted at least one defendant on the basis of expressive activities preceding January 1, 1994, the date when the ICTR's temporal jurisdiction began.⁸ To achieve this result, Trial Chamber I relied upon an expansive conception of the crime of incitement.⁹

4. See *infra* text accompanying notes 80-134.

5. See *infra* text accompanying notes 21-22.

6. See *infra* text accompanying notes 25-65.

7. See *infra* text accompanying notes 75-79.

8. See *infra* text accompanying notes 135-46.

9. See *infra* text accompanying notes 137-41.

These rulings represent significant innovations in the interpretation and enforcement of international crimes. As such, they potentially implicate a fundamental principle of legality: no one may be convicted for conduct that was not criminalized at the time it occurred.¹⁰

I. INCITEMENT TO COMMIT GENOCIDE

Each of the defendants in *Nahimana* was charged with “direct and public incitement to commit genocide.”¹¹ The provision of the ICTR’s statute that vests the tribunal with jurisdiction over this charge¹² is taken directly from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).¹³ Accordingly, the law of this treaty provides the most pertinent guide for interpreting the provision of the ICTR statute establishing the tribunal’s jurisdiction to prosecute “direct and public incitement to commit genocide.”¹⁴

Yet the portion of the *Nahimana* judgment addressing this charge focused overwhelmingly on the law of three other human rights treaties. Two of these treaties, the International Covenant on Civil and Political Rights (“ICCPR”)¹⁵ and the International Convention on the Elimination of All Forms of Racial Discrimination (“Race

10. See *infra* text accompanying notes 94, 133.

11. Prosecutor v. *Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 8-10 (Dec. 3, 2003).

12. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 2(3)(c), U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

13. Convention on the Prevention and Punishment of the Crime of Genocide, art. III(c), Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

14. Cf. Prosecutor v. Krstić, Case No. IT-98-38-T, Judgment, ¶ 541 (Aug. 2, 2001) (noting that the Genocide Convention “constitutes the main reference source” for interpreting an article in the Statute of the International Criminal Tribunal for the former Yugoslavia that adopts provisions of the Genocide Convention *verbatim*).

15. International Covenant on Civil and Political Rights, G.A. Res. 2200, art. 20(2), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]. Article 20(2) of the Covenant provides, “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

Convention”),¹⁶ explicitly require States parties to proscribe not only speech that incites its listeners to racial violence, but also “hate speech”—a term I will use to connote speech that incites its audience to racial discrimination¹⁷ or hatred even when it does not entail incitement to violence. The third of these treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights” or “ECHR”),¹⁸ does not contain a similar provision. The European Court of Human Rights has, however, interpreted this treaty to allow States parties to proscribe hate speech under certain conditions.¹⁹

16. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter *Race Convention*]. Article 4(a) of this treaty 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 against any race or group of persons of another colour or ethnic origin” *Id.* at 220.

17. I am using the phrase “racial discrimination” as short hand for the various forms of group-based discrimination typically encompassed in hate-speech laws. Similarly, the *Race Convention* defines “racial discrimination” as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Id. art. 1(1), 660 U.N.T.S. at 216.

18. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter *European Convention on Human Rights*].

19. See *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 991-99 (Dec. 3, 2003) (summarizing relevant ECHR jurisprudence). Article 10(1) of the European Convention on Human Rights, *supra* note 18, protects “the right to freedom of expression,” including “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” Article 10(2) provides that, since the exercise of these freedoms “carries with it duties and responsibilities,” it “may be subject to such . . . conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the . . . rights of others.” *Id.* Hate-speech prohibitions would be incompatible with Article 10(1) unless they satisfied the legal standards set forth in Article 10(2).

The European Union has been considering a “Framework Decision on combating racism and xenophobia.” The most recent version of the proposed decision includes the following provision:

Although its analysis in *Nahimana* is somewhat ambiguous, Trial Chamber I apparently treated the hate-speech law associated with these treaties as the most pertinent guide to its interpretation of the Genocide Convention's provision on direct and public incitement to commit genocide. The chamber signaled as much when it began its discussion of the genocide-incitement charges with the assertion that, in its view, "a review of international law and jurisprudence on *incitement to discrimination* and violence is helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression."²⁰ The chamber proceeded to discuss three general sources of law, focusing in particular on the hate-speech law associated with the three aforementioned human rights treaties.²¹

As a general rule, it is perfectly appropriate and even desirable to interpret one human rights treaty in light of others. This approach promotes coherence in human rights treaty law and helps ensure that States are not subject to conflicting obligations under different human rights treaties.²² Even so, it would be inappropriate to assume that the Genocide Convention's provision on incitement strikes the same balance between protected and unprotected speech as the

Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable: (a) publicly inciting to discrimination, violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin"

Note from the Presidency, Proposal for a Council Framework Decision on Combating Racism and Xenophobia, art. 1(1)(a), Doc. 8994/1/05 REV 1 (May 27, 2005) [hereinafter Presidency Proposal].

20. *Nahimana*, ICTR 99-52-T, ¶ 980 (emphasis added).

21. *Id.* ¶¶ 983-99. In addition to these treaties, the trial chamber briefly considered the Nuremberg tribunal's treatment of charges relating to incitement to commit crimes against humanity, *id.* ¶¶ 981-82, 1007, and its own jurisprudence, *id.* ¶¶ 1011-15.

22. *Cf.* *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 20-21 (1994) (noting respondent's observation that Danish law penalizing hate speech, application of which was found to be inconsistent with the guarantee of freedom of expression in the European Convention on Human Rights, was adopted to implement Denmark's obligations as a party to the Race Convention).

balance embodied in human rights treaties that require or permit States parties to proscribe hate speech.²³

Although this approach would be problematic for several reasons, the most important is that it would fly in the face of the drafting history of the Genocide Convention.²⁴ The *travaux préparatoires* disclose an unambiguous determination by the treaty's drafters to *exclude* hate speech from the ambit of the clause that makes "direct and public incitement to commit genocide" a punishable offense.

This is not the place for an exhaustive review of the drafting history of the Genocide Convention, but a brief summary of key debates demonstrates the drafters' intent in this regard. The first version of the convention, prepared by a group of experts on behalf of the United Nations Secretary-General, included a provision that was the precursor of the "direct/public incitement" provision²⁵ as well as a separate provision making certain forms of propaganda punishable.²⁶ The latter, which appeared as Article III in the

23. It may, however, be appropriate to look to these treaties for guidance in respect of discrete aspects of incitement law. *See infra* text accompanying note 72 (suggesting that jurisprudence derived from one area of incitement law concerning the legal relevance of context may also be pertinent in other areas of incitement law).

24. *Cf.* Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 589 (Jan. 14, 2000), *rev'd in part on other grounds*, Case No. IT-95-16-A, Judgment (Oct. 23, 2001) ("It would be contrary to the principle of legality to convict someone of persecution [as a crime against humanity] based on a definition [of persecution] found in international refugee law or human rights law."). *But cf. id.* ¶ 621 (drawing upon several international instruments to help define the elements of "persecution").

25. This draft provided in pertinent part: "The following shall likewise be punishable: . . . direct public incitement to any act of genocide, whether the incitement be successful or not . . ." The Secretary-General, *Draft Convention on the Crime of Genocide*, at 7, art. II(II)(2), U.N. Doc. E/447 (June 26, 1947) [hereinafter *Draft Genocide Convention*].

26. It may be relevant to note that this draft was deliberately over-inclusive. *See id.* at 16. It was "intended to form a basis of discussion" and to that end included some acts "which perhaps need not be maintained in the final text of the Convention." *Id.* at 19. It should also be noted that early drafts of the Genocide Convention included political groups in the definition of genocide, *e.g., id.* at 5, art. I(I), which in the final draft is defined as certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Genocide Convention, *supra* note 13, art. II, 78 U.N.T.S. at 280. This undoubtedly colored the views of some governments, which were concerned that criminalizing

Secretary-General's draft, would have proscribed hate speech in the following terms: "All forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished."²⁷ The accompanying commentary noted that draft Article III was "not concerned with direct and public incitement to any act of genocide, which falls within Article II"²⁸—the precursor to the Genocide Convention's provision on incitement. While draft Article II covered words that "openly advocated genocide,"²⁹ draft Article III covered public expression that would constitute "such general propaganda as would, if successful, persuade those impressed by it to contemplate the commission of genocide in a favourable light."³⁰

The next draft of the Genocide Convention was prepared by an Ad Hoc Committee on Genocide convened by the U.N.'s Economic and Social Council. Draft Article IV of the text that it adopted provided: "The following acts shall be punishable: . . . [d]irect incitement in public or in private to commit genocide whether such incitement be successful or not."³¹ Deeming this text "inadequate,"³² the Soviet

speech aimed at molding public opinion to be favorable toward genocide could be used as a tool of political repression. *See infra* note 49.

27. *Draft Genocide Convention*, *supra* note 25, at 7, art. III; *see also id.* at 32 (commentary on Article III). The text of the Draft Genocide Convention on file with the author and the *International Law Review* uses the phrase "provoke genocide." *Id.* art. III; *see also* Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 B.U. INT'L L.J. 1, 12 (1985) (quoting draft Article III of the Secretariat draft). Various reproductions of this text use the phrase "promote genocide," however. *See, e.g.*, WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES* 555 app. (2000).

