'There are those who, like the defendant Streicher, were the instigators, the theorists, the propagandists and the approvers of these crimes. ... we submit that the way of that minority which conceived, ordered and executed the satanic plan was only made possible by years of steady incitement to and justification of murder on the part of this group of defendants. Those who decreed these murders would not have had the courage to order them, and those who executed and helped to execute these orders might have shrunk with the panic of amazement and fear from the terrible deed but for the fact that through the activity of these defendants a mental climate was created in Germany which made of these horrors an act of State, a measure of national purification, a grim but just necessity. ... direct responsibility for crime, in proportion to the potential and actual magnitude of the evil caused, attaches to persons guilty of incitement to and encouragement of such acts or what naturally leads to such acts.'[1] Hersch Lauterpacht,

The Accidental Birth of Hate Crime in Transnational Criminal Law:

'Discrepancies' in the Prosecution for "Incitement to Genocide" during the Nuremberg Process

Michael Salter
with Kim McGuire and Maggi Eastwood

[1] Hersch Lauterpacht, 'Draft Nuremberg speeches,' *C.J.I.C.L. 45* (2012) 77.

INTRODUCTION

Considered in practical humanitarian terms, because incitement to genocide typically precedes and lays the ideological foundations for campaigns of physical extermination, swift and effective prosecutions for such conduct has a priority over criminal justice responses to completed acts of genocide. Article III(c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) criminalises "direct and public incitement to commit genocide."[2] It was specifically included due to its critical role – as demonstrated by Nuremberg trials evidence in relation to the Holocaust - in the planning of genocide.[3] Hate speech is neither specifically prohibited under the 1948 Genocide Convention nor under the Rome Statute of the International Criminal Court. In this respect, a distinct and particularly egregious form of hate speech, namely, "direct and public incitement to commit genocide," represents a recognised exception.[4] Such incitement is clearly established as an international crime under the Genocide Convention, the ICTR[5] and ICTY[6] statutes, Rome Statute and customary international law. Incitement to commit genocide is not only morally objectionable conduct in itself but is also extremely dangerous in that it typically precedes and actively accompanies acts of physical genocide.

During the negotiation of the Genocide Convention, the Russian delegation stated, in reference to the Holocaust, that: 'It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized.' He asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed. More recently, the United Nations Committee on the

[2] Timmerman WK "Incitement in International Criminal Law" 2006 IRRC 823-852
[3] Prosecutor v Akayesu (Trial Chamber: Judgment) Case No ICTR-96-4-T, 2 September 1998, para 551.
[4] Cf. ICTY Prosecutor v Kordić and Čerkez (Trial Chamber: Judgment) Case No IT-95-14/2-T, 26 February 2001 para 209, where it was held that encouraging or promoting hatred on political grounds "does not by itself constitute persecution as a crime against humanity." However, in Nahimana (Trial Chamber) para 1072, the ICTR Trial Chamber held that "hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Art 3(h) of its Statute. Gordon G "Hate speech and persecution: A contextual approach" 2013 *Vanderbilt J Transnat'l L* 303-373
[5] Article 2(3)(c) of the ICTR Statute criminalises "direct and public incitement to genocide", which is listed as one of five punishable acts under the Statute.
[6] Article 4(3)(c) of the ICTY Statute which uses identifical terms to the ICTR but – unlike the latter - there have been no convictions of individuals for direct and public incitement to genocide at the ICTY.

Elimination of Racial Discrimination identified the following as: "factors known to be important components of situations leading to conflict and genocide": "Systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media", as well as "[g]rave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority."[7]

This case study of Julius Streicher's prosecution at Nuremberg aims to explore one element of the various contingencies through which individuals responsible, to various degrees, for promoting expressions of racist hate speech have been subjected to markedly different types of legal responses within the landmark Nuremberg trials programme. These contingencies, together with loose judicial reasoning and indeterminacies in the meaning(s) of international criminal law doctrines, complicate scholarly efforts to identify the historical emergence of this type of transnational hate crime. They also illustrate the complications that arise when seeking to ascertain the implications of the Streicher, and other related case studies, as precedents.[8]

It needs to be emphasised at the outset that what follows is not a *comprehensive* study of the origins of the criminalisation of hate speech in general. Such a project would have to include a full comparative survey of all domestic laws and their judicial interpretation, application and institutional enforcement. In addition, such a project would also have to address the interaction between domestic, regional and international criminalisations in what would amount to a massive multi-volume study. Although this wider type of potential survey of legislation far exceeds the scope of the present study, it has to be acknowledged that a strong case can be made for a team of researchers adopting this more comprehensive approach. This would allow us to interpret the contents of this study within the wider context of transnational regulation of racist speech. For example, there has clearly been a measure of interaction, albeit of an inconsistent type, between US immigration and naturalisation law and practice, and international criminal law relating to hate speech. Here, the Streicher case has been expressly

[7] UN Doc CERD/C/67/Misc.8 (2005).

[8] Legal and other historians have to confront the complexity of trying to create a categorical "timeline," or identifying an unambiguous "origin" of a stream of case law. The historian's choice of precedent can often be as highly selective as that of lawyers when interpreting what is to count as a precedent.

referred to as a precedent for the idea that "persecution," as a subset of crimes against humanity,[9] can include racist and anti-Semitic propaganda.[10]

Indeed, it would be interesting to ascertain what lessons have already been gained, or still could be learned, from the experiences of nation states. This concerns not only with respect to their specific framing of hate speech laws and various "exceptions," "qualifications" and "reservations," but also the interpretation and practical institutional enforcement of such laws. In addition, purely national constitutional and human rights challenges to such legislation on "freedom of expression" grounds may prove instructive at the policy level for the re-drafting of transnational measures to remove such legal vulnerabilities. For example, to strengthen hate speech laws in relation to claims that these represent unlawful "intrusions" into so-called "private" beliefs, thoughts, political association, freedom of religion and freedom of expression (both in terms of "viewpoint" and content).[11] In turn, this leads to concerns, expressed even in the context of post-genocidal societies such as Rwanda, that widely drawn and open-ended hate speech laws prohibiting "division" can be abused by governments in various ways. They can be abused to suppress forms of outright dissent that is strategically reinterpreted as crimes.[12] Other possible legal objections can relate to the possibility of a perpetrator facing "double jeopardy" for a single offence of hate speech, and related "due process" based objections.[13]

---

[9] See London Charter of the International Military Tribunal art. 6(c). Aug. 8, 1945. 59 Stat. 1544. 1547. 82 U.N.T.S. 279, which declares that "persecutions on political, racial or religious grounds" constitutes Crimes against Humanity within the IMT's jurisdiction. What are popularly termed the "Nuremberg Trials" after the city location of these trials were formally designated "IMT."

[10] For example in the Koreh case, the US Third Circuit Court of Appeals made explicit reference to the Streicher case in its opinion regarding the "denaturalization" of a Hungarian newspaper editor, Ferenc Koreh, who had published anti-Semitic articles. The US government sought to denaturalize Koreh on several grounds, including illegal procurement of a visa on account that he "advocated and/or assisted in the persecution' of Jews" in his role as editor of a Hungarian newspaper. The court rejected Koreh's argument that his role as propagandist [d]id not "assist in the persecution" of Hungarian Jews. After quoting from the Streicher judgment, the court noted: "Although the underlying legal basis for the prosecution of Streicher differed from the basis for this denaturalization case against Koreh, the recognition of the nexus between propaganda and persecution is no less applicable for that reason." *United States v. Koreh*, 59 F.3d 431(3rd Cir. 1995) at 440.

[11] US liberal fundamentalism with respect to ideologies of freedom of expression has plagued this issue, and can be interpreted as a reiterating of American cultural identity with respect to the reiteration of an exceptional political culture founded upon the genocide of native Americans (interpreted as "heathen savages") and specifically racist forms of slavery. During the deliberations on the 1948 Convention the USA aggressively campaigned for the total removal of the provision relating to incitement to genocide as a violation of its fundamental conceptions of "freedom of expression" / the press. Schabas W *Genocide in International Law* (Cambridge University Press Cambridge 2009) 321-322; Schabas W., "Hate speech in Rwanda: The road to genocide" 2000 *McGill LJ* 141-171 In this way, this regime kept faith with its own genocidal complicities, whilst reiterating a characteristic lofty stance of principled moral righteousness with respect to the alleged degeneracy of "Old Europe."

[12] See *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgment, Partly Dissenting Opinion of Judge Meron, 10 (Nov. 28, 2007): 'The threat of criminal prosecution for legitimate dissent is disturbingly common, and officials in some countries have explicitly cited the example of RTLM in order to quell criticism of the governing regimes.'.

[13] Gregory R. Nearpass, Comment, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 *Alb. L. Rev*. 547, 561-69 (2003).

In additional to purely domestic national legislation, it is necessary to set the following historical account of the origins of hate speech jurisprudence within international law within the context of the emergence of transnational human rights measures both promoting and, in one sense restricting conceptions of "freedom of expression." Here, we have witnessed a degree of overlap between historical developments within international human rights law, international criminal law and international humanitarian law, as well as noticeable differences of emphasis and focus.

At a general level, conceptions of "incitement" and "hate speech" give voice to efforts to link linguistic and other symbolic expression with its complicities in violent, xenophobic and sometimes genocidal outcomes, where incitement falls under the broader category of "abuse of rights."[14] The international human rights framework, which within European at least has been decisively influenced by the horrors of Nazism and the Holocaust,[15] has developed legal measures to confront both acts and programmes of incitement and broader notions, stemming originally from the civil law tradition, of "the abuse of rights."

These notions have been adapted from its civil law origins to the international law context. Here, during the first decades of the 20th century. Arguably, they have attained the status of either a general principle of international law, or as part of customary international law.[16] Understood as an interpretive practice, the abuse of rights has been legally recognised as a notion involving an essentially hypocritical and – when viewed in terms of the total economy of rights - counterproductive demand. That is, a demand to exercise a "right" to act in a manner whose implications tend, in practice, to be actually or potentially destructive of the rights of others. Considered in terms of its practical consequences, the abuse of rights through incitement to genocide and hate speech more generally typically involves *a reduction* in the reality and viability of rights as a whole. In this wider sense, and contrary to free speech fundamentalists, the legal prohibition of such speech thus amounts to a militant democratic *defence* of the integrity of rights and rights-based culture, not its qualification or reduction.

---

[14] See, e.g., ICCPR, Art. 5, providing an abuse of rights provision in relation to other recognised rights, including Art. 19 expression rights.
[15] During the immediate post-war period, Hersch Lauterpacht was one of many international lawyers campaigning for the regulation of militaristic propaganda, sedition, and what today would be termed hate speech as a key element of part of the historically emergent human rights framework. See, e.g., H. Lauterpacht, *An International Bill of the Rights of Man* (1945), 108.
[16] See ECHR, Art. 17. H. Lauterpacht, *The Function of Law in the International Community* (1933), ch. 14, 298: 'the prohibition of abuse of rights is a general principle of law'. See also M. Byers, 'Abuse of Rights: An Old Principle, a New Age', (2002) 47 *McGill Law Journal* 389.

