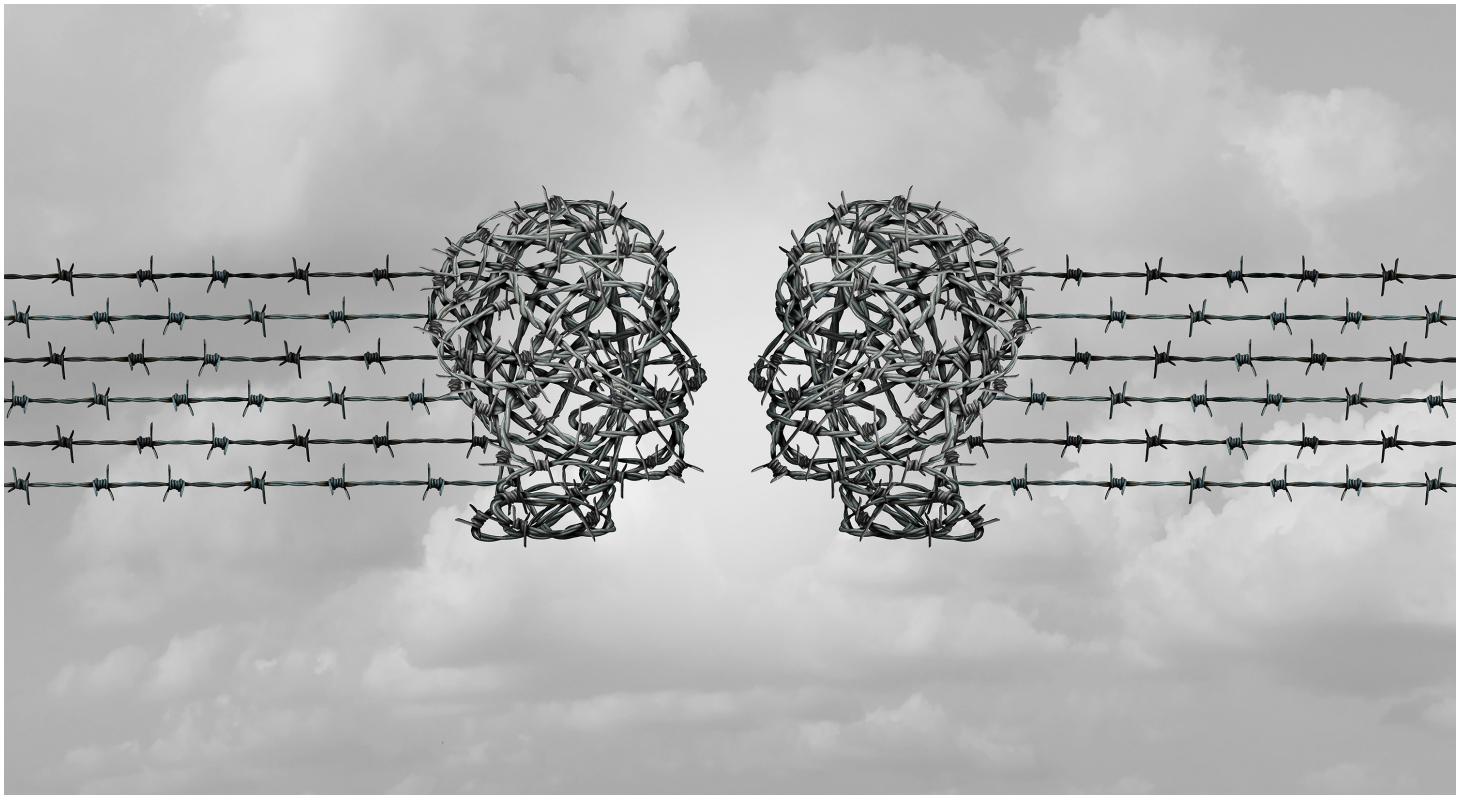


Hate speech and international criminal law

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By: Joshua Vivian

In recent years and decades, the topic of hate speech has become the focus of increasing attention and debate in international legal circles. Legal scholars and prominent international bodies alike have remarked not only on the growing prevalence of hate speech and discrimination directed against minority populations, but also on the frequency with which these acts precede, accompany, or even provoke large-scale violent atrocities and human rights violations (see for example here, here, and here). As such, there is renewed interest in the role of international criminal law (ICL) in addressing the most severe of these incidents of hate speech. While international efforts to tackle hate speech and discrimination will necessarily be multi-faceted, ICL provides a valuable tool for responding to the most widespread and damaging hate speech campaigns. Some forms of hate speech and discrimination are already covered under different aspects of ICL. However, there remains room for more explicit and extensive coverage of such acts given the nature of hate speech and the principles of international law.