28. *Draft Genocide Convention*, *supra* note 25, at 32.

29. *Id.* at 34.

30. *Id.* at 32. To have this effect, the propaganda prohibited by draft Article III "must necessarily be heavily charged with hatred and must be systematic, that is to say, repeated methodically." *Id.* at 33.

31. U.N. Econ. & Soc. Council, Apr. 5–May 10, 1948, *Report of the Ad Hoc Committee on Genocide*, at 7, art. IV(c), U.N. Doc. E/794. The U.S. delegation opposed this language, arguing that direct incitement "of a nature to create an imminent danger that it would result in the commission of [genocide] would generally constitute part of an attempt thereto and/or an overt act of conspiracy thereto," both of which were made punishable by Article IV of the Ad Hoc Committee's draft. *Id.* at 8 n.11.

representative proposed inserting a new paragraph that would, in addition, make punishable “[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.”³³ Opponents of the Soviet text believed that repression of “hateful propaganda” would be beyond the scope of the Genocide Convention and could be abused to suppress freedom of information.³⁴ The Soviet hate-speech text was rejected.³⁵

During the next significant drafting phase, undertaken by the Sixth Committee of the General Assembly, the Soviet delegation unsuccessfully reintroduced its hate-speech proposal.³⁶ The surrounding debate reinforces the obvious implications of the Soviet text: while the final clause concerning propaganda, which was aimed at “provoking the commission of acts of genocide,” would encompass conduct made punishable by the already-approved provision on direct incitement, the first clause of the Soviet text would have made propaganda constituting hate speech punishable as well. In response to several delegates’ observation that the final clause in the Soviet amendment covered conduct already proscribed by draft Article IV(c),³⁷ the Soviet delegate noted that the phrase

32. *Id.* at 9.

33. *Id.*

34. *Id.*

35. *Id.* (noting that the Soviet proposal was rejected by a vote of five to two).

36. Union of Soviet Socialist Republics: Amendments to the Draft Convention (E/794), U.N. GAOR, 3d Sess., at 1, U.N. Doc. A/C.6/215/Rev.1 (Oct. 9, 1948) [hereinafter *USSR Proposed Amendments*].

37. “As a matter of fact,” the Venezuelan delegate argued, “it would be difficult to imagine propaganda in favour of genocide which would not at the same time constitute incitement to that crime.” U.N. GAOR, 3d Sess., 6th Comm., 87th mtg., at 250, U.N. Doc. A/87/PV.6 (Oct. 29, 1948) [hereinafter U.N. GAOR 87th mtg.] (statement of Venez. del. Pérez Perozo); *see also id.* at 249 (statement of Egypt del. Mr. Raafat) (explaining that he “shared the opinion of those delegations which connected the second part of the amendment of the Soviet Union with sub-paragraph (c) of article IV”); *id.* at 248 (statement of Iran del. Mr. Abdoh) (“If the immediate purpose of [propaganda encompassed in the Soviet text] were incitement to the perpetration of genocide, it was covered by sub-paragraph (c) of article IV, which penalized incitement.”); U.N. GAOR, 3d Sess., 6th Comm., 86th mtg., at 246, U.N. Doc. A/87/PV.6 (Oct. 28, 1948) [hereinafter U.N. GAOR 86th mtg.] (statement of Greece del. Mr. Spiropoulos) (observing that the punishment of

"direct incitement" restricted the reach of that provision,³⁸ implying that the proposed amendment would encompass indirect incitement to commit genocide.³⁹

The debate offers few insights into what the delegates understood "direct" (as distinguished from "indirect") incitement to entail. One intervention suggests, however, that direct incitement occurs when the speaker seeks to induce his or her audience to commit genocide rather than seeking to mold public opinion more generally to be receptive to genocide—conduct that would likely constitute hate speech. Disagreeing with those who claimed that the final clause of the Soviet text duplicated draft Article IV(c), the Yugoslav delegate argued that the latter provision, which proscribed "direct incitement . . . to commit genocide,"

covered incitement to a crime committed at a particular time, in a particular place and against a particular category of persons. The amendment, on the other hand, sought to suppress general incitement to genocide, when such incitement took the form of popular education and of moulding public opinion with a view to developing racial, national or religious hatred.⁴⁰

"the forms of public propaganda 'aimed at . . . provoking the commission of acts of genocide' . . . was ensured by the provisions of sub-paragraph (c) of article IV").

38. U.N. GAOR 87th mtg., *supra* note 37, at 252 (statement of USSR del. Mr. Morozov).

39. The Iranian delegate argued that the Soviet amendment would either be redundant of the incitement provision in draft Article IV(c) or would constitute "indirect incitement to crime," in which case it should not be considered since the Sixth Committee had already implicitly excluded indirect incitement from draft Article IV. *Id.* at 248 (statement of Iran del. Mr. Abdoh); *see also* U.N. GAOR 86th mtg., *supra* note 37, at 248 (statement of Cuba del. Mr. Dihigo) (making remarks to a similar effect).

40. U.N. GAOR 87th mtg., *supra* note 37, at 250 (statement of Yugoslavia del. Mr. Bartos). The Polish delegate similarly implied that the direct-incitement provision covered speech aimed at inducing the intended audience to commit genocide. Supporting the Soviet amendment, the Polish delegate argued:

The most horrible crime ever known to the world had been brought about by preaching hatred of certain human groups. It was unnecessary directly to incite future perpetrators to commit acts of genocide. It was sufficient to play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties, in order to create an atmosphere favourable to the perpetration of the crime.

As this intervention suggests, a key distinction between the hate-speech clause proposed by the Soviet government and the direct-incitement provision included in the final text of the Genocide Convention is that the former would have reached expressive activity aimed at creating a general public climate of hostility toward certain groups—a climate that proponents argued is conducive to the commission of genocide⁴¹—while the final text covers only speech urging the speaker's audience to commit genocide.

Several delegates argued that the focus of the Soviet proposal, incitement to group hatred, was simply beyond the province of a convention on genocide. The Greek delegate opposed the text criminalizing hate speech on the ground that “the intention to destroy a specific group, which was an essential part of the definition of

U.N. GAOR 87th mtg., *supra* note 37, at 251 (statement of Poland del. Mr. Lachs). The U.S. delegate's remarks suggest a somewhat different interpretation of the phrase “direct incitement” in draft Article IV(c). Urging that the direct-incitement provision be deleted altogether, he argued that “direct incitement, such as would result in the immediate commission of the crime, was in general merely one aspect of an attempt or overt conspiracy.” U.N. GAOR, 3d Sess., 6th Comm., 84th mtg., at 213, U.N. Doc. A/87/PV.6 (Oct. 26, 1948) [hereinafter U.N. GAOR 84th mtg.] (statement of U.S. del. Mr. Maktos). While the meaning of this observation is somewhat ambiguous, the context suggests that the U.S. delegate may have believed that “direct incitement” implies an immediate causal relationship between inciting words and the commission of genocide. This view does not, however, appear to have been universally shared. For example, the delegate of the United Kingdom questioned “whether it was really necessary to punish genocide at as early a stage as incitement,” *id.* at 218 (statement of U.K. del. Mr. Fitzmaurice), implying that he may have regarded at least some forms of incitement to be temporally removed from the principal act of genocide. Decades later, the United States Senate observed that the word “direct” in Article III(c) suggested that inciting words “must actually advocate the commission of genocide.” S. REP. NO. 99-2, at 7 (1985).

41. Introducing its amendment, the Soviet delegate stated that the forms of propaganda addressed therein “were the cause of acts of genocide, in that they spread the idea of committing the crime and tended to give the criminals a kind of justification for their actions on the ideological plane.” U.N. GAOR 86th mtg., *supra* note 37, at 245 (statement of USSR del. Mr. Morozov). Supporting the amendment, the Haitian delegate observed that the previously-adopted text on direct incitement “dealt with incitement to the crime of genocide, whereas the amendment dealt with the dissemination of ideas which, if shared, might lead to genocide.” *Id.* at 247 (statement of Haiti del. Mr. Demesmin); *see also* U.N. GAOR 87th mtg., *supra* note 37, at 250 (statement of Yugoslavia del. Mr. Bartos) (“Propaganda which stirred up hatred must be punished because it was at the very source of acts of genocide . . .”).

genocide, was absent.”⁴² “However regrettable such acts might be,” he continued, “they did not come within the scope of the convention on genocide.”⁴³ The Iranian delegate likewise “considered that the” hate-speech clause in the Soviet text “should not be included in the convention” since the “concept of genocide did not extend to propaganda of that kind.”⁴⁴ “Such propaganda should certainly be punished,” he continued, “but its punishment was not within the province of the convention.”⁴⁵ Although the Cuban delegation “favoured the adoption of measures aimed at the prevention of incitement to national, racial or religious hatred, . . . it did not think that such measures could be taken within the framework of the convention on genocide.”⁴⁶ These observations reinforce what is plain from the treaty text: speech made punishable by the Genocide Convention must incite the audience to commit genocide. It is not sufficient that the speech incite the audience to racial, national, or religious hatred.

