



THE ACCIDENTAL BIRTH OF HATE CRIME IN TRANSNATIONAL CRIMINAL LAW

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When Law and Hate Collide

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Its specific objective is to contribute to the prevention of, and the fight against all forms of violence occurring in the public or the private domain, including sexual exploitation and trafficking of human beings.

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

The Accidental Birth of Hate Crime in Transnational Criminal Law:

'Discrepancies' in the Prosecution for "Incitement to Genocide" during the Nuremberg Process involving the cases of Julius Streicher, Hans Fritzsche and Carl Schmitt

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

EDITORS' INTRODUCTION

This volume of three interrelated studies aims to explore the various contingencies through which individuals responsible, to various degrees, for promoting expressions of racist hate were subjected to markedly different types of legal responses within the landmark Nuremberg trials programme. These contingencies, together with loose judicial reasoning, complicate scholarly efforts to identify the historical emergence of this type of transnational hate crime, and to illustrate the complications that arise when seeking to ascertain its implications as a precedent.²

It needs to be emphasised at the outset that what follows is not a comprehensive study of the origins of the criminalisation of hate speech in general as this would have to include a full comparative survey of all domestic laws and their judicial interpretation, application and institutional enforcement. In addition, the interaction between domestic, regional and international criminalisations would also have to be addressed in what would amount to a massive multi-volume study. Although this wider type of potential survey of legislation far exceeds the scope of the present study, it has to be acknowledged that a strong case can be made for this more comprehensive approach, and - if it is ever completed - for understanding and interpreting the contents of what follows within this wider context of transnational regulation. For example, there has clearly been a measure of interaction, albeit of an inconsistent type, between US immigration and naturalisation law and practice, and international criminal law relating to hate speech, with the Streicher case expressly referred to as a precedent for the idea

² Legal and other historians have to confront the complexity of trying to create a categorical "timeline," or identifying an unambiguous "origin" of a stream of case law. The historian's choice of precedent can often be as highly selective as that of lawyers when interpreting what is to count as a precedent.

that "persecution," as a subset of crimes against humanity,³ can include racist and anti-Semitic propaganda.⁴

It would indeed be interesting to ascertain what lessons have already been gained or still could be learned from the experiences of nation states not only with respect to the framing of hate speech laws and various "exceptions," "qualifications" and "reservations," but also their interpretation and practical institutional enforcement. In addition, purely national constitutional and human rights challenges to such legislation may prove instructive at the policy level for the re-drafting of transnational measures to remove vulnerabilities on constitutional grounds of, for example, unlawful "intrusions" into so-called "private" beliefs, thoughts, political association, freedom of religion and freedom of expression (both in terms of "viewpoint" and content). In turn, this leads to concerns, expressed even in the context of post-genocidal societies such as Rwanda, that widely drawn hate speech laws can be abused by governments to suppress dissent.⁵ Other possible legal objections can relate to the possibility of a perpetrator facing "double jeopardy" for a single offence and related "due process" based objections.⁶

³ See London Charter of the International Military Tribunal art. 6(c). Aug. 8, 1945. 59 Stat. 1544. 1547. 82 U.N.T.S. 279, which declares that "persecutions on political, racial or religious grounds" constitutes Crimes against Humanity within the IMT's jurisdiction. What are popularly termed the "Nuremberg Trials" after the city location of these trials were formally designated "IMT."

⁴ For example in the *Koreh* case, the US Third Circuit Court of Appeals made explicit reference to the *Streicher* case in its opinion regarding the "denaturalization" of a Hungarian newspaper editor, Ferenc Koreh, who had published anti-Semitic articles. The US government sought to denaturalize Koreh on several grounds, including illegal procurement of a visa on account that he "advocated and/or assisted in the persecution" of Jews" in his role as editor of a Hungarian newspaper. The court rejected Koreh's argument that his role as propagandist [d]id not "assist in the persecution" of Hungarian Jews. After quoting from the *Streicher* judgment, the court noted: "Although the underlying legal basis for the prosecution of *Streicher* differed from the basis for this denaturalization case against *Koreh*, the recognition of the nexus between propaganda and persecution is no less applicable for that reason." *United States v. Koreh*, 59 F.3d 431(3rd Cir. 1995) at 440.

⁵ See *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgment, Partly Dissenting Opinion of Judge Meron, 10 (Nov. 28, 2007): 'The threat of criminal prosecution for legitimate dissent is disturbingly common, and officials in some countries have explicitly cited the example of RTLM in order to quell criticism of the governing regimes.'

⁶ Gregory R. Nearpass, Comment, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 Alb. L. Rev. 547, 561-69 (2003).

For example, the US Congress passed the first piece of federal legislation addressing hate crimes in 1871: namely The Ku Klux Klan Act of 1871.⁷ This made it illegal for persons to conspire to deprive: "any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws." Section 1985 of this measure both prohibits, and provides a cause of action for recovering damages for acts depriving any person or class of equal protection of the laws or of equal privileges and immunities under the laws, causing injury to persons or property, or depriving any person of having or exercising the rights and privileges of citizenship.⁸ Section 1986 imposes liability for all damages caused by such wrongful acts on any persons who know of the wrongs conspired to be committed. As interesting are the limitations of this measure. In order for federal jurisdiction to apply, the Act requires the victim of hate crime to have been participating in a specified "protected activity." In addition, the Act also requires proof of a nexus between the hate crime and the protected activity itself.

Perhaps unremarkably, given the social context of a nation state founded on the genocide of the indigenous native Americans and, in part, built up economically through the institution of racist slavery, it took the US Congress nearly a century to enact the next relevant measure: the 1968 Civil Rights Act.⁹ This measure, codified as 18 U.S.C.A. § 245, prohibits race-, color-, religion-, or national origin-based intimidation or interference with: 'voting, participating in programs or activities provided or administered by the federal government or by states, and enrolling in public school or college.'¹⁰ § 245(b)(2)(C), effectively prohibits interference with employment, for willful injury to and interference with an individual because of his or her race, religion, and national origin. It establishes a penalty of a fine and/or imprisonment of up to one year if no

⁷ Now codified as 42 U.S.C.A. §§ 1985-1986. See David Hong, *Hate Crime Regulation and Challenges*, 10 *Geo. J. Gender & L.* 279, 287-94 (2009)

⁸ § 1985(3).

⁹ Han, Eun Hee, 'Hate Crimes and Hate Speech,' *Georgetown Journal of Gender and the Law*, Vol. 7, Issue 3 (2006), 679-700.

¹⁰ 18 U.S.C.A. § 245(b)

bodily injury results, and fine and/or imprisonment of up to ten years if weapons, explosives, or fire is used, or if their use is attempted or threatened. Those whose acts result in death, or whose acts involve kidnapping, aggravated sexual abuse, or attempts at either, can be fined, imprisoned for any number of years or for life, or sentenced to death.¹¹ Subsequent constitutional challenges on grounds of the alleged state intrusion on "privacy," upheld this measure, and determined that Section 245 of the Act created a *substantive right* "to enjoy state provided benefits free from private harassment motivated by racial animus."¹²

The USA position is also instructive because of its federal structure where some, but not all, hate crimes, including hate speech, fall under the jurisdiction of the Federal State, and thus allow enforcement by the FBI, whilst others are reserved for individual states.¹³ In addition, the constitutional settlement between states and the Federal Government restricts the scope of Federal laws in ways that can mean bizarrely that hate crime and hate speech measures have to be constitutionally justified in terms of Federal legislative powers concerning "freedom of commerce" as established by the "Commerce Clause" of the US Constitution.¹⁴ Furthermore, for some but not all purposes gender, disability and sexual orientation receive legal recognition, thereby creating issues concerning a patchwork of inconsistent discrimination within US anti-discrimination measures taken as a whole,¹⁵ with various *ad hoc* qualifications not based upon identified harm or grounded in general criminal law principles or anti-discrimination principles.

¹¹ § 245(b)(5).

¹² *United States v. Bledsoe* 728 F.2d 1094 (1984), 1096-7. See also the failure of a challenge on similar grounds in *United States v. Lane* 728 F.2d at 1097. Both cases involved racist murders. For a successful constitutional challenge to gender based hate crimes, see *United States v. Morrison* 529 U.S. 598 (2000).

¹³ http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes. The FBI's jurisdiction is based on four federal statutes including sections of the US Criminal Code relating to conspiracy against rights, interference with federally protected activities, damage to religious property and obstruction in free exercise of religious beliefs, and criminal interference with fair housing.

¹⁴ Christopher Chorba, Note, 'The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act,' 87 Va. L.Rev. 319, 348, 355 (2001); Christopher DiPompeo, Comment, Federal Hate Crime Laws and *United States v. Lopez*: On a Collision Course to Clarify Jurisdictional-Element Analysis, 157 *U. Pa. L. Rev. Pennumbra* 617, 649-68 (2008) (Commerce Clause).

¹⁵ On housing related measures, see 42 U.S.C.A. § 3631; on religious matters, see Pub. L. No. 101-275, 104 Stat. 140 (1990), amended by Church Arson Prevention Act of 1996, Pub. L. No. 104-155, § 7, 110 Stat. 1394 (1996).

The last decades have seen a number of specific legislative initiatives. The Hate Crimes Statistics Act of 1990, requires the US Attorney General to collect and publish data on crimes motivated by "discriminatory animus."¹⁶ Four years later, the Violence Against Women Act of 1994 created a civil remedy for victims of crimes motivated by gender.¹⁷ Finally, the Hate Crimes Sentencing Enhancement Act of 1994 specified eight specific crimes for which judges could impose enhanced sentences if it could be determined beyond a reasonable doubt that the crimes were indeed hate crimes.¹⁸

The most recent US measure can be regarded as a response to some of these historical lessons. On October 28, 2009, President Obama signed into law the first bill expanding the parameters of federal hate crime law in over forty years: "The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act ("HCPA").¹⁹ In response to the historical ad hoc provisions and difficult to justify qualification and restrictions, this measure broadens US federal hate crime law to incorporate "violence motivated by the ... gender, sexual orientation, gender identity, or disability of the victim." It also enlarges federal jurisdiction over hate crimes by removing the requirement that victims engage in "federally protected activities," and enhances federal funding for the investigation and prosecution of hate crimes.

Arguably these trends in favour of the belated replacement of a patchwork of *ad hoc* and inconsistent provisions regulating hate crime, including hate speech, with more general codified measures backed up with enhanced enforcement measures could serve as a possible instructive guide for both other nation states and transnational regulation.

¹⁶ Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified in part at 28 U.S.C. § 534).

¹⁷ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 8, 18, 28, 42 U.S.C.).

¹⁸ Hate Crimes Sentencing Enhancement Act of 1994, Pub. L. No. 103-322, § 280003 (1994) (codified as 28 U.S.C. 994). In the case of *Rice*, 6 years after a double murder of two lesbians, the US Attorney general John D Ashcroft, held a nationally televised press conference (April 11 2002), to announce that the US Justice Department was to invoke the federal hate crime statute for the first time to charge the alleged murderer with hate crime. The speech justified the invocation as 'criminal acts of hate run counter to what is best in America, our belief in equality and freedom ... we will pursue, prosecute and punish those who attack law-abiding Americans out of hatred for who they are ... hatred is the enemy of justice, regardless of its source.'

¹⁹ Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, §§ 4701-4713, 123 Stat. 2835 (2009) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

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

At a general level, conceptions of "incitement" and "hate speech" give voice to efforts to link linguistic and other symbolic expression with its complicities in violent, xenophobic and sometimes genocidal outcomes, where incitement falls under the broader category of "abuse of rights."²⁰ The international human rights framework, which within Europe at least has been decisively influenced by the horrors of Nazism and the Holocaust,²¹ has developed legal measures to confront both acts and programmes of incitement and broader notions, stemming originally from the civil law tradition, of "the abuse of rights." This idea has been adapted from its civil law origins to the international law context where, during the first decades of the 20th century, it attained the status of a general principle of international law or as part of customary international law.²² Understood as a practice, the abuse of rights has been recognised as involving the hypocritical demand to exercise a "right" to act in a manner tending, in practice, to be destructive of the rights of others. Considered in terms of its practical consequences, the abuse

²⁰ See, e.g., ICCPR, Art. 5, providing an abuse of rights provision in relation to other recognised rights including Art. 19 expression rights.

²¹ During the immediate postwar period, Hersch Lauterpacht was one of many international lawyers campaigning for the regulation of militaristic propaganda, sedition, and what today would be termed hate speech as a key element of part of the historically emergent human rights framework. See, e.g., H. Lauterpacht, *An International Bill of the Rights of Man* (1945), 108.

²² See ECHR, Art. 17. H. Lauterpacht, *The Function of Law in the International Community* (1933), ch. 14, 298: 'the prohibition of abuse of rights is a general principle of law'. See also M. Byers, 'Abuse of Rights: An Old Principle, a New Age', (2002) 47 *McGill Law Journal* 389.

of rights through hate speech typically involves *a reduction* in the reality and viability of rights as a whole.

Unsurprisingly, the experience of Nazism and racist, militaristic and xenophobic propaganda within that movement, encouraged international lawyers to debate the role of transnational regulation of propaganda as a strategy for preserving post-war peace as well as individual rights.²³ This included the development of notions of imposing legal responsibilities upon states for allowing or encouraging destructive forms of propaganda arising within their borders.²⁴

Article 20 of the ICCPR introduced prohibitions of propaganda inciting war, ‘hate speech.’ This forms part of a package regulating freedom of expression including Article 19, whose subsection 2 recognises the necessity for lawfully constituted restraints on such expression. Particularly relevant for present purposes is how hate speech is defined in terms of ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.’²⁵

Another historical landmark in the criminalisation of racist hate speech as a crime against humanity occurred in the mid-1970’s with the creation of the International Convention on the Suppression and Punishment of the Crime of Apartheid.²⁶ The Apartheid Convention was adopted by the General Assembly on 30 November 1973, by 91 votes in favour, four against (Portugal, South Africa, the United Kingdom and the United States) and 26 abstentions. It came into force on 18 July 1976, and has been ratified by over 100 states. This treaty remains in force despite the transition of South Africa to democracy. In terms of hate speech, Art. II provides:

‘For the purpose of the present Convention, the term “the crime of apartheid”, which shall

²³ See the analysis of propaganda in E. Castrén, *The Present Law of War and Neutrality* (1954), 208-10; J. Stone, *Legal Controls of International Conduct: A Treatise on the Dynamics of Disputes and War-Law* (1954), ch. 11, Discourse 15, 318-23.

²⁴ H. Lauterpacht, ‘Revolutionary Propaganda by Governments’, in H. Lauterpacht, *International Law*, collected papers arranged and ed. E. Lauterpacht, Vol. 3, *The Law of Peace, Parts II-VI* (1977), ch. 8, esp. 293-5.

²⁵ ICCPR, Art. 20(2).

²⁶ 1015UNTS243 (Apartheid Convention).

include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts’, extending the reach of the Convention beyond the specific case of pre-1994 South Africa. This measure establishes individual criminal responsibility for apartheid, including of persons who through hate speech ‘directly incite or conspire in the commission’ of apartheid, as well as to those who ‘directly abet, encourage or cooperate’ in the commission of this crime.²⁷ In addition, State Parties undertake to ‘suppress as well as to prevent any encouragement of the crime of apartheid’, Art. IV(a).²⁸ The Convention still remains in force, but since 2001, its provisions have been partly superseded by the 1998 ICC Statute, which incorporates the crime of apartheid as a "crime against humanity."²⁹

From 1952 until 1990, all aspects of apartheid were annually condemned by the UN General Assembly as contrary to Articles 55 and 56 of the UN Charter and was regularly condemned by the Security Council. In 1966, the General Assembly categorised apartheid as a "crime against humanity"³⁰ and in 1984 the Security Council endorsed this determination.³¹ The Apartheid Convention not only declared apartheid to be unlawful as a violation of the UN Charter but also an international crime.

The Apartheid Convention declares that apartheid is a crime against humanity and that “inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination” are international crimes.³² Article 2 defines the crime of apartheid –“which shall include similar policies and practices of racial segregation

²⁷ Art. III(a)and(b)

²⁸ See M. Cherif Bassiouni and D. H. Derby, ‘Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments’, (1980-1) 9 *Hofstra Law Review* 523. However no one yet has ever been prosecuted under the Convention. See J. Dugard, ‘Introduction to the Convention on the Suppression and Punishment of the Crime of Apartheid’: <http://untreaty.un.org/cod/avl/ha/cspca/cspca.html>.

²⁹ ICC Statute, Art. 7(1)(j).

³⁰ UNGA Resolution 2202 A (XXI) of 16 December 1966

³¹ UNGA Resolution 556 (1984) of 23 October 1984.

³² Art. 1.

and discrimination as practised in southern Africa” – as covering “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them”. It sets out those acts that fall within the ambit of the crime including murder, torture, inhuman treatment and arbitrary arrest of members of a racial group; deliberate imposition on a racial group of living conditions calculated to cause its physical destruction; legislative measures that discriminate in the political, social, economic and cultural fields; measures that divide the population along racial lines by the creation of separate residential areas for racial groups; the prohibition of interracial marriages; and the persecution of persons opposed to apartheid.

Under this Convention, international criminal responsibility applies to individuals, members of organisations and representatives of the State who commit, incite or conspire to commit the crime of apartheid.³³ Consideration was given in 1980 to the establishment of a special international criminal court to try persons for the crime of apartheid (E/CN.4/1426 (1981)). However, no such court was established and it was left to State Parties to enact legislation to enable them to prosecute apartheid criminals on the basis of "universal jurisdiction." The Apartheid Convention allows State parties to prosecute non-nationals for a crime committed in the territory of a non-State party where the accused is physically within the jurisdiction of a State party (arts. 4 and 5).

The historical emergence of such laws against incitement and persecution through words alone can then be understood not as "restrictions upon freedoms," (at best a "necessary evil"), but rather as protective measures. Historical insights suggests that these have proven to be necessary to curb the cynical and hypocritical invocations of rights to further the cause of undemocratic political programmes, including extremist and xenophobic nationalism, racism, militarism,

³³ Art. 3.

warfare and religious sectarianism, or other types of clearly antisocial or criminal consequences. The historical emergence of efforts to prohibit the most damaging forms of hate speech through law is better understood not in classic liberal terms of problematic restrictions upon freedom of expression, but rather as a part of the defense of democratic values, and thus the vindication of community-wide interest in the right to self-determination, together with the various human rights to "freedom of association," "religious belief," "right to life," and "security" of both the person and property that stem from this preeminent right. Restricting forms of hate speech that advocate or incite civil war, religious sectarianism, tribal or state on state warfare cannot be separated from the historical movement to introduce protective measures designed to prevent the massive diminishment in the practical exercise of those core rights that stem from these types of collective conflict, including rape and sexual violence.³⁴

Through three contrasting case studies, the following study explores situations where individuals complicit in the hate crime type propaganda of Hitler's Germany, received completely different legal outcomes. Do these outcomes represent problematic 'discrepancies' causing a measure of instability in the founding elements of the doctrine of "incitement to genocide," which today would be classified in whole or part as hate crimes? Alternatively, can they be 'reconciled', and these founding moments better secured, once we properly understand the applicable legal doctrine? The three case studies under examination are those of Julius Streicher, the private publisher of the grossly anti-Semitic weekly newspaper *Der Stürmer* (The Attacker); and Hans Fritzsche, a mid-level German radio broadcaster within Goebbels' notorious Ministry of Propaganda; and finally Carl Schmitt, a German professor of public law at the pre-eminent University of Berlin. It is widely recognised that, in Gordon's words, the first two Nuremberg decisions: "essentially mark the birth for the international jurisprudence for hate

³⁴ M. G. Kearney, *The Prohibition of Propaganda for War in International Law* (2007)

speech. ... [they are] the most significant pre-ICTR international precedents regarding media use of hate speech in connection with the massive violations of international humanitarian law."³⁵

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

Is the history of the emergence of actual and proposed prosecutions for incitement to acts of genocide and crimes against humanity rooted in law at all, understood as doctrinal rules giving effect to general legal principles and underlying axioms? Alternatively, or in addition, is it more useful to examine the intersection of various factors other than doctrinal rules or theories? To avoid misunderstanding, the term 'incitement to genocide' is of relatively recent coinage stemming from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the Genocide Convention),³⁶ which is now incorporated into the ICTY (Yugoslavia), ICTR (Rwanda) and ICC (Rome) Statutes.³⁷ Such incremental legal recognition, of course, post-dated the International Nuremberg Tribunal (IMT) of 1945-6, and emerged towards

³⁵ See Gregory S. Gordon, 'A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech,' 45 *Va. J. Int'l L.* 139, 143 (2004)

³⁶ Dec. 9, 1948, 78 U.N.T.S. 277.

³⁷ Colette Braeckman, *Incitement to Genocide, in Crimes of War: What the Public Should Know*, 192 (Roy Gutman & David Rieff (eds.) 1999).

the end of the American-led Subsequent Proceedings at Nuremberg (NMT) in which over two hundred mid-level Nazi war crimes defendants were prosecuted between 1947-9.

Once drafted in the summer of 1945, the Charter of the Nuremberg Tribunal did not expressly use the term 'genocide'. However, the indictment under Count Three, Article 6(b) 'war crimes' did, albeit as a point and issue of "fact," accuse the Nazi defendants of committing crime that were analogous with genocide. While drafting the Nuremberg's indictment, former prosecutor Telford Taylor noted: "We used the word 'genocide', newly coined by Raphaël Lemkin (at the time a member of the American prosecution staff) to describe: "the extermination of racial and national groups, particularly Jews and Poles and Gypsies and others."³⁸ During these trials, the concept of 'genocide' was implied and, on occasions, deployed by prosecutors, but not actually prosecuted as a separate offence. Instead, at Nuremberg, offences that today would fall under the heading 'incitement to genocide' and could, on occasions, be differentiated from the wider category "crimes against humanity" were classified as acts of "persecution."³⁹ Indeed, acts of genocide were not internationally recognised as a separate and distinct criminal offence until the adoption in 1948 of the Genocide Convention. This included the offence of "direct and public incitement to commit genocide" under Article III(c).⁴⁰ However, the latter remained judicially untested in that the first prosecution for *any* form of genocide had to wait until the *Akayesu* case of 1994. *Inter alia*, he was charged with the offence of 'direct and public incitement to commit incitement genocide'.⁴¹ Given the near half-century of prosecutorial inaction between the *Streicher* and the *Akayesu* cases, questions concerning the use of racist incitement stemming

³⁸ Telford Taylor, 1992, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, 103 .

³⁹ As defined either by Article 6(c) of the Nuremberg Charter, and - for the Subsequent Proceedings - under Control Council Order 10, which restated the substance of Article 6 as German domestic law

⁴⁰ Proposals to include incitement to commit in the Genocide Convention were contested, particularly by the United States, during deliberation by the Ad hoc Committee on Genocide. William A. Schabas, 'Hate Speech in Rwanda: The Road to Genocide,' 46 *McGill Law Journal* 141, 152, (2000).

⁴¹ *The Prosecutor v. Jean Paul Akayesu* Case No. ICTR-96-I; *The Prosecutor v. Kambanda* Case No. ICTR- 97-23-S; *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I.

from the Nazi era can still be considered comparatively recent precedents. As Gordon recognises:

'International tribunals have found that hate speech targeting a population on the discriminatory grounds identified in Article 7 of the Rome Statute constitutes crimes against humanity (persecution). Jurisprudence to this effect finds its origins in the prosecution of Nazi war criminals Julius Streicher and Hans Fritzsche by the International Military Tribunal (IMT) at Nuremberg.⁴²

Catherine McKinnon has made a similar point in relation to the "Media Case" before the Rwandan Tribunal.⁴³

This volume, which adopts a case study approach, is organised under four chapters. The first three provide details of the nature and types of anti-Semitic and other Nazi propaganda that Streicher, Fritzsche, and Schmitt produced, and the legal responses to such actions. In each case, between 1945-47, their anti-Semitic propaganda was deemed sufficient to warrant their detention by Allied Nazi war crimes prosecutors as possible defendants within the overall Nuremberg process (including the follow up American-led "Subsequent Proceedings." These chapters focus particularly on the details of their divergent treatment at the hands of international criminal law. Whilst the private publisher Julius Streicher was successfully prosecuted, convicted and executed, the mid-level government radio broadcaster, Hans Fritzsche, was interrogated, prosecuted, but ultimately acquitted by the IMT. Carl Schmitt, the former pre-eminent professor of law at the University of Berlin, was interrogated repeatedly by Robert Kempner, a senior German-Jewish émigré serving as a US Nuremberg prosecutor preparing a planned trial

⁴² Gregory S. Gordon, 'From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework,' 98 *Journal of Criminal Law and Criminology* 833 (2008).

⁴³ Catherine A. MacKinnon, 'International Decisions, Prosecutor v. Nahimana, Barayagwiza, & Ngeze, 98 *Am. J. Int'l L.* 325, 328 (2004): "This adjudication is the first since the Streicher and Fritzsche cases at Nuremberg to confront the responsibility of the media under international criminal justice principles." Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze (hereafter Nahimana), Case No. ICTR-99-52-T, Trial Chamber I, Judgement and Sentence, 3 December 2003, 978. For more extensive background to the media's role in the Rwandan genocide than is possible here, see A. Thompson (ed.), *The Media and the Rwandan Genocide* (2007). Robert H. Snyder, "Disillusioned Words Like Bullets Bark": Incitement to Genocide, Music, and the Trial of Simon Bikindi, 35 *Ga. J. Int'l & Comp. L.* 645 (2007), which provides an overview of the ICTR incitement cases).

programme embracing Nazi propaganda and "education." After reviewing the interrogation and other evidence, Kempner and his colleagues decided to release Schmitt without charge.

Whilst other writers concerned with the origins of the criminalisation of hate speech at international criminal law have, for good reason, briefly contrasted the prosecution of Streicher and Fritzsche,⁴⁴ our study is the first to include Schmitt within the overall comparison. Partly for this reason, we devote over half of the present study to this lesser known case. The interpretative grounds for his non-prosecution raise core issues concerning the legal accountability of academics inciting others to commit acts of genocide, an issue which merits wider attention within the academic literature.⁴⁵ These still remain largely indeterminate and potentially controversial on classic liberal constitutional grounds. The final chapter will compare these cases studies with a view to answering a key question: namely, do their divergent legal outcomes represent "inconsistent" treatment of "similar" cases, explicable by reference to extra-doctrinal factors? Alternatively, is it possible to identify substantial material differences between them, which – once properly interpreted according to the protocols of formalistic legal reasoning – explain these divergent results by reference to a distinctly doctrinal logic?

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

⁴⁴ See, Justin La Mort, 'The soundtrack to genocide: Using Incitement to Genocide in the Bikindi Trial to Protect Free Speech and Uphold the Promise of Never Again,' 4 *Interdiscip. J. Hum. Rts. L.* 43 (2009-2010); Joshua Wallenstein, 'Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide,' 54 *Stan. L. Rev.* 351 (2001-2002); Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide,' 48 *Va. J. Int'l L.* 509 (2007-2008); Christopher Scott Maravilla, 'Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law,' 17 *Tul. J. Comp. & Int'l L.* 113, 144 (2008).

⁴⁵ There is an entire book to be written on how issues concerning the complicities of propaganda by academics has been selected interpreted and responded to by both national and international prosecutors, which could profitably review the personal files of the Nuremberg prosecutors and determine the extent of pressure exerted by countervailing doctrines of "academic freedom."

implicitly built upon the Streicher judgement to develop the doctrinal definition of incitement in several key cases: namely, Akayesu,⁴⁶ The Media Case,⁴⁷ and Bikindi⁴⁸ decisions.⁴⁹ During these cases, ICTR prosecutors have secured five convictions,⁵⁰ two guilty pleas,⁵¹ and suffered only one acquittal,⁵² with Bikindi convicted only on appeal. In addition, the ICTR found Georges Ruggiu,⁵³ guilty of using racist propaganda that was recognised as analogous with those offences committed by Streicher. Ruggiu was one of the cases tried for 'direct and public incitement to commit genocide' under Article 2(3)(c) and Article 3(h) of the Rwandan Statute.⁵⁴ *The Media Case* gave a thorough ruling on the level of subjective intent (*mens rea*) required for successfully prosecuting various forms of propaganda that have incited racial and ethnic hatred, which supplemented the Nuremberg judgements. Furthermore, controversy has arisen over whether incitement to genocide includes, or overlaps with, 'hate speech'.⁵⁵ In relation to the 1998 Rome Statute for the ICC, debate has arisen concerning whether incitement remains an international crime in its own right,⁵⁶ or has been relegated to being merely one among other elements of free-

⁴⁶ *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, 674 (2 Sep. 1998). See Roméo Dallaire, *Shake Hands with the Devil: the Failure of Humanity in Rwanda*, 531 (2003).

