Hate Speech and Persecution: A Contextual Approach

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"But the character of every act depends upon the circumstances in which it is done."
United States 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

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¹ Schenck v. United States, 249 U.S. 47, 52 (1919) (formulating the "clear and present danger" test).
has established liability for another offense resulting from inflammatory hate speech linked to mass violence: persecution as a crime against humanity (CAH). 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. In the 2000 *Prosecutor v. Ruggiu* and the 2003 *Prosecutor v. Nahimana* ("Media Case") judgments, for example, separate ICTR Trial Chambers found that hate speech radio broadcasts not necessarily calling for action blisterly 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. Kordic* 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). 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 whether non-advocacy hate speech, standing alone, is of a level of gravity equivalent to that of the other enumerated CAH crimes.

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. 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 pre-conditions), that the speech is uttered as part of a widespread or systematic attack against a civilian population. The chapeau further requires that the defendant be aware that his speech is uttered as part of that attack. And the International Criminal Court’s (ICC) Statute, which will be a significant point of reference going forward, specifically requires that persecution be tied to one of the other

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4 *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence ¶ 10 (June 1, 2000).


8 See, e.g., Streicher, 6 F.R.D. at 161-63.

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

10 Id. at 114-15.
enumerated CAH offenses or another crime within the Statute, such as genocide or war crimes.\textsuperscript{11}

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,\textsuperscript{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 against members of the victim group (whether violent or non-violent).\textsuperscript{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.\textsuperscript{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.\textsuperscript{15} Thus, even if stringent American 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.

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 such cases, context is crucial and case-by-case analysis must follow.

\textsuperscript{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].


\textsuperscript{13} See Alon Harel, Hate Speech and Comprehensive Forms of Life, in THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 326 (Michael Herz & Peter Molnar eds., 2012) (acknowledging that "hate speech is not a single category").

\textsuperscript{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.”) (emphasis in original).

\textsuperscript{15} See Alon Harel, Freedom of Speech, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 599, 601-08 (Andrei Marmor, ed., 2012).
This Article proceeds in four parts. Part Two 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 crimes against humanity. 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 Three 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 Four 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. CAH-PERSECUTION AND SPEECH: ORIGINS AND DEVELOPMENT

A. ORIGINS AND FORMULATION OF CRIMES AGAINST HUMANITY

The offense of "crimes against humanity" traces its origins to an Allied warning to the Turkish government regarding its massacres of the Armenian population during the First World War. On May 28, 1915, France, Great Britain and Russia issued a joint declaration to Ottoman authorities noting that "in view of the 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 post-conflict war crimes commission recommended creation of an international tribunal to prosecute atrocities, including "violation of the laws of humanity," the U.S. delegation successfully argued for excluding the latter given its recent vintage and imprecise definition.17

After the Second World War, 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 "crimes against humanity" in Article 6(c) of the Nuremberg Charter (or "London Charter") and defined it as follows:

[M]urder, exermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated. 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 -- this formulation became known as the "war nexus." 21 Subsequent prosecutions of lesser ranking Nazi officials before the Nuremberg Military Tribunals (NMTs) were governed by Control Council Law (CCL) No. 10 22, which contained a CAH provision nearly identical to that of the London Charter. 23 There were two key differences: the "war nexus" was removed and the list of inhumane acts was expanded to include imprisonment, torture and rape. 24

In the wake of 1990s mass inter-ethnic violence in the former Yugoslavia and Rwanda, the statutes for the ICTY and ICTR largely adopted CCL No. 10's CAH definition. 25 Some minor differences should be noted, however. The ICTY statute re-

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20 See Van Schack, supra note 17, at 838 n.247.
21 Id. at 792 ("The war nexus allowed the drafters of the Charter to condemn specific inhumane acts of Nazi perpetrators committed within Germany without threatening the entire doctrine of state sovereignty.").
23 See Ford, CAH at the ECCC, supra note 17, at 147. Article II of CCL No. 10 reads: "1. Each of the following acts is recognized as a crime . . . (c) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." Article II.1(c) also includes the terms "atrocities and offenses" but this turned out to be the exclusive terminology of CCL No. 10 and an historic anomaly -- neither the London Charter nor subsequent international criminal law instruments containing CAH provisions has employed this language. CCL No. 10, supra note 22, art. II.1(c).
24 Id.
25 Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 5, SC Res. 827, annex (May 25, 1993), as amended by SC Res. 1166, annex (May 13, 1998). Article 5 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;
imposed the "war nexus" requirement, which the Tribunal interpreted to be merely jurisdictional, as opposed to a substantive prima facie requirement. 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." 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 crimes against humanity, would perhaps not need to be directed against a civilian population. The ICTY/ICTR formulations put that question to rest by incorporating persecution into the list of other prohibited acts.

The development of CAH experienced another significant milestone in 1998 with the adoption of the Rome Statute of the International Criminal Court (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:

   (g) rape;

   (h) persecutions on political, racial, and religious grounds;

   (i) other inhumane acts.

26 Van Schaack, supra note 17, at 794.
27 Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 3, U.N. Doc. S/RES/955 (Nov. 8, 1994). 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 . . . ."
29 Id.
(a) "Attack directed against any civilian population" means 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.

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

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.

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."

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 . . ."

Thus, the Rome Statute crystallizes certain features of crimes against humanity, 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. It also expands the offense's scope. In particular, it adds new enumerated criminal acts, such as sexual slavery, enforced disappearance and apartheid. 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

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30 Rome Statute, supra note 11, art. 7.
31 See, e.g., Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, ¶ 133 (May 21, 1999) (confirming the requirement that the accused must have acted with knowledge of the broader context of the attack); Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, ¶¶ 244-50 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (relying on the Kayishema and Ruzindana case to demonstrate that the perpetrator must know that his act is part of the attack on a civilian population).
32 Rome Statute, supra note 11, art. 7.2(a) (emphasis added).
33 Id. art. 7.2(g).
34 Id. art. 7.
35 Id.
under international law. Further, it fleshes out the definition of persecution by specifying that it must consist of an intentional and severe deprivation of fundamental rights. 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."

B. THE DEVELOPMENT OF PERSECUTION AS A CRIME AGAINST HUMANITY

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." 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 one billion mark fine after Kristallnacht. The crimes against humanity charge of which Baldur von Schirach was found guilty included an allegation of persecution and centered primarily on his deporting Jews from Vienna in his capacity as that city's Gauleiter. Further, as set forth more fully below, anti-Semitic newspaper editor Julius Streicher was convicted of persecution as a crime against humanity in connection with his written attacks against the Jews.

