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The Propaganda Prosecutions at Nuremberg: The Origin of Atrocity Speech Law and the Touchstone for Normative Evolution

PROFESSOR GREGORY S. GORDON*

I. INTRODUCTION

As Erna Petri, a German homemaker and mother of two, was driving home after grocery shopping, she saw six disheveled and seemingly scared children huddling together on the side of the road.¹ It was the summer of 1943. And through word of mouth, Erna knew that a group of Jewish children had escaped from a train headed to a Nazi extermination center. It occurred to her that these children may have been a part of that group. She approached them and kindly invited them to come home with her. Once at her house, she gave them something to eat and reassured them that they would be safe. Then she asked them to go outside with her. In a wooded area by her house, she stood them one next to the other. Then she placed herself behind them, pulled out a gun, and shot each one of them in the back of the head.² After the war, when asked how she could have engaged in such an incomprehensible act of cruelty against innocents, she replied:

I am unable to grasp at this time how in those days that I was in such a state as to conduct myself so brutally and reprehensibly—shooting Jewish children. However earlier . . . I had been so conditioned to fascism and the racial laws, which established a view towards the Jewish people. As was told to me, I had to destroy the Jews. It was from this mindset that I came to commit such a brutal act.³

Erna Petri's crime reminds us that instances of mass atrocity have

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1. *Hitler's Murderesses: Women's Role in Third Reich*, YNET NEWS, Sept. 27, 2013, <http://www.ynetnews.com/articles/0,7340,L-4433765,00.html>.

2. WENDY LOWER, *HITLER'S FURIES: GERMAN WOMEN IN THE NAZI KILLING FIELDS* 132–33 (2013).

3. *Id.* at 156.

always been accompanied by communications campaigns designed to demonize the intended victims and inflame the passions/kill the conscience of would-be perpetrators.⁴ Erna Petri had done Adolf Hitler's bidding. After seizing power in 1933, the Nazi dictator created the *Reichsministerium für Volksaufklärung und Propaganda* (Reich Ministry of Public Enlightenment and Propaganda) headed by Joseph Goebbels.⁵ The Ministry exercised strict control over all communications media in the Third Reich, including art, music, theater, films, books, radio, educational materials, and the press. The Nazis used this absolute power to bombard the German public with messages dehumanizing Jews and arousing hatred against them. Long before implementation of the Final Solution, anti-Semitic eliminationist rhetoric permeated National Socialist newspapers and figured prominently in official speeches, documentary films and leaflets.⁶ These materials depicted Jews as disease-carrying insects or vermin, tumors or tuberculosis that were infecting healthy Germans and thus had to be exterminated. By the time the Holocaust was being carried out, Nazi publications such as *Der Stürmer* were calling for Jewish annihilation "root and branch."⁷ And they were convincing people like Erna Petrie to act accordingly.

In response to the unimaginable Nazi offenses, the victorious Allies sought justice at Nuremberg. And their efforts were geared not only toward prosecuting crimes against peace and war crimes but also crimes against humanity. The latter were committed not merely by Nazi security forces, slave labor overseers and death camp administrators, but by propagandists as well. For the first time in history, an international court was seeking justice for crimes arising from hate speech. How did this come about? How was it operationalized? Who were the defendants? What were the verdicts? How did the resultant jurisprudence affect the development of the law governing speech and international crimes? And how might it still exert an impact on the evolution of that vein of law?

4. See generally, e.g., Mayo Moran, *Talking about Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, in DAVID DYZENHAUS & ARTHUR RIPSTEIN, *LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY* 771 (2001) (referring to jurisprudence that links "hate speech to a history of genocide"); ANTHONY JOSEPH PAUL CORTESE, *OPPOSING HATE SPEECH* 43 (2006) ("Instead, ethnic cleansing became normative through hate speech.").

5. See *Nazi Propaganda*, in HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005274> (last updated June 10, 2013) (describing establishment of the Nazi Propaganda Ministry and the extent of its control).

6. NORMAN M. NAIMARK, *FIRES OF HATRED: ETHNIC CLEANSING IN TWENTIETH CENTURY EUROPE* 59 (2002).

7. ERIN STEUTER & DEBORAH WILLS, *AT WAR WITH METAPHOR: MEDIA, PROPAGANDA, AND RACISM IN THE WAR ON TERROR* 142 (2009).

This article addresses those questions. And in doing so, it analyzes the birth of a body of law that came about as the result of hate speech prosecutions at Nuremberg against Nazi newspaper editor Julius Streicher, Radio Division head Hans Fritzsche, and Press Chief Otto Dietrich. While the Armenian Genocide previewed the Nazi hate speech program launched against the Jews, the absence of a post-World War I juridical response emboldened the Nazis to replicate the basic architecture of the Turks' eliminationist smear campaign.⁸ So the post-war work at Nuremberg was crucial in terms of modeling the necessary normative and expressive response. In the International Military Tribunal Charter and the subsequent Control Council Law Number 10, as well as the prosecutions of Streicher, Fritzsche and Dietrich pursuant to those laws, this article will demonstrate how a new body of rules, collectively referred to as "atrocity speech law," came into being.⁹ It will also show how this nascent framework was entirely incomplete and would require much fleshing out in the decades to follow. It will reveal as well how this law may continue to exert its influence today in developing the law of incitement and persecution as crimes against humanity.

The Article will proceed in four parts. Part II chronicles the Nazi hate speech campaign against the Jews from 1933 through 1945. It demonstrates that the Nazis borrowed certain propaganda strategies employed by the Ottoman Empire in carrying out the Armenian Genocide but updated and expanded those strategies for a more modernized mass media society. It also identifies the key players and institutions in the creation and execution of this propaganda campaign. Part III examines the Allied response to the Nazi speech crimes, including the negotiations that led to the prosecution of those crimes at Nuremberg and provisions that governed how those prosecutions would be carried out. Part IV then analyzes the prosecutions themselves, including the court proceedings, judgments and their aftermaths. Finally, Part V delves into the normative impact of the Nuremberg hate speech jurisprudence. In particular, it explains how certain tenets of that jurisprudence have affected

8. See Vahakn N. Dadrian, *Foreword* to WOLFGANG GUST, *THE ARMENIAN GENOCIDE: EVIDENCE FROM THE GERMAN FOREIGN OFFICE ARCHIVES, 1915–1916*, at xiv (2014) (noting that the Armenian Genocide was a model for the Nazis "to unleash their own massive campaign of extermination" and thus "emerges. . . as a precedent for the Jewish Holocaust. . ."); ROBERT MELSON, *REVOLUTION AND GENOCIDE: ON THE ORIGINS OF THE ARMENIAN GENOCIDE AND THE HOLOCAUST* 38 (1992) (observing that the Armenian Genocide "can certainly be compared on ideological and structural dimensions to the Holocaust.").

9. The term "atrocity speech law," in referring to this vein of rules and jurisprudence, is new and was coined by this author. See GREGORY S. GORDON, *ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION* (Oxford University Press, forthcoming 2017).

decisions related to both direct and public incitement to commit genocide and persecution as crimes against humanity. The Article concludes by previewing normative permutations that will continue to be impacted by Nuremberg propaganda case law.

In the end, while a new generation of ad hoc Tribunal jurisprudence may be the primary reference point, inconsistencies and glitches within that jurisprudence mean that the Nuremberg precedent will continue to loom large. It will likely remain the analytical touchstone as atrocity speech law deals with new ways of disseminating hate rhetoric and the International Criminal Court grapples with the convergence of social media and bottom-up propaganda movements.

II. HATE SPEECH AND THE HOLOCAUST

A. Background

The Third Reich represented a twelve-year reign of terror fueled by State thievery, mass media mendacity, unimaginable violence and an all-pervasive cult of personality.¹⁰ It oppressed Jews, Roma Gypsies, homosexuals, the mentally disabled, Seventh Day Adventists, Jehovah's witnesses, clergymen, free masons and others.¹¹ But Jews were the objects of its most obsessive genocidal urges.¹² Their lot during the Hitler regime deteriorated through successive cycles of persecution initiated by civic exclusion and culminating in mass murder.¹³ The genocide against the Jews, which claimed six million innocent lives, was fueled by ubiquitous hate speech.¹⁴ Per Tonja Salomon:

The first stage of genocide has always been the preparation and mobilization of the masses by means of propaganda. In Germany, the Nazis had started a long propaganda campaign against Jews long before they were deported and murdered. They created "*Feinbild*" of

10. See generally WILLIAM SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* (2011).

11. Ellis Washington, *Social Darwinism in Nazi Family and Inheritance Law*, 13 *RUTGERS J. L. & RELIGION* 173, 181 (2011); Jeffrey H. Barker, *Human Experimentation and the Double Facelessness of a Merciless Epoch*, 25 *N.Y.U. REV. L. & SOC. CHANGE* 603, 613 (1999).

12. Daniel Romanovsky, *Soviet Jews under Nazi Occupation in Northeastern Belarus and Western Russia*, in *BITTER LEGACY: CONFRONTING THE HOLOCAUST IN THE USSR* 232 (Zvi Y. Gitelman ed., 1997).

13. *The Nazi Holocaust, 1938–1945*, THE HISTORY PLACE, <http://www.historyplace.com/worldhistory/genocide/holocaust.htm> [hereinafter *The Nazi Holocaust*] (last visited Aug. 16, 2015).

14. *The Holocaust: An Introductory History*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/jsource/Holocaust/history.html> (last visited Aug. 16, 2015) [hereinafter *An Introductory History*].

Jews by using established anti-Semitic stereotypes. The Germans ultimately pictured Jews as “*Ungeziefer*” (vermin).¹⁵

This overview of the Holocaust paints the picture in greater detail:

At the same time, a carefully orchestrated smear campaign . . . portrayed Jews as enemies of the German people. Daily anti-Semitic slurs appeared in Nazi newspapers, on posters, the movies, radio, in speeches by Hitler and top Nazis, and in the classroom. As a result, State-sanctioned anti-Semitism became the norm throughout Germany. The Jews lost everything, including their homes and businesses, with no protest or public outcry from non-Jewish Germans. The devastating Nazi propaganda film *The Eternal Jew* went so far as to compare Jews to plague carrying rats, a foreshadow of things to come.¹⁶

Peter Balakian notes the similarities between this and the Ottoman Empire’s eliminationist incitement against the Armenians during World War I, which emphasized purifying all Turkey of Armenian influence. Balakian refers to this as “an [eerie] foreshadowing [of] the leading Nazi propagandists . . . who propounded the central notion that Germany needed to be *Judenrein* if it was to revitalize itself.”¹⁷ And thus, the Nazi regime, taking a page from the Ottoman playbook, honed the modern genocidal propaganda campaign. As Germany prepared to exterminate all of Europe’s Jews, it would be used to great effect.

