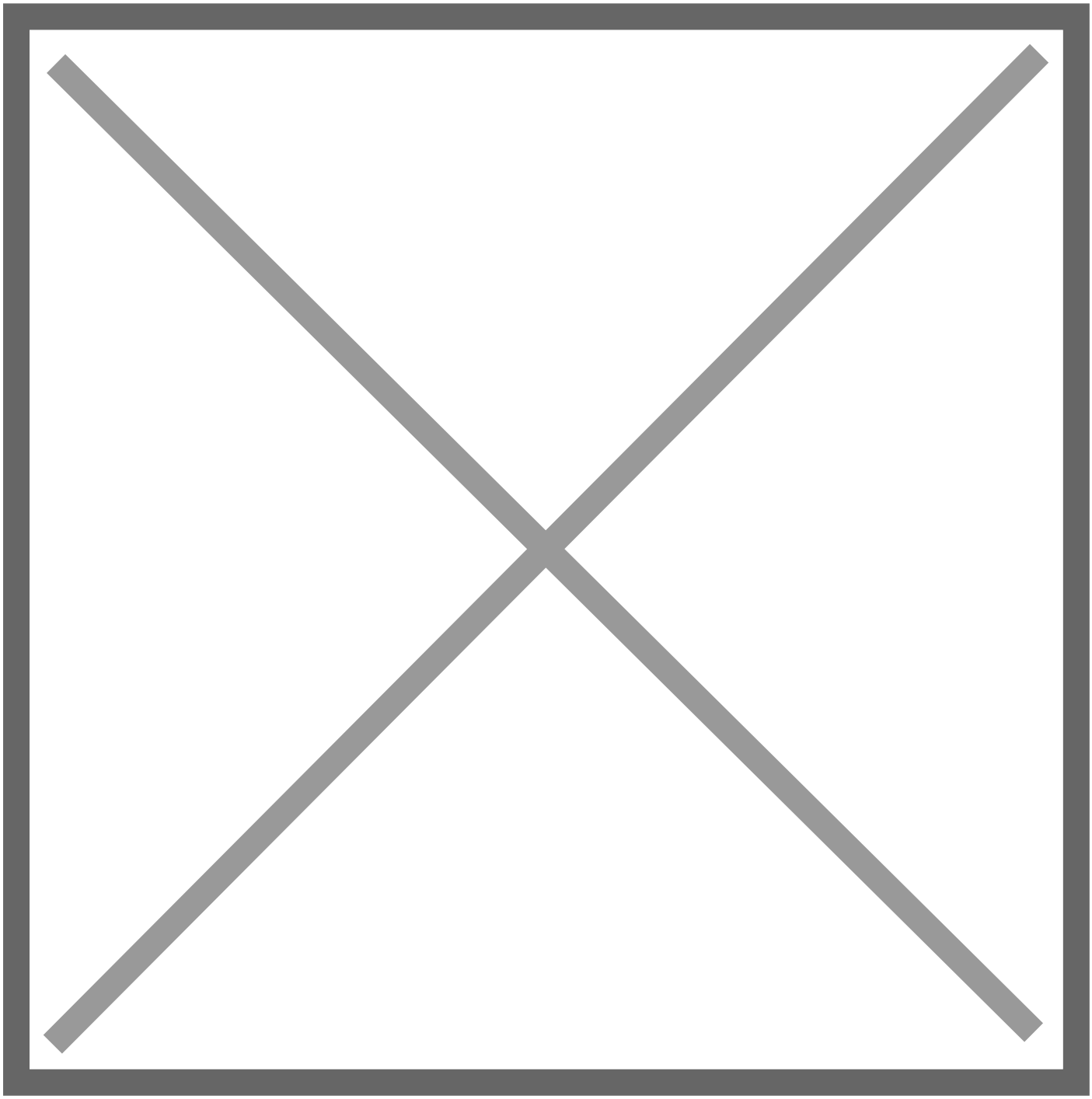


ICC Moot Court Competition 2020: Mooting Whether Social Media Posts Can Constitute Incitement of Genocide and the Scope of Liability for Social Media Executives

October 23, 2020

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By: Anika Winn

Introduction

Can posts made on social media amount to incitement of genocide? What is the scope of liability when social media posts have real life consequences? And how does the International Criminal Court (ICC) establish jurisdiction over a crime that occurs in cyberspace?

These are questions becoming ever more prominent in the digital age that we live in. The effects of social media gained global attention in 2018 when the spotlight was cast on the use of Facebook and other social media platforms in the ongoing human rights violations and abuses in Myanmar against the Rohingya people. Facebook was criticized for the role it played in distributing content inciting violence, hate and intolerance against the Rohingya people, and failing to promptly remove and ban such content.

