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The *Prosecutor v. Vojislav Šešelj*: A Symptom of the Fragmented International Criminalisation of Hate and Fear Propaganda

*Mohamed Elewa Badar*¹

Professor of Comparative and International Criminal Law, Northumbria Law School, Northumbria University, Newcastle, UK

mohamed.badar@northumbria.ac.uk

Polona Florijančič

Legal Researcher and Consultant, Slovenia

polona.florijancic@gmail.com

Abstract

In 2016, the ICTY Trial Chamber found one of the greatest hate and fear propagandists of the Yugoslav wars, Dr Vojislav Šešelj, not guilty on all counts of the indictment. A full comprehension of the role the propaganda played was lost and the partial reversal of the judgment at the Appeals Chamber provided little improvement in this regard. Yet the blame does not solely rest with the Chambers but also with the Prosecution and an utterly fragmented law applicable to hate and fear propaganda. This article looks in depth at the *Šešelj* case in order to highlight the many hurdles to effective prosecution, some specific to the case and others symptomatic generally of propaganda trials. It then takes a multi-disciplinary approach in presenting the nature of hate and fear propaganda to suggest a broader way of looking at causality as well as to argue for reform of the current applicable law.

¹ The authors are very grateful to Professor Predrag Dojčinović, Dr. Wibke K. Timmerman, Professor Gregory S. Gordon, Professor Richard Ashby Wilson and Ms Clare Lawson for their meticulous reading of the paper and their most valuable comments and inputs. Special thanks to Dr. Daley Birkett. Earlier versions of this work were presented at Salzburg Law School's Twentieth Anniversary Symposium 'The Sound of the ICL', Salzburg, Austria; The State Council of Egypt, Cairo; Centre for European Law and Internationalisation, University of Leicester, UK; The Egyptian Society of International Law, Egypt; the international conference on 'Hate Propaganda at International Criminal Tribunals', organised by the authors, hosted by Northumbria University and funded by the Society of Legal Scholars (SLS), online at www.northumbria.ac.uk/hpict2020. All online sources included were accessed on 2 January 2020.

Keywords

hate and fear propaganda – incitement to hatred – instigation – causality – crimes against humanity of persecution – right to dignity and security – right to life – preventative function

1 Introduction

Propaganda, in its various forms and manifestations, is as old as recorded history, and its philosophical origins can be traced back to ancient Greece.² It is a deliberate and systematic attempt at shaping perceptions and manipulating the cognitions of the listener in order to direct their behaviour in a way that furthers the intent of the propagandist.³ The intended influence and manipulation distinguish it from dissemination of mere factual information.⁴ As one commentator put nearly fifty years ago, propaganda is: 'one of the most dangerous sources of international friction and war ... [and that] the presence of unrestrained propaganda can sometimes make the difference between peace and war'.⁵ Because of its omnipresence, propaganda has largely come to be accepted as a fact of political life and its most pernicious forms remain inadequately addressed in international criminal law (ICL).

In terms of propaganda that specifically spreads fear and hatred towards a particular out-group in order to foster crimes against its members⁶ there is a wide spectrum of approaches to it offered by a number of international

2 G.S. Jowett and V. O'Donnell, *Propaganda and Persuasion* (7th ed., SAGE Publishing, London, 2019), pp. 48-49; see also J. Kiper, 'How Dangerous Propaganda Works', in P. Dojčinović (ed.), *Propaganda and International Criminal Law: From Cognition to Criminality* (Routledge, Abingdon, 2020), p. 219.

3 Jowett and O'Donnell, *ibid.*, p. 7.

4 E. De Brabandere, 'Propaganda', *Max Plank Encyclopedia of Public International Law*, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e978?prd=OPIL&q=Propaganda>, p. 2.

5 A. Larson, 'The Present Status of Propaganda in International Law', 31 *Law and Contemporary Problems* (1966) 439-451, p. 439.

6 See the 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar', UN Human Rights Council, 39th session, A/HRC/39/64, 12 September 2018, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf, para. 73, noting that 'The Myanmar authorities, including the Government and the Tatmadaw, have fostered a climate in which hate speech thrives, human rights violations are legitimized, and incitement to discrimination and violence facilitated'; see also W.K. Timmermann, *Incitement in International Law* (Routledge, New York, 2015), p. 3.

conventions and existing jurisprudence, but it all fall short of determining its true nature, role and impact in international criminal trials and its position and status in ICL.⁷

Kearney observes how successive judgments by the ad hoc Tribunals have carried continuous analyses and references to the significance of propaganda, in terms of the role of hate speech, censorship and incitement in preparing people for war and in establishing atmospheres of hatred and fear in which emotion, confusion and uncertainty can be exploited in order to further the commission of the most serious and appalling international crimes.⁸ Yet, this condemnation of propaganda rarely translates into a sustained and focused analysis of an individual criminal responsibility for the relevant speech.⁹

Instead of moving forward, the ICTY took a step back in the Šešelj Trial Judgment. Noting that what it considered to be propaganda of a 'nationalist' ideology was not in itself criminal,¹⁰ it proceeded to consider the entirety of the toxic hate and fear propaganda spread by the accused as falling outside the ambit of international criminal responsibility altogether. Thus, the Šešelj trial, which was considered one of the most significant 'propaganda trials' in the recent history of international law, ended ignominiously for the Prosecution with a complete acquittal.¹¹ As noted by Timmermann, the case demonstrates the difficulties associated with charging instigation in relation to acts of public incitement and more generally with the way in which instigation and incitement are currently treated in ICL.¹²

Unsurprisingly, the judgment received an epilogue at the Appeals Chamber (AC) of the UN International Residual Mechanism for Criminal Tribunals (IMCT), which substantially reversed the findings of the Trial Chamber (TC). However, this was hardly sufficient, as only a single speech given in Hrtkovci, out of all of Šešelj's propaganda, was found to be criminal in the end.

