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Gregory S. Gordon

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Hate Speech and Persecution: A Contextual Approach

Gregory S. Gordon*

ABSTRACT

Scholarly work on atrocity-speech law has focused almost exclusively on incitement to genocide. But case law has established liability for a different speech offense: persecution as a crime against humanity (CAH). The lack of scholarship regarding this crime is puzzling given a split between the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia on the issue of whether hate speech alone can serve as an actus reus for CAH-persecution. This Article fills the gap in the literature by analyzing the split between the two tribunals and concluding that hate speech alone may be the basis for CAH-persecution charges. First, this is consistent with precedent going as far back as the Nuremberg trials. Second, it takes into account the CAH requirement that the speech be uttered as part of a widespread or systematic attack against a civilian population. Third, the defendant must be aware that his speech

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is uttered as part of that attack. As a result, it is problematic to consider "hate speech" in a vacuum. Unlike incitement to genocide, an inchoate crime not necessarily involving speech and simultaneous mass violence, hate speech as persecution must be legally linked to contemporaneous violence in a context in which the marketplace of ideas is shut down and speech thus loses its democracy and self-actualization benefits. Thus, it should ordinarily satisfy the CAH-persecution actus reus requirement. Nevertheless, given the strictly verbal conduct, and possible impingements on quasi-legitimate freedom of expression, isolated or sporadic hate speech, as well as hate speech uttered as part of incipient, low-level, or geographically removed chapeau violence, may not qualify as the actus reus of CAH-persecution. The Article ultimately makes the point that context is crucial and case-by-case analysis should always be required.

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*But the character of every act depends upon the
circumstances in which it is done.*

— U.S. Supreme Court Justice Oliver Wendell Holmes, Jr.¹

I. INTRODUCTION

Most scholarly work on atrocity-speech law has focused almost exclusively on the crime of direct and public incitement to commit genocide.² But jurisprudence in this area has established liability for another offense resulting from inflammatory hate speech linked to mass violence: persecution as a crime against humanity (CAH).³ The lack of scholarship regarding this offense is somewhat perplexing, given that, in recent years, the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY) have taken different approaches to the issue of whether speech can serve as an *actus reus* for persecution as a CAH (CAH-persecution). In the 2000 *Prosecutor v. Ruggiu*⁴ and the 2003

1. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (formulating the “clear and present danger” test).

2. *See, e.g.*, Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485 (2008) (defining the contours of the crime of “incitement of genocide”); Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 SANTA CLARA L. REV. 607 (2010) (proposing a new systematic test for distinguishing hate speech from incitement to genocide); 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) (charting the contours of incitement to genocide and analyzing its application to the music of Simon Bikindi); Joshua Wallenstein, Note, *Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide*, 54 STAN. L. REV. 351 (2001) (arguing that incitement to genocide does not require the element of causation).

3. *See, e.g.*, *United States v. Goering*, Judgment, Streicher (Int’l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 161–63 (1946) (convicting Streicher for “Crimes against Humanity” at the Nuremburg Trials because he published “speeches and articles week after week, month after month, infect[ing] the German mind with the virus of anti-Semitism, and incited the German people to active persecution”).

4. *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶¶ 22, 24 (June 1, 2000), <http://www.unictr.org/Portals/0/Case/English/Ruggiu/judgement/rug010600.pdf>.

*Prosecutor v. Nahimana*⁵ (*Media Case*) judgments, for example, separate ICTR Trial Chambers found that hate-speech radio broadcasts not necessarily calling for action blatantly deprived the target ethnic group of fundamental rights and thus, even without proof of causally related violence, could be the basis for charging persecution as a CAH. In the 2001 *Prosecutor v. Kordić* case, on the other hand, an ICTY Trial Chamber found that the hate speech alleged in the indictment did not constitute persecution because it did not directly call for violence and thus failed to rise to the same level of gravity as the other enumerated CAH acts (such as murder and rape).⁶ Then, in the *Media Case* appeals judgment, the majority found that pure hate speech, if accompanied by separate calls for violence or actual violence, could give rise to CAH-persecution liability, but declined to rule on whether nonadvocacy hate speech, standing alone, is of a level of gravity equivalent to that of the other enumerated CAH crimes.⁷

This Article fills the gap in the literature by analyzing the split between the ICTR and ICTY and grappling with the issue the *Media Case* Appeals Chamber declined to address. It concludes that hate speech not directly calling for action may qualify as persecution. In the first place, this is consistent with the logic and precedent of prior cases going as far back as the Nuremberg trials.⁸ Second, it is impossible to ignore the legal context necessary to charge CAH in the first place. Such a charge presumes, per the crime's "*chapeau*" (i.e., threshold preconditions), that the speech is uttered as part of a widespread or systematic attack against a civilian population.⁹ The *chapeau* further requires that the defendant be aware that his speech is uttered as part of that attack.¹⁰ And the International Criminal Court's (ICC's) Rome Statute, which will be a significant point of reference going forward, specifically requires that persecution be tied to one of the other enumerated CAH offenses or another crime within the statute, such as genocide or war crimes.¹¹

5. *Prosecutor v. Nahimana (Media Case)*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 1072–1073, 1092 (Dec. 3, 2003).

6. *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, ¶¶ 195, 198, 209 & nn.271–72 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf.

7. *Prosecutor v. Nahimana (Media Case)*, Case No. ICTR 99-52-A, Judgment, ¶¶ 986–987 (Nov. 28, 2007).

8. *See, e.g., Goering*, Judgment, Streicher, 6 F.R.D. at 161–63 (“Streicher’s incitement to murder and extermination at a time when Jews in the East were being killed . . . clearly constitutes a crime against humanity.”).

9. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 98 (2008).

10. *Id.* at 114–15.

11. Rome Statute of the International Criminal Court art. 7(1)(h), July 17, 1998, 2178 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

As a result, it is problematic to consider “hate speech” in a vacuum. Unlike incitement to genocide (an inchoate crime), which, as a legal matter, is not necessarily uttered in the context of simultaneous mass violence,¹² hate speech as persecution must be legally tied to contemporaneous, large-scale violence or inhumane treatment (based on the required “attack”). Moreover, hate speech is not a monolithic concept. This Article examines the entire range of animosity-focused expression and, for the first time in the literature, posits that there are three discrete categories along the spectrum: (1) “general hate speech,” which dehumanizes the victim group but is not necessarily directed at any audience in particular; (2) “harassment,” which is spoken directly to members of the victim group; and (3) “incitement,” which is directed toward third parties and encourages them to take action (whether violent or nonviolent) against members of the victim group.¹³

In the end, given the realities of mass atrocity, the question of whether hate speech not directly calling for violence, on its own, rises to the same level of the other enumerated CAH offenses is strictly academic; as explained, hate speech will necessarily be accompanied by other widespread or systematic inhumane treatment in the CAH context. Such coordinated and large-scale attacks on civilian populations have been empirically perpetrated by states or state-like organizations that monopolize channels of communication.¹⁴ In that context, free-expression concerns abate or disappear as the metaphorical “marketplace of ideas” ceases to function and speech is shorn of its democracy and self-actualization benefits.¹⁵ Thus, even if stringent U.S. First Amendment concerns are factored into the calculus, hate speech tethered to a widespread or systematic attack ought to satisfy the CAH *actus reus* requirement.

12. See Gregory S. Gordon, *Formulating a New Atrocity Speech Offense: Incitement To Commit War Crimes*, 43 LOY. U. CHI. L.J. 281, 294 (2012) (noting that one of the two analytic criteria in determining whether discourse was criminal advocacy was the “circumstances surrounding the speaker’s text—such as contemporaneous large-scale interethnic violence”).

13. See Alon Harel, *Hate Speech and Comprehensive Forms of Life*, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 306, 326 (Michael Herz & Peter Molnar eds., 2012) [hereinafter CONTENT AND CONTEXT OF HATE SPEECH] (acknowledging that “hate speech is not a single category”).

14. See CASSESE, *supra* note 9, at 98 (“[Crimes against humanity] are not isolated or sporadic events, but are part of a widespread or systematic practice of atrocities that either form part of a governmental policy or are tolerated, condoned, or acquiesced in by a government or a de facto authority.”).

15. See Alon Harel, *Freedom of Speech*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 599, 601–08 (Andrei Marmor ed., 2012) (noting that free speech protects the “marketplace of ideas,” through which truth is discovered, and the self-realization of individuals as a means toward improvement and growth).

Nevertheless, given the defendant's strictly verbal conduct, as well as the fact that impingement on quasi-legitimate freedom of expression may be implicated, isolated or sporadic hate speech, as well as hate speech uttered as part of low-level or geographically removed *chapeau* violence, may not qualify as the *actus reus* of hate speech as a CAH. In those circumstances, context is crucial and case-by-case analysis must follow.

This Article proceeds in four parts. Part II considers the origins of CAH-persecution and its early nexus with hate speech through prosecutions at the Nuremberg tribunals, and then its subsequent development at the ad hoc tribunals. It then examines the divergent approaches taken by the ICTY and ICTR with respect to hate speech and CAH. Finally, it analyzes the Appeals Chamber judgment in the *Media Case*, which, on certain levels, failed to reconcile the split between the ICTR and ICTY. Part III explains why, given the normative underpinnings of CAH-persecution, as well as its technical legal requirements, this split should be resolved in favor of hate speech fulfilling the CAH-persecution *actus reus* requirement. Finally, Part IV demonstrates that, given the high value of speech in terms of democratic governance and individual actualization, as well as potential circumstances where the relationship between speech and persecution is attenuated, not all hate speech may qualify as the *actus reus* for CAH-persecution.

II. CRIMES AGAINST HUMANITY (CAH)-PERSECUTION AND SPEECH: ORIGINS AND DEVELOPMENT

A. *Origins and Formulation of CAH*

The offense of CAH traces its origins to an Allied warning to the Turkish government regarding its massacre of the Armenian population during World War I. On May 28, 1915, France, Great Britain, and Russia issued a joint declaration to Ottoman authorities noting that “[i]n view of these crimes of Turkey against humanity and civilization,” the Allies would “hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.”¹⁶ The Allies failed to redeem that pledge. Although a postconflict war crimes commission recommended creation of an international tribunal to prosecute atrocities, including “violations of the laws of humanity,” the U.S.

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

delegation successfully argued for its exclusion given its recent vintage and imprecise definition.¹⁷

After World War II, in the wake of the Holocaust and other Nazi crimes, the offense had more traction. Without it, given the limited reach of war crimes, the Allies could not have prosecuted at Nuremberg the high-ranking Nazi officials before the International Military Tribunal (IMT) for crimes they committed against their own citizens.¹⁸ As a result, they included CAH in Article 6(c) of the Nuremberg Charter (or London Charter) and defined it as

murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁹

Thus, the London Charter contemplated two categories of crime: inhumane acts and persecutions on discriminatory grounds.²⁰ Given the offense's recent vintage and extensive scope, the Charter also required that, to be prosecutable, a CAH be linked to one of the Charter's other principal crimes, e.g., crimes against peace or war crimes.²¹ This formulation became known as the "war nexus."²² Subsequent prosecutions of lesser-ranking Nazi officials before the Nuremberg Military Tribunals (NMTs) were governed by Control

17. E.g., Harry M. Rhea, *Paris 1919 and Rome 1998: Different Treaties, Different Presidents, Different Senates, and the Same Dilemma*, 20 *TRANSNAT'L L. & CONTEMP. PROBS.* 411, 415–16 (2011); Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 *COLUM. J. TRANSNAT'L L.* 787, 797–98 (1999); accord Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?* 24 *UCLA PAC. BASIN L.J.* 125, 137–38 (2007).

18. See Daniel Kanstroom, *Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals*, 30 *B.C. INT'L & COMP. L. REV.* 1, 9 (2007) (noting that one of the major features of the Nuremberg model was that "it governed crimes that Germany had taken against its own citizens—an arena that hitherto was widely considered beyond the reach of international law"); Van Schaack, *supra* note 17, at 789–91 & n.5 (stating that the primary legal innovation of the Nuremberg Indictment was that it "encompassed acts committed by Nazi perpetrators against German victims, who were thus of the same nationality as their oppressors, or against citizens of a state allied with Germany").

19. Nuremberg Rules, in *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* art. 6(c), Aug. 8, 1945, 59 *Stat.* 1544, 1547, 82 *U.N.T.S.* 279 [hereinafter *London Charter*].

20. Van Schaack, *supra* note 17, at 838 n.247.

21. *London Charter*, *supra* note 19.

22. *Id.* at 791 ("The war nexus allowed the drafters of the Charter to condemn specific inhumane acts of Nazi perpetrators committed within Germany without threatening the entire doctrine of state sovereignty.").

Council Law (CCL) No. 10,²³ which contained a CAH provision very similar to that of the London Charter.²⁴ There were two key differences: the war nexus was removed and the list of inhumane acts was expanded to include imprisonment, torture, and rape.²⁵

In the wake of mass interethnic violence during the 1990s in the former Yugoslavia and Rwanda, the statutes for the ICTY and ICTR largely adopted CCL No. 10's CAH definition.²⁶ Some minor differences should be noted, however. The ICTY statute reimposed

23. ALLIED CONTROL COUNCIL, NUREMBERG TRIALS FINAL REPORT APPENDIX D: CONTROL COUNCIL LAW NO. 10 (Dec. 20, 1945) [hereinafter CCL No. 10], *reprinted in* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 250 (1949).

24. *See* Ford, *supra* note 17, at 147. Article II.1 of CCL No. 10 reads:

1. Each of the following acts is recognized as a crime:

...

(c) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

CCL No. 10, *supra* note 23, art. II.1. Article II.1(c) includes the phrase "atrocities and offenses," *id.*, but this turned out to be the exclusive terminology of CCL No. 10 and an historic anomaly—neither the London Charter nor subsequent international criminal law instruments containing CAH provisions has employed this language. *See, e.g.*, London Charter, *supra* note 19.

25. Ford, *supra* note 17, at 147 ("[C]rimes against humanity were also modified to include imprisonment, torture and rape in the list of prohibited acts . . ."); *see also* CCL No. 10, *supra* note 23, art. II.1(c).

26. *See* S.C. Res. 827, art. 5, U.N. Doc. S/RES/827 (May 25, 1993), *amended by* S.C. Res. 1166, annex, U.N. Doc. S/RES/116 (May 13, 1998) [hereinafter ICTY Statute]; S.C. Res. 955, art. 3, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. Article 5 of the ICTY statute reads:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial, and religious grounds;
- (i) other inhumane acts.

ICTY Statute, *supra*.

the war nexus requirement, which the Tribunal interpreted to be merely jurisdictional, as opposed to a substantive *prima facie* requirement.²⁷ The ICTR Statute, for its part, required that the enumerated inhumane acts be part of a “widespread or systematic attack against any civilian population,” and that the attack against the civilian population be “on national, political, ethnic, racial or religious grounds.”²⁸

Also of note, the statutes for both ad hoc tribunals eliminated the bifurcation of CAH between persecution and inhumane acts. There had been a question whether persecution, unlike the other CAH, would perhaps not need to be directed against a civilian population.²⁹ The ICTY/ICTR formulations put that question to rest by incorporating persecution into the list of other prohibited acts.³⁰

The development of CAH experienced another significant milestone in 1998 with the adoption of the Rome Statute of the ICC. Article 7 of the Rome Statute reads, in relevant part, as follows:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[a list of enumerated acts follows—murder, extermination, enslavement, deportation, imprisonment, torture, rape/sexual slavery]

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in

27. Van Schaack, *supra* note 17, at 794.

28. ICTR Statute, *supra* note 26, art. 3. The enumerated inhumane acts are the same as those listed in Article 5 of the ICTY Statute. However, the *chapeau*, which is different, reads as follows: “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds . . .” *Id.*

29. See ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 215 (2007).

30. See ICTY Statute, *supra* note 26, art. 5; ICTR Statute, *supra* note 26, art. 3.

paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

...

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity³¹

Paragraph 1 of Article 7 has a structure similar to the CAH provisions in the ICTY and ICTR statutes, featuring a list of inhumane acts and a *chapeau* setting out the conditions under which the commission of such acts constitutes a CAH. Nevertheless, there are differences. With respect to the *chapeau*, the IMT/ICTY war nexus has been removed. And while the ICTR's language regarding a "widespread and systematic attack against any civilian population" has been included, there is no requirement that the attack be based on national, political, ethnic, racial, or religious grounds. The language also explicitly conditions liability on the perpetrator's having knowledge of the attack—a requirement that had been read into the ad hoc tribunal statutes through case law.³²

Paragraph 2 provides elaborations not seen in previous iterations of CAH. For example, paragraph 2(a) fleshes out the meaning of "attack directed against any civilian population." It specifies this must include "a course of conduct involving the *multiple commission of acts* referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a *State or organizational policy to commit such attack*."³³

The balance of the paragraph elaborates on the individual inhumane acts. Of note, for purposes of this Article, is subsection 2(g), which specifies that persecution "means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."³⁴

Thus, the Rome Statute crystallizes certain features of CAH, such as the *chapeau's* requirement of a widespread or systematic attack against any civilian population, as well as certain items on the list of inhumane deeds.³⁵ It also expands the offense's scope. In

31. Rome Statute, *supra* note 11, art. 7.

32. *E.g.*, Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶¶ 133–134 (May 21, 1999), http://www.unictr.org/Portals/0/Case/English/kayishema/judgement/990521_judgement.pdf (confirming the requirement that the accused "must have acted with knowledge of the broader context of the attack"); Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment ¶¶ 694–695 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> (relying on the *Kayishema* case to demonstrate that the perpetrator must know that his act is part of the attack on a civilian population).

33. Rome Statute, *supra* note 11, art. 7.2(a) (emphasis added).

34. *Id.* art. 7.2(g).

35. *See id.* art. 7.

particular, it adds new enumerated criminal acts, such as sexual slavery, enforced disappearance, and apartheid.³⁶ It also supplements the classes of persons who can be the object of persecution by including discrimination on grounds of culture, gender, and on “other grounds that are universally recognized as impermissible under international law.”³⁷ Further, it fleshes out the definition of persecution by specifying that it must consist of an “intentional and severe deprivation of fundamental rights.”³⁸ Finally, the Rome Statute also constricts persecution’s ambit by mandating it be committed “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”³⁹

B. *The Development of Persecution as a CAH*

As demonstrated, persecution was included as a CAH in the constituent instruments of both the IMT and the NMTs. One commentator has noted that in its general finding of Nazi persecution of the Jews, the IMT focused on “the passing of discriminatory laws; the exclusion of members of an ethnic or religious group from aspects of social, political, and economic life; and the creation of ghettos.”⁴⁰ It also found various defendants guilty of persecution for a wide range of conduct. For example, the gravamen of the persecution charge against Hermann Goering was his economic attacks against the Jews, particularly his levying against them a billion mark fine after *Kristallnacht*.⁴¹ The CAH charge of which Baldur von Schirach was found guilty included an allegation of persecution and centered primarily on his deportation of Jews from Vienna in his capacity as that city’s *Gauleiter* (regional branch Nazi leader).⁴² Further, as set forth more fully below, anti-Semitic newspaper editor Julius Streicher was convicted of persecution as a CAH in connection with his written attacks against the Jews.⁴³

36. *Id.* art. 7(g), (i), (j).