⁴⁷ In the "media case" (*Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-T, Judgment and Sentence (Dec. 3, 2003), <http://unictr.org/Portals/0/Case/English/Ngeze/judgment/Judg&sent.pdf>, *Prosecutor v. Nahimana*, Case No. ICTR 99-52-A, Appeals Judgment, 858, 892 (28 Nov. 2007), the ICTR Tribunal re-affirmed the principle that those who use the media for inciting the public to commit genocide can be punished for communications that amount to hate speech and "persecution" as a crime against humanity. This case provides rendered the first contemporary judgment following the Streicher case to examine the role of the media in the context of inciting the public to commit racist crimes. More generally, see A. O. Odora, 'Criminal Responsibility of Journalists under International Criminal Law: The ICTR Experience', (2004)73(3)*Nordic Journal of International Law* 307.

⁴⁸ *Prosecutor v. Bikindi*, Case No. ICTR 01-72-T, Judgment, 426 (2 Dec. 2008).

⁴⁹ Robert H. Snyder, Note, "'Disillusioned Words Like Bullets Bark": Incitement to Genocide, Music, and the Trial of Simon Bikindi,' 35 *Ga. J. Int'l & Comp. L.* 645, 670-73 (2007).

⁵⁰ *Prosecutor v. Bikindi*, Case No. ICTR 01-72-T, Judgment, 426 (2 Dec. 2008); *Prosecutor v. Nahimana*, Case No. ICTR 99-52-A, Appeals Judgment, 857, 886 (28 Nov. 2007); *Prosecutor v. Niyitegeka*, Case No. ICTR 96-14-T, Judgment and Sentence, 437 (16 May 2003); *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, 674 (2 Sep. 1998).

⁵¹ *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, 24 (1 June 2000); *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, 40 (3) (4 Sep. 1998).

⁵² *Prosecutor v. Nahimana*, Case No. ICTR 99-52-A, Appeals Judgment, 858, 892 (28 Nov. 2007).

⁵³ *Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-31-I.

⁵⁴ Other defendants charged with this offence were, *Prosecutor v. Jean Paul Akayesu* Case No. ICTR-96-I; and *Prosecutor v. Kambanda* Case No. ICTR- 97-23-S.

⁵⁵ Christopher Scott Maravilla, 'Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law,' 17 *Tul. J. Comp. & Int'l L.* 113, 144 (2008).

⁵⁶ See Art 25(3)(e) cf. ICTY Statute 4(3)(c) which separate complicity from the crime of incitement to genocide. One question here relates to the difference between incitement and 'instigation' dealt with in Article 25(3)(b) and Article 4(3)(c). Wibke Kristin

standing offences.⁵⁷ Finally, an argument has been put forward suggesting that racist statements by political leaders that are *only potentially* genocidal in their implications could still fall under this offence.⁵⁸

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

Whilst carrying out our cases studies, we have sought to avoid two possible pitfalls. The first would have been to approach our task with the preconceived notion that all three individuals were equally guilty of racist incitement, and the 'failure' to successfully prosecute and convict both Fritzsche and Schmitt represents a shameful, if still instructive, episode within the history of international criminal law: one which must never be repeated. The second, and equally prejudicial, pitfall would be to approach these case studies from the perspective of "freedom of expression," assumed on grounds familiar to American constitutional lawyers to be an absolute, or near-absolute, "human right."⁵⁹ Adopting this second orientation would probably predispose scholars to interpret the non-prosecution of Schmitt as somehow "the norm," as a "vindication" of

Timmermann, 'The Relationship Between Hate Propaganda and Incitement To Genocide: A New Trend In International Law Towards Criminalization of Hate Propaganda,' 18 *Leiden Journal of International Law* 257-282, 267 (2005): See, A. Eser, 'Individual criminal responsibility, in the Rome Statute of the International Criminal Court: a Commentary, Vol. II, 767, 803-4 (A. Cassese, *et al* ed., 2002).

⁵⁷ Thomas E. Davies, Note, 'How the Rome Statute Weakens the International Prohibition on Incitement to Genocide,' 22 *Harv. Hum. Rts. J.* 245 (2009).

⁵⁸ Gregory S. Gordon, 'From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework,' 98 *J. Crim. L. & Criminology*, 853, 895 (2008).

⁵⁹ Albin Eser, 'The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective,' in *Freedom of Speech and Incitement against Democracy*, 63 at 69. (D. Kretzmer and F. K. Hazan, eds, 2000) On the issue of human rights, see also, Timmermann, *op cit* 272.

the universal right to engage in free speech, even of a type widely defined as offensive.⁶⁰ Here, the legally-sanctioned hanging of Streicher would be interpreted as legally and constitutionally problematic, perhaps even a deplorable, "miscarriage of justice" in that it involved a violation of "freedom of expression." It is doubtful whether either of these two prejudicial approaches, which start off from opposed – if equally fundamentalist - presuppositions, are capable of adequately coming to terms with the specific issues raised by our subject-matter.

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⁶⁰ On this tension, Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide,' 48 *Va. J. Int'l L.* 485, 509 (2008); Kevin W. Goering et al. 'Why U.S. Law Should Have Been Considered in the Rwanda Media Convictions,' 22 *Comm. Law.* 10, 10 (2004); But see also Catherine A. MacKinnon, 'International Decisions, Prosecutor v. Nahimana, Barayagwiza, & Ngeze,' 98 *Am. J. Int'l L.* 325, 330 (2004); Susan Benesch, 'Inciting Genocide, Pleading Free Speech,' 21 *World Policy J.* 62, 63 (2004); Tonja Salomon, 'Freedom of Speech v Hate Speech: The Jurisdiction of Direct and Public Incitement to Commit Genocide,' in *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, 141, 151 (Ralph Henham & Paul Behrens, eds., 2007).

CHAPTER ONE

THE CONVICTION AND JUDICIAL KILLING OF JULIUS STREICHER

INTRODUCTION

Julius Streicher was the first journalist to be convicted of international crimes stemming from his media activities, and - as Joyce recognises - his case 'prefigured recent jurisprudence concerning the media in the context of international criminal law.'⁶¹ In its *Akeyesku* judgment, the ICTR considered: 'Perhaps the most famous conviction for incitement to commit crimes of international dimension was that of Julius Streicher by the Nuremberg Tribunal for the virulently anti-Semitic articles which he had published in his weekly newspaper *Der Stürmer*.'⁶² Unlike Fritzsche and Schmitt, Streicher began his anti-Semitic propagandist 'career' in 1919 prior to joining Hitler's Nazi Party. In contrast to Schmitt, Streicher was not an academic. Indeed, the closest he came to an academic role was working as an elementary school teacher in a Bavarian village school in 1904. Five years later, he worked in a similar post in Nuremberg.⁶³ Unlike Fritzsche, a civil servant,

⁶¹ Daniel Joyce, 'Human rights and the mediatisation of international law,' *Leiden Journal of International Law*, 2010, 513.

⁶² At para. 550: <http://unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>

⁶³ This information is taken from the document on the career and activities of Julius Streicher. WO 208/3806, Public Records Office, London, UK.

Streicher was a private publisher of the newspaper *Der Stürmer*, which was not a press organ of the Nazi Party, and thus not entitled to show the swastika, its distinctive symbol. This in itself indicated the lack of government recognition given to Streicher's newspaper, which contrasts markedly with the official status of Fritzsche's propaganda endorsed by the Nazi Propaganda Ministry.

In 1919 Streicher helped form "Wistrich," an anti-Semitic organisation. Hitler was involved with the German workers party which was led by Drexler until 1921, and the name changed to NSDAP in 1920 to highlight 'national' issues. By 1920, Streicher had completely merged his own group of political followers with those of Hitler, earning the latter's lifelong gratitude and protection. In 1923, Streicher had also participated with Hitler in the 'Munich Beer Hall Putsch', an attempted insurrection. In April of the same year, he founded *Der Stürmer*, which reached its peak circulation of 480,000 in 1935, whilst fluctuating and declining throughout the war years.⁶⁴ In November 1923 publication was interrupted when Streicher was imprisoned for his part in the failed Munich putsch. He was released in February 1934, bringing out a new edition of *Der Stürmer* in the following month. It soon moved to a tabloid format with slogan 'A German Weekly in the Struggle for Truth'. Across the bottom of the front page was the quote from historian Heinrich von Treischke: "The Jews are our misfortune ('Die Juden Sind Unser Unglück!').

By means of Streicher's rhetoric and cartoons, Jews were represented as bacilli, vampires, and rats. When depicted in human form, Jews were portrayed as inferior and deformed examples of humanity possessing demonic powers involved in a sinister conspiracy against German society through sexual depravity, corruption and murder. *Der Stürmer's* rhetoric was simplistic and repetitious and designed to invoke an emotional effect. In conjunction with other instances of

⁶⁴ *Id.*

Nazi anti-Semitic propaganda, Streicher's materials distanced Jews from other Germans and cultivated an ideological context that endorsed genocidal programmes.

By 1927, *Der Stürmer* was selling 14,000 copies a week, by 1934 circulation reached 100,000, and by 1935 it was almost up to 500,000. After 1933, Streicher brought out nine additional special editions, sometimes published to coincide with the annual Nuremberg rallies, some of whose print runs were two million copies. However, by 1940, circulation lowered considerably and the format was later reduced to four pages. The final edition appeared in February 1945.⁶⁵

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

After the Nazi Party came into power in 1933, Hitler soon appointed Streicher as Gauleiter⁶⁶ of the Franconia region with his base in the city of Nuremberg. However, by 1940, after allegedly being involved in major financial and sex scandals and slandering Hitler's then deputy Hermann Goering, Streicher was stripped of all party offices, and forcibly "retired" to his rural estate in Pleikershof. From this time onwards, he played no official role within the Nazi Party, but concentrated solely on publishing his anti-Semitic newspaper, which Hitler still favoured even during the war.

Nevertheless, Streicher's indictment at Nuremberg charged him with committing offences under Counts One – by using his position as Gauleiter of Franconia and personal influence with Hitler to: 'promote the accession to power of the Nazi conspirators.' More relevant for present purposes, he was also charged with Count Four for 'the incitement of the persecution of the

⁶⁵ Bryant, Mark, 'Streicher, Fips & Der Stürmer,' *History Today*, Aug 2008, Vol. 58, Issue 8: 60-6.

⁶⁶ A Gauleiter was the party leader of a regional branch of the Nazi Party. Gauleiter became a Nazi paramilitary rank, and would eventually become the second highest position, ranking only below the rank of Reichsleiter.

Jews'.⁶⁷

Streicher's political background meant that he was a staunch Nazi and supporter of Hitler's main policies, and he was certainly notorious for his anti-Semitic persecution of the Jews. Streicher's propaganda was aimed directly at the Jews; it was vile, repulsive and sometimes obscene.

However, the distinctly legal question arises as to whether or not individuals can be rightly convicted of "persecution" on the sole ground that they publicly express personal loathing for any particular group, and publish propaganda to this effect? As originally interpreted by the IMT, (although loosened in later case law) "crimes against humanity" had to manifest a connection with an "armed conflict." However, the prosecution in the Streicher case referred to many examples of pre-war propagandist hate speech without objection from the IMT itself. The IMT's judgment did not differentiate wartime from pre-war propaganda. This raises the question of whether a stream of hate speech can be considered as single entity extended over time, rather than a series of discrete episodic acts?

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

'....We want to reach the planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness, and wracked with the agonies and convulsions, of this terrible war.'⁶⁸

To substantiate this part of their case, the prosecution contended that, for over 25 years, Streicher had indoctrinated the whole of the German people in an attitude of hatred, and that he incited them to commit acts of persecution culminating in the extermination of Jewish people.

On this basis alleged that Streicher was: "an accessory to murder, perhaps on a scale never

⁶⁷ The Charter of the International Military Tribunal, Article 1 (Hereinafter, Charter), International Military Tribunal Trial of the Major War Criminals (Hereinafter, TMWC). Vol. 1 Indictment: Appendix A. The Avalon Project: Documents in Law, History and Diplomacy, Yale University Law School, online at: <http://www.yale.edu/lawweb/avalon/avalon.htm>. (visited Aug. 16, 2010).

⁶⁸ TMWC Vol. 2, Justice Jackson Opening Speech, November 21, 1945, at 104. <http://avalon.law.yale.edu/imt/11-21-45.asp>. (visited Aug. 16, 2010).

attained before.”⁶⁹ They outlined the part he had played in the Jews’ persecution between 1933 and 1945. The prosecution's evidence against Streicher consisted mainly of extracts taken from speeches and copies from *Der Stürmer*. The prosecution could draw upon an abundance of anti-Semitic material that both Streicher and his co-editors, Holz and Heimer, had written and published. Many of the quotes used in evidence were distasteful; and they reflected the vulgar tone of Streicher’s viciously anti-Semitic views.⁷⁰

Streicher’s early propaganda had preached the philosophy of anti-Jewish attitudes prevalent in Germany for hundreds of years: “We know that Germany will be free when the Jew has been excluded from the life of the German people”⁷¹ A speech in April 1925, reflected Streicher’s earliest expression that anticipated the Holocaust: “Let us start today, so that we can annihilate the Jews.”⁷² The prosecution claimed that Streicher’s propaganda: “gave birth to what was years later to become the official policy of the Nazi Government.”⁷³ These accusations had considerable justification in that Streicher’s anti-Semitic propaganda changed its tone and became increasingly vicious after Hitler came to power, and increased his references to both "annihilation" and "extermination." In other words, Streicher’s propaganda appeared to be coordinated with Hitler’s policies of persecution that later intensified into a programme of physical destruction.

⁶⁹ TMWC Vol. 5, 10 Jan. 1946, at 90. <http://avalon.law.yale.edu/imt/01-10-46.asp#streicher>. (visited Aug. 16, 2010).

⁷⁰ It is arguable that, for rhetorical effect, the prosecution strategy tended to ignore how pervasive anti-Semitism was in European society at this time, even within children’s board games and story books. Historically, it might be more accurate to suggest that Streicher "intensified" pre-existing modes of anti-Semitism and highly inflammatory anti-Semitic themes and stereotypes including predatory sexual elements, rather than personally originated them. For understandable institutional reasons, the prosecution had no interest in comparing Streicher's hate speech with the "moderate" anti-Semitism prevalent in and revered by Western ‘canons’ of literature, such as Chaucer’s *Canterbury Tales* (the Prioress’ prologue and tale), or Dicken’s *Oliver Twist*, or Shakespeare’s *Merchant of Venice*? Whilst the prosecutors needed to show the sheer "otherness" of Streicher's hate speech, academic analysis needs to be more self-critical of the very cultural traditions on whose basis historically specific conceptions of "normality" and "otherness" are set up, defined and applied as somehow self-evident and "obvious."

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

The so-called Nuremberg Laws, which codified Nazi anti-Semitism as state policy, were introduced on to the Party platform in the Autumn of 1935. At the IMT trial, the prosecutors argued that the adoption of these 'laws' was the platform for Hitler's anti-Semitic policies. Streicher had positively welcomed and approved of these measures that formed the official basis of, and authorisation for, the Nazi Party's increasingly severe persecutory measures directed against German Jews.

Part of the dilemma facing the prosecution was that, following Justice Jackson's opening speech concerning the importance of convicting the instigators of Nazi atrocities, someone needed to be convicted for actively inciting the deaths of approximately six million Jews. By mid-1945, Hitler, Himmler and Goebbels were already dead. The responsibility could not end with those who directly ordered or performed specific exterminations. Instead, anyone who encouraged, or "cried out," for the exterminations to continue might be held at least equally responsible for "inciting" mass murder. After presenting its main case against Streicher, the prosecution concluded that: "It may be that this defendant is less directly involved in the physical commission of the crimes against Jews, than some of his co-conspirators. His crime is no less the worse for that reason."⁷⁴ It did not, they claimed, matter that Streicher took no physical part in the extermination process. He had set himself the task of encouraging mass murders by "poisoning the minds" of the German people as a whole with racist hatred.⁷⁵ Furthermore, once the Holocaust was underway, he intensified his anti-Semitic propaganda to the point where it became ever-more radically genocidal:

'In the early days he was preaching persecution. As persecutions took place he preached extermination and annihilation; and as we have seen in the ghettos of the East, as millions

⁷⁴ Ibid. at 118.

⁷⁵ It is worth noting how this characterisation ascribes a particularly powerful role to the effects of hate speech as a form of propaganda, and its capacity to incite violence.

of Jews were being exterminated and annihilated, he cried out for more and more.’⁷⁶

According to the prosecutors, was the essence of Streicher’s crime of "persecution" at least with respect to the nature of his material acts of incitement. He had led the propaganda and indoctrination of the German people in increasingly radical forms of anti-Semitism, pointing towards a goal of extermination, and that this ideological activity prepared the preconditions for physical acts of persecution and, ultimately, genocide. Without him, the prosecutors, suggested: “the Kaltenbrunners, the Himmlers, and the General Stroops would have had nobody to carry out their orders.”⁷⁷ Streicher’s crime was probably greater and - in terms of its impact - more far-reaching than any of the other defendants. This was not least because elements of this propaganda were deliberately directed towards impressionable children and young people many of whom would go on to join the Hitler Youth and other Nazi Party institutions, and whose potential for racist hate crime could continue for many decades even following Germany's military defeat.⁷⁸ Streicher was especially responsible for persecution because he had: ‘injected poison into the minds of millions and millions of young boys and girls and that poison would live on ... He leaves behind him a legacy of almost a whole people poisoned with hate, sadism, and murder, and perverted by him. That German people remain a problem and perhaps a menace to the rest of civilisation to come.’⁷⁹

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

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Maggi Eastwood, 'Lessons in hatred: the indoctrination and education of Germany's youth,' *I.J.H.R.* 2011, 15(8), 1291-1314.

⁷⁹ Ibid.

If the Tribunal decided that the prosecution had proven its legal case against Streicher, it needed to determine whether: ‘words used as persecution’ warranted the death sentence. In truth, Streicher’s life depended upon the selective judicial interpretation of evidence presented by the prosecution. The IMT’s judges had to deal with a number of new issues of both law and fact. These included the legal implications of *Der Sturmer*, the duration and intensity of Streicher’s anti-Semitic incitement, the *width* of his readership, and whether there was evidence that this defendant *subjectively knew* (or perhaps ought to have known) that his words coincided with physical acts of official persecution and anti-Semitic acts of extermination. The IMT had to decide whether there needed to be proof that anyone had, *in fact*, been incited by the words Streicher’s newspaper used to carry out acts of persecution that would not otherwise have taken place, but for the influence exerted by his propaganda. In addition, the Nuremberg Charter did not set out "incitement" to commit crimes against humanity or war crimes as a separate offense, yet that type of charge may have been more appropriate for the facts of Streicher's case.⁸⁰

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

The IMT held that:

‘There is no evidence to show that he was ever within Hitler's inner circle advisers; nor during his career was he closely connected with the formulation of the policies which led to war. He was never present, for example, at any of the important conferences when Hitler explained his decisions to his leaders. Although he was a Gauleiter there is no evidence to prove that he had knowledge of those policies. In the opinion of the Tribunal, the evidence fails to establish his connection with the conspiracy or common plan to wage aggressive war as that conspiracy has been elsewhere defined in this judgment.’⁸¹

Prior to presenting the Tribunal’s judgment regarding Streicher’s guilt under Count Four -

⁸⁰ See Robert H. Snyder, 'Disillusioned Words Like Bullets Bark: Incitement to Genocide, Music, and The Trial of Simon Bikindi, 35 *Ga. J. Int'l & ComP. L.* 645, 654 n.72 (2007).

⁸¹ TMWC Vol. 1, Judgement: Streicher: <http://avalon.law.yale.edu/imt/judstrei.asp>

Article 6(c) - crimes against humanity, President Lawrence gave details of the defendant's anti-Semitic propaganda that emphasised, in particular, *the longevity* of his genocidal campaign:

'His persecution of the Jews was notorious. He was the publisher of "Der Stürmer," an anti-Semitic weekly newspaper, from 1923 to 1945 and was its editor until 1933. ... For his twenty-five years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as "Jew-Baiter Number One."⁸²

Hence, it appears that the IMT considered that Streicher's anti-Semitic campaign had been extended over nearly two decades counted as a relevant and possibly decisive factor. The same point applies to the consistency and regularity of this publication's racist messages, and the extent of his potential readership. Such factors appear to have been sufficient in the eyes of the judges to give many of Streicher's statements the required quality of "incitement to persecution."

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

'In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution. Each issue of Der Stürmer, which reached a circulation of 600,000 in 1935, was filled with such articles, often lewd and disgusting. ...⁸³

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

⁸² Ibid.

⁸³ Ibid.

A more difficult doctrinal issue concerned whether, in order to be legally classified as an act of persecution, Streicher's propaganda had to be coordinated with physical acts that amount to non-verbal forms of persecution. Alternatively, was the formulation and dissemination of his extreme racist hate expressions advocating mass extermination by itself sufficient? The IMT's judgment, which is less than impressive in terms of the quality of its legal reasoning, did not clarify or answer this particular issue. However, it cited evidence of such coordination, albeit without expressly deciding whether or not this represented a decisive or merely an incidental factor. A similar interpretive ambiguity attaches to the question of how directly exterminationist such propaganda statements have to be to cross the legal threshold between "lawful," if still grossly offensive speech, and unlawful "incitement" to acts of genocide. The Tribunal's judgment gave particular emphasis to the fact that some of this propaganda called directly for Jews to be exterminated:

'... As early as 1938 he began to call for the annihilation of the Jewish race. Twenty-three different articles of *Der Stürmer* between 1938 and 1941 were produced in evidence, in which the extermination "root and branch" was preached. Typical of his teachings was a leading article in September, 1938, which termed the Jew a germ and a pest, not a human being, but a parasite, an enemy, an evildoer, a disseminator of diseases who must be destroyed in the interest of mankind.'⁸⁴

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

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

⁸⁴ Ibid.

exterminated root and branch.⁸⁵

A further issue relates to the difficult question of whether there is a need for the prosecution to prove a *direct causal link* between words and actions.⁸⁶ It is one thing for Streicher to have intended to directly incite murderous acts, quite another to show that any specific atrocity was directly and primarily the effect of his words. This question is linked to whether international criminal law requires incitement to genocide to be classified as an inchoate offence, in the sense that there is no need to prove that actual harms or atrocities have resulted? Incitement is generally classified as an inchoate offence. However, although the prosecutor is not expected to prove that hate speech constituting the incitement resulted in to the commission of a crime, questions of causation remain relevant issues within the overall trial context. If prosecutors can present compelling evidence demonstrating that the hate speech words were published in, and were directed towards, an especially volatile social context where communal violence was, for example, capable of being ignited by such expressions, then this does form part of the conduct itself relevant to the determination of punishment.⁸⁷ Was it the case that the prosecution had to demonstrate evidence that specific acts of physical persecution took place, which stemmed directly and exclusively from individuals reading his publications, and these acts would not have occurred but for this appropriation?

The IMT accepted that Streicher possessed sufficient subjective knowledge that acts of extermination were taking place in the East, and then responded by further intensifying his anti-Semitic propaganda, including calling for even greater measures against Jews. Indeed, a key element of Streicher's guilt lay in the IMT's acceptance of prosecution evidence that he

⁸⁵ *Der Stürmer* article dated May 1939, Doc. D-811, Exhibit GB-333.

⁸⁶ See, Jamie F. Metzl, 'Rwandan Genocide and the International Law of Radio Jamming,' 91 *AJIL* 628, at 637 (1997); Joshua Wallenstein, 'Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide,' 54 *Stan. L. Rev.* 351 (2001-2002).

⁸⁷ On "direct and public incitement to commit genocide" specifically, see W.A. Schabas, 2000, *Genocide in International Law*, 266-280.

possessed sufficient knowledge of Hitler's extermination programme against the Jews, and that, despite this, he had made a deliberate attempt to 'poison the minds' of Germans in ways to encourage the intensification of such genocide.⁸⁸ The IMT's judgment itself focused more on the criminal character of inciting murder, rather than evidence of Streicher's intent and whether this met an express legal standard. For example, it concluded that: "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter and constitutes a crime against humanity."⁸⁹ On one reading, this judicial wording suggests that the coincidence of incitement with actual acts of genocide was sufficient, without needing to prove subjective knowledge of such acts, despite the fact that the prosecution had stressed Streicher's knowledge as a major factor of his guilt. Each of these issues appears to have been decided against him. He was found guilty of crimes against humanity and subsequently hanged.

For understandable reasons, academic commentators retrace the origins of incitement to genocide back to Streicher's verdict.⁹⁰ Furthermore, academics and historians alike have expressed doubts concerning the IMT's judgment.⁹¹ In regard to his sentence, Bradley Smith observed: "it is reasonable to harbour the feeling that it would have been better if the Court had taken more time and been more precise in dealing with the evidence."⁹² The American Judge, Francis Biddle, admitted that a lack of impartiality existed within the Tribunal.⁹³ Taylor considered that all the judges except Biddle and Parker were to blame for not giving the fanatical

⁸⁸ See Gregory S. Gordon, 'A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech,' 45 *Va. J. Int'l L.* 139, 144 (2004).

⁸⁹ TMWC Vol. 1, Judgment: Streicher. <http://avalon.law.yale.edu/imt/judstrei.asp>. (visited Aug. 16, 2010).

⁹⁰ See, Margaret Eastwood, 2012, *Julius Streicher On Trial at Nuremberg: The Birth of Incitement to Genocide*.

⁹¹ Denis E. Showalter, 1982, *Little Man, What Now?: Der Sturmer in the Weimar Republic*; Bradley F. Smith, 1977, *Reaching Judgement at Nuremberg*; Michael R Marrus, 1997, *The Nuremberg War Crimes Trial 1946-46: A Documentary History*; Taylor 1992 op cit. John Tusa and Ann Tusa, 1983, *The Nuremberg Trial*.

⁹² Smith, op cit, 203

⁹³ Francis Biddle, 1962, *In Brief Authority*, 473.

old Nazis' judgment more careful consideration and express justification: "The carefree way in which the Tribunal members sent him to the gallows, as if they were stamping on a worm, is especially hard to condone."⁹⁴ Others suggest that, in part at least, Streicher had been the victim of his own vulgar and repulsive reputation: "The judges came hastily to their decision about Streicher, and it seems likely that they did so at least as much out of revulsion against his personality and the wartime crimes against the Jews ... as out of reaction to his own wrongdoing."⁹⁵ Taylor, reflecting the characteristic American position on freedom of expression issues, questions whether the publication of a newspaper, no matter how scurrilous, should be considered an international crime?⁹⁶ In this context, Streicher's warranted reputation as prominent and vociferous anti-Semite appeared to be a decisive factor.

Obviously, both inside and outside of the courtroom, Streicher had made more enemies than friends, even the other defendants would not associate with him.⁹⁷ Smith claimed that: "No one had come forward to defend Streicher's character or activities, or to deny that he might have been convicted on other charges and in a different jurisdiction."⁹⁸ These opinions confirm that a degree of controversy still exists regarding both the legal basis, and hence precedent value, for the Streicher's judgment and his death sentence. This begs the question of whether a negative sentiment surrounding Streicher and *Der Stürmer* – together with the perception that, in the wake of belated knowledge of the Holocaust, 'public opinion' demanded that someone be held legally responsible for anti-Semitic propaganda – had understandably affected the Tribunal's decision.

In one sense, this is a disappointing and ambiguous conclusion for anyone concerned to identify and explain the birth of the criminalisation of racist hate crime within international

⁹⁴ Taylor, op cit 561; Tusa & Tusa, op cit 335.

⁹⁵ Marrus, op cit 253.

⁹⁶ Taylor, op cit, 264.

⁹⁷ Gustaf Gilbert, 1947 *Nuremberg Diary* 126.

⁹⁸ Ibid.

criminal law in terms of a clear "legal logic" grounded in the meaning of applicable legal doctrine. It is possible, however, than such issues could in principle be resolved by reference to a close analysis, developed in the next chapter, of a parallel IMT case involving an acquittal for linguistic expression of hate: that of the Nazis' Radio Broadcaster Hans Fritzsche.

CHAPTER TWO

THE ACQUITTAL OF HANS FRITZSCHE

Introduction

Hans Fritzsche, in contrast with Schmitt, was not a distinguished academic. Nor, unlike Streicher, was he a well-known but private newspaper propagandist. Instead, he was a middle-ranking civil servant with a journalistic background who was best known as a radio commentator broadcasting a weekly current affairs programme on his own programme, 'Hans Fritzsche Speaks'.⁹⁹ He was steadily promoted by the leadership of the Nazi regime. However, his radio propaganda work began in September 1932, a year before Hitler came to power. In that year, he was appointed head of the Government's Wireless News Service. On 1st May 1933, the Nazi regime incorporated this agency into Goebbel's Reich Ministry of Popular Enlightenment and Propaganda. Only then did Fritzsche join the Nazi Party, probably as a precondition for retaining his post and advancing his career.¹⁰⁰

The interaction of points of law and questions of fact in this case are especially interesting. If the essence of "persecution" as a "crime against humanity" was centred around, or even confined to, government acts directed against its own citizens, then it would be legally inexplicable why the Tribunal acquitted this leading radio propagandist in the Propaganda Ministry, whilst

⁹⁹ Gassert, Philipp, 'This Is Hans Fritzsche: A Nazi Broadcaster and His Audience,' *Journal of Radio Studies*, Summer 2001, Vol. 8, Issue 1, 81-103.