B. The Components of Hitler’s Propaganda Machine

To poison German attitudes toward Jews, the Nazis built a tremendous propaganda machine. But what were its components? Hitler and his henchmen persuaded German citizens to destroy the Jews in three principal ways: (1) through pervasive hate rhetoric from leading members of the Nazi power hierarchy; (2) through coordinating all hate speech activity via creation of the Reich Ministry of Public Enlightenment and Propaganda (Propaganda Ministry), helmed by Joseph Goebbels; and (3) through eliminating independent print media.

1. Setting the Tone and Content: Orations of the Nazi Chieftains

To establish the proper tone and content, hate sermons by Nazi

15. 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 (Ralph Henham & Paul Behrens eds., 2007).

16. *The Nazi Holocaust*, *supra* note 13.

17. PETER BALAKIAN, *THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA’S RESPONSE* 163 (2003).

leaders, most prominently Hitler, represented the first layer of the Third Reich's verbal onslaught against the Jews. According to Jeffrey Herf:

Hitler and some of his closest associates constituted an experienced core of anti-Semitic propagandists . . . [but] Hitler remained the key storyteller and propagandist. His speeches were printed in the press, broadcast over the radio, and excerpted on hundreds or thousands of posters.¹⁸

In this regard, as war clouds were gathering over Europe in 1939, Hitler made his intentions clear before sending his minions across the continent to engage in racial mass slaughter: "I will provide a propagandistic *causus belli*. Its credibility doesn't matter. The victor will not be asked whether he told the truth."¹⁹

2. Establishing a Central Communications Apparatus: The Propaganda Ministry

To disseminate the official Nazi messages most effectively, a government agency was needed. Thus, the next major component of the Nazis' anti-Semitic propaganda machine was the work of the Reich Ministry of Public Enlightenment and Propaganda. With Joseph Goebbels installed as its head, the Ministry was created on March 13, 1933. It was tasked with formulating, monitoring and harmonizing the output of the country's media, art, cinema, literature and music.²⁰ David Welch characterizes its brief as the "wholesale control of the mass-media."²¹ Goebbels himself described the aim of his new office as "'a mobilisation of mind and spirit in Germany. It is therefore in the sphere of the mind what the Defence Ministry is in the sphere of defence."²² Having begun in 1933 with 350 employees on its payroll and divided into five sections—propaganda, radio, press, motion pictures, and theatre²³—by

18. JEFFREY HERF, *THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST* 17 (2006).

19. ROBERT B. DURHAM, *FALSE FLAGS, COVERT OPERATIONS, & PROPAGANDA* 78 (2014).

20. *Propaganda and the Public*, GERMAN HISTORY IN DOCUMENTS AND IMAGES, http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1579 (last visited July 21, 2015).

21. DAVID WELCH, *THE THIRD REICH: POLITICS AND PROPAGANDA* 29 (2002). Certain limited portions of the Nazi propaganda portfolio were simultaneously controlled by two other offices: the Party Central Propaganda Office and the Reich Chamber of Culture (*Reichskulturkammer*). *Id.* But these offices worked primarily at the behest and in support of the Propaganda Ministry. *Id.* at 29–30. Thus, not coincidentally, Goebbels was the President of the *Reichskulturkammer*. RANDALL L. BYTWERK, *BENDING SPINES: THE PROPAGANDAS OF NAZI GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC* 61 (2004) [hereinafter *BENDING SPINES*].

22. WELCH, *supra* note 21, at 29.

23. *BENDING SPINES*, *supra* note 21, at 61 (2004).

1941, the agency's staff had grown to over one thousand persons allocated to seventeen divisions, including art, music, periodicals and literature.²⁴ The Nazis funded the Ministry chiefly through radio license fees generated by the government's producing inexpensive sets and handing them out at no cost to the public at large.²⁵

3. Snuffing Out Remaining Dissent: Elimination of the Free Press

To reinforce its iron grip over the public communications sphere, the Third Reich had to remove any independent media outlets. Radio had already been government-controlled by the time the Nazis came to power.²⁶ Thus, in practical terms, snuffing out any lingering dissent meant eliminating what remained of the written media.²⁷ Not long after he became German Chancellor in January of 1933, Hitler sacked thousands of German journalists perceived not to have embraced Nazi doctrine, including Jews, liberals, conservatives, Social Democrats and Communists. In addition to being forcibly removed from their jobs, many were arrested or driven out of Germany.²⁸ Of the newspapers whose offices were shuttered, two hundred alone were supporters of the Social Democrats. Thirty-Five Communist publications were also put out of business.²⁹ In all, the Nazis choked off a circulation of approximately two million.³⁰

And, for the newspapers that avoided the chopping block, the regime replaced their persecuted writers with Nazi loyalists.³¹ Thus, only the most rabidly anti-Semitic presses could still publish newspapers. An infamous example among these would be *Der Stürmer*, founded and operated by a vulgar Nazi fanatic named Julius Streicher, who was popularly known as "Jew Baiter Number One."³² His sensationalist rag has been described as:

A major tool of the Nazis' propaganda assault . . . At the bottom of the front page of each issue, in bold letters, the paper proclaimed,

24. *Id.*

25. *Id.*

26. KEITH SOMERVILLE, RADIO PROPAGANDA AND THE BROADCASTING OF HATRED: HISTORICAL DEVELOPMENTS AND DEFINITIONS 111 (2012) ("The Nazi takeover of radio broadcasting was simpler than the press . . . during von Papen's period as chancellor . . . radio was fully nationalized . . .").

27. See HERF, *supra* note 18, at 18.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. LOUIS GROARKE, THE GOOD REBEL: UNDERSTANDING FREEDOM AND MORALITY 82 (2002).

“The Jews are our misfortune!” *Der Stürmer* also featured cartoons of Jews in which they were caricatured as hook-nosed and apelike. The influence of the newspaper was far-reaching: by 1938 about a half million copies were distributed weekly.³³

Finally, on October 4, 1933, to consolidate total control over German newspapers, the regime placed under its aegis all remaining print media editors via the Editorial Control Law, formulated by Reich Press Chief Otto Dietrich.³⁴ Thus was the Fourth Estate liquidated under the Third Reich.

C. The Content of Nazi Holocaust Propaganda

1. Dehumanizing the Jews

Having thoroughly monopolized the media, the regime began its unbridled verbal assault against the Jews. And echoing Ottoman propaganda that had portrayed the Armenians as animals, diseases and parasites, anti-Semitic dehumanization was a key rhetorical ploy in the Third Reich. David Livingstone Smith details how it worked:

The Nazis were explicit about the status of their victims. They were *Untermenschen*—subhumans—and as such were excluded from the system of moral rights and obligations that bind humankind together. It’s wrong to kill a person, but permissible to exterminate a rat. . . . Jews were the main victims of this genocidal project. . . . Jewish people posed a deadly threat to all that was noble in humanity. . . . [T]hese putative enemies of civilization were represented as parasitic organisms—as leaches, lice, bacteria, or vectors of contagion. . . . Sometimes the Nazis thought of their enemies as vicious, blood-thirsty predators rather than parasites.³⁵

2. Fabricating False Threats

An equally effective rhetorical strategy consisted of characterizing the Jews as foes pledged to Germany’s destruction. German Jews, in particular, were vilified as internal enemies cunningly plotting the sabotage of the “Fatherland” within its own borders. One commentator observes that Germans “were influenced by years of Nazi propaganda that consistently depicted Jews as Communists and fifth columnists, blamed them for causing the war in order to destroy Germany, and demonized

33. An Introductory History, *supra* note 14.

34. HERF, *supra* note 18, at 18.

35. DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE Demean, ENslave AND EXTERMINATE OTHERS 15 (2011).

them as an evil race, an alien *other* beyond the pale of caring.”³⁶ And even as Jews across the continent were being herded into cattle cars for murder in places such as Auschwitz, “the Nazi propaganda machine was warning the German people of the demonic Jewish intention ‘to exterminate all Germans.’”³⁷ The Third Reich’s existential warning that it was kill or be killed, was unequivocal: “International law and international custom will be no protection against the Jewish will for total annihilation.”³⁸

D. The Key Nazi Propagandists

Goebbels, Dietrich and Streicher were joined by other prominent Nazi propagandists in disseminating anti-Semitic discourse. Robert Ley, in his capacity as *Reichsorganisationsleiter* (Reich Organization Director) was in charge of party training, which involved ideological verbal conditioning.³⁹ Ley also became head of the German Labor Front, one of whose prime objectives was “to spread Nazi propaganda in the workplace.”⁴⁰ Alfred Rosenberg was considered the Nazi “theoretician,” churning out vapid “philosophical” treatises attempting to justify Jew hatred in pseudo-conceptual prose.⁴¹ As Minister for the Occupied Eastern Territories, he also controlled propaganda in the occupied Baltic and Soviet regions.⁴²

But as part of post-war justice efforts, prosecutors at Nuremberg built cases against the three aforementioned Nazi propagandists: Julius Streicher, the Propaganda Ministry’s Radio Division chief, Hans Fritzsche, and Press Czar Otto Dietrich. The International Military Tribunal found Streicher guilty of crimes against humanity based on his genocidal rants in *Der Stürmer*, which was published through the end of the war.⁴³ The IMT considered evidence of Fritzsche’s work as head of the Radio Division of the Propaganda Ministry. But he was ultimately acquitted of crimes against humanity — problematically — as will be analyzed later.⁴⁴

36. MARVIN PERRY, *WORLD WAR II IN EUROPE: A CONCISE HISTORY* 128 (2013).

37. JUDITH WOOLF, *THE MEMORY OF THE OFFENCE: PRIMO LEVI’S IF THIS IS A MAN* 5 (2001).

38. *Id.*

39. BENDING SPINES, *supra* note 21, at 64.

40. MARTIN COLLIER & PHILIP PEDLEY, *GERMANY 1919–1945* 107 (2000).

41. RODERICK STACKELBERG, *HITLER’S GERMANY: ORIGINS, INTERPRETATIONS, LEGACIES* 140 (1999).

42. BENDING SPINES, *supra* note 21, at 64–65.

43. ANTONIO CASSESE, GUIDO ACQUAVIVA, MARY FAN, & ALEX WHITING, *INTERNATIONAL CRIMINAL LAW: CASES & COMMENTARY* 156 (2011).