7 P. Dojčinović 'Introduction', in Dojčinović (ed.), *Propaganda and International Criminal Law*, *supra* note 2, p. 5; see also M.E. Badar and P. Florijančič, 'Assessing Incitement to Hatred as a Crime against Humanity of Persecution', 24 *International Journal of Human Rights* (2020), DOI: 10.1080/13642987.2019.1671356, 1-30.

8 M. Kearney, 'Propaganda in the Jurisprudence of the ICTY', in P. Dojčinović (ed.), *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes* (Routledge, New York, 2012), p. 231.

9 *Ibid.*

10 *Prosecutor v. Vojislav Šešelj*, Trial Judgment, Case No. (IT-03-67-T), 31 March 2016, para. 300.

11 R.A. Wilson, *Incitement on Trial: Prosecuting International Speech Crimes* (Cambridge University Press, Cambridge, 2017) pp. 8-9.

12 W.K. Timmermann, 'International Speech Crimes following the Šešelj Appeal Judgment', in Dojčinović (ed.), *supra* note 2, pp. 108, 111.

In Section 2, the article first examines how the concept of 'hate speech' has been defined by various international institutions, in the areas of international human rights law as well as international criminal law (ICL). This Section further demonstrates the fragmentation of the law and the lacuna that is still present in terms of international criminalisation of 'hate and fear propaganda' as a particular phenomenon that includes a set of components, which cannot simply be equated with the basic notion of 'hate speech'.

Section 3 analyses the case of Vojislav Šešelj as a case study of the current problems in dealing with hate and fear propaganda at international criminal tribunals. It will delineate the propagandistic activities of Šešelj and demonstrates how the Trial Chamber (TC) failed in understanding the workings of his propaganda while simultaneously being derailed by the fragmentation of the applicable law. The Section will provide a critique of the prosecutorial method in selecting evidence as well as the overly restrictive interpretation of the law by both the TC and AC. The analysis of the Šešelj case is conducted with a view to avoiding mistakes in the future and understanding the underlying legal problems that require a reform of the existing law.

Section 4 takes a multi-disciplinary approach at identifying why the law and its current application at international criminal tribunals fails to approach hate and fear propaganda in an effective manner. It furthermore highlights the necessary shifts in legal perceptions of this phenomenon that would allow more meaningful conclusions in the jurisprudence in line with the findings of experts in the social sciences.

Section 5 assesses the work of the International Law Commission (ILC) on the new draft convention on crimes against humanity (CAH) and the preventative function of international criminal law with the recommendation of adding a new inchoate crime – incitement to CAH. The article concludes with proposing how hate and fear propaganda should be criminalised and adjudicated at the international level.

2 International Law Applicable to Hate and Fear Propaganda

This section will examine briefly the various domestic and international approaches to speech acts broadly termed 'hate speech' from the perspective of human rights and criminal law. It will further demonstrate the fragmentation of the law and the lacuna that is still present in terms of international criminalisation of 'hate and fear propaganda' as a particular phenomenon that includes a set of components, which cannot simply be equated with the basic notion of 'hate speech'.

2.1 *Hate Speech and Hate and Fear Propaganda*

Various speech acts¹³ can cause or strengthen antagonism against the members of particular groups.¹⁴ ‘Hate speech’ is a term that most broadly captures these acts and virtually all states apart from the United States have accepted some sort of national, regional or international restrictions on it since the 1960s.¹⁵ Yet the definitions vary and there is no consensus on what exactly constitutes hate speech. The threshold factor of any hate speech is that it targets a group, or an individual as a member of a group (hereinafter: out-group); usually based on nationality, ethnicity, religion or race, less commonly on gender, gender identity or sexual orientation and sometimes on veteran status, physical ability or suffering from serious diseases.¹⁶ What is understood by the term hatred, and how to legally outline it, is less clear. An earlier draft of General Comment No. 34 by the Human Rights Committee (HRC) of the International Covenant on Civil and Political Rights (ICCPR) defined hatred as ‘intense emotions of opprobrium, enmity and detestation towards a target individual or group’ and considered that the expression in question had to convey such emotions.¹⁷ However this approach was ultimately dropped, perhaps because it would exclude extreme speech that is not explicitly accompanied by such emotions.¹⁸ During the *travaux préparatoires* of the ICCPR Art. 20(2) an early

13 On ‘speech acts’ see generally J. Austin, *How to Do Things with Words* (Harvard University Press, Cambridge, 1962), p. 108: Austin distinguishes between *locutionary acts* roughly equivalent to utterances of sentences with a certain sense and reference (i.e. meaning); *illocutionary acts* corresponding to utterances which inform, order, warn, undertake etc.; and *perlocutionary acts* which bring about or achieve by utterance, for example convincing, persuading, deterring or misleading. See also J. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, Cambridge, 1969). Dojčinović uses their work as the foundation for determining words/phrases/utterances as ‘speech acts’, a concept applicable in legal discourse. Wilson adopted the approach in his monograph *Incitement on Trial*, *supra* note 11. Most recently, see anthropologist and cognitive scientist Kiper, *supra* note 2, p. 219; and legal theorist and cognitive linguist P. Dojčinović, ‘In the Mind of the Crime’, in Dojčinović (ed.), *supra* note 2, p. 196, fn 38.

14 Timmermann, *supra* note 6, p. 17.

15 E. Heinze, ‘Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech’, in I. Hare and J. Weinstein (eds.), *Extreme Speech and Democracy* (Oxford University Press, Oxford, 2009), p. 184.

16 A.F. Sellars, ‘Defining Hate Speech’, Berkman Klein Center Research Publication No. 2016-20 papers.ssrn.com/sol3/papers.cfm?abstract_id=2882244.