37. *Id.* art. 7.1(h).

38. *Id.* art. 7.2(g).

39. *Id.* art. 7.1(h).

40. Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT’L L.J. 73, 128 (2004).

41. See *United States v. Goering*, Judgment, Streicher (Int’l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 148–49 (1946) (describing how Goering’s interest in raising the billion mark fine was “primarily economic—how to get their property and how to force them out of the economic life of Europe”); see also Badar, *supra* note 40, at 129 (“[T]he finding of the Nuremberg Tribunal characterizing certain acts of economic discrimination as persecution support the conclusion that economic measures of a personal, as opposed to an industrial type, can constitute persecutory acts.”).

42. *Goering*, Judgment, von Schirach, 6 F.R.D. at 172–73.

43. *Goering*, Judgment, Streicher, 6 F.R.D. at 161–63.

And as part of the NMT Trials under CCL No. 10, American judges continued to expand the boundaries of persecution's constituent conduct. In *United States v. Altstoetter (Justice Case)*, for example, the NMT found that the use of a legal system to implement a discriminatory policy constituted persecution.⁴⁴ In *United States v. von Weizsaecker (Ministries Case)*, the Tribunal concluded:

The persecution of the Jews went on steadily from step to step and finally to death in foul form. The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, to practice professions, to obtain education, to engage in business enterprises; they were forbidden to marry except among themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, mutilation, and torture; their property was confiscated; they were herded into ghettos; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they were worked to exhaustion and death; they became slave laborers; and finally over six million were murdered.⁴⁵

In commenting on this passage, ICTR Judge Mohamed Shahabuddeen, in his partial dissent in the *Media Case* appeals judgment, found that "it is clear that there were acts of mistreatment not involving violence and that such acts were admissible as evidence of persecution."⁴⁶ He went on to note that the holding in this post-World War II "case may be accepted as reflective of customary international law."⁴⁷

Persecution was also the subject of charges in various domestic jurisdictions trying Nazi war criminals after World War II.⁴⁸ But none of those courts essayed a precise definition of persecution or

44. See *United States v. Altstoetter (Justice Case)*, Opinion and Judgment, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS: "THE JUSTICE CASE" 954, 1063 (1951) (noting that judges' application of law against Poles and Jews were "deliberate contributions toward the effectuation of the policy of the Party and the State").

45. *United States v. von Weizsaecker (Ministries Case)*, Judgment, in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS: "THE MINISTRIES CASE" 308, 471 (1951) [hereinafter 14 TRIALS OF WAR CRIMINALS: "THE MINISTRIES CASE"].

46. *Prosecutor v. Nahimana (Media Case)*, Case No. ICTR 99-52-A, ¶ 13, Judgment (Nov. 28, 2007) (Shahabuddeen, J., partly dissenting).

47. *Id.*

48. See, e.g., Trial of Hans Albin Rauter (Netherlands Spec. Ct. at 'S-Gravenhage (The Hague) May 4, 1948 and Neth. Spec. Ct. of Cassation Jan. 12, 1949), in 14 LAW REPORTS OF TRIALS OF WAR CRIMINALS 89 (U.N. War Crimes Comm'n ed., 1949) (convicting S.S. officer of offenses against the Dutch civilian population, including persecution of Jews); Attorney General of Isr. v. Eichmann, 36 I.L.R. 277 (Isr. 1962) (finding S.S. officer who implemented Final Solution guilty of, inter alia, CAH-persecution); Fédération Nationale des Déportés et Internés Résistants Et Patriotes v. Barbie, 78 I.L.R. 125 (Fr. Cass. 1985) (convicting Lyon Gestapo for being chief of CAH-persecution, among other crimes).

placed parameters on its scope. Additionally, in contrast to genocide and war crimes, the international community did not codify CAH in a treaty. Thus, prior to the advent of the post-Cold War ad hoc tribunals, CAH-persecution had “never been comprehensively defined.”⁴⁹

Nevertheless, certain jurists provided important guidance. M. Cherif Bassiouni, in his seminal treatise on CAH, observed that “[t]hroughout history, the terms ‘persecute’ and ‘persecution’ have come to be understood to refer to discriminatory practices resulting in physical or *mental* harm, *economic* harm, or all of the above.”⁵⁰ He also noted that persecution has been commonly defined in international criminal law circles as “[s]tate action or policy leading to the infliction upon an individual of *harassment*, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim’s beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.).”⁵¹

Similarly, in the commentary on its 1991 *Draft Code of Crimes against the Peace and Security of Mankind*, the International Law Commission provided some important insight into the scope of persecution:

Persecution may take many forms, for example, a prohibition on practising certain kinds of religious worship; prolonged and systematic detention of individuals who represent a political, religious or cultural group; a prohibition on the use of a national language, even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group.⁵²

With the creation of the ICTY, international case law began to hone persecution’s definition. In *Prosecutor v. Tadic*, an ICTY Trial Chamber laid out three foundational requirements: (1) the occurrence of a discriminatory act or omission; (2) a discriminatory basis for that act or omission on one of the listed grounds, specifically race, religion, or politics; and (3) the intent to cause and a resulting infringement of an individual’s enjoyment of a basic or fundamental right.⁵³

In *Prosecutor v. Kupreskic*, another ICTY Trial Chamber formulated a four-part test for determining whether conduct can

49. *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 567 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

50. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 326–27 (2d rev. ed. 1999) (emphasis added).

51. *Id.* at 327 (emphasis added) (internal quotation marks omitted).

52. *Draft Code of Crimes Against Peace and Security of Mankind*, art. 21, ¶ 9, in *Rep. of the Int’l Law Comm’n*, 43d Sess., Apr. 29–July 19, 1991, U.N. Doc. A/46/10; GAOR, 46th Sess., Supp. No. 10 (1991).

53. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 715 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

satisfy the *actus reus* requirement for CAH-persecution: (1) a gross or blatant denial; (2) on discriminatory grounds; (3) of a fundamental right, laid down in international customary or treaty law; and (4) reaching the same level of gravity as the other crimes against humanity enumerated in Article 5 of the ICTY Statute.⁵⁴

In setting out the fourth prong of the test, the Chamber cited to the NMT decision in *United States v. Flick*, and a passage that focused on the distinction between crimes against property and crimes against the person.⁵⁵ The NMT found that, within the terms of CCL No. 10, Nazi expropriation of industrial property from Jews was not of sufficient gravity vis-à-vis various offenses against the person.⁵⁶ Nevertheless, the *Kupreskic* Chamber acknowledged that even crimes against property might be of sufficient gravity to constitute CAH.⁵⁷ More specifically, it noted that *Flick* involved Nazi expropriation of Jewish *industrial* property.⁵⁸ But, the *Kupreskic* Chamber pointed out, the subsequent NMT decision in *United States v. Krauch (I.G. Farben Case)*⁵⁹ suggested that, in contrast to *Flick*, offenses involving *personal* property, such as dwellings, household furnishings, and food supplies, could be considered of sufficient gravity for CAH purposes.⁶⁰ From this passage, one can certainly infer that within the CAH context, offenses directly against the person ought to be considered sufficiently grave pursuant to the fourth prong of the *Kupreskic actus reus* test.

Finally, in formulating this *actus reus* test, and as a way of clarifying it, the *Kupreskic* Chamber made some significant observations regarding the nature and scope of persecution: (a) “a narrow definition of persecution is not supported in customary international law”⁶¹ and was understood by the IMT to “include a wide spectrum of acts . . . ranging from discriminatory acts targeting . . . general political, social and economic rights, to attacks

54. *Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 621.

55. *Id.* ¶ 619 n.897 (citing *United States v. Flick*, Opinion and Judgment, in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS: “THE FLICK CASE” 1187, 1215 (1952)).

56. *Flick*, Opinion and Judgment, *supra* note 55, at 1215.

57. *See Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 619 n.897 (stating that offenses against personal property, as opposed to industrial property, might amount to an “assault upon the health and life of a human being” in contravention of international law).

58. *Id.*

59. *See United States v. Krauch (I.G. Farben Case)*, Testimony of Defense Witness Huenermann, in 7 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS: “THE I.G. FARBEN CASE” 1122, 1129–30 (1952) [hereinafter 7 TRIALS OF WAR CRIMINALS: “THE I.G. FARBEN CASE”].

60. *Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 619 n.897.

61. *Id.* ¶ 615.

on [the] person”;⁶² (b) persecution also includes acts such as murder and other serious acts on the person; (c) it is “commonly used to describe a series of acts rather than a single act,” as “[a]cts of persecution will usually form part of . . . a patterned practice, and must be regarded in their context”; and (d) “[a]s a corollary to [(c)], discriminatory acts charged as persecution must not be considered in isolation” and “may not, in and of themselves, be so serious as to constitute a crime against humanity”—for example, curtailing rights to participate in social life (such as visits to public parks, theaters, or libraries) must not be considered in isolation but examined in their context and weighed for their cumulative effect.⁶³

Applying this precedent, the Trial Chamber in *Prosecutor v. Brdjanin*⁶⁴ found that “the denial of fundamental rights to Bosnian Muslims and Bosnian Croats, including the . . . right to proper judicial process, or right to proper medical care’ [constitute] persecutions.” Significantly, the Trial Chamber rejected the defense argument that “any conviction [for a violation of any of these four rights] violates the principle of legality.”⁶⁵ It held:

The Trial Chamber finds that this argument is misconceived as the Accused is obviously confusing the underlying acts or violations with the actual crime charged, namely that of persecution. The underlying acts (and corresponding violations) alleged are encompassed by the crime of persecution . . . Any possible conviction would be for this crime and not for the underlying acts or violations . . .

....

. . . The Trial Chamber reiterates its view that there is no list of established fundamental rights and that such decisions are best taken on a case by case basis. In order to establish the crime of persecution, underlying acts should not be considered in isolation, but in context, looking at their cumulative effect. The Trial Chamber considers that it is not necessary to examine the fundamental nature of each right individually, but rather to examine them as a whole. It is appropriate, therefore, to look at the cumulative denial of the rights to employment, freedom of movement, proper judicial process and proper medical care in order to determine if these are fundamental rights for the purposes of establishing persecutions.⁶⁶

62. *Id.* ¶ 597.

63. *Id.* ¶ 615.

64. *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment, ¶¶ 1029–1031 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

65. *Id.* ¶ 1030.

66. *Id.* ¶¶ 1030–1031.

C. CAH-Persecution and Speech

1. The Judgments at Nuremberg

From its earliest formulation in the London Charter and IMT indictment, speech has been the object of CAH prosecutions. At Nuremberg, Nazi propagandist Julius Streicher was charged with, inter alia, CAH-persecution based on the virulent anti-Semitic screeds in his newspaper *Der Stürmer*.⁶⁷ The IMT judgment began by observing: "For his twenty-five years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as 'Jew-Baiter Number One.'"⁶⁸ The decision also referred to dozens of pre- and post-war articles Streicher wrote calling for the annihilation, "root and branch," of the Jewish people.⁶⁹ It noted that "[i]n his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution."⁷⁰ The judgment further specified that Streicher wrote a number of these eliminationist articles at a time when Jews were the victims of extermination in eastern Europe and that Streicher was aware of the Nazi murder spree in that region at the time he wrote the articles. It therefore concluded: "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter, and constitutes a crime against humanity."⁷¹

Hans Fritzsche, head of the Radio Division in Joseph Goebbels's Propaganda Ministry, was also prosecuted at Nuremberg for CAH-persecution.⁷² Prosecutors alleged Fritzsche made daily broadcasts espousing the general policies of the Nazi regime, which "arouse[d] in the German people those passions which led them to the commission of atrocities."⁷³ Fritzsche was acquitted, however, because the IMT found his speeches did not directly urge persecution of Jews and "his position and official duties were not sufficiently important . . . to infer that he took part in originating or formulating propaganda campaigns."⁷⁴ Nevertheless, the judgment impliedly recognized that

67. See *United States v. Goering, Judgment, Streicher* (Int'l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 161-63 (1946).

68. *Id.* at 162.

69. *Id.* at 161-63.

70. *Id.* at 162.

71. *Id.* at 163.

72. *Goering, Judgment, Fritzsche*, 6 F.R.D. at 186-87.

73. *Id.* at 187.

74. *Id.*

urging persecution (not necessarily defined as involving violence) could constitute a CAH.⁷⁵

Another propaganda defendant, Otto Dietrich, was charged with CAH-persecution pursuant to CCL No. 10 as part of the *Ministries Case* (the *Dietrich Judgment*).⁷⁶ Dietrich was Reich Press Chief from 1937–1945.⁷⁷ Early in his Nazi career, as Chairman of the “Reich League of the German Press,” Dietrich amassed much personal power by using Germany’s “Editorial Control Law,” which he had drafted, to obligate all print journal editors to join the Reich League.⁷⁸ The Reich League also operated tribunals that penalized and ousted editors who were perceived to run afoul of the regime’s propaganda program.⁷⁹

Hitler thus conferred on Dietrich “responsibility for ideological oversight and direction of editors; furthermore, Dietrich had immediate access to Hitler.”⁸⁰ Based largely on the daily press directives issued by Dietrich during the Holocaust, the IMT found him guilty of CAH-persecution:

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

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

. . . .

These press and periodical directives were not mere political polemics, they were not aimless expression of anti-Semitism, and they were not designed only to unite the German people in the war effort.

. . . .

Their clear and expressed purpose was to enrage Germans against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.

75. See *id.* (explaining that Fritzsche was not guilty of committing a CAH in part because his “speeches did not urge persecution or extermination of Jews”).

76. See *United States v. von Weizsaecker*, Judgment, in 14 TRIALS OF WAR CRIMINALS: “THE MINISTRIES CASE,” *supra* note 45, at 565–76 (1950).

77. *Id.* at 565.

78. See JEFFREY HERF, *THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST* 18 (1st ed. 2006) (describing the requirements placed on editors under the Editorial Control Law formulated by Dietrich).

79. *Id.*

80. RALF GEORG REUTH, *GOEBBELS* 176 (1993).

By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews⁸¹

2. The ICTR Trial Chambers Judgments

a. The *Ruggiu Case*

Nearly five decades on, the ICTR picked up where the Nuremberg judgments left off—finding that hate speech could be the *actus reus* for CAH-persecution. The first case to do so was *Ruggiu*.⁸² Georges Ruggiu, a Belgian citizen and the only white European to be convicted by the ICTR, was an announcer for *Radio Télévision Libre des Mille Collines* (RTL), also known as “Radio Machete,” the extremist Hutu broadcast outlet that verbally attacked Tutsis, moderate Hutus, and Belgians in the period leading up to and during

81. *Id.* at 575–76. Count Five of the Indictment, on which Dietrich was convicted, is styled “War Crimes and Crimes against Humanity: Atrocities and Offenses Committed against Civilian Populations”—the word persecution is not explicitly used there. And although the Tribunal does not use the word persecution in the last sentence of the quoted language, it is clear that Dietrich’s conviction nonetheless encompassed CAH-persecution. In its judgment against Dietrich, the Tribunal referred directly to “persecution” against the Jews in three separate instances. If that does not erase all doubt, the prosecution’s opening statement, explaining the indictment charges, does:

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

United States v. von Weizsaecker, Indictment, in 12 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS: “THE MINISTRIES CASE” 13, 167–68 (1950) [hereinafter 12 TRIALS OF WAR CRIMINALS: “THE MINISTRIES CASE”] (emphasis added).

82. Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶¶ 18–19 (June 1, 2000).

the Rwandan genocide.⁸³ The Tribunal described Ruggiu as playing “a crucial role in the incitement of ethnic hatred and violence” against both Tutsis and Belgian residents in Rwanda.⁸⁴ Ruggiu pled guilty to, inter alia, CAH-persecution.⁸⁵ In sentencing him, the Tribunal had occasion to review the Nuremberg jurisprudence regarding this offense. It began with the Streicher judgment in *United States v. Goering (Streicher)*, noting that the IMT in that case “held that the publisher of a private, anti-Semitic weekly newspaper ‘*Der Stürmer*’ incited the German population to actively persecute the Jewish people.”⁸⁶ The ICTR then concluded that “[t]he *Streicher* Judgement is particularly relevant to the present case since the accused, like Streicher, infected peoples’ minds with ethnic hatred and persecution.”⁸⁷

Citing the ICTY judgment in *Kupreskic*,⁸⁸ the ICTR Trial Chamber then set forth the specific elements of CAH-persecution: “(a) those elements required for all crimes against humanity under the ICTR statute, (b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, and (c) discriminatory grounds.”⁸⁹ With respect to element (a), the Chamber considered the CAH *mens rea*, which it found to be the *intent* to commit the underlying offense, combined with the *knowledge* of the broader context in which that offense occurs.⁹⁰ With respect to the latter, the Chamber observed:

The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act [...] Part of what transforms an individual’s act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or

83. See PAUL R. BARTROP, *A BIOGRAPHICAL ENCYCLOPEDIA OF GENOCIDE* 280 (2012) (“[Ruggiu’s] programs consistently incited his listeners to commit murder or serious attacks against the physical or mental well-being of the Tutsis and constituted acts of persecution against Tutsis, moderate Hutus, and Belgian citizens.”); ANTHONY JOSEPH PAUL CORTESE, *OPPOSING HATE SPEECH* 45 (2006) (“The RTLM was called ‘Radio Machete’”); ALLAN THOMPSON, *THE MEDIA AND THE RWANDA GENOCIDE* 98 (2007) (indicating that most Rwandans believe Georges Ruggiu, a Belgian citizen, was hired because he was white); *Convicted Journalist Released Early in Violation of ICTR Statute*, HAGUE JUST. PORTAL (May 29, 2009), <http://www.haguejusticeportal.net/index.php?id=10688> (“Ruggiu remains the only non-Rwandan to be convicted by the ICTR for involvement in the genocide. . . .”).

84. *Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 50.

85. *Id.* ¶¶ 10, 42–45.

86. *Id.* ¶ 19.

87. *Id.*

88. *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 627 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

89. *Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 21.

90. *Id.* ¶ 20.

constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.⁹¹

With respect to the latter two elements, the Chamber held:

The Trial Chamber considers that when examining the acts of persecution which have been admitted by the accused, it is possible to discern a common element. Those acts were [direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians] 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.⁹²

Two important points can be gleaned from these excerpts. First, the ICTR indicates CAH-persecution via speech can be committed without the speaker explicitly calling for violence. In citing *Streicher*, for instance, the ICTR suggests that the crime was effectuated via the defendant's inciting the German population to "persecute" the Jewish people, but "persecution" does not necessarily include physical violence. Oxford Dictionaries defines persecution as "hostility and ill-treatment, especially because of race or political or religious beliefs; oppression."⁹³ This conclusion is bolstered by the ICTR's description of the crime as entailing Streicher's infecting "peoples' minds with ethnic *hatred* and persecution."⁹⁴ There can be no doubt of this conclusion when the ICTR describes the persecution in the *Ruggiu* case as consisting of radio broadcasts that "singled out" and "attacked" Tutsis and Belgians. In other words, the words themselves attacked the victims—they were not merely a medium through which to encourage others to perpetrate acts of violence independent from the words.⁹⁵ The effect of the words is a deprivation of rights, including liberty and humanity (even if these are uttered with the intent of ultimately causing death or removal from society).

91. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 133–134 (May 21, 1999)).

92. *Id.* ¶ 22.

93. *Definition of Persecution*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/english/persecution> (last visited Jan. 31, 2013).

94. *Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 19.

95. A Trial Chamber of the ICTR later left no doubt about this interpretation. Prosecutor v. Nahimana (*Media Case*), Case No. ICTR 99-52-T, Judgment and Sentence, ¶ 1072 (Dec. 3, 2003) ("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.").

Second, based on the *chapeau's mens rea* requirement, the perpetrator must speak the words knowing that they are “part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan.” This means the speech is not an isolated instance of hate-mongering, unconnected to physical violence or inhumane treatment—it must be linked to such violence or treatment. Thus the speech cannot be considered as merely “bad speech” in a normal societal context. Given the *mens rea* requirements, it is inextricably linked to a massive or well-planned attack on civilians.

b. *The Media Case*

The ICTR next had occasion to consider CAH-persecution in the so-called *Media Case* judgment deciding the liability of defendants Ferdinand Nahimana and Jean-Bosco Barayagwiza, founders and executives of RTLM, and Hassan Ngeze, founder and editor in chief of the extremist Hutu newspaper *Kangura*.⁹⁶ Among other offenses, each defendant was charged with CAH-persecution.

In the judgment's relevant portion, the Trial Chamber began by considering the elements of CAH-persecution. It focused on *Kupreskic's* requirement of a “gross or blatant denial of a fundamental right reaching the same level of gravity” as the other acts enumerated as “crimes against humanity under the Statute.”⁹⁷ It then concluded that “hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute.”⁹⁸ The Trial Chamber then elaborated:

In *Ruggiu*, the Tribunal so held, finding that the radio broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of “the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society.” 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.

.....

96. *Media Case*, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 5–7, 123, 491, 494.

97. *Id.* (quoting *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 627 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000)).

98. *Id.*

Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution.⁹⁹

Significantly, the Chamber suggested that hate speech rises to the same level of gravity as the other enumerated CAH crimes in all circumstances. It noted generally that hate speech is not protected speech under international law. In support of this, it cited the obligation of countries under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Racial Discrimination (CERD) to prohibit advocacy that promotes and incites discrimination on grounds of race (applying to both the ICCPR and CERD), nationality, or religion.¹⁰⁰ This conclusion was further supported, the Chamber added, by similar prohibitions in the domestic criminal codes of numerous countries, including Rwanda, Vietnam, Russia, Finland, Ireland, Ukraine, Iceland, Monaco, Slovenia, and China.¹⁰¹

This was also consistent, according to the Chamber, with the principles enunciated in the IMT's *Streicher* decision. In particular, the Chamber observed that the *Stürmer* editor in chief was convicted of CAH-persecution "for anti-Semitic writings that significantly predated the extermination of Jews in the 1940s."¹⁰² Yet they were understood, the Chamber added, "to be a . . . poison that infected the minds of the German people and conditioned them to follow the lead of National Socialists in persecuting the Jewish people."¹⁰³ Overall, then, based on these sources, the Chamber found that "hate speech that expresses ethnic or other forms of discrimination violates the norm of customary international law prohibiting discrimination."¹⁰⁴

In light of this, the Chamber then considered the activities of the *Media Case* defendants. In general, it found that:

In Rwanda, the virulent writings of *Kangura* and the incendiary broadcasts of RTLTM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed. Similarly, the activities of the CDR, a Hutu political party that demonized the Tutsi population as

99. *Id.* ¶ 1072–1073.

100. *Id.* ¶ 1074.

101. *Id.* ¶ 1075. As pointed out below, this Article posits such an emphasis on the treatment of hate speech in the garden-variety domestic criminal provisions of various states is misplaced. The speech is criminal in the special CAH context because it must be moored to a widespread or systematic attack against a civilian population.

102. *Id.* ¶ 1073.

103. *Id.*

104. *Id.* ¶ 1076.

the enemy, generated fear and hatred that created the conditions for extermination and genocide in Rwanda.¹⁰⁵

The Chamber then referred to specific instances of hate speech that it believed qualified as persecution.¹⁰⁶ For example, it alluded to a February 1993 (pre-genocide) *Kangura* article entitled *A Cockroach Cannot Give Birth to a Butterfly*,¹⁰⁷ which it described as “brimming with ethnic hatred but [that] did not call on readers to take action against the Tutsi population.”¹⁰⁸ The Chamber also noted that “[t]he RTLM interview broadcast on June 1994, in which Simbona interviewed by Gaspard Gahigi, talked of the cunning and trickery of the Tutsi, also constitutes persecution.”¹⁰⁹ Hate speech directed at women, according to the Chamber, similarly constituted persecution: “The portrayal of the Tutsi woman as a *femme fatale*, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM and *Kangura*.”¹¹⁰ It concluded by quoting a prosecution witness who testified that the defendants’ persecutory speech “spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country.”¹¹¹ This, the Chamber pointed out, “is the poison described in the *Streicher* judgment.”¹¹²

3. The ICTY Trial Chamber Judgment in *Kordić*

The 2001 Trial Chamber judgment in the case of *Prosecutor v. Kordić*¹¹³ represents the only jurisprudence from the ICTY analyzing whether hate speech can constitute the *actus reus* for CAH-persecution. The case arose out of efforts by Bosnian Croats to ethnically cleanse an area of central Bosnia-Herzegovina of Muslims for purposes of integrating that region into greater Croatia.¹¹⁴ At the time of the break-up of the former Yugoslavia, Dario Kordić was a prominent politician in the Bosnian Croat community.¹¹⁵ From the early- to mid-1990s, he served as President of the Croatian Democratic Union of Bosnia and Herzegovina, and Vice-President/member of the Presidency of the Croatian Community of Herzeg-

105. *Id.* ¶ 1073.

106. *Id.* ¶ 1078.

107. *Id.*

108. *Id.* ¶ 1037.

109. *Id.* ¶ 1078.

110. *Id.* ¶ 1079.

111. *Id.* ¶ 1078 (internal quotation marks omitted).

112. *Id.*

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

114. *Id.* ¶¶ 5, 9.

115. *Id.* ¶ 5.

Bosnia (later the Croatian Republic of Herzeg-Bosnia).¹¹⁶ Count One of the indictment alleged that Kordić and others carried out the ethnic cleansing campaign by, inter alia, “encouraging, instigating and promoting hatred, distrust and strife on political, racial, ethnic or religious grounds, by propaganda, speeches and otherwise.”¹¹⁷

Curiously, the judgment never specifies which speeches are the subject of the persecution count or conducts legal analysis with respect to the text of any such speeches. Paragraph 522 (under the subheading “The Role of Dario Kordić”) details a series of activities by Kordić that include certain statements. Paragraph 521, which introduces this section, states: “This period also saw the emergence of Dario Kordic as a key Bosnian Croat negotiator and his assumption of the rank of ‘Colonel’.”¹¹⁸

Paragraph 522 begins: “The events of the late summer [of 1992] show Dario Kordic being as active as ever”¹¹⁹ The paragraph then describes the aforementioned activities (essentially participating in meetings and press conferences) and related statements made by Kordić. The statements, which, as previously mentioned, are not explicitly identified as the basis for the persecution count, consist of the following:

(a) On 28 July 1992 the first HVO [Croatian Defense Council—the military arm of the Republic of Herzeg-Bosnia or HZ H-B] press conference was held in Busovaca. Kordic was introduced as Vice-President of the HVO. He greeted the conference on behalf of the regional HVO of Central Bosnia and reported that there had been “certain misunderstandings within the military section” of Busovaca municipal HVO. The misunderstandings had been cleared up.

. . . .

(c) [On 18 August 1992 i]n Novi Travnik he was escorted by soldiers and in a speech said that Novi Travnik would be a Croatian town. . . . In Travnik, Kordic and Kocroman addressed the troops: the text of a proposed speech states that those who do not wish to live in the Croatian provinces of HZ H-B are all enemies and must be fought with both political and military means. In Vitez, the gist of Kordic’s speech was a statement to the Muslims of the Lacva Valley that this was Croat land and that they had to accept that this was Herceg Bosna.

. . . .

116. *Kordić, Dario*, HAGUE JUST. PORTAL, <http://www.haguejusticeportal.net/index.php?id=6014> (last visited Feb. 14, 2013). Mario Cerkez was Commander of the Vitez Brigade of the Croatian Defense Council, the military wing of the Bosnian Croats, during the period 1992–1993. See *Cerkez, Mario*, HAGUE JUST. PORTAL, <http://www.haguejusticeportal.net/index.php?id=6106> (last visited Feb. 14, 2013). The ICTY’s judgment in the case does not deal with Cerkez’s alleged role, if any, in making persecutory speeches. The judgment indicates, albeit indirectly, that only Kordić’s supposed liability for such conduct was analyzed by the Trial Chamber. See *id.* ¶ 209.

117. *Kordić*, Case No. IT-95-14/2-T, Annex V, ¶ 37.

118. *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 521.

119. *Id.* ¶ 522.

(e) On 30 September 1992 Kordic, as Vice-President of HZ H-B, was present at a meeting of the Presidency of the Kakanj HVO, a neighboring municipality to Varec. The minutes of the meeting record Kordic as saying that the HVO was the government of the HZ H-B and what they were doing with the HZ H-B was the realization of a complete political platform: they would not take Kakanj by force but "it is a question of time whether we will take or give up what is ours. It has been written down that Varec and Kakanj are in HZ H-B. The Muslims are losing morale and then it will end with 'give us what you will'".¹²⁰

The judgment makes no reference to any prosecution characterization of or argument regarding these statements or any others made by Kordić that might be considered as supporting the indictment's persecution allegation. Instead, in the paragraph that follows, the judgment sets forth the *defense* arguments regarding Kordić's statements:

The defence evidence on this topic¹²¹ dealt with Kordic's speeches and the terms used in them. For instance, that he always attended areas when things were critical (for instance Jajce, Vitez and Travnik), that he provided political and moral support; and gave a morale-raising speech to soldiers defending Jajce, saying "we have to defend Jajce and I will go with you to defend Jajce". As to the terms used, the defence evidence was to the effect that Kordic's political speeches were never racially inflammatory nor were they intended to foment hatred of Bosnian Muslims by Bosnian Croats. Kordic was portrayed by many witnesses as a moderate, caring person with a strong sense of responsibility. His was not a vehement personality. One witness, who had worked with him for many years prior to the conflict and who claimed to have heard many of his political speeches, testified that she never heard Kordic use derogatory terms with respect to Muslims, publicly or privately, and furthermore that his speeches were never racially inflammatory or incited violence. He did not use derogatory terms for other ethnic groups, apart from extremists about whom he was very sharp. Brigadier Cekerija testified in similar terms and said that in his public appearances, which the witness often saw, Mr. Kordic often stated that Bosnian Croats were one of the constituent peoples in BiH as well as Bosnian Muslims and Bosnian Serbs. Several witnesses involved in the political process at the time testified that they never heard Kordic, in meetings or at press conferences, refer pejoratively to other ethnic groups.¹²²

This paragraph stands alone—there is no commentary on it by the Chamber. The prosecution's response to it is not provided either. Presumably this signifies acceptance of the defense characterization

120. *Id.* (footnotes omitted).

121. The phrase "the defence evidence on this topic" suggests that the preceding paragraph contained the prosecution's evidence on this "topic"—i.e., Kordić's speeches and the terms used in them.

122. *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 523.

of Kordić's speeches as not derogatory or inflammatory, and thus in no way persecutory.

On the other hand, this one-sided explanation of the evidence is consistent with the Chamber's earlier analysis regarding speech and persecution. The Chamber had begun its analysis by stressing the importance in its decision of the Latin maxim *nullum crimen sine lege*: In order for the principle of legality not to be violated, acts in respect of which the accused are indicted under the heading of persecution must be found to constitute crimes under international law at the time of their commission.¹²³ Nevertheless, the Chamber acknowledged that "the actus reus for persecution requires no link to crimes enumerated elsewhere in the Statute."¹²⁴

In order to determine whether the speech at issue could constitute the *actus reus* of the persecution charge, the Chamber applied the four-prong test formulated in *Kupreskic*: "(1) a gross or blatant denial; (2) on discriminatory grounds; (3) of a fundamental right, laid down in international customary or treaty law; (4) reaching the same level of gravity as the other crimes against humanity enumerated in Article 5 of the [ICTY] Statute."¹²⁵ The Chamber then held that "acts which meet the four criteria set out above, as well as the general requirements applicable to all crimes against humanity, may qualify as persecution without violating [the *nullum crimen* principle]."¹²⁶ In so holding, the Chamber rejected the defense request that, consistent with the Rome Statute's Article 7(1)(h), persecutions be connected to another crime within the jurisdiction of the ICC.¹²⁷ The Chamber reasoned the defense position was too restrictive and emphasized "the unique nature of the crime of persecution as a crime of cumulative effect."¹²⁸ Quoting *Kupreskic*, it noted:

[A]cts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed "inhumane".¹²⁹

The Chamber also considered previous instances in which the ICTY found persecution. In those cases, the Chamber asserted, the acts consisted of physical assaults on the victims and their

123. *Id.* ¶ 192.

124. *Id.* ¶ 193.

125. *Id.* ¶ 195.

126. *Id.*

127. *Id.* ¶¶ 191, 197.

128. *Id.* ¶ 199.

129. *Id.* (quoting *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 622 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000)) (first level of internal quotation marks omitted).

property.¹³⁰ Still, the Chamber noted that the crime of persecution “encompasses both bodily and mental harm and infringements upon individual freedom.”¹³¹

Applying the *Kupreskic actus reus* test, however, the *Kordić* Chamber did not find the speech at issue could amount to persecution. It began paragraph 209 by noting, rather inauspiciously for the prosecution, that “the Indictment against Dario Kordic is the first indictment in the history of the International Tribunal to allege this act [encouraging and promoting hatred on political, racial, ethnic or religious grounds].”¹³² The Chamber then spent the balance of the paragraph rendering its decision on this issue:

The Trial Chamber, however, finds that this act, as alleged in the Indictment, does not by itself constitute persecution as a crime against humanity. It is not enumerated as a crime elsewhere in the International Tribunal Statute, but most importantly, it does not rise to the same level of gravity as the other acts enumerated in Article 5. Furthermore, the criminal prohibition of this act has not attained the status of customary international law. Thus to convict the accused for such an act as is alleged as persecution would violate the principle of legality.¹³³

Appended to paragraph 209 is footnote number 272, meant to support the Chamber’s holding.¹³⁴ The Chamber was apparently aware that, with one terse paragraph, it might be flouting conventional wisdom regarding the judgment in *Streicher*. The footnote began by asserting that “criminal prosecution of speech acts falling short of incitement finds *scant* support in international case

130. *Id.* ¶ 198.

131. *Id.*

132. *Id.* ¶ 209. Of course, the Chamber neglected to mention that several other judicial opinions had grappled with this issue outside of the ICTY.

133. *Id.* (footnotes omitted).

134. *Id.* ¶ 209 n.272. It should also be noted that the *Kordić* Chamber held that dismissing or removing Bosnian Muslims from employment similarly did not rise to the same level of gravity as the other acts enumerated in Article 5 of the ICTY Statute. *Id.* ¶¶ 209–210. This is directly at odds with the Nuremberg and subsequent ICTY jurisprudence. See, e.g., United States v. von Weizsaecker (*Ministries Case*), Judgment, in 14 TRIALS OF WAR CRIMINALS: “THE MINISTRIES CASE,” *supra* note 45, at 471 (describing exclusion from employment as part of Nazi persecution of Jews); see also Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶ 1041 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) (finding that discriminatory employment dismissals constitute underlying acts of persecution). As with speech, the *Kordić* judgment also takes employment termination out of context and considers it separately, thus negating its impact in conjunction with other conduct and the overall cumulative effect of the persecutory campaign. See Fausto Pocar, *Persecution as a Crime Under International Criminal Law*, 2 J. NAT’L SEC. L. & POL’Y 355, 359 (2008) (noting, in light of existing jurisprudence, that “one must consider policies such as discriminatory employment dismissals, denial of public services, and denials of justice as persecutory acts, particularly when committed in conjunction with one another” (emphasis added)).

law”¹³⁵ (implying that there is *some* support for such prosecutions—even if the *Kordić* Chamber failed to define the crucial term *incitement*). Given the sentence that follows, the implied small modicum of support would appear to come from *Streicher*, whose reach the Chamber attempted to limit. In that case, the *Kordić* Chamber noted, “the International Military Tribunal convicted the accused of persecution because he ‘incited the German people to active persecution,’” which amounted to “incitement to murder and extermination.”¹³⁶

The Chamber then cited to the ICTR decision in *Prosecutor v. Akayesu*,¹³⁷ which involved a small-town mayor working with militia to direct a genocide operation in his locality.¹³⁸ He was charged primarily with genocide-related crimes, including, peripherally, direct and public incitement to commit genocide.¹³⁹ In emphasizing the dearth of speech-focused CAH-persecution charges in atrocity cases, the *Kordić* Chamber merely pointed out that Akayesu—who was not a journalist or major politician but a small-town mayor whose liability was only tangentially connected to speech—was convicted of direct and public incitement to genocide, not CAH-persecution.¹⁴⁰

Curiously, there was no mention at all of the *Ruggiu* case, which had been decided by the ICTR the previous year and involved a defendant convicted of CAH-persecution.¹⁴¹ On a related note, the *Kordić* Chamber also asserted without further elaboration that “the only speech act explicitly criminalised under the statutes of the International Military Tribunal, Control Council Law No. 10, the ICTY, ICTR and ICC Statute, is the direct and public incitement to commit genocide.”¹⁴²

135. *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 209 n.272 (emphasis added).

136. *Id.* The *Kordić* Chamber omitted, inter alia, the following language in *Streicher*: “In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active *persecution*.” *United States v. Goering*, Judgment, *Streicher* (Int’l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 161–63 (1946) (emphasis added); see also *infra* note 307 and accompanying text (describing how *Streicher*’s speech called for persecution).

137. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

138. 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, 149–53 (2004) (summarizing the ICTR’s case and the guilty verdict rendered against Mayor Akayesu for genocide and CAH).

139. *Id.* at 149–50.

140. *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 209 n.272.