¹⁰⁰ His role is described in two affidavits by Fritzsche himself: Document Number 2976-PS / Exhibit USA-20; and Document Number 3469-PS / Exhibit USA-721.

convicting Streicher, a private publisher with *no relationship* to the Nazi government. In other words, the contrast between these two cases is instructive in highlighting the broad range of potential defendants including those producing expressions of racial and/or racist hate speech *outside the state sector*. Fritzsche was indicted *inter alia* on crimes against humanity being accused of "inciting" and encouraging the commission of war crimes: "by deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities."¹⁰¹

In terms of Fritzsche's official functions that were relevant to this charge, the IMT found that his positions had not carried with them a creative policy-making role. For example, although Fritzsche was in charge of The Radio Division from November 1942, this was merely one of the twelve divisions of Goebbel's Propaganda Ministry. Furthermore, he did not have "sole authority" within this division until the final years of the war. Whilst head of the Home Press Division, Fritzsche's role was to supervise the daily press conferences and transmit the propaganda directives of the Propaganda Ministry to 2,300 daily newspapers. These directives were handed to him by his superior, Dr Otto Dietrich, the Reich Press Chief, who in turn, was Josef Goebbel's immediate subordinate.¹⁰² It was Dietrich, not Fritzsche, who had translated the general propaganda directives of his chief Goebbel into specific instructions to the controlled press, and he would later stand trial for this more "creative" role.¹⁰³ In other words, whilst Fritzsche handed out specific press instructions, which included elements of racist propaganda concerning for example the "Jewish problem" and the at least implicitly genocidal issue of securing "living space" (*lebensraum*), Fritzsche had never been personally responsible for

¹⁰¹ As noted in the IMT's judgement: <http://avalon.law.yale.edu/imt/judfritz.asp>

¹⁰² TMWC Vol. 1 Judgment 1946: Fritzsche. <http://avalon.law.yale.edu/imt/judfritz.asp>.

¹⁰³ United States of America v. von Weizsaecker et al. ('Ministries case'), (1948) 14 TWC 314 (United States Military Tribunal), 565–76.

formulating these, either in general or specific terms. This was in marked contrast to Streicher's "creative" role in relation to personally devising viciously anti-Semitic materials.

Fritzsche remained a senior mid-level official within the Propaganda Ministry. Dietrich, his immediate superior was in American custody. However, the US prosecutor Drexel Sprecher, primarily responsible for this case, considered that Dietrich would have made a more logical choice for prosecution before the IMT, perhaps because he was closer to the policy-making role and creative source for anti-Semitic propaganda.¹⁰⁴ If Goebbels had not committed suicide and there been greater clarity as to Dietrich's role, Fritzsche may not have been indicted at all as a major war criminal.

A decisive factor behind the selection of Fritzsche was connected to the transnational politics of the trials: namely, that he had been arrested and held by the Russians. Given that it was the American and the British Allies who held most of the senior Nazis in custody, the Russian authorities insisted that Fritzsche should stand trial.¹⁰⁵ Indeed, according to Taylor, Fritzsche was added to the list: "only to caress the Soviet's ego."¹⁰⁶ Other commentators assert that: "Since the Russians could not take Goebbels prisoner, they had to be content with his dog."¹⁰⁷

During the Nazis' extermination programme, Fritzsche had broadcast that the war had been caused by Jews and that their fate had turned out as unpleasant as the Führer predicted.¹⁰⁸ In respect of the charges relating to incitement of the Jews, Sprecher argued before the IMT that propagandists expressing hate speech were uniquely and personally responsible for Nazi war criminality: "the results of propaganda as a weapon of the Nazi conspirators reach into every aspect of this conspiracy, including the abnormal and inhuman conduct involved in the atrocities

¹⁰⁴ Sprecher, *op cit*, 56

¹⁰⁵ Taylor, *op cit*, 59.

¹⁰⁶ *Ibid.* 90.

¹⁰⁷ Tusa & Tusa, *op cit*, 35.

¹⁰⁸ <http://avalon.law.yale.edu/imt/judfritz.asp>.

and the ruthless exploitation of occupied countries.”¹⁰⁹ Sprecher further claimed that there existed a *causal relation* between expression of hate speech meeting the legal threshold of "incitement" and the committing of atrocities. This relation was claimed to be both direct and indirect, and included ideological conditioning as well as more direct "goading": “Most of the ordinary members of the German nation would never have participated in, or tolerated the atrocities committed throughout Europe if they had not been conditioned and goaded to barbarous convictions and misconceptions by the constant grinding of the Nazi propaganda machine.”¹¹⁰ This argument clearly linked Fritzsche’s Nazi propaganda with that of Streicher as instances of 'persecution.'

Indeed, Sprecher reiterated Justice Jackson's demand for 'instigators' to be held fully responsible for the acts their hate speech incited, and that - because of the impact of such incitement - they deserved more severe punishment than the foot soldiers of genocide whom they had deceived and corrupted. In particular, he argued that: “the propagandists who lent themselves to this evil mission of instigation and incitement are guiltier than the credulous and callous minions who headed the firing squads or operated the gas chambers.”¹¹¹ This was a similar argument to that put forward during Streicher’s prosecution, in which Griffith-Jones asserted that: “The Nazi Party could not have done what they did, without having a large number of people, men and women, who were prepared to put their hands to their bloody murder.”¹¹²

Sprecher argued that the Propaganda Ministry had a special branch for the misnamed "enlightenment" of the German people; and that Fritzsche took a particularly active part concerning the "Jewish question" in his radio broadcasts, which exerted a causal impact: “These

¹⁰⁹ Sprecher, op cit, 56.

¹¹⁰ Ibid. at 64. .

¹¹¹ Ibid. at 65.

¹¹² TMWC Vol. 5, Jan. 10 1946, at 118. <http://avalon.law.yale.edu/imt/01-10-46.asp>.

broadcasts literally teemed with provocative libels against Jews, the only logical result of which was to inflame Germany to further atrocities against the helpless Jews who came within its physical power.”¹¹³

Sprecher attempted to show that Fritzsche had been personally responsible for making inflammatory types of anti-Semitic propaganda that even rivalled those of Streicher, and which had in fact incited others to commit real atrocities: “Even the defendant Streicher, the master Jew-baiter of all time, could scarcely outdo Fritzsche in some of his slanders against the Jews.”¹¹⁴ In saying this, Sprecher suggested that this defendant's criminality was no different in kind from Streicher because his radio broadcasts had also sought to persecute the Jews.

In response, Fritzsche remained indignant when the prosecution had likened him to Streicher: “I do not believe that I deserve any such accusation.”¹¹⁵ However, contrary to Sprecher’s claims, it was not possible to treat Streicher and Fritzsche’s different forms of propaganda as either on a par, or as stemming from, similar subjective motivations and intentions. Streicher alone clearly possessed both the criminal intent (founded on broadly accurate knowledge of mass exterminations), and had personally devised and formulated extreme racist propaganda.

Sprecher concluded his presentation of evidence against Fritzsche by strongly re-emphasising the importance of propaganda as a direct causal factor in, and even a precondition for, Nazi atrocities against the Jews and other civilians under Nazi control. Without apparently thinking of the implications of his argument for the credibility of the prosecution's case against Streicher, Sprecher suggested that this defendant's position as a senior civil servant within Goebbel's Ministry was an *especially incriminating factor*:

‘Fritzsche was not in the dock as a free journalist, but as an efficient, controlled Nazi

¹¹³ Document Number 3064-PS contains a number of complete broadcasts by Fritzsche.

¹¹⁴ TMWC Vol. 6, Jan. 23 1946, at 66. <http://avalon.law.yale.edu/imt/01-23-46.asp>. (Visited Aug. 12 2010).

¹¹⁵ Id.

propagandist, a propagandist who helped substantially to tighten the Nazi stranglehold over the German people, a propagandist who made the excesses of these conspirators more palatable to the consciences of the German people themselves, a propagandist who cynically proclaimed the barbarous racialism which is at the very heart of this conspiracy, a propagandist who coldly goaded humble Germans to blind fury against people they were told by him were subhuman and guilty of all the suffering of Germany, suffering which indeed these Nazis themselves had invited.¹¹⁶

Sprecher sought to demonstrate that Fritzsche had endorsed official propaganda that falsely blamed international Jewry and related capitalist interests, for the outbreak of the war, rather than Hitler's invasion of Poland.

In his defence, Fritzsche testified that he had heard that Jews and non-Jews were being arrested. However, he did not know anything about the removal of Jews from occupied territories. Concerning the fate of Jewry in Europe, this defendant maintained: "I discussed the unpleasant fate of Jewry in Europe, and according to the things that we know today, this must appear as though I meant the murder of the Jews."¹¹⁷ Throughout his testimony, Fritzsche protested that he had been lied to by Goebbels and other Nazi leaders when he inquired about reports of atrocities taking place in the East. Fritzsche stated to the Tribunal that he did not know how often he had been the victim of a falsehood or a lie from his superior.¹¹⁸

He had used sharp propagandist language, even after he thought he was being lied to by Goebbels, because the Allies propaganda was always far worse: "We were in a war, and the enemy was not too particular in his methods."¹¹⁹ Fritzsche, thus sought to excuse his statements as part of the inevitable process of exaggeration and half-truths characteristic of wartime propaganda and counter-propaganda on both sides of WW2. In the context of the IMT, this was hardly an effective argument because the legislative basis of the Nuremberg trials precluded any

¹¹⁶ Id.

¹¹⁷ Ibid. at 168.

¹¹⁸ Ibid. at 154.

¹¹⁹ Ibid. at 157.

legal consideration of the actions of the Allies.

Fritzsche attempted to rebut Sprecher's equation of his case with that of Streicher's more virulent and concerted expressions of anti-Semitic hate speech. He did so by emphasising that he had twice sought to suppress *Der Stürmer*. He testified that, during his 13 years of work, he had never quoted *Der Stürmer*, neither had any German press subject to his oversight. Fritzsche also denied ever possessing any subjective intent to persecute Jews, and insisted only that this group not attain disproportionate influence at the expense of others:

‘I was not [basically] anti-Semitic. But I was anti-Semitic [only] in this sense: I wanted a restriction of the predominant influence of Jewry in German politics, economy, and culture, such as was manifested after the First World War. I wanted a restriction based on the ratio of Jews to Germans.’¹²⁰

Fritzsche insisted that if he possessed and articulated anti-Semitic prejudices, these were of a familiar moderate nature with neither specifically genocidal implications, nor genocidal intent. He: ‘was not anti-Semitic in the idea of a noisy anti-Semitism,’ or in the sense of either the radical theories or methods beginning with Theodor Fritsch to Julius Streicher.’¹²¹ Concerned to negate an attribution of criminal intent, he presented himself as someone who, in retrospect, had himself been overly-trusting and gullible concerning Nazi propaganda. Fritzsche’s testimony claimed that he was primarily a "victim" of the lies he had been told by his superiors. He presented himself not as a willing or knowing accomplice to genocide, but rather as a more or less innocent journalist who had been effectively "hoodwinked" by his superiors. He argued that Sprecher's accusations misunderstood fundamentally the nature of his radio audience, and their vulnerability to subtle and hence more insidious forms of propaganda misrepresented as statements of fact. In his final statement, this defendant adopted the rhetorical strategy of claiming:

¹²⁰ Id. at 166.

¹²¹ TMWC Vol. 17, 27 June 1946, at 164.

I wish I had in my radio talks carried out the propaganda of which the prosecution accuses me now! Had I only expounded the theory of the Master Race! Had I only preached the hatred of other nations! Had I only urged wars of aggression, acts of terror, of murder, and inhumanity! Then, gentlemen, if I had done all these things, the German people would have turned away from me, and would have rejected the system for which I spoke. But the misfortune lies in the fact that I did not propagate these attitudes which were the secret motives of Hitler and a small circle of his henchmen.¹²²

His argument, which could have been counterproductive, was that - taken as a whole - he had not broadcast the crude and obvious type of propaganda the prosecution had claimed. Had this been the case, then it would have proved counterproductive. Whilst this suggests that the actions (his *actus reus*) was undeniable, perhaps even worse than Sprecher suggested, it negates the equally necessary requirement of subjective intent.

The factual evidence the prosecutors laid against Fritzsche was not conclusive. One of the memoranda from a legal aide working for the prosecution frankly admitted that his speeches were: 'no stronger than statements of American war correspondents in Washington during the war.'¹²³ This, in turn, raises the question of how the Tribunal's judges reacted to the prosecution's allegations that Fritzsche was guilty of producing inflammatory propaganda that endorsed the Nazi Party's persecution and degradation of the Jews and its plans for aggressive war? In particular, was his position decided to be sufficiently close to important *policy-making* aspects of Nazi racist propaganda, to its origination and authorship to merit the attribution of individual criminal responsibility? The Tribunal answered both of these questions in the negative deciding that: "His position and official duties were not sufficiently important, however, to infer that he took part in originating or formulating propaganda campaigns."¹²⁴ Clearly this accepted Fritzsche's argument that his case was clearly distinguishable from Streicher's who alone remained a creative source of hate speech. Despite the prosecution's forceful arguments

¹²² TMWC Vol. 22, 31 August 1946, at 409

¹²³ Memo Biddle Papers, Box 5. Quoted in Tusa & Tusa, *op cit*, 463

¹²⁴ TMWC, Vol. 1, Judgment: Fritzsche, 1946. <http://avalon.law.yale.edu/imt/judfritz.asp>. (Last visited March 12, 2013).

regarding Fritzsche's role in producing propaganda that fuelled Nazi policies, the IMT judges came to the conclusion that: "Fritzsche had no control of the formulation of these propaganda policies. He was merely a conduit to the press of the instructions handed him by Dietrich."¹²⁵

The judge's had reached the decision - contrary to Sprecher's efforts - not to equate the intent and knowledge of Streicher with that of Fritzsche, when the situation with respect to the latter was far less clear. For the IMT, it was certainly of a far lower order than that of Streicher, and possibly even different in kind:

'Excerpts in evidence from his speeches show definite anti-Semitism on his part. He broadcast, for example, that the war had been caused by Jews and said their fate had turned out "as unpleasant as the Fuehrer predicted." But these speeches did not urge persecution or extermination of Jews. There is no evidence that he was aware of their extermination in the East.'¹²⁶

This finding suggests that the IMT considered (or assumed) that the prosecution's failure to prove Fritzsche's subjective knowledge of actual anti-Semitic atrocities represented a decisive factor in exonerating this defendant. The problem for present purposes is that this requirement contrasts markedly with the position taken by the IMT with respect to Streicher, and indeed appears to contradict itself in relation to whether such subjective knowledge of the facts of atrocities is an essential doctrinal requirement. The judgment acknowledged that in his broadcasts Fritzsche sometimes spread what must "objectively" be interpreted as "false news," but the prosecution had failed to prove that this defendant subjectively *knew* it to be false in a manner that clearly met the criminal intent requirements for 'incitement'. It is possible for any rationalisation of these two cases to suggest that this presumed lack of intent (or a failure to positively establish it with clear evidence and compelling evidence) proved decisive.¹²⁷ It is important that, unlike Streicher, Fritzsche did not expressly advocate the extermination of Jews,

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ L. John Martin, *International Propaganda: Its Legal and Diplomatic Control*, 1958 at 206.

as this would, perhaps, have indicated what would later be termed a 'specific intent' to incite acts of genocide.¹²⁸ Also in his favour, far from endorsing Streicher's anti-Semitic propaganda, he had actively sought to suppress it, even though it was widely known that Streicher's type of anti-Semitic hate speech was personally supported and protected by Hitler himself.¹²⁹

The IMT also distinguished between generic wartime propaganda of a familiar kind that is not specifically focused on the justification of atrocities, and active and – through deliberate acts of incitement - knowing and direct forms of participation in acts of persecution defined as a sub-set of crimes against humanity. On one interpretation, this contextually questionable distinction, which prioritises issues of ascribed subjective "intent" to incite over any reasonable and objective assessment of the actual harm done by racist hate speech, placed Fritzsche on the "lawful" side of this distinction. Hence, in one sense and perhaps by accident, it created a defence of "unknowing" participation in incitement to genocidal actions through the entirely semantic exercise of insisting that any type of "participation" in hate speech must be proven to be "intentional." If the prosecution fail to demonstrate compelling evidence of intent, which represents a real challenge in many if not most cases, then damaging examples of hate speech, could escape effective sanctions because of evidential difficulties of proving beyond reasonable doubt what was going through their mind at the time, or because of the presence of a more general propagandist subjective intent rendering the hate speech element "merely incidental." As the IMT stated:

‘It appears that Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a

¹²⁸ Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later,' 8 *Temp. Int'l & Comp. L.J.* 1, 45-46 (1994).

¹²⁹ TMWC, Vol. 1, Judgment: Fritzsche, 1946. <http://avalon.law.yale.edu/imt/judfritz.asp>. (Visited Mar. 30, 2013).

participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.¹³⁰

The idea that, in this context of a war annihilation driven by a racist agenda, a clear-cut distinction existed between "purely" wartime propaganda and incitement to genocidal acts, understood as a separate category, is dubious. Here, we have to recall that the Nazis' anti-Semitic / 'master race' theory provided a dominant legitimization, even motivation, for their acts of military invasion and conquest, and even explained the distinctive genocidal practices they adopted against the Slavic peoples of Eastern Europe including Soviet POWs.

The judgment in Fritzsche's case has provoked debate on the doctrinal and extra-doctrinal reasons behind the Tribunal's decision. This is not least because only half the judges believed this defendant's protestations about being "lied to" by Goebbels.¹³¹ Furthermore, the IMT reached a split decision regarding Fritzsche's innocence with three votes for his acquittal taking precedence over three guilty votes. Obviously, and in marked contrast with the unanimous decision in Streicher's case, this lack of judicial consensus may be one factor in explaining why there still remains a question mark over the precedent value of the IMT's Fritzsche judgment. The Soviet judge, Major General Nikitchenko, claimed that the IMT's decision involved a highly selective interpretation and application of the relevant facts. This was presented as a critique. However, this naively presumes the possibility of a "non-selective" interpretation of both facts and law, and the relationship between them, in defiance of the insights of hermeneutics. Under the heading 'The Unfounded Acquittal of defendant Fritzsche,' this judge usefully summarised the majority's reasoning for this acquittal:

'The acquittal of defendant Hans Fritzsche follows from the reasoning that Fritzsche, allegedly, had not reached in Germany the official position making him responsible for

¹³⁰ Ibid.

¹³¹ See, the notes on the Fritzsche case. Adjudged not guilty – Biddle Papers, Notes on Judgement, Meetings on Individuals, Sept. 9 and 11, 1946, cited in Robert E. Conot, *Justice at Nuremberg* 491 (1983).

the criminal actions of the Hitler regime and that his own personal activity in this respect cannot be considered criminal. The verdict characterises him as a secondary figure carrying out the directives of Goebbels and Ribbentrop, and of the Reich Press Director Dietrich.¹³²

Nikitchenko contested this interpretation, mainly by reference to its understanding of the facts relating to Fritzsche's official positions and this judge's interpretation of the central and enabling role that state propaganda played in policies of "aggression" and associated "crimes against humanity." In fact, the Soviet judge maintained that, within Hitler's propaganda system, it was the daily press and the radio that were the most important weapons. Given that the Nazi leadership (and one could add the Stalinist dictatorship) realised the importance of propaganda for motivating the actions of citizens, the majority's decision that his position was not a senior or important one was difficult to accept. The remainder of Nikitchenko's judgment concentrated on supplementing and interpreting the facts of Fritzsche's biography in a far less sympathetic way than his colleagues. He interpreted this defendant's complicities in a manner that judged his official positions to be far closer to both the centre of the *creation* of propaganda policy and thus in possession of subjective knowledge of related atrocities against Jews and other civilians. Fritzsche's work brought him into closer contact with Nazi policies of persecution and extermination than he had admitted, many of which he must have been aware. Agreeing with the prosecutors, Nikitchenko insisted that this defendant's propaganda included some of the more virulent and dehumanising forms of anti-Semitism associated with Streicher.

Given this far less sympathetic interpretation of both the facts and their significance in relation to the meaning and scope of "persecution," it is not surprising that this judge favoured a guilty verdict. Superficially, as a radio broadcaster, Fritzsche's propaganda concentrated on issues that were more palatable to the German people, and he veered away from events happening in the

¹³² TMWC: Vol. 1. Judgement: Dissenting Opinion. <http://avalon.law.yale.edu/imt/juddiss.asp#fritzsche> (Visited Mar. 12 2013).

concentration camps. The Soviet judge claimed that Fritzsche admitted having access to all foreign newspaper and radio reports, some of which reported on the details of Nazi atrocities. This focus implies that subjective knowledge of such atrocities, at least in outline if not specific details, can be judicially held to be a decisive factor, and that this defendant met this doctrinal test. Although ideologically-driven, taking orders from his political masters in Moscow, Nikitchenko was more consistent than the Allied judges. He appeared to apply a broadly similar test to Fritzsche's case, as he and the other IMT judges had deployed with respect to that of Streicher.

The IMT's legacy for subsequent NMT prosecutors addressing anti-Semitic and other racist forms of "persecution' through words alone" was surely a mixed one. If we contrast Streicher's conviction with Fritzsche's acquittal, the task of determining the presumed "rationale" of the key distinctions at the level of doctrine is far from straightforward. Streicher was convicted and hung because he was held to have actively and expressly incited murder at a time when Jews in the East were being killed. This was held to self-evidently constitute "persecution." The IMT made this judgment without, however, the benefit of any judicial/judicious "weighing up" of doctrinal arguments for and against this proposition, and its policy implications for less extreme cases. The highly incriminating fact that, during the extermination programme, Fritzsche had broadcast that the war had been caused by Jews and that "their fate had turned out as unpleasant as the Führer predicted," was given a particularly sympathetic interpretation.

Furthermore, the IMT appears to have raised the doctrinal requirement for criminal intent significantly higher from that applied to Streicher, by justifying his acquittal by reference to the "fact" that Fritzsche had not been aware of what was happening to them. The idea that this comparatively senior figure within a government ministry with access to overseas media

containing considerable details of the unfolding Holocaust, clearly lacked subjective knowledge or intent, and that, unlike Streicher's, his more subtle (if perhaps more insidious?) propaganda had not "directly" urged persecution of Jews, was to remain controversial and strain credibility.¹³³ Unsurprisingly Fritzsche was subsequently prosecuted by the German courts under the de-Nazification laws, found guilty, and sentenced to nine years of hard labour and loss of his civic rights.¹³⁴ (He was pardoned in 1950 and died of cancer in 1953).¹³⁵

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

- 1/. Is a defendant's official position, or lack of it, a mitigating or an aggravating factor in cases of "persecution" by words alone?
- 2/. What is the significance of the elapse of time between the act of expressing hate speech and actual deeds falling within the legal definition of "crimes against humanity"?
- 3/. Whether or not proof of causation, in the sense of a form of propaganda shown to be inextricably intertwined with the crimes Streicher's readers perpetrated against the Jews, is a necessary requirement? Alternatively, is there a defence that *other factors* were the more immediate cause of an atrocity or genocidal programme directed against the group previously singled out by the hate speech in question?
- 4/. If causation is a requirement, then are there legally relevant distinctions between *different forms* of causation, such as direct and indirect types?
- 5/. Is there a requirement to demonstrate a defendant's subjective knowledge of such atrocities

¹³³ See Mark Thompson, 'Incitement, Prevention, and Media Rights,' in *Confronting Genocide* 97, 99 (Rene Prevost ed., 2010) who argues that effective hate speech techniques can be much more insidious than the more blatant calls to violence engaged in Streicher, and later in Rwanda by the RTLM. More generally, it is arguable that during wartime official broadcasters rarely emphasise the full nature of atrocities committed by their own side, including the rape of women, not least because they are themselves subject to forms of information control.

¹³⁴ 'Sentence On Hans Fritzsche: Nine Years In Labour Camp,' *The Times*, Saturday, Feb 01, 1947, 4.

¹³⁵ Eugene Davidson, 1966, *The Trial of the Germans*, 549–61.

prior to, or at least at the time of, the hate speech in question?¹³⁶

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

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

8/. Can the incitement caused by implicit, euphemistic and more "subtle" forms of racist hate speech similar in tone to Fritzsche's nevertheless be sufficient provocation of perpetrators to meet the legal requirement? Indeed, are these less blatant forms of racist propaganda that avoid the crudities of Nazi master race theory and Streicher's vulgar provocations, indicators of *greater culpability*, particularly in contexts where cruder expressions of hate speech could prove counterproductive?¹³⁷

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

10/. What is the legal position where the group persecuted by hate speech is individualised, such as members of a named family, or alternatively where words are directed against *all* members of an entire group in ways that segregate, denigrate and insult them as a whole?¹³⁸

11/. What is the significance of interpretations of the *cultural context* of both the original expression and reception of the meaning of hate speech? Are the likely interpretations of actual audiences at the time, including their understanding of the meaning and purpose of various euphemisms and other coded expressions, the decisive criteria for identifying "persecution" by means of hate speech?¹³⁹

¹³⁶ Although the IMT noted that Streicher continued his propaganda '[w]ith knowledge of the extermination of the Jews in the Occupied Eastern Territory', (IMT Judgment para. 538), it remains unclear whether this finding was necessary for finding Streicher guilty, or relevant only to his sentence.

¹³⁷ This point was only clarified later in Prosecutor v. Akayesu, para. 557.

¹³⁸ The ICTR Ruggiu case stated: "Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group . . . on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself." Prosecutor v. Ruggiu, Case No. ICTR 97-32-1. Judgment and Sentence, 22 (June 1, 2000). By contrast, the ICTY held in Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, 209 (Feb. 26, 2001) that the alleged hate speech did not constitute "persecution" because it did not have the same level of "gravity" as the other enumerated acts.

¹³⁹ In Mugesera v. Minister of Citizenship and Immigration [2004] 1 F.C.R. 3, Canada's Federal Court of Appeal stated that when assessing whether an utterance constitutes direct and public incitement to commit genocide, its meaning is to be assessed in terms of the speech as a whole, in terms of the particular context in which the speech was made, and in terms of whatever a reasonable listener would ordinarily interpret it to mean.

12/. How do the "vertical" and "horizontal" dimensions relating, respectively, to "conspiracies" among peers, and institutional hierarchies between comparative superiors and subordinates, affect the ascription of liability for hate speech amounting to incitement? In particular, can diverse and even antagonistic sub-groups, all of whom promote a similar form of hate speech, nevertheless be charged with participating in a wider and overarching "conspiracy"?

13/. Is a "stream" or "campaign" of hate speech to be legally interpreted as a "continuing offence" that is only "complete" when there are physical acts of persecution? Alternatively, as an "inchoate offence," is verbal persecution "complete" on each singular occasion when such speech is expressed, irrespective of whatever takes place before or afterwards?¹⁴⁰

14/. Is the IMT application of the meaning of "persecution" (by words) of particular relevance to contexts where the related category of "direct incitement" under the 1948 Genocide Convention, and parallel provisions in the ICTR statute,¹⁴¹ fail to giving fitting expression to a pervasive climate of malice and terroristic intolerance, where the content of hate speech is at least as problematic as their identifiable effects? On the other hand, can hate speech arising from a single media source meet the requirement for a type of persecution that is both "systematic and widespread," as required by modern definitions of "crimes against humanity"?¹⁴²

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

16/. Was *Streicher's* hate speech *itself* part of the Nazis' genocidal attack upon European Jewry, akin to a weapon, or rather a background ideological and motivational factor behind this attack?¹⁴³ It is unclear whether the doctrinal focus should be on the kind of harm stemming from hate speech with respect to the bilateral relationship of insulter-insulted, or upon a wider type of environmental harm in which the character of social relations between

¹⁴⁰ See G. Werle, 2009, 'General Principles of International Criminal Law,' in A. Cassese (ed.), *Oxford Companion to International Criminal Law*, 54 at 60. Instigation of these crimes is punishable only if the crimes themselves were eventually committed.

¹⁴¹ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, art. 2(3) (c), U.N. Doc. S/RES/955 (Nov. 8, 1994) [ICTR Statute]. The same language appears in the Genocide Convention. Convention on the Prevention and Punishment of the Crime of Genocide art. 3(c), Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

¹⁴² *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgment, 7 922, 931-34 (Nov. 28, 2007).

