

Role of Hate Speech in International Criminal Law

HR versus ICL differences

- * Hate Speech: overlaps and implications in other areas (depending on severity and consequences)
- * BUT also the theoretical and conceptual differences
- * Two different branches of International Law

Hate Speech as an International Crime?

- * Hate speeches have often been associated with armed conflicts and ethnic cleansing and genocide occurring during these armed conflicts.

Persecution as a crime against humanity with respect to speech-related conduct.

- * The judgment of the International Military Tribunal (IMT).
- * Julius Streicher and Hans Fritzsche, charged with crimes against humanity **by virtue of anti-Semitic advocacy**. Streicher: convicted of this charge and sentenced to hang, Fritzsche: acquitted.
- * Is there a need to include a call to action? Or even more so, a call to violence?

Advocacy of (Racial) Hatred versus Advocacy of (Racial) Violence

Persecution as a crime against humanity based upon expressive activity only when intentionally urged listeners to commit atrocities.

Streicher: unambiguous calls for extermination (a call to action) of Jews.

Advocacy of (Racial) Hatred versus Advocacy of (Racial) Violence

Fritzsche's speeches: while showing definite anti-Semitism... did not urge persecution or extermination of Jews.

Strong statements of a propagandistic nature in his broadcasts, BUT

the IMT was “not prepared to hold that they were intended to incite German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged.”

What role did HR law play before the ICTR?

- * "a review of international law and jurisprudence on incitement to discrimination and violence is helpful as a guide to the assessment of criminal accountability for direct and public *incitement to genocide*, **in light of the fundamental right of freedom of expression.**" (*Media Case*)

What role did HR law play before the ICTR?

- * The portion of the *Nahimana judgment* (Trial Chamber): incitement to genocide: focus on the law of three human rights treaties.
- * The International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Racial Discrimination (CERD) **require** States Parties to **proscribe hate speech**.
- * The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): *allows* (but not **requires**) States Parties to **proscribe** hate speech under certain conditions.

International Criminal Tribunal for Rwanda: Media Case

- * An extreme example of hate speech: the use of the mass media to promote genocide or racially-motivated attacks, such as the role played by Radio-Télévision Libre des Milles Collines in the Rwandan genocide in 1994.
- * (The ICTR, Cases of Nahimana, Ngeze, Baryagwiza/Media case: incitement to genocide)

Hate Speech as a part of Incitement to Genocide

- * Speech promoting ethnic hatred falls beyond the bounds of **protected speech**.
- * “not all of the writings published in *Kangura* constitute **direct incitement**. ,*A Cockroach Cannot Give Birth to a Butterfly*, brimming with ethnic hatred but did not call on readers to take action against the Tutsi population.”

Persecution as a Crime against Humanity: The ICTY: Dario Kordic case

The Office of the Prosecutor at the ICTY:

- * **persecution as a crime against humanity** based upon the act of “encouraging and promoting hatred on political etc. grounds.”

Persecution as a Crime against Humanity: The ICTY: Dario Kordic case

The ICTY:

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

Persecution as a Crime against Humanity

- * Judge Pocar:
- * “Hate speech targeting a population on one of the prohibited discriminatory grounds violates the right to respect for human dignity of the members of that group and thus constitutes discrimination in fact. ”

Persecution as a Crime against Humanity

- * "**Hate speech**, such as in the *Media Case*, which is **accompanied by** incitement to commit genocide and is part of a massive campaign of other discriminatory acts including acts of violence against property and persons – without any doubt does rise to the required level of gravity so as to amount to persecution. This legal finding is, in my view, firmly grounded in existing limitations on freedom of expression in IL. ” (Judge Pocar)

Persecution as a Crime against Humanity

- * Conflation of **hate speech** with **incitement to violent crimes**?
- * Making the protected speech an element of the crime of persecution?
- * CONSIDER THE ANSWER BELOW

Judge Pocar: Media Case

- * Need to take into account the **lack of consensus at the international level** about what protection should be given to abusive language when it infringes upon the right to human dignity.
- * Need to adequately address the power of propaganda to incite when it takes place in situations of **extended discrimination with an ethnic component** (**context is crucial!**) Hate speech may, and in the *Media Case* it did, amount to an underlying act of persecution.