And as part of the NMT Trials under CCL No. 10, American judges continued to expand the boundaries of persecution's constituent conduct. In the Justice case, for example, the NMT found that the use of a legal system to implement a discriminatory policy constituted persecution. In the 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

36 Id. art. 7.1(h).
37 Id. art. 7.2(g).
38 Id. art. 7.1(h).
40 See United States v. Goering, Judgment (Int'l Mil. Trib. Sept. 30, 1946), reprinted in 6 F.R.D. 69, 148-149 (1946). See also Badar, supra note 39, 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 See Streicher Judgment, supra note 3, at 161-63.
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.\footnote{United States v. Ernst Weizsaker \textit{(Ministries Case)}, in XIV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 498 (1951).}

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."\footnote{Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-A, ¶ 13 (Nov. 28, 2007) (Shahabuddeen, J., partially dissenting).} He went on to note that the holding in this post-World War II case may be accepted as reflective of customary international law.\footnote{Id. at 13 (emphasis added).}

Persecution was also the subject of charges in various domestic jurisdictions trying Nazi war criminals after World War II.\footnote{See, e.g., Trial Of Hans Albin Rauter, (Netherlands Spec. Ct. The Hague, May 4th, 1948 And Spec. Ct. Cassation, Jan. 12, 1949), XIV L. REPT. TRIALS WAR CRIM. 49 (U.N. War Crimes Comm'n, 1949) (S.S. officer convicted for offenses against the Dutch civilian population, including persecutions of Jews); Attorney General of Israel v. Adolf Eichmann, 36 INT'L L. REP. 5, 278 (1968) (Israeli court finds SS officer who implemented Final Solution guilty of, \textit{inter alia}, CAH-persecution); Fédération Nationale Des Déportés Et Internés Résistants Et Patriotes And Others v. Barbie, 78 I.L.R. 124 (1988) (Court of Cassation, Criminal Chamber 1983-85) (among other crimes, French court convicts Lyon Gestapo chief of CAH-persecution).} But none of those courts essayed a precise definition of persecution or 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 \textit{ad hoc} tribunals, CAH-persecution had "never been comprehensively defined . . ."\footnote{Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 567 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).}

That said, 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.”\footnote{M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 326-27 (2d rev. ed., 1999) (emphasis added).} He also noted that persecution has been commonly defined in international criminal law circles as: "\textit{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.) . . ."\footnote{\textit{Id.} at 327 (emphasis added).}
insight into the scope of persecution: "Persecution may take many forms, for example, a prohibition on practicing 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."

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.

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

In setting out the fourth prong of the test, the Chamber cited to the NMT Flick decision and a passage that focused on the distinction between crimes against property and crimes against the person. 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. Nevertheless, the Kupreskic Chamber acknowledged that even crimes against property might be of sufficient gravity to constitute crimes against humanity. More specifically, it noted that Flick involved Nazi expropriation of Jewish industrial property. But, the Kupreskic Chamber pointed out, the subsequent NMT IG Farben decision 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. 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 prong 4 of the Kupreskic actus reus test.

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54 Id. ¶ 619 n.897 (citing United States v. Flick, in VI Trials of War Criminals Before the Nuremberg Military Tribunals Under CCL No. 10, at 1215 (1952) [hereinafter Flick]).
55 Flick, supra note 54.
56 Kupreskic, Case No. IT-95-16-T, ¶ 619 n.897.
57 Id.
58 See United States v. Krauch (The IG Farben Trial), 8 Trials of War Criminals Before the Nuremberg Military Tribunals 1080, 1129-1130 (1952).
59 Kupreskic, Case No. IT-95-16-T, ¶ 619 n.897.
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 in a series of bullet points: (a) a narrow definition of persecution is not supported in customary international law and was understood by the IMT to “include a wide spectrum of conduct ranging from discriminatory acts targeting . . . general political, social and economic rights, to attacks on [the] person”; (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 – acts of persecution will usually form part of a patterned practice, and must be regarded in their context; and (d) as 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 CAH -- for example, curtailing rights to participate in social life (such as visits to public parks, theatres or libraries) must not be considered in isolation but examined in their context and weighed for their cumulative effect.  

Applying this precedent, the Trial Chamber in *Prosecutor v. Brdjanin* 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." 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 of 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 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 persecution.

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60 Id. ¶ 615.
62 Id. ¶ 1030.
63 Id. ¶ 1030-31.
C. CAH-PERSECUTION AND SPEECH

1. The Judgments at Nuremberg

From its earliest formulation in the London Charter and charging in the 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*. 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." The decision also referred to dozens of pre-and post-war articles Streicher wrote himself calling for the annihilation, "root and branch," of the Jewish people. 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." 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."

Hans Fritzsche, head of the Radio Division in Joseph Goebbels' Propaganda Ministry, was also prosecuted at Nuremberg for CAH-persecution. Prosecutors alleged Fritzsche made daily broadcasts espousing the general policies of the Nazi regime, which "aroused in the German people those passions which led them to the commission of atrocities." Fritzsche was acquitted, however, because the Tribunal 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." Nevertheless, the judgment impliedly recognized that urging persecution (not necessarily defined as involving violence) could constitute a crime against humanity.

Another propaganda defendant, Otto Dietrich, was charged with CAH-persecution pursuant to CCL No. 10 as part of the "Ministries Case." Dietrich was Reich Press

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64 See Streicher Judgment, supra note 3, at 161-63.
65 Id.
66 Id.
67 Id.
68 Id.
70 Id.
71 Id.
72 Id.
Chief from 1937 to 1945. In the early days of the Reich, Dietrich formulated the "Editorial Control Law," which, among other things, required all newspaper and periodical editors to be members of the Reich League of the German Press. Dietrich was Chairman of the Reich League, which ran courts that punished and purged editors who did not follow Nazi directives.

In this way, Hitler gave Dietrich "responsibility for ideological oversight and direction of editors; furthermore, Dietrich had immediate access to Hitler." Based largely on the daily press directives issued by Dietrich during the Holocaust, the Tribunal 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 the German people against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected . . . . By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews . . . .

74 Id.
75 Id.

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
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 *Prosecutor v. Ruggiu*.\(^76\) Georges Ruggiu, a Belgian citizen and the only white European to be convicted by the ICTR, was an announcer for Radio Télévision Libre des Milles Collines (RTLM), 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 the Rwandan genocide. 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. Ruggiu pled guilty to, *inter alia*, CAH-persecution.\(^77\) In sentencing him, the Tribunal had occasion to review the Nuremberg jurisprudence regarding this offense. It began with *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."\(^78\) The ICTR then concluded that "The *Streicher* Judgement is particularly relevant to the present case since the accused, like Streicher, infected peoples’ minds with ethnic hatred and persecution."\(^79\)

Citing the ICTY judgment in *Prosecutor v. Kupreskic*,\(^80\) the ICTR Trial Chamber then set forth the specific elements of CAH-persecution: (a) those elements required for all crimes against humanity under the 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.\(^81\) With respect to element (a), the Tribunal 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.\(^82\) 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

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\(^{75}\) United States v. Ernst Weizsaker (*Ministries Case*), in XIV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 167-68 (1951).

\(^{76}\) *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 10 (June 1, 2000).

\(^{77}\) *Id.* ¶ 50.

\(^{78}\) *Id.* ¶ 19.

\(^{79}\) *Id.*


\(^{81}\) *Id.* ¶ 21.