44. *See* MICHAEL G. KEARNEY, *THE PROHIBITION OF PROPAGANDA FOR WAR IN*

After the major Nazi war criminals were brought to justice before the IMT, the Americans held a series of twelve trials in their occupation zone.⁴⁵ The penultimate proceeding before these “Nuremberg Military Tribunals” (NMT’s) was the “Ministries Case,” which put in the dock officials who had held important positions in Third Reich ministries in Berlin’s geographic center.⁴⁶ As part of this case, former Reich Press Chief Otto Dietrich was charged with, and found guilty of, crimes against humanity related to his anti-Semitic hate speech.⁴⁷ The jurisprudence generated by the judgments in these cases will be considered below.

In the meantime, once the post-war dust had settled and justice had been meted out, it was apparent that Hitler’s verbal and visual vilification of the Jews had its intended effect. As stated succinctly by Wolfgang Mieder: [The] propaganda machine of Nazi Germany . . . played a considerable role in inciting the hatred and creating the mindset that made the Holocaust possible.”⁴⁸

III. PRELUDE TO NUREMBERG

A. *The London Negotiations*

Announcing a set of rules to protect citizens against future government abuses—the advent of human rights law—was one of the positive legal outcomes in the establishment of the post-war order. But another was the notion of “individual criminal responsibility”—the idea that those well-placed in the power hierarchy, who oversaw perpetration of the worst crimes, should not be shielded from liability by virtue of working for the state. And, in the summer of 1945, it was this idea that

INTERNATIONAL LAW 42 (2007).

45. MICHAEL J. BAZYLER, HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD 90–91 (2016).

46. LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE 171–72 (2008).

47. Sarabeth A. Smith, *What’s Old Is New Again: Terrorism and the Growing Need to Re-visit the Prohibition on Propaganda*, 37 SYRACUSE J. INT’L. L. & COM. 299, 319 (2010).

48. Wolfgang Mieder, *Language and Folklore of the Holocaust*, in THE HOLOCAUST: INTRODUCTORY ESSAYS 140 (David Scrase & Wolfgang Mieder, eds. 1996); see also BILL KOVARIK, REVOLUTIONS IN COMMUNICATION: MEDIA HISTORY FROM GUTENBERG TO THE DIGITAL AGE 204–05 (2001) (focusing on the work of Nazi filmmaker Fritz Hippler’s movie *The Eternal Jew* and noting that “by depicting Jewish people as sub-human, [Nazi propagandists] made the genocide of the Holocaust possible.”); United States Holocaust Memorial Museum, *Nazi Propaganda*, HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005202> (last visited Oct. 24, 2016) (“[The Nazi] propaganda campaigns created an atmosphere tolerant of violence against Jews [and] was likewise essential to motivating those who implemented the mass murder of the European Jews and of other victims of the Nazi regime.”).

animated the proceedings of the Allies as they met in London to arrange for justice measures in respect of the top Nazi leadership.⁴⁹

As we have seen, hate speech was an integral component of the Holocaust. And the Allies' London negotiations in the summer of 1945 recognized this. Chief U.S. Prosecutor Robert Jackson, in discussing Nazi culpability at a key juncture in the negotiations, emphasized the centrality of incitement to British jurist Sir David Maxwell Fyfe:

SIR DAVID MAXWELL FYFE: Mr. Justice Jackson, just to clarify the discussion, could your point be fairly put this way: that you want the entering into the plan to be made a substantive crime?

MR. JUSTICE JACKSON: Yes. The knowing incitement and planning is as criminal as the execution.⁵⁰

Flowing from this, in his epochal opening of the IMT trial, Justice Jackson stressed the important role played by the “inciters behind the scenes” of the “Nazi conspiracy.”⁵¹

B. The International Military Tribunal Charter

1. Incitement, Instigation or Crimes against Humanity?

Still, the IMT Charter, the fruit of the Allied summer 1945 negotiations that operationalized the notion of individual criminal responsibility, did not separately criminalize “incitement” with respect to Nazi atrocities.⁵² Rather, liability linked to hate speech theoretically existed under the wider rubric of “crimes against humanity.”⁵³ The prosecutors could have also charged “instigation,” given that Article 6 of the Charter established liability for “leaders, organizers, *instigators* and accomplices participating in the formulation or execution of a common plan or

49. Brian K. Feltman, *Robert H. Jackson, in GERMANY AND THE AMERICAS: CULTURE, POLITICS AND HISTORY* VOL. 1 571 (Thomas Adam ed., 2005).

50. ROBERT H. JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 376 (Dept. of State 1945).

51. *Second Day, Wednesday, 21 November 1945*, II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 104–05 (Nuremberg, 1947).

52. Margaret Eastwood, *Hitler's Notorious Jew Baiter: The Prosecution of Julius Streicher*, in PROPAGANDA, WAR CRIMES TRIALS AND INTERNATIONAL LAW: FROM SPEAKERS' CORNER TO WAR CRIMES 222–23 (2012) (“incitement . . . did not exist as a specific offense under the Nuremberg Charter . . .”).

53. See Diane F. Orentlicher, *Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana, et al.*, 13 HUM. RTS. BRIEF 1, 3 (Nov. 2005), https://www.wcl.american.edu/hrbrief/13/hate_speech.pdf (“Two defendants before the IMT, Julius Streicher and Hans Fritzsche, were charged with crimes against humanity by virtue of anti-Semitic advocacy.”).

conspiracy to commit any of the foregoing crimes.”⁵⁴ At international criminal law, instigation is speech prompting another to commit an offense when the offense is committed and the speech makes a substantial contribution to its commission.⁵⁵

But instigation did not factor into the speech crime charges at Nuremberg—instead, the charges centered uniquely on crimes against humanity (CAH). To better grasp how speech was treated as a CAH in this context, it is instructive to consider the general background of CAH and the specific sub-category of “persecution,” under which speech-related offenses were charged.

2. The Origins of Crimes against Humanity

The legal concept of “crimes against humanity” first appeared in a message sent to the Ottoman Empire’s Sublime Porte (or central government) in reference to the systematic slaughter of Armenians during World War I.⁵⁶ This joint *communiqué* issued by France, Great Britain and Russia warned that “in view of the crimes of Turkey against humanity and civilization” they would “hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.”⁵⁷

Unfortunately, there was no follow-up. After the war, U.S. diplomats pointed to the crime’s recent formulation and lack of clear definition to persuade their Allied counterparts to omit “crimes against humanity” from the remit of an international court being contemplated for trying Turkish crimes.⁵⁸

3. Crimes against Humanity in the Nuremberg Charter

After the depredations of World War II, however, crimes against humanity finally saw the light of day as a codified offense. This was

54. Charter of the International Military Tribunal at Nuremberg art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter] (emphasis added).

55. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 326 (2d. ed. 2013).

56. Levon Chorbajian, “*They Brought It on Themselves and It Never Happened*”: *Denial to 1939*, in THE ARMENIAN GENOCIDE LEGACY 170 (Alexis Demirdjian ed., 2016).

57. TIMOTHY L.H. MCCORMACK & GERRY J. SIMPSON, THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 45 (1997).

58. Harry M. Rhea, *Paris 1919 and Rome 1998: Different Treaties, Different Presidents, Different Senates, and the Same Dilemma*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 411, 415–16 (2011); Stuart Ford, *Crimes against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?* 24 UCLA PAC. BASIN L.J. 125, 137–38 (2007) [hereinafter CAH at the ECCC]; Beth Van Schaack, *The Definition of Crimes against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 779–98 (1999).

crucial given the relatively circumscribed scope of war crimes, which did not cover Nazi delicts committed on Third Reich territory against the regime's own citizens.⁵⁹ In other words, these offenses were not committed during battle, in reference to prisoners of war, or as part of occupying the territory of a foreign sovereign.⁶⁰ Thus, crimes against humanity was incorporated into Article 6(c) of the Nuremberg Charter and defined as follows:

[M]urder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated.⁶¹

Parsing Article 6(c) reveals that it is bifurcated into two separate offense categories: inhumane acts and persecutions on discriminatory grounds.⁶² Given the offense's novelty and wide scope, the Charter mandated that crimes against humanity be yoked to one of the Charter's other principal crimes, *i.e.*, Crimes against Peace or War Crimes. This obligatory connection is now known as the "war nexus."⁶³

Taking advantage of this new provision, Allied IMT prosecutors charged two hate speech-focused defendants: *Der Stürmer* founder/editor-in-chief Julius Streicher and Nazi Radio Division Chief Hans Fritzsche. These Nazi propagandists were briefly introduced above. Their respective crimes and trials will be considered in greater depth in the following section.

IV. THE NUREMBERG PROPAGANDA PROSECUTIONS

A. *Julius Streicher before the International Military Tribunal*

1. Background

Julius Streicher was born on February 12, 1885 in the Upper Ba-

59. Gerry Simpson, *Nuremberg and Tokyo Trials*, in *ENCYCLOPEDIA OF HUMAN RIGHTS*, VOLUME 1 141 (David P. Forsythe ed., 2009)

60. See Daniel Kanstroom, *Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals*, 30 B.C. INT'L & COMP. L. REV. 1, 9 (2007); Van Schaack, *supra* note 58, at 789–91 (1999).

61. Nuremberg Charter, *supra* note 54, art. 6.

62. Van Schaack, *supra* note 58, at 838 n.247.

63. *Id.* at 792 ("The war nexus allowed the drafters of the Charter to condemn specific inhumane acts of Nazi perpetrators committed within Germany without threatening the entire doctrine of state sovereignty.").

varian village of Fleinhausen.⁶⁴ He began his career as a schoolteacher,⁶⁵ but was swept up in the patriotic fervor of Germany's entering the Great War and enlisted in the army.⁶⁶ Well-regarded as a soldier, by war's end he had earned, among other medals, the Iron Cross, First Class.⁶⁷ Post-war, Streicher became a leader of the "German Socialist Party" (GSP) and competed with Hitler for right-wing supporters.⁶⁸ But the competition petered out as the two zealous Jew-haters eventually made common cause and merged their budding fascist organizations into one.⁶⁹ Streicher soon embraced Hitler without reservation and was rewarded over time with a number of high-profile posts, including General in the SA Storm Troopers, *Gauleiter* (District Leader) of Franconia, and a member of the *Reichstag* (German parliament).⁷⁰ During this time, his reputation as an obsessive anti-Jewish hatemonger was growing. Nuremberg prosecutor Drexel Sprecher observed that "Streicher was known outside of Germany as the foremost anti-Semite of Nazi Germany . . ."⁷¹

2. Founding *Der Stürmer*

As a leader of the GSP, Streicher had also served as the editor of the party's newspaper, *Deutscher Sozialist*, a forerunner of *Der Stürmer*.⁷² Streicher seemed especially drawn to the crude sort of agit-prop journalism featured in the GSP publication. The year after he joined the NSDAP, he started *Der Stürmer*, another rabidly anti-Semitic newspaper but with an allegiance toward National Socialism.⁷³ With a peak circulation of 600,000–800,000 in the period before World War II,⁷⁴ this crude rag slandered Jews with vulgar aspersions, false accusations and grotesque caricatures.⁷⁵ Its impact was not limited to its sub-

64. RANDALL BYTEWERK, JULIUS STREICHER: NAZI EDITOR OF THE NOTORIOUS ANTI-SEMITIC NEWSPAPER *DER STÜRMER* 2 (2001) [hereinafter NAZI EDITOR].