Delegates’ rejection of the Soviet hate-speech proposal also suggests that *direct* incitement, which is made punishable by Article III(c) of the Genocide Convention,⁴⁷ does not include speech whose relationship to the crime of genocide is attenuated. As noted, proponents of the hate-speech clause believed that the dissemination of hateful propaganda fostered a general climate conducive to genocide.⁴⁸ While opponents of the Soviet amendment did not dispute this as a sociological account of the genesis of genocide, they regarded this attenuated relationship to be insufficient to justify

42. U.N. GAOR 86th mtg., *supra* note 37, at 245 (statement of Greece del. Mr. Spiropoulos).

43. *Id.* at 245-46.

44. U.N. GAOR 87th mtg., *supra* note 37, at 248 (statement of Iran del. Mr. Abdoh).

45. *Id.*

46. U.N. GAOR 86th mtg., *supra* note 37, at 247-48 (statement of Cuba del. Mr. Dihigo). Although sympathetic to the Soviet effort to make hate speech punishable, the French delegate noted that the Sixth Committee “had never considered hatred as a crime.” *Id.* at 246 (statement of France del. Mr. Chaumont).

47. *See supra* text accompanying note 14.

48. *See supra* note 41 (recounting the positions of the USSR, Haiti, and Yugoslavia) and accompanying text.

criminalization in a convention on genocide.⁴⁹ More generally, the determination not to criminalize conduct whose causal relationship to genocide was attenuated is reflected in the Sixth Committee's rejection⁵⁰ of a Soviet proposal⁵¹ to criminalize certain preparatory conduct.

While aspects of the drafting history of the Genocide Convention are inconclusive, some general conclusions are warranted. Speech made punishable by the convention is limited to words that advocate the commission of genocide by the speaker's intended audience. However pernicious, propaganda that instead seeks to induce racial, religious, or national hatred is beyond the reach of the convention's provision on "direct and public incitement to commit genocide."

In light of this drafting history, it would be manifestly inappropriate to interpret the Genocide Convention's incitement provision to encompass hate speech. How far Trial Chamber I went

49. See *supra* text accompanying notes 42-46. Several delegations opposed the Soviet proposal on the ground that it could be abused to endanger the freedoms of speech and the press. See, e.g., U.N. GAOR 86th mtg., *supra* note 37, at 246-47 (statement of U.S. del. Mr. Maktos); U.N. GAOR 87th mtg., *supra* note 37, at 248 (statement of Iran del. Mr. Abdoh); *id.* at 249-50 (statement of Syria del. Mr. Tarazi); *id.* at 251-52 (statement of U.K. del. Mr. Fitzmaurice). Since the draft treaty still included political groups in the definition of genocide, some delegates feared that the Soviet proposal could, in the words of the Iranian delegation, lead to "punishment of propaganda aimed at stirring up political hatred." *Id.* at 248 (statement of Iran del. Mr. Abdoh); see also *id.* at 251-52 (statement of U.K. del. Mr. Fitzmaurice) (observing that if the Soviet amendment "were adopted, together with the protection of political groups, . . . [m]ere criticism of a political party in a foreign country might be considered by that country . . . as propaganda aimed at the dissemination of hatred against a political group"). Some delegations had unsuccessfully opposed even the direct-incitement provision of draft Article IV(c) because of the potential threat it posed to freedom of expression. See, e.g., U.N. GAOR 84th mtg., *supra* note 40, at 213-14 (statement of U.S. del. Mr. Maktos) (explaining that the U.S. delegation proposed to delete draft Article IV(c) in part because it could imperil freedom of speech and of the press); *id.* at 217 (statement of Chile del. Mr. Arancibia Lazo) (speaking in favor of the U.S. proposal); *id.* at 218 (statement of U.K. del. Mr. Fitzmaurice) (supporting deletion of sub-paragraph (c)).

50. See U.N. GAOR 86th mtg., *supra* note 37, at 244 (rejecting sub-paragraph (c) of the Soviet proposal by a vote of thirty to eight, with five abstentions).

51. *USSR Proposed Amendments*, *supra* note 36, at 1, 3 (proposing a new sub-paragraph (e) in draft Article IV).

in doing so is somewhat unclear, but key portions of its analysis provide grounds for concern. I will return to this point.

Even if the implications of the Genocide Convention's *travaux préparatoires* were not so clear, to conflate that treaty's incitement provision with the hate-speech provisions in other human rights treaties would be a mistake of law and principle. The Genocide Convention is above all a treaty defining *an international crime*—genocide—and related criminal conduct, including direct and public incitement to commit genocide, and prescribing the obligations of States parties in relation to these acts.⁵² As international crimes, these acts are criminal under international law regardless of whether they are defined as crimes under the domestic law of any particular State.⁵³ In contrast, the hate-speech provisions of the ICCPR and Race Convention impose obligations at the national level that States are free to accept or reject, either through their decision about whether to adhere to these treaties in the first place or through their decision, when consenting to become States parties, whether to enter reservations to these treaties' hate-speech provisions.

The hate-speech provisions of the ICCPR and Race Convention are, in fact, among the more controversial to be found in human rights treaties.⁵⁴ Notably, these provisions differ from each other in

52. See Genocide Convention, *supra* note 13, art. I, 78 U.N.T.S. at 280 (“[G]enocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting Parties] undertake to prevent and to punish.”); *id.* art. III, 78 U.N.T.S. at 280 (providing that various acts, including genocide itself, “shall be punishable”); see also Wibke Kristin Timmermann, *The Relationship Between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?*, 18 LEIDEN J. INT’L L. 257, 271-72 (2005) (noting difference between legal consequences of hate-speech provisions of various treaties and international criminalization of hate speech as a foundation for arguing that hate propaganda should be made an international crime).

53. Cf. ICCPR, *supra* note 15, art. 15 (implicitly affirming that prohibition of retroactive punishment is not breached if someone is tried for conduct criminalized under international law at the time the offense was committed, even if domestic law did not criminalize that conduct).

54. Even human rights advocates have wide-ranging views concerning the appropriate boundaries of hate-speech regulation. For differing views on the subject, see STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992).

significant respects⁵⁵ while the texts of two other comprehensive human rights treaties, the European Convention on Human Rights⁵⁶ and the African Charter on Human and Peoples' Rights,⁵⁷ do not include hate-speech provisions.⁵⁸ These variations in treatment led a trial chamber of the ICTY to conclude in *Prosecutor v. Kordić*, "The sharp split over treaty law in this area is indicative that such speech may not be regarded as a crime under customary international law."⁵⁹ The disparity among human rights treaties' approaches to hate speech stands in striking contrast to their uniform condemnation of other conduct, such as torture, which has figured prominently in the

55. See *supra* notes 16-17 (quoting text of ICCPR and Race Convention, respectively). The American Convention on Human Rights contains yet another variation:

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

American Convention on Human Rights, art. 13(5), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (emphasis added).

56. European Convention on Human Rights, *supra* note 18.

57. African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, reprinted in 21 I.L.M. 58 (1982) [hereinafter African Charter on Human Rights].

58. National hate-speech legislation has nonetheless been determined to be consistent with the European Convention on Human Rights under certain conditions. See *supra* note 20 and accompanying text. The African Charter on Human and Peoples' Rights, *supra* note 57, does not include a hate-speech provision. Article 9(2) provides: "Every individual shall have the right to express and disseminate his opinions within the law." A declaration adopted by the African Commission on Human and Peoples' Rights provides that "[a]ny restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary . . . in a democratic society." Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, art. 2(2), Afr. Comm. on Hum. and Peoples' Rts., 32d Sess. (Oct. 17-23, 2002), available at http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html. For an analysis of the compatibility of hate-speech laws with the African Charter, see Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57, 113-19 (1992).

59. *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 209 n.272 (Feb. 26, 2001).

jurisprudence associated with international crimes.⁶⁰ According to the *Kordić* judgment, moreover, a “significant number of States have attached reservations or declarations of interpretations” to the provisions of the ICCPR and Race Convention requiring States parties to proscribe hate speech,⁶¹ further detracting from the view that international law generally proscribes—much less criminalizes—hate speech.⁶²

The most, then, that can be made of the hate-speech provisions of the Race Convention and the ICCPR is that they require States parties that have not entered a relevant reservation to proscribe hate speech *in their domestic law* in accordance with the treaties’ terms and, more generally, these provisions signify that appropriately circumscribed national hate-speech laws are compatible with international law.⁶³ But treaty-based obligations to proscribe hate speech do not embody customary law, much less do they support the view that such speech is a crime under international law. In fact, drafters of the ICCPR explicitly rejected proposed text that would have required States parties to criminalize hate speech in their respective domestic laws⁶⁴ and instead settled on language providing that hate speech as defined in the Covenant “shall be prohibited by law.”⁶⁵ To the extent, then, that the ICTR trial chamber conflated the hate-speech provisions of the Race Convention and the ICCPR with

60. See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 134 et. seq. (Dec. 10, 1998) (interpreting provisions of the Geneva Conventions of 1949 proscribing torture in light of prohibitions of torture in various human rights treaties).

61. *Kordić*, IT-95-14/2-T, ¶ 209 n.272.

62. Thus the following observation of Trial Chamber I in the *Media Case* reflects misplaced confidence in the current state of international law vis-à-vis hate speech: “The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards.” Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1010 (Dec. 3, 2003).