141. Gordon, *supra* note 138, at 153.

142. *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 209 n.272. That observation would seem inaccurate since, arguably, “instigating” and “ordering” are other speech acts explicitly criminalized in the ICTY and ICTR Statutes. See, e.g., ICTY Statute, *supra* note 26, art. 7(1) (“A person who planned, instigated, ordered, committed or otherwise aided and abetted . . . a crime referred to in articles 2 to 5 . . . shall be

The Chamber further attempted to justify its ruling by referring to the fact that certain countries have attached reservations or declarations to human rights treaties, such as the ICCPR, that prohibit incitement to invidious discrimination and hatred.¹⁴³ As a result, the Chamber observed, there is a split on this issue between the United States, an extremely speech-protective society, and the majority of other countries in the world (such as Germany, Canada, France, and South Africa), who are more concerned with protecting the rights of victims.¹⁴⁴ Given this split, the *Kordić* Chamber concluded, “[T]here is no international consensus on the criminalisation of this act [incitement] that rises to the level of customary international law.”¹⁴⁵

4. *Mugesera v. Canada*

In 2005, in the immigration case of a Rwandan refugee named Leon Mugesera, the Canadian Supreme Court was called on to decide whether hate speech charged as persecution is equal in gravity to the other enumerated CAH bad acts. Mugesera, an extremist Hutu politician, had made an infamous speech in November 1992 at a political rally in which he attempted to denigrate and dehumanize the Tutsis.¹⁴⁶ He referred to them as cockroaches (*Inyenzi*) and alluded to them as serpents and thieves.¹⁴⁷ He urged his audience not to deal with them or accept them as citizens of Rwanda. He concluded by stating that the “cockroaches” (Tutsis) should “be leaving . . . instead of living among us Let them pack their bags, let them get going, so that no one will return here”¹⁴⁸ Mugesera was indicted by Rwandan authorities in connection with the speech

individually responsible for the crime.”); see also Rome Statute, *supra* note 11, art. 25 (fixing criminal liability for one who “[o]rders, solicits or induces the commission of . . . a crime”). Moreover, the *Kordić* Chamber neglected to acknowledge that, even if not explicit, these instruments permit criminalization of other speech acts, including CAH-persecution.

143. *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 209 n.272.

144. *Id.*

145. *Id.* Of course, as will be discussed in greater depth *infra* Part III.C.2, the *Kordić* Chamber’s reliance on these treaties and domestic provisions is just as problematic because they do not take into account the CAH context of a widespread or systematic attack on a civilian population. Moreover, as noted previously, it is well settled that underlying acts of persecution need not be criminal acts. See Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 186 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (“[A]cts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent.”).

146. *Mugesera v. Canada*, 2005 SCC 40, [2005] 2 S.C.R. 100, ¶¶ 65–73 (Can.).

147. *Id.* app. III, ¶¶ 13, 17, 28. The audience also understood parts of the speech to be a call for extermination of the Tutsis.

148. *Id.* app. III, ¶ 28.

but fled to Canada, where an illegal entry immigration case was filed against him.¹⁴⁹

The case worked its way up to the Canadian Supreme Court, which had to decide, among other issues, whether there were reasonable grounds to believe Mugesera was liable for CAH-persecution and therefore inadmissible to Canada under its immigration laws.¹⁵⁰ In its analysis, the court addressed the specific question of whether “a speech that incites hatred, which as we have seen Mr. Mugesera’s speech did, [can] meet the initial criminal act requirement for persecution as a crime against humanity.”¹⁵¹ The court then surveyed on-point ICTY and ICTR precedent, including the split between *Ruggiu/Media Case* and *Kordić* and concluded that his speech could.¹⁵² It began by noting the relationship between Mugesera’s speech and the widespread and systematic attack against the civilian population:

[T]he attack must be directed against a relatively large group of people, mostly civilians, who share distinctive features which identify them as targets of the attack. A link must be demonstrated between the act and the attack. In essence, the act must further the attack or clearly fit the pattern of the attack, but it need not comprise an essential or officially sanctioned part of it. A persecutory speech which encourages hatred and violence against a targeted group furthers an attack against that group. In this case, in view of the [lower court’s] findings, [Mugesera’s] speech was a part of a systematic attack that was occurring in Rwanda at the time and was directed against Tutsi and moderate Hutu, two groups¹⁵³

In this context, the court was able to find that “the harm in hate speech lies not only in the injury to the self-dignity of target group members but also in the credence that may be given to the speech, which may promote discrimination and even violence.”¹⁵⁴ The court therefore found that Mugesera’s speech satisfied the requirements of CAH-persecution.¹⁵⁵

5. The Appeals Chamber Judgment in the *Media Case*

The next important milestone in the jurisprudential development of speech as CAH-persecution is the 2007 Appeals

149. *Id.* ¶¶ 3–5.

150. *Id.* ¶¶ 1–5, 112.

151. *Id.* ¶ 137.

152. *Id.* ¶¶ 146–147.

153. *Id.* at 10.

154. *Id.* ¶ 147. But the court also emphasized that “hate speech always denies fundamental rights. The equality and the life, liberty and security of the person of target-group members cannot but be affected.” *Id.*

155. *Id.* ¶ 148.

Chamber judgment in the *Media Case*. The defendants in that case argued that hate speech should not qualify as conduct satisfying the *actus reus* requirement for CAH-persecution.¹⁵⁶ Citing to paragraph 209 and footnote 272 of the *Kordić* judgment, the defendants made, among others, the following points: (1) “hate speech is not regarded as a crime under customary international law (except in the case of direct and public incitement to commit genocide)” and so defendants’ convictions violated the principle of legality; (2) “hate speech does not fall within the definition of the crime against humanity of persecution, because it does not lead to discrimination in fact and is not as serious as other crimes against humanity”; and (3) “the Trial Chamber erred in relying on the *Ruggiu* Trial Judgment to conclude that hate speech targeting a population by reason of its ethnicity is sufficiently serious to constitute a crime against humanity, because that judgment was not the result of a real trial.”¹⁵⁷

Defendants were supported by an amicus curiae brief from the American nongovernmental organization Open Society Institute, which argued that Streicher’s persecution conviction hinged uniquely on his “prompting ‘to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions.’”¹⁵⁸ This conclusion was bolstered, the brief contended, by the IMT’s acquitting Hans Fritzsche “on grounds that his hate speeches did not seek ‘to incite the Germans to commit atrocities against the conquered people.’”¹⁵⁹ The brief also criticized the *Media Case* Trial Chamber for failing to follow the *Kordić* judgment, which had found that mere hate speech could not constitute persecution.¹⁶⁰

In its judgment, the Appeals Chamber began by setting out the applicable law to be considered in forming its conclusions. It confirmed that “the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).”¹⁶¹ The Chamber noted, however, that “not every act of discrimination will constitute the crime of persecution: the underlying acts of persecution, whether considered in isolation or

156. Prosecutor v. Nahimana (*Media Case*), Case No. ICTR 99-52-A, Judgment, ¶¶ 970–972 (Nov. 28, 2007).

157. *Id.* ¶ 972.

158. *Id.* ¶ 979 (quoting United States v. Goering, Judgment, Streicher (Int’l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 163 (1946)).

159. *Id.* (quoting Goering, Judgment, Streicher, 6 F.R.D. at 163).

160. *Id.*

161. *Id.* ¶ 985 (quoting Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 185 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003)).

in conjunction with other acts, must be of a gravity equal to the crimes listed under Article 3 of the [ICTR] Statute.”¹⁶²

However, the Chamber also noted that “it is not necessary that these underlying acts of persecution amount to crimes in international law.”¹⁶³ It therefore rejected defendants’ arguments that mere hate speech does not constitute a crime in international law.¹⁶⁴

The Appeals Chamber also affirmed 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 therefore constitutes ‘actual discrimination.’”¹⁶⁵ In support of this proposition, the Chamber alluded to the Universal Declaration of Human Rights, the preamble of which “expressly refers to the recognition of dignity inherent to all human beings, while the Articles set out its various aspects.”¹⁶⁶ The Chamber also declared that “speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security of the members of the targeted group and therefore constitutes ‘actual discrimination.’”¹⁶⁷

Nevertheless, the Appeals Chamber noted that it was not “satisfied that hate speech alone can amount to a violation of the rights to life, freedom, and physical integrity of the human being.”¹⁶⁸ As a result, it concluded that “other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them.”¹⁶⁹

The Appeals Chamber then took up a related, but separate question: whether the violation of fundamental rights at issue in CAH-persecution cases (i.e., right to respect for human dignity, right to security) is as serious as in the case of the other CAH enumerated in Article 3 of the ICTR Statute.¹⁷⁰ The Chamber essentially punted on this issue:

The Appeals Chamber is of the view that it is not necessary to decide here whether, in themselves, mere hate speeches not inciting violence against the members of the group are of a level of gravity equivalent to that for other crimes against humanity. As explained above, it is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity:

162. *Id.* (emphasis added).

163. *Id.*

164. *Id.*

165. *Id.* ¶ 986.

166. *Id.* ¶ 986 n.2256.

167. *Id.* ¶ 986.

168. *Id.*

169. *Id.*

170. *Id.* ¶ 987.

underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity.¹⁷¹

The Chamber then applied this analysis to the case before it. It held that the speeches at issue after the start of the genocide, i.e., post-April 6, 1994, were accompanied by calls for genocide and took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda.¹⁷² The Chamber specified that the campaign was characterized by acts of violence and destruction of property.¹⁷³ In this context, it ruled, the speeches were of a gravity equivalent to the other CAH.¹⁷⁴ Accordingly, it concluded:

[T]he hate speeches and calls for violence against the Tutsi made after 6 April 1994 (thus *after the beginning of a systematic and widespread attack against the Tutsi*) themselves constituted underlying acts of persecution. In addition . . . some speeches made after 6 April 1994 did in practice substantially contribute to the commission of other acts of persecution against the Tutsi; these speeches thus also instigated the commission of acts of persecution against the Tutsi.¹⁷⁵

The Chamber also concluded that any pre-April 6, 1994, speech for which the defendants could be held responsible did not constitute acts of persecution pursuant to Article 3 of the ICTR Statute because they were not part of a widespread or systematic attack against the Tutsi population.¹⁷⁶ That said, the Chamber noted that pre-April 6, 1994, speech could be found to have “instigated the commission of acts of persecution.”¹⁷⁷ However, in both the case of RTLM broadcasts and *Kangura* articles, the Chamber concluded that the pre-genocide speech did not, in fact, instigate the commission of acts of persecution.¹⁷⁸

171. *Id.* (emphasis added).

172. *Id.* ¶ 988.

173. *Id.*

174. *Id.*

175. *Id.* (emphasis added) (footnotes omitted).

176. *See id.* ¶ 993 (discussing the RTLM broadcast); *id.* ¶ 1013 (discussing the *Kangura* publications). This is an unfortunate characterization of the situation pre-April 6, 1994, and not reflective of realities on the ground at that time. According to an International Commission of Investigation on Human Rights Violations in Rwanda, as early as 1993, “the Rwandan state committed acts of genocide, and its violations were massive and systematic, with the deliberate intent to attack the Tutsi ethnic group, as well as opponents of the regime.” *See Commission of Inquiry: Rwanda 93*, U.S. INST. PEACE, <http://www.usip.org/publications/commission-inquiry-rwanda-93> (last visited on Feb. 14, 2013).

177. *Media Case*, Case No. ICTR 99-52-A, Judgment, ¶ 993.

178. *See id.* ¶ 994 (discussing the RTLM broadcast); *id.* ¶ 1014 (discussing the *Kangura* publications). In reference to RTLM, the Chamber supported its conclusion by

Three judges appended partly dissenting opinions addressing the issue of persecution. Only one of them, American Theodor Meron, objected to the majority approach on the grounds that it was *too* permissive regarding speech as the basis for a persecution conviction. In Judge Meron's opinion, under any circumstances, "mere hate speech may not be the basis of a criminal conviction."¹⁷⁹ Only when hate speech "rises to the level of inciting violence or other imminent lawless action" can it be criminalized.¹⁸⁰ In support of his position, Judge Meron pointed to the lack of consensus around the world in terms of criminalizing hate speech domestically—thus arguing that making it the basis for a conviction at the ICTR violated the principle of legality.¹⁸¹ In support of this, he cited with approval the *Kordić* judgment ruling that hate speech that does not explicitly call for violence does not rise to the same level of gravity as the other enumerated CAH acts.¹⁸² This conclusion, Judge Meron asserted, accurately reflects the law on hate speech since, "the Prosecution did not appeal this important determination, and the Appeals Chamber did not intervene to correct a perceived error . . ." ¹⁸³ Judge Meron also wrote of the value of protecting hate speech, alluding to American values that cherish the "benefit of protecting political dissent."¹⁸⁴ Citing the U.S. Constitution and U.S. Supreme Court case law, he observed that: "[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . . [U]nder the rubric of persecution, to criminalize unsavory speech that does not constitute actual imminent incitement might have grave and unforeseen consequences."¹⁸⁵

Two other partial dissents took the opposite position—that the majority decision's position regarding hate speech and persecution was too circumscribed. In other words, they felt the Tribunal ought to have held that hate speech can *per se* constitute an underlying act of persecution. Judge Fausto Pocar began his partial dissent by acknowledging that the majority opinion "does not appear to rule

noting that "it has not been established that the broadcasts prior to 6 April 1994 substantially contributed to the murder of Tutsi after 6 April 1994." *Id.* This is a curious statement, and not dispositive of the issue, as the Chamber had previously conceded that acts of persecution could be broader in scope than mere murder. Thus, pre-genocide speech that might have contributed toward Tutsi misfortunes short of murder was not considered by the Chamber.

179. *Id.* ¶ 13 (Meron, J., partly dissenting).

180. *Id.* ¶ 12.

181. *Id.* ¶ 5.

182. *Id.* ¶ 7.

183. *Id.*

184. *Id.* ¶¶ 7, 11.

185. *Id.* ¶¶ 11–12 (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Watts v. United States*, 394 U.S. 705, 708 (1969)).

definitively on the question whether hate speech can *per se* constitute an underlying act of persecution.”¹⁸⁶ Judge Pocar then provided his view in definitive terms: “In my opinion, the circumstances of the instant case are, however, a perfect example where hate speech fulfils the conditions necessary for it to be considered as an underlying act of persecution.”¹⁸⁷ He then specified that, for example, the hate speeches broadcast by RTLM announcers were clearly aimed at discriminating against Tutsis and resulted in the Hutu population discriminating against them, “thus violating their basic rights.”¹⁸⁸ He then left no doubt about the legal consequences of this conclusion: “Taken together and in their context, these speeches amounted to a violation of equivalent gravity as the other crimes against humanity [and thus] were *per se* underlying acts of persecution.”¹⁸⁹

In his partial dissent, Judge Mohamed Shahabuddeen took the same position but fleshed out his analysis in much greater detail. The defendants, he noted, were arguing that speech could only be considered equal in gravity to the other CAH enumerated acts if it amounted to incitement to commit genocide or extermination.¹⁹⁰ Judge Shahabuddeen responded to this argument by reminding the parties that persecution as a CAH is wider than incitement to commit genocide—the former therefore cannot be limited in scope to the latter.¹⁹¹ Judge Shahabuddeen then explained why the IMT *Fritzsche* decision, relied on by the defendants, was not to the contrary. *Fritzsche* was acquitted, the judge noted, because “he did not take part ‘in originating or formulating propaganda campaigns.’”¹⁹² Moreover, while the IMT happened to note that *Fritzsche* did not appear to intend “to incite the German people to commit atrocities on conquered people,” this does not show that the IMT thereby meant to make advocacy to genocide or extermination an essential element “to the success of a charge for persecution (by making public statements) as a crime against humanity.”¹⁹³

On the contrary, the judge pointed out, other judgments from Nuremberg indicate that “a more satisfactory test is that an allegation of persecution as a crime against humanity has to show harm to ‘life and liberty’” or “acts committed in the course of wholesale and systematic violation of life and liberty.”¹⁹⁴ As

186. *Id.* ¶ 3 (Pocar, J., partly dissenting).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* ¶ 7 (Shahabuddeen, J., partly dissenting).

191. *Id.* ¶ 9.

192. *Id.* ¶ 10.

193. *Id.* ¶¶ 10–11.

194. *Id.* ¶ 12 (citing the decisions in *Flick* and *Einsatzgruppen*).

demonstrated by the Nuremberg jurisprudence, this could include economic (except for expropriation of industrial property) and political discrimination.¹⁹⁵ Thus, "it is not necessary to prove a physical attack."¹⁹⁶ Judge Shahabuddeen therefore concluded: "In my argument, the court may well regard the 'cumulative effect' of harassment, humiliation, and psychological abuse as impairing the quality of 'life', if not 'liberty', within the meaning of the tests laid down in *Einsatzgruppen*."¹⁹⁷

Judge Shahabuddeen then addressed the more narrow view of persecution adopted by the Trial Chamber decision in *Kordić*. He pointed out that the *Kordić* judgment appeared to be saying that, shorn of context (i.e., not as part of a larger campaign of persecution or a widespread or systematic attack against a civilian population), a naked allegation of "encouraging, instigating and promoting hatred, distrust and strife on political, racial, ethnic or religious grounds, by propaganda, speeches or otherwise" cannot found a charge of persecution.¹⁹⁸ But in context, Judge Shahabuddeen explained, hate speech could constitute an underlying act of persecution:

In my opinion, the Trial Chamber's judgment in that case overlooked the fact that it is not possible fully to present a campaign as persecutory if integral allegations of hate acts are excluded. What is pertinent to such a case is the general persecutory campaign, and not the individual hate act as if it stood alone. The subject of the indictment is the persecutory campaign, not the particular hate act. This was why non-crimes were included with crimes in the *Ministries* case. It may be said that an act, which is ordinarily a non-crime, can no longer be treated as a non-crime if it can be prosecuted when committed in a special context. But the possibility of the act being regarded as criminal if committed in a certain context only reinforces the proposition that the Trial Chamber's exclusion of it in *Kordić and Čerkez* is not consistent with the *Ministries* case, or with other cases of the ICTY; the exclusion is contrary to customary international law and is incorrect.¹⁹⁹

Finally, Judge Shahabuddeen clarified why it was problematic for the Appeals Chamber to rely on the Trial Chamber's analysis regarding the fact that certain international human rights instruments, such as the ICCPR, require participating states to criminalize propaganda that incites racial hatred or discrimination.²⁰⁰ The Trial Chamber suggested such prohibitions supported a finding that this variety of speech can constitute an

195. *Id.*

196. *Id.*

197. *Id.* ¶¶ 14, 10.

198. *Id.* ¶ 15.

199. *Id.* ¶ 16 (footnotes omitted).

200. *Id.* ¶ 18.

underlying act of persecution.²⁰¹ But the Appeals Chamber claimed that reservations to such treaty provisions by certain signatory nations signified that these prohibitions were not part of customary international law and therefore could not, on their own, be the basis for persecution allegations.²⁰² But Judge Shahabuddeen explained his view that this line of reasoning is specious:

These instruments operate on the basis that a mere hate speech could be criminalised in domestic law: freedom of expression is not absolute. But the Trial Chamber did not mean that the fact that a prosecution could be brought domestically by virtue of legislation enacted pursuant to these instruments necessarily showed that a similar prosecution could be brought internationally. Those instruments were illustrative, not foundational; they were used by the Trial Chamber to illustrate the nature of the rights breached at international law, not to found a right to complain of a breach at international law.²⁰³

Based on all this, Judge Shahabuddeen concluded:

All that can be legitimately extracted from the post-World War II jurisprudence, including *Fritzsche*, is that the underlying acts must be sufficiently grave to affect the 'life and liberty' of the victims—though not necessarily by a physical act against them. It is for an international court to exercise its powers of clarification by explaining what concrete cases will satisfy that criterion. It may be recalled that the ICTY Appeals Chamber, in its discussion of customary international law, unanimously held that 'where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle'. A new case, thus decided, is not an extension of customary international law; it is a further illustration of the workings of that law. This at the same time answers criticisms that the principle of legality was breached in this case. In holding that proof of extermination or genocide is not required, a Trial Chamber is not making new law with retrospective application, or at all.