¹⁴³ In the *Nahimana* case, the Trial Chamber, the radio station and magazine in question were likened to 'the bullets in the gun,' the actual weaponry of genocide and those in charge of them bore both individual and command 'responsibilities stemming from their ownership and institutional control over the media (para. 979). The idea of media as an attack dog integral to genocide was carried forward into the appeal stage.

groups themselves are altered by pervasive hate speech.¹⁴⁴

17/. What relation, if any, is there between the interpretation and application of "persecution" through media propaganda in the Streicher case, and wider ranging non-criminal aspects of international human rights laws against discrimination that set up and embody universalistic norms of "human dignity" as fundament axioms?"¹⁴⁵

18/. Is the graphic, if seductive, judicial metaphor of racist hate speech "poisoning the mind" of entire populations in ways that encourage genocide an appropriate characterisation of the difficult policy and legal issues at stake, or does its deployment tend rather to evade them?¹⁴⁶

19/. In the context of a racist war of annihilation as, for example, fought by Hitler is it possible to identify a credible and decisive legal distinction between, say, Fritzsche's "lawful" propaganda designed to support that overall war effort, which is only incidentally racist in quality and aim,¹⁴⁷ and that of, say, Streicher's fully-blown and concerted racism that openly embodies and promotes an exterminationist agenda?

20/. What is the legal position for a defendant whose racist hate speech is as extreme as that of Streicher but which does not call upon its audience to commit physical hate crimes against the targeted group? This question stems from an ambiguity as to whether it is the resulting incitement-effect, or the hateful and racist quality of the words in themselves, which is the key determinant of illegal "persecution."¹⁴⁸

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

Given the lack of sustained and careful doctrinal analysis contained in the IMT's judgment, there is a danger of over-interpreting the distinctions between these cases. It is too easy to assume that the IMT must – as a matter of strict logic – have possessed and applied a set of legal

requirements and doctrinal tests. It may be further assumed that it is the task of academics to

¹⁴⁴ In Nahimana 1072-3 the Trial Chamber insisted the hate speech functioned by "conditioning the Hutu population and creating a climate of harm" such that ideological persecution was more than a provocation to cause harm but was the harm itself.

¹⁴⁵ For example, the preamble of the Universal Declaration of Human Rights. In N the Appeal Chamber of the ICTR found that "hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the members of the targeted group as human beings," and it suggested that such speech could provide the sole basis for a conviction. See Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgment, 7 922, 931-34 (Nov. 28, 2007), 986-7. This Court mooted such a possibility but did not go so far as to expressly endorse it.

¹⁴⁶ The Trial Chamber in Nahimana employed the "poison" metaphor from the Streicher case to justify its conclusion that the RTLM broadcast accusing all Tutsi of cunning and trickery amounted to "persecution." op cit, 1078.

¹⁴⁷ The IMT claimed that his propaganda was mainly intended: "to arouse popular sentiment in support of Hitler and the German war effort." Fritzsche Judgment, op cit, 338.

¹⁴⁸ Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment, 1073 (Nov. 28. 2007): 'there need not be a call to action in communications that constitute persecution [and thus] there need be no link between persecution and acts of violence.'

ascertain, describe and clarify these requirements, and - once this has been achieved - the underlying doctrinal rational for the differences in outcome will become fully explicable.¹⁴⁹

For example, there is the legalistic temptation to distinguish these two cases in terms of questions of intent and purpose on the one hand, and causation on the other. The presumption - here is because Streicher's anti-Semitic propaganda used words such as "kill," "exterminate" and "eradicate" this means that it follows, as a matter of logic, that the Nazi regime killed millions of Jews. Few historians could accept this simple notion of causation, least of all between words and actions. At the same time, a doctrinal "explanation" of the Fritzsche decision on the grounds that he "lacked" the required intent and purpose, and that the prosecution had failed to establish a causal nexus between his words and anti-Semitic acts of persecution, merely restates rather than resolves, what is really at issue here. By contrast, a distinctly historical form of analysis would typically examine the particular social and institutional contexts within which Streicher could issue such statements, and also within which purely "doctrinal issues" could be raised as "explanations", without question.

Such formalist assumptions may suggest that, as a matter of pure legal doctrine, it is easier to secure prosecution of private publishers of racist words because they are acting exclusively on their own initiative as a creative source of acts of incitement. Here, the contrast is with official state propagandists, who are merely acting as a mouthpiece for others who may deceive their subordinates as to the true state of affairs, thereby nullifying the required element of purposefulness.¹⁵⁰

¹⁴⁹ Cf. Spencer W. Davis, 'Incitement to Terrorism in Media Coverage: Solutions to Al-jazeera after the Rwandan Media Trial,' 38 *The George Washington International Law Review*, 749 (2006).

¹⁵⁰ There is the critical analytical question, which the prosecutors needed to avoid, of the extent to which, in both peace and war, *all types* of government deploy official statements for propagandist purposes, although rarely with the intensity and damaging effects of the Nazi regime? Is there a difference in kind, or just degree, between the rhetorical presentation of a highly selective interpretation of empirically accurate "facts," and "propaganda." Is "overt" propaganda more or less "propagandist" than more subtle and oblique forms that take care to present themselves as "objective," "impartial" and "properly balanced"? In responding

Superficially, these propositions appear to make good doctrinal sense of the contrast between these cases. And yet the difficulties become clearer if we ask what if Streicher's words had been expressed by Fritzsche or *vice-versa*? Of if Streicher had exhibited Fritzsche's repentant and sympathetic demeanour in court and had been singled out for prosecution primarily to appease the Soviets? In short, it remains an open question whether racist hate speech that amounts to 'declaratory propaganda' fell outside the scope of crimes against humanity, or whether any such distinction underplays the extent to which these cases were decided primarily on their particular facts alone with little reference to doctrinal distinctions and requirements. The IMT's statement that, in fact, Fritzsche's speeches did not *expressly* incite and encourage the commission of war crimes, remains no more than a simple assertion; it fails to provide criteria for identifying and distinguishing that sub-set of war crimes directly "caused" by his type of racist hate speech, from other forms stemming from other factors.

If Fritzsche's "innocence" rested on this lack of evidence of an actual and proximate cause and encouragement of at least some persecutorial activity through hate speech, then Streicher's guilt would need to partly rest, upon proof of precisely such a direct causal connection. Yet, as already noted, that was not the case. It is, therefore, hard to avoid the suspicion that the IMT not only applied inconsistent legal tests in these two cases, but also chose to give a particularly sympathetic interpretation to the facts of Fritzsche's complicities not shared by later domestic German Courts considering the same evidence.

The intuitive revulsion prompted by Streicher, including his physical appearance, vulgar and unrepentant manner in court, radiates from the extremely brief, even cavalier, level of legal

to such questions, are questions of the comparative gullibility, receptiveness or dismissive cynicism of the intended audience just as vital as those of the quality of the propaganda itself, and is it relevant to consider the extent to which poorly crafted propaganda can, in practice, sometimes prove counter-productive, achieving the opposite effect to that which was intended? How would European audiences typically react to the type of propaganda messages characteristic of the current North Korean regime, or *vice-versa*?

analysis explaining the grounds for his guilt. If the dominant (and I would add entirely understandable) judicial perception was that, in the wake of revelations concerning the Holocaust, he simply "no longer deserved to live" on both moral and political grounds, then there was barely any need to show with care and clarity how the proven material facts of his case met determinate and specified legal criteria. Perhaps the court was simply unwilling to provide an extensive legal rationalisation in terms of the "objective meaning" of legal precedent, doctrine and the "logical implication" of legal rules for given proven facts for what was, in essence, a moral choice in favour of a judicial killing. Perhaps, such a stance could be defended in terms of the avoidance of excessive hypocrisy? On the other hand, it could be argued that the IMT's position was itself hypocritical insofar as Streicher's physical appearance, vulgar manner, etc., were factors taken to preclude the need for any serious legal investigation and debate. Here, we can ask what difference might it have made if Streicher had - despite his crass stupidity and repugnant character - still been able to present a more attractive, polished and repentant profile similar to the "smoother" manner of Fritzsche for example, and whether any such differentiation is morally as well as legally justifiable?

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

There are, we would suggest, specifically institutional factors that may be of more use in explaining the distinctions the IMT ascribed to these two cases. Although the IMT trial was, in one sense, a first instance hearing, there was no provision for an appeal chamber, and hence no

possibility of an appeal on a "point of law." Unlike other first instance trial judges, members of the IMT did not, therefore, have to be concerned with the prospects of having their judgments unravel when subjected to later and more clinical forms of legalistic scrutiny by a higher level court eager to display its institutional and cognitive superior "authority." Far from being provisional, in the sense of subject to appeal, the IMT's "initial" determination was also a "final decision." In this sense, the judges were also legislators. Within certain semantic and cultural limits, in this case "persecution," as a subset of "crimes against humanity," meant whatever they wanted this word to mean. This semantic elasticity allowed it to be extensively stretched in one case, while contracted in another. It was within the judges' discretion to define this term narrowly in each case (for the purposes of justifying the acquittal of both these defendants), or broadly (to legally authorise their convictions and killing). However, considered in terms of their policy implications and likely moral and political reaction, neither of these interpretive options could be considered ideal. Alternatively, the IMT judges had the option of defining "persecution" broadly to ensure and justify the killing of Streicher and - albeit at the expense of a measure of internal consistency - narrowly to authorise the Fritzsche's acquittal.

Independent of legal doctrine and its implications, the IMT had little choice but to attempt to draw a policy line between "lawful" and "unlawful" propaganda involving hate speech. Had Fritzsche, a middle-level official, been classified and punished as a "*major* war criminal," then there may well have been the demand for literally thousands of other journalists and broadcasters whose actions were broadly similar (and in many cases far more extreme) to be classified and prosecuted in the same way. Arguably, this would not have been a practical option during the immediate postwar years, where the agreed Allied plan was to deploy a quasi-administrative "denazification" programme to purge and punish such individuals. Furthermore, had the

unremarkable Fritzsche been classified as a "major" war criminal on a par with SS defendant Kaltenbrunner or Hitler's chief propagandist Goebbels for example, then this might have had the unwarranted effect of diluting the proper gravity attached to this classification itself. As already noted, only the Soviets had ever classified Fritzsche as *any type* of war criminal at all, and the other prosecutors had this case foisted upon them largely for geopolitical reasons. In other words, and independently of any "strictly legal" (i.e., legalistic) considerations, there is a pragmatic institutional and utilitarian argument to be made in favour of the IMT's decision to draw an oblique and fuzzy line between the Streicher and Fritzsche cases.

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

"The divergent outcomes in the early international criminal cases against journalists may be distinguished using this conception of dignity. Julius Streicher and Hans Fritzsche were the two Nazi journalists tried by the IMT at Nuremberg. For the vitriol published in his newspaper, *Der Sturmer*, Streicher was convicted of crimes against humanity by the tribunal and executed. By contrast, Fritzsche, a radio propagandist, was acquitted on all counts. The difference between these two cases thus may prove important for understanding the status of hate speech in ICL, and lawyers involved in the Nahimana case have argued that the material distinction in the Nuremberg judgment was that Streicher directly incited the extermination of Jews, whereas Fritzsche did not. Therefore, it is argued, the Nuremberg precedent should be read to support only convictions for direct incitement, and not for other forms of hate speech. In other words, expressive activity should be the basis for a persecution conviction only when it urges violent action."¹⁵¹

¹⁵¹ Benton Heath, 'Human Dignity At Trial: Hard Cases And Broad Concepts In International Criminal Law,' 44 *Geo. Wash. Int'l L. Rev.* 317, 363 (2012). See also Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 *New Eng. J. Int'l & Comp. L.* 17, 38-42 (2005); Jean-Marie Biju-Duval, 'Hate Media '-Crimes Against Humanity and the Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda,' in *Media and Genocide*, at 343, 347.

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

'Our focus on dignity as re-stratification points toward a second important difference between Streicher and Fritzsche, at least on the facts as they are recounted in the Nuremberg judgment. The portion of the judgment convicting Julius Streicher constitutes a catalog of grievous status injuries. Though Streicher's conduct cannot be divorced from his frequent calls for extermination of the Jews, his writings are also striking in their systematic attempts to accuse the Jewish people of lies and deception, to reduce them to vermin or to a virus, and to publish weekly "lewd and disgusting" portrayals of Jews.'¹⁵²

By contrast to such rationalisations, we would suggest that *if* there is a rational and legally explicable distinction between these two cases that adequately explains the difference in legal outcome, it lies in the selective interpretation of *questions of fact and factual distinctions*.¹⁵³

Fritzsche could, despite his title as political director of German radio, plead that he was a mere "stand in" for Goebbels and, to a lesser extent, his immediate superior Otto Dietrich, who alone were the creative sources of Nazi radio and press propaganda. By contrast, the influence of Streicher's position as editor in chief and owner of *Der Stürmer* was free of any such ambiguity and could, therefore, be relied upon as a decisive criteria. If Streicher had decided to desist his anti-Semitic propaganda, then that would have made an identifiable difference to the content of his publication. But the same cannot be said for Fritzsche whose *personal responsibility* for disseminating inciting content was, therefore, far less clear.

And yet one contradiction here is that Fritzsche appears to have been given credit for

¹⁵² Benton Heath, 2012 op cit, 363; Jean-Marie Biju-Duval, 'Hate Media '-Crimes Against Humanity and the Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda,' in *Media and Genocide*, at 343, 347.

¹⁵³ In essence, the IMT downplayed the extent and quality of Fritzsche's anti-Semitic propaganda that had previously been highlighted, in undisputed factual evidence, by the prosecution: 6 TMWC 65-67 (1947).

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

Had the prosecutors selected four defendants to represent (or more precisely "personify") the racist hate crime dimension of Nazi war criminality, then Fritzsche might have ended up falling on the "wrong side" of where the judges created a dividing line between "lawful" and "unlawful" racist propaganda. When considering the origins of the criminalisation of hate speech within international criminal law, it is, perhaps, too easy to accuse the IMT judges of a lack of doctrinal clarity and arbitrariness, which of course presumes that they chose perversely to ignore a non-arbitrary option. The presumption that legal doctrines cover all relevant situations for which they have been enacted or judicially developed, and that legal codes lack "black holes," remains a strong one.¹⁵⁴ In the context of Hitler's genocidal war of racist annihilation, there was possibly no non-arbitrary way of distinguishing, by reference to the newly-devised category of "persecution," "lawful" from "unlawful" forms of propaganda. A similar point applies to the distinction between propaganda in favour of "general German war aims" from Streicher's openly exterminationist

¹⁵⁴ Prosper Weil, "The Court Cannot Conclude Definitively . . .": *Non Liqueat* Revisited, 36 Colum. J. Transnat'l L. 109 (1997).

incitement to mass murder. Central to Hitler's war aims was a racial reconfiguration of humanity based on a master race ideology to be realised through a campaign of genocide directed mainly against European Jewry.

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

We would suggest that the considerable scholarly interest in the Rwandan "Media Trial" (*Nahimana* case) at the ICTR is indicative of the continuing importance of the unresolved issues handed down to ICL by the Fritzsche and Streicher cases, both individually and when read together.¹⁵⁵ The continuing failure of international criminal to arrive at a shared understanding of the criminality of hate speech, which academic commentators have recognised, stems in part, from an understandable challenge contained with the IMT's legacy.¹⁵⁶

¹⁵⁵ Catharine A. MacKinnon, 'Prosecutor v. Nahimana, Barayagwiza & Ngeze', 98 *Am. J. Int'l L.* 325 (2004); Gregory S. Gordon, 'A War of Media, Words, Newspapers, and Radio Stations': The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech, 45 *Va. J. Int'l L.* 139 (2004); But see Scott Straus, 'What Is the Relationship Between Hate Radio and Violence? Rethinking Rwanda's "Radio Machete"', 35 *Pol. & Soc.* 609, 611 (2007); Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 *Va. J. Int'l L.* 485 (2008).

¹⁵⁶ Diane F. Orentlicher, 'Criminalizing Hate Speech in the Crucible of Trial', *Prosecutor v. Nahimana*, 21 *Am. U. Int'l L. Rev.* 557, 573-75 (2006).

CHAPTER THREE

THE NON-PROSECUTION OF CARL SCHMITT

Having discussed one successful and another unsuccessful prosecution and attempted to draw some legal and policy conclusions from their comparison, our next question concerns the practical implications of this mixed bequest for our third case study involving a case of selective non-prosecution: Professor Carl Schmitt. It is interesting to explore the borderline decision not to prosecute him because, on further investigation and interrogation, his case was deemed to fall outside the scope of 'persecution' as a crime against humanity. If re-interpreted in the light of the Fritzsche and Streicher cases, can our third case study cast new light upon either doctrinal or institutional-pragmatic questions as these appeared to the pragmatic field of awareness of international war crimes prosecutors?

In April 1947, Schmitt was facing the prospect of prosecution for Nazi war crimes at the NMT trials, which followed the earlier IMT trials.¹⁵⁷ When Schmitt was interrogated in this month, the prosecutors were entitled to rely upon the precedent of Streicher's conviction and execution for the proposition that incitement by words alone, even by a private individual, could, in principle, constitute "persecution"; and thus a "crime against humanity." Furthermore, the idea of prosecuting leading academics for incitement to genocidal acts, including acts of persecution by words alone, would not have appeared outlandish if we appreciate the significant role that German scholars played in supporting Hitler for example, or the fact that many voluntarily joined Nazi-affiliated guilds, institutes and organisations. Indeed, from 1933 to 1945, a range of German academic or quasi-academic institutes of various kinds actively promoted Nazi race

¹⁵⁷ The IMT / NMT distinction is an important one therefore as the term "Nuremberg trials" is ambiguous without it.

theory, eugenics and overtly anti-Semitic programmes.¹⁵⁸ Lenard and Starck, Nobel prize winners in physics, are perhaps the most infamous professors who endorsed Hitler. However, this long list includes Martin Heidegger, Wundt and Alfred Rosenberg from philosophy, Erich Marcks and Srbik in history, and Hans Frank and Carl Schmitt in law. Therefore, many legal academics, lawyers and judges actively collaborated, with only a fraction of those expelled by the Nazis on racial and/or political grounds ever later regaining their posts in the legal profession.¹⁵⁹

Few established senior academics, who had a choice, decided to emigrate rather than work under the inevitable compromises imposed upon them by the Nazi regime.¹⁶⁰ Hence, it is unsurprising that, in 1946, Max Weinreich, Research Director of the Yiddish Scientific Institute, published a well-researched and documented book entitled *Hitler's Professors: The Part of Scholarship in Germany's Crimes against the Jewish People*, with the clear view of having its contents deployed optimally during the NMT trials.¹⁶¹

There is considerable ambiguity and conflicting statements as to the precise reasons why Schmitt was interrogated and upon whose initiative within the America's Occupational Military Government (OMGUS) headed by General Lucius Clay. Robert Kempner, who was Schmitt's primary interrogator, provides only inconsistent accounts,¹⁶² even concealing relevant materials -

¹⁵⁸ Examples include the Reich Institute for the History of the New Germany, the Institute for the Study of the Jewish question, the Institute for the study of Jewish influence on German Church Life, the Institute for German work in the East, and the Institute for Research into the Jewish Question.

¹⁵⁹ Ingo Moller, *Hitler's Justice: The Courts Of The Third Reich*, 236-37 (1991).

¹⁶⁰ J. Bendersky, 'The Expendable Kronjurist: Carl Schmitt and National Socialism 1933-36,' 14 *Journal Of Contemporary History*, 309-328 (1979).

¹⁶¹ Yiddish Scientific Institute, 1946.

¹⁶² Compare Robert M. W. Kempner, *Ankläger Einer Epoche: Lebenserinnerungen* 129, (1983); "Preussens Ende," *Frankfurter Allgemeine Zeitung*, April 29, 1991, "Zum Tode von Professor Carl Schmitt," Robert M. W. Kempner Papers, U.S. Holocaust Memorial Museum Archives, Washington, DC, RG 71.001.01, General Correspondence, box 10. Cf. Claus-Dietrich Wieland, 'Carl Schmitt in Nürnberg' (1947), 1999: *Zeitschrift für Sozialgeschichte des 20. und 21. Jahrhunderts* 2 (January 1987): 101–102. Jörg Wollenberg, Ed., *Von Der Hoffnung Aller Deutschen: Wie Die Brd Entstand 1945 Bis 1949* (1991), 105–106. Céline Jouin, 'Carl Schmitt à Nuremberg. Une théorie en accusation', 74 *Genèses*, 1-30 (2009). The most comprehensive and recent English language overview on this question is: Joseph Bendersky, "Carl Schmitt's Path to Nuremberg: A Sixty-Year Assessment," *Telos* 139 (2007): 6–34, followed by "The 'Fourth' (Second) Interrogation of Carl Schmitt at Nuremberg," 139 *Telos* 35–43 (2007). The latter updates his earlier study which includes three of the four interrogation transcripts. See J. Bendersky, 'Carl Schmitt at Nuremberg,' 72 *Telos*, 91-129, (1997). On the wider context, see J. Bendersky, *Carl Schmitt*.

including the fact that, contrary to his published accounts, he had conducted a fourth interrogation.¹⁶³ With respect to the orientation of the Nuremberg prosecutors, Bendersky notes that:

"The question of whether Schmitt merited prosecution as a Nazi war criminal is not only of historical interest but also relevant to the current massive revival of scholarly interest in his work, including within international law and relations literature. Much of this is predicated on the belief that this writer's Weimar and post-war legal writings possess continuing value: one that transcends his short, but deplorable, period of intense collaboration. The latter signified a 'break', a temporary aberration, the cancerous fruits of which can and must be surgically removed from an otherwise healthy body of work."¹⁶⁴

Critics of this revival, such as William Scheuerman, re-affirm many of the arguments with which the Nuremberg prosecutors confronted Schmitt concerning the alleged "continuity" between his Weimar and Nazi writings. Typically, such critics argue that the overall Nazi project, including its viciously anti-Semitic doctrines and its associated atrocities against the Jewish people, represented an all-too practical realisation of Schmitt's theories and their author's hopes and dreams.¹⁶⁵ The contention that, taken as a whole, Schmitt's legal and constitutional writings contain and, insofar as they are influential, publicly incite anti-Semitism, as the Nuremberg

Theorist For The Reich (1983). On Schmitt's qualified anti-Semitism see J. Bendersky, 'New Evidence, Old Contradictions: Carl Schmitt and the Jewish Question,' 132 *Telos*, 64-82, at 64-5 (2005).

¹⁶³ Robert M. W. Kempner, *Das Dritte Reich Im Kreuzverhör: Aus Den Unveröffentlichten Vernehmungsprotokollen Des Anklägers*, 293-300 (1969), a suppression of evidence corrected only recently in Bendersky 2007 op cit.

¹⁶⁴ George Schwab, *The Challenge of the Exception: an Introduction to the Political Ideas of Carl Schmitt Between 1921 and 1936* (1970), 2nd ed. (1989); J. Bendersky, 1983, op cit; Helmut Quaritsch, *Positionen Und Begriffe Carl Schmitts* (1989), 3rd ed. (1995); Ernst Wolfgang Böckenförde, "Der Begriff Des Politischen Als Schlüssel Zum Staatsrechtlichen Werk Carl Schmitts," In *Complexio Oppositorum: Über Carl Schmitt*, 283-299 (1988).

¹⁶⁵ Those who adopt this position within the German literature in either extreme or qualified versions include Jürgen Fijalkowski, *Die Wendung Zum Führerstaat: Ideologische Komponenten In Der Politischen Philosophie Carl Schmitts* (1958); Christian Graf Von Krockow, *Die Entscheidung: Eine Untersuchung Über Ernst Jünger, Carl Schmitt, Martin Heidegger* (1958), 2nd Ed. (1990); Kurt Sontheimer, *Antidemokratisches Denken In Der Weimarer Republik. Die Politischen Ideen Des Deutschen Nationalismus Zwischen 1918 und 1933* (1978), 2nd Ed. (1962); Hasso Hofmann, *Legitimität Gegen Legalität: Der Weg Der Politischen Philosophie Carl Schmitts* (1964), 2nd Ed. (1992); Stefan Breuer, *Anatomie Der Konservativen Revolution* (1993); and Ingeborg Maus, *Bürgerliche Rechtstheorie Und Faschismus: Zur Sozialen Funktion Und Aktuellen Wirkung Der Theorie Carl Schmitts* (1976), 2nd ed. (1980); Helmut Rumpf, 'Carl Schmitt Und Der Faschismus,' 17 *Der Staat* 233, 237 (1978); Stefan Breuer, *Complexio Oppositorum: Ober Carl Schmitt*, 1989 *Kritische Justiz* 500, 503 (book review); Bernd Rüthers, *Carl Schmitt Im Dritten Reich: Wissenschaft Als Zeit-Verstärkung?* (1989); R. Gross, op cit. More recently, English language scholars have attributed continuities with Nazism and fascism to at least aspects to Schmitt's overall intellectual positions, and dismiss more sympathetic approaches that insulate his more problematic Nazi era writings from 1933-36 as 'apologist'. See, for example, David Dyzenhaus, *Legality And Legitimacy: Carl Schmitt, Hans Kelsen And Hermann Heller In Weimar*, (1997); John P. McCormick, *Carl Schmitt's Critique Of Liberalism: Against Politics As Technology* (1997); Renato Cristi, *Carl Schmitt And Authoritarian Liberalism: Strong State, Free Economy* (1998), and William Scheuerman, *The End of Law* (1999).

prosecutions attempted to establish, still remains controversial today as a damning objection routinely advanced by his critics.¹⁶⁶ From this diametrically opposed stance, Schmitt's work during the Third Reich provides the key to understanding his pre-Nazi era writings. The latter allegedly incited readers to accept Nazism, not least by discrediting and counteracting familiar intellectual arguments of liberal constitutionalism and institutional practices incompatible with Hitler's project.¹⁶⁷

Such attacks, which have recently taken on a cultural-theological twist,¹⁶⁸ are largely rejected by his defenders as a cynical, ill-informed and prejudicial smear tactic. The latter entails the expedient avoidance of the considerable intellectual challenges these writing's continue to pose to liberal and socialist agendas.¹⁶⁹ In this respect, despite dying in 1985, Schmitt remains on posthumous trial *in absentia* within contemporary scholarship, with no prospect of a conclusive verdict in sight.¹⁷⁰

In 2005, Caldwell's review of recent literature makes the interesting point that scholarly reflection upon Schmitt's responses during his Nuremberg interrogation raise interesting and more general academic issues that exhibit continuing relevance:

'Along with the apologetics, Schmitt's intellectual energy comes through in the documents as well. He raises interesting questions about the connection between an intellectual's ideas and their effect and about what the limits are to legal and moral responsibility—questions that point beyond his specific situation to more general issues about the intellectual in politics.'¹⁷¹

¹⁶⁶ On this debate, Andreas Koenen, *Der Fall Carl Schmitt: Sein Aufstieg Zum "Kronjuristen Des Dritten Reiches"* 829-831 (1995).

¹⁶⁷ Arguably the most concerted advocate of this longstanding continuity theme is R. Gross, op cit 26-28, 366, 382; Dyzenhaus, op cit 98-101; Mark Lilla, 'The Reckless Mind: Intellectuals in Politics,' *New York Review of Books*, 71-75 (2001). For a critique, see G. Ulmen, op cit, 30.

¹⁶⁸ See M. Lilla, op cit, 68-76; *Heinrich Meier, Carl Schmitt And Leo Strauss: The Hidden Dialogue* (1995); A Koenen, op cit, at 313-328, 728.

¹⁶⁹ Bendersky 2005 op cit, 64-5.

¹⁷⁰ The extremely polarised reactions to Gross' recent study are a case in point. The positive reviews include: Ulrike Herrmann, "Der Jude als Feind," *Die Tageszeitung*, Feb. 27, 2001, 16; and H. Kittsteiner, "Das entdeckte arcanum," *Neue Zürcher Zeitung*, Aug. 2, 2000. Amongst the negative are: Thomas Wirtz, "Ein fall von reiner rechtsleere," *Frankfurter Allgemeine Zeitung*, July 31, 2000. Günter Maschke, "Der subventionierte amoklauf," *Junge Freiheit*, Oct. 20, 2000.

¹⁷¹ Peter Caldwell, 'Controversies over Carl Schmitt: A Review of Recent Literature,' *77 The Journal Of Modern History* 357-387, 365 (2005).