65. *Id.*

66. *Id.* at 5.

67. *Id.* at 5–6.

68. ALEXANDER G. HARDY, HITLER'S SECRET WEAPON: THE "MANAGED PRESS" AND PROPAGANDA MACHINE OF NAZI GERMANY 82 (1967).

69. NAZI EDITOR, *supra* note 64, at 15–16.

70. HARDY, *supra* note 68, at 82.

71. DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT 919 (1999).

72. *Julius Streicher*, in 2 ENCYCLOPEDIA OF NATIONALISM: LEADERS, MOVEMENTS AND CONCEPTS 515 (2001).

73. ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 504 (1983).

74. EUGENE DAVIDSON, THE TRIAL OF THE GERMANS: AN ACCOUNT OF THE TWENTY-TWO DEFENDANTS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG 50 (1966).

75. HARDY, *supra* note 68, at 82.

scribers alone—the paper was passed between families and acquaintances, a certain percentage of each issue was gifted to members of the public, and towns around Germany exhibited it in glass-covered display cases in public gathering places.⁷⁶ Claudia Koonz elaborates:

Subscribers were exhorted to pass their copies to friends, and about 15 percent of each print run was distributed free of charge. Local SA units built lavish oversized display cases for *Der Stürmer* at bus stops, newsstands, and market-places so that casual bystanders could hardly avoid the tabloid's message. Elaborate dedication ceremonies and competitions for the best display design produced even more outsized and garish publicity.⁷⁷

After permeating the German conscience during the balance of the 1920s through the middle part of the 1940s, *Der Stürmer's* toxic discourse and obscene images whipped up ordinary Germans and instilled in them a profound and violent contempt for the country's Jewish citizens. Nuremberg prosecutor Alexander Hardy gives a powerful illustration:

The full force and effect of [Streicher's] press propaganda on the masses is contained in an episode relating to the time when Streicher, as a Gauleiter, delivered a Christmas story to the children of Nuremberg. Reaching the climax of his Yuletide tale, which concerned a "little Aryan boy and girl," Streicher suddenly asked the children, do you know who the devil is?" And the little ones shrieked in chorus, "The Jew, the Jew."⁷⁸

3. Streicher in the Dock

At the IMT, the prosecution included Streicher in Counts One ("Common Plan or Conspiracy) and Four ("Crimes against Humanity") of the indictment.⁷⁹ For the crimes against humanity charge, even though not explicitly referred to as such in the indictment itself, the *actus reus* consisted of the second limb of the offense, *i.e.* "persecution of political, racial and religious groups."⁸⁰ Evidence marshaled in court failed to establish Streicher's liability for preparing and planning the aggressive war.⁸¹ Rather, the gravamen of the case against Streicher was his incendiary rhetoric against the Jews. In laying out its case against

76. RICHARD MORROCK *THE PSYCHOLOGY OF GENOCIDE AND VIOLENT OPPRESSION* 30 (2010).

77. CLAUDIA KOONZ, *THE NAZI CONSCIENCE* 229 (2003).

78. HARDY, *supra* note 68, at 83.

79. *Second Day, Wednesday, 21 November 1945*, *supra* note 51, at 29–41.

80. Eastwood, *supra* note 52, at 204.

81. *Id.* at 205.

the boorish firebrand, British prosecutor Mervyn Griffith Jones explained to the IMT:

[F]or the course of some 25 years, this man educated the whole of the German people in hatred and . . . incited them to the persecution and to the extermination of the Jewish race. He was an accessory to murder, perhaps on a scale never attained before.⁸²

The prosecution then had admitted into evidence over fifty documents containing more than twenty Streicher quotations pulled from his anti-Semitic scribblings published in *Der Stürmer*.⁸³ The import of this evidence was that, from the very start, Streicher advocated the exclusion of Jews from German society.⁸⁴ Over time, he advocated intensifying Nazi persecutory measures against the Jews. For example, evidence at trial demonstrated his laying the foundation for, and then subsequently backing the notorious 1935 “Nuremberg Laws” that stripped Jews of their German citizenship and denied them fundamental civil and political rights.⁸⁵ Such advocacy included republishing the blood libel over and over, dehumanizing Jews via metaphors of bestiality and pestilence (e.g. comparing Jews to rats and plague), and denouncing the Jews as criminals, including allegations against them of theft, rape, and a global Jewish cabal for subjugating all gentiles, up to the point of exterminating them.⁸⁶ And toward the final phases of the Third Reich, as millions of Jews were perishing in the Holocaust, prosecutors showed that, “even with . . . knowledge of actual genocide unfolding, Streicher’s propaganda . . . openly advocated, urged, supported and demanded extermination of the Jewish people.”⁸⁷

In fact, Streicher’s knowledge that the Final Solution was being implemented while he continued to publish his verbal attacks against the Jews was central to the prosecution’s case against him. This was apparent in Griffith-Jones’s cross-examination of the defendant. The prosecution sought to show how he had copied an article, verbatim in *Der Stürmer*, from the *Israelitisches Wochenblatt*, dated August 27, minus

82. *Thirty-First Day, Thursday, 10 January 1946*, V TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 91 (Nuremberg, 1947).

83. Eastwood, *supra* note 52, at 206.

84. *Id.* at 208 ([The prosecution’s case] sought to stress that, from his earliest political involvement, Streicher had engaged in propaganda that identified Jews as unwanted within Germany and/or perhaps more widely, claimed their existence represented [a form] of oppression against the freedom of German citizens that required the expulsion of this group.”).

85. *Id.* at 208–09.

86. *Id.* at 209–11.

87. *Id.* at 213.

the references made to the number of Jews missing and murdered. After writing “The Jewish reservoir of the East which was able to counterbalance the force of assimilation in the West no longer exists,” the original text from the *Israelitisches Wochenblatt* then went on to say: “three million dead, the same number outlawed; many thousands, all over the world, mentally and physically broken. . . .” This evidence demonstrated that Streicher had definitely read one particular copy of the *Israelitisches Wochenblatt*. Despite this damning evidence the defendant was not prepared to admit that he believed what was printed in a foreign Jewish newspaper. After this exchange of words, it appeared that Griffith-Jones’ cross-examination strategy had been successful.⁸⁸

4. The IMT’s Judgment against Streicher

And the IMT was persuaded, finding Streicher guilty of persecution as a crime against humanity. At the outset, its decision focused on the Nazi propagandist’s anti-Semitic rhetoric and reputation: “For his twenty-five years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as ‘Jew-Baiter Number One.’”⁸⁹

It went on to examine a slew of pre- and post-war texts written by Streicher himself and urging the destruction, “root and branch,” of the Jews.⁹⁰ The Tribunal found that “[i]n 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.”⁹¹ The judges also emphasized the fact that Streicher published his jeremiads aware that, as he vented his murderous spleen, Jews in Eastern Europe were being butchered en masse. Thus, the judgment concluded: “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.”⁹²

88. *Id.* at 215.

89. *See, e.g.*, United States v. Goering, Judgment, Streicher (Int’l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 161–63 (1946) [hereinafter Streicher Judgment].

90. *Id.*

91. *Id.*

92. *Id.*

B. Hans Fritzsche before the IMT

1. Background

Born in Bochum, in Germany's Ruhr area, in 1900, Hans Fritzsche's later standing as an urbane media personality contrasted with his modest beginnings.⁹³ His father was a career civil servant and Hans failed to distinguish himself as a student.⁹⁴ Like Streicher, though, he volunteered for army service during World War I and spent the war as a private in the infantry. Post-war, he studied liberal arts at universities in Griefswald and Berlin, but did not earn a degree.⁹⁵ This did not prevent him, however, from transitioning into a journalism career. Beginning as a correspondent for the *Hamburg Press*,⁹⁶ Fritzsche moved up the ladder to an editor position at the *Preussische Jahrbücher*, a monthly journal. This was followed by additional editorial jobs at the *Telegraphen Union* news agency and the *International News Service*—both publications of media mogul Alfred Hugenberg.⁹⁷ After refining his editorial skills in the Hugenberg media empire, Fritzsche “educated himself in the use of radio in mass media” and in 1932 was appointed chief of the Weimar Republic's *Drahtloser Dienst* (Wireless News Service).⁹⁸

2. Fritzsche at the Propaganda Ministry

As a fervent German nationalist, though, he soon grew disenchanted with his Weimar employers. On attending a political rally, he found himself “swayed by the oratory of Adolf Hitler,” and enlisted in the Nazi party on May 1, 1933. He was immediately assigned to work for Goebbels's Propaganda Ministry staff.⁹⁹ Once there, he made a rapid ascent. He had, by 1938, climbed his way up the Propaganda Ministry's management ranks to become Chief of the German Press Division.¹⁰⁰ In this capacity, on a daily basis, he prevailed upon newspaper editors to publish Nazi propaganda through so-called “press directives,” or

93. LESLIE ALAN HORVITZ AND CHRISTOPHER CATHERWOOD, *ENCYCLOPEDIA OF WAR CRIMES AND GENOCIDE* 159 (2006); CN Trueman, *Hans Fritzsche*, *THE HISTORY LEARNING SITE*, April 2012, <http://www.historylearningsite.co.uk/nazi-germany/nazi-leaders/hans-fritzsche/>.