This year, law students from 75 countries around the world grappled with the issue of how incitement of genocide committed over social media could be prosecuted, as well as the outbreak of COVID-19 that drastically affected the competition format. The University of Ottawa team competed at both the Regional Round for the Americas and Caribbean and the International Round. Unfortunately, COVID-19 peaked right before the regional round in New York. This meant that the entire Regional Round took place on an online platform. Despite last minute changes to accommodate and adapt this new online competition format, the Ottawa team won the entire Regional Round and picked up 7 different awards, including Top Oralist and Memorial Awards for all three positions. The International Round sadly cancelled all oral arguments that were set to take place in The Hague and presented awards only for written arguments. Once again, the Ottawa team excelled, winning 2nd runner-up Best Memorial Team Overall and 2nd runner-up Best Government Counsel Memorial.

In this 2020 edition of the Moot, teams were asked to grapple with three challenging and increasingly relevant issues: (1) Whether there are substantial grounds to believe one or more posts made by an extremist group on a social networking platform constituted direct and public incitement of genocide under Article 25(3)(e) of the *Rome Statute*; (2) Whether the owner and CEO of the social networking company can be held criminally responsible for inciting genocide under Article 25(3)(e) of the *Rome Statute* and/or providing the means to incite genocide under Article 25(3)(c) of the *Rome Statute*; and (3) Whether the ICC has jurisdiction to prosecute the Accused under Article 12 of the Rome Statute, when all of her actions related to the charges occurred in her State of nationality which is not a member of the ICC? Never before has any international tribunal dealt with incitement in the context of social media, nor establishing jurisdiction over crimes committed in cyberspace. Each of the three

novel issues are summarized below.

(1) Whether anonymous posts made by an extremist group constitute incitement of genocide

The crime of incitement of genocide is contained in Article 25(3)(e) of the Rome Statute and has never been interpreted nor charged. Beyond the fact that the drafters of the Rome Statute likely never contemplated incitement occurring through cyberspace, the provision itself provides numerous conceptual challenges, including the fact that incitement is contained within the “Modes of Liability” Article instead of under the Article for “Genocide”. This marks a departure in placement of the crime from the statutes of the former international criminal tribunals and means that incitement is not defined within the *Elements of Crimes*, which may result in ambiguity in its treatment.

Under Article 25(3)(e) of the *Rome Statute*, for speech to constitute incitement it must be: (1) “public”; (2) “direct”; and (3) intended to incite genocide. Absent definitions of these elements in the *Rome Statute and Elements of Crime*, Article 21 of the Rome Statute allows the ICC to rely on the jurisprudence from other international *ad hoc* tribunals. For the crime of incitement of genocide, the sole jurisprudence derives from the International Criminal Tribunal of Rwanda (ICTR).

The ICTR’s *Akayesu* and Media Case decisions provide significant interpretive guidance for the elements of incitement. *Akayesu* was the first case heard by the trial chamber of the ICTR and provided the first definitions of what is meant by incitement: that is both public and direct. The trial chamber in *Akayesu* assessed the public element through the place where the incitement occurred, and whether the audience was selective or unrestricted. The trial chamber acknowledged that a “public” place is not restricted to physical space but incorporates means of communication, which includes mass media like radio or television. The *Media Case* was the first international decision to find that the media can be instrumental in inciting genocide among the masses. The trial chamber considered whether the controlling personnel of RTLM radio station and *Kangura* newspaper could be liable for the widespread distribution of inciting messages through their respective platforms. The *Media Case* easily concluded that sources of mass media are sufficiently public.

The element of “directness” is concerned about whether the speech was understood by its intended audience as inciting genocide. Akayesu determined that this element can be met through both explicit or implicit speech, with the latter being assessed in light of contextual factors to determine how the intended audience understood the speech. The ICTR recognized that a narrow interpretation of “direct” would fail to account for cultural differences in communication, the specific context of genocide, and the deliberately coded nature of genocidal speech. Further, because incitement is an inchoate crime, evidence of subsequent violence can support a finding that the speech was sufficiently direct, but is not necessary.

Finally, to constitute incitement, the author of the speech must intend to incite genocide. The *Media Case* confirmed that intent can best be inferred from the effect the speaker’s words has on its audience and the language the author uses. For example, the use of racial slurs and derogatory

phrases can negate a suggested *bona fide* intent by the author. Further, the intent to incite genocide can also be evidenced in part by the fact that genocide actually occurred. The ultimate question to ask is whether the speech created a particular state of mind to convince the engaged audience to commit genocide? If yes, then it can be said the speech intended to incite genocide.

As the ICTR found, assessing the elements of incitement is qualitative in nature and a fact-driven analysis. In the context of social media, this assessment can become even more complicated due to a number of factors. For example, content may be published by an anonymous author, the intended audience may be unclear, and there may be no way to determine who actually viewed the posts. The ICC will have to determine how they will deal with these present-day challenges, as well as how they will interpret Article 25(3)(e) for the first time.