17 Human Rights Committee, Draft General Comment No. 34, U.N. Doc. CCPR/C/GC/34/CRP.2 (2010) hrlibrary.umn.edu/gencomm/hrcom34.html, para. 53.

18 J. Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge University Press, Cambridge, 2016), p. 173. Temperman describes how this definition was influenced by the definition of hatred in

text proposed by France included advocacy of hostility that constituted an incitement to violence or hatred.¹⁹ Some delegates however expressed that incitement to hatred was not easy to define as a penal offence²⁰ nor was it easy to legally interpret the word 'hatred' in general and thus suggested its removal.²¹ The final wording that qualifies advocacy of hatred with other necessary outcomes (see below) has allowed the HRC to identify hatred with the element of incitement in its case law.²² For example in the case of *Faurisson v. France*, Rajssoomer Lallah accepted the conclusion of the French courts that the statements were 'of such a nature as to raise or strengthen anti-Semitic tendencies' and for that reason they amounted to hatred.²³

Some definitions of hate speech describe speech that promotes inferiority of the target group or the denial of the personhood of target group members²⁴ or their stigmatisation with qualities widely regarded as undesirable in order

Art. 12(i) of the NGO, Article XIX, *Camden Principles on Freedom of Expression and Equality* (April 2009), which in turn was influenced by a Canadian Supreme Court decision in *R. v. Keegstra* [1990] 3 S.C.R. 697, 13 December 1990, at 697 (Can.), para. 1, where the Court held that the word 'hatred' under the Canadian criminal hate speech prohibition (s. 319(2) Criminal Code of Canada 1985) refers to 'only the most severe and deeply felt form of opprobrium'. The Court further speaks of 'extreme feelings of opprobrium and enmity against a racial or religious group' (*R. v. Keegstra*, section V). Note that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression employed a similar approach to the draft General Comment. In his Report on Hate Speech and Incitement to Hatred he defined hate as 'a state of mind characterized as intense and irrational emotions of opprobrium, enmity and detestation towards the target group'. He considered that a severe and deeply felt form of opprobrium should be present for the application of ICCPR Art.20(2) and that it should be assessed based on the severity of what is said, the harm advocated, magnitude and intensity in terms of frequency, choice of media, reach and extent. UN General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, (2012), (UNGA, Report A/67/357, 2012), paras. 44(a), 45(a).

19 Text proposed by the representative of France [Any advocacy of national, racial or religious hostility that constitutes an incitement to violence or hatred shall be prohibited by the law of the State.] UN Economic and Social Council, Commission on Human Rights, Sixth Session, Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles, E/CN.4/365, (1950) (UN, E/CN.4/365) 57.

20 *Ibid.*, para. 2 (United Kingdom).

21 UN Economic and Social Council, Commission on Human Rights, Sixth Session, E/CN.4/SR.174, (1950) (UN, E/CN.4/SR.174) para. 38 (Lebanon).

22 Temperman, *supra* note 18, pp. 168-172.

23 Human Rights Committee, *Faurisson v. France*, No. 550/1993, Individual opinion, Lallah (concurring), para. 9.

24 M.J. Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story', 87 *Michigan Law Review* (1989) 2320-2381, p. 2358.

to be seen as an undesirable presence and a legitimate object of hostility.²⁵ Other definitions more simply include speech that is abusive, humiliating, offensive or intimidating.²⁶ The Rabat Plan of Action (RPA), which considers the distinction between freedom of expression and incitement to hatred, looks to see if the speech is 'provocative and direct', and asks European Union (EU) member states to look to the 'nature of the arguments employed'.²⁷

The broader definitions of hate speech include speech that does not necessarily incite or instigate a further harm apart from hatred itself. Thus the Council of Europe and the EU have produced at various times by various bodies widely differing and broad definitions that mostly include the instruction to member States to criminalise either incitement, promotion, justification, the spreading of or subjection to 'hatred' in itself.²⁸

On the contrary, *qualified* hate speech is meant to elicit some sort of action from the listener. Most notably Article 20(2) of the ICCPR orders States parties to adopt incitement laws not to ban hate speech for the sake of banning hatred but only if such advocacy incites discrimination, hostility or violence, i.e. forms of harm that are 'contingent' and 'measurable'.²⁹ An earlier draft sought to prohibit 'incitement to hatred *and* violence', i.e. incitement to violent acts only,

25 B. Parekh, 'Is There a Case for Banning Hate Speech?', in M. Herz and P. Molnar (eds.), *The Content and Context of Hate Speech* (Cambridge University Press, Cambridge, 2012) pp. 40–41.

26 United Kingdom refers to speech that is 'threatening, abusive, or insulting' (Public Order Act 1986, para. 18(1)); Australia refers to speech that is likely to 'offend, insult, humiliate, or intimidate others' (Racial Discrimination Act 1975, para. 18(c)(1)).

27 *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* (Rabat, 5 October 2012), www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx, para. 22. The Rabat Plan of Action considers the distinction between freedom of expression and incitement to hatred. It was adopted by a group of experts and brings together the conclusions and recommendations of a series of workshops organised by the Office of the High Commissioner for Human Rights (OHCHR) in 2011. It is included in Appendix to an Addendum to an annual report of the High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013. For its significance see Sejal Parmar, 'The Rabat Plan of Action: A Critical Turning Point in International Law on "Hate Speech"', in P. Molnár (ed.), *Free Speech and Censorship around the Globe* (Central European University Press, Budapest, 2015) 211–231, p. 213: claiming that 'states and non-state actors, particularly media and civil society organizations, should rally behind the RPA as a legitimate and credible framework for responding to diverse challenges of hate speech around the world'.

28 See ECtHR, *Gündüz v. Turkey*, App no. 35071/97 (ECtHR, 4 December 2003), para. 40. Committee of Ministers, Recommendation No. R (97) 20 on 'Hate Speech' (adopted on 30 October 1997). Other documents adopted by the Committee of Ministers emphasise specific contexts.