Anti-Semitic statements within Schmitt's personal diaries and notebooks (*Glossarium*) need to be excluded from discussions of his potential criminal liabilities for acts of incitement and/or "persecution", primarily through his publications.¹⁷² Schmitt could not be prosecuted for acts of incitement or for acts of persecution by reference only to his unpublished private words. Whereas, the interrogation and proposed prosecution of Schmitt remains highly relevant to, and topical for, current academic controversies over Schmitt's changing orientations, the inverse can only be true in part.¹⁷³

The institutional details concerned Schmitt's proposed prosecution now need to be clarified. Interesting archival research by Kevin Jon Heller indicates that, on 14 March 1947, 20 May 1947, and 4 September 1947, the Nuremberg prosecutor's office (OCC) submitted three different potential trial programmes to the America's Occupational Military Government (OMGUS). Schmitt was listed as a *potential* defendant in the first trial program in what was envisaged as the 'Propaganda and Education case.' According to this initial plan, there were three definite defendants in the trial: Max Amann, the President of the Reich Press Chamber; Arthur Axmann, Schirach's successor as Reich Youth Leader; and Fritzsche's immediate superior, Otto Dietrich, Chief of the Press Division of the Ministry of Propaganda. Characterised as a "university professor and propagandist," Schmitt was listed with the following other potential defendants: Hartmann Lauterbacher, a District Commander in the Hitler Youth; Dr. Gustav Schulz, Reich Leader of Students and Lecturers; Helmut Sundermann, Press Chief and Chief of Staff in the Press Chamber, and Werner Zachintisch, from the Science, Education, and Popular Culture Division (of Goebbels' Ministry of Propaganda); Bernard Rust, Hitler's Minister of Education;

¹⁷² *Carl Schmitt, Glossarium: Aufzeichnungen Der Jahre 1947–1951, Ed. Eberhard Freiherr Von Medem* (1991). For examples of attempts to read the Weimar books and essays through the lens of sporadic private expressions of hostility mainly to specific Jews, see Dyzenhaus, op cit 93; W. Scheuerman, op cit 177-179; Gross, op cit 366-381; M. Lilla, op cit 53-54.

¹⁷³ In current hate crime guidance in the UK, words or affiliations outside of the action can be taken as evidence of 'hostility,' but this is different from 'incitement' of course.

and Herman Muhs, the Minister of Church Affairs. Between 14 March and 20 May but probably after the final interrogation session at the end of April, Telford Taylor's prosecution staff took the decision not to prosecute Schmitt since the documentation for the second proposed trial programme dropped his name from the list of defendants.¹⁷⁴

Schmitt's transition from law professor at Germany's leading Law Faculty, the University of Berlin, to the status of accused "war criminal" was an especially poignant episode in the controversial life of this legal academic. Until 1933, he had been widely recognised by Marxists, liberals and fellow conservatives as one of Germany's pre-eminent constitutional jurists. During the early 1930's, Schmitt was, perhaps, the most prominent of the conservative-authoritarian scholars who strongly opposed both Communism and National Socialism.¹⁷⁵ At that time, he became one of the strongest critics of parliamentary forms of liberal democracy.¹⁷⁶ Part of this critique was that liberal constitutionalism endorsed an "equal chance" doctrine that, on grounds of an exaggerated and unqualified notion of "freedom of expression", refused to prohibit any political movement or expression of ideology, however undemocratic and connected to a programme of the "lawful" destruction of democratic governance from within.¹⁷⁷ As Ulmen recognises, Schmitt's politics in the final years of the Weimar republic were those of a traditional Hobbesian statist conservative, which found expression in his practical collaboration not with the strengthening a resurgent Nazi movement, but with General Kurt Schleicher and Von Papen:

¹⁷⁴ Correspondence with Jon Heller: cf. <http://opiniojuris.org/2010/01/10/carl-schmitts-nuremberg-near-miss/>

¹⁷⁵ As Bendersky notes with respect to recent biographical research: 'the documents examined so far in the Schmitt Nachlass tend, in essence, to confirm the interpretation of Schmitt as a traditional conservative thinker who, for various reasons, collaborated with the Third Reich.' J. Bendersky 2005, op cit 69.

¹⁷⁶ Carl Schmitt, *The Crisis Of Parliamentary Democracy* (1985) (2nd Ed) (originally 1926) and *Political Theology: Four Chapters On The Concept Of Sovereignty* (George Schwab Tr., 1985) (2nd ed. originally 1934).

¹⁷⁷ Carl Schmitt, *Legality And Legitimacy*, 27–36 (Trans. and ed. Jeffrey Seitzer) (2004); M. Wiegandt, 'The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt,' *Cardozo Law Review*, 1583-4 (2004-5).

both strong political enemies of Hitler from the traditional conservative side of German politics willing to work within the democratic framework of the Weimar Republic.¹⁷⁸

Wieland's reliable review of the biographical evidence concludes that it would be 'false to see him as a theorist who supported the rise of the Nazis,' and that, in July 1932, he expressly 'warned in the *Tagliche Rundschau*, a paper close to General von Schleicher, against a further strengthening of the Nazis in the upcoming elections'. Wieland then quotes key parts of Schmitt's public intervention that expresses the implications of his more theoretical writings from 1931 and 1932:

'Whoever provides the National Socialists with the majority on July 31, acts foolishly ... He gives this still immature ideological and political movement the possibility to change the constitution, to establish a state church, to dissolve the labor unions, etc. He surrenders Germany completely to this group It would be extremely dangerous... because 51% gives the NSDAP a "political premium of incalculable' significance.'¹⁷⁹

At the beginning of Hitler's chancellorship and coalition government with non-Nazi conservative politicians, Schmitt expressed hope that the army would bring the "Nazi adventure" to an end and sought privately to bring this about.¹⁸⁰ This was at the time when fellow conservatives had attempted to keep Hitler away from power, and - of course - preserve it for themselves.¹⁸¹

Following Hitler's entry into government, Schmitt remained at first aloof from direct political activity while serving as a behind-the-scenes adviser to the conservative clique within the government. "I am a theorist," he told Veit Rosskopf in a radio interview the day after Hitler's appointment, "a pure scholar and nothing but a scholar."¹⁸²

¹⁷⁸ G.Ulmen, op cit, 20. Von Papen suggested inviting Hitler into government, but only because he thought, wrongly, that the conservative majority could control him, and von Papen needed the votes he appeared to be acquiring, even though these were declining by 1932-3.

¹⁷⁹ M. Wiegandt, op cit 108.

¹⁸⁰ See Lutz Berthold, *Carl Schmitt Und Der Staatsnotstandsplan Am Ende Der Weimarer Republik* 13, 77 (1999); Ferdinand Hermens, *Zwischen Politik Und Vernunft: Gesammelte Aufsätze Aus Drei Welten*, 158-159 (1969).

¹⁸¹ M. Wiegandt, op cit, 1586.

¹⁸² J. Bendersky, 1983 op cit 201.

Schleicher's resignation and the President's refusal to act against Hitler, signalled the collapse of Schmitt's preferred alternative. After having publicly opposed Nazism from a conservative perspective, even calling for this movement to be legally suppressed on the basis of his critique of the liberal "equal chance" doctrine and affirmation of broad Presidential powers under Art.48 of the Weimar Constitution to take 'necessary measures' to defend constitutional governance, Schmitt abruptly reversed his position.¹⁸³ This apparently took place within the first month after Hitler took power in 1933 as head of a coalition government with other traditional conservatives, with whom Schmitt had associated.

Schmitt was appointed by the coalition government, in which the Nazi party remained a numerical minority, to a committee charged with drafting a law that would significantly change the federal relationship between the Reich and the regional German states. Since the 1933 Enabling Act had, in effect, already legalised the Nazi take-over of regional governments, compliance with Von Papen's directive marked a turning point in Schmitt's life and work.¹⁸⁴ This was his first act of collaboration with the still emerging Third Reich. Schmitt's subsequent rapid transition from firm opponent to Nazi collaborator was made easier by his personal association with leading conservative members of what remained a coalition government, particularly Von Papen and Popitz.¹⁸⁵ Their continuance within Hitler's coalition government tended to reinforce the deceptive appearance of there being a "moderating," and by implication "responsible," conservative influence within a government in which the Nazi party remained a numerical minority, and which needed support to control the hopefully temporary Nazi threat.¹⁸⁶ However,

¹⁸³ Lutz Berthold, 'Das Konstruktive Misstrauensvotum und Seine Ursprünge in der Weimarer Staatsrechtslehre,' 36 *Staat*, 38-40, 73-4, 76-77, 81-5 (1997).

¹⁸⁴ J. Bendersky 1983 op cit, 199.

¹⁸⁵ After an aborted plot to assassinate Hitler on July 20th 1944, Popitz was arrested as a major conspirator, tried, and hanged.

¹⁸⁶ J. Bendersky, 1983 op cit, 200.

once the Enabling Act was passed on March 23 1933, it produced a new constitutional situation in effect signalling the end of the short-lived Weimar Republic.¹⁸⁷

Notwithstanding, his previous private and public aversion to National Socialism, Schmitt rapidly came to terms with the new situation, and sought to exploit it for his own advantage. Whether for opportunist careerist motives, or as a defensive move, or for a combination of the two, he joined the Nazi Party only on May 1st 1933. His party number was, 2,098,860 - emphasising his internally problematic status as a late-comer to a movement that particularly valued long-standing members ("old fighters") who could not be accused of opportunism and jumping on a bandwagon for reasons unconnected to personal convictions.¹⁸⁸

For the purpose of discussing questions of incitement and/or persecution as defined by international criminal law, a key issue is whether or not Schmitt's practical endorsement of Nazi governance signified a "fulfilment" of his prior theoretical work? Can the latter be accused of "laying the theoretical foundations" for the former? Or did it rather signify the crass betrayal of both the content and implication of his own Weimar writings, on which his reputation among centrist and leftist thought had been built up?

There is no doubt that proponents of the continuity thesis, such as Scheuerman, who adopt a prosecutorial even inquisitorial orientation towards the interpretation of Schmitt's major Weimar works, can extract apparently damning quotes to support their thesis. The latter appear to suggest Schmitt's commitment to a 'decisionist' public law theory centred around legally unrestrained acts of sovereign power where "might alone makes right," harmonised with the Nazis' "leadership principle." In addition, such critics can cite other statements that seemingly endorse

¹⁸⁷ P. Noack, *Carl Schmitt: Eine Biographie*, 9 (1993). Considered historically the strategy of creating or exaggerating "emergencies" as a way of "justifying" strong state reactions to internal and external political enemies is, of course, an all-too familiar one.

¹⁸⁸ 'Personnel File Carl Schmitt,' Party Records Gau Cologne-Aachen, and Nazi Party Records Central Munich, Document Centre, Berlin-Dahlem.

notions of "homogeneity" apparently requiring the expulsion of non-conformist elements of society. This interpretation suggests that Schmitt's writings anticipates, even prepared the grounds for, Hitler's notorious anti-Semitic Nuremberg Laws of 1935.

On the other hand, a well-prepared defence lawyer would have had little difficulty in countering such unsympathetic and retrospective interpretations of extracts of Schmitt's writings torn out their scholarly context, with other quotations. The latter might well inspire at least reasonable doubt concerning the validity of the highly selective prosecutorial interpretation of Schmitt's Weimar-era publications. The IMT's judgement had expressly rejected the prosecution claim that anyone who had been significantly involved as an "instigator" or "accomplice" with the promotion of Nazism since 1919 was potentially caught by the "common plan" / "conspiracy" dimension of the Nuremberg Charter. Rejecting this overly-broad contention, the IMT had held that the conspiracy must not have been too far removed from the time of decision and of action.¹⁸⁹

Furthermore, prior to the summer of 1933, Schmitt had positively cultivated a wide range of outstanding German-Jewish students and scholars. As a scholar deeply committed to the discussion of challenging ideas from every part of the political spectrum spanning Kirchheimer's revolutionary Marxism through to the deep Hobbesian conservatism of Leo Straus - he personally encouraged and assisted these individuals in various ways.¹⁹⁰ Ulmen recognises that Schmitt's abrupt reversal of position in 1933-4 was inexplicable to these and other scholars who had closely studied not only his Weimar-era academic works but also his political practices. Both had appeared firmly rooted in a distinctly Hobbesian conservative tradition strongly resistant to

189 IMT Judgment reprinted in AJIL 172, 22 (1947).

190 Even hostile accounts grounded in Schmitt's private files provide detailed evidence of this and Schmitt's close friendship with many German Jews, and his protection of some (e.g., Erwin Jacobi and Albert Hensel) but not all (e.g., Hans Kelsen and Arnold Brecht) colleagues from early forms of anti-Semitic persecution. See Andreas Koenen, *Der Fall Carl Schmitt: Sein Aufstieg Zum "Kronjuristen Des Dritten Reiches"*, 313-328, 367-380, 728 (1995) It appears that the criteria Schmitt deployed in lending or withholding his personal support was primarily political not racial/religious.

central tenets of Nazism. It appeared that, for purely personal and shameful reasons, Schmitt had now betrayed the very political culture he had previously been promoting at both theoretical and political levels. Ulmen recognises that:

'Most of Schmitt's colleagues, students, and admirers were shocked by his decision to join the Nazi Party. To make sense out of this development, they looked for clues in his previous writings, but they could not find any, and Schmitt was warning against a Nazi or Communist takeover of the Weimar Republic as late as 1932.'¹⁹¹

Many of his more brilliant leftist German-Jewish students and academic associates, including Otto Kirchheimer and Franz Neumann, who had admired his published work,¹⁹² turned against Schmitt *only at this point*. They turned against him precisely for having betrayed and acted grossly inconsistently with the implications of his previous constitutional scholarship,¹⁹³ which they had 'endorsed and adapted.'¹⁹⁴ Even scholars critical of Schmitt who defend the continuity thesis supportive of Schmitt's prosecution at Nuremberg have recognised that the latter's theories decisively influenced a number of other major scholars from a Jewish background, including Joseph Schumpeter, Leo Strauss, and Hans Morgenthau. Both before - and even after - the Nazi era, a considerable number of leading scholars from a Jewish background engaged with Schmitt's ideas, including Jacob Taubes, Julien Freund, George Schwab, and Alexander Kojève. Yet, there is no evidence that any of them detected any essential, even implicit, anti-Semitism within his

¹⁹¹ G.Ulmen, 'Between the Weimar Republic and the Third Reich: Continuity in Carl Schmitt's Thought,' 119 *Telos*, 18-31 (2001).

¹⁹² For examples of Schmitt's influence see Otto Kirchheimer, 'The Socialist and Bolshevist Theory of the State,' and 'Weimar-And What Then?' both in Frederic s. Burin And Kurt L. Shell, Eds., *Politics, Law, And Social Change: Selected Essay Of Otto Kirchheimer* 3-21, 33-74 (1969). More generally on Schmitt's influence on the Frankfurt School legal and political theorists, see Ellen Kennedy, 'Carl Schmitt and the Frankfurt School'; Martin Jay, 'Reconciling the Irreconcilable? A Rejoinder to Kennedy,' Alfons Söllner, 'Beyond Carl Schmitt: Political Theory in the Frankfurt School,' and Ulrich K. Preuss, 'The Critique of German Liberalism: A Reply to Kennedy,' all in 71 *Telos* 37-109 (1987). Scheuerman's 1994 study on Schmitt's influence on Neumann and Kirchheimer struggles with this contradiction of ascribing an anti-Semitic core to Schmitt's theory, whilst - at the same time - entirely exempting Neumann and Kirchheimer's left-Schmittian work from this charge. William Scheuerman, *Between The Norm And The Exception*, (2004).

¹⁹³ George Schwab, 'Carl Schmitt Through a Glass Darkly,' 1 *Schmittiana* 70, 79-80 (Piet Tommissen ed., 1988); Joachim Perels, 'Otto Kirchheimer (1905-1965): Demokratischer Marxist und Verfassungstheoretiker,' in *Streitbare Juris: Eine Andere Tradition* 401, 407-08 (1988).

¹⁹⁴ Bendersky, 2005 op cit, 75.

overall theories.¹⁹⁵ Indeed, in 1930, Schmitt had published an essay praising Preuss, a German-Jewish founder of the Weimar Republic.¹⁹⁶

The problem with the inquisitorial approach supportive of Schmitt's prosecution for incitement / persecution is that it fails to appreciate the contradiction involved in ascribing an essentially anti-Semitic theoretical approach of the kind and quality analogous to the hate speech of Streicher, or at least Fritzsche, to his pre-Nazi era publications. If, as alleged, Schmitt's Weimar theoretical writings at least implicitly lay the theoretical and ideological foundations for Nazism, then – on what legal logic – could one claim that Kirchheimer, Neumann Straus and other German Jews, who fled the Nazis, avoid prosecution (or at least denazification trials) for their role in spreading Schmittian theory even as late as 1933?¹⁹⁷ Yet, the very idea of prosecuting such German émigré victims of Nazism, who possess unimpeachable anti-fascist backgrounds, for alleged criminal complicity concerning anti-Semitic incitement, would surely have appeared grotesque, even to the most zealous Nuremberg prosecutor.

On the basis of the earlier Streicher precedent, prosecutors might have considered that Schmitt's participation in aspects of Nazi ideologies that, it could be argued, were ultimately supportive of atrocities and illegal war was, in itself, unlawful. However, they would also have been aware of the IMT's decision acquitting defendant Schacht (Hitler's early Finance Minister who had resigned in 1937).¹⁹⁸ Whilst this defendant had engaged in actions close to the centre of state power that had helped legitimate and materially stabilise Hitler's early rule, there was insufficient proof that he had thereby *subjectively intended* to participate in this regime's wider criminal acts, which intensified towards genocidal policies after his resignation. Thus, another

¹⁹⁵ Bendersky 2005, op cit, 72 relying in part upon Armin Mohler, ed., *Carl Schmitt-Briefwechsel Mit Einem Seiner Schüler* 95, 119-122, 171, 234-235, 248-249, 251-253, 256-257, 341, 354-356, 407, and 421-422 (1995).

¹⁹⁶ *Carl Schmitt, Hugo Preuss: Sein Staatsbegriff Und Seine Stellung In Der Deutschen Staatslehre* (1930).

¹⁹⁷ These critics include W.Scheuerman, op cit, 181-255 and John p. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics As Technology*, 302-305 (1997).

¹⁹⁸ IMT Vol. 1, Judgment: Schacht, 223.

legal difficulty facing any proposed prosecution of Schmitt lay in establishing and ascribing evidence of the *required subjective element of criminal intent*, and then co-ordinating any pertinent evidence of this with the factual details of his allegedly criminal actions. The identification of 'intention' ('guilty mind' or *mens rea*) within criminal trials has, of course, to be retrospective ascribed or imputed by others, often based upon specific presumptions, including common sense understandings of typical human motivations in given contexts, together with circumstantial evidence.¹⁹⁹ Our point is that to ascribe war criminality to Schmitt for his pre-Nazi era writings on the basis of the continuity thesis would have faced a difficult task. It would have to had to clearly demonstrate that his subjective intent, purpose and motivation was primarily to promote Nazism, including the latter's extreme anti-Semitism, albeit perhaps – if for tactical reasons alone - in a disguised and indirect manner.

Given that there was little chance of extracting a confession from Schmitt to substantiate this legal requirement contention concerning his subjective intentions, the difficulty facing the prosecutors was that there was little material evidence to support it, and ample counter-evidence available to a defence lawyer. For example, this academic and writer of a series of expert constitutional commentaries clearly possessed a massive professional investment in the preservation of the Weimar constitution, albeit possibly in a modified, more authoritarian Presidential form, until Germany's economic and political crisis were resolved. In addition, there was evidence contained both in his late-Weimar writings and personal actions within the party political sphere that Schmitt was deeply troubled regarding the prospect of the Weimar Republic being swept away and replaced by the predictably non-constitutional form of governance by either Communists or Hitler.²⁰⁰ This ominous development threatened to destroy his own

¹⁹⁹ Ilias Bantakeas, Susan Nash, *International Criminal Law*, 362 (2003).

²⁰⁰ G.Ulmen, *op cit*, 20.

'intellectual capital' as a constitutional law expert. The emergence of a one-party dictatorship dismissive of the very idea of constitutional governance would have meant that his hard-won expertise – and its widespread domestic and international recognition by other scholars - would have become irrelevant. A defence lawyer would have had little difficulty in arguing that Schmitt's actions in the final years of the Weimar Republic were, in fact, consistent with – and were intended to be consistent with – the fulfilment of his own professional material interests. It would not have been difficult for any defence lawyer to argue that, at the subjective level, his Weimar works were never intended to encourage the Nazi take over of Germany. On the contrary, and given his material interests, it is more credible to believe that Schmitt's intent and purpose was to oppose such a development, and his scholarly and practical actions need to be interpreted in this light.

Furthermore, in a criminal trial, it is of course, for the prosecution to prove its case beyond reasonable doubt, not for defence lawyers to have to prove their clients' innocence. Hence, any ambiguity concerning Schmitt's motivations and actions prior to the Hitler era, of which the historical record suggests that there were certainly many, could not be expected to be judicially interpreted in favour of the prosecution. In other words, with respect to his publications and political actions prior to joining the Nazi party in May 1933, prosecutors would have had to assume that, within any future trial, conflicts of evidence generated by the sharply opposed narratives of defence and prosecution lawyers would be resolved in favour of the former.

On the other hand, the situation with respect to the next three years is very different. Schmitt actively participated in the first three years of Nazi regime by giving lectures and writing publications, newspaper articles and pamphlets. In these, he attempted to 'give meaning to Hitler's phrases' and implicitly reshape the intellectual and constitutional void within Nazi

doctrine along less extreme, more traditional lines that implicitly resisted the assimilation of the traditional state structures into mere tool of the Nazi movement. As Wieland notes, Schmitt became an active propagandist within popular, as well as academic, publications on behalf of the Nazi movement and its programme of dictatorship, and that any potential prosecution case alleging "crimes against humanity" would have been well-advised to concentrate upon on the content, style and quantity of these numerous writing:

'In the years between 1934 and 1936, Schmitt wrote about forty articles that supported the restructuring of the legal system in a National Socialist way. Only one week after the Enabling Act had been passed, he presented an article that justified the suspension of the constitutional guarantees. In May 1933, he was the author of a column entitled The German Intellectuals in the Cologne Nazi newspaper *Westdeutscher Beobachter* that fiercely attacked the oppositional German emigrants. Schmitt argued that they had never belonged to the German nation and finished his article with the sentence: "They are spit out of Germany for all time." Many of Schmitt's articles appeared in regular newspapers and not in exclusive legal magazines, thus helping even more effectively to consolidate the National Socialist basis in the founding years of the regime. This alone would be enough to warrant the charge of a disgusting opportunism towards the Nazis.'²⁰¹

Consequently, Schmitt became widely known abroad at least as the Nazi's 'Crown Jurist' and "the self-appointed ideologue of the Nazis".²⁰² As a member of the Prussian State Council personally appointed by Goering in July 1933, Schmitt had also materially assisted with drafting Nazi legislation. This included the municipal laws of December 1933, and other: "practical questions of Prussian administration and organisation." He helped write new laws that placed municipalities under direct Nazi party control, rather than under the control of the central state machinery, thus destroying federal aspects of the German system of government.²⁰³ Schmitt even publicly welcomed the notoriously anti-Semitic Nuremberg Laws as signalling the end of the

²⁰¹ M. Wiegandt, *op cit*, 1588.

²⁰² George Schwab, *Carl Schmitt: Theorist For The Reich*, 3 (1989). It might be a mistake to assume that even in this deplorable role Schmitt's writings avoided having to reckon with the practice of censorship, including self-censorship.

²⁰³ Dirk Blasius, *Carl Schmitt: Preussischer Staatsrat in Hitlers Reich*, 10-14, 105-7 (2001).

mere legality of earlier German constitutions, which did not originate in “German blood and German honor”²⁰⁴.

Especially relevant for present purposes concerning the possibility a successful prosecution for incitement and/or persecution is the fact that Schmitt published several short articles, such as *State, Movement, Nation* (1933), and *National Socialism and International Law* (1934) in which he sought to render considerable service to the ideological transformation and subordination of the judiciary into a subservient branch of Nazi government.²⁰⁵ Other publications from this period express Schmitt's strong support for the Nazi regime, and have formed the object of particular controversy. For example in *The Fuhrer Defends the Law*, published on August 1st 1934, he justified the murders by the SS of scores of internal party rivals associated with the SA in the notorious 'Night of the Long Knives' purge of June 30, 1934. According to Schmitt, such killings were concrete expressions of the highest jurisdiction of the Fuhrer, who unified judicial with political and governmental authority. This work contains only heavily coded and implicit criticism of abuses of this purge involving the murder of his former mentor General Schleicher and the latter's aides. It now appeared that a former principled conservative opponent of the Nazis had now been converted into an apologist for a murderous one-party dictatorship. Thereafter, Schmitt would find it increasingly difficult to either sustain or extricate himself from his Nazi entanglements.²⁰⁶

Schmitt was materially rewarded for such endorsements of Hitler and collaboration more generally. In autumn 1933, he accepted the directorship of the Berlin faculty group of the Nazi Lawyers' Guild, an organisation created by Hans Frank Minister for Legal Affairs (and later

²⁰⁴ Ibid. 168. These biologicistic references, in fact stupid if rhetorically powerful metaphors, are of course stock in trade of extreme nationalism more generally, and rarely if ever encourage positive outcomes, least of all for those deemed to fall outside their cherished zone of exclusivity.

²⁰⁵ C. Wieland, op cit, 98.

²⁰⁶ J. Bendersky, 1983 op cit, 218.

notorious Governor General of Poland (1939–1945) and Nuremberg defendant, who had become his protector. Schmitt's standing within this organisation was, he claimed, dependent upon the patronage and support of Frank, which ended in December 1936.²⁰⁷ Schmitt profited professionally from his co-operation with the Nazis by being appointed chair of law at the pre-eminent University of Berlin and chairman of the Nazi League of German Jurists. He was also appointed editor of the leading law journal, *Deutsche Juristen-Zeitung*.²⁰⁸ This was a prestigious academic journal, not comparable to the tabloid *Der Stürmer*.

And yet, as already noted, the prosecutors would have been all-too aware of the IMT's acquittal of Fritzsche and Schacht who had left official posts in 1937, and the remarkable failure to convict even Baldur Von Schirach, the leader of the Nazi Youth, for "crimes against humanity" with respect to the indoctrination of a generation with anti-Semitism. These legal decisions would have caused potential difficulties with respect to Schmitt's potential case before the NMT. Schacht had not been convicted of "crimes against humanity" because his administration of anti-Semitic expropriatory exchange controls took place *entirely before the war*, and could not be linked to the preparation for warfare in any material way. In particular, this judgment raised the question of whether Schmitt's anti-Semitic statements, and later *Grossraum* theory of international law, could be convincingly interpreted as being sufficiently proximate in time to actual criminal acts of physical persecution?

Despite his rapid rise to prominence within academia and legal affairs during 1933-34, Schmitt soon ran into difficulties with his rivals within the Nazi Party. He discovered that determined attempts to readjust his prior Weimar ideas to suit the distinct policy imperatives of National Socialism fell significantly short of what was demanded by longer standing party ideologues.

²⁰⁷ Schmitt in J. Bendersky, 1997op cit, 121.

²⁰⁸ Ibid., at 92.

Furthermore, he became personally affected by some of the bitter and sectarian divisions within the party itself, which were contested in a particularly unscrupulous manner.²⁰⁹ Leading figures such as Goering, Himmler, Rosenberg and, to a lesser extent, Hans Frank, fought each other and jostled for position through their proxies and subordinates.

Schmitt was not well-equipped to succeed in this vicious institutional context. He had never previously taken seriously Nazi ideology, other than as a dangerous and primitive rival political movement needing legal suppression. Nor had he ever engaged with distinctly Nazi ideas and beliefs rooted in race / master-race theory. On the contrary, his constructionist/phenomenological approach was categorically hostile to any form of reductionist and biologicistic approach. Whilst his Weimar studies had discussed Marxism, liberalism, anarchism and Mussolini's Fascism in a scholarly way, without endorsing any of them as suitable models for Germany, he had pointedly ignored Nazism and Nazi racist philosophy. Ironically, Schmitt's prior studies and expertise would have been better prepared intellectually to contribute to the ideological work for a Marxist-Leninist dictatorship, or perhaps that of Franco, than for a Nazi one. Presumably, his earlier lack of engagement with Nazi ideology, even within the fields of constitutional and international law, is explicable because he had long recognised that its ideological content lacked any significant intellectual content whatsoever.²¹⁰ Hence, despite his personal ambitions and self-confidence, Schmitt was singularly ill-equipped to collaborate at the ideological level in ways that would harmonise with the divergent expectations of this movement's longer-established ideologists. The arrogant idea, shared with philosopher Martin Heidegger, that National

²⁰⁹ G.Ulmen, op cit, 27.

²¹⁰ See for example Schmitt's review of Erwin Von Beckerath, *Wesen Und Werden Des Fascistischen Staates* (1927), and "Wesen Und Werden Des Fascistischen Staates," both in Carl Schmitt, *Positionen Und Begriffe Im Kampf Mit Weimar — Genf — Versailles 1923-1939* (1940), 2nd ed. 111 (1988).