Unsurprisingly, the experience of Nazism and racist, militaristic and xenophobic propaganda within that regressive movement, encouraged international lawyers to debate the role of transnational regulation of forms anti-democratic of propaganda as a strategy for preserving post-war "peace and security" - as well as individual rights.[17] This included the development of notions of imposing legal responsibilities upon states for allowing or encouraging destructive forms of propaganda arising within their borders.[18]

Article 20 of the ICCPR introduced prohibitions of propaganda inciting war. This forms part of a package regulating liberal conceptions of "freedom of expression" - including Article 19, whose subsection 2 recognises the necessity for lawfully constituted "restraints" on such expression. What is particularly relevant for present purposes is how hate speech is being defined in terms of 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.'[19]

Another historical landmark in the criminalisation of racist hate speech as a crime against humanity was created during the mid-1970's with the creation of the International Convention on the Suppression and Punishment of the Crime of Apartheid.[20] The Apartheid Convention was adopted by the General Assembly on 30 November 1973, by 91 votes in favour, four against (Portugal, South Africa, the United Kingdom and the United States) and 26 abstentions. It came into force on 18 July 1976, and has been ratified by over 100 states. This treaty remains in force despite the transition of South Africa to democracy. In terms of hate speech, Art. II provides: 'For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts', extending the reach of the Convention beyond the specific case of pre-1994 South Africa. This measure establishes an individual form of criminal responsibility for apartheid, including of persons who, through hate speech alone, 'directly incite or conspire in the commission' of apartheid, as well as to those who 'directly abet, encourage or cooperate' in the commission of this crime.[21] In addition, State Parties undertake to: 'suppress

[17] See the analysis of propaganda in E. Castrén, *The Present Law of War and Neutrality* (1954), 208-10; J. Stone, *Legal Controls of International Conduct: A Treatise on the Dynamics of Disputes and War-Law* (1954), ch. 11, Discourse 15, 318-23.
[18] H. Lauterpacht, 'Revolutionary Propaganda by Governments', in H. Lauterpacht, *International Law*, collected papers arranged and ed. E. Lauterpacht, Vol. 3, *The Law of Peace, Parts II-VI* (1977), ch. 8, esp. 293-5.
[19] ICCPR, Art. 20(2).
[20] 1015UNTS243 (Apartheid Convention).
[21] Art. III(a)and(b)

as well as to prevent any encouragement of the crime of apartheid', Art. IV(a).[22] The Convention still remains in force, but - since 2001- its provisions have been partly superseded by the 1998 ICC Statute, which incorporates the crime of apartheid as a "crime against humanity."[23]

From 1952 until 1990, all aspects of apartheid were annually condemned by the UN General Assembly as contrary to Articles 55 and 56 of the UN Charter and was regularly denounced by the UN Security Council. In 1966, the General Assembly categorised apartheid as a "crime against humanity"[24] and in 1984 the Security Council endorsed this determination.[25] The Apartheid Convention not only declared apartheid to be unlawful as a violation of the UN Charter but also an international crime. The Convention still remains in force, but - since 2001- its provisions have been partly superseded by the 1998 ICC Statute, which incorporates the crime of apartheid as a "crime against humanity."[26]

The Apartheid Convention declares that apartheid is a crime against humanity and that "inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination" are international crimes.[27] Article 2 defines the crime of apartheid –"which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa" – as covering "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them". It sets out those acts that fall within the ambit of the crime including murder, torture, inhuman treatment and arbitrary arrest of members of a racial group; deliberate imposition on a racial group of living conditions calculated to cause its physical destruction; legislative measures that discriminate in the political, social, economic and cultural fields; measures that divide the population along racial lines by the creation of separate residential areas for racial groups; the prohibition of interracial marriages; and the persecution of persons opposed to apartheid.

---

[22] See M. Cherif Bassiouni and D. H. Derby, 'Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments', (1980-1) 9 *Hofstra Law Review* 523. However no one yet has ever been prosecuted under the Convention. See J. Dugard, 'Introduction to the Convention on the Suppression and Punish ment of the Crime of Apartheid': http://untreaty.un.org/cod/avl/ha/cspca/cspca.html.
[23] ICC Statute, Art. 7(1)(j).
[24] UNGA Resolution 2202 A (XXI) of 16 December 1966
[25] UNGA Resolution 556 (1984) of 23 October 1984.
[26] ICC Statute, Art. 7(1)(j).
[27] Art. 1.

Under this Convention, international criminal responsibility applies to individuals, members of organisations and representatives of the State who incite or conspire to commit (as well as who actually commit), the crime of apartheid.[28] Consideration was given in 1980 to the establishment of a special international criminal court to try persons any strand of the crime of apartheid (E/CN.4/1426 (1981)), which would have allowed specific prosecutions for incitement of course. However, no such court was ever established. Hence, it was left to State Parties to enact domestic legislation to enable them to prosecute apartheid criminals on the basis of "universal jurisdiction." This means that the Apartheid Convention authorises State parties to prosecute non-nationals for a crime committed in the territory of even a non-State party (like the UK) where the accused is physically within the jurisdiction of a State party (arts. 4 and 5).

The *ad hoc* historical emergence of such laws against incitement and persecution through words alone can then be understood not as "restrictions upon freedoms," (at best a "necessary evil"), but rather as essentially protective measures for an evolving rights / responsibilities nexus being constructed through various international law devices. Historical insights suggests that these have proven necessary to curb the cynical and hypocritical invocations of rights, especially “freedom of expression,” to further the cause of undemocratic political programmes. This is only most obvious with respect to extremist and xenophobic nationalism, racism, militarism, and religious sectarianism, or other types of clearly antisocial or criminal consequences.

In short, the historical emergence of efforts to criminalise the most damaging forms of hate speech is better understood not in classic liberal terms of essentially problematic restrictions upon “freedom of expression” defined as a precondition for the oxymoron of “liberal democratic governance.” Rather, such criminalisation measures are more realistically interpreted as falling outside the zone of liberal cosmopolitan ideologies because they form part of the militant institutional defence of core democratic values and political cultures: a defensive practice that includes - but also supersedes - legal measures. As such, transnational incitement laws are better defined as one part not a depoliticised realm of human rights, posited as timeless, absolute and grounded in natural law conceptions. Instead, they make more sense when interpreted as the *emphatically political* and historically specific vindication of an emerging community-wide interest in the right to self-determination

[28] Art. 3.

characteristic of modernity. Only this historical context and project makes it possible for us to link incitement laws to the various ideological conceptions of human rights to "freedom of association," "religious belief," "right to life, "and "security" of both the person and property. Such phenomenon, which are never anything but contextually specific and contingent, stem from this preeminent right of collective self-determination, which is also a responsibility to others. Restricting forms of hate speech that advocate or incite civil war, religious sectarianism, tribal or state on state warfare cannot be separated from historical concrete movements. In particular, they need to be contextualised in terms of distinctly political efforts to introduce protective measures designed to prevent massive diminishments in the practical exercise of core rights stemming from these types of collective conflict, including rape and sexual violence.[29] A vital method here is to develop a series of in-depth case studies of law in action exposing the limitations of purely normativist / doctrinal interpretations of this topic.

Through the following case study, we now aim to explore the implications of a situation where Streicher, who was complicit in the hate crime type propaganda of Hitler's Germany, received a legal outcomes different in kind from those of others whose contributions to Nazi propaganda were broadly comparable. Does the existence of divergent outcomes represent legally problematic 'discrepancies' causing a measure of instability in the founding elements of the doctrine of "incitement to genocide," which today would be classified in whole or part as hate crimes? Alternatively, can the decision in the Streicher case be 'reconciled', and these founding moments better secured, once we properly understand the applicable legal doctrine? The main case study under examination is that of Julius Streicher, the private publisher of the grossly anti-Semitic weekly newspaper *Der Stürmer* (The Attacker). But our case study would benefit from a systematic comparison with that of fellow Nurember defendant and Hans Fritzsche, a mid-level German radio broadcaster within Goebbel's notorious Ministry of Propaganda; and even perhaps with Carl Schmitt, a German professor of public law at the pre-eminent University of Berlin. It is widely recognised that, in Gordon's words, the first two Nuremberg decisions: "essentially mark the birth for the international jurisprudence for hate speech. ... [they are] the most significant pre-ICTR international precedents regarding media use of hate speech in connection with the massive violations of international

[29] M. G. Kearney, *The Prohibition of Propaganda for War in International Law* (2007)

humanitarian law."[30] The theme of possible 'discrepancy' arises because of the dramatically different legal outcomes the international criminal justice system produced in these three cases. This was despite the fact that each of these two individuals – according to prosecution statements and evidential materials – was complicit in Nazi propaganda associated with hate crimes, namely, inciting genocidal atrocities contrary to the newly-codified offence of crimes against humanity, particularly the sub-set of "persecution." We critically explore the contention that, despite the formalist tendency to seek to rationalise legal decisions in terms of a "logic of legal doctrine," a range of highly pragmatic, contingent and institutional factors, operating independently from the objective and strict application of legal doctrine to given material facts, best explain these divergent outcomes.

Is the history of the emergence of actual and proposed prosecutions for incitement to acts of genocide and crimes against humanity rooted in law at all, understood as doctrinal rules giving effect to general legal principles and underlying axioms? Alternatively, or in addition, is it more useful to examine the intersection of factors *other than* doctrinal rules or theories? To avoid misunderstanding, the term 'incitement to genocide' is of relatively recent coinage stemming from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Genocide Convention),[31] which is now incorporated into the ICTY (Yugoslavia), ICTR (Rwanda) and ICC (Rome) Statutes.[32] Such incremental legal recognition, of course, post-dated the International Nuremberg Tribunal (IMT) of 1945-6, and emerged towards the end of the American-led Subsequent Proceedings at Nuremberg (NMT) in which over two hundred mid-level Nazi war crimes defendants were prosecuted between 1947-9.