94. ROBERT S. WISTRICH, *WHO'S WHO IN NAZI GERMANY* 68 (2002).

95. *Id.*

96. HORVITZ & CATHERWOOD, *supra* note 93, at 159.

97. Trueman, *supra* note 93.

98. HARDY, *supra* note 68, at 87.

99. Trueman, *supra* note 93.

100. *Id.*

Tagesparolen.¹⁰¹ In this way, he was essentially ordering the press to publish whatever the Nazis said they should.¹⁰² The IMT described the press directives, as “instructions [directing] the press to present to the people certain themes, such as the leadership principle, the Jewish problem, the problem of living space, and other standard Nazi ideas.”¹⁰³

In 1942, Fritzsche was moved into another influential position within the Propaganda Ministry: head of the Radio Division. Beyond merely directing programming and content on the Third Reich’s airwaves, the rising propagandist also lent his voice, hosting a daily radio program called “Hans Fritzsche Speaks.”¹⁰⁴

3. Fritzsche in the Dock

Portions of his radio show broadcasts supported the CAH charges against Fritzsche. Transcripts of these transmissions introduced as evidence at trial showed the defendant trumpeting the core dogmas of National Socialism, which “aroused in the German people those passions which led them to the commission of atrocities.”¹⁰⁵ Fritzsche’s rhetoric was “full of provocative libels against Jews, the result of which was to inflame Germans to further atrocities against Jews.”¹⁰⁶ On December 18, 1941, for instance, as *Einsatzgruppen* were slaughtering innocent Jewish civilians in captured Soviet territory, Fritzsche announced:

The fate of Jewry in Europe has turned out as unpleasant as the Führer predicted in the case of a European war. After the extension of the war instigated by Jews, this unpleasant fate may also spread to the New World, for you can hardly assume that the nations of this New World will pardon the Jews for the misery of which the nations of the Old World did not absolve them.¹⁰⁷

But in his trial testimony, Fritzsche relied on self-serving statements and naked denials to neutralize some of the prosecution’s most damning evidence. On direct examination, for instance, when asked if, by war’s end, he was aware of the Holocaust, Fritzsche merely alluded to a high-ranking SS officer, who told him at the very end of the war

101. *Id.*

102. WISTRICH, *supra* note 94, at 68.

103. *See* United States v. Goering, Judgment, Fritzsche (Int’l Mil Trib. Sept. 30, 1946), *reprinted in* 6 F.R.D. 69, 186–87 (1946) [hereinafter Fritzsche Judgment].

104. HARDY, *supra* note 68, at 87.

105. Fritzsche Judgment, *supra* note 103, at 186–87.

106. *Nuremberg Trial Defendants: Hans Fritzsche*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/jsource/Holocaust/Fritzsche.html> (last visited Dec. 19, 2015).

107. *Id.*

that Himmler had ordered that Jews not be harmed because he viewed them “as a kind of hostages.”¹⁰⁸ Unfortunately, Chief Soviet Prosecutor Roman Rudenko failed to explore this point any further in cross-examination, thus implicitly accepting Fritzsche’s assertion of limited knowledge.¹⁰⁹ Indeed, Rudenko botched the entire cross-examination, permitting Fritzsche to assert what he wanted without any effort to impeach him. The following encounter between the prosecutor and the defendant, as cross-examination was getting under way, reveals the serious flaws in Rudenko’s technique:

GENERAL R. A. RUDENKO (Chief Prosecutor for the U.S.S.R.): I should like to begin the cross-examination in determining the role which German propaganda played in the criminal activity of the Hitler Government. Tell me, do you admit that German propaganda disseminated racial theories and introduced into the minds of the German people the ideas of the superiority of the German race— that means, the idea of the “master race”? Do you admit that?

FRITZSCHE: The question touches upon two problems. May I reply to both of them? I admit that German propaganda spread the racial theory, but I deny that German propaganda spread the theory of the “master race.”

GEN. RUDENKO: You do not admit it?

FRITZSCHE: No.

GEN. RUDENKO: Very well. You admit that the German propaganda incited in the German people racial hatred toward the Jews and propagated the necessity of their extermination?

FRITZSCHE: Once again two problems are contained in this question. May I answer to both?

GEN. RUDENKO: I beg your pardon, you do not have to emphasize this. Just answer the question; if there are two, answer two.

FRITZSCHE: I admit, as I have done in my answer to your first question, that German propaganda spread the racial theory but I deny most emphatically that German propaganda, had made preparations for, or had called for, the mass murder of Jews.

GEN. RUDENKO: But you do not deny that German propaganda preached to the German people racial hatred toward Jews? You do not deny that?

FRITZSCHE: I cannot even affirm that without reserve. That is the reason why, in my answer to the second question, I made a slight dis-

108. *One Hundred and Sixty-sixth Day, Friday, 28 June 1946, Morning Session, XVII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946*, at 180 (Nuremberg, 1947) (Dr. Heinz Fritz: Counsel for Defendant Fritzsche).

109. *See id.* at 195–210.

tion. German propaganda, and under that I understand official German propaganda, did not even preach racial hatred. It only spoke about racial distinctions, and that is something quite different; but I will admit that there was a certain type of German propaganda which went beyond that and which did preach the clear-cut and primitive racial hatred.

GEN. RUDENKO: You will admit that the activity of German propaganda was also directed against the Church?¹¹⁰

This passage perfectly illustrates how Fritzsche's evasive responses blunted inculpatory evidence with no follow-up questions or attempts to discredit. Thus, Fritzsche could simply deny that National Socialist rhetoric instigated extermination of, or even hatred toward, the Jews. And, inexplicably, Rudenko let that stand. Similarly, when Fritzsche acknowledged that there was a certain type of German propaganda "which did preach the clear-cut and primitive racial hatred," Rudenko posed no further questions that might have provided helpful examples or ultimately led to inculpatory statements.¹¹¹

4. The IMT's Judgment and the Aftermath

Given the prosecution's ineffectual performance, then, Fritzsche's acquittal does not come as a complete shock. It contributed toward the IMT's conclusion that the defendant's anti-Semitic radio tirades did not directly advocate persecution of the Jews and "his position and official duties were not sufficiently important . . . to infer that he took part in originating or formulating propaganda campaigns."¹¹²

Nevertheless, the IMT's decision has been criticized. I have noted elsewhere that the reasoning of the Fritzsche judgment is "out of step with the important international criminal law principles established by the IMT at Nuremberg."¹¹³ In particular, that he may have complied with Goebbels's overall propaganda strategy, rather than formulate it himself, should have been irrelevant. Pursuant to Article 8 of the Nuremberg Charter, "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility . . ."¹¹⁴ The IMT definitively reaffirmed this principle in convicting

110. *Id.* at 194–95.

111. *Id.* at 196.

112. Fritzsche Judgment, *supra* note 103, at 186–87. Of course, this holding contradicts the Nuremberg principle that superior orders may not absolve a defendant from criminal liability.

113. 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, 885–86 n.238 (2008).

114. Nuremberg Charter, *supra* note 54, art. 8.

German Field Marshal Wilhelm Keitel, who sought to evade responsibility for war crimes with the justification that he was merely complying with Hitler's wishes.¹¹⁵ Thus, implicitly exempting Fritzsche from one of the IMT's signature normative achievements was a grave error.

Moreover, Fritzsche's acquittal was announced over a strong dissent. Soviet judge Iona Nikitchenko stressed the verdict's failure to take into account that Fritzsche was, until 1942, "the Director *de facto* of the Reich Press and that, according to himself, subsequent to 1942, he became the 'commander-in-chief of the German radio system'"¹¹⁶ The dissent continued:

For the correct definition of the role of defendant Hans Fritzsche it is necessary, firstly, to keep clearly in mind the importance attached by Hitler and his closest associates (as Göering, for example) to propaganda in general and to radio propaganda in particular. This was considered one of the most important and essential factors in training the German populace to accept obediently [Nazi] criminal enterprises . . .

. . . .

In the propaganda system of the Hitler State it was the daily press and the radio that were the most important weapons

. . . .

. . . Fritzsche agitated for all the civilian population of Germany to take active part in the activities of this terroristic Nazi underground organization.¹¹⁷

Consistent with the concerns of the dissent, Nuremberg prosecutor Alexander Hardy later revealed that evidence not yet available at the time of the IMT proceeding would have certainly meant a guilty verdict for Fritzsche at a subsequent Nuremberg trial:

[His work as Chief of the German Press Division] was far more important than the task of venting his golden voice . . . [Later found press directives] brought the lie to Fritzsche's denials, during his trial before the IMT, of knowledge of such crimes as the extermination of the Jews and atrocities in concentration camps. He not only knew of

115. *Judgment*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 290–91 (Nuremberg, 1947) (Keitel Judgment, finding "[H]is defense relies on the fact that he is a soldier and on the doctrine of 'superior orders', prohibited by Article 8 of the Charter as a defense."); see also Mark S. Martins, "War Crimes" *During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg – and Beyond*, 149 MIL. L. REV. 145, 155 ("The judgment against Keitel was a clear rejection of the defense of superior orders.").

116. *Judgment*, *supra* note 115, at 350–51.

117. *Id.* at 351–53.

them but also played an important part in bringing them about.¹¹⁸

And yet, in the end, there was at least a modicum of justice with respect to Fritzsche. On February 4, 1947, a West German government *Spruchkammer*, or Denazification Court, put him on trial.¹¹⁹ The Court found against him and sentenced him to eight years' imprisonment, the maximum allowable punishment.¹²⁰

C. Otto Dietrich before the Nuremberg Military Tribunal

1. Background

Post-IMT, in their own occupation zone, the Americans prosecuted comparatively inferior Nazi lieutenants before their Nuremberg Military Tribunals (“NMT’s”) pursuant to Control Council Law (“CCL”) No. 10.¹²¹ That statute largely replicated the IMT Charter’s CAH provision,¹²² but was different in two essential ways: (1) it removed the “war nexus;” and (2) it expanded the list of inhumane acts by adding imprisonment, torture and rape.¹²³

Dietrich’s initial success at evading the post-war Allied dragnet, as well as his nominally subordinate position to Goebbels, spared him being placed in the IMT dock with Hitler’s other top paladins.¹²⁴ Rather,

118. HARDY, *supra* note 68, at 87. Dietrich ordered all written copies of the *Tagesparolen* to be destroyed by the editors who received them. By the time of Dietrich’s trial, prosecutors had found two editors who had not destroyed their copies. Those had not been discovered by the time of the IMT’s judgment. *Id.* at 40-41.

119. Trueman, *supra* note 93.

120. HARDY, *supra* note 68, at 85.

121. See generally *Control Council Law No. 10*, I TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at *xvi-xix* (U.S. Gov’t Printing Office, Oct. 1946–Apr. 1949) [hereinafter CCL No. 10].