Defining hate speech

Before turning to an examination of legal treatments of hate speech, it is important to establish a thorough understanding of the behaviour to which this term refers. In his "Strategy and Plan of Action on Hate Speech", UN Secretary-General António Guterres defines hate speech as follows:

"any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor."

This definition provides a helpful overview of the general character of hate speech, incorporating the most common and widely-accepted elements in recent discussions on this topic (see for example here , and here, and here). However, far greater challenges emerge in trying to determine what specific acts and behaviours are encompassed under this definition. The term "hate speech" has increasingly been applied to a host of different speech acts in a variety of settings and contexts, and there is consequently a great deal of ongoing debate over the precise criteria for what qualifies as "hateful" speech in public discourse (see here and here).

Indeed, the task of establishing an exhaustive list of all "hateful" speech acts proves virtually impossible given the myriad ways in which hatred for a given group can be expressed. Fortunately, despite not being fully exhaustive, efforts to classify and categorize common varieties of hateful speech acts yield valuable insights into the range of behaviours to which the label of "hate speech" applies. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted by the United Nations General Assembly in 1965, discusses the different forms of speech and "propaganda" which may contribute to (or even constitute) identity-based discrimination. While the language of this Convention focusses exclusively on discrimination based on race, its contents prove equally relevant to discrimination on any number of other of identifying grounds, and the ICERD is often referenced in modern discussions of hate speech even outside of specifically racial contexts. Most notably, article 4 of the ICERD has been recognized as establishing "four distinct types of hate speech":
"(a) dissemination of ideas based on racial superiority; (b) dissemination of ideas based on racial hatred; (c) incitement to racial discrimination; and (d) incitement to acts of racially-motivated violence (see here, §565)."

This classification of discriminatory speech acts helps reveal several key points about common themes in hateful speech behaviour. In particular, we see that the enumerated varieties of hate speech above fall into two general categories: dissemination of ideas, and incitement to action. Here, "disseminating" hate speech can involve either promoting hatred or a perceived inferiority of the victim group. By contrast, "incitement" goes beyond these general statements by encouraging others to undertake further discriminatory acts against members of that group. Several legal scholars have produced models of a kind of "spectrum" of hate speech building upon this distinction, endeavoring to illustrate different sub-categories of incitement and dissemination as well as the various audiences to which these speech acts may be addressed (see for example here, pp. 311-316, and here). While

these classification efforts are, in many ways, ongoing, they further reveal that the concept of “hate speech” encompasses a broad and complex range of communicative behaviours, including those aimed at disseminating hateful ideas about a particular group as well as those which seek to incite violence or other discriminatory acts against that group’s members.

Current coverage in ICL

Perhaps because of the complexities involved in its definition, “hate speech” itself has never been internationally criminalized. Instead, there are several sections of ICL which directly or indirectly address speech acts under particular circumstances. These so-called “speech crimes” – most notably incitement, instigation, and persecution – provide mechanisms through which some areas of the hate speech spectrum may be prosecuted and punished under international law. (For two detailed analyses of the scope and history of these speech crimes in international law, see here and here.) However, these sections of ICL tend to focus predominantly on speech acts which materially contribute to other recognized international crimes. “Incitement”, for example, is only expressly criminalized in reference to the crime of genocide (see here, article 25(3)(e)). Other forms of hate speech “soliciting” or “inducing” crimes not amounting to genocide may also be criminal, but are punishable only in cases where those further crimes are in fact committed or attempted (see here, article 25(3)(b)).