To respond to what I believe to be the position of the appellants, I am of the view that, where statements are relied upon, the gravity of persecution as a crime against humanity can be established without need for proof that the accused advocated the perpetration of genocide or extermination.²⁰⁴

201. *Id.* ¶ 5.

202. *Id.*

203. *Id.* ¶ 18 (footnote omitted).

204. *Id.* ¶¶ 19–20 (footnotes omitted).

III. RECONCILING THE SPLIT IN TREATING SPEECH AND PERSECUTION

A. Unresolved Issues

By the final sentence of the majority opinion in the *Media Case* appeals judgment, the relationship between speech and CAH-persecution remained a mystery on certain levels. Some issues had been clarified. The Appeals Chamber adopted the *Kupreskic* formulation of persecution as comprising “an act or omission which discriminates in fact and which: [(1)] denies or infringes upon a fundamental right laid down in international law or treaty law (the *actus reus*); and [(2)] was carried out deliberately with the intent to discriminate on one of the enumerated grounds, i.e., race, religion, or politics (the *mens rea*).”²⁰⁵ In line with the ICTY decisions as well, the *Media Case* Appeals Chamber found that not every discriminatory act, in itself, can give rise to the crime of persecution.²⁰⁶ More specifically, any constitutive acts of persecution, whether considered in isolation or in conjunction with other acts, must be tantamount in gravity to the other crimes enumerated in Article 3 of the ICTR Statute (equivalent to Article 5 of the ICTY Statute).²⁰⁷ Nevertheless, the underlying persecutory acts need not rise to the level of crimes in international law.²⁰⁸

Moreover, with respect to speech in particular, the Appeals Chamber found that “hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to the respect for dignity of the targeted group as human beings, and therefore constitutes ‘actual discrimination.’”²⁰⁹ The Appeals Chamber also ruled that speech inciting to violence against a population on the enumerated discriminatory grounds violates the right to security of members of the targeted group. As a result, this also constitutes actual discrimination.²¹⁰ However, the Appeals Chamber stated that it was “not satisfied” that “hate speech alone can amount to a violation of the rights to life, freedom, and physical integrity of the human being.”²¹¹ So other persons need to intervene before those such violations can occur. Put another way, a speech cannot, in itself, “directly kill members of a group, imprison or

205. *Id.* ¶ 985 (majority opinion).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* ¶ 986.

210. *Id.*

211. *Id.*

physically injure them.”²¹² This seems somewhat of a truism—speech *qua* speech does not result in direct *physical* consequences to a listener.

Nevertheless, while speech in itself does not have these types of consequences, it may result in violations to the rights of dignity or security.²¹³ At perhaps the most crucial juncture of the judgment’s reasoning, the Appeals Chamber punted. It refused to opine whether such hate speech violations are as serious as the other enumerated CAH. In other words, it did not decide whether “mere hate speeches not inciting violence against members of a group are of a level of gravity equivalent to that for other crimes against humanity.”²¹⁴ Still, the Appeals Chamber provided reason to believe such speeches, in the proper context, could be deemed equally grave:

[I]t is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity.²¹⁵

Beyond the explicitly unresolved question of whether hate speeches not inciting violence are of a level of gravity equivalent to the other CAH, additional questions remain. What exactly is “hate speech”? What does “incite” mean? The next subpart will grapple with those questions.

B. *The Spectrum of Speech at Issue*

The judicial opinions dealing with speech and persecution tend to bifurcate speech into two broad classifications: (1) hate speech; and (2) speech that incites violence.²¹⁶ To the extent the distinction is significant, breaking down the type of speech into more meaningful analytical categories is called for. Is it even proper to have two general but distinct groupings? Or might there be a spectrum of speech wherein, depending on other contextual factors, various points along the spectrum might determine persecution liability? Given the

212. *Id.*

213. *Id.* ¶ 987.

214. *Id.*

215. *Id.*

216. See 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, 886–90 (2008) (discussing this in the context of the *Ruggiu* case and the *Media Case*).

broad range of persecutory speech, the latter approach seems preferable. As one commentator has noted:

[A] wide definition of hate speech would include group libel, or an attack on the dignity or reputation of a given group or individual. This would cover speech that is considered offensive regardless of whether it would lead to harmful results. A narrower definition of hate speech, however, would limit speech “that is intended to incite hatred or violence” against certain groups or individuals.²¹⁷

All relevant speech for purposes of this analysis ought to be considered hate speech. In that sense, incitement would only constitute a subcategory of hate speech along this spectrum, not a separate phenomenon altogether.²¹⁸ In that case, what, precisely, would be all of the major points along such a spectrum?

On one end, one would find the mildest forms of hate speech—general statements casting aspersions on a group.²¹⁹ This could be through the republication of racial, ethnic, or religious stereotypes. It could, for example, consist of group libel, which entails attacking or defaming a group that suffers from social prejudice and creating a general climate more receptive to animosity toward and violence against the group.²²⁰ These are general statements not necessarily directed at any person in particular. Such statements may include milder forms of dehumanizing the victim group through techniques of verminization (equating the group with parasitic, pestilent subhuman creatures such as lice or locusts), pathologization (analogizing the group with disease), and demonization (ascribing to the group satanic or other comparably evil qualities).²²¹

Moving further along toward the other end of the spectrum, statements voiced directly at the victims can be categorized as “harassment.”²²² Such statements would be addressed to the

217. Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. COMP. & INT'L L. 1, 4 (2008).

218. See Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence*, in CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 13, at 242, 281 (“Not all hate speech is alike, and its consequences may vary from one setting to another.”).

219. See PHYLLIS B. GERSTENFELD, HATE CRIMES: CAUSES, CONTROLS AND CONTROVERSIES 35 (2010) (defining hate speech as “words or symbols that are derogatory or offensive on the basis of race, religion, sexual orientation, and so on”).

220. See Kent Greenfield, *Group Libel Laws*, in DICTIONARY OF AMERICAN HISTORY (Stanley I. Kutler ed., 3d ed. 2003).

221. See Gordon, *supra* note 2, at 639–41. The cited passage in this Article refers to dehumanization as a method of incitement. This is a matter of degree. Less virulent forms of dehumanization may not amount to calls for action and can therefore be categorized as general hate speech. The language must be parsed on a case-by-case basis to determine the proper category.

222. See NORMAN E. BOWIE & ROBERT L. SIMON, THE INDIVIDUAL AND THE POLITICAL ORDER: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY 136 (4th

collective group (e.g., “You do not belong here,” or, “You are parasites”) or to particular individuals (e.g., “You filthy residents of the Biryogo are making the rest of society dirty and disease-infested. You are destroying our country”).²²³

The next point in this direction along the spectrum, incitement, entails advocacy directed toward third persons.²²⁴ Such messages are designed to provoke action vis-à-vis the victim group.²²⁵ This kind of incitement bifurcates into two forms: (1) incitement toward nonviolent action and (2) incitement toward violent action.²²⁶ Regarding the former, one can discern three general, relevant nonviolence categories: (1) incitement to hatred, (2) incitement to discrimination, and (3) incitement to persecution.²²⁷

Incitement to hatred urges the majority group to develop general feelings of animosity toward the victim group.²²⁸ It is similar to group libel but takes a more active tone in encouraging the majority group

ed. 1998) (describing speech at specifically targeted individuals as a form of harassment).

223. In the United States, the most speech-protective country in the world, such speech might be deemed “fighting words” not deserving of First Amendment protection. As explained in *Beauharnais v. Illinois*:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include . . . the insulting or “fighting” words It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Beauharnais v. Illinois, 343 U.S. 250, 255–57 (1952). Similarly, advocating illegal conduct to third parties in the United States will not be protected if it seeks “imminent” action and is reasonably likely to provoke such action imminently. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that speech advocating lawless action is protected unless it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action”). Thus, looking at the analogy to domestic laws, it is no surprise that incitement, next along the spectrum after harassment, would also be considered more serious than general hate speech. Continuing with the United States as a point of reference, of these types of speech, only general hate speech would presumably find absolute protection under the First Amendment.

224. See Ian Leigh, *Homophobic Speech, Equality Denial, and Religious Expression*, in *EXTREME SPEECH AND DEMOCRACY* 375, 379 (Ivan Hare & James Weinstein eds., 2010).

225. *Id.*

226. *Id.*

227. *Id.* (discussing the breakdown of incitement in the context of the Netherlands Criminal Code).

228. See Wibke Timmerman, *The Relationship Between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Toward Criminalization of Hate Propaganda*, 18 *LEIDEN J. INT’L L.* 257, 276 (2005).

to despise the minority.²²⁹ For example, the Rwandan pop singer Simon Bikindi's pre-Rwandan genocide song *Njyewe Nanga Abahutu* ("I Hate the Hutu") actively encouraged extremist Hutus to develop feelings of contempt for moderate Hutus who were supporting Tutsis in the period leading up to the genocide (both moderate Hutus and Tutsis were victim groups during this time).²³⁰ Incitement to discrimination urges the majority group to mistreat the victim group in particular nonviolent ways.²³¹ It could be a call to the majority group to refuse medical treatment or service in restaurants or to discourage marriage with members of the victim group. For example, a Nazi pamphlet distributed to German teenagers warned them not to "mix" with Jewish people or marry them for fear of race "defilement."²³²

Incitement to persecution is incitement to discrimination on a broader and more systematic scale.²³³ This is advocacy to exclude the victim group from participation in society and enjoyment of civil rights in a comprehensive way.²³⁴ In pre-genocide Rwanda, for example, Hassan Ngeze published the infamous *Ten Commandments of the Hutu* in a 1990 issue of *Kangura*. One commentator has described this document as an appeal to "Hutus to separate themselves from the Tutsis."²³⁵ In fact, it was a call for comprehensive exclusion of Tutsis from society: (1) Hutu males must not have close personal or work relations with Tutsi women; (2) Hutu women are superior to Tutsi women; (3) Hutu women must fraternize only with Hutu men; (4) Tutsis are dishonest and no Hutu should conduct business with them; (5) all high-level positions in society should be occupied by Hutus only; (6) the education sector should be majority Hutu; (7) the military must be exclusively Hutu; (8) The Hutu should stop having mercy on the Tutsi; (9) all Hutus must have unity and solidarity; and (10) the ideology of the 1959 and 1961

229. *Id.*

230. See Gordon, *supra* note 2, at 618 ("These songs allegedly characterized Tutsis as 'Hutu enslavers, enemies or enemy accomplices.'").

231. See Timmerman, *supra* note 228, at 575-76 (describing how incitement dehumanizes the victim group and makes empathy with those groups impossible).

232. See *You and Your People: Your Marriage and Your Children*, GERMAN PROPAGANDA ARCHIVE, <http://www.calvin.edu/academic/cas/gpa/du.htm> (last visited Jan. 31, 2013).

233. See David L. Neressian, *Comparative Approaches To Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 STAN. J. INT'L L. 221, 263 (2007) (describing persecution as discrimination on a widespread or systematic basis).

234. *Id.*

235. *The Path to Genocide*, UNITED NATIONS, <http://www.un.org/en/preventgenocide/rwanda/text-images/Panel%20Set%202%20Low%20Res.pdf> (last visited Jan. 31, 2013).

revolution (when many Tutsis were disenfranchised, forced to leave Rwanda, or massacred) must be taught to Hutu at all levels.²³⁶

The other major form of incitement is to violence. There are two varieties—explicit and non-explicit.²³⁷ Since incitement to violence is often effectuated via code, non-explicit calls are quite common.²³⁸ William Schabas has observed that those who incite to mass atrocity “speak in euphemisms.”²³⁹ Such non-explicit methods can be myriad in form and include: (1) predictions of destruction (in the *Media Case* Trial Chamber judgment, for instance, certain RTLM emissions that predicted liquidation of the Tutsis were among those broadcasts deemed to constitute incitement);²⁴⁰ (2) so-called “accusation in a mirror” (which consists of imputing to the victim the intention of committing the same crimes that the actual perpetrator is committing, as in Leon Mugesera’s November 1992 speech: “These people called Inyenzis are now on their way to attack us.” “They only want to exterminate us.”);²⁴¹ (3) euphemisms and metaphors (in the Rwandan genocide, for instance, “go to work,” a common mass slaughter directive, meant “kill Tutsis”);²⁴² (4) justification during contemporaneous violence (this amounts to describing atrocity already taking place in a manner that convinces the audience its violence is morally justified—Nazi leaders, for example, described to potentially complicit Germans the “humaneness” of their massacres, torture, death marches, slavery, and other atrocities);²⁴³ (5) condoning and congratulating past violence (RTLM announcers, such as Georges Ruggiu, would congratulate the “valiant combatants” who

236. See SAMUEL TOTTEN, PAUL BARTROP & ERIC MARKUSEN, *DICTIONARY OF GENOCIDE: A–L* 200 (2008).

237. See Gordon, *supra* note 2, at 638–39 (discussing the difference between explicitly calling for violence and more indirect methods of predicting violence).

238. *Id.* at 638–44.

239. William A. Schabas, *Mugesera v. Minister of Citizenship and Immigration*, 93 AM. J. INT’L L. 529, 530 (1999) (speaking of incitement to genocide).

240. Prosecutor v. Nahimana (*Media Case*), Case No. ICTR 99-52-T, Judgment, ¶ 405 (Dec. 3, 2003) (“Thus when day breaks, when that day comes, we will be heading for a brighter future, for the day when we will be able to say ‘There isn’t a single Inyenzi left in the country.’”).

241. *Mugesera v. Canada*, 2005 SCC 40, [2005] 2 S.C.R. 100, ¶¶ 18, 69; Kenneth L. Marcus, *Accusation in a Mirror*, 43 LOY. U. CHI. L.J. 357, 359 (2012); see also Gordon, *supra* note 2, at 641–42.

242. See, e.g., Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 44(iv) (June 1, 2000) (noting that over the passage of time, “go to work” meant “go kill the Tutsis and Hutu political opponents of the interim government”); see also Gordon, *supra* note 2, at 642 (noting that “go to work” meant go kill the Tutsis).

243. See 3 RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 1010 (1961); Gordon, *supra* note 2, at 642.

engaged in a “battle” against Tutsi civilians);²⁴⁴ (6) asking questions about violence (Simon Bikindi asked Hutu militia over a truck loudspeaker whether they had killed Tutsis and whether they had killed the “snakes”);²⁴⁵ and (7) more virulent forms of verminization, pathologization, and demonization (Ruggiu admitted that the word *Inyenzi*, as used in the sociopolitical context of the time of the Rwandan genocide, came to designate the Tutsis as “persons to be killed”).²⁴⁶

Of course, the most serious form of incitement consists of explicit calls for violence. These are relatively rare in mass-atrocity cases but certainly the most chilling and evocative of the horrors surrounding the speech.²⁴⁷ A prominent example is Kantano Habimana’s June 4, 1994, broadcast in which he asked listeners to exterminate the “Inkotanyi,” or Tutsis, who would be known by height and physical appearance.²⁴⁸ Habimana then added: “Just look at his small nose and then break it.”²⁴⁹ Another disturbing example comes from Iranian President Mahmoud Ahmadinejad, who urged Israel’s destruction when he told the Iranian people in October 2005 that Israel “must be wiped off the map.”²⁵⁰

C. Hate Speech as an Actus Reus for Persecution as a CAH

Having considered the range and qualities of the relevant speech, it is now appropriate to examine the issue left unresolved by the *Media Case* appeals judgment: whether hate speech not explicitly calling for violence may constitute the *actus reus* for CAH-persecution. An affirmative answer is justified when one analyzes the

244. Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Judgment and Sentence, ¶ 142 (May 16, 2003); Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 44(v); see also Gordon, *supra* note 2, at 642–43.

245. Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgment, ¶ 423 (Dec. 2, 2008); see also Gordon, *supra* note 2, at 643.

246. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 44(iii); see also Gordon, *supra* note 2, at 639–41.

247. It should be noted that general hate speech not calling for violence can be transformed into incitement when closely anchored to speech calling for violence. See Marcus, *supra* note 241, at 391 n.200.

248. Prosecutor v. Nahimana (*Media Case*), Case No. ICTR 99-52-T, Judgment, ¶ 396 (Dec. 3, 2003).

249. *Id.*

250. See Nazila Fathi, *Iran’s New President Says Israel Must Be Wiped Off the Map*, N.Y. TIMES, Oct. 27, 2005, at A8. Certain commentators have disputed that this constitutes direct and public incitement to commit genocide. See, e.g., Benesch, *supra* note 2, at 490–91 (“Ahmadinejad’s speech was reprehensible and perhaps even dangerous, but did not constitute incitement to genocide, in my view.”). But given Iran’s support of terrorist attacks against Israel, it may have constituted CAH-persecution. See, e.g., *Incitement to Indictment*, *infra* note 216, at 880–82.

chapeau elements of CAH, as well as the case law and nature of the persecution offense itself. Each will be studied below.

1. The CAH *Chapeau*

The most compelling reasons to consider speech as constituting the *actus reus* of CAH-persecution are found in the CAH *chapeau*. Most significantly, recall that a precondition for the offense is a “widespread or systematic attack against any civilian population.”²⁵¹ Thus, there cannot even be a conversation about whether certain underlying conduct can be the basis of CAH unless that conduct is perpetrated in circumstances wherein civilians are being exposed to massive, pervasive lawlessness. A line of ICTY cases suggests that an attack is a “course of conduct involving the commission of acts of violence.”²⁵² Even if such attacks are not explicitly violent, they will, at the very least, involve “inhumane mistreatment of the civilian population.”²⁵³

And the attack will, from an empirical perspective, be perpetrated by state organs.²⁵⁴ As William Schabas has noted regarding the cases before the international tribunals: “Essentially all prosecutions have involved offenders acting on behalf of a State and in accordance with a State policy, or those acting on behalf of an organization that was State-like in its attempts to exercise control over territory and seize political power”²⁵⁵ Moreover, the Rome Statute explicitly mandates that the broader attack be pursuant to or

251. See Stuart Ford, *Is the Failure To Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility To Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis*, 38 DENV. J. INT'L L. & POL'Y 227, 255 (2010) (“It is now generally agreed that the customary international law definition of crimes against humanity requires that crimes against humanity take place in connection with a widespread or systematic attack on a civilian population.”).

252. Prosecutor v. Limaj, Case No. IT-03-66-T, ¶ 182 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Prosecutor v. Blagojevic, Case No. IT-02-60-T, Judgment, ¶ 543 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶ 131 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004); Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 141 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

253. *Galic*, Case No. IT-98-29-T, Judgment, ¶ 257.

254. Although the ICTY Statute, for example, “implicitly requires that crimes against humanity arise from an official state action or policy,” the ICTY has held that *state policy* is not a CAH requirement. Cristin B. Coan, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, 26 N.C. J. INT'L L. & COM. REG. 183, 200 (2000); see also Prosecutor v. Jelusic, Case No. IT-95-10-T, Judgment, ¶ 100 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), *aff'd*, Case No. IT-95-10-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001).