122. See Ford, CAH at the ECCC, *supra* note 58, at 147. Article II of CCL No. 10 reads: “1. Each of the following acts is recognized as a crime . . . (c) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.” CCL No. 10, *supra* note 121, art. II(1)(c). Art. II(1)(c) also includes the terms “atrocities and offenses” but this turned out to be the exclusive terminology of CCL No. 10 and an historic anomaly—neither the Nuremberg Charter nor subsequent international criminal law instruments containing CAH provisions has employed this language. *Id.*

123. CAH at the ECCC, *supra* note 58, at 147.

124. Of course, Fritzsche, an IMT defendant, was also subordinate to Goebbels. But Fritzsche was put in the dock at the IMT at the insistence of the Soviet Union, which had in its custody significantly fewer IMT defendants than the other allies, especially the Americans. See *How Did Hans Fritzsche Avoid the Noose?*, THE PROPAGANDER, <http://grwa.tripod.com/050.html> (last visited Dec. 22, 2016). Fritzsche was one of only two high-ranking Nazis captured by the Soviets (the other being Raeder). *Id.* They felt Fritzsche’s inclusion would help balance the inequality regarding IMT defendants vis-à-vis the other allies. *Id.* So, his prosecution before the IMT, as

he was prosecuted as part of the penultimate American NMT proceeding: the so-called “*Ministries Case*.”¹²⁵ The twenty-one defendants were top officials in assorted Reich ministries, senior bankers, or armaments executives.¹²⁶

How did Dietrich become the target of justice efforts at Nuremberg? Born in 1897 in the western German city of Essen, his childhood was not too dissimilar from the other two Nuremberg propaganda defendants. A product of humble origins as well, he served in the German army during the First World War,¹²⁷ and, like Streicher, earned the Iron Cross, First Class.¹²⁸ In 1921, he was awarded a political science doctorate. From there, he began a career in the newspaper business.¹²⁹ His first position was deputy editor of the Essen *Nationalzeitung*. The *Augsburger Zeitung*, a German-national evening paper, then hired him as its business manager.¹³⁰ After marrying the daughter of a wealthy newspaper magnate (owner of the influential *Rheinisch-Westfälische Zeitung*), Dietrich became more prominent. His father-in-law introduced him to important Rhineland industrialists and, after joining the Nazi party in 1929, he gave Hitler access to them.

2. Dietrich Becomes Nazi Press Chief

Hitler was appreciative and reciprocated by naming Dietrich the Nazi party press chief.¹³¹ After Hitler became chancellor in 1933, he ultimately placed Dietrich in the same role for the German state.¹³² As Press Chief, Dietrich assumed total power over German newspapers in two key ways: (1) on a daily basis, similar to Fritzsche, he conducted “press conferences” with the entire corps of German newspaper editors,

opposed to a subsequent trial in the Russian zone, was motivated largely by incipient Cold War political considerations. *Id.*

125. *United States v. Ernst Weizsaker (Ministries Case)*, XII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 498 (U.S. Gov’t Printing Office Oct. 1946–Apr. 1949) [hereinafter “*Ministries Case*”]. It is also known as the “*Wilhelmstrasse Trial*” because the German Foreign Office, where a number of the defendants worked, was located on the Wilhelmstrasse in Berlin.

126. *Subsequent Nuremberg Proceedings, Case #11, The Ministries Case*, HOLOCAUST ENCYCLOPEDIA, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007082> (last visited March 23, 2013) [hereinafter “*Holocaust Encyclopedia*”].

127. Roger Moorhouse, *Introduction to OTTO DIETRICH, THE HITLER I KNEW: MEMOIRS OF THE THIRD REICH’S PRESS CHIEF* (1955), at ix (2010).

128. WISTRICH, *supra* note 94, at 39.

129. *Id.*

130. *Id.*

131. HARDY, *supra* note 68, at 50.

132. *Id.* at 52.

giving them daily verbal press directives or “*Tagesparolen*” (described above);¹³³ and (2) he policed print media content through the “Editorial Control Law,” which he drafted himself.¹³⁴ The law required all newspaper and periodical editors to join the “Reich League of the German Press.”¹³⁵ Dietrich served as Chairman of the “Reich League,” which operated a kangaroo-court system that fined, punished and removed newspaper editors whose publications printed material considered offensive by the Nazis.¹³⁶

Former Nuremberg prosecutor Alexander Hardy explained how Dietrich used this position to condition Germans to persecute Jews:

It was Dietrich, the *Poisoned Pen*, who led the press propaganda phases of the program which incited hatred and conditioned public opinion for mass persecutions on political, racial, and religious grounds. Heretofore, Dietrich’s role has been ignored by historians, but actually he, more than anyone else, was responsible for presenting to the German people the justification for liquidating the Jews. . . Dietrich had at his disposal not only Streicher’s paper, but more than 3,000 other publications in the newspaper field and 4,000 publications in the periodical field with a circulation of better than 30,000,000 to disseminate anti-Semitism in a vastly more comprehensive manner. And, he did just that!¹³⁷

3. Dietrich in the Dock

Based on this conduct, Dietrich was convicted on Count Five of the indictment for crimes against humanity.¹³⁸ In issuing its judgment, the NMT did not explicitly state that Dietrich was being convicted of crimes against humanity (persecution) specifically in connection with his hate speech directed at the Jews.¹³⁹ In fact, the title of Count Four of the indictment, the only count on which Dietrich was convicted, lumped together war crimes and crimes against humanity, without mentioning persecution or associated language.¹⁴⁰ So what was the basis for Dietrich’s conviction?

133. *Id.* at 40–44; Fritzsche Judgment, *supra* note 103, at 186–87.

134. JEFFREY HERF, *THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST* 18 (2006).

135. *Id.*

136. *Id.*

137. *Id.* at 189.

138. *Ministries Case*, *supra* note 125, at 39–40.

139. See Gregory S. Gordon, *The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law*, 75 OHIO ST. L. J. 571, 606 (2014) (“the decision never explicitly found Dietrich guilty of persecution for his speech activities.”).

140. *Id.*

a. The Indictment, Trial and Conviction

The *Ministries* indictment listed eight counts. Dietrich was indicted on Counts One (Crimes against Peace), Three (War Crimes), Four (Crimes against Humanity: Persecution of German Nationals), Five (Crimes against Humanity: Atrocities and Offenses Committed against Civilian Populations), and Eight (Membership in Criminal Organizations).¹⁴¹ At the conclusion of the proceeding, Dietrich was convicted on only Counts Five and Eight.¹⁴² Given its unique focus on pre-war conduct, the Tribunal dismissed Count Four.¹⁴³ The title of that charge (“Crimes against Humanity: Persecution of German Nationals”) reveals explicitly that “persecution” was its exclusive focus.¹⁴⁴

That is not true of Count Five, which was the basis of Dietrich’s conviction in relation to his media activity and hate speech. Styled “War Crimes and Crimes against Humanity: Atrocities and Offenses Committed against Civilian Population,” it clearly entails different categories of criminal acts.¹⁴⁵ But those acts include persecution arising from speech conduct. More specifically, Paragraph 38 of the indictment (the first paragraph under Count Five), avers that the defendants committed “crimes against humanity, as defined by Article II of Control Council Law No. 10, in that they participated in atrocities and offenses, including . . . persecutions on political, racial, and religious grounds . . .”¹⁴⁶

Paragraph 39 goes on to detail that “[t]he defendants created, formulated and disseminated inflammatory teachings which incited the Germans to the active persecution of ‘political and racial undesirables.’”¹⁴⁷ Paragraph 46 centers this explicitly on Dietrich’s hate rhetoric, pointing out that, *vis-à-vis* the program to exterminate the Jews, Dietrich and the other specified defendants “presented to the German people . . . the rationale and justification for, and the impetus to, mass slaughter.”¹⁴⁸ Paragraph 48 then states that, in doing these things, “the defendant Dietrich conditioned public opinion to accept this pro-

141. KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 457 (2011). Dietrich’s conviction on Count Eight meant the Tribunal found him to be a member of the SS and Leadership Corps of the Nazi party. *Id.* The conviction on that count did not implicate Dietrich’s hate speech or media conduct.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Ministries Case*, *supra* note 125, at 43 (Indictment).

146. *Id.* at 43–44.

147. *Id.* at 44. The paragraph concludes: “In speeches, articles, news releases, and other publications, it was constantly reiterated that those groups were germs, pests, and subhumans who must be destroyed.” *Id.*

148. *Id.* at 47.

gram . . .”¹⁴⁹

Telford Taylor’s opening statement for the prosecution leaves no doubt about this:

The war crimes and crimes against humanity charged in the indictment fall into three broad categories. First, there are war crimes committed in the actual course of hostilities or against members of the armed forces of countries at war with Germany. These are set forth in count Three of the indictment. Second, there are crimes committed, chiefly against civilians, in the course of and as part of the German occupation of countries overrun by the Wehrmacht. These include various crimes set forth in count Five of the indictment, the charges of plunder and spoliation in count Six, and the charges pertaining to slave labor in count Seven. Many of the crimes in this second category constitute, at one and the same time, war crimes as defined in paragraph 1(b) and crimes against humanity as defined in paragraph 1(c) of Article II of Law No. 10. *Third, there are crimes committed against civilian populations in the course of persecution on political, racial, and religious grounds. Such crimes, when committed prior to the actual initiation of Germany’s invasions and aggressive wars, are set forth in count Four of the indictment; when committed thereafter, they are charged in count Five.* The crimes described in count Four accordingly, are charged only as crimes against humanity; those charged in count Five, for the most part, constitute at one and the same time war crimes and crimes against humanity.¹⁵⁰

Focusing on Dietrich and persecution in its closing statement, the prosecution emphasized that his liability was based on his conditioning the German people to support Jewish persecution. Arguing that, like Streicher, Dietrich “infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution,” the closing suggested that Dietrich’s powers of persuasion were even more extensive.¹⁵¹ At its apex, *Der Stürmer* had a circulation of only six hundred thousand. The prosecution emphasized that Dietrich, for his part, “had at his disposal not only Streicher’s paper, but more than 3,000 other publications with a circulation of better than 3,000,000.”¹⁵² Thus, the prosecution argued: “The evidence shows the character and intensity of the anti-Semitic directives released by the defendant Dietrich during the period to which the IMT referred in passing judgment on Streicher.”¹⁵³

149. *Id.* at 48.

150. *Id.* at 167–68 (emphasis added).

151. *Ministries Case*, *supra* note 125, at 40.