\(^{82}\) *Id.* ¶ 20.
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 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.83

With respect to the latter two elements, the Tribunal 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.84

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 – "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."85 This conclusion is bolstered by the ICTR's describing the crime as entailing Streicher's infecting "peoples’ minds with ethnic hatred and persecution." 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.86 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).

83 Id. (quoting Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 133 (May 21, 1999).
84 Id. ¶ 22.
86 A Trial Chamber of the ICTR later left no doubt about this interpretation. In Prosecutor v. Nahimana, Barayagwiza, & Ngeze, 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 not connected 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. 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."87 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."88 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 . . . . 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.89

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

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88 Id.
89 Id. ¶ 1072-73.
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. 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.

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." 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." 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.

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 RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed. Similarly, the activities of the CDR, a Hutu political party that demonized the Tutsi population as the enemy, generated fear and hatred that created the conditions for extermination and genocide in Rwanda.

The Chamber then referred to specific instances of hate speech that it believed qualified as persecution. For example, it alluded to a February 1993 (pre-genocide) Kangura article titled A Cockroach Cannot Give Birth to a Butterfly, which it described as "brimming with ethnic hatred but [that] did not call on readers to take action against the Tutsi population." The Chamber also noted that "The RTLM interview broadcast in June 1994, in which Simbona interviewed by Gaspard Gahigi, talked of the cunning and

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90 Id. ¶ 1074.
91 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.
92 Id. ¶ 1073.
93 Id.
94 Id. ¶ 1076.
95 Id.
96 Id. ¶ 1078.
97 Id.
98 Id. ¶ 1037.
trickery of the Tutsi, also constitutes persecution." 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*." 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." This, the Chamber pointed out, "is the poison described in the *Streicher* judgment."

3. **The ICTY Trial Chamber Judgment in Kordic**

The 2001 Trial Chamber judgment in the case of *Prosecutor v. Kordic & Cerkez* 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 of Muslims an area of central Bosnia-Herzegovina for purposes of integrating that region into greater Croatia. At the time of the break-up of the former Yugoslavia, Dario Kordic was a prominent politician in the Bosnian Croat community. From 1991 until 1995, he was President of the Croatian Democratic Union of Bosnia and Herzegovina, from 1992 until 1995, Vice-President and a member of the Presidency of the Croatian Community of Herceg-Bosna and later the Croatian Republic of Herceg-Bosna. Count One of the indictment alleged that Kordic 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.*

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 Kordic") details a series of activities by Kordic 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.""

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99 *Id.* ¶ 1078.
90 *Id.* ¶ 1079.
102 *Id.* ¶¶ 5, 9.
103 *Id.* ¶ 5.
104 See *Dario Kordic*, THE HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/index.php?id=6014 (last visited July 17, 2012). 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 *Mario Cerkez*, THE HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/index.php?id=6106 (last visited July 17, 2012). 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 Kordic’s supposed liability for such conduct was analyzed by the Trial Chamber.
105 Kordic, Case No. IT-95-14/2-T, Annex V, ¶ 37.
106 *Id.* ¶ 521.
Paragraph 522 then begins: "The events of the late summer [of 1992] show Dario Kordic being as active as ever . . ." The paragraph then describes the aforementioned activities (essentially participating in meetings and press conferences) and related statements made by Kordic. 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.

b. [On 18 August 1992] in Novi Travnik he was escorted by soldiers and in a speech said that Novi Travnik would be a Croatian town. . . . In Travnik, Kordic and Koctroman 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.

c. 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.”

The judgment makes no reference to any prosecution characterization of or argument regarding these statements or any others made by Kordic 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 Kordic's statements:

The defence evidence on this topic dealt with Kordic’s speeches and the terms used in them. For instance, that he always attended areas when

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107 The phrase "the defence evidence on this topic" suggests that the preceding paragraph contained the prosecution's evidence on this "topic" – i.e., Kordic's speeches and the terms used in them.
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.108

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 of Kordic’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 [paragraphs 193, et seq.] regarding speech and persecution. The Chamber had begun its analysis by stressing the importance in its decision of the Latin maxim *nullum crimine sine lege* – ”in order the for 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 the commission.”109 Nevertheless, the Chamber acknowledged that ”the *actus reus* for persecution requires no link to crimes enumerated elsewhere in the Statute.”110

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 Statute.111 The Chamber then held that acts which meet the four criteria set out above, as

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108 Kordic, Case No. IT-95-14/2-T, ¶ 523.
109 Id. ¶ 192.
110 Id. ¶ 193.
111 Id. ¶ 195.
well as the general requirements applicable to all crimes against humanity, may qualify as persecution, without violating the *nullum crimen* principle. 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 Court. 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." Quoting *Kupreskic*, it noted:

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.’

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

Applying the *Kupreskic actus reus* test, however, the *Kordic* 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]." 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.

Appended to Paragraph 209 is a footnote, number 272, meant to support the Chamber's holding. The Chamber was apparently aware that, with one terse

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112 *Id.*
113 *Id.* ¶ 199.
114 *Id.*
115 *Id.* ¶ 198.
116 *Id.*
117 *Id.* ¶ 209. Of course, the Chamber neglected to mention that several other judicial opinions had grappled with this issue outside of the ICTY.
118 *Id.*
119 *Id.* n.272. It should also be noted that the *Kordic* Chamber held that dismissing or removing Bosnian Muslims from employment similarly did not rise to the same level of gravity as the other acts
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 law" (implying that there is some support for such prosecutions – even if the *Kordic* 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 *Kordic* 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."  

The Chamber then cited to the ICTR decision in *Prosecutor v. Akayesu*, which involved a small-town mayor working with militia to direct a genocide operation in his locality. He was charged primarily with genocide-related crimes, including, peripherally, direct and public incitement to commit genocide. In emphasizing the dearth of speech-focused CAH-persecution charges in atrocity cases, the *Kordic* 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.

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. On a related note, the *Kordic* Chamber also asserted, without further elaboration, that "the only speech act explicitly criminalised under the statutes of the

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120 *Id.*  
121 *Id.* As will be discussed in greater depth infra, the *Kordic* Chamber omitted, *inter alia*, the following language in *Streicher*: "In his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution." *Streicher* Judgment, *supra* note 3, at 161-63 (emphasis added).  
124 *Id.*  
International Military Tribunal, Control Council Law No. 10, the ICTY, ICTR and ICC Statute, is direct and public incitement to commit genocide.”

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. 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, which are more concerned with protecting the rights of victims. Given this split, the Kordic Chamber concluded, “there is no international consensus on the criminalization of this act [incitement] that rises to the level of customary international law.”

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. He referred to them as cockroaches (Inyenzi) and alluded to them as serpents and thieves. 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 . . . ."