63. See *supra* notes 15-19 and accompanying text.

64. See MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 403, 405 (1987).

65. ICCPR, *supra* note 15, art. 20(2).

the Genocide Convention's incitement provision, it expanded the latter's writ without persuasive justification.

It is not altogether clear, however, to what extent Trial Chamber I did this. On the one hand, several passages in *Nahimana* suggest that the court regarded the approach toward hate speech embodied in the ICCPR, the Race Convention, and jurisprudence under the European Convention to provide highly relevant guidance in interpreting the Genocide Convention. As already noted, the trial chamber introduced its discussion of international jurisprudence concerning hate speech with a general statement to the effect that this body of treaty law, along with the law governing incitement to violence, "is helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression."⁶⁶ Although ambiguous, this language implies that the parameters of permissible hate-speech regulation established by treaties such as the Race Convention and the ICCPR are pertinent guides for determining when speech is punishable under the incitement clause of the Genocide Convention.⁶⁷ Later, the chamber asserted that several "central principles emerge from the international jurisprudence on incitement to discrimination and violence that serve as a useful guide to the factors to be considered in defining elements of 'direct and public incitement to genocide' as applied to mass media"⁶⁸ and 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 its consideration of these issues"⁶⁹

66. *Nahimana*, ICTR 99-52-T, ¶ 980.

67. A less troubling interpretation of the quoted language would be that speech that enjoys protection even under the law associated with treaties that require or allow States parties to proscribe hate speech is *a fortiori* protected from criminalization pursuant to the Genocide Convention.

68. *Nahimana*, ICTR 99-52-T, ¶ 1000.

69. *Id.* ¶ 1010. The trial chamber made this assertion to explain its rejection of a defense lawyer's argument "that United States law, as the most speech-protective, should be used as a standard, to ensure the universal acceptance and legitimacy of the Tribunal's jurisprudence." *Id.* For an interpretation of *Nahimana* suggesting that the judgment significantly expanded the meaning of incitement to commit genocide in some respects, see Timmermann, *supra* note 52, at 267-71.

Yet it is unclear how broadly the trial chamber meant to define “these issues.”⁷⁰ Moreover, after asserting that “[a] number of central principles emerge from the international jurisprudence on incitement to discrimination and violence that serve as a useful guide to the factors to be considered in defining elements of ‘direct and public incitement to genocide’ as applied to mass media”⁷¹—a phrase that implies the trial chamber considered hate-speech law to be a highly relevant guide in interpreting the Genocide Convention’s incitement provision—the chamber went on to consider this broader law’s relevance for three *comparatively* narrow dimensions of the law of incitement, relating to *purpose* (a word that the tribunal apparently used interchangeably with *intent*), *context*, and *causation*. Jurisprudence relating to these three aspects of incitement law as it pertains to hate speech may have some relevance in interpreting the prohibition of incitement to commit genocide. For example, the proposition that context is relevant in assessing the likely impact of speech⁷² is relevant to virtually every area of incitement law.

Turning from general principles to the case before it, Trial Chamber I compounded these ambiguities. For example, after implying that speech promoting ethnic hatred falls beyond the bounds of “protected speech,”⁷³ the trial chamber noted 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.”⁷⁴ While the former implication would thwart the intent of the drafters of the Genocide Convention, the latter observation seems broadly consistent with their determination to exclude hate speech from the treaty’s incitement provision.

70. The quoted assertion appears under the sub-heading “Causation” and thus might pertain solely to this aspect of incitement law.

71. *Nahimana*, ICTR 99-52-T, ¶ 1000.

72. *See id.* ¶ 1004.

73. *Id.* ¶ 1020.

74. *Id.* ¶ 1037. Similarly, the trial chamber implicitly acknowledged that direct and public incitement to commit genocide does not encompass “advocacy of ethnic hatred in other forms.” *Id.* ¶ 1078.

These and other ambiguities cry out for clarification by the Appeals Chamber. In particular, the Appeals Chamber should make clear that “incitement to commit genocide” does not encompass words that, however deeply they affront human decency, do not advocate the commission of genocide.

II. GENOCIDE

While this article focuses on other portions of the *Nahimana* judgment, I would be remiss if I failed to note that the defendants were convicted not only of incitement to commit genocide but also of genocide itself by virtue of their responsibility for publications and radio broadcasts. Determining that *Kangura* and RTLM played a causal role in the 1994 genocide,⁷⁵ Trial Chamber I convicted two defendants of genocide based in part upon their leadership roles in relation to RTLM.⁷⁶ The third defendant, Hassan Ngeze, was

75. Under the heading of “Genocide,” the chamber concluded that RTLM broadcasts in 1994 “called explicitly for the extermination of the Tutsi ethnic group” and that there was a “specific causal connection between some RTLM broadcasts and the killing of . . . individuals” named in those broadcasts. *Id.* ¶ 949. It further found that various publications in *Kangura*, including one published as far back as December 1990, conveyed hatred toward Tutsi while others called “for the destruction of the Tutsi ethnic group as such.” *Id.* ¶ 950. “Through fear-mongering and hate propaganda,” the trial chamber concluded, “*Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy.” *Id.*; see also *id.* ¶ 953 (“[T]he killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM [and] *Kangura* . . . before and after 6 April 1994.”); *id.* ¶ 952 (attributing a “causation” role to “the media”). When it took up the separate charge of incitement to commit genocide, Trial Chamber I concluded that causation is not an element of this offense. *Id.* ¶ 1007; see also *id.* ¶ 981 (observing that the Nuremberg judgment “did not explicitly note a direct causal link between” *Der Stürmer*, whose publication formed the basis of Julius Streicher’s conviction on the charge of crimes against humanity, “and any specific acts of murder”).

76. See *id.* ¶¶ 970-74 (concerning Nahimana and Barayagwiza). Although both of these defendants were convicted based upon their leadership roles, the trial chamber took different paths toward establishing their criminal responsibility. Jean-Bosco Barayagwiza was convicted of genocide based upon his “superior responsibility.” *Id.* ¶ 973. Although the trial chamber believed that Ferdinand Nahimana, too, “had superior responsibility for the broadcasts of RTLM,” *id.*, it noted that he had not been charged under the provision of the ICTR Statute establishing superior responsibility as a basis for prosecution, *id.*, and convicted him instead of instigating genocide. *Id.* ¶ 974.

convicted of genocide in part because of his role “[a]s founder, owner and editor of *Kangura*, a publication that instigated the killing of Tutsi civilians.”⁷⁷ To reach these results, Trial Chamber I in effect treated *Kangura* and RTLM themselves as perpetrators of genocide and convicted the defendants by virtue of their relationship to the media organs in question.⁷⁸

While this aspect of the *Nahimana* judgment lies beyond the scope of this article, it, too, should receive careful scrutiny by the Appeals Chamber. Like other aspects of the judgment, it represents a novel interpretation of international criminal law and thus raises significant questions of retroactive justice.⁷⁹

III. CRIMES AGAINST HUMANITY: PERSECUTION

All three defendants in the *Media Case* were convicted of persecution as a crime against humanity based upon expressive activities that advocated “ethnic hatred or inciting violence against the Tutsi population” of Rwanda.⁸⁰ As the phrasing of these

77. *Id.* ¶ 977A.

78. *Id.*; see also *id.* ¶ 974 (justifying the conviction of Ferdinand Nahimana for genocide in part on the grounds that “RTLM was Nahimana’s weapon of choice, which he used to instigate the killing of Tutsi civilians”).

79. A troubling aspect of this portion of the judgment is the dearth of legal reasoning supporting the trial chamber’s approach. The chamber explained the genocide conviction of Hassan Ngeze in a brief paragraph that appeared to have been inserted into the final judgment after it was already largely drafted. (Appearing between Paragraphs 977 and 978, this paragraph is numbered “977A.”) The reasoning underlying this conviction apparently went something like this: “*Kangura* contributed causally to the 1994 genocide. The defendant played a leadership role in this publication (principally, however, during periods preceding the genocide). Therefore he is criminally responsible for genocide.”

80. *E.g., id.* ¶ 1081 (emphasis added). Two were convicted of this charge based upon certain RTLM broadcasts. *Id.* (finding Ferdinand Nahimana guilty of crimes against humanity (persecution) by virtue of his responsibility for certain RTLM broadcasts “advocating ethnic hatred or inciting violence against the Tutsi population”); *id.* ¶ 1082 (finding Jean-Bosco Barayagwiza guilty of the same offense by virtue of his responsibility for certain RTLM broadcasts “advocating ethnic hatred or inciting violence against the Tutsi population”). The third defendant was convicted of persecution as a crime against humanity based upon his responsibility for certain *Kangura* publications. *Id.* ¶ 1084 (convicting Hassan Ngeze of crimes against humanity (persecution) based upon his responsibility for certain *Kangura* publications “that advocated ethnic hatred or incited violence, as

convictions implies and the supporting analysis makes clear, Trial Chamber I interpreted the charge of persecution as a crime against humanity to include hate speech that would not qualify as incitement to violence. In doing so, it expanded established law relating to crimes against humanity.⁸¹

To understand this point, it is necessary to consider the definition of crimes against humanity in the ICTR Statute. Article 3 defines crimes against humanity as certain “crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”⁸² Those crimes include: “(a) murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, (h) persecutions on political, racial and religious grounds, and (i) other inhumane acts.”⁸³ The defendants in the *Media Case* were charged with several of these crimes; as already noted, the charges involving advocacy of racial hatred and violence were based upon Article 3(h)—persecution.⁸⁴

To a greater degree than most other categories of crimes against humanity, such as murder, extermination, enslavement, torture and rape, persecution is inherently subject to broad interpretation.⁸⁵

well as for his own acts that advocated ethnic hatred or incited violence against the Tutsi population . . .”).