Once drafted in the summer of 1945, the Charter of the Nuremberg Tribunal did not expressly use the term ‘genocide’. However, the indictment under Count Three, Article 6(b) ‘war crimes’ did, albeit as a point and issue of "fact," accuse the Nazi defendants of committing crime that were analogous with genocide. While drafting the Nuremberg’s indictment, former prosecutor Telford Taylor noted: “We used the word ‘genocide’, newly coined by Raphaël Lemkin (at the time a member of the American prosecution staff) to describe: “the extermination of

[30] See Gregory S. Gordon, 'A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech,' 45 *Va. J. Int'l L*. 139, 143 (2004)
[31] Dec. 9, 1948, 78 U.N.T.S. 277.
[32] Colette Braeckman, *Incitement to Genocide, in Crimes of War: What the Public Should Know*, 192 (Roy Gutman & David Rieff (eds.) 1999); Davies TE "How the Rome Statute weakens the international prohibition on incitement to genocide" 2009 *Harv Hum Rts J* 245-270.

racial and national groups, particularly Jews and Poles and Gypsies and others."[33] During these trials, the concept of 'genocide' was implied and, on occasions, deployed by prosecutors, but not actually prosecuted as a separate offence. Instead, at Nuremberg, offences that today would fall under the heading 'incitement to genocide' and could, on occasions, be differentiated from the wider category "crimes against humanity" were classified as acts of "persecution."[34] Indeed, acts of genocide were not internationally recognised as a separate and distinct criminal offence until the adoption in 1948 of the Genocide Convention. This included the offence of "direct and public incitement to commit genocide" under Article III(c).[35] However, the latter remained judicially untested in that the first prosecution for *any* form of genocide had to wait until the *Akayesu* case of 1994. *Inter alia*, he was charged with the offence of 'direct and public incitement to commit incitement genocide'.[36] In March 2013, Yvonne Basebya was convicted of incitement to genocide by the Hague District Court in the Netherlands.[37] Given the near half-century of prosecutorial inaction between the *Streicher* and the *Akayesu* cases, questions concerning the use of racist incitement stemming from the Nazi era can still be considered comparatively recent precedents. As Gordon recognises:

> 'International tribunals have found that hate speech targeting a population on the discriminatory grounds identified in Article 7 of the Rome Statute constitutes crimes against humanity (persecution). Jurisprudence to this effect finds its origins in the prosecution of Nazi war criminals Julius Streicher and Hans Fritzsche by the International Military Tribunal (IMT) at Nuremberg.'[38]

Catherine McKinnon has made a similar point in relation to the "Media Case" before the Rwandan Tribunal.[39]

---

[33] Telford Taylor, 1992, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, 103.

[34] As defined either by Article 6(c) of the Nuremberg Charter, and - for the Subsequent Proceedings - under Control Council Order 10, which restated the substance of Article 6 as German domestic law

35 Proposals to include incitement to commit in the Genocide Convention were contested, particularly by the United States, during deliberation by the Ad hoc Committee on Genocide. William A. Schabas, 'Hate Speech in Rwanda: The Road to Genocide,' 46 *McGill Law Journal* 141, 152, (2000).

[36] The Prosecutor v. Jean Paul Akayesu Case No. ICTR-96-I; The Prosecutor v. Kambanda Case No. ICTR- 97-23-S; Prosecutor v. Ruggiu, Case No. ICTR 97-32-I.

[37] See Basebya District Court of The Hague, Case No 09/748004-09, 1 March 2013

[38] Gregory S. Gordon, 'From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework,' 98 *Journal of Criminal Law and Criminology* 833 (2008).

[39] Catherine A. MacKinnon, 'International Decisions, Prosecutor v. Nahimana, Barayagwiza, & Ngeze, 98 *Am. J. Int'l L*. 325, 328 (2004): "This adjudication is the first since the Streicher and Fritzsche cases at Nuremberg to confront the responsibility of the media under international criminal justice principles." Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze (hereafter Nahimana), Case No. ICTR-99-52-T, Trial Chamber I, Judgement and Sentence, 3 December 2003, 978. For more extensive background to the media's role in the Rwandan genocide than is possible here, see A. Thompson (ed.), *The Media and the Rwandan Genocide* (2007).Robert H. Snyder, "Disillusioned Words Like Bullets Bark": Incitement to Genocide, Music, and the Trial of Simon Bikindi, *35 Ga. J. Int'l & Comp. L*. 645 (2007), which provides an overview of the ICTR incitement cases).

We will now provide details of the nature and types of anti-Semitic and other Nazi propaganda that Streicher, produced, and the legal reponses. In each case, between 1945-47, the anti-Semitic propaganda of Streicher, Fritzsche and Schmitt was deemed sufficient to warrant their detention by Allied Nazi war crimes prosecutors as possible defendants within the overall Nuremberg process (including the follow up American-led "Subsequent Proceedings.") We therefore have to focus particularly on the details of their divergent treatment at the hands of international criminal law. Whilst the private publisher Julius Streicher was successfully prosecuted, convicted and executed, the mid-level government radio broadcaster, Fritzsche, was interrogated, prosecuted, but ultimately acquitted by the IMT.[40] Law Professor Schmitt, was interrogated repeatedly by Robert Kempner, a senior German-Jewish émigré serving as a US Nuremberg prosecutor preparing a planned trial programme embracing Nazi propaganda and "education." After reviewing the interrogation and other evidence, Kempner and his colleagues decided to release Schmitt without charge. The interpretative grounds for Schmitt's non-prosecution raise core issues concerning the legal accountability of academics inciting others to commit acts of genocide, an issue which merits wider attention within the academic literature.[41] These still remain largely indeterminate and potentially controversial on classic liberal constitutional grounds. International law scholarship needs to ask: do their divergent legal outcomes represent "inconsistent" treatment of "similar" cases, explicable by reference to extra-doctrinal factors? Alternatively, is it possible to identify substantial material differences between them, which – once properly interpreted according to the protocols of formalistic legal reasoning – explain these divergent results by reference to a distinctly doctrinal logic?

We argue that this main question is important. This is because if the first argument succeeds, it then calls into question the ongoing validity of the Streicher judgment insofar as this has functioned as a primary source and significant precedent for prosecutions in a number of recent cases concerning incitement to genocide through racist propaganda. For example, over the past three decades the International Criminal Tribunal for Rwanda

[40] See, Justin La Mort, 'The soundtrack to genocide: Using Incitement to Genocide in the Bikindi Trial to Protect Free Speech and Uphold the Promise of Never Again,' 4 *Interdiscip. J. Hum. Rts. L*. 43 (2009-2010); Joshua Wallenstein, 'Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide,' 54 *Stan . L. Rev*. 351 (2001-2002); Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide,' 48 Va. J. Int'l L. 509 (2007-2008); Christopher Scott Maravilla, 'Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law,' 17 *Tul. J. Comp. & Int'l L*. 113, 144 (2008).

[41] There is an entire book to be written on how issues concerning the complicities of propaganda by academics has been selected interpreted and responded to by both national and international prosecutors, which could profitably review the personal files of the Nuremberg prosecutors and determine the extent of pressure exerted by countervailing doctrines of "academic freedom."

(ICTR) has both expressly and implicitly built upon the Streicher judgement to develop the doctrinal definition of incitement in several key cases: namely, Akayesu,[42] The Media Case,[43] and Bikindi[44] decisions.[45] During these cases, ICTR prosecutors have secured five convictions,[46] two guilty pleas,[47] and suffered only one acquittal,[48] with Bikindi convicted only on appeal. In addition, the ICTR found Georges Ruggiu,[49] guilty of using racist propaganda that was recognised as analogous with those offences committed by Streicher. Ruggiu was one of the cases tried for 'direct and public incitement to commit genocide' under Article 2(3)(c) and Article 3(h) of the Rwandan Statute.[50] *The Media Case* gave a thorough ruling on the level of subjective intent (*mens rea*) required for successfully prosecuting various forms of propaganda that have incited racial and ethnic hatred, which supplemented the Nuremberg judgements. Furthermore, controversy has arisen over whether incitement to genocide includes, or overlaps with, 'hate speech'.[51] In relation to the 1998 Rome Statute for the ICC, debate has arisen concerning whether incitement remains an international crime in its own right,[52] or has been relegated to being merely one among other elements of free-standing offences?[53] Finally, an argument has been put forward

[42] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, 674 (2 Sep. 1998). See Roméo Dallaire, *Shake Hands with the Devil: the Failure of Humanity in Rwanda*, 531 (2003).
[43] In the "media case" (Prosecutor v. Barayagwiza, Case No. ICTR-97-19-T, Judgement and Sentence (Dec. 3, 2003), http://unictr.org/Portals/0/Case/English/Ngeze/judgement/Judg&sent.pdf, Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, 858, 892 28 Nov. 2007), the ICTR Tribunal re-affirmed the principle that those who use the media for inciting the public to commit genocide can be punished for communications that amount to hate speech and "persecution" as a crime against humanity. This case provides rendered the first contemporary judgment following the Streicher case to examine the role of the media in the context of inciting the public to commit racist crimes. More generally, see A. O. Odora, 'Criminal Responsibility of Journalists under International Criminal Law: The ICTR Experience', (2004)73(3)*Nordic Journal of International Law* 307.
[44] Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, 426 (2 Dec. 2008).
[45] Robert H. Snyder, Note, '"Disillusioned Words Like Bullets Bark": Incitement to Genocide, Music, and the Trial of Simon Bikindi,' 35 *Ga. J. Int'l & Comp. L*. 645, 670-73 (2007).
[46] Prosecutor v. Bikindi, Case No. ICTR 01-72-T, Judgment, 426 (2 Dec. 2008); Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, 857, 886 (28 Nov. 2007); Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment and Sentence, 437 (16 May 2003); Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, 674 (2 Sep. 1998).
[47] Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, 24 (1 June 2000); Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, 40 (3) (4 Sep. 1998).
[48] Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Appeals Judgment, 858, 892 (28 Nov. 2007).
[49] Prosecutor v. Georges Ruggiu, Case No. ICTR-97-31-I.
[50] Other defendants charged with this offence were, Prosecutor v. Jean Paul Akayesu Case No. ICTR-96-I; and Prosecutor v. Kambanda Case No. ICTR- 97-23-S.
[51] Christopher Scott Maravilla, 'Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law,' 17 *Tul. J. Comp . & Int'l L*. 113, 144 (2008).
[52] See Art 25(3)(e) cf. ICTY Statute 4(3)(c) which separate complicity from the crime of incitement to genocide. One question here relates to the difference between incitement and 'instigation' dealt with in Article 25(3)(b) and Article 4(3)(c). 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 Journal of International Law* 257-282, 267 (2005): See, A. Eser, 'Individual criminal responsibility, in the Rome Statute of the International Criminal Court: a Commentary, Vol. II, 767, 803-4 (A. Cassese, *et al* ed., 2002).
[53] Thomas E. Davies, Note, 'How the Rome Statute Weakens the International Prohibition on Incitement to Genocide,' 22 *Harv. Hum. Rts. J*. 245 (2009).

suggesting that racist statements by political leaders that are *only potentially* genocidal in their implications could still fall under this offence.[54]

Clearly, then, issues concerning the international criminal law basis for successfully prosecuting expressions of racist incitement remains a developing and, in places, a controversial field of international criminal law. As we aim to show, the demarcation of the doctrinal requirements for the first version of racist incitement falling under the category of "persecution" as a subset of "crime against humanity" regarding Streicher and Fritzsche, still remains open to controversy.