255. William A. Schabas, *State Policy as an Element of International Crimes*, 98 J. CRIM. L. & CRIMINOLOGY 953, 954 (2008).

in furtherance of a state or organizational policy involving the multiple commission of enumerated CAH acts.²⁵⁶

Additionally, as with any other CAH, proving persecution means satisfying the *chapeau* requirement that the defendant knew his acts were part of the widespread or systematic attack.²⁵⁷ Thus, consistent with the relevant jurisprudence, any speech supporting a CAH-persecution charge will be consciously in the service of a state, or state-like, campaign to inflict violence or inhumane treatment on a civilian population. This would be especially true in cases before the ICC, whose statute specifies that persecution must be perpetrated in connection with any other enumerated CAH act or any crime within the jurisdiction of the court.²⁵⁸

In state-sponsored or state-sanctioned campaigns, such as those seen in Rwanda during 1994 and in the Balkans during the break-up of the former Yugoslavia, media is government controlled and the means for minority or victim groups to voice dissent are not available. Joseph Keeler points out that, in connection with both the Rwanda and Balkan mass atrocities of the 1990s, “the head of state either had complete or at least significant control over the media.”²⁵⁹ In these situations, the government has a monopoly on speech and uses it as just one more instrument in a coordinated attack on the victim civilian population. As Susan Benesch notes, mass-atrocity perpetrators “typically have overwhelming, state-sponsored access to the means of broadcasting or other media distribution. This sort of access would be impossible for an individual with a soapbox or even a website.”²⁶⁰ While this is true of all CAH, it is especially true of persecution, which, based on the origins and evolution of the crime, Professor Bassiouni has defined as “*State action or policy* leading to the infliction upon an individual of . . . physical or mental suffering.”²⁶¹

Even the staunchest defenders of free expression do not seek to protect such state-controlled utterances in service of mass-atrocity

256. Rome Statute, *supra* note 11, art. 7(2)(a).

257. See Mikol Sirkin, *Expanding the Crime of Genocide To Include Ethnic Cleansing: A Return to Established Principles in Light of Contemporary Interpretations*, 33 SEATTLE U. L. REV. 489, 499 (2010).

258. Rome Statute, *supra* note 11, art. 7(1)(h).

259. Joseph A. Keeler, *Genocide: Prevention Through Nonmilitary Measures*, 171 MIL. L. REV. 135, 184 (2002); see also Ameer F. Gopalani, *The International Standard of Direct and Public Incitement To Commit Genocide: An Obstacle to U.S. Ratification of the International Criminal Court Statute?*, 32 CAL. W. INT'L L.J. 87, 97 (noting that in Rwanda, “the government controlled the media”).

260. Benesch, *supra* note 2, at 496. As the title of her article suggests, Benesch was speaking about the specific context of incitement to genocide. But the same logic applies with equal force to the context of a widespread or systematic attack against a civilian population.

261. BASSIOUNI, *supra* note 50, at 327 (emphasis added).

campaigns (even if it is only generalized hate speech or harassment and not calls for violence). The partial dissent of Judge Meron in the *Media Case* appeals judgment, it should be recalled, was essentially grounded in an American philosophy that recognizes the “benefit of protecting political dissent.”²⁶² Referring to the U.S. Constitution and cases interpreting it, Judge Meron emphasized that the “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁶³

But the American jurisprudence relied on by Judge Meron is premised on the existence of a society with open and accessible channels of communication or, from another perspective, that permits publication of minority or anti-establishment messages. With respect to the former, Justice Oliver Wendell Holmes, Jr. posited in his famous dissent in *Abrams v. United States*²⁶⁴ that “the theory of our Constitution” is “that the ultimate good desired is better reached by free trade in ideas [because] the best test of truth is the power of the thought to get itself accepted in the competition of the market.”²⁶⁵ Regarding the latter, in *Texas v. Johnson*²⁶⁶ the U.S. Supreme Court “reaffirmed that the core purpose of the First Amendment is to protect political dissent.”²⁶⁷ Benesch has noted that “U.S. free-speech doctrine” is not relevant in the mass-atrocity context because the “marketplace of ideas” theory fails.²⁶⁸ “U.S. law protects odious and even violent speech,” Benesch adds, “in the belief that ‘bad’ speech will eventually be neutralized by ‘good’ speech.”²⁶⁹ But by the time mass atrocity is unfolding, she concludes, “there is such a disproportion in access to the means of disseminating information that protests by the targeted group, or even by sympathizers among the audience, would be extremely unlikely” to stop the bad speech.²⁷⁰

Similarly, other rationales proffered in defense of the most vigorous free-speech protections are not implicated in the sociopolitical or communications landscape of the CAH scenario. For example, logic and common sense dictate that “free speech as an essential element of democratic governance, providing citizens with

262. See *Prosecutor v. Nahimana (Media Case)*, Case No. ICTR 99-52-A, Judgment, ¶ 11 (Meron, J., partly dissenting).

263. *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Watts v. United States*, 394 U.S. 705, 708 (1969)).

264. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

265. *Id.*

266. *Johnson*, 491 U.S. 397 (1989).

267. *United States v. Haggerty*, 731 F. Supp. 415, 422 (W.D. Wash. 1990).

268. Benesch, *supra* note 2, at 496.

269. *Id.*

270. *Id.*

the necessary information to exercise their civic duties,”²⁷¹ or making “a vital contribution to personal autonomy, individual self-expression, and diversity of lifestyle”²⁷² will not be present in a society enduring a government-sponsored, widespread, or systematic attack against a civilian population.²⁷³

As Faustin Pocar has observed, with respect to “limitations on freedom of expression”:

It has been argued that [hate speech as a basis for persecution] conflates hate speech with incitement to violent crimes and makes protected speech an element of the crime of persecution. I disagree with such a view. With all due respect, I believe that this approach does not, among other things . . . adequately address the power of propaganda to incite when it takes place in situations of extended discrimination with an ethnic component. . . .

. . . .
[Moreover,] *the existence of stringent general requirements for crimes against humanity, such as the need for a widespread or systematic attack against the civilian population, warrants the conclusion that offensive or otherwise disagreeable speech will generally not form the*

271. ROBERT WHEELER LANE, *BEYOND THE SCHOOLHOUSE GATE: FREE SPEECH AND THE INCULCATION OF VALUES* 50 (1995). This is consistent with the views of philosopher Alexander Meiklejohn. *Id.* Justice Brandeis also conveyed this view in his *Whitney v. California* concurrence:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

272. LANE, *supra* note 271, at 51.

273. In commenting on the *Media Case* trial judgment, Professor Diane Orentlicher has taken a position generally sympathetic to Judge Meron's partial dissent. See Diane E. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 *NEW ENG. J. INT'L & COMP. L.* 17, 39–40 (2005). Unfortunately, Professor Orentlicher bases her analysis on the same faulty assumption as Judge Meron: that the Tribunal was passing judgment on whether hate speech not calling for violence, in the abstract, could be criminalized. Although stating that the case for criminalization makes “powerful and deeply compelling claims,” *id.* at 43, she rejects the ICTR's approach because, as she sees it, dealing with mere hate speech not calling for violence means that no international crime is implicated. And therefore an international court should not adjudicate claims premised on use of such speech. Unfortunately, Professor Orentlicher fails to recognize that the speech must, serving as the basis for CAH charges, be connected to a widespread or systematic attack against a civilian population. This does involve an international crime and, in that sense, it is entirely appropriate to be the object of adjudication for an international criminal court. For the same reason, it takes the argument regarding free speech out of the realm of American assumptions regarding exercise of disagreeable expression—it is government-controlled speech and in service of a criminal enterprise. Therefore, it should not be lumped in with the speech that was the object of the great Holmes/Brandeis dissents/concurrences or the Nazi speech dealt with in *Brandenburg*.

basis for a conviction of this type. Only in extreme situations will some types of speech be considered underlying acts of persecution.²⁷⁴

2. The Elements of Persecution

As set forth in the relevant jurisprudence and commentary, the elements and interpretation of the specific crime of persecution support the notion that speech can serve as its *actus reus*. In this regard, it is helpful to reconsider the *Kupreskic* test. Pursuant to that decision, the persecution *actus reus* must consist of (1) a gross or blatant denial; (2) on discriminatory grounds; (3) of a fundamental right, laid down in international customary or treaty law; and (4) reaching the same level of gravity as the other crimes against humanity enumerated in Article 5 of the ICTY Statute.²⁷⁵ The *Kordić* judgment found speech wanting with respect to the third and fourth prongs of the *Kupreskic* test (and arguably, by implication, the first prong).

Regarding the third prong, the *Kordić* Chamber concluded that hate speech not explicitly calling for violence could not result in a fundamental rights infringement based strictly on an examination of certain international conventions that regulate speech on a *domestic* level.²⁷⁶ Because some countries, such as the United States, have expressed reservations regarding criminalizing mere hate speech in their domestic criminal codes, *Kordić* inferred from the lack of consensus that infringement of a fundamental right was not implicated.²⁷⁷ However, basing the analysis on lack of unanimity regarding domestic speech regulation in the garden-variety crime context was misplaced.²⁷⁸ To be precise, persecution does not involve criminalization of hate speech in the ordinary municipal setting. Instead, as explained previously, it is concerned with hate speech delivered as part of a widespread or systematic attack against a civilian population.

274. Pocar, *supra* note 134, at 360–61 (emphasis added).

275. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 621 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

276. See *supra* notes 143–145 and accompanying text.

277. *Id.*

278. In all fairness, the ICTR has taken the same faulty approach by noting generally that hate speech is not protected speech under international law (citing the ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination) or in most domestic criminal codes such as those of Rwanda, Vietnam, Russia, Finland, Ireland, Ukraine, Iceland, Monaco, Slovenia, and China. See Prosecutor v. Nahimana (*Media Case*), Case No. ICTR 99-52-T, Judgment, ¶¶ 1075–1076 (Dec. 3, 2003). Again, looking at such garden-variety criminal domestic provisions without reference to the *chapeau* elements of CAH skews the analysis.

And the *Kordić* Chamber exacerbated the ills of this faulty approach by analyzing “speech” alone, in the abstract: “The Trial Chamber, however, finds that this act, as alleged in the Indictment, does not by itself constitute persecution as a crime against humanity.”²⁷⁹ Ironically, however, the *Kordić* Chamber elsewhere commented on “the unique nature of the crime of persecution as a crime of cumulative effect.”²⁸⁰ Quoting *Kupreskic*, it noted that “acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed ‘inhumane.’”²⁸¹

Moreover, in the context of the ICC, pursuant to Article 7(1)(h) of the Rome Statute, persecution must occur “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”²⁸² Thus, in addition to the *chapeau*’s already tethering the speech to a widespread or systematic attack against a civilian population involving the multiple commission of enumerated CAH acts and pursuant to a state or organizational policy, Article 7(1)(h) ties the speech even closer to inhumane treatment by grafting it onto yet another crime within the ICC’s jurisdiction.²⁸³ This could be either another enumerated CAH, such as murder, extermination, enslavement, torture, or rape, or another core subject-matter jurisdiction offense, such as genocide or war crimes.²⁸⁴ Speech abetting such conduct clearly entails violation of a fundamental right, laid down in international customary or treaty law. This argument is especially compelling given that “the Rome Statute is widely accepted and was intended to provide a collation of existing customary international law prohibitions, [and] so ‘represents compelling evidence of the customary international law of crimes against humanity.’”²⁸⁵

279. Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 209 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

280. *Id.* ¶ 199.

281. *Id.*

282. Rome Statute, *supra* note 11, art. 7(1)(h).

283. *See supra* notes 31–39 and accompanying text.

284. *See supra* notes 31–39 and accompanying text.

285. Adriaan Barnard, *Slegs Suid Afrikaners—South Africans Only? A Review and Evaluation of the International Crime of Apartheid*, 7 N.Z. J. PUB. & INT’L L. 317, 355 (2009) (citations omitted). Meg deGuzman notes that, although the Rome Statute “does not purport to crystallize the international law of crimes against humanity,” “[n]onetheless, [its] definition is the only one that has been adopted by a large segment of the world’s states.” Margaret M. deGuzman, *Crimes Against Humanity*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 126 (William A. Schabas & Nadia Bernaz eds., 2011); *see also* William J. Fenrick, *The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY*, 22 NETH. Y.B. INT’L L. 81, 95 (2001) (“The ICC elements [for the crime of persecution] will be used as a template.”). Nevertheless,

With respect to the fourth prong of the *Kupreskic actus reus* test—that persecution reach the same level of gravity as the other enumerated CAH—the *Kordić* Chamber found hate speech deficient because (1) “[it] is not enumerated as a crime elsewhere in the International Tribunal Statute,”²⁸⁶ and (2) the only speech explicitly and separately criminalized in international law is direct and public incitement to commit genocide.²⁸⁷ Once again, the reasoning in *Kordić* is faulty.

First, there is no support for the proposition that being enumerated elsewhere in the ICTY Statute is a definitive litmus test for gravity. The *Kordić* Chamber merely asserted this without any supportive citation or reasoning. But, in formulating its *actus reus* test, *Kupreskic* explicitly rejected this as an evaluative factor: “A persecutory act need not be prohibited explicitly in Article 5 or elsewhere in the Statute.”²⁸⁸

Even if *Kupreskic* were silent on this issue, consideration of enumeration elsewhere would be problematic. While this factor could theoretically have some probative value, it would be outweighed by anomalous statutory interpretation consequences. In particular, if an act constituting persecution had to replicate another explicitly prohibited act in the ICTY Statute (as *Kordić* necessarily suggests), then the separate crime of persecution as set out in Article 5(h) would be rendered a nullity. It would make no sense for the framers to include it as an independent enumerated act within the CAH

the *Kordić* Chamber rejected the defense argument that the prosecution show, consistent with the Rome Statute requirement, that persecution be connected to another crime in the ICTY Statute. The Chamber reasoned the defense position was too restrictive and not reflective of customary international law. *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 197 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001). One is tempted to speculate whether the Chamber rejected tying it to another crime so it could more conveniently consider hate speech in an abstract, isolated fashion for purposes of rejecting it as an *actus reus* for persecution.

286. *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 209. The wording of the judgment seems to indicate that this is not in support of the Chamber's analysis regarding the fourth prong of the *Kupreskic actus reus* test. It states:

The Trial Chamber, however, finds that this act [encouraging and promoting hatred on political, etc. grounds], as alleged in the Indictment, does not by itself constitute persecution as a crime against humanity. It is not enumerated as a crime elsewhere in the International Tribunal Statute, but most importantly, it does not rise to the same level of gravity as the other acts enumerated in Article 5.

Id. Still, the statement is made in the same sentence as the gravity comment and does not otherwise fit into the four-prong *actus reus* test. So it is being considered here as informing part of the “gravity” analysis.

287. *Id.* ¶ 209 n.272.

288. *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 614 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

provision because, in effect, it would be only a repeat of another act with the inclusion of the discriminatory grounds cited in Article 5(h) (i.e., political, racial, or religious).²⁸⁹ In essence, this would convert persecution into nothing more than a sentence enhancement more appropriately included in a different section of the statute. That is not consistent with its being separately enumerated as a crime in its own right within Article 5, as it appears in the actual structure and context of the statute. Furthermore, there is evidence that the statute contemplates that nonenumerated conduct could be sufficiently grave to qualify as a CAH. That is why it includes Article 5(i), referring to “other inhumane acts”—a catchall provision necessarily indicating that nonlisted acts may be sufficiently grave for CAH purposes despite their not being otherwise specifically listed in Article 5.²⁹⁰

Similarly, the *Kordić* Chamber provided no support for its assertion that hate speech cannot satisfy the gravity prong because the only speech conduct explicitly criminalized elsewhere in international law is direct and public incitement to commit genocide. Quite simply, *Kupreskic* rejected this as an appropriate evaluative factor, finding that “whether or not such acts are legal . . . is irrelevant.”²⁹¹ And the Trial Chamber in *Prosecutor v. Kvocka* nonetheless qualified the implications of the *Kordić* holding as follows:

The *Kordić* Trial Chamber Judgement stated that “in order for the principle of legality not to be violated, acts in respect of which the accused are indicted under the heading of persecution must be found to constitute crimes under international law at the time of their commission.” The Trial Chamber reads this statement as meaning that jointly or severally, the acts alleged in the Amended Indictment must amount to persecution, not that each discriminatory act alleged must individually be regarded as a violation of international law.²⁹²

More significantly, however, the *Kordić* Chamber overlooked the explicit reasoning and citation alluded to by the *Kupreskic* Chamber

289. Such an interpretation of persecution certainly does not foreclose the possibility, however, that acts that happen to be enumerated in the Statute, such as murder or rape, may serve as the basis for a persecution charge. As long as those acts were committed with the requisite discriminatory intent, they should qualify. But that should not be the *sole* source of persecutory acts—in other words, nonenumerated acts should also be eligible for qualifying as the basis for a persecution charge.

290. ICTY Statute, *supra* note 26, art. 5.

291. *Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 614. Although *Kupreskic* mentioned this in the context of domestic law, the same logic would apply at the international level. In any event, such a proposition is supported elsewhere in the case law. *See, e.g.*, *Prosecutor v. Kvocka*, Case No. IT-98-30/1-T, Judgment, ¶ 186 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (“Thus, acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent.”).

292. *Kvocka*, Case No. IT-98-30/1-T, Judgment, ¶ 186 (footnote omitted).

in formulating the gravity requirement of the fourth prong. To wit, in including the gravity element, the *Kupreskic* Chamber explicitly cited to the NMT *Flick* case. As explained above, *Kupreskic* focused on *Flick's* teaching that expropriation of *industrial* property was not a sufficiently grave violation of a fundamental right to constitute CAH-persecution.²⁹³ It will be recalled, however, that *Kupreskic* then cited the *I.G. Farben Case* decision,²⁹⁴ which implied that, in contrast to *Flick*, offenses involving *personal* property, such as dwellings, household furnishings, and food supplies, could be considered of sufficient gravity for CAH purposes.²⁹⁵ Thus an inference was raised that offenses directly against the *person*, as opposed to those involving commercial property, should be considered of sufficient gravity pursuant to the fourth prong of the *Kupreskic actus reus* test. Using this logic, since hate speech is directed against and directly affects *persons*, as opposed to mere property, it should, contrary to *Kordić*, be capable of satisfying the gravity prong of the *Kupreskic actus reus* test.

Finally, the general nature and description of persecution by courts and commentators over the years supports the contention that hate speech should qualify as an *actus reus* for the crime of persecution. International courts have taken an extremely broad view of conduct that may constitute this offense. Surveying these cases, Professor Bassiouni has proposed the following definition of persecution: “‘*State action or policy*’ leading to the infliction upon an individual of *harassment*, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim’s beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.)”²⁹⁶

Based on this liberal approach by courts toward defining persecution, a number of important principles may be gleaned: (1) persecution is not limited to infliction of physical injury only—mental or economic harm may also be its object;²⁹⁷ (2) discriminatory acts charged as persecution must not be considered in isolation—rather, all discriminatory acts within a case’s common nucleus of operative

293. See *Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 619 n.897.

294. See *United States v. Krauch (I.G. Farben Case)*, Testimony of Defense Witness Huenermann, in 7 TRIALS OF WAR CRIMINALS: “THE I.G. FARBEN CASE,” *supra* note 59, at 1122, 1129–30.

295. *Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 619 n.897.