81. Although every statute of an international tribunal that has been vested with jurisdiction over crimes against humanity has defined this international crime somewhat distinctly, the offense itself is well established under international law and its common elements have been elaborated in extensive jurisprudence, beginning with the 1946 Nuremberg judgment. *Cf.* Guénaél Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT’L L.J. 237, 238 (2002) (observing that the ICTY and ICTR have interpreted the definitions of crimes against humanity in light of customary law concerning this offense).

82. ICTR Statute, *supra* note 12, art. 3.

83. *Id.*

84. See *supra* text accompanying note 80. All three defendants were also charged with the crimes against humanity of extermination and murder. See *Nahimana*, ICTR 99-52-T, ¶¶ 22-23, 26, 29-30, 1057-68, 1085-88.

85. See *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 153-54; *cf.* *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, ¶ 567 (Jan. 14, 2000), *rev’d in part on other grounds*, Case No. IT-95-16-A, Judgment (Oct. 23, 2001) (noting that “persecution” as an element of the ICTY’s statutory definition of crimes against

While this has enabled contemporary tribunals to apply the charge of persecution as a crime against humanity to conduct that might not have been recognized as such in post war prosecutions, the reach of this offense has been constrained through judicial interpretation and other means⁸⁶ since its enforcement at Nuremberg.⁸⁷ For example, a U.S. military tribunal operating in post war Germany reasoned that the phrase "other persecutions" in the relevant definition of crimes against humanity⁸⁸ "must be deemed to include only such as affect

humanity "has never been comprehensively defined in international treaties"; nor has case law provided "an authoritative single definition").

86. The potential reach of this crime as it affects the jurisdiction of the International Criminal Court ("ICC") is limited through statutory definition. The relevant portion of the ICC's statute defines the Court's jurisdiction over crimes against humanity to include, when other elements are satisfied:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . , or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court

Rome Statute of the International Criminal Court, art. 7(1)(h), U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute], *available at* <http://www.un.org/law/icc/statute/rome.htm>. The phrase "any act referred to in this paragraph" encompasses other crimes against humanity, such as murder, extermination, enslavement, enforced disappearance of persons, and similarly grave violations of human rights. The phrase "or any crimes within the jurisdiction of the Court" would encompass genocide and serious war crimes and, in accordance with the terms of Articles 5(2), 121 and 123, may some day include aggression.

87. *See Kupreškić*, IT-95-16-T, ¶ 618 ("There must be *clearly defined limits* on the types of acts which qualify as persecution. . . . [N]ot every denial of a human right may constitute a crime against humanity" (emphasis in original).); *see also Mugesera*, [2005] 2 S.C.R. at 153-54. *But see Kupreškić*, IT-95-16-T, ¶ 615 (concluding that a "narrow definition of persecution is not supported in customary international law").

88. *See, e.g.*, 3 OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 51 (1946); 5 MILITARY GOVERNMENT GAZETTE, GERMANY, BRITISH ZONE OF CONTROL 46 (1945); 12 JOURNAL OFFICIEL DU COMMANDEMENT EN CHEF FRANÇAIS EN ALLEMAGNE (Jan. 11, 1946) [hereinafter JOURNAL DU COMMANDEMENT]. Control Council Law No. 10, adopted on December 20, 1945, established the basis for war crimes prosecutions by the four Allied Powers in their respective zones of occupation in post war Germany. *See* Control Council Law No. 10, in TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW No. 10 app. D, at 251. Its provisions establishing subject-matter jurisdiction were closely modeled on (but not identical to) the subject-matter provisions of the Nuremberg Charter. *See* Diane

the life and liberty of the oppressed peoples.”⁸⁹ Under the case law of the ICTY and ICTR, the crime against humanity of persecution has been held to require a “gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity”⁹⁰ as other enumerated acts constituting a crime against humanity, which, as noted above, include murder, extermination, torture and the like.

Applying a variation of this test in the case of *Prosecutor v. Kordić*,⁹¹ an ICTY trial chamber rejected the prosecutor’s attempt to convict Dario Kordić on the charge of persecution as a crime against humanity based upon the act of “encouraging and promoting hatred on political etc. grounds.”⁹² Noting that the indictment against Kordić was “the first indictment in the history of the [ICTY] to allege this act as a crime against humanity,”⁹³ the chamber concluded that this

F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2587 (1991).

89. *United States v. Flick*, in VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1215 (1952).

90. *Kupreškić*, IT-95-16-T, ¶ 621; *see* *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 21 (June 1, 2000); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶ 135 (July 29, 2004); *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 195 (Feb. 26, 2001), *aff’d*, Case No. IT-95-14/2-A, Judgment, ¶ 102 (Dec. 17, 2004); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 535 (Aug. 2, 2001), *rev’d in part on other grounds*, Case No. IT-98-33-A, Judgment (Apr. 19, 2004). In another variation, the ICTY Appeals Chamber approved the following formulation of law by a trial chamber: “the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*).” *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 185 (Sept. 17, 2003).

91. IT-95-14/2-T, ¶ 195.

92. *Id.* ¶ 290. This phrase, which appears as a sub-heading in the *Kordić* judgment, apparently summarizes the following charge in the indictment against Dario Kordić: “encouraging, instigating and promoting hatred, distrust and strife on political, racial, ethnic or religious grounds, by propaganda, speeches or otherwise.” *Id.* ¶ 209 n.272; *Prosecutor v. Kordić*, Case No. IT-95-14/2, Amended Indictment, ¶ 37(c) (Sept. 30, 1998), *available at* <http://www.un.org/icty/indictment/english/kor-lai980930e.htm>.

93. *Kordić*, IT-95-14/2-T, ¶ 209.

conduct “does not by itself constitute persecution as a crime against humanity.”⁹⁴ The court reasoned:

It is not enumerated as a crime elsewhere in the [ICTY] Statute, but most importantly, it does not rise to the same level of gravity as the other acts enumerated in Article 5 [of the statute]. 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.⁹⁵

In its judgment in the *Media Case*, Trial Chamber I made no mention of the *Kordić* judgment, which had been decided more than two and one-half years earlier. Citing just one precedent—an ICTR judgment that had been based upon a guilty plea—Trial Chamber I wrote that it “consider[ed] it evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches [the same] level of gravity [as the other crimes against humanity enumerated in its Statute] and constitutes persecution under Article 3(h) of its Statute.”⁹⁶ It continued, “The Tribunal so held [in *Prosecutor v. Ruggiu*⁹⁷], finding that the radio broadcasts of RTLM, in 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.’”⁹⁸

But the trial chamber’s judgment in *Ruggiu* did not go as far as *Nahimana* implied.⁹⁹ Immediately after the passage quoted in *Nahimana*, the *Ruggiu* judgment continued, “The deprivation of these rights can be said to have as its aim the death and removal of

94. *Id.*

95. *Id.* (footnotes omitted). This aspect of the trial chamber’s judgment was not addressed on appeal.

96. *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1072 (Dec. 3, 2003). In a subsequent decision, Trial Chamber I cited this passage in *Nahimana* as its sole support for the proposition that “[e]xamples of acts that have been found to be persecution [as a crime against humanity] include [among others] hate speech” *Prosecutor v. Bagosora*, Case No. ICTR 98-41-T, Decision on Motions for Judgment of Acquittal, ¶ 32 & n.68 (Feb. 2, 2005).

97. Case No. ICTR 97-32-I, Judgment and Sentence (June 1, 2000).

98. *Nahimana*, ICTR 99-52-T, ¶ 1072 (quoting *Ruggiu*, ICTR 97-32-I, ¶ 22).

99. Like *Nahimana*, *Ruggiu* was decided by Trial Chamber I.

those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.”¹⁰⁰ Thus the *Ruggiu* judgment did not explicitly hold that advocacy of racial hatred (as distinguished from speech advocating racial violence) could form the basis of a persecution conviction. Instead, it apparently held that RTLM broadcasts aimed at “the death and removal” of the Tutsi minority “from the society in which they live . . . or eventually even from humanity itself” qualify as the crime against humanity of persecution.

While ignoring *Kordić* and placing excessive reliance on *Ruggiu*, the *Nahimana* judgment downplayed¹⁰¹ and misconstrued the judgment of the International Military Tribunal (“IMT”)¹⁰² convened at Nuremberg following World War II, the leading precedent concerning incitement as a basis for the charge of crimes against humanity and persecution. Two of the defendants before the IMT, Julius Streicher and Hans Fritzsche, were charged with crimes against humanity by virtue of anti-Semitic advocacy.¹⁰³ Streicher was convicted of this charge and sentenced to hang; Fritzsche was acquitted. Although *Nahimana*’s discussion of this precedent is somewhat jumbled, Trial Chamber I apparently relied upon the *Streicher* case to establish that hate speech can form the basis of a conviction for persecution as a crime against humanity even without a call to violent action or a link to violent action:

Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. *Accordingly, there need not be a call to action in*

100. *Ruggiu*, ICTR 97-32-I, ¶ 22.