Socialism could be refashioned and redefined by means of the intellectual superiority of his interventions was always a vain delusion.

Schmitt's status as a "March violet," a high-profile late-comer to the Nazi cause, aroused particular suspicion and envy among the party's "old fighters."²¹¹ Many were angered by the fact that someone who was both a new arrival and former political opponent received so much acclaim and rapid promotion with the support of Frank and Goering. Schmitt's aspiration to play the dominant role of 'Crown Jurist' was deeply resented. For these reasons, his party critics, some of whom aspired to this role following many years of service, argued with justification that Schmitt had acquired neither great influence nor popularity with the Nazi party itself.²¹²

Furthermore, his enemies were not confined to long-standing Nazis. Since 1934-35, Schmitt became increasingly vulnerable to the publication abroad of scathing personal attacks upon him by refugee émigrés and Nazis concerning his previous cordial association with German Jews, including many well-known leftists and liberals who were vocal critics of Hitler's regime. Critics emphasised his genuine support for General Schleicher, Catholic commitments, and – most damning - for having once referred to Nazism as: “organized mass insanity.”²¹³ Once again, these points were factually accurate as even Schmitt's critics accept.²¹⁴

In response to such attacks, and for the first time, Schmitt began to include a small number of gratuitous anti-Semitic remarks within his published articles and books.²¹⁵ However, he soon discovered that even these efforts to pay strategic lip-service to Nazi anti-Semitism, and thereby counteract these attacks by passing himself off as a hard-core Nazi, was starting to backfire horribly upon him. As Bendersky notes, Schmitt had seriously underestimated the Nazi

²¹¹ J. Bendersky, 1983 op cit, 220.

²¹² Ibid.

²¹³ J. Bendersky, 1983 op cit, 224-25; G. Ulmen, op cit, at 27.

²¹⁴ M. Wiegandt provides interesting details summarising the various biographies, op cit, at 1582-83.

²¹⁵ J. Bendersky 1983 op cit, at 95.

movement's capacity to detect and turn against those new-comers who sought to exploit this party for their own ulterior career purposes:

'By 1934 the Jewish question has serious personal ramifications for Schmitt. Jewish émigrés, many of whom were his former students and friends, are exposing his past relationships with Jews and the contradictions between his theories and Nazi ideology. His Nazi opponents used this against him There is a reciprocal sense of betrayal and bitterness between Schmitt and émigrés.²¹⁶

These factual point would have probably supported a defence lawyer's argument rebutting the accusation that Schmitt's Weimar works laid a theoretical foundation for Nazism. Of course, prosecutors could have selected a dozen incriminating examples of Schmitt's anti-Semitic statements from the 1933-36 period of active collaboration as part of a prosecution brief organised in a similar way to that of Streicher's support of the Nazi Party's racist policies. And yet the problem remained that, when viewed in context Schmitt, it would have been extremely difficult to portray Schmitt as anti-Semitic fundamentalist and obsessive racist propagandist broadly akin to Streicher without facing a mass of counter-evidence. It could be anticipated that a defence lawyer would argue, perhaps with some success, that his expressions of anti-Semitism were sporadic and haphazard and – with rare exceptions - rarely at the centre of whatever theoretical or policy argument he was developing at the time.²¹⁷ By contrast, Streicher's propaganda was essentially and zealously anti-Semitic and specifically called for ever greater persecution of European Jewry in direct and unambiguous terms that intensified in coordination with acts of physical persecution.

Concerning the 1933-6 period, Bendersky notes that there is evidence that many instances of Schmitt's deplorably racist expressions of this kind appears to be an insincere, tactical, and defensive. In this regard, and with respect to the earlier IMT decisions relevant to questions of

²¹⁶ J. Bendersky, 2005 op cit, at 79.

²¹⁷ D. Blasius, op cit, 105-7.

anti-Semitic incitement and the restriction of crimes against humanity under Art 6(c) to the period 1939-45, it is possible that his case would have been judicially interpreted as far closer to that of Fritzsche than to Streicher. The fact that Schmitt's anti-Semitic statements trailed off markedly after having reached a virulent peak of intensity in 1936, would certainly have posed a challenge for his prosecutors, not least following Schacht's acquittal. As Bendersky notes:

'Here [in Schmitt's publications from 1933-36] we find anti-Semitic expressions totally uncharacteristic of his earlier work and relationships. Yet, even in these years, we do not find an immediate emergence of anti-Semitism or even an extensive, pervasive or constant manifestation of it. Instead, it emerges only gradually and always remains limited. Given the kinds of compromises he was already making, he would have had much to gain by exploiting this issue. But early on he never does. Initially, his few anti-Semitic references appear only as minor lip service to Nazism and gradually escalate as he is under attack for not being a true believer. His anti-Semitism reaches its peak in 1936, when he is under assault by the SS. After this watershed showdown with the Nazi state, he actually has very little to say on the Jewish Question at all. This pattern is also evident in perhaps his three major works during the Nazi years: *The Three Types of Juristic Thought*, his work on Hobbes' *Leviathan*, and his *Grossraum* theory. Nowhere in these works is what he has to say, or even imply, about Jews a necessary element in his theory. One could eliminate these references or insinuations without in any way affecting the theory.'²¹⁸

Nuremberg prosecutors may have appreciated that a competent defence lawyer would have argued that these outbursts were made, at least in part, under duress. They represented a desperate and transparent response to his being outflanked by the Nazi zealots of the SS during an internal power struggle.²¹⁹ At this time, both the Rosenberg Office, responsible for promoting and defending Nazi ideology, and the feared Nazi internal security organisation *Schutzstaffel* ("SS"), headed by Himmler, began gathering incriminating evidence against Schmitt.²²⁰ Thus, in

²¹⁸ J. Bendersky, 2005 op cit, 77.

²¹⁹ Ibid., 95.

²²⁰ Ibid, M. Wiegandt, op cit, 1591.

1935-6, Schmitt's claims to be a genuine Nazi were increasingly under threat and unravelling, not least from his fellow legal theorists Otto Koellreutter.²²¹ As Bendersky recognises:

'As the aspiring regime crown jurist, Koellreutter launched a campaign denouncing Schmitt as a neo-Hegelian conservative whose political theory lacked a racial foundation and contributed nothing substantial to National Socialism. Koellreutter eagerly contributed to the SS attacks on Schmitt'²²²

Such attacks typically included references to Schmitt's many Jewish friends, professional associations and scholarly influences that allegedly betrayed his long-standing "lack" of required anti-Semitism, and hence credentials as a Nazi. As Ulmen recognises, these ominous SS denunciations had a valid factual basis, one which a defence lawyer for Schmitt could have exploited:

'Any discussion of Schmitt and the Third Reich immediately raises the issue of anti-Semitism. Yet, there was no trace of anti-Semitism in any of Schmitt's writings or personal relations prior to 1933; on the contrary, not only were some of his brightest students and admirers Jews, but he dedicated his major treatise on constitutional law [1928] to the memory of his friend, Dr. Fritz Eisler, who fell on September 27, 1914, and he had high praise for Hugo Preuss, both of whom were Jews.'²²³

From the summer of 1936, Schmitt and his associates became increasing subject to SS surveillance as potential subversives, even with respect to their academic duties. In response to these growing threats, he tried to rehabilitate himself by resorting to a more intense, public display of anti-Semitism. The despicable low-point of this attempted included his organisation in a 'Conference of Judaism in Jurisprudence', which opened in Berlin on October 3rd 1936. Schmitt concluded the event with a crassly anti-Semitic Nazi speech on 'German Jurisprudence

²²¹ See Otto Koellreutter, *Volk Und Staat In Der Weltanschauung Des Nationalsozialismus*, 6–11, 19 (1935); *Deutsches Verfassungsrecht: Ein Grundriss*, 3–4, 26 (1938); and *Der Deutsche Führerstaat* 16 (1934). See Bendersky, 1983 op cit, 221–27,
²³⁴ Ibid, 248–49.

²²² J. Bendersky 2007 op cit, 11-12.

²²³ G. Ulmen, op cit, 27-28.

in the Struggle against the Jewish Intellect.¹²²⁴ As the following extracts from the latter address, published in the *Deutsche Juristen-Zeitung* under the title *German Jurisprudence in Combat Against the Jewish Mind*, make clear, this “conference” promoted the policy of having the works of Jewish legal writers labelled as “non-Germanic”, and then ultimately expelled from libraries of “pure German” legal scholarship:

'A Jewish author does not have any authority for us, not even a "purely academic" authority A Jewish author, if he is quoted at all, is for us a Jewish author. Adding the word and the attribute "Jewish" is not a formality, but something essential. However, most important ... is the clear and final finding that Jewish opinions, in their intellectual content, cannot be put on the same level with German and other non-Jewish authors. Again and again at this conference, the knowledge got through that, for the German kind of mind, the Jew is unproductive and sterile. He does not have anything to say to us, may he combine as sharply as possible, or may he assimilate as zealously as possible. When it is said time and again that this man [Stahl] was "subjectively honest," it may be so, but I have to add that I cannot look into the soul of a Jew and that we do not have any access to the internal essence of the Jews. We only know their disparity from our kind. Who once has understood this truth also knows what race is.'¹²²⁵

On 2 December 1936, Schmitt followed up this conference with a letter to SS Leader Himmler explaining his personal anti-Semitic efforts to "purge" German legal scholarship, and committing himself to serve this policy within the legal sphere. As his biographer Bendersky notes concerning the 'conference': “[T]his was self-serving, dishonest and morally despicable – and it failed to convince even his opponents that it was anything but a sham.”¹²²⁶ Another low-point was his written praise of the 1935 Nuremberg laws that withdrew German citizenship from Jews as a "constitution of freedom.”¹²²⁷

At this time, close surveillance by the political intelligence sub-division of the SS showed that Schmitt intended to better secure his position within the party by acquiring the sympathy of men close to Hitler, and it was this intention that explained his invitation to Julius Streicher to attend

¹²²⁴ Ibid. Carl Schmitt, 'Die Deutsche Rechtswissenschaft im Kampf gegen den jildischen Geist,' 41 *Deutsche Juristen—Zeitung*, 1193-1199 (1936).

¹²²⁵ Ibid, col. 1195, 1195-97.

¹²²⁶ J. Bendersky 1987op cit, at 96.

¹²²⁷ M. Wiegandt, op cit, at 1591.

the Berlin Conference. (Both Schmitt and Streicher had been subjected to SS surveillance). The SS judged, probably correctly, that Schmitt's "conference" was little more than a cynical and self-serving attempt to defend himself from various incisive and factually accurate attacks from more ideologically-committed, die-hard Nazi lawyers, and to rehabilitate himself within the National Socialist regime.²²⁸

It soon became even clearer that Schmitt's attempts at strategic deception had failed miserably, and his sham had even proved counterproductive for him. Certainly immediately after the conference, on December 3, he was heavily criticised by successive issues of the SS magazine *Das Schwarze Korps* (The Black Corps). These articles charged him with "insincere opportunism," with various articles pointed out his numerous Weimar connections with Jews, the statist and non-racist nature of his political and legal theories, and Schmitt's earlier sustained support for the conservative political opponents of Hitler, such as Von Papen and Schleicher.²²⁹ In Schmitt's defence, Hermann Goring, who had personally appointed him to Prussian State Councillor, complained to the editor about an attack upon his own personal appointee (which implicitly recognised how senior Nazis fought with each other through attacks upon each other's appointees and supporters.) However, the damage to Schmitt's credibility within the Nazi movement and beyond had been done, and Goering's protection was sufficient only to preserve his academic position as law professor, and protect Schmitt and his family from physical attack. As of January 1st 1937, Hans Frank relieved Schmitt of his various posts within the Nazi legal organisation. Despite Goering's intervention, the internal SS campaign against Schmitt for crass opportunism and careerism continued, although not in overt media attacks.

²²⁸ J. Bendersky 1983 op cit, 234.

²²⁹ M. Wiegandt, op cit 1599.

After Schmitt's fall from favour within the Nazi movement, he became mistrusted by all sides, either for his demonstrable insincerity, or – by former friends and colleagues outside that movement - for his initial collaboration and betrayal of his earlier positions.²³⁰ For the next two years, he focused his academic studies on the less contentious field of international law, and an important product of this was his '*Grossraum* Theory' (large space).²³¹ As Schmitt first presented these ideas only weeks after the German occupation of Czechoslovakia, the press took special notice. Articles appeared not only in Germany, but also in England. Two British newspapers, *The Times* and *The Daily Mail*, presented Schmitt as the key theorist behind Hitler's 'expansionary policy' (*Lebensraum*).²³² To those outside the National Socialist camp at least, it appeared that Schmitt had returned to the Nazi fold as their main academic theorist supportive of a type of military expansionism which (although absent in Schmitt's writings) nevertheless was itself rooted in Nazi anti-Semitic race theory.²³³ Schmitt appeared to have formulated and refined a theory of *Grossraum* that anticipated and 'justified' Hitler's military expansionist policies, which the Nazis' ideological rhetoric termed '*Lebensraum*', or 'living space', supposedly reserved for the so-called 'master race' at the expense of the Jewish, Slavic and other peoples of Eastern Europe.

One complicating factor here was that the Nazi press strongly attacked Schmitt precisely because his *cultural-ethnic* conception of *Grossraum* was entirely independent of the Nazi race theory, which expressly underpinned Hitler's *Lebensraum* conception.²³⁴ It was as if one side of Schmitt wanted to collaborate and receive official recognition as an intellectual leader of Nazi international law but another, more scholarly part of his make up wilfully refused to endorse a

²³⁰ J. Bendersky, 1983 op cit, 244.

²³¹ Ibid. at 250-262. This theory of international law was based largely upon the idea that the era of the nation state was now finally over, and that sovereignty was increasingly centred on regional power-blocs. Carl Schmitt, *Völkerrechtliche Grossraumordnung Mit Interventionsverbot Für Rauffremde Mächte: Ein Beitrag Zum Reichsbegriff In Völkerrecht* (1939).

²³² J. Bendersky, 1983 op cit, 258.

²³³ Ibid.

²³⁴ Ibid, 258-9.

race theory that would destroy his international scholarly reputation. Another possible complication was that the IMT prosecutors had failed to connect even Streicher's extreme and genocidal anti-Semitic propaganda with Hitler's theory of "living space." Through his *Grossraum* studies, Schmitt still clearly sought renewed influence over German foreign policy at a time of impending conflict, but he sought to do so at least partly on his own terms. Despite a smattering of some anti-Semitic statements in these *Grossraum* studies and an underlying nationalistic orientation in favour of Germany, his stance still refused to endorse the toxic absurdities of Nazi master race theory. Unlike other Nazi jurists, he had a hard-won and international scholarly reputation to protect, and was probably unwilling to sacrifice this.

Sympathetic scholars have engendered controversy by directly confronting and seeking to rebut a central claim on which rested Schmitt's status as a potential war crimes defendant. Bendersky, for example, claims that Schmitt: "did not advocate war or the Nazi conquest of Europe," and "did not provide the theoretical foundations for Nazi foreign policy."²³⁵ Later, we will examine how Schmitt's Nuremberg interrogators attempted in vain to reinterpret the evidence of his *Grossraum* theory as proof of his complicity in the planning of aggressive warfare.

Immediately following the final defeat of Germany in April 1945, Schmitt carried on working as usual at the University of Berlin. However, he was soon arrested by the Russians, interrogated for several hours but then released. For the next six months, he lived undisturbed in his apartment in the American zone of this city. In June, he completed the required *Fragebogen* questionnaire, an initial part of the Allied 'de-Nazification' process, designed to assist in the

²³⁵ Bendersky, 1983 op cit, 256 and 259. After reviewing later studies and archival sources, the same writer concluded: 'Despite his harsh anti-Semitic attacks in 1936, calling for the purge of the Jewish spirit from German law, he never develops a racial or anti-Semitic legal theory.' J. Bendersky, 2005 op cit, 79.

official determination of a person's classification status and potential legal culpability.²³⁶ Schmitt had neither featured on any Allied CROWCASS 'wanted list' used by Nazi war crimes investigators. Nor did he fall under the automatic arrest categories for senior and mid-ranking members of Hitler's regime.

It was the American authorities who reclassified him as a political danger - probably at the request of Karl Löwenstein, the legal advisor for the military occupation government in Berlin, and former German constitutional scholar. On 26 September 1946, US officials re-arrested Schmitt without charge, subsequently detaining him in various camps in the Berlin region, including Berlin/Lichterfeld-Süd and Wannsee. During this time, the professor was questioned first by U.S. Army counter-intelligence officials, and then by Ossip Flechtheim, a German émigré lawyer working with the U.S. war crimes staff. The resulting 'Preliminary Interrogation Report' claimed that Schmitt was the 'official constitutional apologist' for the Nazi regime, and he was 'the most eminent legal exponent of the Nazi ideology'.²³⁷ It remained to be determined whether, as far the Nuremberg prosecutors were concerned, his location within the legal sphere and his 'eminence' within it were positive, neutral or mitigating factors.

On October 4, 1945 Otto Loewenstein and a Captain Fearnside visited Schmitt's apartment in Schlachtensee to examine his library containing over 5,000 volumes on German law and political science, which was impounded partly for general purposes but also because it provided "instruments of confrontation" for future interrogation and possible prosecution. As potential evidence of incitement, Loewenstein removed a 1940 edition of Schmitt's essay on *Grossraum* and his 1934 "ill-reputed article" "Der Führer schützt das Recht." Bendersky notes that:

Loewenstein made extraordinary, though erroneous, claims about the first work: "This is the foundation of the policy of aggrandizement of the Third Reich, the scientific

²³⁶ J. Bendersky, 2007 op cit, at 9.

²³⁷ See, 'Preliminary Interrogation Report of Carl Schmitt,' Berlin, October 18, 1945: NA RG 238.

incorporation of expansion by might into what the Nazis considered international law.” His depiction of the second, though incomplete on crucial aspects, accurately captivated its impact: “a defense of the assassinations committed by Hitler in which more than one thousand persons were illegally killed . . . tries to justify Hitler’s acts by pseudo-legal methods. The article had aroused widespread horror in the legal world as a token of the perversion of German legal thinking.”²³⁸

Clearly, this émigré official was committed to Schmitt's ultimate prosecution if at all possible.

Indeed he wrote:

'In the opinion of this writer Schmitt qualifies as a war criminal. He is one of the intellectual instigators of Hitler’s acts of aggression and aided and abetted them by his intellectual authorship. I hardly know of any individual person who has contributed more for the defense of the Nazi regime than Carl Schmitt. I suggest that the case be submitted to the War Criminals Commission for further action.’²³⁹

The brief, but reasonably balanced, military intelligence interrogation report on Schmitt of October 18 1945 listed his Nazi affiliations and noted his contention that, following the SS attacks in 1936, Schmitt lacked all official positions within Hitler's regime or the Nazi movement more generally, with any influence confined to his purely academic activities.²⁴⁰ This report recognised, however, that even after this period he continued to provide support to the regime: “he continued to publish works advocating totalitarianism and a European control system dominated by Nazi Germany”; and that he had lectured abroad in 1943–44.²⁴¹

Although prohibited from publishing, Schmitt was released on October 10, 1946. However, six months later, he was arrested again and then held in another internment camp, until March 1947, when he was brought to Nuremberg as a potential war crimes defendant (and possible witness) for repeated interrogations by Robert Kempner.²⁴² These took place on April 3, 21, 27 and 29.

²³⁸ J. Bendersky 2007 op cit, 14.

²³⁹ See 'Loewenstein to Colonel McLendon, “Library of Professor Carl Schmitt,” October 10, 1945, Loewenstein Papers, box 28/1, cited in id, 14-15.

²⁴⁰ Wieland's study includes a copy of this report plus excerpts from his interview with Kempner and a version of a letter written by one of the latter's émigré assistants, Ossip K. Flechtheim, discussing his interrogations of Schmitt. C. Wieland, op cit.

²⁴¹ 'Preliminary Interrogation Report of Carl Schmitt,' Berlin, October 18, 1945, US National Archives, College Park, MD, RG 238.

²⁴² J. Bendersky, 1997 op cit, 91. For archival documentation on the would-be case against Schmitt, which demonstrates that a prosecution was being actively sought if at all possible, see Robert M. W. Kempner Papers, U.S. Holocaust Memorial Museum

The decision to re-arrest and interrogate him at Nuremberg was largely due to the reputation he had acquired abroad as the ‘Crown Jurist’ of the Hitler’s regime.²⁴³ Kempner may have had a personal interest in seeing Schmitt convicted as he and a number of his colleagues, a number of whom were former academics, had been driven from their homeland by the same Nazi regime that Schmitt had enthusiastically endorsed, served and personally benefited from.

The question of the reasons for his classification as a war crimes suspect, and their justification has generated controversy that continues into the 21st century. For example, according to one of the key German author’s on the significance of Schmitt’s interrogation at Nuremberg, Quaritsch, Schmitt's innocence of crimes against humanity was so obvious that his release was a foregone conclusion. For this commentator, the very decision to interrogate him reflected political and personal factors, rather than those grounded on a credible interpretation of the relevant legal provisions. Kempner must, therefore, have been motivated by an effort to recruit Schmitt as an expert witness against those members of the traditional state machinery who served Hitler, in particular the leaders of the Reich Chancellery.²⁴⁴ Kempner's recollections to the contrary, are - Quaritsch claims - an unreliable guide, not least because they contain numerous internal contradictions.²⁴⁵ The fact that, from 1936, Schmitt had worked full-time as a professor of public law meant that, within the institutional context of Hitler's Germany, he had no access to power sufficient to exert influence over WWII war crimes, even at the level of this regime's official or semi-official propaganda, which was the preserve of Goebbel's ministry.²⁴⁶ Quaritsch addresses Schmitt’s limited cooperation with Kempner implicating others accused in the NMT

Archives, Washington, DC, RG 71-0005.05 Prosecution Case Books, Case XI, boxes 187–188 and RG 71.001.01, General Correspondence, box 10.

²⁴³ Even a sympathetic commentator, such as Bendersky, recognises that “[T]he decision to interrogate him at Nuremberg was largely due to the infamous reputation he had acquired abroad . . . of Schmitt as the ‘Crown Jurist’ of the Third Reich and the theorist of Nazi expansionism” *id.*, 91.

²⁴⁴ *Ibid.*, 20, 24-5, 27.

²⁴⁵ *Ibid.*, 39ff.

²⁴⁶ *Ibid.*, 115.

Wilhelmstrasse trial against officials of the German foreign office as something other than a strategy to mitigate his implicitly admitted guilt.²⁴⁷ Instead, such collaboration was merely a strictly tactical response to the threat of a trial and the poor prison conditions under which Schmitt was being kept.²⁴⁸

Yet, there are good reasons for questioning Quaritsch's clearly partisan analysis, and for taking seriously the idea that Kempner was genuinely seeking to evaluate the legal responsibility of intellectuals who supported Hitler's regime, and that he was concerned that Nazi academics who had directly and indirectly incited acts of persecution, even even genocide, might evade prosecution altogether.²⁴⁹ Quaritsch's dismissive interpretation fails to explain why Kempner had strongly pressed Schmitt for an explanation of the significance of the *Grossraumordnung* and, more generally, of the influence of intellectuals on Nazi politics and policy.

The fact that Schmitt's 1933-40 writings were, in most cases, distinguishable from the tabloid-style outpourings of Goebbel's Ministry of Propaganda by virtue of their scholarly style, is a double-edged argument. Goebbels already possessed sufficient crude and intellectually-groundless propaganda resources, and Schmitt's endorsements of the new regime arguably had greater force, perhaps even as acts of 'incitement', *precisely because* they stood out from more predictable content and sources of official and semi-official propaganda. During the Weimar period Schmitt was well-known not as a Nazi but as a prominent and influential proponent of political Catholicism. Hence, his unlikely public endorsement of the new regime probably exerted heightened propaganda value, at least in comparison with other sources.

Furthermore, Schmitt's intellectual work during the 1920's and 30's had never taken the form of purely abstract theory. It had typically involved political engagements with controversial aspects

²⁴⁷ Ibid., 36, 47.

²⁴⁸ Ibid., 50.

²⁴⁹ Ibid., 21.

of concrete realities, such as the criticism of the contradictions and hypocrisies of parliamentary forms of democracy, the naiveté's of supposedly politically neutral approaches to law akin to the legal positivism of Hans Kelsen, and the wide potential scope for government deployments of emergency powers under Art. 48 of the Weimar constitution. The idea that the author of such openly polemical works had not subjectively sought to exercise political influence with respect to these issues and their policy implications is difficult to credit, least of all with respect to his writings within the Nazi era. It is arguable that public displays of intellectual endorsement provide a uniquely powerful form of incitement within the context of a genocidal regime, with Schmoekel arguing that: 'Indeed, Schmitt tried to develop a myth that would influence the German people and thus add force to the German quest to subdue eastern Europe. In Schmitt's view, his contribution was more important than Hitler's feeble intellectual efforts. ...'²⁵⁰

At first sight, and following the review and interpretation of evidence of collaboration just presented, the idea of prosecuting Schmitt as a Nazi war criminal might strike many as self-evidently justified, particularly if we focus on evidence of his subjective intent to become a pre-eminent and influential theorist within a new regime that had never concealed its anti-Semitic agenda, which it developed through an increasingly severe series of repressive measures during the mid-1930's onwards. Admittedly, the first wave of Schmitt's morally reprehensible actions took place under conditions of possible threat to himself and his family following General Schleicher's murder committed in July 1934 under cover of the purge of the SA leadership. However, the extent to which he then actively sought out and consistently exploited the opportunities offered by Nazi regime for as long as these were on offer, particularly in relation to his initiative in organising the anti-Semitic conference, remains significant. It went far beyond

²⁵⁰ Mathias Schmoekel 13 *EJIL* at 550-552 (2002) reviewing Quaritsch's 2000 study of Schmitt at Nuremberg.

any of the recognised criminal law defences of necessity or duress. At most, any conceivable element of self-defence in relation to personal threat could have served merely as a mitigating factor, possibly relevant to questions of sentencing, but not to any determination of guilt.

On the other hand, the prosecutors needed to establish that, over and above evidence of Schmitt's subjective intent to support and promote Hitler's regime that continued after his expulsion from official positions, his actions as a scholar objectively fell within the scope of legally prohibited acts. What factual evidence was there that his words had actually incited anyone to commit persecution analogous to those contained in Streicher's propaganda, which was the only available precedent?

Other institutional factors supportive of prosecuting Schmitt within the NMT trials included the fact that returning German émigré victims of Nazi anti-Semitism, including former academics and professional associates of Schmitt, who were fully aware of his complicity, now held influential official positions within the occupation government and prosecutors office dealing with him. Such officials could hardly be expected to look favourably upon his case by interpreting the factual evidence and legal requirements in a manner that was supportive of Schmitt's cause.