29 R. Post, 'Hate Speech', in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford University Press, Oxford, 2009) pp. 123–38, 127, 133–5.

however the final wording also now includes incitement to discrimination or hostility without a need for violence.³⁰ The definitions of the terms remain somewhat of an enigma, as the HRC General Comment 34 is exceedingly summary, more detailed provisions in early drafts having been dropped.³¹

Nevertheless, as Schabas notes, discrimination is a 'familiar concept in international human rights law' thoroughly addressed in Articles 2 and 26 of the ICCPR.³² It can be understood as any distinction, exclusion, restriction or preference of different categories of people, the list of which keeps expanding over time,³³ with the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.³⁴ In terms of the other two 'harms' referred to in Article 20(2), the Special Rapporteur described 'violence' as 'the use of physical force or power against another person, or against a group or community, which either results in, or has a high likelihood of resulting in, injury, death psychological harm, maldevelopment or deprivation'.³⁵ On the other hand the term 'hostility' was described by the Rapporteur as 'a manifestation of hatred beyond a mere state of mind'³⁶ in the form of actual harmful acts.³⁷ The term is nevertheless vague and can blur the distinction between qualified and unqualified hate speech. For example, the Camden Principles on Freedom of Expression and Equality,³⁸ a set of principles developed by the non-governmental organisation Article XIX,³⁹ equate hostility with hatred.⁴⁰

30 See Art. 26 of the Commission on Human Rights draft cited in W.A. Schabas, *Nowak's Commentary on the International Covenant on Civil and Political Rights* (Engel, Kehl, 2019) 576-591, p. 583.

31 Schabas, *ibid.*

32 *Ibid.*, p. 587.

33 UN General Assembly, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, (A/74/486) (2019), para. 8.

34 NGO Article XIX, *Prohibiting Incitement to Discrimination, Hostility or Violence*, Policy Brief, (December 2012) www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf, 19; UN Special Rapporteur on Freedom of Expression, *Report on Hate Speech and Incitement*, para. 45(d) contains a similar definition.

35 UN General Assembly, Sixty-seventh session, *Promotion and Protection* (A/67/357), (2012), para. 43.

36 *Ibid.*, para. 44.

37 UN Special Rapporteur on Freedom of Expression, *supra* note 34, para. 45(e).

38 See the Camden Principles on Freedom of Expression and Equality, April 2009, www.article19.org/wp-content/uploads/2009/04/Camden-Principles-ENGLISH-web.pdf.

39 For more on the work of the international NGO Article XIX see www.article19.org.

40 NGO Article XIX, *supra* note 34, Principle 12(1)(i) 'the terms 'hatred' and 'hostility' refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group'.

Even narrower definitions of hate speech than that in Article 20(2) of the ICCPR demand not solely incitement but instigation of the listener and thus a causal link with the discrimination, hostility, violence, or other harm subsequently committed, which is what is mainly the trend in ICL, described in detail below. Approaches in the middle, require the likelihood of subsequent harm occurring, in which case context is essential in defining such likelihood. The European Court of Human Rights (ECtHR) has at times used a multifaceted test that takes into account a variety of factors including the likelihood and seriousness of the consequences of a particular expression and the intention of the speaker, while at other times it has disregarded this for an open-ended and context based so-called *democratic necessity* approach.⁴¹

From the *travaux préparatoires* of ICCPR Article 20(2) one can observe that the term 'hate propaganda' was often used throughout the drafting debates and when the term 'advocacy' was introduced, some delegates maintained that it should be understood as 'systematic and persistent propaganda'⁴² and others that it must mean 'repeated and insistent expression'.⁴³ Interestingly, paragraph 20(1) still uses the term *propaganda* for war while there were no efforts to define it during the drafting.⁴⁴ Delegates in the Third Committee indicated that the term had already been employed in national and international legal norms, in various General Assembly resolutions and in the judgment of the International Military Tribunal.⁴⁵ The intent of the drafters of Art. 20(1) was to prohibit propagandistic incitement roughly comparable to that practised in the Third Reich.⁴⁶ Schabas thus understands propaganda in this context to mean 'intentional, well-aimed influencing of individuals by employing various channels of communication to disseminate, above all, incorrect or exaggerate allegations of fact... negative or simplistic value judgments whose intensity is at least comparable to that of provocation, instigation or incitement'.⁴⁷

Similarly, in terms of advocacy of hatred, the reference to Nazi views and Nazi-like propaganda was obvious. A text proposed by the representative of the Soviet Union, explicitly referred to fascist-Nazi views and the propaganda

41 S. Sottiaux, 'Leroy v France: Apology of Terrorism and the Malaise of the European Court of Human Rights' free speech jurisprudence', 3 *European Human Rights Law Review* (2009) 419-420, 425.

42 E/CN.4/SR.174, *supra* note 21, para. 37 (Lebanon).

43 UN A/C.3/SR.179, para. 2.

44 Schabas, *Nowak's Commentary*, *supra* note 30, p. 580.

45 A/C.3/SR. 1078, para 12 as cited in M.J. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, Dordrecht, 1987) 408.

46 Schabas, *supra* note 30, p. 581.

47 *Ibid.*

of racial and national superiority.⁴⁸ Mr. Jevremović representing Yugoslavia stated that Nazi ideas had been the cause of the death of two million of his countrymen and that the people of the region 'knew what was meant by incitement to hatred'.⁴⁹ He further noted that there were already laws in Yugoslavia prohibiting such incitement and that it was necessary to introduce the idea into the covenant.⁵⁰