101. The judgment devoted one full paragraph each to two defendants charged with incitement-related crimes at Nuremberg, *Nahimana*, ICTR 99-52-T, ¶¶ 981-82, and later made several brief references to this precedent.

102. OFFICE OF U.S. CHIEF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT (U.S. Gov’t Printing Off. 1947) [hereinafter NUREMBERG JUDGMENT].

103. Both defendants were also charged with a common plan or conspiracy to wage aggressive war; Fritzsche was also charged with war crimes. Both defendants were acquitted of the first charge and Fritzsche was acquitted of all charges against him. *See id.* at 129 (finding Streicher not guilty of the charge relating to crimes against peace); *id.* at 162-63 (acquitting Fritzsche on all counts).

communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. The Chamber notes that Julius Streicher was convicted by the International Military Tribunal at Nuremberg of persecution as a crime against humanity for anti-semitic writings that significantly predated the extermination of Jews in the 1940s. Yet they 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. In Rwanda, the virulent writings of *Kangura* and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed.¹⁰⁴

The *Streicher* verdict does not readily support a conclusion to the effect that “communications that constitute persecution” need not include a call to action, let alone a call to violence. Although the IMT did not clearly enunciate the elements of persecution as a crime against humanity, its conviction of Streicher and acquittal of Fritzsche strongly suggest that the Tribunal was prepared to judge a defendant guilty of persecution as a crime against humanity based upon his expressive activity only when he intentionally urged listeners to commit atrocities.

The charges against Julius Streicher were based upon his role as publisher of the virulently anti-Semitic weekly newspaper *Der Stürmer*, in whose pages Streicher advocated the extermination of Jews in terms that would readily qualify as direct and public incitement to commit genocide as that term is used in the Genocide Convention.¹⁰⁵ Streicher was convicted of “persecution on political

104. *Nahimana*, ICTR 99-52-T, ¶ 1073 (emphasis added).

105. See Donna E. Arzt, *Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal*, 12 N.Y.L. SCH. J. HUM. RTS. 689, 744 (1995) (reviewing TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (Little, Brown & Co., 1993)). According to the Nuremberg judgment, a leading article in *Der Stürmer* published in May 1939 called for Russia's Jews to “be exterminated root and branch.” NUREMBERG JUDGMENT, *supra* note 102, at 130. As the war progressed, “Streicher even intensified his efforts to incite the Germans against the Jews”; twenty-six articles published between August 1941 and September 1944, twelve of which

and racial grounds” constituting a crime against humanity based upon his “incitement to murder and extermination” of Jews in Nazi-occupied territory¹⁰⁶—not, as *Nahimana* implies, for conduct constituting hate speech that did not include a call to violent action.

In contrast to Streicher’s unambiguous calls for extermination of Jews, Fritzsche’s speeches, while “show[ing] definite anti-Semitism . . . did not urge persecution or extermination of Jews.”¹⁰⁷ Moreover, while Fritzsche “sometimes made strong statements of a propagandistic nature in his broadcasts,” the IMT was “not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples” and concluded that Fritzsche could not “be held to have been a participant in the crimes charged.”¹⁰⁸ Accordingly, Fritzsche was acquitted.

In a further misreading of *Nuremberg*, the *Nahimana* judgment claimed that Julius Streicher was convicted “for anti-semitic writings that significantly predated the extermination of Jews in the 1940s [and yet] 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.”¹⁰⁹ This characterization of the *Streicher* precedent is misleading on two counts. First, it incorrectly implies that the IMT convicted Streicher for speech that was not closely linked to extermination. Immediately after citing a 1940 publication in *Der Stürmer* calling for the complete extermination of Jews, the IMT observed in the passage paraphrased by Trial Chamber I, “Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution *and extermination*.”¹¹⁰ These last two words, which were omitted in the

were written by Streicher himself, “demanded annihilation and extermination in unequivocal terms.” *Id.*

106. NUREMBERG JUDGMENT, *supra* note 102, at 131.

107. *Id.* at 163.

108. *Id.*

109. *Nahimana*, ICTR 99-52-T, ¶ 1073; *supra* text accompanying note 104; see also *Nahimana*, ICTR 99-52-T, ¶ 1078 (suggesting that RTLM broadcasts and *Kangura* publications constituting “advocacy of ethnic hatred” but not incitement to genocide were analogous to “the poison described in the *Streicher* judgement”).

110. NUREMBERG JUDGMENT, *supra* note 102, at 131 (emphasis added).

above-quoted passage from *Nahimana*,¹¹¹ imply that Streicher's expressive activity amounted to a crime against humanity only when linked to extermination. Parenthetically, it is noteworthy that *Nahimana* lowered the bar to conviction set by the *Streicher* precedent; generally supportive observers of—and even participants in—Nuremberg have raised questions about the IMT's insufficiently justified conviction of Streicher.¹¹²

Second, Trial Chamber I erred when it stated that Streicher was convicted of crimes against humanity for writings that “significantly predated the extermination of Jews in the 1940s.” Although the IMT described Streicher's “25 years of speaking, writing, and preaching hatred of the Jews,”¹¹³ apparently to establish his unambiguous intent to incite Germans to exterminate Jews,¹¹⁴ the Tribunal was at pains to emphasize that Streicher “continued to write and publish his

111. In other passages paraphrasing or quoting this language from Nuremberg, however, the *Nahimana* judgment includes the phrase “and extermination.” See, e.g., *Nahimana*, ICTR 99-52-T, ¶ 981; *id.* ¶ 1007 (quoting the *Streicher* judgment in support of the claim that causation is not an element of incitement to commit genocide).

112. See, e.g., ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 457 (1986) (stating that the IMT judges “failed to debate . . . the fundamental question of whether Streicher's words could be linked directly with others' deeds” and noting, “There is a suspicion that Streicher was not judged strictly on the law but on the physical and moral revulsion he evoked”); JOSEPH E. PERSICO, *NUREMBERG: INFAMY ON TRIAL* 438 (1994) (asserting that “Streicher and his works were loathsome” and questioning whether “loathsomeness [is] a capital offense”); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 590 (Knopf, 1992) (expressing the view that, while Streicher's conviction seemed “legally defensible,” the Tribunal's failure to mention facts such as *Der Stürmer*'s dwindling circulation during World War II and Streicher's lack of contact with those actually perpetrating the atrocities could not be justified; nor could Taylor “justify the Tribunal's failure to mention . . . that publication of a newspaper, however maddening and unconscionable it may be, should be touched with criminal accusations only with the greatest caution”); Arzt, *supra* note 105, at 716-17 (asking whether Streicher was “judged by the Nuremberg tribunal on the basis of the law or for the moral and physical revulsion which the man evoked” and suggesting that he may have been prosecuted “as a scapegoat, selected precisely because his repulsive visage was a reminder of what the German people at its worst had been capable of producing”).

113. *NUREMBERG JUDGMENT*, *supra* note 102, at 129.

114. See Arzt, *supra* note 105, at 712 (stating that Nuremberg prosecutors cited a 1925 speech of Streicher as “the earliest expression of one of the conspirators' primary objectives—the annihilation of the Jews”).

propaganda of death” at a time when he knew “of the extermination of the Jews in the occupied eastern territory.”¹¹⁵ Concluding the portion of its judgment relating to Streicher, the IMT held that his “incitement to murder and extermination at the time when Jews in the east were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the [Nuremberg] Charter, and constitutes a crime against humanity.”¹¹⁶

The Tribunal’s careful phrasing made clear that Streicher was convicted only for incitement that occurred during, not before, World War II. To understand this point it is necessary to recall that an earlier portion of the Nuremberg judgment concluded that the IMT could exercise jurisdiction over crimes against humanity only when they were committed “in execution of, or in connection with,” one of the other two offenses recognized in its charter—war crimes and crimes against peace.¹¹⁷ In the view of the Tribunal, it had not been “satisfactorily proved” that acts relied on before the outbreak of war, “revolting and horrible as many of these crimes [against humanity] were,” met this test.¹¹⁸ Accordingly, the Tribunal could not

make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.¹¹⁹

This passage clarifies the significance of the IMT’s phrasing when it convicted Streicher of persecution “in connection with war crimes, as defined by the [Nuremberg] Charter” based upon his “incitement to murder and extermination at the time when Jews in the east were

115. NUREMBERG JUDGMENT, *supra* note 102, at 130.

116. *Id.* at 131.

117. *Id.* at 84.

118. *Id.*

119. *Id.*

being killed under the most horrible conditions”¹²⁰; Streicher was convicted only for expressive activities that occurred *during* World War II.¹²¹

Why does this matter? For present purposes the key point is that if Streicher had been convicted of pre-war conduct, Nuremberg could more readily be interpreted as precedent for convicting a defendant of persecution as a crime against humanity by virtue of speech that does not include a call to violence but that nonetheless helps condition a society to engage in persecution. But such an interpretation would misread Nuremberg. Streicher’s conviction rested squarely upon his calls for the extermination of Jews at a time when they were being slaughtered “under the most horrible conditions,”¹²² as Streicher was well aware. *Nahimana* thus placed unwarranted reliance on *Streicher* when it concluded, “in light of well-established principles of international and domestic law, and the jurisprudence of the *Streicher* case in 1946 . . . , that hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination.”¹²³

In addition to its unpersuasive reliance on *Streicher* and *Ruggiu*, Trial Chamber I sought to justify its conclusion that hate speech may constitute the crime against humanity of persecution by citing the same treaty law concerning hate speech that dominated its discussion

120. *Id.* at 131; *see supra* text accompanying note 116.