Whilst carrying out our cases studies, we have sought to avoid two possible pitfalls. The first would have been to approach our task with the preconceived notion that all three individuals were equally guilty of racist incitement, and the 'failure' to successfully prosecute and convict both Fritzsche and Schmitt represents a shameful, if still instructive, episode within the history of international criminal law: one which must never be repeated. The second, and equally prejudicial, pitfall would be to approach these case studies from the perspective of "freedom of expression," assumed on grounds familiar to American constitutional lawyers to be an absolute, or near-absolute, "human right."[55] Adopting this second orientation would probably predispose scholars to interpret the non-prosecution of Schmitt as somehow "the norm,' as a "vindication" of the "universal right" to engage in so-called "free speech," even of a type widely defined as offensive.[56] Here, the legally-sanctioned hanging of Streicher would be interpreted as legally and constitutionally problematic, perhaps even a deplorable, "miscarriage of justice" in that it involved a violation of "freedom of expression." It is doubtful whether either of these two prejudicial approaches, which start off from opposed – if equally fundamentalist - presuppositions, are capable of adequately coming to terms with the specific issues raised by our subject-matter.

---

[54] Gregory S. Gordon, 'From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework,' 98 *J. Crim . L. & Criminology*,' 853, 895 (2008).

[55]Albin Eser, 'The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective,' in Freedom of Speech and Incitement against Democracy,' 63 at 69. (D. Kretzmer and F. K. Hazan, eds, 2000) On the issue of human rights, see also, Timmermann, *op cit* 272.

[56] On this tension, Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide,' 48 *Va. J. Int'l L*. 485, 509 (2008); Kevin W. Goering et al. 'Why U.S. Law Should Have Been Considered in the Rwanda Media Convictions,' 22 Comm. Law. 10, 10 (2004); But see also Catherine A. MacKinnon, 'International Decisions, Prosecutor v. Nahimana, Barayagwiza, & Ngeze, 98 *Am. J. Int'l L*. 325, 330 (2004); Susan Benesch, 'Inciting Genocide, Pleading Free Speech,' 21 *World Policy J*. 62, 63 (2004); Tonja Salomon, 'Freedom of Speech v Hate Speech: The Jurisdiction of Direct and Public Incitement to Commit Genocide,' in *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, 141, 151 (Ralph Henham & Paul Behrens, eds., 2007).

THE CONVICTION AND JUDICIAL KILLING OF JULIUS STREICHER

Julius Streicher was the first journalist to be convicted of international crimes stemming from his media activities, and - as Joyce recognises - his case: 'prefigured recent jurisprudence concerning the media in the context of international criminal law.'[57] In its *Akeyesku* judgment, the ICTR considered: 'Perhaps the most famous conviction for incitement to commit crimes of international dimension was that of Julius Streicher by the Nuremberg Tribunal for the virulently anti-Semitic articles which he had published in his weekly newspaper *Der Stürmer*.'[58] Unlike Fritzsche and Schmitt, Streicher began his anti-Semitic propagandist 'career' in 1919 prior to joining Hitler's Nazi Party. In contrast to Schmitt, Streicher was not an academic. Indeed, the closest he came to an academic role was working as an elementary school teacher in a Bavarian village school in 1904. Five years later, he worked in a similar post in Nuremberg.[59] Unlike Fritzsche, a civil servant, Streicher was a private publisher of the newspaper *Der Stürmer*. The latter was not itself an official press organ of the Nazi Party, and thus not entitled to show the swastika, its distinctive symbol. This in itself indicated the lack of government recognition given to Streicher's newspaper, which contrasts markedly with the official status of Fritzsche's propaganda forming part of the work of the Nazi Propaganda Ministry.

In 1919 Streicher helped form "Wistrich," an anti-Semitic organisation. Hitler was involved with the German workers party which was led by Drexler until 1921, and the name changed to NSDAP in 1920 to highlight 'national' issues. By 1920, Streicher had completely merged his own group of political followers with those of Hitler, earning the latter's lifelong gratitude and protection. In 1923, Streicher had also participated with Hitler in the 'Munich Beer Hall Putsch', an attempted insurrection. In April of the same year, he founded *Der Stürmer*, which reached its peak circulation of 480,000 in 1935, whilst fluctuating and declining throughout the war

[57] Daniel Joyce, 'Human rights and the mediatisation of international law,' *Leiden Journal of International Law*, 2010, 513.
[58] At para. 550: http://unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf
[59] This information is taken from the document on the career and activities of Julius Streicher. WO 208/3806, Public Records Office, London, UK.

years.[60] In November 1923 publication was interrupted when Streicher was imprisoned for his part in the failed Munich putsch. He was released in February 1934, bringing out a new edition of *Der Stürmer* in the following month. It soon moved to a tabloid format with slogan 'A German Weekly in the Struggle for Truth'. Across the bottom of the front page was the quote from historian Heinrich von Treischke: "The Jews are our misfortune ('Die Juden Sind Unser Unglück!').

By means of Streicher's rhetoric and cartoons, Jews were represented as bacilli, vampires, and rats. When depicted in human form, Jews were portrayed as inferior and deformed examples of humanity possessing demonic powers involved in a sinister conspiracy against German society through sexual depravity, corruption and murder. *Der Stürmer's* rhetoric was simplistic and repetitious and designed to both invoke and reinforce a desired emotional effect. In conjunction with other instances of Nazi anti-Semitic propaganda, Streicher's materials distanced Jews from other Germans, while cultivating an ideological context that endorsed genocidal programmes.

By 1927, *Der Stürmer* was selling 14,000 copies a week, by 1934 circulation reached 100,000, and by 1935 it was almost up to 500,000. After 1933, Streicher brought out nine additional special editions, sometimes published to coincide with the annual Nuremberg rallies, some of whose print runs were two million copies. However, by 1940, circulation lowered considerably and the format was later reduced to four pages. The final edition appeared in February 1945.[61]

Any legal assessment of *Der Stürmer's* empirical influence in terms of incitement to mass killings must take into account that its readership substantially exceeded the numbers actually sold. This is because many more were read through public display cases located at bus stops, parks, and street corners. Often these display cases reiterated its slogan: "The Jews are our misfortune."

After the Nazi Party came into power in 1933, Hitler soon appointed Streicher as Gauleiter[62] of the Franconia region with his base in the city of Nuremberg. However, by 1940, after allegedly being involved in major

---

[60] *Id.*

[61] Bryant, Mark, 'Streicher, Fips & Der Stürmer,' *History Today,* Aug 2008, Vol. 58, Issue 8: 60-6.

[62] A Gauleiter was the party leader of a regional branch of the Nazi Party. Gauleiter became a Nazi paramilitary rank, and would eventually become the second highest position, ranking only below the rank of Reichsleiter.

financial and sex scandals and slandering Hitler's then deputy Hermann Goering, Streicher was stripped of all party offices, and forcibly "retired" to his rural estate in Pleikershof. From this time onwards, he played no official role within the Nazi Party, but concentrated solely on publishing his anti-Semitic newspaper, which Hitler still favoured even during the war.

Nevertheless, Streicher's indictment at Nuremberg charged him with committing offences under Counts One – by using his position as Gauleiter of Franconia and personal influence with Hitler to: 'promote the accession to power of the Nazi conspirators.' More relevant for present purposes, he was also charged with Count Four for 'the incitement of the persecution of the Jews'.[63] Streicher's political background meant that he was a staunch Nazi and supporter of Hitler's main policies, and he was certainly notorious for his anti-Semitic persecution of the Jews. Streicher's propaganda was aimed directly at the Jews; it was vile, repulsive and sometimes obscene. However, the distinctly legal question arises as to whether or not individuals can be rightly convicted of "persecution" on the sole ground that they publicly express personal loathing for any particular group, and publish propaganda to this effect? As originally interpreted by the IMT, (although loosened in later case law) "crimes against humanity" had to manifest a connection with an "armed conflict." However, the prosecution in the Streicher case referred to many examples of pre-war propagandist hate speech without objection from the IMT itself. Indeed, the IMT's judgment did not differentiate distinctly wartime from *pre-war* types of propaganda. This raises the question of whether a stream of hate speech can be considered as single entity extended over time, rather than a series of discrete episodic acts?

The US Chief prosecutor, Justice Jackson, stated during his opening address that *the incitement* of atrocities by words alone should clearly fall within the scope of the IMT's jurisdiction:

> ' ….We want to reach the planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness, and wracked with the agonies and convulsions, of this terrible war.'[64]

[63] The Charter of the International Military Tribunal, Article 1 (Hereinafter, Charter), International Military Tribunal Trial of the Major War Criminals (Hereinafter, TMWC). Vol. 1 Indictment: Appendix A. The Avalon Project: Documents in Law, History and Diplomacy, Yale University Law School, online at: http: //www.yale.edu/lawweb/avalon/avalon.htm. (visited Aug. 16, 2010).
[64] TMWC Vol. 2, Justice Jackson Opening Speech, November 21, 1945, at 104. http://avalon.law.yale.edu/imt/11-21-45.asp. (visited Aug. 16, 2010).

To substantiate this part of their case, the prosecution contended that, for over 25 years, Streicher had indoctrinated the whole of the German people in an attitude of hatred, and that he incited them to commit acts of persecution culminating in the extermination of Jewish people. On this basis, the prosecutors alleged that Streicher was: "an accessory to murder, perhaps on a scale never attained before."[65] They outlined an interpretation of the part he had played in the Jews' persecution between 1933 and 1945. The prosecution's evidence against Streicher consisted mainly of extracts taken from speeches and copies from *Der Stürmer*. They could draw upon an abundance of anti-Semitic material that both Streicher and his co-editors, Holz and Heimer, had written and published. Many of the quotes used in evidence were distasteful; and they reflected the vulgar tone of Streicher's viciously anti-Semitic views.[66]

Streicher's early propaganda had preached the philosophy of anti-Jewish attitudes prevalent in Germany for hundreds of years: "We know that Germany will be free when the Jew has been excluded from the life of the German people"[67] A speech in April 1925, reflected Streicher's earliest expression that anticipated the Holocaust: "Let us start today, so that we can annihilate the Jews."[68]

The prosecution claimed that Streicher's propaganda: "gave birth to what was years later to become the official policy of the Nazi Government."[69] These accusations had considerable justification in that Streicher's anti-Semitic propaganda changed its tone and became increasingly vicious after Hitler came to power, and increased his references to both "annihilation" and "extermination." In other words, Streicher's propaganda appeared to be *coordinated* with Hitler's polices of persecution that later intensified into a programme of physical destruction.

The so-called Nuremberg Laws, which codified Nazi anti-Semitism as state policy, were introduced on to the Party platform in Autumn 1935. At the IMT trial, the prosecutors argued that the adoption of these 'laws' was the

---

[65] TMWC Vol. 5, 10 Jan. 1946, at 90. http://avalon.law.yale.edu/imt/01-10-46.asp#streicher. (visited Aug. 16, 2010).
[66] It is arguable that, for rhetorical effect, the prosecution strategy tended to ignore how pervasive anti-Semitism was in European society at this time, even within children's board games and story books. Historically, it might be more accurate to suggest that Streicher "intensified" pre-existing modes of anti-Semitism and highly inflammatory anti-Semitic themes and stereotypes including predatory sexual elements, rather than personally originated them. For understandable institutional reasons, the prosecution had no interest in comparing Streicher's hate speech with the "moderate" anti-Semitism prevalent in and revered by Western 'canons' of literature, such as Chaucer's *Canterbury Tales* (the Prioress' prologue and tale), or Dicken's *Oliver Twist*, or Shakespeare's *Merchant of Venice*? Whilst the prosecutors needed to show the sheer "otherness" of Streicher's hate speech, academic analysis needs to be more self-critical of the very cultural traditions on whose basis historically specific conceptions of "normality" and "otherness" are set up, defined and applied as somehow self-evident and "obvious."
[67] Ibid.
[68] Ibid.
[69] 9 Iibd.

platform for Hitler's anti-Semitic policies. For his part, Streicher had positively welcomed and approved of these measures that formed the official basis of, and authorisation for, the Nazi Party's increasingly severe persecutory measures directed against German Jews.