Despite this, the highly dangerous phenomenon of what can best be characterised as *repetitive and systematic hate and fear propaganda* cannot simply be equated with any subset of hate speech but rather includes a comprehensive set of specific components. As with all propaganda, it is designed to last longer than a single utterance or speech act.⁵¹ It is systematic and aimed at defining the very 'level of reality on which people think, discuss, and act'.⁵² The most precarious methods of hate propaganda 'are those that intersect with hate media, which stigmatizes and demonizes an out-group'.⁵³ This is equally true of hate propaganda used by governments and other organised groups as part of a systematic process of persecution to prepare the public to commit atrocities against other members of the society.⁵⁴ Crucially, it furthermore not only characterises the out-group in highly negative stereotypical terms (hate propaganda) but also as a threat to the survival or well-being of the in-group (fear propaganda), which in turn, is proposed to be managed with a 'solution' ranging from discrimination to physical separation or even annihilation.⁵⁵ Thus

48 UN Secretary General, *Compilation of the comments of Governments on the draft International Covenant on Human Rights and on the proposed additional articles; memorandum / by the Secretary-General* (E/CN.4/365) (1950). Text proposed by the representative of the Union of Soviet Socialist Republics [The propaganda in whatever form of fascist-Nazi views and the propaganda of racial and national superiority, hatred and contempt shall be prohibited by law.] 57.

49 E/CN.4/SR.174, *supra* note 21, para. 41 (Yugoslavia).

50 *Ibid.*

51 Dojčinović, 'Introduction', *supra* note 7, p. 7.

52 H. Gerth, 'Crisis Management of Social Structures: Planning, Propaganda and Societal Morale', 5 *International Journal of Politics, Culture and Society* (1992) 337-359, p. 338.

53 Kiper, *supra* note 2, p. 219. For instance, the military establishment in Myanmar has used Facebook to incite widespread violence against the Rohingya Muslim minority a fact that was admitted by Facebook, www.bbc.co.uk/news/world-asia-46105934.

54 UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, (A/HRC/39/CRP.2) 17 September 2018, noting that 'The Myanmar authorities, including the Government and the Tatmadaw, have fostered a climate in which hate speech thrives, human rights violations are legitimized, and incitement to discrimination and violence facilitated'. See also Timmermann, *supra* note 6, p. 3.

55 A. Oberschall, 'Propaganda, hate speech and mass killings', in Dojčinović (ed.), *supra* note 8, pp. 171, 174; J. Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (Oxford University Press, Oxford, 2002); Timmermann, *ibid.*, pp. 17-18, 29.

'hate speech' and 'fear speech' are components of distinct but corresponding conduct geared towards achieving the same ends and goals.⁵⁶

Oberschall explains how 'the public makes sense of public affairs through a cognitive frame that establishes the truth value of perceptions, beliefs, opinions, attitudes, and action norms'.⁵⁷ Threat messages in the mass media are the most effective in switching the public's cognitive frame of peaceful inter-group relations to a crisis frame justifying coercion and violence.⁵⁸ This phenomenon, also called 'paranoia propaganda', consists of fostering delusions of danger from external enemies and traitors at home and of complete dependency upon leadership, party and ideology.⁵⁹ Its effects have been recognised in international criminal jurisprudence, for example in *Nahimana et al.* where most references to fear 'constitute inferences and links between the evidence of *fear propaganda* and the commission and perpetration of a wide range of physical crimes'.⁶⁰ Referring to the newspaper *Kangura*, the TC stated that '[t]hrough *fear-mongering* and *hate propaganda*, [it] paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy'.⁶¹ Furthermore, in *Brđanin*, the TC addressed the combination of spreading fear and hatred by stating the following:

By his public statement the Accused created *fear* and *hatred* between Bosnian Serbs on the one hand and Bosnian Muslims and Bosnian Croats on the other hand, inciting the ethnic groups against each other. The Accused repeatedly used derogatory language to refer to non-Serbs, calling them 'Balijs' (Muslims), 'Ustaša' (Croats), 'Šiptar' (Albanians), 'vermin', 'scum', 'infidel' and second rate people.⁶²

As noted by Predrag Dojčinović, 'through the distinct combination of fear, hate, derogatory and dehumanising, and indirect culture-specific references

56 Dojčinović, 'Introduction', *supra* note 7, p. 7.

57 A. Oberschall, *Vojislav Šešelj's Nationalist Propaganda: Contents, Techniques, Aims and Impacts, 1990-1994*, An Expert Report for the UN International Criminal Tribunal for the former Yugoslavia, exhibit no. P00005, (4 January 2005), p. 44, www.baginist.org/uploads/1/0/4/8/10486668/vojislav_sesels_nationalist_propaganda_contents_techniques_aims_and_impacts.pdf.

58 *Ibid.*, p. 45.

59 R. Cole (ed.), *The Encyclopedia of Propaganda* (Routledge, New York, 1998) 566.

60 Dojčinović, 'Introduction', *supra* note 7, pp. 8-12.

61 *Prosecutor v. Ferdinand Nahimana et al*, Trial Judgment, Case No. (ICTR-99-52-T), 3 December 2003, para. 950, emphasis added.

62 *Prosecutor v. Radoslav Brđanin*, Trial Judgment, Case No. (IT-99-36-T), 1 September 2004, para. 325 (emphasis added).

and types of linguistic communication, the concept of *fear* is placed at the centre of Brđanin's and other JCE members' propagandistic conduct'.⁶³

Hate and fear propaganda furthermore rest on a number of persuasion techniques to speed up this process, such as relentless repetition of its never changing narrative; speaking in the voice of trusted authorities including God,⁶⁴ the majority of the in-group, ancestors, history, national heroes, and experts;⁶⁵ and employing falsehoods, from a selective omission of facts, deliberate mischaracterisation of events and adversaries to out and out fabrication and lies. According to Oberschall, it is the latter that is the essential element of hate propaganda.⁶⁶ An often-used example are accusations in a mirror, 'a rhetorical practice in which one falsely accuses one's enemies of conducting, plotting, or desiring to commit precisely the same transgressions that one plans to commit against them'.⁶⁷

Despite the far broader and more complex nature of such propaganda, current international criminalisation is limited mainly to incitement of violence, leaving out much of the hate and fear propaganda surrounding it. Judgments that have dared to include it into the criminalisation of hate speech outside strict incitement and instigation have been reversed in later jurisprudence.