152. *Id.*

153. *Id.*

As a result, Dietrich “directed the press to present to the people certain themes, such as the leadership principle, the Jewish problem, the problem of living space, or other standard Nazi ideas which served as a condition precedent in tempering the masses of German people to each aggression.”¹⁵⁴

b. Dietrich’s Hate Speech as Persecution

But in the Tribunal’s assignment of liability to Dietrich based on his Final Solution verbal conditioning, we find the most compelling evidence of a hate-speech-as-persecution finding:

It is thus clear that a well thought-out, oft-repeated, persistent campaign to *arouse the hatred* of the German people against Jews was fostered and directed by the press department and its press chief, Dietrich. That part or much of this may have been inspired by Goebbels is undoubtedly true, but Dietrich approved and authorized every release

The only reason for this campaign was to blunt the sensibilities of the people regarding the campaign of persecution and murder which was being carried out.

. . . .

These press and periodical directives were not mere political polemics, they were not aimless expression of anti-Semitism, and they were not designed only to unite the German people in the war effort. Their clear and expressed purpose was to enrage the German people against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.

By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews¹⁵⁵

Even if the NMT did not employ the word “persecution” itself in the last sentence, we can safely conclude its finding Dietrich guilty of crimes against humanity was based on that particular delict. More specifically, the judges alluded to “persecution” in the sentence right before it—to wit, Dietrich’s press directives were meant to “subdue doubts” regarding measures of “racial persecution” against the Jews.¹⁵⁶ And two sentences before that, the judgment explained that the only reason for Dietrich’s propaganda was to anesthetize German sensibilities as to per-

154. *Id.*

155. *Id.* at 575–76.

156. *Id.* at 576.

secution of the Jews.¹⁵⁷

Thus, logically and syntactically, Count Five of the indictment includes persecution within its ambit. This conclusion is bolstered by the prosecution's closing statement. As will be recalled, in analogizing *Dietrich* to *Streicher*, the prosecution quoted that part of the IMT judgment against Streicher that referred to Streicher's "infecting the German mind with the virus of anti-Semitism" and thereby inciting the German people to "active persecution." As we have seen, Streicher's conviction stemmed entirely from hate speech as CAH-persecution.

One should also take note of the *Dietrich* judgment's last sentence for what it reveals about the grounds for the persecution finding. The Tribunal did not allude to calls for action. Instead, the hate speech was criminally actionable for the "furnishing" of "excuses and justifications" to "subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected."¹⁵⁸ Although never cited in international criminal law hate speech jurisprudence, this ruling is significant in terms of clarifying the scope of liability for the rhetoric of conflict entrepreneurs charged with persecution as a crime against humanity.

V. THE SIGNIFICANCE OF THE NUREMBERG PROPAGANDA PROSECUTIONS

A. *Background: A Singular Opportunity that Might Have Been Missed*

The Nuremberg propaganda case precedents were seminal in terms of criminalizing speech in relation to atrocity. But the prosecutions were far from inevitable. An IMT dock without Streicher or Fritzsche, as well as an NMT one without Dietrich, is no stretch of the imagination. In relation to the other IMT defendants, all former high-ranking Nazi leaders or former senior officials of the government in Berlin, Streicher seems an outlier. He had been a local leader (*Gauleiter* for Franconia) and ceremonial member of the *Reichstag* and SA. John Keegan notes that, from the beginning, "Streicher was too corrupt and disreputable to be given high government posts."¹⁵⁹

Moreover, for years prior to the end of the war, he had been marginalized, shunned, and eventually stripped of all posts by the Nazi leadership. In 1939, he was suspended from the party for "massive cor-

157. *Id.*

158. *Id.*

159. JOHN KEEGAN, WHO'S WHO IN WORLD WAR II 151 (2002).

ruption” and forbidden from making public speeches.¹⁶⁰ And in 1940 he was actually placed under house arrest.¹⁶¹ As a result, Streicher “was progressively sidelined in Nazi circles of power after the early years of rule.”¹⁶² He did not seem to match the IMT description of “major war criminal.”

Thus, Streicher’s role in the life of the Third Reich was reduced to publishing *Der Stürmer*.¹⁶³ And that makes his presence in the IMT dock even more surprising. Why? At war’s end, he attempted to go into hiding but was found and arrested “by American soldiers in Austria, near Berchtesgaden.”¹⁶⁴ Given Streicher’s notoriety as a *media* personality, not to mention his marginal status as a Nazi leader, one could easily imagine his First Amendment-focused captors concluding that a Streicher prosecution would represent too much of an incursion on free speech prerogatives. But the other Allies were able to prevail upon the Americans to include Streicher in the IMT indictment given his newspaper’s impact on crimes against peace. As noted by Donald Bloxham:

For instance, much of the evidence on the antisemitic propagandist Julius Streicher concerned the pre-war period. He was primarily included in the trial in a sort of early attempt at prosecuting incitement to racial hatred, for his pornographic, racist publications. As the only defendant indicted exclusively for his anti-Jewish influence, Streicher was also alone in being charged with the peculiar combination of conspiracy and crimes against humanity. His presence suggests that the Allies recognized the need to account on some level for the virulence of the Nazi hatred of Jews, though—clearly under American influence—within the context of the plan for aggressive warfare.¹⁶⁵

It is similarly hard to imagine Fritzsche being tried before the IMT if he had not been captured by the Soviets. Nonetheless, they put him in the dock based on the their “desire to include a couple of defendants from the ranks of those whom they had captured (Raeder also) and the wish to have someone to act as a stand-in for Goebbels, in much the

160. ERIC A. ZILLMER, MOLLY HARROWER, ET AL., *THE QUEST FOR THE NAZI PERSONALITY: A PSYCHOLOGICAL INVESTIGATION OF NAZI WAR CRIMINALS* 155 (1995).

161. Frederick M. Schweitzer, *Antisemitism and Law*, in *ANTISEMITISM IN NORTH AMERICA: NEW WORLD, OLD HATE* 280 (Steven K. Baum et al. eds., 2016).

162. DONALD BLOXHAM, *GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY* 65 (2001).

163. GARY C. FOUSE, *ERLANGEN: AN AMERICAN’S HISTORY OF A GERMAN TOWN* 186 (2005) (“[Streicher] spent the war years banned from the city [of Nuremberg], but allowed to continue with *Der Stürmer*.”).

164. *Id.*

165. BLOXHAM, *supra* note 162, at 64–65.

same way that Kaltenbrunner was used as Himmler's understudy."¹⁶⁶ Thus, another media figure, this one linked to the radio, faced Allied justice in the immediate aftermath of the war.

Dietrich, yet another strictly media figure, might have also seemed like a longshot defendant given that he was in the exclusive custody of the speech-protective Americans. But they understood the devastating catalytic effect of his anti-Semitic rhetoric. Thus, despite the odds, these media figures—and by extension their hate speech—was the object of prosecutorial efforts that gave birth to a sub-discipline within ICL. What impact has the resultant jurisprudence had on ICL's treatment of hate speech in the years since? That question will be explored next.

B. The Impact on the Law of Incitement

Although the *Streicher* and *Fritzsche* judgments deal with persecution as a crime against humanity, they have left an indelible imprint on the law of incitement. In the wake of the IMT proceeding, Polish jurist and Holocaust survivor Raphael Lemkin, who had found refuge in the United States, spearheaded an effort to draft a convention to legislate against an offense not included in the Nuremberg Charter and whose name he had coined: genocide.¹⁶⁷ On December 9, 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which established genocide as a crime carrying individual accountability under international law.¹⁶⁸ Article II of the Convention defines genocide as a series of acts—including, for example, killing, causing serious bodily or mental harm, and inflicting on the group conditions of life calculated to bring about its physical destruction—committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such.¹⁶⁹

Article III then states that a number of related acts committed in furtherance of Article II shall also be punishable.¹⁷⁰ This includes, at Article III(c), “[d]irect and public incitement to commit genocide.”¹⁷¹ The United States Holocaust Memorial Museum, in its *Holocaust Encyclo-*

166. MARK TURLEY, FROM NUREMBERG TO NINEVEH: WAR, PEACE AND THE MAKING OF MODERNITY 147 (2008).

167. James Hughes, *Genocide*, in THE ROUTLEDGE HANDBOOK OF ETHNIC CONFLICT 120 (Karl Cordell & Stefan Wolff eds., 2016).

168. See generally Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277.

169. *Id.* art. II.

170. *Id.* art. III.

171. *Id.* art. III(c).

pedia, concludes that Article III(c) was the product of “the intellectual and legal foundation laid by the IMT in the *Streicher* decision.”¹⁷² Wibke Timmermann elaborates:

Incitement to genocide first became a crime under international law when the International Military Tribunal (IMT) at Nuremberg passed judgment on the accused Julius Streicher and Hans Fritzsche in 1946. While the term “incitement to genocide” was not yet known as such and the accused were instead charged with crimes against humanity, this charge was based on acts which would today fall within the definition of incitement to genocide.¹⁷³

Given that Article II 3(c) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) essentially mirrors Article III (b) of the Genocide Convention, Larry May is quite justified in noting that the “*Streicher* and *Fritzsche* cases set the stage well for the defendants on trial in Rwanda.”¹⁷⁴ Indeed, the first case to pass judgment on charges of direct and public incitement to commit genocide, *Prosecutor v. Akayesu* (1998), expressly acknowledged its debt to *Streicher* at the outset:

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*. The Nuremberg Tribunal found 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.”¹⁷⁵

And since *Akayesu*, other important incitement decisions, including the seminal *Media Case* Trial Chamber judgment, have cited and drawn from *Streicher* and *Fritzsche*.¹⁷⁶ In fact, in the *Media Case* Ap-

172. *Incitement to Genocide in International Law*, HOLOCAUST ENCYCLOPEDIA, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007839> (last visited Oct. 28, 2016).

173. Wibke Kristin Timmerman, *Incitement in International Criminal Law*, 88 INT’L REV. RED CROSS 823, 827 (2006). Although Fritzsche was acquitted, his case helped lend credence to the idea that a radio announcer could be brought to justice for hate speech based on government-sanctioned (and disseminated) broadcasts.

174. LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT 186 (2010).

175. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 550 (Sept. 2, 1998).

176. See, e.g., *Prosecutor v. Nahimana, Barayagwiza & Ngeze* (Media Case), Case No. ICTR 99-52-T, Judgement and Sentence, ¶¶ 981–82 (Dec. 3, 2003) (discussing both *Streicher* and *Fritzsche*); *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Judgment and Sentence, ¶ 500 (Sept. 12, 2006) (also referring to both cases); *Nahimana, Barayagwiza & Ngeze v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶¶ 680, 686, 688, 702, 979 (Nov. 28, 2007).

peals Chamber judgment, the panel explicitly considered *Streicher* and *Fritzsche* in rejecting the argument that “only discourse explicitly calling for extermination, or discourse that is entirely unambiguous for all types of audiences, can justify a conviction for direct and public incitement to commit genocide.”¹⁷⁷ Thus, the Chamber was able to conclude that “speech containing no explicit appeal to commit genocide, or which appeared ambiguous, [could] still [constitute] direct incitement to commit genocide in a particular context.”¹⁷⁸ And so the influence of *Streicher* and *Fritzsche* on the development of the law of incitement has been enduring.