121. Telford Taylor, one of the American prosecutors at Nuremberg, was unambiguous on this point. In his memoir of Nuremberg, Taylor wrote that “the entire basis of Streicher’s guilt rested on his actions from September 1, 1939, until the end of the war” TAYLOR, *supra* note 112, at 590.

122. NUREMBERG JUDGMENT, *supra* note 102, at 131; *see supra* text accompanying note 116.

123. Prosecutor v. *Nahimana*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1076 (Dec. 3, 2003).

of incitement to commit genocide,¹²⁴ as well as several national laws proscribing hate speech.¹²⁵

Just as it is inappropriate to conflate the Genocide Convention's incitement clause with the hate-speech provisions of the ICCPR and the Race Convention, however, it would be inappropriate to graft these provisions onto the crime against humanity of persecution. Like incitement to commit genocide, the crime against humanity of persecution is an international crime. As such, it can be punished by an appropriate court with jurisdiction regardless of whether the conduct in question violates domestic penal law.¹²⁶ Yet as previously noted, the hate-speech provisions of the ICCPR and Race Convention do not even embody a universal standard, much less an international crime.¹²⁷

The *Nahimana* judgment obscured the crucial distinction between hate-speech provisions of certain human rights treaties on the one hand and crimes against humanity/persecution on the other. Introducing its persecution-related discussion of the ICCPR and Race Convention, Trial Chamber I asserted, "[F]reedom of expression and freedom from discrimination are not incompatible principles of law. Hate speech is not protected speech under international law. In fact, governments have an obligation under the [ICCPR] to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."¹²⁸ But if hate speech "is not protected under international law," it has never been considered a *crime* under international law. Put differently, while some treaties require States parties (not, as Trial Chamber I implied, "governments" in general) to proscribe hate speech *in domestic law*,

124. *Id.* ¶ 1074 (citing ICCPR provision requiring States parties to prohibit "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" and the Race Convention's requirement that States parties prohibit "propaganda activities that promote and incite racial discrimination" in support of conclusion that "[h]ate speech is not protected speech under international law").

125. *Id.* ¶ 1075.

126. *See supra* text accompanying note 53.

127. *See supra* text accompanying notes 54-65.

128. *Nahimana*, ICTR 99-52-T, ¶ 1074. The chamber went on to make a similar point concerning the Race Convention. *Id.*

hate speech is not and has never been a crime under conventional or customary international law.¹²⁹

Trial Chamber I bolstered its conclusion that hate speech constitutes persecution as a crime against humanity by characterizing such speech as “a discriminatory form of aggression that destroys the dignity of those in the group under attack.”¹³⁰ The judgment continued:

[Hate speech] 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.¹³¹

From this observation it was a short step to the conclusion that it is not necessary to establish that the speech in question constitutes incitement to commit another crime; rather, the effect of hate speech “is itself the harm” that amounts to persecution.¹³²

Through this reasoning, the trial chamber injected itself into a highly contested debate about the desirable boundaries of hate-speech regulation and unambiguously aligned itself with proponents of comparatively strong regulation. The fulcrum of their position is that hate speech is itself inherently and profoundly harmful, in ways enunciated by Trial Chamber I.¹³³

129. See *supra* text accompanying note 95 (quoting the ICTY trial chamber’s judgment in *Kordić*).

130. *Nahimana*, ICTR 99-52-T, ¶ 1072.

131. *Id.*

132. *Id.* ¶¶ 1072-73 (concluding that the effects of hate speech “can be an irreversible harm” and that hate speech constitutes a form of persecution as a crime against humanity). In a recent judgment, the Supreme Court of Canada—a country whose domestic law criminalizes hate speech—adopted the reasoning used in *Nahimana*. See *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 140-41.

133. For a favorable review of *Nahimana* by a leading proponent of this view, see MacKinnon, *supra* note 2.

In my view, this position makes powerful and deeply compelling claims.¹³⁴ But those claims are properly addressed in fora other than an international criminal tribunal that does not clearly possess jurisdiction over hate speech. A principle of fundamental fairness is at stake when an international criminal court redefines an international crime in the crucible of trial.¹³⁵ As ICTY judgments have noted, the principle of legality requires that “acts in respect of which [a defendant is] indicted under the heading of persecution must be found to constitute crimes under international law at the time of their commission.”¹³⁶ Accordingly, “there must be ‘*clearly defined limits*’ on the expansion of the types of acts which qualify as persecution.”¹³⁷

IV. THE TEMPORAL JURISDICTION OF THE ICTR

A final troubling aspect of *Nahimana* on which I will briefly touch relates to the Trial Chamber’s treatment of broadcasts and publications that preceded January 1, 1994, the date on which the ICTR’s temporal jurisdiction began.¹³⁸ Although earlier litigation in the *Media Case* apparently had resolved that defendants could not be

134. Those claims should, however, be carefully assessed in light of the potential threat that hate-speech regulation presents to an independent media. See *infra* Conclusion.

135. Cf. Davidson, *supra* note 2, at 519 (arguing that the ICTR trial chamber’s judgment in *Nahimana* may add further fuel to charges that “international criminal law replaces the will of the people with a tyranny of unelected foreign judges”).

136. Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 192 (Feb. 26, 2001).

137. *Id.* ¶ 194 (quoting Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 618 (Jan. 14, 2000)) (emphasis in original). This passage slightly misquotes *Kupreškić*. The passage in *Kupreškić* corresponding to the quotation in *Kordić* asserts: “There must be *clearly defined limits* on the types of acts which qualify as persecution.”

138. Article 1 of the ICTR Statute provides in full:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

ICTR Statute, *supra* note 12, art. 1.

prosecuted for pre-1994 conduct “and that such events would not be referred to ‘except for historical purposes or information,’”¹³⁹ Trial Chamber I concluded that it could exercise jurisdiction over speech-related conduct that occurred before 1994.

The chamber justified this approach on two principal grounds. First, it concluded that its temporal jurisdiction encompassed “inchoate offences that culminate[d] in the commission of acts in 1994.”¹⁴⁰ Characterizing incitement as an inchoate offence, the chamber concluded that this crime “continues to the time of the commission of the acts incited.”¹⁴¹ Building on this foundation, the chamber concluded that

the publication of *Kangura*, from its first issue in May 1990 through its March 1994 issue, the alleged impact of which culminated in events that took place in 1994, falls within the temporal jurisdiction of the Tribunal to the extent that the publication is deemed to constitute direct and public incitement to genocide.¹⁴²

This characterization is hard to reconcile with the trial chamber’s view that, as an inchoate offense, incitement is a crime regardless of whether it has its intended effect.¹⁴³ If the criminality of incitement

139. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 100 (Dec. 3, 2003) (quoting Ngeze v. Prosecutor, Case No. ICTR 99-52-A, Decision on the Interlocutory Appeals, at 6 (Sept. 5, 2000) (referring to Nahimana and Ngeze)).

140. *Id.* ¶ 104.

141. *Id.*; see also *id.* ¶ 1017 (“[T]he crime of direct and public incitement to commit genocide, like conspiracy, is an inchoate offence that continues in time until the completion of the acts contemplated.”).

142. *Id.* The trial chamber made a similar finding with respect to pre-1994 broadcasts by RTLM.

143. See *id.* ¶¶ 1013, 1029. This characterization is not in itself controversial. The ICTR had previously characterized incitement to commit genocide as an inchoate offense. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 562 (Sept. 2, 1998), *aff’d*, Case No. ICTR 96-4-A, Judgment (June 1, 2001) (“[G]enocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.”). So, too, have others. See, e.g., William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141, 149 (2000) (explaining that, in establishing the “distinct act of ‘direct and public incitement,’ the drafters of the Genocide

does not turn upon its impact, it is not readily apparent that this offense should be considered to have “ended” when it achieves its aim.¹⁴⁴

A second reason for treating pre-1994 publications as a basis of criminal responsibility was fact-specific. Notably, *Kangura* did not publish any articles during the 1994 genocide in Rwanda, which began in April of that year.¹⁴⁵ Nevertheless, Trial Chamber I concluded that past issues of *Kangura* could be deemed to have essentially the same effect as a publication in March 1994, a date that falls within the ICTR’s temporal jurisdiction, by virtue of a competition published in *Kangura* twice that month. The competition in question offered prizes to the ten contestants who scored highest in responding to eleven questions, the answers to which were found in past issues of *Kangura*.¹⁴⁶ Trial Chamber I concluded that this competition “was intended to direct the attention of readers to back issues of the publication *and effectively brought back these back issues into circulation* in Rwanda in March 1994.”¹⁴⁷

But if the competition was intended to direct the attention of readers to back issues of *Kangura*, it does not automatically follow that such a competition effectively “brought back these back issues into circulation” in a way that justifies treating the publications themselves as having occurred during 1994.¹⁴⁸ In fact, in assessing

Convention sought to create an autonomous infraction, one that, like conspiracy, is an inchoate crime, in that the prosecution need not make proof of any result”); *Mugesera v. Canada*, [2005] 2 S.C.R. 100, 136 (“Because of its inchoate nature, incitement is punishable by virtue of the criminal act alone irrespective of the result.”).