Part of the dilemma facing the prosecution was that, following Justice Jackson's opening speech concerning the importance of convicting the instigators of Nazi atrocities, the prosecution needed someone to be convicted for actively inciting the deaths of approximately six million Jews. By mid-1945, Hitler. Himmler and Goebbels were already dead. The responsibility could not end with those who directly ordered or performed specific exterminations. Instead, anyone who encouraged, or "cried out," for the exterminations to continue might be held at least equally responsible for "inciting" mass murder. After presenting its main case against Streicher, the prosecution concluded that: "It may be that this defendant is less directly involved in the physical commission of the crimes against Jews, than some of his co-conspirators. His crime is no less the worse for that reason."[70] It did not, they claimed, matter that Streicher took no *physical part* in the extermination process. They resulted to a naturalistic metaphor claiming that he had set himself the task of encouraging mass murders by "poisoning the minds" of the German people as a whole with racist hatred.[71] Furthermore, once the Holocaust was underway, Streicher's incitements became coordinated with mass murder as he intensified his anti-Semitic propaganda to the point where it became ever-more radically genocidal in its demands:

> 'In the early days he was preaching persecution. As persecutions took place he preached extermination and annihilation; and as we have seen in the ghettos of the East, as millions of Jews were being exterminated and annihilated, he cried out for more and more.'[72]

The implication was that Streicher's propaganda was connected to, and coordinated with, the Nazis anti-Semitic physical extermination programme. This was because of his hate speech's the material impact.

According to the prosecutors, this constituted the essence of Streicher's crime of "persecution" - at least with respect to the nature of his material acts of incitement. He had led the propaganda and indoctrination of the

---

[70] Ibid. at 118.

[71] It is worth noting how this characterisation ascribes a particularly powerful role to the effects of hate speech as a form of propaganda, and its capacity to incite violence. More recently, in Prosecutor v Nahimana et al, the ICTR Trial Chamber held that Hassan Ngeze, the owner and editor of the virulently anti-Tutsi newspaper, Kangura, had "poisoned the minds of his readers" thereby causing thousands of innocent deaths. ICTR Prosecutor v Nahimana et al (Trial Chamber: Judgment) Case No ICTR-99-52-T, 3 December 2003 para 1101 (hereafter Nahimana (Trial Chamber)

[72] Ibid.

German people in increasingly radical forms of anti-Semitism, pointing towards a goal of extermination. Such propaganda activity had a material impact in that it prepared the ideological preconditions among his readership for their physical acts of persecution and, ultimately, genocide. Without him, the prosecutors, suggested: "the Kaltenbrunners, the Himmlers, and the General Stroops would have had nobody to carry out their orders."[73] Streicher's crime was probably greater and - in terms of its impact - more far-reaching than any of the other defendants. This was not least because elements of this propaganda were deliberately directed towards impressionable children and young people. Many of these would go on to join the Hitler Youth and other Nazi Party institutions, and whose potential for racist hate crime could continue for many decades even following Germany's military defeat.[74] Streicher was especially responsible for "persecution" in the sense to be afforded to this subset of "crimes against humanity" because he had:

'injected poison into the minds of millions and millions of young boys and girls and that poison would live on ... He leaves behind him a legacy of almost a whole people poisoned with hate, sadism, and murder, and perverted by him. That German people remain a problem and perhaps a menace to the rest of civilisation to come.'[75]

The prosecution further claimed that, as part of his campaign to stir up fear and hatred, Streicher's anti-Semitic propaganda was responsible not only for inspiring genocidal hate crime but - as it was actually taking - 'aiding and abetting' the Nazis' programme of expulsion and ultimately mass extermination of the Jews. In short, Streicher's propaganda was alleged to be both a pre-condition for, and – more immediately – a motivating factor behind the work of those materially responsible for carrying out acts of anti-Semitic genocide.

If the Tribunal decided that the prosecution had proven its legal case against Streicher, it needed to determine whether: 'words used as persecution' warranted the death sentence. In truth, Streicher's life depended upon the selective judicial interpretation of evidence presented by the prosecution. The IMT's judges had to deal with a number of new issues of both law and fact. These included the legal implications of *Der Sturmer*, the duration and intensity of Streicher's anti-Semitic incitement, the *width* of his readership. It also included the questions of whether there was evidence that this defendant *subjectively knew* (or perhaps *ought to have known*) that his words

[73] Ibid.

[74] Maggi Eastwood, 'Lessons in hatred: the indoctrination and education of Germany's youth,' *I.J.H.R.* 2011, 15(8), 1291-1314.

[75] Ibid.

either coincided with, or were in some way coordinating with, physical acts of official persecution and anti-Semitic acts of extermination. The IMT had to decide whether there needed to be clear proof that anyone had, *in fact*, been incited by the words Streicher's newspaper used to carry out acts of persecution that would not otherwise have taken place *but for* the influence exerted by his propaganda. In addition, the Nuremberg Charter did not set out "incitement" to commit either crimes against humanity or war crimes as a separate offense, yet that type of charge may have been more appropriate for the facts of Streicher's case.[76]

In reaching a decision regarding Streicher's guilt under Count One – Article 6(a) - "crimes against the peace," the prosecution's evidence was held to have failed to establish his connection with the "conspiracy" or "common plan" to wage aggressive war as defined in the indictment. The IMT held that:

> 'There is no evidence to show that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war. He was never present, for example, at any of the important conferences when Hitler explained his decisions to his leaders. Although he was a Gauleiter there is no evidence to prove that he had knowledge of those policies. In the opinion of the Tribunal, the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this judgment.'[77]

This left often all the questions we have already highlighted in terms of the legal requirements for the incitement related charge, including the issue of relative. Prior to presenting the Tribunal's judgment regarding Streicher's guilt under Count Four - Article 6(c) - crimes against humanity, President Lawrence gave details of the defendant's anti-Semitic propaganda that emphasised, in particular, *the longevity*, *consistency* and *intensity* of his genocidal campaign:

> 'His persecution of the Jews was notorious. He was the publisher of "*Der Stürmer*," an anti-Semitic weekly newspaper, from 1923 to 1945 and was its editor until 1933. … For his twenty-five years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as "Jew-Baiter Number One."'[78]

Hence, it appears that the IMT considered that Streicher's anti-Semitic campaign had been extended over nearly two decades counted as a relevant and possibly decisive factor. The same point applies to the consistency and regularity of this publication's racist messages, and the extent of his potential readership. Such factors appear to

---

[76] See Robert H. Snyder, 'Disillusioned Words Like Bullets Bark: Incitement to Genocide, Music, and The Trial of Simon Bikindi, 35 *Ga. J. Int'l & ComP. L.* 645, 654 n.72 (2007).
[77] TMWC Vol. 1, Judgement: Streicher: http://avalon.law.yale.edu/imt/judstrei.asp
[78] Ibid.

have been sufficient in the eyes of the judges to give many of Streicher's statements the required quality of "incitement to persecution."

Arguably, on a narrow literal interpretation, the wording of Article 6(c) suggests that there was no need for the prosecution to prove beyond reasonable doubt that any particular person was, *in fact*, ever incited to commit a specific and identifiable act of physical persecution, such that the Streicher's words amounted to both a necessary and sufficient cause.[79] Whilst such evidence was probably relevant in suggesting that his words had an "inciting quality," it may not have been strictly vital as a precondition for criminal liability. Regarding offences alleged under Count Four, the IMT held that *the size of his readership* was a relevant factor:

> 'In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution. Each issue of *Der Stürmer*, which reached a circulation of 600,000 in 1935, was filled with such articles, often lewd and disgusting. . . .[80]

The judges certainly considered evidence of the *breadth* of coverage of Streicher's propaganda. However, it is not clear whether this represented a legally decisive factor, or simply an aggravating element that was not strictly relevant to the issue of liability, but rather to that of sentencing.

A more difficult doctrinal issue concerned whether, in order to be legally classified as an act of persecution, Streicher's propaganda had to be *coordinated with* physical acts that amount to *non-verbal* forms of persecution. Alternatively, was the formulation and dissemination of his extreme racist hate expressions advocating mass extermination *by itself sufficient*? The IMT's judgment, which is less than impressive in terms of the quality of its legal reasoning, did not address – let alone clarify or answer - this vital issue. However, the judges did cite evidence of such coordination. However they failed to expressly determine whether or not such evidence represented either a decisive, or merely an incidental, factor. A similar interpretive ambiguity attaches to the question of how directly exterminationist such propaganda statements have to be to cross the legal threshold between "lawful," if still grossly offensive speech, and "unlawful incitement" to acts of genocide. The Tribunal's

[79] Cf. Werle G "Individual criminal responsibility in article 25 ICC Statute" 2007 JICJ 953-975, 972 with respect to the 1948 Convention: "Incitement also covers cases where genocide has been completed but where the causal nexus of an act of instigation cannot be proven."
[80] Ibid.

judgment gave particular emphasis to the fact that some of this propaganda directly called for Jews to be exterminated:

> '... As early as 1938 he began to call for the annihilation of the Jewish race. Twenty-three different articles of *Der Stürmer* between 1938 and 1941 were produced in evidence, in which the extermination "root and branch" was preached. Typical of his teachings was a leading article in September, 1938, which termed the Jew a germ and a pest, not a human being, but a parasite, an enemy, an evildoer, a disseminator of diseases who must be destroyed in the interest of mankind.'[81]

This judicial statement possibly implies that Streicher's words were in both fact and law *sufficiently direct and unambiguous*, and that these requirements can be taken as a decisive element in the sense of a pre-condition for liability under crimes against humanity. There was no question that statements such as the following from Streicher, which the prosecution quoted, sought to encourage acts of extreme and murderous physical persecution in the most direct manner conceivable:

> 'A punitive expedition must come against the Jews in Russia. A punitive expedition which will provide the same fate for them that every murderer and criminal must expect. Death sentence and execution. The Jews in Russia must be killed. They must be exterminated root and branch.'[82]