2.2 *International Criminalisation of Hate Speech and Hate and Fear Propaganda*

Neither hate speech nor systematic hate and fear propaganda are internationally criminalised as such, although they can in part constitute international crimes. The concept of propaganda is furthermore often used in the jurisprudence to describe 'behavioural patterns and forms of intent in a variety of ideological, political and military, individual or collectively coordinated efforts'.⁶⁸

63 Dojčinović, 'Introduction', *supra* note 7, p. 10.

64 A propaganda technique which has been successfully employed by a terrorist organisation that named itself the Islamic State (ISIS), see M.E. Badar, 'The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)', 16 *International Criminal Law Review* (2016) 361-411; M.E. Badar and P. Florijančič, 'The Cognitive and Linguistic Implications of ISIS Propaganda: Proving the Crime of Direct and Public Incitement to Commit Genocide', in Dojčinović (ed.), *supra* note 2, pp. 27-62.

65 Oberschall refers to this as 'testimonial persuasion technique' and the use of *vox populi*, *vox dei*, see Oberschall, *supra* note 57, pp. 172-173.

66 *Ibid.*, p. 173.

67 K.L. Marcus, 'Accusation in a Mirror', 43 *Loyola University Chicago Law Journal* (2012) 357-394, p. 359; noting that 'the basic idea of [Accusation in a mirror] is deceptively simple: propagandists must 'impute to enemies exactly what they and their own party are planning to do'.

68 Dojčinović, 'Introduction', *supra* note 7, p. 4.

'Incitement to hatred' is the closest law-based concept that has been dealt with in international criminal jurisprudence since the International Military Tribunal at Nuremberg (IMT) considered the cases against Nazi propagandists, Julius Streicher and Hans Fritzsche. The former was found guilty of CAH while Fritzsche, was acquitted. A third propagandist, Otto Dietrich, was prosecuted and also convicted under Control Council Law No. 10 in the *Ministries* case before the Nuremberg Military Tribunal (NMT).

Since then, the Convention on the Prevention and Punishment of the Crime of Genocide (1948) established the international crime of direct and public incitement to commit genocide.⁶⁹ This was incorporated verbatim into the statutes of the ICTY (1993) and the ICTR (1994), while the ICC Statute (2002) established in its 'General Part', in respect of the crime of genocide, individual criminal responsibility for anyone who directly and publicly incites others to commit said crime.⁷⁰

On the other hand, publicly uttered hate propaganda falling short of direct incitement to commit genocide was not criminalised in any of the statutes. In fact, during the drafting of the Rome Statute, Roger Clark and a few others suggested including incitement to all four major crimes, however the proposal gained little traction.⁷¹ Strongly opposed to the idea, some delegations even felt that incitement as a specific form of complicity in genocide should not be included in the 'General Part' of the Statute but only in the specific provision on the crime of genocide (Article 6) in order to underline that incitement was *not* recognised for other crimes.⁷² Yet such incitement is covered by several forms of complicity.⁷³ In terms of the Rome Statute, it is covered by *soliciting*⁷⁴ and *inducing*.⁷⁵ Furthermore under the ICTY and ICTR Statutes speech acts

69 Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277, Art. 3(c).

70 ICTY Statute, Article 3(c); ICTR Statute, Article 2(3)(c); ICC Statute, Article 25(3)(e).

71 G.S. Gordon, *Atrocity Speech Law: Foundation, Fragmentation, Fruition* (Oxford University Press, Oxford, 2017) p. 375, fn. 32 (e-mail from R. Clark, Board of Governors Professor of Law, Rutgers Law School, to G.S. Gordon (9 Aug. 2016).

72 K. Ambos, 'Article 25: Individual Criminal Responsibility', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed., CH-Beck/Hart/Nomos, Baden-Baden/Munich/Oxford, 2016) p. 1016.

73 ICC Statute, Art. 25(3).

74 According to Section 5.02 (1) of the United States Model Penal Code, 'soliciting' entails 'urging, advising, commanding, or otherwise inciting another to commit a crime'. Inducing entails the 'enticement or urging of another person to commit a crime' American Law Institute, *Model Penal Code and Commentaries* (The American Law Institute, Philadelphia 1985).

75 According to R. Clark, *soliciting*, *inducing* and *inciting* seem to be synonyms in the Rome Statute. R. Clark, 'Lexsitur Lecturer: ICC Statute Article 25', Centre for International Law Research and Policy, www.cilrap-lexsitur.org/lectures/25-3-d-i/25-clark.

can fall under *instigation* while all three Statutes establish individual criminal responsibility for *ordering* and *aiding and abetting*.⁷⁶ Under Article 25(3)(d) of the Rome Statute such acts can also lead to what has been described as a 'residual form of accessory liability' since it establishes 'the lowest objective threshold for participation' and thus constitutes a lower level of blameworthiness than other liability theories.⁷⁷ While this mode of liability is based on the 'common purpose theories' from which the ICTY established the joint criminal enterprise (JCE) doctrine⁷⁸ it nevertheless differs from the latter doctrine and is unprecedented in ICL.⁷⁹ It applies to a person who intentionally contributes to a group crime, either with the aim of furthering the criminal activity or criminal purpose of the group or in the knowledge of the intention of the group to commit the crime. Yet membership of the person in the group or the existence of an agreement between the person and the group are irrelevant as it is rather the *intentional contribution* that is the basis of responsibility. The *mens rea* requirement reshapes part (d) into a version of the crime of joining a conspiracy, which is a crime based on individual responsibility, arguably formulated this way to overcome the collective responsibility implicit in the variations of JCE, particularly JCE III.⁸⁰