Mugesera was indicted by Rwandan authorities in connection with the speech but fled to Canada, where an illegal entry immigration case was filed against him.
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.\textsuperscript{134} 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."\textsuperscript{135} The Court then surveyed on-point ICTY and ICTR precedent, including the split between \textit{Ruggiu/Media Case} and \textit{Kordic \& Cerkez} and concluded that it could.\textsuperscript{136} It began by noting the relationship between Mugesera's speech and the widespread and systematic attack against the civilian population:

\begin{quote}
[The] 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 groups . . . \textsuperscript{137}
\end{quote}

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."\textsuperscript{138} The Court therefore found that Mugesera's speech satisfied the requirements of CAH-persecution.\textsuperscript{139}

\section*{5. The Appeals Chamber Judgment in the Media Case}

The next important milestone in the jurisprudential development of speech as a persecution crime against humanity is the 2007 Appeals Chamber judgment in the Media Case. The defendants in that case argued that hate speech should not qualify as conduct satisfying the \textit{actus reus} requirement for CAH persecution.\textsuperscript{140} Citing to Paragraph 209 and Footnote 272 of the \textit{Kordic} judgment, the defendants made, among others, the following points: (1) hate speech was 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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{134} \textit{Id.} ¶ 112.
\item \textsuperscript{135} \textit{Id.} ¶ 137.
\item \textsuperscript{136} \textit{Id.} ¶¶ 146-47.
\item \textsuperscript{137} \textit{Id.} at page 10.
\item \textsuperscript{138} \textit{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." \textit{Id.}
\item \textsuperscript{139} \textit{Id.} ¶ 148.
\item \textsuperscript{140} See \textit{Prosecutor v. Nahimana, Barayagwiza, \& Ngeze}, Case No. ICTR 99-52-A, Judgment, ¶ 970 (Nov. 28, 2007).
\end{itemize}
\end{footnotesize}
fall within the definition of CAH 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 CAH, because that judgment was not the result of a real trial. 141

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."142 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.'"143 Id. The brief also criticized the Media Case Trial Chamber for failing to follow the Kordic judgment, which had found that mere hate speech could not constitute persecution.144

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)."145 The Chamber noted, however, that not every act of discrimination will constitute the crime of persecution as the underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of a gravity equal to the crimes listed under Article 3 of the Statute.146

However, the Chamber also noted that it is not necessary that these underlying acts of persecution amount to crimes in international law.147 It therefore rejected defendants' arguments that mere hate speech does not constitute a crime in international law.148

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."149 In support of this proposition, the Chamber alluded to the Universal Declaration of Human Rights, the Preamble of which "expressly refers to the

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141 Id.
142 Id. ¶ 979.
143 Id.
144 Id.
145 Id. ¶ 985 (citing Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003)).
146 Id. (emphasis added).
147 Id.
148 Id.
149 Id. ¶ 986.
recognition of dignity inherent to all human beings, while the Articles set out its various aspects."\textsuperscript{150} 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."\textsuperscript{151}

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.\textsuperscript{152} 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."\textsuperscript{153}

The Appeals Chamber then took up a related, but separate question: whether the violation of fundamental rights at issue in such cases (\textit{i.e.}, right to respect for human dignity, right to security) is as serious as in the case of the other crimes against humanity enumerated in Article 3 of the Statute.\textsuperscript{154} 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: \textit{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.\textsuperscript{155}

The Chamber then applied this analysis to the case before it. It held that the speeches at issue after the start of the genocide, \textit{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.\textsuperscript{156} The Chamber specified that the campaign was characterized by acts of violence and destruction of property.\textsuperscript{157} In this context, it ruled, the speeches were of a gravity equivalent to the other crimes against humanity.\textsuperscript{158} Accordingly, it concluded:

\textsuperscript{150} \textit{Id.} \S 986 n.2256.
\textsuperscript{151} \textit{Id.} \S 986.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} \S 987.
\textsuperscript{155} \textit{Id.} (emphasis added).
\textsuperscript{156} \textit{Id.} \S 988.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.}
[The] 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.159

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 Statute, because they were not part of a widespread or systematic attack against the Tutsi population.160 That said, the Chamber noted that pre-April 6, 1994 speech could be found to have "instigated the commission of persecution."161 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.162

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."163 Only when hate speech "rises to the level of inciting violence or other imminent lawless action" can it be criminalized.164 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.165 In support of this, he cited with approval the Kordic 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.166 This conclusion, Judge Meron asserted, accurately reflects the law on hate speech since "the Prosecution did not appeal this important determination, and the Appeals

159 Id. (emphasis added).
160 Id. ¶¶ 993 (for RTLM), 1013 (for Kangura). 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, UNITED STATES INSTITUTE OF PEACE, http://www.usip.org/publications/commission-inquiry-rwanda-93 (last visited on Aug. 12, 2012).
161 Id. ¶ 993.
162 Id. ¶ 994 (for RTLM), ¶ 1014 (for Kangura). In reference to RTLM, the Chamber supported its conclusion by 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 were not considered by the Chamber.
163 Id. ¶ 13 (Meron, J., partially dissenting).
164 Id.
165 Id. ¶ 5.
166 Id. ¶ 7.
Chamber did not intervene to correct a perceived error." Judge Meron also wrote of the value of protecting hate speech, alluding to American values that cherish the "benefit of protecting political dissent . . . "167 Citing the American Constitution and U.S. Supreme Court case law, he observed that: "[The] government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . under the rubric of persecution, to criminalize unsavory speech that does not constitute actual imminent incitement might have grave and unforeseen consequences."168

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 definitively on the question whether hate speech can per se constitute an underlying act of persecution."169 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 fulfills the conditions necessary for it to be considered an underlying act of persecution."170 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."171 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 discrimination."172

In his partial dissent, Judge Mohamed Shahabuddeen took the same position but fleshed out his analysis in much greater detail. 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.173 Judge Shahabuddeen responded to this argument by reminding the parties that persecution as a crime against humanity is wider than incitement to commit genocide -- the former therefore cannot be limited in scope to the latter.174 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.'"175 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

167  Id. ¶ 11.
169  Id. ¶ 3 (Pocar, J., partially dissenting).
170  Id.
171  Id.
172  Id.
173  Id. ¶ 7 (Shahabuddeen, J., partially dissenting).
174  Id. ¶ 9.
175  Id. ¶ 10.
extermination an essential element "to the success of a charge for persecution (by making public statements) as a crime against humanity."\textsuperscript{176}

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."\textsuperscript{177} As demonstrated by the Nuremberg jurisprudence, this could include economic (except for expropriation of industrial property) and political discrimination.\textsuperscript{178} Thus, "it is not necessary to prove a physical attack."\textsuperscript{179} 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 \textit{Einsatzgruppen}.\textsuperscript{180}

Judge Shahabuddeen then addressed the more narrow view of persecution adopted by the Trial Chamber decision in \textit{Kordic}. He pointed out that the \textit{Kordic} judgment appeared to be saying that, shorn of context (\textit{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.\textsuperscript{181} But in context, Judge Shahabuddeen explained, hate speech could be an underlying act of persecution:

\begin{quote}
In my opinion, the Trial Chamber’s judgement 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 \textit{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 \textit{Kordić and Čerkez} is not consistent with the \textit{Ministries} case, or with other cases of the ICTY; the exclusion is contrary to customary international law and is incorrect.\textsuperscript{182}
\end{quote}

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

\begin{itemize}
\item \textsuperscript{176} Id. ¶ 11.
\item \textsuperscript{177} Id. ¶ 12 (citing the decisions in \textit{Flick} and \textit{Einsatzgruppen}).
\item \textsuperscript{178} Id.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id. ¶ 14.
\item \textsuperscript{181} Id. ¶ 15.
\item \textsuperscript{182} Id. ¶ 16.
\end{itemize}
international human rights instruments, such as the ICCPR, require participating states to criminalize propaganda that incites racial hatred, or discrimination. The Trial Chamber suggested such prohibitions supported a finding that this variety of speech can constitute an underlying act of persecution. 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. 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.\(^\text{183}\)

Based on all this, Judge Shahabuddeen concluded:

All that can be legitimately extracted from the post-World War II jurisprudence, including \textit{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.\(^\text{184}\)

\(^{183}\) \textit{Id.} ¶ 18.