A further issue relates to the difficult question of whether the IMT held that there is a need for the prosecution to prove a *direct causal link* between words and actions.[83] It is one thing for Streicher to have intended to directly incite murderous acts, quite another to show that any specific atrocity was directly and primarily the effect of his words. That is, to have shown that acts of genocide would not have been committed "but for" the effects of Streicher's hate speech. In turn, this "but for" question is linked to whether international criminal law requires incitement to genocide to be classified as an *inchoate offence*, in the sense that there is no need to prove that actual harms or atrocities have resulted? Incitement is generally classified as an inchoate offence.[84] However, although the prosecutor is not expected to prove that hate speech constituting the incitement resulted in the commission of a crime, questions of causation remain relevant issues within the overall trial context. If

---

[81] Ibid.
[82] *Der Stürmer* article dated May 1939, Doc. D-811, Exhibit GB-333.
[83] See, Jamie F. Metzl, 'Rwandan Genocide and the International Law of Radio Jamming,' 91 *AJIL* 628, at 637 (1997); Joshua Wallenstein, 'Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide,' 54 *Stan. L. Rev.* 351 (2001-2002).
[84] As opposed to civil law systems that treat incitement as a form of complicity in relation to the actual offence. Cassese, *International Criminal Law*: *Cases and Commentary* (Oxford University Press Oxford 2011), 402. As a distinct crime of an inchoate or incomplete nature (as opposed to a mode of complicity) incitement is an exception to the general common law rule that criminal laws prohibit only the consequences or circumstances brought about by a person's unlawful conduct or omission. Prosecution depends on the failure of incitees to successfully commit the crime towards which they have been motivated by the inciter(s). Where incitement leads to the commission of the incited crime by the incitee, then the inciter may be prosecuted as either a co-perpetrator as an accomplice to the crime.

prosecutors can present compelling evidence demonstrating that the hate speech words were published in, and were directed towards, an especially volatile social context where communal violence was, for example, capable of being ignited by such expressions, then this does form part of the conduct itself relevant to the determination of punishment?[85] Was it the case that the prosecution had to demonstrate evidence that specific acts of physical persecution took place, which stemmed directly and exclusively from individuals reading his publications, and these acts would not have occurred "but for" this appropriation?

The IMT accepted that Streicher possessed sufficient subjective knowledge that acts of extermination were taking place in the East, and then responded to such insights by *further deliberately intensifying* his anti-Semitic propaganda, including calling for even greater measures against Jews. Indeed, a key element of Streicher's guilt lay in the IMT's acceptance of prosecution evidence that he possessed sufficient knowledge of Hitler's extermination programme against the Jews, and that, despite this, he had made a deliberate attempt to 'poison the minds' of Germans in ways to further encourage the intensification of such genocide.[86]

The interpretive difficulty for us is that the IMT's judgment focuses more on the criminal character of inciting murder, rather than evidence of Streicher's intent and the question of whether this met an expressly clarified legal standard. For example, it concluded that: "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter and constitutes a crime against humanity."[87] On one reading, this judicial wording suggests that the coincidence of incitement with actual acts of genocide was sufficient, without needing to prove subjective knowledge of such acts, despite the fact that the prosecution had stressed Streicher's knowledge as a major factor of his guilt. Each of these issues appears to have been decided against him but without a close examination of either the legal criteria or the sense in which the evidence produced by the prosecution was sufficiently credible and relevant to the task of meeting these criteria. He was found guilty of crimes against humanity and subsequently hanged.

---

[85] On "direct and public incitement to commit genocide" specifically, see W.A. Schabas, 2000, *Genocide in International Law*, 266-280.
[86] See Gregory S. Gordon, 'A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech,' 45 *Va. J. Int'l L*. 139, 144 (2004).
[87] TMWC Vol. 1, Judgment: Streicher. http://avalon.law.yale.edu/imt/judstrei.asp. (visited Aug. 16, 2015).

PROBLEMS WITH A NORMATIVIST ANALYSIS OF THE STREICHER JUDGEMENT

For understandable reasons, academic commentators retrace the origins of incitement to genocide back to Streicher's verdict.[88] Furthermore, academics and historians alike have expressed doubts concerning the IMT's judgment.[89] In regard to his sentence, Bradley Smith observed: "it is reasonable to harbour the feeling that it would have been better if the Court had taken more time and been more precise in dealing with the evidence."[90] The American Judge, Francis Biddle, admitted that a lack of impartiality existed within the Tribunal.[91] Taylor considered that all the judges except Biddle and Parker were to blame for not giving the fanatical old Nazis' judgment more careful consideration and express justification: "The carefree way in which the Tribunal members sent him to the gallows, as if they were stamping on a worm, is especially hard to condone."[92] Others suggest that, in part at least, Streicher had been the victim of his own vulgar and repulsive reputation: "The judges came hastily to their decision about Streicher, and it seems likely that they did so at least as much out of revulsion against his personality and the wartime crimes against the Jews ... as out of reaction to his own wrongdoing."[93] Taylor, reflecting the characteristic American position on freedom of expression issues, questions whether the publication of a newspaper, no matter how scurrilous, should be considered an international crime?[94] In this context, Streicher's warranted reputation as prominent and vociferous anti-Semite appeared to be just as a decisive factor as any express form of normativist legal reasoning. Such reasoning focuses upon:

1/. The identification of applicable technical rules in the form of distinctly legal norms.

2/. The latter's formal requirements capable of distinguishing what does and does not amount to "persecution" by words alone; and

[88] See, Margaret Eastwood, 2012, *Julius Streicher On Trial at Nuremberg: The Birth of Incitement to Genocide*.
[89] Denis E. Showwalter, 1982, *Little Man, What Now?: Der Sturmer in the Weimar Republic*; Bradley F. Smith , 1977, *Reaching Judgement at Nuremberg;* Michael R Marrus, 1997, *The Nuremberg War Crimes Trial 1946-46: A Documentary History*; Taylor 1992 op cit. John Tusa and Ann Tusa, 1983, *The Nuremberg Trial*.
[90] Smith, op cit, 203
[91] Francis Biddle, 1962, *In Brief Authority*, 473.
[92] Taylor, op cit 561; Tusa & Tusa, op cit 335.
[93] Marrus, op cit 253.
[94] Taylor, op cit, 264.

3/. Credible evidence as to whether the prosecution have demonstrated that they have met the burden of meeting these express requirements and tests.

Obviously, both inside and outside of the courtroom, Streicher had made more enemies than friends. Even the other defendants would not associate with him.[95] Smith claimed that: "No one had come forward to defend Streicher's character or activities, or to deny that he might have been convicted on other charges and in a different jurisdiction."[96] These opinions confirm that a degree of controversy still exists regarding both the legal basis, and hence precedent value, for the Streicher's judgment. This begs the question of whether a negative sentiment surrounding Streicher and *Der Stürmer* – together with the perception that, in the wake of belated knowledge of the Holocaust, 'public opinion' demanded that someone be held legally responsible for anti-Semitic propaganda – had understandably affected the Tribunal's decision.

In one sense, this is a disappointing and ambiguous conclusion for anyone concerned to identify and explain the birth of the criminalisation of racist hate crime within international criminal law in terms of a clear "legal logic" grounded in the meaning of applicable legal doctrine.

Both the Streicher and Fritzsche IMT judgments are comparatively short and, given the novelty of the doctrinal issues raised, comparatively unsophisticated in their exhibition of legal reasoning. They have certainly bequeathed a difficult doctrinal and policy legacy of setting a high, if still ambiguous, criteria. From a doctrinal perspective, the following interrelated questions were not adequately posed - let alone resolved - , and have continued to generate controversy into the present day:

1/. Is a defendant's official position, or lack of it, a mitigating or an aggravating factor in cases of "persecution" by words alone?

2/. What is the significance of the elapse of time between the act of expressing hate speech and actual deeds falling within the legal definition of "crimes against humanity"?

3/. Whether or not proof of causation, in the sense of a form of propaganda shown to be inextricably intertwined with the crimes Streicher's readers perpetrated against the Jews, is a necessary requirement? Alternatively, is there a defence that *other factors* were the more immediate cause of an atrocity or genocidal programme directed against the group previously singled out by the hate speech in question?

4/. If causation is a requirement, then are there legally relevant distinctions between *different forms* of causation,

[95] Gustaf Gilbert, 1947 *Nuremberg Diary* 126.
[96] Ibid.

such as direct and indirect types?

5/. Is there a requirement to demonstrate a defendant's subjective knowledge of such atrocities prior to, or at least at the time of, the hate speech in question?[97]

6/. Whether words judged to have the quality of inciting can be articulated as descriptive statements and ominous predictions, or do they need to take the form of imperative demands (akin to Streicher's cruder propaganda expressly urging the extermination of European Jews)? Is the crucial distinction between the Streicher and Fritzsche cases related to the former's actual and express incitement to anti-Semitic violence?

7/. What is the distinct quality of "inciting" hate speech more generally that distinguishes such words from other types of propaganda and mere expressions of ideological preference?

8/. Can the incitement caused by implicit, euphemistic and more "subtle" forms of racist hate speech nevertheless be sufficient provocation of perpetrators to meet the legal requirement? Indeed, are these less blatant forms of racist propaganda that avoid the crudities of Nazi master race theory and Streicher's vulgar provocations, indicators of *greater culpability*, particularly in contexts where cruder expressions of hate speech could prove counterproductive?[98]

9/. Is it relevant if the audience of hate speech are diffuse and physically distant from the perpetrators of physical hate crimes and have limited direct communication with them, such as Streicher's? Alternatively, what is the legal position if the specific audience is restricted to those who in the immediate presence of defendant when he or she expresses hate speech, such as those attending a public rally, or even a more limited group such as members of a paramilitary militia?

10/. What is the legal position where the group persecuted by hate speech is individualised, such as members of a named family, or alternatively where words are directed against *all* members of an entire group in ways that segregate, denigrate and insult them as a whole?[99]

11/. What is the significance of interpretations of the *cultural context* of both the original expression and reception of the meaning of hate speech? Are the likely interpretations of actual audiences at the time, including their understanding of the meaning and purpose of various euphemisms and other coded expressions, the decisive criteria for identifying "persecution" by means of hate speech?[100]

12/. How do the "vertical" and "horizontal" dimensions relating, respectively, to "conspiracies" among peers, and institutional hierarchies between comparative superiors and subordinates, affect the ascription of liability for hate speech amounting to incitement? In particular, can diverse and even antagonistic sub-groups, all of whom

---

[97] Although the IMT noted that Streicher continued his propaganda '[w]ith knowledge of the extermination of the Jews in the Occupied Eastern Territory', (IMT Judgment para. 538), it remains unclear whether this finding was necessary for finding Streicher guilty, or relevant only to his sentence.

[98] This point was only clarified later in Prosecutor v. Akayesu, para. 557.

[99] The ICTR Ruggiu case stated: 'Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group . . . on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.' Prosecutor v. Ruggiu. Case No. ICTR 97-32-1. Judgment and Sentence, 22 (June 1. 2000). By contrast, the ICTY held in Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, 209 (Feb. 26, 2001) that the alleged hate speech did not constitute "persecution" because it did have the same level of "gravity" as the other enumerated acts.