Dojčinović notes that 'any effective propagandistic campaign at the leadership level in modern times must be an enterprise and not merely a personal

76 ICTY Statute, Art. 7; ICTR Statute, Art. 6(1).

77 Situation in the DRC, *Prosecutor v. Germain Katanga*, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/04-01/07, Trial Chamber Judgment, 7 March 2014, para. 1683; Situation in DRC, *Prosecutor v. Thomas Lubanga*, Decision on the confirmation of charges, Case no. (ICC-01/04-01/06), 29 January 2007, para. 337; Situation in the Republic of Kenya, *Prosecutor v. William Ruto, Henry Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges, Case No. (ICC-01/09-01/11), 23 January 2012, para. 354. *see contra*: Marjolein Cupido, 'Common Purpose Liability Versus Joint Perpetration: A Practical View on the ICC's Hierarchy of Liability Theories' 29 *Leiden Journal of International Law* (2016) 897-915.

78 *Brđanin* Trial Judgment, *supra* note 62, paras. 80, 323-32; *Prosecutor v. Karadžić*, Trial Judgment, Case No. (IT-95-5/18-T), 24 March 2016, para. 347; *Prosecutor v. Popović et al*, Trial Judgment, Case No. (IT-05-88-T), 10 June 2010, paras. 1912-21.

79 K. Ambos, 'The ICC and Common Purpose: What Contribution is Required under Article 25(3)(d)?', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements* (Oxford University Press, Oxford, 2015) p. 592.

80 G. Fletcher, *The Grammar of Criminal Law – Volume II International Criminal Law* (Oxford University Press, Oxford, 2019) p. 281; For a critique of JCE III in the ICTY jurisprudence, *see* M.E. Badar, 'Just Convict Everyone!' From Tadić to Stakić and Back Again', 6 *International Criminal Law Review* (2006) 293-302.

attempt at instigating groups and individuals to commit a crime'.⁸¹ He thus finds the concept of *conspiracy to commit a crime* or the corresponding doctrine of JCE to best reflect this phenomenon that encompasses both a *collective intent* and a *common objective* and provides for the liability both of the inciter/instigator and the liabilities of the incited/instigated.⁸²

Importantly, for the establishment of liability in these instances, a causal link is necessary between the speech and subsequent crimes committed,⁸³ while such a link is not necessary in terms of incitement to genocide.⁸⁴ JCE liability requires that the act or omission had a 'significant' contribution or effect on subsequent crimes, while aiding and abetting, instigating, soliciting and inducing, ordering and planning, all require a higher threshold, i.e. a 'substantial' effect or contribution.⁸⁵ There are indications however, that the

81 Dojčinović, 'Introduction', *supra* note 7, pp. 1, 7.

82 *Ibid.*, p. 10. 'Conspiracy' is both an inchoate offence and a complicity doctrine (a basis for holding a person accountable for the *consummated* offences of another). A common law conspiracy is an agreement, express or implied, between two or more persons to commit a criminal act or series of criminal acts, or to accomplish a legal act by unlawful means. It has been frequently prosecuted particularly in the United States but more recently courts and scholars called for its reform or abolition, see Joshua Dressler, *Understanding Criminal Law* (6th ed., LexisNexis Matthew Bender, 2012) pp. 421-422.

83 Apart from conspiracy to commit genocide, which is an inchoate crime, see Art. 4(3)(b) of the ICTY Statute; Art. 111(b) of the Genocide Convention.

84 *Prosecutor v. Ferdinand Nahimana et al*, Appeal Judgment, Case No. (ICTR-99-52-A), 28 November 2007, para. 678 'the crime of direct and public incitement to commit genocide is an inchoate offence, punishable even if no act of genocide has resulted therefrom. This is confirmed by the *travaux préparatoires* to the Genocide Convention, from which it can be concluded that the drafters of the Convention intended to punish direct and public incitement to commit genocide, even if no act of genocide was committed, the aim being to forestall the occurrence of such acts'.

85 For aiding and abetting see, *Prosecutor v. Duško Tadić*, Appeal Judgment, Case No. (IT-94-1-A), 15 July 1999, para. 229 (iii); *Prosecutor v. Zlatko Aleksovski*, Appeal Judgment, Case No. (IT-95-14/1-A), 24 March 2000, para. 164; *Prosecutor v. Mitar Vasiljević*, Appeal Judgment, Case No. (IT-98-32-A), 25 February 2004, para. 102(i); *Prosecutor v. Moinina Fofana and Aliou Kondewa (the CDF Accused)*, Appeal Judgment, Case No. (SCSL-04-14-A), 28 May 2008, paras. 52, 71, 75, 84; *Prosecutor v. Naser Orić*, Appeal Judgment, Case No. (IT-03-68-A), 3 July 2008, para. 43; *Prosecutor v. Tharcisse Muvunyi*, Appeal Judgment, Case No. (ICTR-2000-55A), 29 August 2008, para. 79; *Nahimana* Appeal Judgment, *supra* note 84, paras. 482, 672, 934; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeal Judgment, Case No. (IT-95-13/1-A), 5 May 2009, para. 81; Situation in the DRC, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, Case No. (ICC-01/04-01/10), 16 December 2011, para. 279; Situation in the DRC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, Case No. (ICC-01/04-01/06-2842), 14 March 2012, para. 997.