(2) Whether the owner of a social media platform can be held criminally responsible for inciting genocide and / or providing the means for the incitement

The criminal liability of media executives for incitement of genocide is internationally accepted. The scope of liability is determined by the nexus between the actions of the media executive and the incitement. The responsibilities inherent in media ownership and the influence of executives must be considered.

Media executives can be liable for providing a platform for incitement depending on their control over the disseminated content. In the *Media Case*, Ferdinand Nahimana was held liable in his capacity as director and owner of RTLM for inciting broadcasts disseminated systematically. RTLM was characterized as a "vehicle for anti-Tutsi propaganda." While Nahimana did not make journalistic decisions, the broadcasts reflected the board's editorial policies which he was responsible for. Likewise, Hassan Ngeze was directly liable of incitement in his capacity as owner and editor of *Kangura*. Ngeze was convicted on the basis of the cumulative impact of inciting articles published in *Kangura* because of his control over publications.

Establishing liability of media owners is based on how their influence shapes the type of content being disseminated. The *Media Case* recognized how RTLM broadcasts throughout the genocide built on the foundation Nahimana laid as founder and principal ideologist of RTLM. The trial chamber found Ngeze purposely used *Kangura* publications to instill hatred, promote fear, and incite genocide. Furthermore, liability is established when the media executive had the authority to act but chose not to. In the *Media Case*, Nahimana's failure to stop the inciting RTLM broadcasts established his criminal liability. Nahimana had the ability to intervene at the highest decision-making level, yet he failed to do so even after acknowledging the global concern over RTLM programming.

The *mens rea* required under Article 25(3)(e) of the *Rome Statute* is dual intent. First, the accused must intend to directly and publicly incite genocide. Second, the accused must possess genocidal intent; the specific intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The purpose of the speech disseminated by the media is indicative of the media executive's

intent. In the *Media Case*, the trial chamber found the media platforms would systematically and repetitiously identify the entire Tutsi population as the enemy, as well as name individuals explicitly. The failure of the defendants to distance themselves from the messages of ethnic hatred conveyed by *Kangura* and RTLM content and instead, purvey the messages, was significant. These factors suggested the impugned speech was intended to incite genocide.

Establishing specific genocidal intent is a special requirement for any crimes related to genocide. The personal history of the accused, such as past interviews and publications could facilitate a finding of genocidal intent. The social environment of the incitement further may support a finding of genocidal intent. In *Muvunyi*, the trial chamber considered the "large-scale massacres of Tutsi" that had "already occurred in the area." In *Kalimanzira*, the trial chamber concluded that genocidal intent could be inferred from "the general context of the perpetration of other culpable acts systematically directed against the same group." Generally, an ongoing campaign of genocide strengthens a finding of genocidal intent.

It is an extremely high standard to be held directly liable for incitement of genocide, especially as a media executive. In the case of social media platforms, it becomes even more difficult because generally, executives do not have the same control over the content appearing on the platforms as they would over traditional sources of media. Millions of people around the world have access to social media platforms and it would be an unrealistic to expect executives to be personally liable for all content. Even if the *actus reus* could be established for the failure of a platform to respond expeditiously to harmful content, establishing the dual intent required under Article 25(3)(e) would be particularly difficult.

A more practicable approach may be to hold the executives of social media platforms liable for providing the means for the commission of incitement under Article 25(3)(c) of the *Rome Statute*. The *actus reus* of Article 25(3)(c) requires the accused provide some sort of assistance to further the commission of the offence. The assistance can take the form of "providing the means," which is a special example of providing practical or tangible assistance or it could be in the form of an omission, so long as it furthered the commission of the offence and the Accused had a legal duty act. The *mens rea* required under Article 25(3)(c) is that the accused acts with "the purpose of facilitating the commission" of the crime. While still presenting a high evidentiary standard, on the right set of facts, proof that an executive of a social media platform was made aware that their platform was being used to incite genocide, might support a charge under Article 25(3)(c). From a policy perspective, however, this creates a slippery slope and runs the risk of impeding technological advancements, stifling freedom of expression and putting almost unmanageable pressures on social media executives.

(3) Does the ICC have jurisdiction to prosecute the owner of a social media company that operates in a non-party state but the effects are felt in a party state?

The ICC has jurisdiction over cases where either the accused is a national of a state that is signatory to the *Rome Statute* or if the conduct of the alleged crime occurred on the territory of a state party.