\(^{184}\) \textit{Id.} ¶¶ 19, 20.
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 (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 (mens rea)." 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. 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). Nevertheless, the underlying persecutory acts need not rise to the level of crimes in international law.

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 listed discriminatory ground, violates the right to the respect for dignity of the targeted group as human beings. Thus, it constitutes actual discrimination. 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. 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. So other persons need to intervene before such violations can occur. Put another way, a speech cannot, in itself, "directly kill members of a group, imprison or physically injure them." 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. At perhaps the most crucial juncture of the judgment's reasoning, the Appeals Chamber punted. It refused to opine

186 Id.
187 Id.
188 Id.
189 Id. ¶ 986.
190 Id.
191 Id.
192 Id.
193 Id. ¶ 987.
whether such violations are as serious as the other enumerated crimes against humanity. 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." Still, the Appeals Chamber provided reason to believe such speeches, in the proper context, could be deemed as grave:

[It] 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.

Beyond the explicitly unresolved question of whether "hate speeches" not "inciting violence" are of a level of gravity equivalent to the other crimes against humanity, additional questions remain. What exactly is "hate speech"? What does "incite" mean? The next sub-section 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 classifications: (1) hate speech; and (2) speech that incites to violence. 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 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.

All relevant speech for purposes of this analysis ought to be considered "hate speech." In that sense, incitement would only be a subcategory of hate speech along this

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194 Id.
195 Id.
196 See Gordon, Incitement to Indictment, supra note 131, at 886-90.
spectrum, not a separate phenomenon altogether.\textsuperscript{198} Which precisely, then, would be all 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.\textsuperscript{199} 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.\textsuperscript{200} 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 sub-human creatures such as lice or locusts), pathologization (analogizing the group with disease), and demonization (ascribing to the group satanic or other comparable evil qualities).\textsuperscript{201}

Moving further along toward the other end of the spectrum, statements voiced directly at the victims can be categorized as "harassment."\textsuperscript{202} Such statements would be addressed to the collective group (\textit{e.g.} "You do not belong here" or "You are parasites") or to particular individuals (\textit{e.g.}, "You filthy residents of the Biryogo are making the rest of society dirty and disease-infested. You are destroying our country.").\textsuperscript{203}

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\textsuperscript{198} See Michael Rosenfeld, \textit{Hate Speech in Constitutional Jurisprudence, in The Content and Context of Hate Speech}, supra note 13, at 281 ("Not all hate speech is alike, and its consequences may vary from one setting to another.").
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\textsuperscript{199} See Phyllis B. Gerstenfeld, \textit{Hate Crimes: Causes, Controls and Controversies} 35 (2010).
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\textsuperscript{201} See Gordon, Music and Genocide, 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.
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\textsuperscript{203} 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. \textit{See, e.g.}, Beauharnais v. Illinois, 343 U.S. 250, 255-57 (1952) ("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 problems. These include . . . the insulting or ‘fighting’ words . . . it has been well observed that such utterances are not 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."). 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. \textit{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 U.S. as a point of reference, of these types of speech, only general hate speech would presumably find absolute protection under the First Amendment.
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The next point in this direction along the spectrum, incitement, entails advocacy directed toward third persons.\(^{204}\) Such messages are designed to provoke action vis-à-vis the victim group.\(^{205}\) This kind of incitement bifurcates into two forms: (1) incitement toward non-violent action; and (2) incitement toward violent action.\(^{206}\) Regarding the former, one can discern three general relevant non-violence categories: (1) incitement to hatred; (2) incitement to discrimination; and (3) incitement to persecution.\(^{207}\)

Incitement to hatred urges the majority group to develop general feelings of animosity toward the victim group.\(^{208}\) It is similar to group libel but takes a more active tone in encouraging the majority group to despise the minority.\(^{209}\) For example, the Rwandan pop singer Simon Bikindi’s pre-Rwandan genocide song N\(\text{\textit{jyewe nanga Abahutu}}\) ("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).\(^{210}\) Incitement to discrimination urges the majority group to mistreat the victim group in particular non-violent ways. It could be a call to the majority group to refuse medical treatment or service in restaurants or 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."\(^{211}\)

Incitement to persecution is incitement to discrimination on a broader and more systematic scale.\(^{212}\) This is advocacy to exclude the victim group from participation in society and enjoyment of civil rights in a comprehensive way.\(^{213}\) 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."\(^{214}\) 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 Tutsi should conduct business with them; (5) all high-level positions in society

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\(^{204}\) See Ian Leigh, *Homophobic Speech, Equality Denial, and Religious Expression, in Extreme Speech and Democracy* 375, 379 (Ivan Hare & James Weinstein eds., 2010).

\(^{205}\) Id.

\(^{206}\) Id.

\(^{207}\) Id. (discussing the breakdown of incitement in the context of the Netherlands Criminal Code).


\(^{209}\) Id.

\(^{210}\) See Gordon, Music and Genocide, *supra* note 2, at 618.


\(^{213}\) Id.

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 revolution (when many Tutsis were disenfranchised, forced to leave Rwanda or massacred) must be taught to Hutu at all levels. 215

The other major form of incitement is to violence. There are two varieties -- explicit and non-explicit.216 Since incitement to violence is often effectuated via code, non-explicit calls are quite common.217 William Schabas has observed that those who incite to mass atrocity "speak in euphemisms."218 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)219; (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.");220 (3) euphemisms and metaphors (in the Rwandan genocide, for instance, "go to work," a common mass slaughter directive, meant "kill Tutsis");221 (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);222 (5) condoning and congratulating past violence (RTLM announcers, such as Georges Ruggiu, would congratulate the "valiant combatants" who engaged in a "battle" against Tutsi civilians);223 (6) asking questions about violence (Simon Bikindi's asked Hutu militia over a truck loudspeaker "[h]ave you killed the Tutsis here?" and he further asked whether they had killed the "snakes."),224 and (7) more virulent forms of verminization, pathologization, and demonization (RTLM announcer Georges Ruggiu admitted that the word Inyenzi, as used in the socio-political context of

216 See Gordon, Music and Genocide, supra note 2, at 638-39 (discussing the difference between explicitly calling for violence and the more indirect method of predicting violence).
217 Id. at 638-44.
219 Prosecutor v. Nahimana, Barayagwiza, & Ngeze, 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.").
221 See, e.g., Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 44(iv) (June 1, 2000). See also Gordon, Music and Genocide, supra note 2, at 642.
223 Ruggiu, Case No. ICTR 97-32-I, ¶ 44(v); Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, ¶ 142, Judgment and Sentence (May 16, 2003). See also Gordon, Music and Genocide, supra note 2, at 642-43.
the time of the Rwandan genocide, came to designate the Tutsis as “persons to be killed.”).