296. BASSIOUNI, *supra* note 50, at 327 (emphasis added).

297. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶ 695 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (“Throughout history . . . the terms ‘persecute’ and ‘persecution’ have come to be understood to refer to discriminatory practice resulting in physical or mental harm, economic harm, or all of the above . . .” (quoting BASSIOUNI, *supra* note 50, at 327)).

facts should be considered *cumulatively* and within the proper context;²⁹⁸ (3) acts that are not inherently or statutorily criminal may nevertheless become persecutory and criminal in the proper context if committed with the requisite discriminatory intent;²⁹⁹ and (4) based on the foregoing, a narrow definition of persecution is not supported in customary international law.³⁰⁰

As a result, “jurisprudence from World War II trials found acts or omissions such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion, constitute persecution.”³⁰¹ Similarly, ICTY cases have found persecution in bad acts directed against property, as opposed to persons, such as destruction of homes and property,³⁰² and destruction and damage of religious or educational institutions.³⁰³ In line with this liberal interpretation of acts that may constitute persecution in general, hate speech ought to be included.

3. The Jurisprudence and Commentary on Speech and Persecution

The jurisprudence and commentary centered specifically on speech and persecution bolsters this conclusion. In this regard, it is necessary to consider both the Nuremberg and ICTR/ICTY cases. Regarding Nuremberg, much of the commentary, and scholarly and case analysis, has focused on the IMT’s *Streicher* and *Fritzsche* judgments.

Free-speech advocates try to mitigate the significance of *Streicher*’s persecution conviction for hate speech on the grounds that the IMT concluded its analysis with the following sentence: “*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.”³⁰⁴ From this one line, they argue that the conviction was based exclusively on *Streicher*’s

298. *Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 622.

299. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, ¶ 186 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

300. *Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 605.

301. *Kvočka*, Case No. IT-98-30/1-T, Judgment, ¶ 186.

302. *See Kupreskic*, Case No. IT-95-16-T, Judgment, ¶ 631 (“The Trial Chamber finds that attacks on property can constitute persecution.”).

303. *See Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, ¶¶ 206–207 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001). Significantly, the *Kordić* Trial Chamber took a more expansive view of persecution when speech was not involved.

304. *United States v. Goering*, Judgment, *Streicher* (Int’l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 163 (1946).

calling for violence at a time when Jews were being killed in the East.³⁰⁵ However, the judgment also referred to liability for general hate speech that conditioned the German public to persecute the Jews. The very first sentences of the “Crimes against Humanity” portion of the opinion, for example, state:

For his twenty-five years of speaking, writing, and preaching hatred of the Jews, Streicher was widely known as “Jew-Baiter Number One”. 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 Sturmer*”, which reached a circulation of 600,000 in 1935, was filled with such articles, often lewd and disgusting.³⁰⁶

Two paragraphs later, the Tribunal clearly indicated that Streicher’s liability was grounded, at least in part, in general hate language that negatively colored German attitudes toward Jews and sought their *persecution*, not exclusively their physical destruction: “Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish *persecution* and extermination.”³⁰⁷

In this regard, the prosecution’s opening statement is revealing. It suggests the gravamen of the persecution charge is *conditioning* the population to be receptive to perpetrating a campaign of mass violence against a victim population, not direct calls for imminent commission of such violence:

305. See, e.g., Orentlicher, *supra* note 273, at 40–41.

306. Goering, Judgment, Streicher, 6 F.R.D. at 162.

307. *Id.* (emphasis added). Professor Diane Orentlicher notes that the IMT’s finding of Streicher’s persecution liability on the basis of speech is limited to the war period given CAH’s required nexus to war crimes and crimes against peace in the London Charter. With respect to pre-war speech, Orentlicher argues, by definition no nexus could be demonstrated. See Orentlicher, *supra* note 273, at 40–41. While that may be true, the *Streicher* judgment can be read to include within its analysis speech uttered during the war but not necessarily calling for extermination of the Jews. In fact, the *Streicher* judgment’s section on CAH began by temporally framing his speech activity during a period of twenty-five years. That period necessarily covered both the pre-war and war years. During that period (thus including the war years), according to the introductory paragraph on Crimes against Humanity, Streicher “infected the German mind with the virus of anti-Semitism, and incited the German people to active *persecution*.” Goering, Judgment, Streicher, 6 F.R.D. at 161–63. As noted previously, “persecution” does not necessarily include violence. Similarly, in a later passage, the IMT alluded to a piece published by Streicher in 1940 (during the war) comparing the Jews to locusts. After citing this text, the IMT stated: “Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish *persecution* and extermination.” *Id.* at 162 (emphasis added). Clearly, Streicher’s speech during the war called for persecution, not extermination exclusively. That said, the opinion is not a model of clarity and there is concededly support for both Orentlicher’s position and the one taken in this Article.

It may be that this defendant is less directly involved in the physical commission of crimes against Jews. The submission of the prosecution is that his crime is no less the worse for that reason. No government in the world, before the Nazis came to power, could have embarked upon and put into effect a policy of mass extermination without having a people who would back them and support them. It was to the task of educating people, of producing murderers, educating them and poisoning them with hate, that Streicher set himself. In the early days he was preaching persecution. As persecution took place he preached extermination and annihilation

It is the submission of the prosecution that he made these things possible—made these crimes possible—which could never have happened had it not been for him and for those like him. Without him, the Kaltenbrunners, the Himmlers, the General Stroops would have had nobody to carry out their orders. The effect of this man's crimes, of the poison that he has injected into the minds of millions and millions of young boys and girls and young men and women lives on. He leaves behind him a legacy of almost a whole people poisoned with hate, sadism, and murder, and perverted by him.³⁰⁸

Free-expression proponents also put much stock in the IMT's *Fritzsche* judgment.³⁰⁹ They point to the following language as suggesting the IMT considered only calls for violence to be the basis for persecution charges:

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 participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.³¹⁰

However, as noted previously, language in the *Fritzsche* judgment also permits the inference that speech not calling for violence could constitute persecution. The judgment notes that the persecution charge is based on "deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities."³¹¹ Falsifying news to arouse passions does not necessarily amount to direct calls for violence. Consistent with this, the judgment referred to Fritzsche's connection with "propaganda campaigns"—this type of language suggests materials that would condition a population to violence rather than directly call

308. ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 384–85 (1983) (quoting Lieutenant Colonel J.M. Griffith-Jones of the British prosecution) (internal quotation marks omitted).

309. See Orentlicher, *supra* note 273, at 39 (distinguishing Fritzsche's speech from Streicher's).

310. *United States v. Goering*, Judgment, *Fritzsche* (Int'l Mil. Trib. Oct. 1, 1946), reprinted in 6 F.R.D. 69, 187 (1946).

311. *Id.* at 187.

on it to do so.³¹² As Judge Shahabuddeen noted in his *Media Case* Appeals Chamber partial dissent, while the IMT happened to note that Fritzsche did not appear to intend “to incite the German people to commit atrocities on conquered people,” this does not show that the IMT thereby meant to make advocacy to genocide or extermination an essential element “to the success of a charge for persecution (by making public statements) as a crime against humanity.”³¹³ This is especially true since, by definition, CAH-persecution is not the same as incitement to genocide. Thus, as Judge Shahabuddeen has noted: “[W]here statements are relied upon, the gravity of persecution as a crime against humanity can be established without need for proof that the accused advocated the perpetration of genocide or extermination.”³¹⁴

Granted, the *Streicher* and *Fritzsche* decisions leave some ambiguity on this point. But in this debate, commentators and scholars have overlooked an extremely important piece of Nuremberg’s jurisprudential mosaic: the *Ministries Case*. That decision’s key language regarding the Nazi propagandist’s liability for criminal speech does not allude to direct calls for violence. Instead, it focuses on Dietrich’s role in conditioning the population to persecute the Jews. It will be recalled that the relevant language states:

It is thus clear that a well thought-out, oft-repeated, persistent campaign to *arouse the hatred* of the German people against Jews was fostered and directed by the press department and its press chief, Dietrich. . . .

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

. . . .
[The] clear and expressed purpose [of this speech] was to enrage Germans against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.

By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews³¹⁵

312. *Id.* Certainly, direct calls for violence could be part of a propaganda campaign. But the IMT language suggests they were not the exclusive means of manipulating the population to inspire violence against a victim group.

313. Prosecutor v. Nahimana (*Media Case*), Case No. ICTR 99-52-A, Judgment, ¶¶ 10–11 (Nov. 28, 2007) (Shahabuddeen, J., partly dissenting).

314. *Id.* ¶ 20.

315. United States v. von Weizsaecker (*Ministries Case*), Judgment, in 14 TRIALS OF WAR CRIMINALS: “THE MINISTRIES CASE,” *supra* note 45, at 308, 575 (1952). Count Five of the Indictment, on which Dietrich was convicted, is styled “War Crimes and Crimes against Humanity: Atrocities and Offenses Committed against Civilian

Indeed, the cited language makes clear that Dietrich's liability hinges on speech aiming to "enrage the Germans," "justify persecutory measures," and "subdue doubts" about persecution. This was speech meant to condition and lay the groundwork for acceptance of the regime's heinous policies. It did not consist of direct calls to engage in violence. Thus, while certain statements in *Streicher* and *Fritzsche* might leave some doubt, the *Dietrich* case makes clear that speech not calling for action may be the basis for persecution charges.

The ICTR Trial Chamber decisions, as well as the *Mugesera v. Canada* opinion from Canada, strongly affirm this. *Ruggiu* stresses that, in the context of a government's widespread or systematic attack against a civilian population, speech uttered, encouraged, or sanctioned by the government that singles out and attacks the victim population constitutes a deprivation of rights, including liberty and humanity.³¹⁶ The words are not merely a medium through which to encourage others to perpetrate acts of violence independent from the words.³¹⁷ The words themselves, in that context, effectuate the violation.³¹⁸

Populations"—the word persecution is not explicitly used there. And although the Tribunal does not use the word persecution in the last sentence of the quoted language, it is clear that Dietrich's conviction nonetheless encompassed CAH-persecution. In its judgment against Dietrich, the Tribunal referred directly to "persecution" against the Jews in three separate instances. If that does not erase all doubt, the prosecution's opening statement, explaining the indictment charges, does:

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

United States v. von Weizsaecker, Indictment, in 12 TRIALS OF WAR CRIMINALS: "THE MINISTERIES CASE," *supra* note 81, at 13, 167-68 (emphasis added).

316. See *supra* notes 82-95 and accompanying text.

317. See *supra* notes 82-95 and accompanying text.

318. See *supra* notes 82-95 and accompanying text.

Similarly, the *Media Case* Trial Chamber found that the virulent writings of *Kangura* and the incendiary broadcasts of RTLM created a climate of harm and conditioned the Hutu population to persecute the Tutsis.³¹⁹ This hate speech generated fear and hatred that created the conditions for extermination and genocide in Rwanda.³²⁰ It gave rise to liability for persecution before the ICTR in much the same way as Dietrich's press directives did at Nuremberg.

Consistent with this, in *Mugesera*, the Canadian Supreme Court held that hate speech may constitute persecution, even if it does not result in the commission of acts of violence.³²¹ In arriving at this conclusion, the court considered that a link was demonstrated between the speech at issue and the widespread or systematic attack against the civilian population.³²²

Thus, the post-World War II jurisprudence generally establishes that hate speech not urging an audience to commit imminent violence can constitute persecution. Of the cases issuing from international and domestic courts, only *Kordić* takes a contrary position. As was demonstrated in the previous section, though, *Kordić* is deeply flawed. Its deficient application of the *Kupreskic actus reus* test has already been discussed. But there are other problems, too.

In the first place, as a threshold matter, the *Kordić* Chamber's entire handling of the persecution issue seems gratuitous and artificial. The indictment in that case did charge the defendants with persecution in carrying out an ethnic-cleansing campaign by, inter alia, "encouraging, instigating and promoting hatred, distrust, and strife on political, racial, ethnic or religious grounds, by propaganda, speeches and otherwise."³²³ But the indictment did not specify a single speech supporting the charge.³²⁴ The judgment alludes to not one speech the prosecution specifically argued supported the count. Paragraph 522 of the judgment references certain statements made by *Kordić* in connection with various events and meetings.³²⁵ But they are not characterized as the basis for the persecution count (the subsection containing this paragraph is generically titled "The Role of Dario *Kordić*"). However, paragraph 523 provides a defense characterization of *Kordić*'s speeches as never ethnically inflammatory and never derogatory toward other ethnic groups.³²⁶

319. See *supra* notes 97–110 and accompanying text.

320. See *supra* notes 97–110 and accompanying text.

321. See *supra* notes 146–155 and accompanying text.

322. See *supra* notes 146–155 and accompanying text.

323. Prosecutor v. *Kordić*, Case No. IT-95-14/2-T, Annex V, ¶ 37 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

324. See *supra* notes 113–145 and accompanying text.

325. *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 522.

326. *Id.* ¶ 523.

Curiously, there is no prosecution rebuttal described or considered by the Chamber.³²⁷ This creates the impression that persecution through speech was not a contested issue at the trial.

And so it seems as if the analysis provided in paragraph 209 is unnecessary and contrived.³²⁸ One has the impression the Chamber was merely looking for a pretext to discuss speech and persecution and then manipulated the analysis in a vacuum to exclude the former from the latter's ambit. The Chamber's analysis, then, comes off as an abstraction with little or no application to the case before it. It suffers from lack of contextualization or factual grounding. This is troubling given the massive ethnic-cleansing campaign described elsewhere in the judgment.³²⁹

Even more problematic, however, is the fact that the judgment also distorts existing legal precedent on speech and persecution. First, it completely overlooks the passages in *Streicher*,³³⁰ explicitly and prominently cited by the ICTR decisions,³³¹ which suggest that speech not calling for imminent action may constitute persecution.³³² Apart from this, the judgment mangles the exposition of ICTR precedent. For starters, it simply asserts that the only previous ICTR conviction for crimes arising from speech was *Akayesu*, and that was for direct and public incitement to commit genocide.³³³ From that, the *Kordić* Chamber suggests one could conclude that only direct and public incitement to commit genocide was chargeable as a speech crime.³³⁴ Unfortunately, the *Kordić* Chamber had its facts wrong. Just one year earlier, the ICTR had convicted former RTLM announcer Georges Ruggiu for CAH-persecution based on his hate diatribes against Tutsis and Belgians in connection with the 1994 widespread and systematic attack against the civilian population in

327. See *supra* notes 113–145 and accompanying text.

328. See *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 209 (finding the alleged persecution was not illegal under the Rome Statute or customary international law).

329. See *supra* notes 113–145 and accompanying text.

330. See *supra* notes 305–307 and accompanying text.

331. See *supra* notes 86–87, 93–95, 102–104 and accompanying text.

332. *Kordić* acknowledges that “criminal prosecution of speech acts falling short of incitement finds scant support in international case law” (implying, as mentioned previously, that there is some support for such prosecutions (i.e., *Streicher*)—even if the *Kordić* Chamber failed to define the crucial term *incitement*). *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 209 n.272 (emphasis added).

333. See *id.* (discussing criminalization of incitement under international statutes).

334. *Id.* It should be noted that the *Kordić* Chamber also asserted, without further elaboration, that “the only speech act explicitly criminalised under the statutes of the International Military Tribunal, Control Council Law No. 10, the ICTY, ICTR and ICC Statute, is direct and public incitement to commit genocide.” *Id.* ¶ 209 n.272. While this may be true, as far as it goes, it conveniently excludes the fact that these instruments implicitly provide for prosecution of other speech crimes, including CAH-persecution.

Rwanda.³³⁵ The ICTR's decision made it clear that Ruggiu's criminal liability was not based exclusively on direct calls for violence.³³⁶ Inexplicably, the *Kordić* judgment did not even reference *Ruggiu*.

The *Kordić* judgment is internally inconsistent, too. As noted previously, the opinion emphasizes the importance of considering acts of alleged persecution cumulatively and in context.³³⁷ But for speech alleged as constitutive of persecution in the case before it, the Chamber analyzes it "on its own," without reference to surrounding and connected acts of persecution or violence constituting the overall widespread or systematic attack against the civilian population.³³⁸ The Chamber then conveniently rejects, perhaps so as to avoid cumulative/contextual assessment, the defense argument that the ICC "connected-to-other-crimes" requirement be adopted.³³⁹ This is especially curious since the entire case arose and was otherwise analyzed by the Chamber in the context of a massive, elaborate, and violent ethnic-cleansing campaign. The Chamber's antiseptic examination of the speech allegations, without even so much as a reference to the relationship between the charged speech acts and the ethnic cleansing, could not be more disconnected from the called-for contextual/cumulative analysis. And given the resulting thin reed on which the examination rests, it could not be less convincing.

Similarly, the *Kordić* Chamber noted that CAH-persecution "encompasses both bodily and *mental* harm and infringements upon individual freedom."³⁴⁰ This would appear to support the proposition that hate speech can result in mental harm and, when pervasive, infringements on individual freedom (as acknowledged by the ICTR). But the *Kordić* Chamber's end analysis on this issue³⁴¹ is at odds with this foundational observation—yet another hole in the overall fabric of the decision.

Finally, the *Kordić* judgment makes much of the described lack of consensus regarding criminalization of hate speech in international instruments and garden-variety statutory provisions in municipal

335. See *supra* Part II.C.2.a (discussing *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 10 (June 1, 2000)).

336. See *supra* Part II.C.2.a. (discussing *mens rea* and its importance to the crime of genocide).

337. See *Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 199 ("Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed 'inhumane.'").

338. See *id.* ¶ 209 ("[T]his act, as alleged in the Indictment, does not by itself constitute persecution as a crime against humanity.").

339. See *id.* ¶ 199 (asserting that persecution can consist of one act if evidence of discriminatory intent exists).

340. *Id.* ¶ 198.

341. See *id.* ¶ 209 (stating that a conviction would "violate the principle of legality").

jurisdictions.³⁴² From this lack of consensus regarding criminalization, it concludes that hate speech is not as grave as the other enumerated CAH offenses and therefore cannot serve as the *actus reus* for CAH-persecution³⁴³ (the opposite conclusion of the ICTR Trial Chambers, which found consensus on this issue³⁴⁴). However, as noted previously, it is problematic to use garden-variety domestic provisions as a point of repair as they do not take into account the contextual *sine qua non* of CAH, the widespread or systematic attack against the civilian population.³⁴⁵ It is in *that* context that hate speech much be assessed. Moreover, whether hate speech might otherwise be criminalized or not, the case law is clear that underlying acts of persecution need not be criminal to satisfy the *actus reus* requirement.³⁴⁶ So the *Kordić* Chamber's reliance on the supposed lack of consensus regarding criminalization of hate speech outside the CAH context is entirely misplaced (as was, it is submitted, the same reliance of the ICTR Trial Chambers).

Perhaps most damningly, the subsequent ICTY case of *Brdjanin*³⁴⁷ implicitly rejected the *Kordić* approach. Although not dealing with speech per se, the case involved charges of persecution based on nonviolent conduct, in particular discriminatory denial of employment, freedom of movement, proper judicial process, and proper medical care. The *Brdjanin* Chamber looked at this conduct in the context of the wider campaign of ethnic cleansing against Bosnian Muslims and Croats.³⁴⁸ And it found that, when viewed in context, each of these acts could be the basis for a persecution charge.³⁴⁹ Significantly, the *Kordić* Chamber found denial of employment analogous to hate speech in concluding that neither of these

342. See *id.* ¶ 209 n.272 (discussing sources such as the First Amendment and the ICCPR).

343. See *id.* (“The sharp split over treaty law in this area is indicative that such speech may not be regarded as a crime under customary international law.”).