However, there is also the conclusion of a study where Bendersky significantly updates his earlier studies, which is based upon closely studied the primary archival sources. He notes that such an initial orientation strongly in favour of prosecution, which was driven by political and moral value-judgements, became more complicated when examined from a strictly legal perspective:

‘The subject of Carl Schmitt and Nuremberg involves all the major aspects of intriguing historical research. It contains prominent personalities, momentous historical episodes, significant impact on longstanding heated (often hostile) interpretive debates, and decades-long documentary discoveries and revelations. The spatial settings of the

collapsed Third Reich and a Nuremberg cell are also dramatic. And within these are juxtaposed — in juridical, intellectual, and moral confrontations—Schmitt and returning émigrés serving in official capacities with the American Military Government (OMGUS) or Nuremberg prosecuting teams. On the surface it appears as a black-and-white story of good and evil, the pursuit of justice against, at best, a significant collaborator and, at worst, the person legally culpable for providing the intellectual and legal foundations for Nazi oppressive policies at home and wars of aggression and war crimes abroad. But as is so often the case in history, this particular morality play is complicated by documentary evidence, which categorically shatters such simplistic dichotomies.²⁵¹

In particular, and despite the entirely understandable desire among relevant officials to see Schmitt face legal accountability, it became necessary to address the classic prosecutorial question of what credible evidence supported which specific charges under recognised categories of international criminal law. As Bendersky recognises, if prosecuted, Schmitt could avail himself of a series of strong counterarguments, stemming from earlier IMT decisions, relating to the lack of objective evidence of *demonstrable influence* over Nazi policy-makers:

His subsequent Grossraum theory had no impact on the motivation, planning, or execution of World War II; it was explicitly rejected by Nazi theorists and neglected by even those decision-makers aware of it, such as Werner Best. Any survey of the Nazi journals in Schmitt's library would have revealed this indispensable part of the story. It surely would surface in any public airing or trial.²⁵²

Schmitt's potential allocation to the NMT defendants at Nuremberg for incitement of anti-Semitic genocide was thus certainly complicated by a number of factors pressing in contrary directions. A number of these nuanced, and arguably undermined, Kempner's claims that Schmitt was self-evidently a Nazi war criminal who had, echoing the case deployed against Streicher, "poisoned the young" and provided the theoretical foundations and motivations for the domestic and foreign policy of the Third Reich, including wars of aggression and war crimes.²⁵³ Among these factors are the implications of newly-discovered archival documentation including complete transcripts of the fourth interrogation – together with Schmitt's own copies of studies

251 J. Bendersky 2007.

252 Ibid. at 18-19.

253 Ibid.

he was asked to write to assist the OCC in their preparation for what became *The Ministries Case*. Bendersky claims that this new material re-affirms Kempner's seriousness in seeking to make a case against Schmitt, as distinct from merely harassing him in order to secure witness testimony:

'Most surprising, however, was the discovery of the only surviving transcript of a fourth (completely unknown) interrogation of Schmitt that had occurred on April 11, 1947. ... Aside from its inherent documentary value, this fourth interrogation and related material show that, contrary to other interpretations, Kempner was determined to prosecute Schmitt.'²⁵⁴

This historian also corrects Quaritch's somewhat dismissive account of what lay behind Schmitt's arrest and interrogation by showing that fellow German scholars with firsthand knowledge of Schmitt's work and activities were also active in this matter:

'The extant evidence also indicates that the impetus for the various arrests and internments of Schmitt, as well as the push for his prosecution, emanated from German émigrés serving with OMGUS in Berlin or with prosecuting teams in Nuremberg. At each stage, they took the initiative and persisted in action against Schmitt. All knew him personally, or of him professionally, as a colleague, student, and/or political opponent in Weimar and early stages of the Nazi regime.'²⁵⁵

Bendersky suggests that, when taken together, these new materials demonstrate how Kempner's own account of the non-prosecution of Schmitt, contained in *Das Dritte Reich im Kreuzverhör* (1969), must also be considered: “incomplete, distorted, and unreliable.”²⁵⁶

A major problem facing Kempner was that, even when subjected to a hostile interpretation, Schmitt's legal and political theories did not directly and expressly endorse any essentially *racial and biological* – as distinct from essentially political – grounds for the unity of the sovereign nation state.²⁵⁷ His repugnant anti-Semitic statements expressed within, for example, his 1938

²⁵⁴ Ibid.

²⁵⁵ J. Bendersky 2007 op cit, 9.

²⁵⁶ Ibid

²⁵⁷ Schmitt in Bendersky, 1997 op cit, 110–111. Bendersky himself notes that, despite for all his other concessions Schmitt: “never succumbed to a belief in the biological racism of National Socialist ideology. He had always considered such ideas absurd. . . . [H]e [thus] never became an ideological convert to Nazism.” 1983 op cit, 208. Later the same writer's review of

scholarly study on Hobbes largely but not exclusively singled out Jewish writers for being allegedly responsible for undermining the political unity integrity of the nation state.²⁵⁸ Such statements more closely resembled classic and familiar forms of Catholic *religious* prejudice against Judaism as routinely preached at this time, and not just in Germany of course. It is significant that such statements were, in fact, almost entirely gratuitous, and certainly not integral to his overall scholarly analysis. It would have raised problems for Kempner's claim, also later endorsed by leftist critics, that his writings supplied "theoretical foundations" for Nazism. Even Schmitt's most remorseless critics would have to concede that whilst his theoretical writings lacked adequate normative resistance to Nazi, or any other types of dictatorship, they were never rooted in the Nazis' distinctive biologicistic master race theory that radiated genocidal implications.

As difficult from the prosecutors' perspective was the fact that defence counsel could have cited other passages from Schmitt's Hobbes study that contained coded criticisms of Hitler's regime for betraying the Hobbesian compact requiring obedience to positive law in return for guarantees of physical security for citizens. The oblique and encoded critique here was that Hitler was emulating earlier forms of unconstitutional and illegitimate tyranny.²⁵⁹

Indeed, arguably it was precisely Schmitt's refusal to endorse a racially-based theory of *Grossraum*, i.e., large-scale geopolitical power blocs, as distinct from his own ethnic-cultural

recently available materials from Schmitt's personal papers concludes: 'For the new evidence confirms that Schmitt's political and legal theory was quite distinct from that of Nazi racial ideology and the political biology supporting Nazi anti-Semitic policies. Whatever anti-Semitism Schmitt might have exhibited was definitely not racial in the Nazi sense of the term. Even some of his harshest critics, such as Dyzenhaus, Gross, and Lilla, concede that Schmitt's anti-Semitism was not racial.' J. Bendersky 2005 op cit, 66.

²⁵⁸ Schmitt, Carl. *The Leviathan In The State Theory of Thomas Hobbes: Meaning And Failure of a Political Symbol*, Foreword and Introduction by George Schwab, Trans. by George Schwab and Erna Hilfstien, 69-70, 75 (1996).

²⁵⁹ This deeply ambiguous book, written under conditions of censorship and surveillance, continues to generate radically different interpretations. See, for example, Helmut Rumpf, *Carl Schmitt Und Thomas Hobbes: Ideelle Beziehungen Und Aktuelle Bedeutung, Mit Einer Abhandlung Über: Die Frühschriften Carl Schmitts* (1983); Helmut Schelsky, *Politik Und Publizität* 30 (1983). For a pertinent brief overview, see G. Ulmen, op cit, 30-31, and – for the argument that it signified a coded critique of Hitler's totalitarian state as a betrayal of the Hobbesian tradition endorsed by Schmitt – see Schwab's introduction to this work at xxi-xxii.

concept, which explains the “failure” of his work between 1933–1945 to feature within the approved lists of official Nazi publications.²⁶⁰ Of the thousands of grossly anti-Semitic publications that the Nazi regime published, sponsored or otherwise encouraged, which expressly incited 'persecution', Schmitt's are noticeably only for their absence of official recognition. In turn, Schmitt's writings pre-dating and during the Nazi era generally but not exclusively avoided the standard repository of clichés, imagery and rhetorical excesses that were characteristic of Goebbel's official propaganda.²⁶¹

Having explored some generic issues, it is now timely to examine the details of Kempner's interrogation where the conflict of interpretations was played out concretely and for high stakes.²⁶² Although Kempner attempted to force Schmitt to incriminate himself by responding to “yes or no” type questions, the latter displayed considerable tactical skill in challenging the very terms of the questions. Often Schmitt gave qualified, negative replies, engaged in diversionary tactics, or offered only minor concessions, in respect of only the least serious matters, a tactic which often successfully frustrated any “follow up” questions. At the outset, Kempner, told Schmitt: “I will tell you quite candidly what I am interested in: your participation, direct and indirect, in the planning of wars of aggression, of war crimes and of crimes against humanity.”²⁶³ Given that the category of ‘war crimes’ in this context relates to the narrowly technical realm of offences against the laws and customs of war typically committed by the armed forces, Kempner could not seriously have thought that Schmitt, who from the end of 1936 remained a civilian

²⁶⁰ Ibid., 91, 110–111, 114–115.

²⁶¹ Wieland's 1987 study has highlighted the exceptions, albeit whilst unfortunately presenting these as if they were the norm and out of context, thereby creating a distorted impression of Schmitt as a typical Nazi propagandist, which removes precisely the complexity and ambiguities that makes our present topic of Schmitt as perhaps a borderline case of incitement especially interesting. Cf. C. Wieland, *op cit*.

²⁶² See the commentary by F. Kröll, *Das Verhör. Carl Schmitt In Nürnberg 1947* (1995).

²⁶³ J. Bendersky, 2007 *op cit*, 103.

academic, a full-time professor of public law throughout the war, could have been prosecuted under this heading.

In order to determine whether Schmitt should face trial, Kempner pursued three main lines of questioning. Did Schmitt's *Grossraum* writings provide the *theoretical foundations* for Hitler's expansionist policies oriented by an anti-Semitic master race theory and *Lebensraum*, making him an accomplice in wars of aggression? Had Schmitt served in a decision-making capacity within the Nazi government machinery? And – most important for present comparative purposes - what had been his relation to the Jewish question?

Kempner addressed Schmitt's work in National Socialist legal affairs, which potentially could have made him a defendant in the Ministries Case that eventually swallowed up the planned propaganda trials. In response, Schmitt maintained that he always acted and wrote under the control and censorship of a brutally totalitarian party demanding of public displays of support. His anti-Semitic remarks must be viewed in this context as mere lipservice.²⁶⁴ Kempner explained that: '[W]e are of the opinion the executing agencies in the administration, the economy and military are not more important than the men who conceived the theory and the plans for the entire affair . . . to what extent did you provide the theoretical foundation for Hitlerian *Grossraum* policy?'²⁶⁵ In an ominous exchange, Kempner told Schmitt that the prosecutors sought to draw a legally relevant connection between even indirect ideological support for Nazi *Lebensraum/Grossraum* and the most concrete atrocities on the basis that the former was a causal factor in, and perhaps even a precondition for, the latter. Kempner expressly referred to the Streicher case claiming Schmitt's responsibility was *even higher* than that of the

²⁶⁴ J. Bendersky 1983 op cit, 269.

²⁶⁵ J. Bendersky 1997 op cit 101.

recently executed IMT defendant. Unsurprisingly, Schmitt response was to locate Streicher's propaganda on an altogether different level:

Kempner: You can assume that everything you have written is well known and that these demonstrate that you have theoretically established the foundations for war crimes, wars of aggression.

Schmitt: No, that is not correct.

Kempner: Would you not admit that your influence in this area is much more significant and much more dangerous than when, on the basis of your work, some members of the SS ultimately invade foreign countries and shoot people en masse?

Schmitt: That is taking things too far. I would very much like to address that matter. That is a complicated subject.

Kempner: From a criminal perspective it is straightforward. Aren't you engaging in metaphysical somersaults?

Schmitt: I'm not denying anything. The problem of the responsibility for ideologies doesn't require any metaphysical somersaults.

Kempner: ...You sermonized 30 years in order to bring about "Grossraum."

Schmitt: That doesn't necessarily follow from my writings either.

Kempner: Of course it does. Without men like you Nuremberg would not be laying in ruins.

Schmitt: That's another topic.

Kempner: In comparison to you isn't Streicher a harmless sermonizer?

Schmitt: On an entirely different level. I am an advocate of free scholarship.

Kempner: On another occasion you have said that you compare yourself to someone who diagnoses a plague. But didn't you yourself spread a plague?

Schmitt: That was not my intention.²⁶⁶

Kempner thus made it clear that he rejected the distinction between purely scholarly diagnosis at the descriptive-analytical level and evangelising for Nazism and Hitler's anti-Semitism in particular. He also unsuccessfully pressed Schmitt to admit that a causal relationship existed between a number of his scholarly statements and subsequent events within the Nazi era, such that the latter represent the practical fulfilment of the former, possibly akin to the relationship between the Holocaust and Streicher's propaganda:

Kempner: You did however enthusiastically welcome the Enabling Act.

Schmitt: That is a provisional constitution.

Kempner: Of a great new era?

Schmitt: That relationship is not causal.

Kempner: Didn't you enthusiastically welcome the dictatorship as the fulfillment of your

266 J. Bendersky 2007op cit, 39.

scholarly dreams?

Schmitt: No, in 1928 [actually 1932] I published a work, "Legality and Legitimacy," an affirmation of the parties of the Weimar Coalition.....

Kempner: Didn't the doctrine that one should shoot allied pilots derive precisely through men like you?

Schmitt: But, please. You will not find a single word in anything I've written about marching into Poland and about such things.²⁶⁷

To rebut this central charge, Schmitt thus sought to rely upon his Weimar opposition to Nazism. Schmitt denied that, despite being one of 'the leading university professors in this field,' within public and international law, he had ever exercised any role at the crucial point of decision-making comparable with that of: 'other high state or party officials.'²⁶⁸ Whilst this defence appeared to work in Streicher's favour, as he was not found guilty of "conspiracy" under Art. 6(a), which might have been a pertinent point to Schmitt's defence, however, in wake of Streicher's overall conviction this was hardly a decisive legal argument.

Schmitt's more ingenious argument, which was hardly available to Streicher, was that Kempner's accusations ignored the minimal role that respect for the purely scholarly realm of intellectual ideas played, or can ever play, within the policy-making processes of an essentially totalitarian state: one that renounces democratic consultation because the actual or presumed political will of the leader constitutes the supreme source of government policy. Schmitt's interesting response was not to deny his fame and high reputation as a scholar but to argue that, with respect to government activity: 'such a position was not "decisive," not even as a basis for making decisive contacts:

'E]nough to say here that it was impossible for a chair in jurisprudence to be regarded as a decisive position or as a basis for exercising a decisive influence at decisive points in Hitler's totalitarian system, given its prevailing conceptions of science, education and jurisprudence. Such a position would never have been considered for initiation into

²⁶⁷ It is arguable that between 1933-36 the Nazis' "future plans" for foreign relations, if they existed, were far from well-known and perhaps strategically concealed, and there was no overt indication of plans to drag the German people into a new world war so soon after the previous catastrophe and national humiliation.

²⁶⁸ Ibid. at 102.

Hitler's secret planning. . . . Theories and ideas do have influence, but this influence is not traceable to 'decisive points'. The effects of spoken, written and printed words are various and incalculable. . . . When an author makes public the results of this research and thinking, his intent is as scientific as his intellectual habitus is scholarly – the purpose is to further knowledge and the exchange of opinion. It is well known that my publications have always greatly stimulated both. But many listeners and readers do not respond to theories and formulations in a scholarly way, but automatically and unreflectively link them with practical matters and their momentary goals and interests. This is particularly dangerous with theories, theses and formulations of international law, constitutional law and politics.²⁶⁹

A hostile reading of Schmitt's responses would suggest that he was seeking to deflect any responsibility for the practical effects of his scholarly activities of collaboration away from himself, and on to both segments of his audience, and the scholarly discipline to which he had contributed. And yet students of international criminal law cannot entirely dismiss his related argument that the high standard of proof required to demonstrate a *causal link* between a scholar's publication of theoretical ideas and the 'planning' of practical actions, especially war, transcends the realm of what can be decided upon by any properly judicial process. More generally, Schmitt argued polemically that: 'not even the political opinions expressed in Hitler's *Mein Kampf* constitute criminal planning as such'.²⁷⁰ His implication was that if the prosecutors would have struggled to successfully prosecute the author of *Mein Kampf* (or similar populist work) for 'planning' aggressive war, then how much more difficult is it to bring such a charge against a university law professor. Schmitt suggests that if these prosecutors fail to recognise the easily-overlooked distinction between the propagandist exploitation of an already well-known conservative scholar, which Schmitt freely conceded was what had happened in his case, and the promotion of academic work that is clearly grounded in Nazi racial theories, then they risk making a highly questionable supposition.

²⁶⁹ Ibid. at 128.

²⁷⁰ Ibid, at 125.

Kempner failed in his attempts to force Schmitt to draw analogies between his role as both a constitutional lawyer and member of the largely ceremonial Prussian Chancery, and the activities of Hans Lammers, who was Hitler's legal advisor and chief of the overall Reich Chancery. Lammers was later convicted and sentenced by the NMT to 20 years' imprisonment for war crimes.²⁷¹ Whilst Schmitt was willing to help Kempner by analysing, as a "constitutional expert," the legal responsibility of Lammers under Nuremberg principles, he refused to accept that any analogies could then be drawn with his own situation.²⁷²

During this interrogation, Kempner certainly pressed Schmitt on his occasionally negative and stereotyping remarks about the ability of contemporary Jewish international and public lawyers to properly understand 'territorial' theories of the state because of their own status – prior to the creation of the state of Israel - as a distinct people lacking soil to call their own:

Kempner: What is your attitude toward the Jewish Question, in general, and how it was handled by the Third Reich?

Schmitt: It was a great misfortune and, indeed, from the very beginning.

Kempner: Did you consider the influence of your Jewish colleagues, who were teachers of international law, a misfortune?

Schmitt: With the exception of Erich Kaufmann, there were no Jewish legal scholars there [in Nazi Germany]...

Kempner: Would you say there was a definite distinction between international and constitutional law influenced by Jews and that which you taught and advocated?

Schmitt: The standpoint of Jewish colleagues was not sufficiently homogeneous for that.

Kempner: Have you ever written such things?

Schmitt: I wrote only once that Jewish theorists have no understanding of this territorial theory.

Kempner: Where did you write that?

Schmitt: In a little essay in the *Zeitschrift für Raum-Forschung*, 1940-41.

Kempner: What was that essay called?

Schmitt: I cannot recollect the title.

Kempner: Who published the journal?

Schmitt: The Reich Office for Raum Research.

Kempner: How long is the essay?

Schmitt: *Volkerrechtliche Grossraumordnung* had 50 large octavo pages.

271 Id at 104.

272 On Schmitt's written opinions, Carl Schmitt, "Beantwortung der mir gestellten Frage 'Warum sind die deutschen Sekretäre Hitler gefolgt?'" in H. Quaritsch supra note 95 at 102-14.

Kempner: How many editions?

Schmitt: I believe 5 or 6. The essay was reprinted there from the *Zeitschrift für deutsche Raumforschung*, published by Deutscher Rechtsverlag, a press of the National Socialist League of Jurists.

Kempner: It had a swastika on its publisher's insignia?

Schmitt: Yes, of course.

Kempner: Reading your writings creates a completely different impression from the one you are now providing.

Schmitt: If one reads them completely, they have very little to do with the Jewish Question.²⁷³

Clearly, Kempner wanted to press Schmitt on this point and to ascertain the extent and published source of his incriminating anti-Semitic remarks, together with the length of time that they were available over successive editions. In this last respect, he may have been taken his cue from the IMT's judgement on Streicher which emphasised the longevity of this defendant's anti-Semitic publications. The fact that the publisher was a recognised Nazi agency was also deemed relevant in that it seemed to amount to evidence that Schmitt had directly contributed towards official Nazi propaganda. This did not seem to matter in Streicher's case, who as a private publisher was not allowed to display the swastika on *Der Stürmer*.

Kempner then 'confronted' Schmitt with a snippet extracted from his publication *Volkerrechtliche Grossramordnung*, 4th Edition, as on a par with, and a contribution to, Goebbels's official form of anti-Semitic propaganda

Kempner: "The Jewish authors had, of course, as little to do with the previous development of Raum theory as they had with the creation of anything else. They were also here an important cause of the dissolution of concretely-determined territorial orders." Do you deny that this passage is in the purest Goebbels-style? Yes or no?
Schmitt: I do deny that the content and form of that is in Goebbels' style. I would like to emphasize that the serious scholarly context of that passage should be taken into consideration. In its intent, method, and formulation it is a pure diagnosis ... Everything I stated, in particular this passage, was intended as scholarship, as a scholarly thesis I would defend before any scholarly body in the world.

Kempner: Here, however, we are before a criminal court. You were the directing, one of the leading jurists of the Third Reich.

Schmitt: Someone who in 1936 was publicly defamed in *Das Schwarze Korps* [the S.S.

²⁷³ Cited in J. Bendersky 1997 op cit, at 109.

journal] cannot be described in that fashion.²⁷⁴

It is doubtful whether Kempner had adequately researched this topic, particularly with respect to Schmitt's 1933-36 writings.²⁷⁵ His surviving files from this period contained Schmitt's three-page expressly Nazi pamphlet "Five Principles for Legal Practice" ("Fünf Leitsätze für die Rechtspraxis"), as well as "Jews in Legal Science" ("Das Judentum in der Rechtswissenschaft,") the long anti-Semitic article in the *Jüdische Rundschau* (both published in Berlin in 1936).²⁷⁶

Schmitt sought to rely upon the claim that the 'intent, method, and formulation' of Goebbel's style racist propaganda is one thing, those of his writings quite another. In addition, he did not deny that his generalising claims about Jewish orientations, prior to the creation of the state of Israel, were offensive. He only insisted that, when understood in context, they clearly and intentionally amounted to constitute a scholarly hypothesis capable of debate, further study and possible revision. He implies that his 'pure diagnosis,' although possibly offensive to Jewish scholars, remained a *strictly descriptive* social scientific claim. By reminding Schmitt that whatever his subjective intentions and self-definition, his Nazi-era writings had the authority and status of a leading Nazi jurist, Kempner clearly resisted Schmitt's self-serving interpretation. However, this prosecutor could not, as Schmitt reminded him, coordinate any of his published statements written after 1936 to any official position he had held during Hitler's regime. Ironically, he sought to use the SS public attack and his resulting loss of official positions as an alibi, as a vindication for the claim that that his post-1936 writings, including negative references to Jews, were made as anything but pure scholarship. In response, Kempner then sought to expose a contradiction that discredited Schmitts' alibi.²⁷⁷

²⁷⁴ Ibid., 100.

²⁷⁵ H.Quaritsch, op cit, 26.

²⁷⁶ J.Bendersky 200, op cit 37.

²⁷⁷ Schmitt in Bendersky 1997, at 110

Schmitt sought, in the second interrogation, to counteract this evidence of his anti-Semitism by pointing out that on his trip to Paris he was accompanied by a 'Jewish friend and his wife', and directed Kempner to a publication that summarised the main points he made on these lecture tours, which he clearly thought would counteract the negative impression created by the publications highlighted by this prosecutor. The latter challenged Schmitt's claim to be an intellectual adventurer oriented only to the pursuit of knowledge and personally responsible only for the theoretical implications of his writings, not their propagandist appropriation by Hitler's regime:

'Kempner: You have the blood of an intellectual adventurer?

Schmitt: Yes, that is how thoughts and knowledge develop. I assume the risk. I have always accepted the consequences of my actions. I have never tried to avoid paying my bills.

Kempner: If, however, what you call the pursuit of knowledge results in the murder of millions of people?

Schmitt: Christianity also resulted in the murder of millions of people.²⁷⁸

Of course, this response relies upon a dubious analogy. Whilst the content of Nazi doctrine possessed genocidal aims and implications, this hardly applies to the ethos of the New Testament. Although it is possible to argue that sectarianism within the interpretation of Christianity had murderous consequences, the resulting carnage was hardly the realisation of this religion in the way that the Holocaust was anticipated by the programme announced by *Mein Kampf* and constituted the fulfilment of Nazi ideology and race theory.²⁷⁹ Yet Schmitt's wider point appears to have been that neither scholars nor theologians can be held criminally accountable for how their analyses of doctrine are appropriated and abused by others.

²⁷⁸ Bendersky, 1987 op cit, 104.

²⁷⁹ However, it is arguable that, in addition to ideological factors, the Holocaust also developed as a result of successful territorial expansion and the fact that so many more of those deemed to be racially "undesirable" thus came within German control. Also the technology that made mass murder possible (as "preferable" to mass shootings, of which Himmler's men were complaining), was quicker and more efficient.

Other aspects of Kempner's interrogation alluded only indirectly to questions of genocide by confronting Schmitt with the charge that he was affiliated intellectually with the SS or factions with it, which was denied. This prosecutor then put to Schmitt the latter's statement that German law should now be interpreted in line with Nazi doctrine, which by implication incorporated anti-Semitism as a legal principle. His rhetorical response was to counter the possibility of this being legally defined as "incitement" by reinterpreting his own clearly normative contention as if it were merely a descriptive thesis, one which had proved embarrassingly false, as if it were akin to a scientific hypothesis that is disproved by subsequent experiments:

Kempner: Did you state that German legislation and the German administration of justice must be carried out in the spirit of National Socialism? Yes or no? Did you state that between 1933 and 1936?

Schmitt: Yes. I was from 1935 to 1936 head of the professional organization. I felt superior at that time. I wanted to give the term National Socialism my own meaning.

Kempner: Hitler had a National Socialism and you had a National Socialism.

Schmitt: I felt superior.

Kempner: You felt superior to Adolf Hitler?

Schmitt: Intellectually, of course. He was to me so uninteresting that I do not want to talk about that at all.

Kempner: When did you renounce the devil?

Schmitt: 1936.

Kempner: Are you not ashamed to have written these kinds of things at that time, such as, for example, that the administration of justice should be National Socialist.

Schmitt: I wrote that in 1933.

Kempner: Do you deserve good or poor grades for that?

Schmitt: It was a thesis. The National Socialist League of German Jurists extracted it, so to speak, from my mouth. At that time there was a dictatorship with which I was not yet familiar. ...

Kempner: Are you not ashamed that you wrote these kinds of things at that time?

Schmitt: Today, of course. Without question, it was unspeakable. There are no words to describe it.²⁸⁰

The brief nature of this exchange on the persecution of the Jews, and the lack of follow up questioning on this theme in later interrogations are significant. They suggest that Kempner considered that Schmitt's answers, and other available evidence supplied by his varied

²⁸⁰ Bendersky, 1987 op cit, 106.

publications, were insufficiently incriminating to constitute evidence of a specific international crime as recently interpreted by the IMT, in Streicher's case. It may have assisted Schmitt's case that, unlike Streicher, he rarely touched upon "the Jewish question" and it was never a particular focus of his research. Also most of his racist statements cited by Kempner were made before the onset of the Nazis' genocidal campaign against the Jews. Therefore, the arguments the IMT prosecutors had made against Streicher that he continued with increasingly radical calls for Jewish persecution at a time when he knew of their mass extermination was not available. Hence, Kempner could not follow the lead of Streicher's prosecutors by showing how Schmitt knew of the Holocaust and actively and deliberately encouraged its intensification as willing cheerleader for mass murder. His interrogator was clearly alert to Schmitt's interpretative strategy of drawing a sharp line between his position in 1933-36, where his words could be defined as expressions of a leading figure within the Nazi regime, and afterwards.

Kempner did not pursue one possible argument that was available to him. Namely, that the strong emphasis Schmitt's work places upon substantive cultural "homogeneity" as the precondition for an effective democracy.²⁸¹ He could have put it to Schmitt that within a historical context where national identity was being officially defined by the Nazi regime in strictly "racial" terms, Schmitt's theory could be taken to imply that German Jews, simply by virtue of their Jewish identity, fell outside the rights and protections otherwise afforded by full German citizenship. He could have supplemented this point by reference to Schmitt's contention that politics is constituted by a friend/enemy polarity, and that the terms in which he expressed this anticipated the fate of German Jews as well as his notorious address to the anti-Semitic

²⁸¹ C. Schmitt, *The Concept of the Political*, op cit 8, where he refers to Australia racist immigration laws as an example together with population expulsions involving Greeks and Turks but without endorsing either normatively.

conference he organised in December 1936.²⁸² One possible explanation is that Schmitt's Weimar works never expressly advocated any specific substantive normative criteria for homogeneity, and hence both heterogeneity and the resulting differentiation of collective friend from enemies. His analysis was presented as a sober-minded and realistic scholarly description and generalisations of what often happens in practice as part of the politics of national identity, which liberal constitutional notions of "equal rights for all" tends to ignore. Schmitt did not present these theoretical analyses drawing attention to the exclusionary logic within militant nationalist ideologies and political practices (Ireland for the Irish alone or 'Sinn Fein' etc.) *as prescriptive* statements concerning what ought to happen to, say, the Jews and other minority groups within Weimar Germany. Instead, Schmitt's defensive claims relating to the descriptive-analytical nature these contentions, based on 'prudent observations' of common tendencies for collectives to divide themselves into antagonistic groups, would have been difficult to rebut with textual evidence.²⁸³ Unlike the pseudo-science of Nazi race theory, which is typically rooted in crude biological prejudices, Schmitt's political theory suggests that there is no natural-biological basis for making such distinctions, with the result that whatever criteria are deployed can only be culturally relative, historically contingent and comparatively arbitrary.

Kempner would not have been able to discover statements claiming that, for example, that the re-assertion of a 'healthy' form of German national identity required the expulsion of Jews of the type common in Streicher's anti-Semitic propaganda. Hence, Kempner could have placed a more subtle accusation to Schmitt; namely, that, within the late Weimar context at least, his broader theory of politics lent itself to anti-Semitic reinterpretation and application, and that his

282 Later critics have tried to make this argument, with Dyzenhaus claiming Schmitt's political theory leads to the "blind hatred of the other" and had as its practical fulfilment in the persecution and radical exclusion of Jews. Schmitt "provided a theory capable of justifying a policy to get rid of Germany's Jews." D. Dyzenhaus, op cit, 100.

283 J.Bendersky 1983, op cit 93.

republication of these ideas in unmodified form in 1932 and 1933 in the second and third editions of the *Concept of the Political* respectively in a situation shaped by the growth of Nazi anti-Semitism, implicitly encouraged such interpretation.²⁸⁴ However, if this was the case, then Kempner may have rejected this strategic interpretation for being too diffuse and indirect, at least for criminal law purposes related to incitement to war crimes.