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. 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. Habimana then added: “Just look at his small nose and then break it." 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."

C. **HATE SPEECH AS AN ACTUS REUS FOR PERSECUTION AS A CRIME AGAINST HUMANITY**

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

1. **The Crimes against Humanity 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 pre-condition for the offense is a "widespread or systematic attack against any civilian population." Thus, there cannot even be a conversation about whether certain

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225 Ruggiu, Case No. ICTR 97-32-I, ¶ 44(iii). See also Gordon, Music and Genocide, supra note 2, at 639-41.
226 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 220, at 391 n.200.
228 Id.
229 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., Gordon, Incitement to Indictment, supra note 131, at 880-82.
230 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) [hereinafter Failure to Respond] (“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.”).
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." Even if such attacks are not explicitly violent, they will, at the very least, involve "inhumane mistreatment of the civilian population." "

And the attack will, from an empirical perspective, be perpetrated by state organs." 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 . . . ." Moreover, the Rome Statute explicitly mandates that the broader attack be pursuant to or in furtherance of a State or organizational policy involving the multiple commission of enumerated CAH acts.

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. 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.

In such state-sponsored or sanctioned campaigns, as was 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

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232 Id. at 257.

233 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. See 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); Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment, ¶ 100 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999), aff'd, Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgment, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001).


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


237 Rome Statute, supra note 11, art. 7(1)(h).
significant control over the media." 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." While this is true of all crimes against humanity, 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 . . . ."

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

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*, 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." Regarding the latter, in *Texas v. Johnson* the United States Supreme Court "reaffirmed that the core purpose of the First Amendment is to protect political dissent . . . ." Susan Benesch has noted that "U.S. free-speech doctrine" is not relevant in the mass atrocity context because the "marketplace of ideas" theory fails. "U.S. law protects odious and even violent speech," Benesch adds, "in the belief that 'bad' speech will

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239 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.

240 BASSIOUNI, supra note 49, at 327.


244 Johnson, 491 U.S. at 397.


246 Benesch, supra note 2, at 497.
eventually be neutralized by 'good' speech." 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.

Similarly, other rationales proffered in defense of the most vigorous free-speech protections are not implicated in the socio-political- or communications-landscape of the CAH scenario. For example, logic and common sense dictate that "free speech as an element of democratic governance, providing citizens with the necessary information to exercise their civic duties," or making "a vital contribution to personal autonomy, individual self-expression, and diversity of lifestyle" will not be present in a society enduring a government-sponsored widespread or systematic attack against a civilian population.

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. 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

247 Id.
248 Id.
249 ROBERT WHEELER LANE, BEYOND THE SCHOOLHOUSE GATE: FREE SPEECH AND THE INOCULATION OF VALUES 50 (1995). This is consistent with the views of philosopher Alexander Meiklejohn. Id. See also Whitney v. California, 274 U.S. 357, 375 (Brandeis, J., concurring) (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 . . . .).  
250 Id. at 51.
251 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," 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, 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.
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 basis for a conviction of this type. Only in extreme situations will some types of speech be considered underlying acts of persecution.252

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.253 The Kordic 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 Kordic 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.254 Because some countries, such as the United States, have expressed reservations regarding criminalizing mere hate speech in their domestic criminal codes, Kordic inferred from the lack of consensus that infringement of a fundamental right was not implicated.255 However, basing the analysis on lack of unanimity regarding domestic speech regulation in the garden-variety crime context was misplaced.256 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.

And the Kordic 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."257 Ironically, however, the Kordic Chamber elsewhere commented on "the unique nature of the crime of persecution as a crime of cumulative effect." Quoting

252 Pocar, supra note 119, at 360-61 (emphasis added).
254 See supra notes 128-29 and accompanying text.
255 Id.
256 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 CERD) or in most domestic criminal codes such as Rwanda, Vietnam, Russia, Finland, Ireland, Ukraine, Iceland, Monaco, Slovenia and China. See Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment, ¶ 1075-76 (Dec. 3, 2003). Again, looking at such garden-variety criminal domestic provisions without reference to the chapeau elements of CAH skews the analysis.
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.'\textsuperscript{258}

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."\textsuperscript{259} 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 Court's jurisdiction.\textsuperscript{260} 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.\textsuperscript{261} 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, so represents compelling evidence of the customary international law of crimes against humanity."\textsuperscript{262}

With respect to the fourth prong of the Kupreskic actus reus test, that persecution reach the same level of gravity as the other enumerated crimes against humanity, the Kordic Chamber found hate speech deficient because: (1) "[it] is not enumerated as a crime elsewhere in the International Tribunal Statute"\textsuperscript{263}; and (2) the only speech

\textsuperscript{258} Id. ¶ 199.
\textsuperscript{259} Rome Statute, supra note 11, art. 7(1)(h).
\textsuperscript{260} See supra notes 30-38 and accompanying text.
\textsuperscript{261} Id.
\textsuperscript{262} 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). Meg deGuzman notes that, although the Rome Statute "does not purport to codify customary international law . . . [it] nonetheless represents the agreement of the majority of the world’s states concerning the definition of crimes against humanity as of July 1998." Margaret M. deGuzman, "Crimes against Humanity"at 2 in WILLIAM A. SCHABAS AND NADIA BERNAZ, ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW (2010). See also William J. Fenrick, The Crime against Humanity of Persecution in the Jurisprudence of the ICTY, 22 NETHERLANDS YEARBOOK OF INT'L L. 81, 95 (2001) ("The ICC elements [for the crime of persecution] will be used as a template."). Nevertheless, the Kordic 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. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 199 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001). One is tempted to speculate whether the Chamber found it convenient to reject 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.
\textsuperscript{263} Id. ¶ 209. The wording of the judgment seems to indicate that this is not in support of the Chamber's analysis regarding prong four 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." Still, the statement is made in the same sentence.
explicitly and separately criminalized in international law is direct and public incitement to commit genocide. Once again, the reasoning in Kordic is faulty.

First, there is no support for the proposition that being enumerated elsewhere in the Statute is a definitive litmus test for gravity. The Kordic 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."265

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 Statute (as Kordic 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 a separate enumerated act within the CAH provision because, in effect, it would be only a replication of another act with the inclusion of the discriminatory grounds cited in Article 5(h) (i.e., political, racial or religious).266 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 the Statute contemplates that non-enumerated conduct could be sufficiently grave to qualify as a CAH. That is why it includes Article 5(i) referring to "other inhumane acts" – a catch-all provision necessarily indicating that non-listed acts may be sufficiently grave for CAH purposes despite their not being otherwise specifically listed in Article 5.267

Similarly, the Kordic 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."268 And the Trial Chamber

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.