344. See, e.g., Prosecutor v. Nahimana (*Media Case*), Case No. ICTR 99-52-T, Judgment, ¶¶ 1074–1075 (Dec. 3, 2003) (“A great number of countries around the world, including Rwanda, have domestic laws that ban advocacy of discriminatory hate, in recognition of the danger it represents and the harm it causes.”).

345. See *supra* notes 273–278 and accompanying text.

346. See, e.g., Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 186 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001) (citing the World War II trials that found the denial based on religion to Jews of bank accounts, educational or employment opportunities, or the freedom to choose one's spouse constituted persecution).

347. Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶¶ 1029–1031 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

348. See *id.* (stating that the court should determine whether rights are fundamental on a case-by-case basis).

349. See *id.* (“The Trial Chamber considers that it is not necessary to examine the fundamental nature of each right individually, but rather to examine them as a whole.”).

constituted violation of a fundamental right.³⁵⁰ In holding that denial of employment *does* constitute a sufficiently serious violation when viewed in context, the *Brđjanin* Chamber syllogistically repudiated *Kordić's* related ruling regarding hate speech.

Of course, in the meantime, the *Media Case* appeals judgment is largely in accord with the ICTR Trial Chamber decisions regarding speech and persecution.³⁵¹ In most respects, it accepts that speech can be the basis for CAH-persecution charges.³⁵² While it reasoned that hate speech alone cannot amount to a violation of the rights to life, freedom, and physical integrity of the human being, it nevertheless concluded that hate speech on its own may result in violations to the rights of dignity or security.³⁵³ It refused to opine whether such violations are as serious as the other enumerated CAH. But as this Article has demonstrated, that is largely an academic point. Since the CAH *chapeau* requires the speech to be connected to a widespread or systematic attack against a civilian population, such speech would never exist in complete isolation. This is especially true before the ICC, where persecution must be linked to one of the other crimes in the Rome Statute. But might the relationship between the speech and the civilian attack be sufficiently attenuated to call into question whether certain speech might not qualify as persecution? The next section considers that possibility.

IV. LIMITS ON SPEECH AS THE BASIS FOR CAH (PERSECUTION)?

As has been demonstrated, from policy, logic, and common-sense perspectives, the relationship between verbal or written expression and the CAH *chapeau* provides the most compelling argument for treating speech as the basis for persecution charges. But one must be leery of abstractions in this regard, too. Not all speech is the same. And widespread and systematic attacks against civilian populations, as well as individual acts in relation to those attacks, can also have quite varied characteristics. In light of the free-expression concerns flagged elsewhere in this Article, perhaps certain speech in certain

350. See Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶¶ 209–210 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (stating that such speech “does not rise to the same level of gravity as the other crimes against humanity”); see also *supra* note 134 and accompanying text.

351. See *supra* Part II.C.5 (discussing the *Media Case* appellate decision).

352. *Id.*

353. See Prosecutor v. Nahimana (*Media case*), Case No. ICTR 99-52-A, Judgment, ¶ 986 (Nov. 28, 2007) (noting that violations of dignity and security add up to discrimination).

contexts should be considered insufficient to support persecution charges. But what might those situations be?

A. Possible Limitations Related to the Chapeau Elements of CAH

First, it might be helpful to consider scenarios where speech is not strongly connected to the widespread or systematic attack or the nature of the attack itself does not support a finding of liability. Of course, the attack against the civilian population and its relationship with the speech and the speaker can, in theory, vary widely. Most significantly for purposes of the analysis here, the nexus between the speech and the attack may be attenuated in varying ways and degrees. For example, even though satisfying the minimum-connectivity threshold, the attack may be relatively geographically distant.³⁵⁴ Similarly, from a temporal perspective, the attack could be only in its incipient phases.³⁵⁵ While such an “emerging” attack might minimally satisfy the *chapeau*,³⁵⁶ liability for any speech uttered in connection with it might also be affected.

Consistent with this, the nature of the widespread and systematic attack should also be considered. As noted previously, while the attack may often be violent, violence is not a mandated aspect. An ICTR Trial Chamber has held, for example, that “attack” simply means an “unlawful act of the kind enumerated” in the ICTR statute, which can be “non violent in nature, like imposing a system of apartheid.”³⁵⁷ The Special Court for Sierra Leone has declared that an attack can be a “campaign, operation, or course of conduct . . . not limited to the use of armed force, but also encompasses any mistreatment of the civilian population.”³⁵⁸ Stuart Ford has noted that “the concept of mistreatment might well cover acts that could not be underlying crimes . . . [and] mistreatment generally means ‘to treat badly,’ which does not seem to require severe suffering.”³⁵⁹

The identity of the perpetrator of the widespread or systematic attack should also be considered. Regardless of the empirical trend in

354. See deGuzman, *supra* note 285, at 11 (“[T]he attack need not cover a very large geographic area.”); see also *id.* at 14–15 (“It is not necessary that the entire population of a particular geographic area be attacked.”).

355. See *id.* at 17 (referring to liability for “emerging attacks”).

356. In this regard, it should be noted that the Rome Statute’s Elements of Crimes specify a more stringent mental element “[in] case of an emerging widespread or systematic attack against a civilian population.” Int’l Criminal Court [ICC], *Elements of Crimes*, art. 7, intro., ¶ 2, ICC Doc. ICC-ASP/1/3 (Sept. 9, 2002).

357. Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment, ¶ 581 (Sept. 2, 1998).

358. Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, ¶ 111 (Aug. 2, 2007).

359. Ford, *supra* note 251, at 258.

the cases, the party responsible for the widespread or systematic attack may not in fact be a state or government entity. The ICTY, for example, has held that no state plan or policy is required for CAH.³⁶⁰ In *Prosecutor v. Kunarac*, the defendant was convicted by the ICTY of CAH in connection with the detention and rape of female civilians, but the attack in question was committed by members of an organized paramilitary group, not state agents.³⁶¹

Even at the ICC, the CAH offense may flow from a state or organizational policy.³⁶² But the “organizational” aspect of this requirement has been very liberally interpreted by the ICC. In *Situation in the Republic of Kenya*,³⁶³ an ICC Pre-Trial Chamber found that the 2007–2008 postelection violence in Kenya was perpetrated not by “an organization with statelike qualities” but by “an amorphous or private group of individuals whose principal distinguishing feature . . . turned on its ability to perpetrate vile acts.”³⁶⁴ Charles Jalloh claims the import of this holding is that “the policy brains behind crimes against humanity need not be part of an organization as such, as opposed to being merely organized and systematic in executing their criminal activities.”³⁶⁵ This means that a well-organized group of private individuals, not necessarily possessing the attributes of a state, may be the author of the widespread or systematic attack. This has serious implications for speech and persecution analysis since one of the central premises in this Article is that, under most circumstances, the broader attack is government sponsored or connected. If it is not, then speech protection may assume greater importance in the calculus.

The relationship between the speaker and the general attack must also be taken into account. To prosecute a defendant for CAH, his act must be “part of” a widespread or systematic attack. This

360. See *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, ¶ 98 n.114 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (asserting that references seeming to support the policy requirement “merely highlight the factual circumstances of the case at hand, rather than . . . an independent constitutive element”).

361. See *id.* ¶¶ 1–4 (endorsing the Trial Chamber’s findings); see also Schabas, *supra* note 255, at 960 (“These were crimes committed by members of an organized paramilitary group, but they were not necessarily attributable to a State plan or policy.”).

362. Rome Statute, *supra* note 11, art. 7(2)(a).

363. See ICC, *Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ¶¶ 116–128, ICC Doc. ICC-01/09-19 (Mar. 31, 2010) (referring to the participation of political and business leaders).

364. Charles C. Jalloh, *International Decision: Situation in the Republic of Kenya*, No. ICC-01/09-19, *Decision on the Authorization of an Investigation*, 105 AM. J. INT'L L. 540, 544–45 (2011).

365. *Id.* at 545.

bifurcates into objective and subjective components.³⁶⁶ With respect to the former, the act must objectively—by its nature or consequences—be part of the attack.³⁶⁷ According to Meg deGuzman:

The objective component does not require, however, that the act was committed in the midst of the attack. A crime can be part of an attack even if it is geographically or temporally distant from the attack as long as it is connected in some manner. Judges take into account the particular circumstances involved in determining whether an act can “reasonably be said to have been part of the attack.”³⁶⁸

Thus, from the other side of the telescope, the individual criminal act may be geographically or temporally distant from the larger attack.

With respect to the subjective element, the defendant must act with knowledge that his act is part of a widespread or systematic attack against a civilian population.³⁶⁹ Case law from the international tribunals has taken a liberal view of this requirement and finds that such knowledge may be constructive, not just actual.³⁷⁰ Although the ICC’s more restrictive *mens rea* requirement consists of “awareness that a circumstance exists or a consequence will occur in the ordinary course of events,”³⁷¹ deGuzman points out: “[A] question remains whether, under customary international law, crimes against humanity require actual knowledge that one’s act is part of a widespread or systematic attack”³⁷² Thus, the lower *mens rea* standard may also permit a more attenuated connection between speech and the broader attack.

B. Possible Limitations Related to Speech

The nature of the speech at issue may also affect the calculus. As discussed above, in the atrocity context, it is problematic to view hate speech monolithically.³⁷³ Previous analysis demonstrated that a

366. See *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, ¶ 99 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002) (stating that the accused must both play a role in the attack and know that his or her act constitutes part of an attack on civilians).

367. *Id.*

368. deGuzman, *supra* note 285, at 16 (footnotes omitted) (quoting *Kunarac*, Case No. IT-96-23/1-A, Judgment, ¶ 100).

369. *Id.*

370. See, e.g., *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment, ¶ 110 (Aug. 2, 2007) (finding that the mental element is satisfied if the defendant “had reason to know” his act was part of the broader attack); *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶ 251 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (holding that *mens rea* is proven if defendant “took the risk” that his act was part of a widespread or systematic attack).

371. Rome Statute, *supra* note 11, art. 30(3).

372. deGuzman, *supra* note 285, at 17.

373. See *supra* notes 216–229 and accompanying text.

hierarchy exists in hate speech. All things being equal, general hate speech, not necessarily directed at anyone in particular but denigrating and dehumanizing the victim group, is relatively less serious than harassment and incitement.³⁷⁴ In theory, harassment, consisting of verbal attacks aimed directly at members of the victim group, more easily supports persecution charges.³⁷⁵ Finally, incitement, directed at third parties and urging them to take action against members of the victim group, constitutes the most serious form of hate speech.³⁷⁶ Even incitement should be parsed as a hate-speech category. Incitement to persecution, for instance, is less serious than incitement to violence.³⁷⁷ And incitement to violence itself bifurcates into direct and indirect varieties.³⁷⁸

On the other hand, the specific text and quantity of the speech, as well as the medium for its dissemination, should also be taken into account.³⁷⁹ Even general hate speech, if especially degrading or incendiary and issued at frequent intervals on a public broadcasting system, could have far more of an impact than an indirect form of incitement to persecution spoken to a small group.³⁸⁰

Clearly, then, the nature of the widespread or systematic attack in relation to the type of speech will have to be assessed on a case-by-case basis. It would seem that a persecution charge may be unfounded if less grave hate speech is coupled with a widespread or systematic attack against a civilian population that is not sponsored or perpetrated by a government. This would be especially true if the attack itself were nonviolent, or geographically or temporally attenuated.

C. Possible Scenarios

So, more concretely, what sort of speech connected to civilian-directed, nongenocidal mass violence might be exempted from CAH-persecution charges? Several scenarios might be imagined. For example, a group of private citizens belonging to a minority ethnic group in one region of a nation could spontaneously begin forming a

374. See *supra* notes 216–229 and accompanying text.

375. See *supra* notes 216–229 and accompanying text.

376. See *supra* notes 216–229 and accompanying text.

377. See *supra* notes 216–229 and accompanying text.

378. See *supra* notes 216–229 and accompanying text.

379. See Gordon, *supra* note 2, at 635–36 (noting that “from a temporal perspective, written communication media are much less apt to incite to mass violence than broadcast media”).

380. See Pocar, *supra* note 134, at 361 (describing “the power of propaganda to incite when it takes place in situations of extended discrimination with an ethnic component”).

militia to support creation of a separate country in that region.³⁸¹ As the militia begins to assert control over the region by terrorizing the civilian population, a member of the same minority ethnic group, in a corner of the country far removed from the uprising, begins to broadcast hate speeches over a private radio station that seek to dehumanize members of the majority ethnic group. Assuming the attack in the breakaway region is stymied early on but nevertheless gives rise to CAH charges against its authors, may the hate-speech private radio announcer in the geographically removed region of the country, a member of the ethnic minority, be charged with CAH-persecution? Given the criteria examined, such a case seems rather weak. Although the attack might technically qualify as “widespread” or “systematic,” perhaps it had only just crossed that threshold as it never got past the incipient phase.³⁸² Moreover, the attack was not government sponsored, so the free-speech concerns are heightened because a minority, acting against the government’s interests, is criticizing the majority.³⁸³

Other factors could conceivably militate against CAH-persecution charges in this scenario. For example, given that the widespread/systematic attack was “emerging” when the speech was made, a higher *mens rea* requirement might be imposed (intent, instead of mere knowledge).³⁸⁴ Depending on the circumstances, that may be difficult to prove. Similarly, one could imagine a nonviolent widespread or systematic attack that consists of, for example, the imposition of a temporary apartheid regime in the region.³⁸⁵ Again, speech uttered in support of such a nonviolent attack, especially since it is by a member of the country’s minority group, should be accorded more protection. This looks more like the sort of dissenting speech, however ugly and unpopular, that fits within the marketplace of ideas metaphor.³⁸⁶ Then again, perhaps the speech would seem more

381. In general, rebel groups representing a country’s minority population and engaging in large-scale violence have been the object of CAH prosecutions. *See, e.g.*, ICC, *Situation in Uganda: Decision on the Prosecutor’s Application for Warrants of Arrest Under Article 58*, ICC Doc. ICC-02/04-01/05 (July 8, 2005) (calling for the arrests of Joseph Kony and other leaders of the Lord’s Resistance Army in Uganda charged with CAH).

382. *See deGuzman, supra* note 285, at 17 (discussing knowledge in the context of an emerging attack).

383. *See generally* *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (holding that the First Amendment protects one’s right to burn an American flag in protest against government policies).

384. *See deGuzman, supra* note 285, at 17 (discussing the approaches of the Rome Statute and the ICTY).

385. *See* Rome Statute, *supra* note 11, art. 7(1)(j) (including apartheid as an enumerated act).

386. *See* *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

appropriate for CAH-persecution charges if it were more egregious, such as harassment of or incitement to persecute members of the victim group.

Conversely, if the speech at issue called directly, or even indirectly, for violence and was uttered in the region where the violence was occurring, then a persecution charge would become much more viable. This would be especially true if the broader attack were violent, had been in progress for some time, and were being perpetrated by an organization that had asserted iron-fisted control over the region. In that case, even if the country's official "government" were not perpetrating the violence, the speech would be in the service of an attack whose authors represented the region's de facto authority and controlled the channels of communication. It would be even more difficult to exempt such speech from persecution charges if, taking advantage of the communications monopoly, the controlling authority were to block diffusion of opposition views. This would represent the collapse of the metaphorical marketplace and remove the most serious policy barriers against a legitimate CAH-persecution case.

Other situations could be imagined. Even if the government is connected to the alleged attack, the nature of the attack might influence how the speech is evaluated. Stuart Ford has argued, for example, that government refusal to provide disaster relief to civilians may satisfy the *chapeau* requirements for CAH.³⁸⁷ In the case of such a hypothetical widespread or systematic attack by omission, speech alleged as the basis for a persecution charge might take on a different cast. For instance, a radio announcer expressing his religious belief that humanitarian aid is sinful and would only be accepted by citizens who are less than human might be difficult to prosecute on CAH-persecution charges.

The number and variety of scenarios could be infinite. The point is that each situation must be analyzed according to the nature of the attack, the identity of the parties, and the category of speech. Empirically, CAH-persecution charges have been based on government-perpetrated attacks and speech directly linked to and supportive of such attacks. But when that formula varies, we must be prepared to engage in reasoned analysis sensitive to the relevant policy considerations and special social value of free speech.

387. Ford, *supra* note 251, at 255.

V. CONCLUSION

History has shown time and again that without verbally conditioning and encouraging perpetrators to take action, large-scale human rights violations are not possible. And mass-atrocity law has recognized this, too. Incitement to genocide is a unique speech crime that entails advocating group destruction. But speech short of urging liquidation that nonetheless targets civilians for inhumane treatment, up to and including violence and killing, should give rise to criminal liability, as well. And that has been the role of CAH-persecution.

The formulation of persecution and its development since Nuremberg reveals an offense grounded in discriminatory motive but receptive to being defined by wide-ranging conduct. The jurisprudence specifies that, in combination with a discriminatory campaign against a victim group, adverse actions against the *person* or against *personal* property of group members (including religious property), as opposed to actions against their commercial or industrial property, are sufficiently grave to support persecution charges. In light of the *Dietrich* judgment, Nuremberg precedent is clear that hate speech in support of such a campaign, even if not directly calling for action, may satisfy persecution's *actus reus* element. Consistent with this precedent, the ICTR Trial Chambers in the *Ruggiu* and *Media Case* judgments recognized that speech short of action advocacy may give rise to CAH-persecution charges. Granted, the ICTR's reliance on criminalization of hate speech in the garden-variety criminal context was misplaced. It should have focused instead on the connection between speech and the widespread or systematic attack. But its end result nevertheless had merit.

Kordić concluded otherwise. This Article has discussed the serious flaws in that opinion. Apart from its internal inconsistencies, disharmony with Nuremberg precedent and previous ICTY holdings, and omission of relevant ICTR precedent, the opinion fails to recognize the larger context of speech, persecution, and CAH. Even if speech does not call for action, its strong, inherent connection with *chapeau* violence or inhumane treatment means its value as democracy-promoting, self-actualizing expression is largely nullified. In finding that speech can be the basis for persecution charges, the *Media Case* appeals judgment essentially grasped this important point. But it went off track in positing that speech might be considered in granular isolation from other conduct in a CAH attack against civilians. Since, by definition, the speech must be tethered to the broader attack, it serves no purpose to ponder whether, in the abstract, hate speech not calling for action is as grave as the other enumerated CAH acts. If the speech cannot be connected to the

broader attack, then the charge has no merit in the first place. This will be especially true in the ICC context, in which persecution must be tied to another crime in the Rome Statute.

Of course, there may be exceptions. Marginal CAH cases may not permit prosecution of peripherally connected hate speech. Low-level expression on behalf of minority interests with defendants removed from the major crime scene suggests First Amendment value that may merit protection. The point is that each case must be reviewed for its specific circumstances. But an outright ban on charging nonadvocacy hate speech as persecution ignores the extreme importance of such speech in service of mass atrocity. Even if the attack against civilians and the speech may not be geared toward *destruction* of the victim group, criminal liability should still attach. An old adage teaches that words kill. But in the context of crimes against humanity, it is equally true that words need not kill to persecute.