Conduct in Article 12(2)(a) of the *Rome Statute* is established "if at least one legal element of a crime […] or part of such a crime is committed on the territory of a State Party." Recently, in the first of the *Myanmar decisions*, the Office of the Prosecutor asked if her office had jurisdiction to prosecute Myanmar officials for deporting Rohingya peoples from Myanmar to Bangladesh. Myanmar is not a party to the Rome Statute, but Bangladesh is. The pre-trial chamber (PTC) determined the precondition for jurisdiction under Article 12(2)(a) was met because "displacement across a border" was a requisite element of Article 7(1)(d). The displacement of Rohingya people to Bangladesh necessarily established the "conduct" of forced displacement on the territory of a State Party, therefore granting the Court jurisdiction.

The PTC interpretation of "conduct" to include any element of the offence was confirmed in subsequent ICC decisions. The PTC further elaborated that jurisdiction is established "if the conduct was either completed […] or it was initiated in the territory of a State Party and continued in the territory of a non-State Party or vice versa."

The PTC in the second *Myanmar* decision suggests that "conduct" under Article 12(2)(a) should include the consequences, as well as the elements, of the offence. The PTC recognized elements of the actus reus of the conduct in question "may encompass within its scope, the consequences of such conduct." For instance, an element of deportation involves the victims being physically removed from the area or forced to leave through coercion. In the latter situation, the victim's response is both a consequence of the coercive environment and an element that completes the crime.

Furthermore, according to the PTC, the effects doctrine permits a state to "assert territorial jurisdiction if the crime takes place outside the state territory but produces effects within the territory of the state." The "effects doctrine" conforms with *opinio juris*. The PTC concluded Article 12(2)(a) is not intended to "limit the Court's territorial jurisdiction to crimes occurring exclusively in the territory of one or more State Parties." However, on the facts, the PTC found it unnecessary to formulate conditions for the ICC's exercise of jurisdiction in transboundary crimes.

The ICC is not the only court to recognize the effects doctrine. Domestic jurisprudence from both common and civil law jurisdictions, including Germany, France, the UK and the US, have adopted the "effects doctrine" in the context of prosecuting transnational crimes. The "effects doctrine" has generally interpreted "conduct" to include both the prohibited acts/omissions and their consequences. The "effects doctrine" is commonly invoked in the context of prosecuting cyberspace crimes.

The primary purpose of Article 12 of the *Rome Statute* is to ensure the ICC has jurisdiction to effectively prosecute the "most serious crimes of concern to the international community as a whole." The drafters of the Rome Statute considered incitement to "threaten the peace, security, and wellbeing of the world." Therefore, a broad interpretation of "conduct" to include both the "elements" and "consequences" of the offence will enable the ICC to more effectively fulfill its mandate of prosecuting grave international crimes.

The drafters could not have contemplated the implications of modern-day internet when the Rome Statute was adopted. The reach of the worldwide web is such that any individual has the means to communicate with the masses across the globe. Thus, a single person holds immense power to spread hate, promote violence, or even, incite genocide across international boundaries.

Due to the nature of cyberspace and the increasing role social media plays in the commission of international crimes, Article 12 must be interpreted to prevent perpetrators from escaping liability simply because they are located in a non-State Party. Limiting the interpretation of “conduct” to exclude consequences would severely undermine the ICC’s capacity to prosecute crimes in the new digital age. If Article 12(2)(a) is interpreted narrowly, perpetrators will be allowed to commit grave international offences while escaping liability, given the unrestricted capabilities of cyberspace. Moving forward, the ICC will have to formulate conditions that enable prosecution of incitement committed via cyberspace but also strike a balance with ensuring fairness to accused when so many factors may be uncontrolled.

Conclusion

The ICC Moot Court provides a rare opportunity for students to engage with complex and emerging legal issues that are of great importance to the international community. Students are put in the unique position to craft creative legal arguments to address novel issues that may very well become reality. While this years’ experience wasn’t necessarily the same as previous years, it was nonetheless an extremely memorable and rewarding journey. It put students right in the epicentre, alongside the rest of the legal community in terms of learning how to function given the limitations imposed by COVID-19. Specifically, the organizers of the New York Regional Round did an incredible job of putting together an entire online competition in less than a week to allow students to still have the chance to showcase so many months of hard work. The global pandemic also raises the question of how the ICC will continue to operate when the collaboration and cooperation of the international community is stifled.

The University of Ottawa team would like to take this opportunity to thank our wonderful coaches, Tim Radcliffe and Amanda Ghahremani; the many amazing people who gave us their time and expertise in order to help us prepare for this moot; and our external sponsor, the Canadian Partnership for International Justice.

This article could be cited as Anika Winn, “ICC Moot Court Competition 2020: Mooting Whether Social Media Posts Can Constitute Incitement of Genocide and the Scope of Liability for Social Media Executives” (2020), 4 PKI Global Justice Journal 38.

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