264 Id. n.272.


266 Such an interpretation of persecution certainly does not foreclose the possibility, however, that acts which 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, non-enumerated acts should also be eligible for qualifying as the basis for a persecution charge.

267 ICTY Statute, supra note 25, art. 5.

268 Kupreskic, Case No. IT-95-16-T, ¶ 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, ¶
in *Prosecutor v. Kvocka* nonetheless qualified the implications of the *Kordic* holding as follows:

The *Kordic* 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.\(^{269}\)

More significantly, however, the *Kordic* Chamber overlooked the explicit reasoning and citation alluded to by the *Kupreskic* Chamber 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.\(^{270}\) It will be recalled, however, that *Kupreskic* then cited the *IG Farben* decision,\(^{271}\) 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.\(^{272}\) 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 prong 4 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 *Kordic*, 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.) . . .*"\(^{273}\)

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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.”).

269 *Id.* ¶ 186.

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


272 Kupreskic, Case No. IT-95-16-T, ¶ 619 n.897.

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;\(^{274}\) (2) discriminatory acts charged as persecution must not be considered in isolation -- rather, all discriminatory acts within a case's common nucleus of operative facts should be considered \textit{cumulatively} and within the proper context;\(^{275}\) (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;\(^{276}\) and (4) based on the foregoing, a narrow definition of persecution is not supported in customary international law.\(^{277}\)

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."\(^{278}\) Similarly, ICTY cases have found persecution in bad acts directed against property, as opposed to persons, such as destruction of homes and property\(^{279}\) and destruction and damage of religious or educational institutions.\(^{280}\) In line with this liberal interpretation of acts that may constitute persecution in general, hate speech ought to be included.

3. \textit{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 decisions in the \textit{Streicher} and \textit{Fritzsche} cases.

Free-speech advocates try to mitigate the significance of \textit{Streicher}'s persecution conviction for hate speech on the grounds that the IMT concluded its analysis with the following sentence: "\textit{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.}"\(^{281}\) From this one line, they argue

\(^{274}\) Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment ¶ 695 (May 7, 1997) (citing Bassiouni and noting "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 . . . ").

\(^{275}\) Kupreskic, Case No. IT-95-16-T, ¶ 622.


\(^{277}\) Kupreskic, Case No. IT-95-16-T, ¶ 605.

\(^{278}\) Kvocka, Case No. IT-98-30/1-T, ¶ 186.

\(^{279}\) See Kupreskic, Case No. IT-95-16-T, ¶ 631.

\(^{280}\) See Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 206 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001). Significantly, the \textit{Kordic} Trial Chamber took a more expansive view of persecution when speech was not involved.

\(^{281}\) Streicher Judgment, \textit{supra} note 3, at 161-63.
that the conviction was based exclusively on Streicher's calling for violence at a time when Jews were being killed in the East.282 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 Stuermer", which reached a circulation of 600,000 in 1935, was filled with such articles, often lewd and disgusting.283

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."284

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:

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

282 See e.g., Orentlicher, supra note 251, at 39-40.
283 Id.
284 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 251, 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. Streicher Judgment, supra note 3, 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. (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.
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.285

Free-expression proponents also put much stock in the IMT's Fritzsc he judgment.286 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 Fritzsc he 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.287

However, as noted previously, language in the Fritzsc he 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 . . . ." Falsifying news to arouse passions does not necessarily amount to direct calls for violence. Consistent with this, the judgment referred to Fritzsc he's connection with "propaganda campaigns" – this type of language suggests materials that would condition a population to violence rather than directly call on it to do so.288 As Judge Shahabuddeen noted in his Media Case Appeals Chamber partial dissent, while the IMT happened to note that Fritzsc he 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."289

286 See Orentlicher, supra note 251, at 39.
287 Fritzsc he Judgment, supra note 69, at 186-87.
288 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.
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."\(^{290}\)

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 *Dietrich* judgment. 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 the German people against the Jews, to justify the measures taken and to be taken against them, and to subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected . . . . By them Dietrich consciously implemented, and by furnishing the excuses and justifications, participated in, the crimes against humanity regarding Jews . . . .\(^ {291}\)

\(^{290}\) *Id.* ¶ 20.

\(^{291}\) *Id.* 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
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, Dietrich 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 opinion from Canada, strongly affirm this. Ruggui stresses that, in the context of a government's widespread or systematic attack against a civilian population, government-uttered, encouraged or sanctioned speech that singles out and attacks the victim population constitutes a deprivation of rights, including liberty and humanity. The words are not merely a medium through which to encourage others to perpetrate acts of violence independent from the words. The words themselves, in that context, effectuate the violation.

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. This hate speech generated fear and hatred that created the conditions for extermination and genocide in Rwanda. It gave rise to liability for persecution before the ICTR in much the same way as Dietrich's press directives did at Nuremberg.

Similarly, in Mugesera v. Canada, the Canadian Supreme Court held that hate speech may constitute persecution, even if it does not result in the commission of acts of violence. 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.

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 Kordic takes a contrary position. As was demonstrated in the previous section, though, Kordic is deeply flawed.

292 See supra notes 76-86 and accompanying text.
293 Id.
294 Id.
295 See supra notes 87-100 and accompanying text.
296 Id.
297 See supra notes 130-39 and accompanying text.
298 Id.
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 *Kordic* 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." But the indictment did not specify a single speech supporting the charge. The judgment alludes to not one speech the prosecution specifically argued supported the count. Paragraph 522 of the judgment references certain statements made by Kordic in connection with various events and meetings. But they are not characterized as the basis for the persecution count (the subsection containing this paragraph is generically titled "The Role of Dario Kordic"). However, Paragraph 523 provides a defense characterization of Kordic's speeches as never ethnically inflammatory and never derogatory toward other ethnic groups. Curiously, there is no prosecution rebuttal described or considered by the Chamber. 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. 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.

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*, explicitly and prominently cited by the ICTR decisions, which suggest speech not calling for imminent action may constitute persecution. 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. From that,
the Kordic Chamber suggests, one could conclude that only direct and public incitement to commit genocide was chargeable as a speech crime.\textsuperscript{310} Unfortunately, the Kordic Chamber has 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 1994's widespread and systematic attack against the civilian population in Rwanda.\textsuperscript{311} The ICTR's decision made it clear that Ruggiu's criminal liability was not based exclusively on direct calls for violence.\textsuperscript{312} Inexplicably, the Kordic judgment does not even reference Ruggiu.

The Kordic judgment is internally inconsistent too. As noted previously, the opinion emphasizes the importance of considering acts of alleged persecution cumulatively and in context.\textsuperscript{313} 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.\textsuperscript{314} 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.\textsuperscript{315} 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 Kordic Chamber noted that CAH-persecution "encompasses both bodily and mental harm and infringements upon individual freedom."\textsuperscript{316} 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 Kordic Chamber's end-analysis on this issue\textsuperscript{317} is at odds with this foundational observation -- yet another hole in the overall fabric of the decision.