There was, after all, no evidence that Schmitt *subjectively intended* his political theory, which made no reference whatsoever to Jews, to be interpreted and applied in an anti-Semitic way, or even that it ever had been by Nazi ideologists, politicians or those in charge of anti-Semitic persecution.²⁸⁵ Indeed, if this theory was essentially anti-Semitic and intended to endorse and incite this prejudice, then it is inexplicable that Schmitt illustrated it with reference to Australian immigration laws, for example, and remained entirely silent on: "The Jewish Question."²⁸⁶

Kempner may have believed he was on stronger ground with respect to the apparent connection and coordination between Schmitt's scholarly model of *Grossraum* as a post-liberal conception of sovereignty within international affairs, and an early form of Nazi military expansionism that followed only weeks afterwards. As Schmoecke notes, Schmitt appeared vulnerable to a hostile interpretation by the Nuremberg prosecutors of his international law writings:

‘Apparently, some Allied officials considered Carl Schmitt not only an important legal scholar of the Nazi era, but also an influential author who had promoted the idea of a war of aggression. Indeed, the first interrogation concerned Schmitt's 1939 booklet on the *Großraumtheorie*. In it, he developed his theory of the 'greater space', according to which more important states may, due to the force of their dominating political theory, control

284 Carl Schmitt, *The Concept Of The Political*, Tr. By George Schwab (1976).

285 J. Bendersky, 2005 op cit, 66-7. Archival documentation suggests that the Nazis' expressly rejected Schmitt's Weimar theories precisely because of their implied rejection of anti-Semitic racial and master race theory. Cf. Gross "Politische Polykratie 1936: Die legendenumwobene SD-Akte Carl Schmitt," 33 *Tel Aviver Jahrbuch Für Deutsche Geschichte*, 115-143 (1994).

286 J. Bendersky, 2005 op cit 75, criticising those who read a smattering of private postwar statements hostile to specific German-Jews involved in his proposed prosecution as 'confirmation' of the strategically concealed anti-Semitic essence of his Weimar scholarship as a whole.

not only their own territory but also other adjacent countries. Hitler had used this concept almost immediately to repudiate US requests to refrain from further actions in central and eastern Europe. Modelled after the US Monroe doctrine, the 'European Greater Area' was to become an area of exclusive German interests. As Germany invaded Poland a few months later, a direct link between Schmitt's theory and the Second World War and its crimes could be discerned.²⁸⁷

Such close connection, even possible co-ordination, thus appeared to bestow on Schmitt's theory an intensely practical aspect suggestive of a linkage between ideas and practical actions of a criminal nature. Kempner's line of attack was extremely direct:

“Kempner: I will tell you quite candidly what I am interested in: your participation, direct and indirect, in the planning of wars of aggression, of war crimes and of crimes against humanity.

Schmitt: Planning wars of aggression is a new and very broad concept.

Kempner: I take it for granted that, as a professor of public law, you know exactly what a war of aggression is. Do you agree with me on the fact that Poland, Norway, France, Russian, Denmark, Holland were invaded? Yes or no?

Schmitt: Of course.

Kempner: Did you not provide the ideological foundation for those kinds of things?

Schmitt: No.

Kempner: Could your writings be so interpreted?

Schmitt: I do not think so - not by anyone who has read them.

Kempner: Did you seek to achieve a new international legal order in accordance with Hitlerian ideas?

Schmitt: Not in accordance with Hitlerian ideas and not sought to achieve but diagnosed.

Schmitt thus denied each of Kempner's suggestions, claiming they were founded upon a careless or misreading of his writings whose focus was, in any event, upon developing a scholarly "diagnosis" of unfolding contemporary events utterly distinct from Hitler's primitive type of military expansionism, which in any event relied upon no theory:

Schmitt: '[M]y theory of Grossraum and international law has a broad scholarly framework, is the result of scholarly research; it is a theory which had been and should be taken seriously as a scientific hypothesis. Hitler had no Grossraum policy in the sense of this theory. He pursued a policy inimical to this theory in both thought and principle. ... Hitler's policy of conquest was so primitive that any kind of scholarly analysis necessarily threatened it.²⁸⁸

287 Schmoেকে, op cit, xxx.

288 J. Bendersky, 1987 op cit, 116.

According to Schmitt, the difference between his own conception and a biological-racial Nazi ideology, together with the former's potential threat to the latter, explained why Schmitt ideas were responded to in "deadly silence" by the Nazi Party press.²⁸⁹

It might be possible to accept Schmitt's argument that Nazi war criminality not only lacked any scholarly foundation but was hostile to the very critical processes of rational inquiry required by independent scholarship. Yet, even if this were the case, Schmitt had hardly drawn attention to the alleged tension between the substance of *his own* scholarship and the requirements of Nazi propaganda. Indeed, it is possible that the inclusion of various, and often entirely gratuitous, anti-Semitic statements in his Nazi era writings, which continued until 1940, was designed to disguise such tensions, possibly as part of a strategy to promote his own different conception of what National Socialism entails. Also by admitting that some degree of connection necessarily existed between the theoretical and practical realms, between pure scholarship and state policy, Schmitt does appear to have further undermined the theory/practice dichotomy on which rested his general defence to the charges of providing a criminal form of endorsement to Nazi war criminality. He may have realised that, although this dichotomy may have offered protection for, say, a biologist whose pure scientific research was abused, it badly fitted the facts of a politically-engaged intellectual such as Schmitt. As Bendersky notes in relation to his interrogation answers:

'One could easily get the impression from these disquisitions that his works were abstract analyses of political and legal subjects intended primarily for intellectual discussions among scholars. He conveniently forgot that before his rebuke in 1936 he had hoped that his works would influence political and legal developments, and that despite the distortion of his ideas, he thrived on the public attention he received as a result of his publications and activities within Nazi institutions.'²⁹⁰

289 Id.
290 J. Bendersky 1983 op cit, 272.

On the vital legal question of whether or not Schmitt's writings and various institutional involvements contributed to the 'waging of an aggressive war' under the Nuremberg principles, Schmitt turned the tables upon Kempner. He argued that he had already been involved in a debate with Professor Wehberg, a famous Geneva pacifist and international lawyer who helped originate the very idea that the preparation for such a war should constitute a "war crime." At no time during this debate had Wehberg ever suggested that Schmitt's own theory, with which the former was already familiar, could be linked to the proposed war crime of "waging aggressive war." Schmitt argued that if one of the earliest and most important originators of a key Nuremberg principle had failed to accuse Schmitt's work of complicity in war crimes as: 'a party to the new criminal offense inaugurated by Wehberg himself,' then this remained significant. It should be treated as a defence that was both conclusive and decisive.²⁹¹ Schmitt also argued that his role within Nazi Germany as both a Prussian State Councillor and as Director of the Nazi Lawyers' Guild was confined to purely technical organisational matters. Such affairs had no bearing on the charge of: 'collaborating in the preparation of a war of aggression' at a 'decisive point'.²⁹²

Kempner confronted Schmitt with a hostile interpretation of his *Grossraum* writings – together with both their timing and influence, to suggest that they harmonised all too closely with the Nazis' notion of *Lebensraum* (living space). From this perspective, Schmitt must be judged culpable because the Nazis advanced the latter as an ideological "justification" for their own military expansion and colonisation of Eastern Europe, which in turn provided the context for the Holocaust.

291 J. Bendersky 1987 op cit 113–114.

292 Ibid., 120, 123.

Schmitt's defence was that those extracts Kempner singled out and quoted to him created a false impression when taken out of their original context, and that, when restored to their original context, they lacked those incriminating qualities that Kempner was a trying to read into them. (This was an argument put forward by Streicher's defence counsel, but subsequently discounted by the IMT). Schmitt's scholarship, he claimed, had nothing material to do with acts of planning or promoting aggressive wars as criminalised by the Nuremberg Charter. He argued that his conception of *Grossraum* was quite different in kind from the Nazis' *Lebensraum* theory rooted in their characteristic race theory. Indeed, and as already noted, a major problem facing Kempner and his colleagues was that Schmitt's theory had been strongly attacked by orthodox Nazi legal scholars precisely for its "neglect" of racial factors in favour of cultural formations in a context where the former were, of course, essential to authentic Nazi ideology.²⁹³

These writings also take the form of lengthy and largely descriptive-diagnostic studies of the implications of the decline of an international system based upon individual nation states and the rise in Latin American of a US-dominated regional power-bloc. Since Schmitt's publications expressly grounded his *Grossraum* concept in America's comparatively benign and initially anti-imperialist 1832 Monroe Doctrine, his prosecution by US-led prosecutors for further developing this idea might appear incongruous, if not politically embarrassing. Insofar as his writings implicitly endorsed any specific German foreign policy at all – it was to emulate American domination of Latin America through creating a defensive pan-European regional security alliance under a German hegemony but by means of bilateral treaties and respect for principle of cultural self-determination. Crucially, these writings contain no advocacy of imperialistic invasion and annexation, followed by ethnic cleansing and genocide, as practised by Hitler's wars of annihilation within Eastern Europe.

293 Ibid., 93.

In this respect, and despite his vigorous attempts during four interrogation sessions in April 1947, Kempner clearly struggled to reinterpret these writings as constituting even an "indirect" form of participation in Hitler's planning and waging of "wars of aggression" as defined by the Nuremberg Charter. He failed to force Schmitt to accept, or otherwise substantiate, the charge that he had provided – both in substance and in style – “an international legal theory of *Lebensraum*,” i.e., an idea of existential “living space” central to Hitler’s racist justification for German military invasion and expansionism closely connected to master race ideology.²⁹⁴ Schmitt argued that no serious scholars who were concerned for their reputation as such, *could ever have* endorsed a patently unscientific and irrationalistic Nazi *racial* ideology.²⁹⁵

Kempner's central problem was that not even a hostile interpretation can show these writings to amount to be belligerent calls for military invasion, or a bellicose affirmation of militaristic glorifications of war. Worse still, a defence lawyer could have cited contrary passages from Schmitt's *Concept of the Political* (1932, 1933) As a political realist conscious of the contradictions of pacifism, he recognised that states defined political enemies, and thereby potentially initiated wars involving deadly force. However, he expressly opposed any belligerent resort to military force outside of an act of national self-defence to resist an enemy invader bent on destroying the entire way of life of a people.²⁹⁶ His position was arguably more attune to the Polish and French resistance movements against Nazi military invasion, occupation and annexation, then supportive of such aggression.

In addition to his verbal responses, Schmitt was asked by Kempner to furnish more, thoroughly written explanations on four different issues: To what extent did you further Hitler's policy of the greater space? To what extent did you participate in the preparation of an aggressive war and the

294 Id., 99–100.

295 Id., 111.

296 Carl Schmitt, *Concept Of The Political*, 26-28 (1996) (1932).

crimes resulting from it? Legal remarks on the constitutional position of the Reichsminister and the Head of the Reichskanzlei; and why did the German Secretaries of State follow Hitler?

In his written answers, Schmitt reiterates the evidence that the Nazis had merely tolerated him because of his international scholarly reputation, and that he never exercised any measure of personal influence on their totalitarian system, or on the plans and policies of its leaders.²⁹⁷ In short, throughout the interrogation process, Schmitt denied Kempner's charges that his writings on *Grossraum* had provided 'the theoretical foundation' of Hitler's expansionist policies.²⁹⁸ Schmitt maintained that he was only involved in National Socialist matters in his capacity as a law professor. He argued: [I]f a few authorities, journalists and propagandists tolerated my name being used as a figurehead, that is still no theoretical foundation. It belongs much more to the style of a totalitarian system, which exploits the names of numerous scholars, destroys what it cannot exploit, and seeks to exploit what it cannot destroy.²⁹⁹

During interrogation Schmitt stated: "For me the Schleicher government offered the only option to stem the chaos." This was an important claim. Even well-informed émigré officials in the occupation government who had repeatedly used their influence to have Schmitt punished, showed that they were aware of evidence more supportive of Schmitt's defence than to his prosecution.

The evidence of Schmitt's activities prior to the Nazi assumption of power, both political as a constitutional adviser to Chancellor General Schleicher (who in 1934 was murdered by the SS under the cover of the purge of the SA or Brownshirt leadership during the notorious 'night of the long knives'), and in terms of his publications, certainly did provide a 'theoretical foundation' for one form of German governance in the early 1930's. The problem for Kempner's proposed case

297 J. Bendersky, 1987 op cit 95.

298 J. Bendersky, 1983 op cit, 268.

299 J. Bendersky 1987 op cit, 116.

against Schmitt, however, was that this was for the pre-Nazi authoritarian conservative governments headed by the aging President Hindenburg who, when confronted with chronic parliamentary deadlock caused by negative majorities comprising obstructive communist and Nazi parliamentarians, made extensive use of Art 48 Emergency Powers measures. As Bendersky argues:

'He actually did provide the legal and political theories for the Presidential System of Hindenburg (1930 and 1933), in which emergency powers and other legal presidential authorities were used to attempt to stabilize Weimar economically as well as politically. And, as should be common knowledge ..., he served as the adviser to Chancellor Schleicher in his efforts to preclude a seizure of power, through force or legal democratic means, by the Communists and Nazis. And while one should not avoid, minimize, or excuse the reprehensible compromises that Schmitt did make with the Nazis, the overwhelming amount of evidence clearly establishes that he neither prepared the way for their seizure of power nor provided the theoretical foundations for their policies or practices. The Third Reich was not the fulfilment of his theories, and he did not welcome it enthusiastically as later charged.'³⁰⁰

In early May 1947, a week after his final interrogation, Schmitt was released from custody at Nuremberg and transferred to a residence for witnesses for the Nuremberg trials until he had completed his study of the state secretaries in the Third Reich that Kempner had required of him. Once this was completed, he was allowed to return home. In the absence of further admissible evidence of his *direct* involvements in war crimes, as strictly defined by the initial Nuremberg judgments, his extra-judicial punishment was to have his university career ended and a refusal to return his personal library of books and other research material.³⁰¹

According to Quaritsch, one of the key German author's on the significance of Schmitt's interrogation at Nuremberg, there is little legal interest or relevance to what took place. Indeed,

³⁰⁰ Id

³⁰¹ J. Bendersky, 1983 op cit 265–266; Vagts 1990 op cit, 677–678; D. Dyzenhaus, op cit, 3.

he claims that Schmitt's innocence of crimes against humanity was so obvious that his release was a foregone conclusion.³⁰²

The outcome of Kempner's interrogation was that insufficient evidence was deemed forthcoming to warrant Schmitt's being formally charged with war crimes.³⁰³ It appears from recently available diaries that there was a conflict among the prosecutors between Kempner and others among the US occupation authorities, such as the German-Jewish émigré Karl Loewenstein, who, as a civilian German constitutional theorist, had expert knowledge of Schmitt's academic writings as a whole. Bendersky argues that the latter's diaries reveal how although personally determined Loewenstein was to Schmitt's arrest and prosecution, the specific details he provided on Schmitt's work undermined Kempner's main thesis, which:

'... was all premised upon the faulty assumption that through his work and reputation he had significantly influenced the policies and practices of the Third Reich. This perspective, which had been developed abroad, never attempted a thorough examination of his writings or an analysis of his actual personal, political, and professional relationships with the institutions and policies of the Nazi regime. Indeed, when in his OMGUS reports Loewenstein wrote from personal knowledge of Schmitt in Weimar and an extensive scholarly familiarity with his works at that time, he actually refuted Kempner's claims that Schmitt had sought to undermine Weimar democracy, establish a dictatorship, and for thirty years promoted the conquest of Europe. For Loewenstein depicts Schmitt as one of the most world-renowned "political writers of our time," whose analysis of Weimar's political structure, if followed, "might have led to its preservation." Moreover, Schmitt's *Verfassungslehre* was "probably the best treatise on democratic constitutional law in Germany," and earlier than most he warned against the "overthrow, by legal methods, of the Weimar Republic by Hitler." Schmitt's subsequent turn to Nazism, Loewenstein argued, was an opportunistic path of a morally flawed personality with inherent authoritarian tendencies.'³⁰⁴

This new material is instructive in that it shows how those committed to the idea that Schmitt deserved punishment on moral and political grounds, and who had insisted upon his repeated arrest and questioning, nevertheless made their case in ways that undermined Kempner's attempt

302 H. Quaritsch, *op cit*, at 27.

303 M. Wiegandt *op cit*, 1575–1576.

304 J. Bendersky, 2007 *op cit*, 92.

to build up a strong *distinctly legal case*. There is no doubting the political will of both Loewenstein and Kempner to see Schmitt held accountable. Yet the former was better placed to appreciate the difficulties of making the available facts meet the admittedly open-ended legal requirements. As Bendersky notes:

'... Kempner was determined to prosecute Schmitt. Nevertheless, the factual information in Schmitt's written disquisitions about his actual writings and activities during the Nazi years, combined with the judicial constraints of the trials, quickly proved Kempner's case of legal culpability unfounded, though discussions of Schmitt's intellectual and moral responsibility remain open to this day.'³⁰⁵

Despite his release, the conclusion of Schmitt's interrogation reports reiterated moral condemnation stating that he was the 'official constitutional apologist' for Hitler, and the: 'most eminent legal exponent of the Nazi Ideology.'³⁰⁶ According to Bendersky, Kempner had reluctantly come to this conclusion even before Schmitt handed him his final written disquisition, and, at the end of the last interrogation on April 29th, Kempner informed Schmitt: "I want to see that you return home."³⁰⁷ The loss of his chair and effective banishment from academia became Schmitt's punishment for the part he played in the Nazi regime, along with the confiscation of his private library. If you count the time that Schmitt was held in internment, he also lost a year's freedom, unlike Julius Streicher, who lost his life for publishing racist propaganda that supported the Nazi Party policies that led to their extermination programme.

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Id.

306

J. Bendersky 1983 op cit 266.

307

Id. at 107.

CHAPTER FIVE

Comparing the three cases

Whilst each of these case studies contains interesting elements in their own right, the main point of our study has been to compare them to identify whether these strikingly different outcomes can be interpreted in terms of a logic of legal doctrine alone. In other words, are they accounted for in terms of the technical meaning and scope of the word “persecution” as defined by Art 6(c) of the Nuremberg Charter?

Compared with the Streicher case, Fritzsche’s judgment established a high standard to pass when seeking to demonstrate a *causal relationship* between racist words and specific atrocities. Guilt in this area appears to require evidence of statements that include calls for extermination made either explicitly, or at least in a coded manner understood by their immediate audience. Criminal responsibility does not – and for pragmatic reasons could not - attach to everyone involved in the distribution of racist propaganda. That is, from a journalist and editor through to a newsagent who merely re-transmits already formulated statements previously drafted by their institutional superiors. If the test for criminal acts of incitement had been formulated in these broad terms, then it would embrace those who repair radios or merely printed, sold and delivered newspapers.

Instead, the IMT held that such liability attaches primarily to those who *first originate* racist propaganda as part of a wider and deliberate campaign of persecution that includes murderous atrocities, and can therefore be considered "participants" in a strict sense of this term. Applying, at least implicitly, this "test," Fritzsche was interpreted as a mere "conduit" for Nazi wartime hate

speech, rather than, as with Streicher, its "creative" source, and thus a criminally liable participant.

The critical distinction between the Streicher and Fritzsche cases was not that latter's propaganda had no racist elements whatsoever. Indeed, the Tribunal held that there was clear evidence of anti-Semitism in Fritzsche's broadcasts as he had clearly blamed the war on the Jews. However, the distinguishing factor was that there were major differences in both the content and tone of Fritzsche's anti-Semitic propaganda. Streicher had expressly called for the official extermination of Jews; whereas Fritzsche's expressions of anti-Semitism were of a far less direct and virulent kind, lacking exterminationist implications. Given the context, Fritzsche's broadcasts generally contained a "conventional" kind of wartime propaganda that did not stand out from the mass of Nazi regime's anti-Semitic ideology as particularly virulent or otherwise remarkable. If Fritzsche was guilty on the basis of the racist propaganda he transmitted, then so too were the majority of German radio broadcasters, newspaper journalists and even academics such as Martin Heidegger and Carl Schmitt.

If there is a credible doctrinal explanation for Fritzsche's acquittal, then it may be that the evidence was not considered sufficient to establish any more than a generic and indirect involvement in hate speech of an anti-Semitic kind. In the absence of evidence of subjective knowledge of exterminations, and any clear and malicious intent to "persecute" Jews through his words, which had been amply shown in the prosecution's case against Streicher, the case against Fritzsche was not proven. The Tribunal thus attributed a far lower measure of criminal intent to Fritzsche's actions than to those of Streicher. They even accepted that the former was naïve enough to believe everything he was told by Goebbels and others in positions of power, even when he admitted that he sometimes doubted the truthfulness of their denials. Whilst the

Tribunal accepted that Fritzsche was responsible for producing propaganda that, when considered objectively, was in the nature of things deceitful, it did not consider that it was perpetrated with the intention to incite atrocities sufficient to constitute "persecution of the Jews." In contrast to Streicher's judgment, the Tribunal came to the conclusion that despite finding evidence of incitement within Fritzsche's radio broadcasts it was not "direct enough" to be classified as "persecution" or "incitement" within the meaning of "crimes against humanity."³⁰⁸

In addition, and without expressly defining the legally required level of subjective intent for "incitement," the Tribunal found that Fritzsche lacked *any form* of criminal intention relevant to the charges he faced. Indeed, and in contrast with the Streicher case, they gave a particularly generous interpretation of the evidence of Fritzsche's subjective motivations, underlying intentions, and knowledge. Taken as a whole, his broadcasts were interpreted as more or less routine forms of wartime propaganda that, in common with its Allied equivalents, aimed to rally the nation behind the policies of its leadership and the overall "war effort." Given this relatively generous judicial interpretation of the material facts, and somewhat vague glossing over of the points of law, the conclusion that this defendant was not guilty of the charges relating to "crimes against humanity" comes as little surprise. The comparison, as a rhetorical foil, with Streicher and his involvement with Nazi propaganda, may well have worked to Fritzsche's advantage because his intentions and deeds then appeared comparatively benign.

We would argue that the Fritzsche and Streicher cases were decided as much on their facts as upon doctrinal grounds relating to the understanding of persecution under Article 6(c). In support of this view, it is useful to review both the Soviet judge's dissenting judgement and how a later German court conducting de-Nazification trials convicted Fritzsche. It is possible that non-

308 William A. Schabas, *Genocide In International Law* (2000) at 278.

doctrinal factors were particularly important in the IMT's decisions. Fritzsche, in comparison to Streicher was apologetic, and remorseful. His manner, even his appearance, was one of respectability contrasting markedly with Streicher's clear vulgarity. His testimony appeared to be carefully and intentionally prepared to emphasise how regretful he had become. Fritzsche presented himself as more intelligent than Streicher and aware of the prejudice that existed inside and outside of the Tribunal. In marked contrast with Streicher, everyone at the trial appeared to gain a favourable impression of Fritzsche's character. The main exception was the Russian judges who were insistent that 'their' defendant ought to hang, which probably accounts for their strongly dissenting arguments.

It was clear from the IMT's Streicher judgment that "crimes against humanity" has been legally defined to include the deliberate use of written words to incite others to engage in acts of racist, religious or ethnic persecution. Prosecutor Justice Jackson was unwilling to prosecute academics, anthropologists and scientists who had collaborated with the Nazi regime where their support was by words alone. However, it is also clear from the wording of the definition of this offence that providing ideological support for a regime that was working to a programme that included, or even required, the commission of war crimes, including policies of racist or religious discrimination and "waging aggressive war," could amount to complicity in "persecution:" and be recognised as a subset of "crimes against humanity.". Streicher's status as a private citizen was certainly not considered a mitigating factor, any more than Fritzsche's official government position was judged to involve enhanced criminal responsibility. It might have been important to the Tribunal that Fritzsche, unlike Streicher, never had any direct contact with Hitler. That said, although the latter had an early friendship with Hitler, he did not have any direct contact after his removal as Gauleiter in 1940. Taken all these factors into account, including the inconsistent

formulation and application of legal tests in relation to subjective knowledge of atrocities, Streicher's execution (as distinct from conviction with a life sentence of imprisonment) seems extreme in the light of Fritzsche's acquittal. The fact that Streicher was executed for persecution/incitement, with his ashes scattered in the river Isar to avoid any burial ground becoming a focus for neo-Nazis, serves to emphasise the highest severity with which the IMT regarded his type of racist propaganda.

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

Our next comparative theme is whether, given the ambiguous legal tests applied in the earlier two cases, Schmitt's own writings could, in principle, have generated a serious case to answer sufficient for him to be successfully prosecuted on the same grounds as Streicher? The case against Schmitt was founded on the proposition that his ideas and writings had exerted political influence, including with respect to Nazi anti-Semitic policies, and that he had played a significant part in the decision making within the Nazi Party. The prosecutors needed to consider the prospects of securing a successful prosecution Schmitt, given the grounds the IMT gave for Fritzsche's acquittal, and recent decisions of the NMT in relation to defendant's with equal or greater levels of complicity. If high-ranking and longstanding members of the Nazi youth were, as seemed likely, to escape prosecution for war crimes despite their direct complicity for indoctrinating almost an entire generation into anti-Semitic racism and providing much of the personnel for the notorious Waffen-SS, then, in comparison, it may have seemed incongruous to charge Schmitt with incitement.

There are grounds then for taking at face value Kempner's claim that, at least in principle, the Nuremberg Charter allowed academics, intellectuals, educationalist and propagandists more generally to face prosecution for acts of "persecution" through inciting words alone. It is more difficult to explain why, in a context of the many more extreme examples of wartime anti-Semitic propaganda distributed within the education and cultural sectors, it was reasonable to focus on Schmitt, who had been forced out of any even semi-official role three years before WW2 started. However, the fact that Streicher had been removed from the official position of Gauleiter in 1940 had little bearing on his arrest and prosecution before the IMT. Furthermore, why, other far more directly incriminated legal and other academics were spared, or otherwise evaded arrest and interrogation, can be viewed as more a question of institutional pragmatics and policy factors than the strict and consistent application of legal principles. On the other hand, together with the philosopher Martin Heidegger, Schmitt's contribution to the pre-war rationalisation of aspects of Hitler's overall programme, was arguably extremely powerful in part *because* it traded on the pre-existing intellectual standing of one of Weimar Germany's pre-eminent and widely respected legal academics.

Of course, neither the prosecutors nor the judges could subcontract the question of whether any particular academic's writings constituted "persecution" within the meaning, scope and purpose of "crimes against humanity" to the decisions of the Nazis regime itself. In principle, and as they would have known from the earlier judgment in the Streicher case, "unofficial" forms of racist propaganda stemming from private individuals and organisations, even those disapproved of by leading members of Hitler's genocidal regime, could fall within the scope of this offence. Arguably the main precondition here was that they had to be shown to be *closely coordinated with* physical acts of genocide, such that they materially contributed to the rhetorical effects of

official incitements. By contrast, Kempner was not able to locate or cite any passages from even the most problematic of Schmitt's Nazi-era writings that specifically called for, or otherwise encouraged or endorsed on any grounds (political, religious or racial) the *physical* persecution of Jews.

If Schmitt's intentions and actions between 1933-36, particularly in relation to his anti-Semitic publications and conference organisation had been subjected to the more hostile legal scrutiny akin to the Streicher case, then it is difficult to see how he would have avoided prosecution and conviction. It is probable that Schmitt was not prosecuted for three reasons. First, his legalistic guile during prolonged interrogations in which he avoided the various traps set for him, and provided at times powerful counterarguments. Second, Schmitt's defences about the 'purely scholarly' nature of his involvements with Nazism in a context of a murderous dictatorship where even theoretical work was heavily censored and internal opposition dangerous; and, thirdly, the difficulties in establishing to a high standard of proof any direct *causal* relationship between his theoretical ideas and the events that were either pre-existing crimes or became the object of retrospective criminalisation within the Nuremberg process, such as "crimes against the peace."³⁰⁹

However, had the facts of Schmitt's brief period of collaboration and ideological service for Hitler's regime from 1933-36 been judicially interpreted in a manner as sympathetic as those of Fritzsche, then it is likely he would have been acquitted. The fact that Schmitt's propaganda role was in effect over before the Holocaust started, may have counted in his favour for the same reasons that it worked against Streicher, who intensified his propaganda in coordination with Hitler's extermination programme. On the other hand, his role in helping to legitimate the early phases of Nazi rule, which was already known to have a strongly anti-Semitic ideology, could

309 J. Bendersky 1983 op cit, 265–273; Wiegandt, op cit, 1575–1576.

have been interpreted as laying the foundations for persecutions and later atrocities. On an unsympathetic reading of his contributions to National Socialism, Schmitt's position is closer to that of Streicher than Fritzsche in that both men were the creative source and initiators of anti-Semitic propaganda, whereas Fritzsche was held to be a mere conduit for the hate speech of others. On the other hand, if Schmitt had stood trial as an eminent professor of law, he would have presented himself with considerable guile to create a positive impression as someone who was essentially misled and abused by a movement he had initially resisted, which was a successful argument put forward by Fritzsche's defence.

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