[100] In Mugesera v. Minister of Citizenship and Immigration [2004] 1 F.C.R. 3, Canada's Federal Court of Appeal stated that when assessing whether an utterance constitutes direct and public incitement to commit genocide, its meaning is to be assessed in terms of the speech as a whole, in terms of the particular context in which the speech was made, and in terms of whatever a reasonable listener would ordinarily interpret it to mean.

promote a similar form of hate speech, nevertheless be charged with participating in a wider and overarching "conspiracy"?

13/. Is a "stream" or "campaign" of hate speech to be legally interpreted as a "continuing offence" that is only "complete" when there are physical acts of persecution? Alternatively, as an "inchoate offence," is verbal persecution "complete" on each singular occasion when such speech is expressed, irrespective of whatever takes place before or afterwards?[101]

14/. Is the IMT application of the meaning of "persecution" (by words) of particular relevance to contexts where the related category of "direct incitement" under the 1948 Genocide Convention, and parallel provisions in the ICTR statute,[102] fail to giving fitting expression to a pervasive climate of malice and terroristic intolerance, where the content of hate speech is at least as problematic as their identifiable effects? On the other hand, can hate speech arising from a single media source meet the requirement for a type of "persecution" that is both "systematic and widespread," as required by modern definitions of "crimes against humanity"?[103]

15/. Although the *Streicher* case is often regarded as the precursor of the crime of incitement to genocide' before the offence category of "genocide" became recognised under international law through the 1948 Genocide Convention, this interpretation may only reflect the *purely factual* overlap between the two scenarios, not points of law. Indeed, it may fail to register the difference in legal doctrine between how "acts of persecution" differ from incitement to genocide. "Persecution" is not an inchoate offence but rather a criminal form of discrimination that violates the "right to equality" as established under international customary or treaty law. It is unclear how the Streicher precedent features in the contrast between these two doctrinal categories.

16/. Was Streicher's hate speech *itself* part of the Nazis' genocidal attack upon European Jewry, akin to a weapon, or rather a background ideological and motivational factor behind this attack?[104] It is unclear whether the doctrinal focus should be on the kind of harm stemming from hate speech with respect to the bilateral relationship of insulter-insulted, or upon a wider type of environmental harm in which the character of social relations between groups themselves are altered by pervasive hate speech.[105]

17/. What relation, if any, is there between the interpretation and application of "persecution" through media propaganda in the Streicher case, and wider ranging non-criminal aspects of international human rights laws against discrimination that set up and embody pseudo-universalistic norms of "human dignity" as fundament axioms?"[106]

18/. Is the graphic, if seductive, judicial metaphor of racist hate speech "poisoning the mind" of entire populations

---

[101] See G. Werle, 2009, 'General Principles of International Criminal Law,' in A. Cassese (ed.), *Oxford Companion to International Criminal Law*, 54 at 60. Instigation of these crimes is punishable only if the crimes themselves were eventually committed.

[102] Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, art. 2(3) (c), U.N. Doc. S/RES/955 (Nov. 8, 1994) [ICTR Statute]. The same language appears in the Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide art. 3(c), Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

[103] Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgment, 7 922, 931-34 (Nov. 28, 2007).

[104] In the Nahimana case, the Trial Chamber, the radio station and magazine in question were liked to 'the bullets in the gun,' the actual weaponry of genocide and those in charge of them bore both individual and command 'responsibilities stemming from their ownership and institutional control over the media (para. 979). The idea of media as an attack dog integral to genocide was carried forward into the appeal stage.

[105] In Nahimana 1072-3 the Trial Chamber insisted the hate speech functioned by "conditioning the Hutu population and creating a climate of harm" such that ideological persecution was more than a provocation to cause harm but was the harm itself.

[106] For example, the preamble of the Universal Declaration of Human Rights. In Nahimana, the Appeal Chamber of the ICTR found that "hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the members of the targeted group as human beings,' and it suggested that such speech could provide the sole basis for a conviction. See Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgment, 7 922, 931-34 (Nov. 28, 2007), 986-7. This Court mooted such a possibility but did not go so far as to expressly endorse it.

in ways that encourage genocide an appropriate characterisation of the difficult policy and legal issues at stake, or does its judicial deployment tend rather to evade them?[107]

19/. In the context of a racist war of annihilation as, for example, fought by Hitler is it possible to identify a credible and decisive legal distinction between, say, Fritzsche's "lawful" propaganda designed to support that overall war effort, which is only incidentally racist in quality and aim,[108] and that of, say, Streicher's fully-blown and concerted racism that openly embodies and promotes an exterminationist agenda?

20/. What is the legal position for a defendant whose racist hate speech is as extreme as that of Streicher but which does not call upon its audience to commit physical hate crimes against the targeted group? This question stems from an ambiguity as to whether it is the resulting incitement-effect, or the hateful and racist quality of the words in themselves, which is the key determinant of illegal "persecution."[109]

21/. The Streicher judgment does not clarify the position of an editor or radio owner whose media outputs contain episodes instances of hate speech composed by other persons, and where this defendant's liability has to be based largely on their omission to police and prevent such content, rather than a deliberate decision to create initiate it themselves.

Given the lack of sustained and careful doctrinal analysis contained in the IMT's judgment, there is a danger of over-interpreting the Streicher case and distinctions with other related Nazi war crimes cases. It is too easy to assume that the IMT must – as a matter of strict logic – have possessed and applied a set of legal requirements and doctrinal tests. It may be further assumed that it is the task of academics to ascertain, describe and clarify these requirements, and - once this has been achieved - the underlying doctrinal rational for the differences in outcome will become fully explicable.[110]

For example, there is the legalistic temptation to distinguish the Streicher case in terms of questions of intent and purpose on the one hand, and causation on the other. The presumption - here is because Streicher's anti-Semitic propaganda used words such as "kill," "exterminate" and "eradicate" this means that it follows , as a matter of logic, that the Nazi regime killed millions of Jews. Few historians could accept this simple notion of causation, least of all between words and actions. By contrast, a distinctly historical form of analysis would typically examine the particular social and institutional contexts within which Streicher could issue such statements, and also within which purely "doctrinal issues" could be raised as "explanations", without question.

---

[107] The Trial Chamber in Nahimana employed the "poison" metaphor from the Streicher case to justify its conclusion that the RTLM broadcast accusing all Tutsi of cunning and trickery amounted to "persecution." op cit, 1078.
[108] The IMT claimed that his propaganda was mainly intended: "to arouse popular sentiment in support of Hitler and the German war effort." Fritzsche Judgment, op cit, 338.
[109] Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment, 1073 (Nov. 28. 2007): 'there need not be a call to action in communications that constitute persecution [and thus] there need be no link between persecution and acts of violence.'
[110] Cf. Spencer W. Davis, 'Incitement to Terrorism in Media Coverage: Solutions to Al-jazeera after the Rwandan Media Trial,' 38 *The George Washington International Law Review*, 749 (2006).

Such formalist assumptions may suggest that, as a matter of pure legal doctrine, it is easier to secure prosecution of private publishers of racist words because they are acting exclusively on their own initiative as a creative source of acts of incitement. Here, the contrast is with official state propagandists, who are merely acting as a mouthpiece for others who may deceive their subordinates as to the true state of affairs, thereby nullifying the required element of purposefulness.[111]

Superficially, these propositions appear to make good doctrinal sense of the contrast between these cases. And yet the difficulties become clearer if we ask what if Streicher's words had been expressed by Fritzsche or *vice-versa?* Of if Streicher had exhibited Fritzsche's repentant and sympathetic demeanour in court and had been singled out for prosecution primarily to appease the Soviets? In short, it remains an open question whether racist hate speech that amounts to 'declaratory propaganda' fell outside the scope of "crimes against humanity," or whether any such distinction underplays the extent to which these cases were decided primarily on their particular facts alone with little reference to doctrinal distinctions and requirements?

The intuitive revulsion prompted by Streicher, including his physical appearance, vulgar and unrepentant manner in court, radiates from the extremely brief, even cavalier, level of legal analysis explaining the grounds for his guilt. If the dominant (and I would add entirely understandable) judicial perception was that, in the wake of revelations concerning the Holocaust, he simply "no longer deserved to live" on both moral and political grounds, then there was barely any need to show with care and clarity how the proven material facts of his case met determinate and specified legal criteria. Perhaps, the court was simply unwilling to provide an extensive legal rationalisation in terms of the "objective meaning" of legal precedent, doctrine and the "logical implication" of legal rules for given proven facts for what was, in essence, a moral choice in favour of a judicial killing. Arguably, such a stance could be defended in terms of the avoidance of excessive forms of hypocrisy that

[111] There is the critical analytical question, which the prosecutors needed to avoid, of the extent to which, in both peace and war, *all types* of government deploy official statements for propagandist purposes, although rarely with the intensity and damaging effects of the Nazi regime? Is there a difference in kind, or just degree, between the rhetorical presentation of a highly selective interpretation of empirically accurate "facts," and "propaganda." Is "overt" propaganda more or less "propagandist" than more subtle and oblique forms that take care to present themselves as "objective," "impartial" and "properly balanced"? In responding to such questions, are questions of the comparative gullibility, receptiveness or dismissive cynicism of the intended audience just as vital as those of the quality of the propaganda itself, and is it relevant to consider the extent to which poorly crafted propaganda can, in practice, sometimes prove counter-productive, achieving the opposite effect to that which was intended? How would European audiences typically react to the type of propaganda messages characteristic of the current North Korean regime, or *vice-versa*?

typically accompany normativist rationalisations of judicial killings made on camouflaged grounds? On the other hand, it could be argued that the IMT's position was itself hypocritical insofar as Streicher's physical appearance, vulgar manner, etc., were factors taken to preclude the need for any serious legal investigation and debate. Here, we can ask what difference might it have made if Streicher had - despite his crass stupidity and repugnant character - still been able to present a more attractive, polished and repentant profile similar to the "smoother" manner of Fritzsche for example, and whether any such differentiation is morally as well as legally justifiable?

In taking their minimalist approach, and avoiding the elaborate doctrinal clarification that legal normativists, influenced by the metaphysics of Kelsenian legal positivism, expect from judges when deciding novel cases, the IMT evaded the embarrassment of presuming that there really is, or could ever be, a single correct meaning of the single word "persecution," which had never previously been deployed in an international criminal law context, on whose basis life and death decisions may be dispassionately resolved.

There are, we would suggest, specifically institutional factors that may be of more use in actually explaining the distinctions the IMT ascribed to the Streicher and related cases. Although the IMT trial was, in one sense, a first instance hearing, there was no provision for an appeal chamber, and hence no possibility of an appeal on a "point of law." Unlike other first instance trial judges, members of the IMT did not, therefore, have to be concerned with the prospects of having their judgments unravel when subjected to later and more clinical forms of legalistic scrutiny by a higher level court eager to display its institutional and cognitive superior "authority." Far from being provisional, in the sense of subject to appeal, the IMT's "initial" determination was also a "final decision." In this sense, the judges were also legislators. Within certain semantic and cultural limits, in this case "persecution," as a subset of "crimes against humanity," *meant whatever they wanted this word to mean*. This semantic elasticity allowed it to be extensively stretched in the Streicher one case, while contracted in other parallel cases, such as the IMT's acquittal of Hans Fritzsche.