144. Cf. Davidson, *supra* note 2, at 512 (“[T]here are strong arguments to be made based on common-law precedent that the act of urging is completed once the speech is finished.”).

145. See *Nahimana*, ICTR 99-52-T, ¶ 122.

146. See *id.* ¶ 247. The trial chamber noted that participants in the contest were directed to submit the original page of the newspaper containing the relevant answer. *Id.*

147. *Id.* ¶¶ 257, 1018 (emphasis added).

148. Like other aspects of *Nahimana*, the judgment’s treatment of pre-1994 publications and broadcasts is ambiguous. For example, the judgment made “legal findings” that characterized various pre-1994 publications by *Kangura* without indicating the legal significance it attached to these findings. See, e.g., *id.* ¶ 950. The trial chamber also concluded that “the killing of Tutsi civilians can be said to

pre-1994 *Kangura* publications, Trial Chamber I seemed concerned about their impact in real time over time¹⁴⁹ rather than the contemporaneous impact of the March 1994 contest. The chamber thus did not lay the necessary foundation for its conclusion that publications predating the period of its temporal jurisdiction could be deemed to have occurred during that period.

CONCLUSION

Although the judgment in the *Media Case* raises several concerns, this commentary has focused principally on the question whether Trial Chamber I violated the principle of legality and, secondarily, has considered whether the judgment exceeded the ICTR's temporal jurisdiction. While concerns relating to the impact of the judgment on freedom of expression are largely beyond the scope of this article, they are substantial enough to warrant at least brief mention.

Writing shortly after the *Nahimana* judgment was issued, Joel Simon, deputy director of the Committee to Protect Journalists ("CPJ"), cautioned that "[s]ome repressive countries could be emboldened by the language of the tribunal's decision."¹⁵⁰ In the two years since then, CPJ's concerns have grown. According to Simon, "[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."¹⁵¹ Simon continues:

The practice of casting the suppression of critical media as a legitimate effort to fight hate speech and incitement is now

have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, *Kangura* and [the Coalition for the Defence of the Republic], before and after 6 April 1994." *Id.* ¶ 953. The chamber did not make clear whether the relevant conduct occurring before April 6, 1994—the date marking the onset of genocide—occurred before January 1, 1994, the date when the ICTR's temporal jurisdiction began.

149. See, e.g., *id.* ¶ 950 (describing various pre-1994 publications of *Kangura* and concluding, "Through fear-mongering and hate propaganda, *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy").

150. Joel Simon, *Murder by Media: Why the Rwandan Genocide Tribunal Went Too Far*, SLATE, Dec. 11, 2003, <http://www.slate.com/id/2092372> (last visited Apr. 2, 2006).

151. Simon, *supra* note 3.

distressingly common, so much so that it has become a major impediment to independent journalism in many countries in Africa. In fact, the misuse of hate-speech laws by repressive African governments may well be a greater threat right now than hate speech itself.

Since 2002, the Committee to Protect Journalists has documented nearly fifty such cases in at least a half-dozen countries[, including Rwanda, where the current government] has increasingly used allegations of ethnic “divisionism” to silence critics, including those in the press.¹⁵²

While the *Nahimana* judgment evinced a nuanced grasp of the noxious impact of hate media in Rwanda, it was not sufficiently alert to the perils chronicled by Simon. In this respect the judgment contrasts with another leading international decision addressing the proper balance between the values protected by freedom of the press and those promoted by international justice. Reversing a trial chamber’s order seeking to compel the testimony of then-*Washington Post* journalist Jonathan Randal, the Appeals Chamber of the ICTY recognized a qualified privilege for war correspondents in the case of *Prosecutor v. Brdjanin*.¹⁵³ The ICTY Appeals Chamber’s supporting analysis in *Brdjanin* is notable not only for its sensitivity to the vital role of an independent media but also for its sophisticated treatment of the relationship between an international criminal court and important public interests that may be affected by its work.¹⁵⁴

The Appeals Chamber began its analysis in *Brdjanin* by recognizing a strong public interest in a vigorous press corps,

152. *Id.*

153. *Prosecutor v. Brdjanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal (Dec. 11, 2002).

154. More controversially, ICTY trial chambers have indicted several journalists on contempt charges for publishing the names of witnesses who had provided testimony to the ICTY under protective measures. See Marlise Simons, *U.N. Court Seeks Arrest of Croatian Journalists*, N.Y. TIMES, Oct. 2, 2005; Edgar Chen, Coalition for Int’l Just., *Croatian Contempt Cases: Issues and Analysis* (Oct. 18, 2005), available at <http://cij.org/index.cfm?fuseaction=viewReport&reportID=703&tribunalID=1&languageID=1>.

including war correspondents in particular.¹⁵⁵ Recognizing that “the perception that war correspondents can be forced to become witnesses against their interviewees”¹⁵⁶ could imperil their news-gathering function as well as their personal safety, the appellate chamber affirmed that it would “not unnecessarily hamper the work of professions that perform a public interest.”¹⁵⁷

The Appeals Chamber defined the public interest in terms that figure prominently in national as well as international jurisprudence concerning press freedom, recognizing that the media’s watchdog role is essential to democratic societies¹⁵⁸ and affirming the “right of members of the public to receive information.”¹⁵⁹ But its analysis emphasized another consideration that is peculiar to the work of an international criminal tribunal—the respective roles of war correspondents and international tribunals vis-à-vis “the horrors and reality of conflict.”¹⁶⁰ The Appeals Chamber reasoned:

In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of this Tribunal. In this regard, it may be recalled that the images of the terrible suffering of the detainees at the Omarska Camp that played such an important role in awakening the international community to the seriousness of the human rights situation during the conflict in Bosnia Herzegovina were broadcast by war correspondents. . . . The information uncovered by war

155. *Brdjanin*, IT-99-36-AR73.9, ¶¶ 34-38. The Appeals Chamber defined “war correspondents” as “individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict.” *Id.* ¶ 29.

156. *Id.* ¶ 43.

157. *Id.* ¶ 44.

158. *Id.* ¶ 35.

159. *Id.* ¶ 37.

160. *Id.* ¶ 36 (quoting the Trial Chamber order compelling the testimony of *Washington Post* correspondent Jonathan Randal).

correspondents has on more than one occasion provided important leads for the investigators of this Tribunal.¹⁶¹

To ensure that war correspondents can play their essential role in “enabl[ing] citizens of the international community to receive vital information from war zones,” the Appeals Chamber reasoned, “adequate weight must be given to protecting the ability of war correspondents to carry out their functions.”¹⁶²

This did not mean that the public interest in protecting the role of war correspondents would invariably trump “the public interest in having all relevant evidence available to the court and, where it is implicated, the right of the defendant to challenge the evidence against him[.]”¹⁶³ Rather, it meant that “adequate weight must be given to protecting the ability of war correspondents to carry out their functions.”¹⁶⁴ Balancing the competing claims implicated by the trial chamber’s subpoena, the Appeals Chamber held

that in order for a Trial Chamber to issue a subpoena to a war correspondent a two-pronged test must be satisfied. First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.”¹⁶⁵

To be sure, the defendants prosecuted in the *Media Case* bear no resemblance to the journalists who were granted a qualified privilege in the *Brdjanin* case. Aligned with the government then in power in Rwanda, the defendants in *Nahimana* are more accurately characterized as active organizers of genocide than as members of an independent media. Even so, like *Randal* the *Media Case* raises consequential issues concerning the public interest served by an independent media and the protections that underpin their

161. *Id.* (footnote omitted).

162. *Id.* ¶ 38. A striking feature of this decision is the Appeals Chamber’s construction of an “international community” to which the ICTY is itself accountable and whose interests it sought to protect.

163. *Id.* ¶ 34.

164. *Id.* ¶ 38.

165. *Id.* ¶ 50.

independent functioning. If those responsible for RTLM's broadcasts during the 1994 genocide in Rwanda deserved to be convicted of incitement to genocide (and surely they did), the defendants in *Nahimana* were also convicted on the basis of novel legal standards that are susceptible to abuse: governments hostile to an independent press may find new tools for repression in *Nahimana*'s treatment of hate speech.

In contrast to the ICTY Appeals Chamber's exquisite sensitivity to the potential implications of its ruling in *Brdjanin* beyond the immediate case at hand, the ICTR trial chamber did not attach sufficient weight to the potential impact on legitimate media of its judgment in *Nahimana*. In larger perspective, Trial Chamber I overstepped its proper role as an international criminal court by reinterpreting the law of its charter, which derives from international criminal law, in light of its views on hate-speech regulation.

This is not to suggest that the chamber's underlying position is misguided. To the contrary, Trial Chamber I's views of hate speech rest upon compelling claims and reflect a nuanced grasp of the poisonous power of racist words. The point, rather, is that a criminal trial is the wrong place to revise the law.