C. Impact on the Law of Persecution

The same is true of persecution as a crime against humanity. In *Prosecutor v. Ruggiu* (2000), the first ad hoc Tribunal case considering liability for hate speech as CAH-persecution, the Trial Chamber relied heavily on *Streicher*. In affirming the guilty plea of the defendant, an RTLM announcer originally from Belgium (and the only European prosecuted by the ICTR), the judges noted:

The Trial Chamber has examined significant legal precedents related to the crime of persecution, including the Judgement of *Julius Streicher*. In that historic case, The International Military Tribunal at Nuremberg held that the publisher of a private, anti-Semitic weekly newspaper “*Der Stürmer*” incited the German population to actively persecute the Jewish people. The Tribunal found 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”. The *Streicher* Judgement is particularly relevant to the present case since the accused, like Streicher, infected peoples’ minds with ethnic hatred and persecution.¹⁷⁹

Based on this, the Trial Chamber concluded that speech infecting “peoples’ minds with ethnic hatred and persecution” satisfies the actus reus of persecution as a crime against humanity as it deprives members of the target group of “the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society.”¹⁸⁰

177. Nahimana, ICTR-99-52-A, ¶ 702.

178. *Id.* ¶ 703.

179. *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 19 (June 1, 2000).

180. *Id.* ¶ 22.

This approach was reaffirmed in the *Media Case* Trial Chamber judgment. In finding the defendants guilty of CAH-persecution, the panel implicitly adopted the *Ruggiu* Chamber's reading of *Streicher*:

Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.¹⁸¹

Then, citing *Streicher* explicitly, the judges pointed out that persecution is not a provocation to cause harm—it is the harm itself:

Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. The Chamber notes that Julius Streicher was convicted by the International Military Tribunal at Nuremberg of persecution as a crime against humanity for anti-Semitic writings that significantly predated the extermination of Jews in the 1940s. Yet they were understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people. In Rwanda, the virulent writings of Kangura and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed.¹⁸²

The International Criminal Tribunal for the former Yugoslavia (ICTY), however, also relying on *Streicher*, has taken a different approach. In *Prosecutor v. Kordić & Čerkez*,¹⁸³ an ICTY trial chamber concluded that, without exception, hate speech not calling for action, and on its own, could not be the basis for a CAH-persecution charge. The indictment in that case averred that defendant Dario Kordić, along with other persons, carried out an ethnic cleansing campaign by, inter alia, “encouraging, instigating and promoting hatred, distrust, and strife on political, racial, ethnic or religious grounds, by propaganda, speeches and otherwise.”¹⁸⁴

In its judgment, the *Kordić* Trial Chamber ruled that the charged speech could not amount to persecution. It found that “criminal prosecu-

181. Nahimana, ICTR 99-52-T, ¶ 1072.

182. *Id.* ¶ 1073.

183. See *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 209 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

184. *Kordić*, IT-95-14/2-T, Judgment, Annex V, ¶ 37.

tion of speech acts falling short of incitement finds *scant* support in international case law.”¹⁸⁵ To support that proposition, it cited *Streicher* and noted that “the International Military Tribunal convicted the accused of persecution because he “incited the German people to active persecution,” which amounted to ““*incitement* to murder and extermination.””¹⁸⁶

Thus, there was a split between the two ad hoc Tribunals. And the *Media Case* Appeals Chamber judgment failed to resolve it. In affirming the Trial Chamber convictions as to persecution, the Appeals Chamber did hold that hate speech, in the context of other conduct constituting a persecutory campaign against a victim population, could be the basis for a CAH-persecution conviction.¹⁸⁷ But it refused to decide whether hate speech, on its own, could be the predicate for a CAH-persecution charge: “The Appeals Chamber is of the view that it is not necessary to decide here whether, in themselves, mere hate speeches not inciting violence against the members of the group are of a level of gravity equivalent to that for other crimes against humanity.”¹⁸⁸

And this is where the *Dietrich* judgment may yet play a crucial role. Existing persecution jurisprudence has focused on *Streicher*. But, as we have seen, that decision contains language that could support either position: the “infecting peoples’ minds” text (persecution charges may be based on language not calling for action) versus the “incitement to murder and extermination” text (persecution must be based on direct calls for action).

But *Dietrich* can resolve the impasse. As demonstrated above, Otto Dietrich’s persecution liability was not premised on specific calls to engage in particular action. Rather, to quote the NMT, Dietrich’s speech was actionable because it constituted a “furnishing” of “excuses and justifications” to “subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.”¹⁸⁹

This could have significant implications for contemporary cases. In Myanmar, for instance, in the context of widespread and systematic

185. *Id.* ¶ 209 n.272.

186. *Id.* As this Article has demonstrated previously, the *Kordić* Chamber omitted, *inter alia*, the following language in *Streicher*: “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*.” *Streicher* Judgment, *supra* note 89, at 161–63 (emphasis added).

187. See *Nahimana*, ICTR-99-52-A, ¶¶ 985–86.

188. *Id.* ¶ 987.

189. *Ministries Case*, *supra* note 138, at 576

violence against Rohingya Muslims,¹⁹⁰ extremist Buddhists have given public speeches accusing “Muslim men of repeatedly raping Buddhist women, of using their wealth to lure Buddhist women into marriage, then imprisoning them at home.”¹⁹¹ Such incendiary rhetoric does not constitute direct calls for action but is uttered as part of a widespread or systematic attack directed against a civilian population. This is not the type of speech worthy of First Amendment concerns—it is rhetoric in service of ongoing atrocity in an environment where the government monopolizes media messages.¹⁹² Such discourse is not uttered as part of the metaphorical “marketplace of ideas” that contributes toward promoting democracy and the self-actualization of citizens—rationales routinely offered in support of speech-protective American First Amendment jurisprudence.¹⁹³ Thus, the influence of *Dietrich* might help foster accountability in such cases and make further inroads against the culture of impunity.

VI. CONCLUSION

The Nuremberg propaganda cases will continue to influence the development of atrocity speech law going forward. This past year, in connection with a notorious oration delivered during the lead-up to the Rwandan Genocide, a Kigali court convicted extremist Hutu politician Léon Mugesera of incitement to commit genocide and persecution as a crime against humanity.¹⁹⁴ But the conviction is being appealed and so a higher court will be called upon to clarify the law regarding incitement and persecution.¹⁹⁵ Soon after Mugesera’s conviction, an ICTY Trial

190. See, e.g., *After Violence against Muslims, Myanmar Moves to Curb Buddhist Extremism*, REUTERS (July 15, 2016) (referring to violence against Muslims since 2013); Habib Siddiqui, *Suu Kyi Must Stop The Ethnic Cleansing In Arakan*, EURASIA REVIEW (October 25, 2016), <http://www.eurasiareview.com/25102016-suu-kyi-must-stop-the-ethnic-cleansing-in-arakan-oped/> (“[S]ince the Oct. 9 attacks, at least 133 unarmed Rohingyas (mostly children and women) have been killed, or have died in custody.”).

191. Jonathan Head, *What Is Behind Burma’s Wave of Religious Violence?*, BBC NEWS (April 4, 2013), <http://www.bbc.co.uk/news/world-asia-22023830>.

192. *Myanmar: Freedom of the Press 2016*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2016/myanmar> (noting that in Myanmar, “infrastructure for production and distribution of print and broadcast media is largely monopolized by the state. . .”).

193. ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION, *supra* note 9, at 319–20.

194. Stevenson Mugisha, *Mugesera Sent to Prison for Life*, THE RWANDA FOCUS (April 15, 2016), <http://www.focus.rw/wp/2016/04/mugesera-sent-to-prison-for-life/>. He was acquitted of conspiracy to commit genocide and planning genocide. *Id.*

195. Rodrigue Rwirahira, *Leon Mugesera Gets Life Term for Genocide Crimes*, THE NEW TIMES (April 16, 2016), <http://www.newtimes.co.rw/section/article/2016-04-16/199005/> (noting

Chamber acquitted extremist Serb politician Vojislav Šešelj of, inter alia, crimes against humanity (persecution) in connection with hate speech linked to ethnic cleansing in the Balkans during the early 1990s.¹⁹⁶ The prosecution has appealed, permitting possible clarifications and rectifications regarding hate speech as persecution.¹⁹⁷

At the same time, at the ICC, former Ivorian President Laurent Gbagbo and one of his top lieutenants, Charles Blé Goudé, have been charged with persecution in relation to hate speech connected to post-election violence in Côte d'Ivoire in 2010.¹⁹⁸ Both are currently on trial before the ICC.¹⁹⁹ And although Kenyan radio announcer Joshua arap Sang's persecution case before the ICC was dismissed earlier this year (linked to Kenya's 2007–2008 post-election violence), it is illustrative of analogous cases that will call on the ICC to get the law of atrocity speech right.

There is no doubt that judges adjudicating these cases will look to the now considerable body of law that has developed over the past two decades regarding the relationship between speech and atrocity. But to put that law in context, and understand its finer nuances, those jurists will continue to rely on the Nuremberg propaganda-defendant jurisprudence. They will likely continue to appreciate that the Third Reich's hate speech program against the Jews is the template by which modern atrocity propaganda campaigns will continue to be judged. And, in that sense, the judgments in *Streicher*, *Fritzsche* and *Dietrich* will be of enduring value to courts for generations to come.

that Mugesera would be appealing).

196. Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2016).

197. Marija Ristic, *Hague Prosecution Appeals Against Vojislav Seselj Acquittal*, BALKAN INSIGHT (May 3, 2016), <http://www.balkaninsight.com/en/article/prosecution-calls-for-guilty-verdict-or-new-seselj-trial-05-02-2016>.

198. See Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges ¶¶ 167, 226 (June 12, 2014); Prosecutor v. Blé Goudé, Case No. ICC-02/11-02/11-186, Decision on the Confirmation of Charges ¶¶ 192(d), 194 (Dec. 11, 2014).

199. Oumar Ba, *Who Is Laurent Gbagbo, and Why Is He on Trial at the ICC?*, WASHINGTON POST (Feb. 3, 2016), at <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/03/who-is-laurent-gbagbo-and-why-is-he-on-trial-at-the-icc/>.