Finally, although “persecution” as a crime against humanity initially appears to offer a promising avenue of coverage for disseminating forms of hate speech and discrimination, there is significant ambiguity as to whether this coverage extends to acts of hate speech outside the context of other contemporaneous international crimes. Findings from the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) are directly conflicted as to whether hate speech not calling for further discriminatory or violent action may qualify as persecution’s actus reus (see here, §1073, and here, §209 respectively). More recently, “persecution” under the Rome Statute of the International Criminal Court (ICC) has been explicitly limited to cases where such acts occur “in connection” with another crime under the Court’s jurisdiction (see here, article 7(1)(h)). While the precise nature of this “connection” has yet to be interpreted in ICC jurisprudence, there is a concern that such a stipulation renders persecution “the functional equivalent of a mode of criminal liability” rather than a distinct crime in its own right (see here, p. 386, as well as here, §§116-119).

Thus, while the current framework of ICL encompasses a variety of potential acts of hate speech, this framework focusses almost exclusively on speech that contributes to other acts which already constitute international crimes. With the exception of incitement to commit genocide (or, in theory, persecution as a crime against humanity), the current emphasis in ICL is therefore on using speech acts as modes of liability for other crimes, rather than on pursuing/prosecuting acts of hate speech in themselves.

Moving forward

In many ways, this emphasis on violent crimes in ICL is completely understandable. ICL is expressly concerned with addressing “the most serious crimes of concern to the international community as a whole” (see commentary in the preamble of the Rome Statute here), and incidences of mass violence represent the most obvious and horrific examples of such crimes. Furthermore, there has been a tragically steady stream of such violent incidents for international organs to concern themselves with over the past several decades. Since its foundation, the ICC has been inundated with requests and reports of situations meriting international intervention, with the overwhelming majority of these cases involving some form of recent or ongoing violence (see here). Given this abundance of cases involving mass violence, it stands to reason that addressing these devastating atrocities should represent a primary concern for international legal bodies.

However, this important ambition does not preclude greater coverage of hate speech and discrimination. Indeed, there are good reasons to believe that more comprehensive coverage in these areas would actually further the stated aims of the ICC and of ICL more broadly. Firstly, the ability to prosecute speech crimes in themselves without reliance on a demonstrable connection to other criminal acts would greatly increase the preventative power of ICL. Prevention of violent atrocities and other major crimes is often presented among the avowed goals of international law, and various statutes and international conventions have explicitly adopted this approach (see for example here as well as again in the preamble of the Rome Statute). Given the acknowledged connection between widespread hate speech campaigns and subsequent mass violence, intervention against the hateful speech campaigns themselves represents one of the most promising ways of preventing such atrocities from occurring in the first place. Various legal scholars have already remarked on this unfulfilled preventative potential in ICL, and have pointed to hate speech as a key area where expanded coverage would be especially effective (see here). In its simultaneous capacity as early warning indicator, correlate, and sometimes direct cause of mass violence, hate speech has a unique role in the prediction and prevention of large-scale atrocities. A more robust criminal coverage for hateful propaganda campaigns may therefore help eliminate the very crimes for which these speech acts are currently charged as modes of liability.

Secondly, expanded coverage of hate speech and discrimination outside of an existing context of violence would better address the full range of harms inflicted by such discriminatory acts. While the current framework of ICL focusses on the harmful acts which may result from hateful rhetoric against particular groups, there is also a growing acknowledgement that hateful speech acts may also represent direct harms in themselves (see here). Hate speech has long been acknowledged as a violation of its victims’ basic human rights, and such discrimination has repeatedly been described as an “offence against human dignity” (see here and here, as well as findings by international criminal tribunals here, here, and here). In the words of the *Media* Case Trial Chamber at the International Criminal Tribunal for Rwanda (para. 1072):

“Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also

in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm."

The harms inflicted by hate speech thus extend beyond simply encouraging or increasing the likelihood of subsequent violence or other discriminatory acts. The very act of demeaning or dehumanizing a person or group based on some aspect of their identity is an injustice in its own right, even absent any further violence or other actions taken against members of that group. At present, these harms find little to no redress under the framework of international criminal law.