It was within the judges' discretion to define this term narrowly in each case (for the purposes of justifying the acquittal of both these defendants), or broadly (to legally authorise their convictions and killing). However, considered in terms of their policy implications and likely moral and political reaction, neither of these interpretive options could be considered ideal. Alternatively, the IMT judges had the option of defining

"persecution" broadly to ensure and justify the killing of Streicher and - albeit at the expense of a measure of internal consistency - narrowly to authorise the Fritzsche's acquittal.

Independent of legal doctrine and its implications, the IMT had little choice but to attempt to draw a policy line between "lawful" and "unlawful" propaganda involving hate speech. Had Fritzsche, a middle-level official, been classified and punished as a "*major* war criminal," then there may well have been the demand for literally thousands of other journalists and broadcasters whose actions were broadly similar (and in many cases far more extreme) to be classified and prosecuted in the same way. Arguably, this would not have been a practical option during the immediate postwar years, where the agreed Allied plan was to deploy a quasi-administrative "denazification" programme to purge and punish such individuals. Furthermore, had the unremarkable Fritzsche been classified as a "major" war criminal on a par with SS defendant Kaltenbrunner or Hitler's chief propagandist Goebbels for example, then this might have had the unwarranted effect of diluting the proper gravity attached to this classification itself. In other words, and independently of any "strictly legal" (i.e., legalistic) considerations, there is a pragmatic institutional and utilitarian argument to made in favour of the IMT's decision to draw an oblique and fuzzy line between the Streicher and Fritzsche cases.

On the other hand, some commentators, taking their cue partly from ICTR's "Media Trial" case of 2003, which was the first conviction at international criminal law exclusively for hate speech since the Streicher judgment, have recently suggested that a rational distinction, internal to legal doctrine, can be identified by reference to the category of "human dignity."[112] It may also be ascertained from the difference between "direct" and other forms of incitement. For instance, Benton Heath argues:

> 'The divergent outcomes in the early international criminal cases against journalists may be distinguished using this conception of dignity. Julius Streicher and Hans Fritzsche were the two Nazi journalists tried by the IMT at Nuremberg. For the vitriol published in his newspaper, Der Sturmer, Streicher was convicted of crimes against humanity by the tribunal and executed. By contrast, Fritzsche, a radio propagandist, was acquitted on all counts. The difference between these two cases thus may prove important for understanding the status of hate speech in ICL, and lawyers involved in the Nahimana case have argued that the material distinction in the Nuremberg judgment was that Streicher directly incited the extermination of Jews, whereas Fritzsche did not. Therefore, it is argued, the Nuremberg precedent should be read to support only convictions for direct incitement, and not for other forms of hate speech. In other words, expressive activity should be the basis for a persecution conviction only when it urges

[112] Zahar A "The ICTR's 'Media' judgment and the reinvention of direct and public incitement to commit genocide" 2005 Criminal Law Forum 33-48.

violent action.'[113]

Benton Heath then proceeds to claim that a certain legal conception and principle of "human dignity," and its attack by divisive forms of racism enhancing social stratification of humanity into supposedly "higher" and "lower" groups, underpins aspects of modern international criminal law. This conception, he claims, provides a more credible account of the distinction between these two IMT cases than the more traditional explanations:

> 'Our focus on dignity as re-stratification points toward a second important difference between Streicher and Fritzsche, at least on the facts as they are recounted in the Nuremberg judgment. The portion of the judgment convicting Julius Streicher constitutes a catalog of grievous status injuries. Though Streicher's conduct cannot be divorced from his frequent calls for extermination of the Jews, his writings are also striking in their systematic attempts to accuse the Jewish people of lies and deception, to reduce them to vermin or to a virus, and to publish weekly "lewd and disgusting" portrayals of Jews.'[114]

By contrast to such rationalisations, we would suggest that *if* there is a rational and legally explicable distinction between these two cases that adequately explains the difference in legal outcome, it lies in the selective interpretation of *questions of fact and factual distinctions*.[115] Fritzsche could, despite his title as political director of German radio, plead that he was a mere "stand in" for Goebbels and, to a lesser extent, his immediate superior Otto Dietriech, who alone were the creative sources of Nazi radio and press propaganda. By contrast, the influence of Streicher's position as editor in chief and owner of *Der Stürmer* was free of any such ambiguity and could, therefore, be relied upon as a decisive criteria. If Streicher had decided to desist his anti-Semitic propaganda, then that would have made an identifiable difference to the content of his publication. But the same cannot be said for Fritzsche whose *personal responsibility* for disseminating inciting content was, therefore, far less clear.

And yet one contradiction here is that Fritzsche appears to have been given credit for exercising discretion to prohibit from German radio some of the more extreme official forms of anti-Semitic sentiments, including references to the "master race" and to Jews as "sub-humans." Yet, this generous, if questionable, interpretation of

---

[113] Benton Heath, 'Human Dignity At Trial: Hard Cases And Broad Concepts In International Criminal Law,' 44 *Geo. Wash. Int'l L. Rev*. 317, 363 (2012). See also Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial:* Prosecutor v.Nahimana, 12 *New Eng. J. Int'l & Comp. L*. 17, 38-42 (2005); Jean-Marie Biju-Duval, 'Hate Media '-Crimes Against Humanity and the Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda,' in *Media and Genocide*, at 343, 347.

[114] Benton Heath, 2012 op cit, 363; Jean-Marie Biju-Duval, 'Hate Media '-Crimes Against Humanity and the Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda,' in *Media and Genocide*, at 343, 347.

[115] In essence, the IMT downplayed the extent and quality of Fritzsche's anti-Semitic propaganda that had previously been highlighted, in undisputed factual evidence, by the prosecution: 6 TMWC 65-67 (1947).

fact meant he was held *not* individually responsible and accountable for *the remainder* he chose not to block. This placed him in the fortunate position of "heads I win, tails you lose" situation of a truly favoured defendant. In addition, the IMT appeared predisposed to accept that the content of the anti-Semitic materials disseminated by the radio chief that denigrated Jews as inferior, was significantly less extreme and exterminationist than those of Streicher, who provided a convenient foil for this exonerating interpretation. However, this argument probably assumes that, as a matter of fact, the latter was itself a borderline case, such that any "less extreme" expressions would, as a matter of strict logic, have to fall on the other side of the relevant doctrinal distinction.

Had the prosecutors selected four defendants to represent (or more precisely "personify") the racist hate crime dimension of Nazi war criminality, then Fritzsche might have ended up falling on the "wrong side" of where the judges created a dividing line between "lawful" and "unlawful" racist propaganda. When considering the origins of the criminalisation of hate speech within international criminal law, it is, perhaps, too easy to accuse the IMT judges of a lack of doctrinal clarity and arbitrariness, which of course presumes that they chose perversely to ignore a non-arbitrary option. The presumption that legal doctrines cover all relevant situations for which they have been enacted or judicially developed, and that legal codes lack "black holes," remains a strong one.[116] In the context of Hitler's genocidal war of racist annihilation, there was possibly no non-arbitrary way of distinguishing, by reference to the newly-devised category of "persecution," "lawful" from "unlawful" forms of propaganda. A similar point applies to the distinction between propaganda in favour of "general German war aims" from Streicher's openly exterminationist incitement to mass murder. Central to Hitler's war aims was a racial reconfiguration of humanity based on a master race ideology to be realised through a campaign of genocide directed mainly against European Jewry.

In short, the Streicher case raised but failed to resolve a number of key issues concerning incitement to genocide, and bequeathed a difficult legacy to those seeking to prosecute at international criminal law for racist hate speech.

We would suggest that the considerable scholarly interest in the Rwandan "Media Trial" (*Nahimana* case) at the ICTR is indicative of the continuing importance of the unresolved issues handed down to ICL by the Streicher

[116] Prosper Weil, "The Court Cannot Conclude Definitively . . .*": Non Liquet* Revisited,' 36 Colum**.** J**.** Transnat'l L. 109 (1997).

case.[117] The continuing failure of international criminal to arrive at a shared understanding of the criminality of hate speech, which academic commentators have recognised, stems in part, from an understandable challenge contained with the IMT's legacy.[118]

[117] Catharine A. MacKinnon, 'Prosecutor v. Nahimana, Barayagwiza & Ngeze, 98 *Am. J. Int'l L*. 325 (2004); Gregory S. Gordon, 'A War of Media, Words, Newspapers, and Radio Stations': The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech, 45 *Va. J. Int'l L*. 139 (2004); But see Scott Straus, What Is the Relationship Between Hate Radio and Violence? Rethinking Rwanda's "Radio Machete.', 35 *Pol. & Soc*. 609, 611 (2007); Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 *Va. J. Int'l L*. 485 (2008).

[118] Diane F. Orentlicher, 'Criminalizing Hate Speech in the Crucible of Trial, *Prosecutor v. Nahimana*,' 21 *Am. U. Int'l L. Rev*. 557, 573-75 (2006).

It was clear from the IMT's Streicher judgment that "crimes against humanity" has been legally defined to include the deliberate use of written words to incite others to engage in acts of racist, religious or ethnic persecution. US Prosecutor Justice Jackson, a man steeped in liberal fundamentalism, was unwilling to prosecute academics, anthropologists and scientists who had collaborated with the Nazi regime where their support was by words alone. However, it is also clear from the wording of the definition of this offence that providing ideological support for a regime that was working to a programme that included, or even required, the commission of war crimes, including policies of racist or religious discrimination and "waging aggressive war," could amount to complicity in "persecution:" and be recognised as a subset of "crimes against humanity.". Streicher's status as a private citizen was certainly not considered a mitigating factor, any more than Fritzsche's official government position was judged to involve enhanced criminal responsibility. It might have been important to the Tribunal that Fritzsche, unlike Streicher, never had any direct contact with Hitler. That said, although the latter had an early friendship with Hitler, he did not have any direct contact after his removal as Gauleiter in 1940. Taken all these factors into account, including the inconsistent formulation and application of legal tests in relation to subjective knowledge of atrocities, Streicher's execution (as distinct from conviction with a life sentence of imprisonment) seems extreme in the light of Fritzsche's acquittal. The fact that Streicher was executed for persecution/incitement, with his ashes scattered in the river Isar to avoid any burial ground becoming a focus for neo-Nazis, serves to emphasise the highest severity with which the IMT regarded his type of racist propaganda.

That a precedent exists for the most severe permissible punishment for using hate speech is surely significant. Assuming that the nature of their racist propaganda is comparable, Streicher's punishment contrasts dramatically with Fritzsche's acquittal before the IMT.

In short, it is arguable that the explanation for the 'discrepancies' and divergent outcomes in the Streicher and related cases was related less to the application of settled legal doctrine to material facts, than to the selective interpretation of the facts themselves, driven in part by the subjective impression created by these three individuals.