Finally, the Kordic judgment makes much of the described lack of consensus regarding criminalization of hate speech in international instruments and garden-variety statutory provisions in municipal jurisdictions.\textsuperscript{318} From this lack of consensus regarding criminalization, it concludes that hate speech is not as grave as the other enumerated

\textsuperscript{310} Id. It should be noted that the Kordic 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. 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.

\textsuperscript{311} See supra notes 76-86 and accompanying text.

\textsuperscript{312} Id.

\textsuperscript{313} Kordic, Case No. IT-95-14/2-T, ¶ 199.

\textsuperscript{314} Id. ¶ 209.

\textsuperscript{315} Id. ¶ 199.

\textsuperscript{316} Id. ¶ 198.

\textsuperscript{317} See id. ¶ 209.

\textsuperscript{318} Id. ¶ 209 n.272.
CAH offenses and therefore cannot serve as the *actus reus* for CAH-persecution\(^{319}\) (the opposite conclusion of the ICTR Trial Chambers, which found consensus on this issue\(^{320}\)). 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.\(^{321}\) 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.\(^{322}\) So the *Kordic* 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 *Prosecutor v. Brdjanin*\(^{323}\) implicitly rejected the *Kordic* approach. Although not dealing with speech *per se*, the case involved charges of persecution based on non-violent 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.\(^{324}\) And it found that, when viewed in context, each of these acts could be the basis for a persecution charge.\(^{325}\) Significantly, the *Kordic* Chamber found denial of employment analogous to hate speech in concluding that neither of these constituted violation of a fundamental right.\(^{326}\) In holding that denial of employment does constitute such a serious violation when viewed in context, the *Brdjanin* Chamber syllogistically repudiated *Kordic'*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.\(^{327}\) In most respects, it accepts that speech can be the basis for CAH-persecution charges.\(^{328}\) 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.\(^{329}\) It refused to opine whether such violations are as serious as the other enumerated crimes

\(^{319}\) *Id.*

\(^{320}\) See *e.g.*, Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment, ¶¶ 1074-75 (Dec. 3, 2003).

\(^{321}\) See supra notes 254-56 and accompanying text.

\(^{322}\) 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).


\(^{324}\) *Id.*

\(^{325}\) *Id.*


\(^{327}\) See supra notes 145-62 and accompanying text.

\(^{328}\) *Id.*

against humanity. 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 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 CRIMES AGAINST HUMANITY (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 contexts should be considered insufficient to support persecution charges. But what might those situations be?

A. POSSIBLE LIMITATIONS RELATED TO THE CHAPEAU ELEMENTS OF CRIMES AGAINST HUMANITY

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. \^330 Similarly, from a temporal perspective, the attack could be only in its incipient phases. \^331 While such an "emerging" attack might minimally satisfy the chapeau, \^332 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

\^330 See deGuzman, supra note 262, 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.")

\^331 See id. at 17 (referring to liability for "emerging attacks").

\^332 In this regard, it should be noted that the Rome Statute's Elements of Crimes specify a more stringent mental element "[i]n case of an emerging widespread or systematic attack against a civilian population." International Criminal Court, Elements of Crimes, art. 7 intro., U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002).
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 Court's Statute, which can be "non-violent in nature, like imposing a system of apartheid."[^333] 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; it encompasses any mistreatment of the civilian population."[^334] 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."[^335]

The perpetrator of the widespread or systematic attack should also be considered. Regardless of the empirical trend in 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 crimes against humanity.[^336] In *Kunarac*, the defendant was convicted by the ICTY of crimes against humanity 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.[^337]

Even at the ICC, the CAH offense may flow from a State or organizational policy.[^338] But the "organizational" aspect of this requirement has been very liberally interpreted by the ICC. In *Situation in the Republic of Kenya*,[^339] an ICC pre-trial chamber found that the 2007-2008 post-election 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."[^340] 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 organizing their criminal activities . . . ."[^341] This means that a well-organized group of private individuals, not necessarily possessing the attributes of a state, may be the authors 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.

[^337]: *Id.* See also Schabas, *State Policy, supra* note 234, 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.").
[^338]: Rome Statute, *supra* note 11, art. 7(2)(a).
[^341]: *Id.* at 545.
The relationship between the speaker and the general attack must also be taken into account. To prosecute a defendant for CAHy, his act must be "part of" a widespread or systematic attack. This bifurcates into objective and subjective components. With respect to the former, the act must objectively – "by its nature or consequences" – be part of the attack. 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.”

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. 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. 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," deGuzman points out that "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 . . . ." 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. Previous analysis demonstrated that there is a hierarchy in hate speech. All things being equal, general hate speech, not necessarily directed to anyone in particular but denigrating and dehumanizing the victim group, is relatively less serious than harassment.

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343 Id.
344 deGuzman, supra note 262, at 16 (quoting Kunarac, Case No. IT-96-23/1-A, Judgment, ¶ 100).
345 Id.
346 See, e.g., Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgment, ¶ 111 (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, ¶ 254 (March 3, 2000) (holding that mens rea is proven if defendant "took the risk" that his act was part of a widespread or systematic attack).
347 Rome Statute, supra note 11, art. 30(3).
348 deGuzman, supra note 262, at 17.
349 See supra notes 196-209 and accompanying text.
and incitement. In theory, harassment, consisting of verbal attacks aimed directly at members of the victim group, more easily supports persecution charges. Finally, incitement, directed at third-parties and urging them to take action against members of the victim group is the most serious form of hate speech. Even incitement should be parsed as a hate-speech category. Incitement to persecution, for instance, is less serious than incitement to violence. And incitement to violence itself bifurcates into direct and indirect varieties.

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. 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.

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 non-government sponsored or perpetrated widespread or systematic attack against a civilian population. This would be especially true if the attack itself were non-violent, or geographically or temporally attenuated.

C. POSSIBLE SCENARIOS

So, more concretely, what sort of speech connected to civilian-directed non-genocidal 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 militia to support creation of a separate country in that region. 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 break-away 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.\footnote{358}{See deGuzman, supra note 262, at 17.} 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.\footnote{359}{See Texas v. Johnson, 491 U.S. 397 (1989).}

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 \textit{mens rea} requirement might be imposed (intent, instead of mere knowledge).\footnote{360}{See deGuzman, supra note 262, at 17.} Depending on the circumstances, that may be difficult to prove. Similarly, one could imagine a non-violent widespread or systematic attack that consists of, for example, the imposition of a temporary apartheid regime in the region.\footnote{361}{See Rome Statute, supra note 11, art. 7(1)(j) (including apartheid as an enumerated act).} Again, speech uttered in support of such a non-violent 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.\footnote{362}{See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).} Then again, perhaps the speech would seem more 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 \textit{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 civilians disaster relief may satisfy the chapeau requirements for CAH.\footnote{363}{Ford, Failure to Respond, supra note 230, at 255.} 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.

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 too. 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 case, 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.

Kordic 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, where 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 non-advocacy 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.