It should be noted here that there is some debate as to whether these particular harms represent suitable targets for international prosecution. Several Judges and international legal scholars have argued that hate speech in itself is not sufficiently severe to represent a crime under international jurisdiction (see here, as well as further discussion here). While human rights violations are of natural concern to international legal bodies, such violations, like any other criminal act, must reach a certain threshold of gravity in order to be pursued in international criminal courts. This is undoubtedly a sensible restriction; it would be practically impossible, as well as wildly inappropriate, for international organs to attempt to engage in direct prosecution of every individual instance of a harmful/criminal act. That is why the Rome Statute of the ICC includes complementarity with national legal systems as one of its foundational principles, as well as why international conventions like the ICERD set out actions to be taken by individual member states within their own respective jurisdictions (see here and here respectively). Given these principles of gravity and complementarity, acts of hate speech may seem inappropriate candidates for prosecution under international criminal law.

However, while most individual acts of hate speech may be adequately addressed by national and regional systems, particularly prominent or widespread acts of this sort may well meet the threshold of gravity necessary to enter international jurisdiction. As with other crimes covered under the Rome Statute, international intervention may be required in cases where a particular state demonstrates an inability or an unwillingness to address acts of hate speech occurring within its borders. Such situations become all the more serious when members of a state apparatus or government are responsible for the acts of hate speech in question. Indeed, the Rome Statute requires that any act considered as a crime against humanity be committed "as part of a widespread or systematic attack directed against any civilian population" (see here, article 7(1)), making it even more likely that hate speech prosecuted under this heading would involve actions by a government or other organization where redress at the national or local level would be ineffective. Unfortunately, we have seen in a tragic number of cases that these types of situations do occur (see for example here, here, and, more recently, here), and international responses to these situations have often been hampered by an inability to prosecute hateful speech acts as distinct crimes. The more widespread or systematic a practice of hate speech or discrimination becomes, the more severe its impact will be, to the point where international intervention becomes not only appropriate but necessary. In such cases, international criminal prosecution of those responsible for hate speech campaigns would fully align

with international principles of gravity and complementarity.

One other important area of concern in contemplating any criminalization of speech acts is that of protecting individuals' rights to free speech. Freedom of speech and freedom of expression are each recognized and protected under international law, and legal organizations must be extremely careful to avoid creating dangerous precedents regarding international imposition on free speech rights. However, it is also widely acknowledged that sanctions against hate speech and discrimination are compatible with these basic rights. Most national systems, as well as virtually all international treatments of human rights, include protections for free expression and information directly alongside additional protections against discrimination (see for example here and here). With the notable exception of the United States, there is virtually unanimous international agreement that hate speech and discrimination do not represent areas of protected speech – hence why, as we have seen, there are already criminal provisions for certain speech acts in national and international law. While there is a delicate balance to be struck between free speech rights and protections against discrimination, there is therefore good reason to believe that more extensive criminalization of hate speech – particularly the most widespread and severe varieties which would be of interest to ICL – would uphold rather than violate the various rights guaranteed to all persons under international law.

Conclusion

Given these various factors, it should be clear that there is room for an expanded coverage of hate speech and discrimination in ICL which respects the guiding principles of international law. Indeed, implementation of such expanded coverage would be very much in keeping with the stated goals of ICL, including the denunciation of acts inflicting suffering and harm against civilian populations, the safeguarding of fundamental human rights for all persons, and the elimination and prevention of atrocities against civilian populations around the world. Ultimately, ICL cannot address the root causes of hatred and discrimination; nor can it provide a universal framework for prosecuting isolated incidents of hate speech. However, by taking a clear stand and adopting measures which explicitly target the most severe such acts, ICL can greatly increase its ability to prevent and respond to large-scale harms inflicted against civilian populations. With the difficulties currently facing any attempted prosecution of hate speech in ICL, there is both pressing need for and much to gain from a re-examination of the ways in which discrimination and hateful speech acts are approached in the context of international criminal law.

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interest in international law and the history of criminal speech. This article is an excerpt from a longer work currently being prepared on this subject, examining the current attitudes towards speech acts in international criminal law.

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