thresholds in the ICC Statute may be interpreted lower than this. The aiding and abetting definition includes the language ‘or otherwise assists’ that may simply constitute an example of assistance, and perhaps a lower threshold than ‘substantial’ contribution.⁸⁶ Furthermore, while certain decisions required a ‘substantial contribution’⁸⁷ others did not.⁸⁸ The *Ongwen* and *Al Mahdi* confirmation of charges decisions specifically rejected the existence of any threshold as did the Trial Chamber in *Bemba*.⁸⁹ The latter noted that the ILC Draft Code Article 2(3)(d) envisioned individual criminal responsibility for anyone who knowingly aids, abets or otherwise assists, directly and *substantially*, in the commission of the crime.⁹⁰ The fact that ‘*substantially*’ vanished from the final text, indicates that such a standard was likewise intentionally removed.⁹¹ Several scholars have expressed their disagreement with this approach, insisting on a substantial contribution or at least some sort of minimal threshold.⁹² However, the *Bemba* Appeal Judgment confirmed that the ICC

86 C.B. Mahony, ‘Make the ICC Relevant: Aiding, Abetting, and Accessorizing as Aggravating Factors in Preliminary Examination’, in M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examination – Volume 11* (Torkel Opsahl Academic EPublisher, Brussels, 2018) 200.

87 *Mbarushimana* Confirmation of Charges, *supra* note 85, para. 279; *Lubanga* Trial Judgment, *supra* note 85, para. 997; *Ruto, Kosgey and Sang*, Decision on the Confirmation of Charges, *supra* note 77, para. 354.

88 Situation in the Republic of Côte d’Ivoire, *Prosecutor v. Charles Blé Goudé*, Decision on the Confirmation of Charges, Case No. (ICC-02/11-02/11-186) 11 December 2014, para. 167; Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo, et al.*, Decision on the Confirmation of Charges, Case No. (ICC-01/05-01/13-749), 11 November 2014, para. 35.

89 Situation in Uganda, *Prosecutor v. Dominic Ongwen*, Decision on the Confirmation of Charges, Case No. (ICC-02/04-01/15-422-Red), 23 March 2016, para. 43; Situation in the Republic of Mali, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on the Confirmation of Charges, Case No. (ICC-01/12-01/15-84-Red), 24 March 2016, para. 26. Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba et al.*, Trial Judgment, Case No. (ICC-01/05-01/13-1989), 19 October 2016, paras. 93-95.

90 UN, International Law Commission, 48th session, Draft Code of Crimes against the Peace and Security of Mankind with commentaries (1996) (*Yearbook of the International Law Commission*, 1996, vol. 11, Part Two).

91 *Bemba* Trial Judgment, *supra* note 89, para. 93; see also W.A. Schabas, *An Introduction to the International Criminal Court* (4th ed., Cambridge University Press, Cambridge, 2011), 228; G. Werle and F. Jessberger, *Principles of International Criminal Law* (3rd ed., Oxford University Press, Oxford, 2014) pp. 216-217, fn. 298.

92 M.J. Ventura, ‘Aiding and Abetting’, in J. de Hemptinne *et al.* (eds.), *Modes of Liability in International Criminal Law* (Cambridge University Press, Cambridge, 2019) pp. 219-223; A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary – Volume I* (Oxford University Press, Oxford, 2009) p. 801; E. van Sliedregt, *Individual Criminal Responsibility*

was not bound by the 'substantial contribution' standard and that the *actus reus* of Article 25(3)(c) is fulfilled when the accused's actions have 'an effect', i.e. they facilitate or further the commission of the crime.⁹³ This was also reflected in one of the majority reasonings of the Decision acquitting Mr Laurent Gbagbo and Mr Charles Blé Goudé as well as in the dissenting opinion.⁹⁴ In terms of Article 25(3)(d) of the Rome Statute, it likewise does not qualify the threshold and thus has been interpreted as excluding only contributions that are 'inconsequential', 'immaterial', or 'neutral' to the commission of the crime.⁹⁵

The inclusion of incitement to genocide under Article 25(3)(e) in the ICC Statute has caused some confusion regarding whether this strips the offence of its inchoate nature⁹⁶ since it is listed as a ground for criminal responsibility

in International Law (Oxford University Press, Oxford, 2012) 128; S. Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (Martinus Nijhoff, Leiden, 2012) p. 146; K. Ambos, *Treatise on International Criminal Law – Volume I: Foundations and General Part* (Oxford University Press, Oxford, 2013) 164; Ambos, 'Article 25', *supra* note 72, p. 1008; M. Jackson, *Complicity in International Law* (Oxford University Press, Oxford, 2015); V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart, Oxford, 2016) p. 72; H. Olásolo and E. Camero Rojo, 'Forms of Liability under Article 25(3)(b) and (c)', in Stahn (ed.), *supra* note 79, pp. 587, 590; Ambos, *supra* note 79, pp. 599, 601, 607 (arguing that Article 25(3)(c) and (d) of the ICC Statute 'require a minimum threshold of assistance').

93 Situation in the Central African Republic, *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeal Judgment, Case No. (ICC-01/05-01/08-3636), 8 June 2018, paras. 18, 1326-1327.

94 Situation in Côte d'Ivoire, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons of Judge G. Henderson, Case No. (ICC-02/11-01/15-1263-AnxB), 16 July 2019, para. 2020: 'At this level of abstraction and generality, almost every act in support of an institution or organisation can be said to have made a contribution to the conduct of individual members of such institution or organisation. At some point, the causal link between the contribution and the specific criminal conduct, although theoretically present, becomes so tenuous that it becomes artificial to say that the physical perpetrator was genuinely assisted by the contribution'; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15-1263-AnxC, Dissenting Opinion Judge H. Carbuccia, 16 July 2019, para. 559 indicating that merely facilitating 'may suffice' for aiding and abetting.

95 *Gbagbo and Blé Goudé* decision, Reasons of Henderson, *supra* note 94, para. 1960 referring to Prosecutor's reasoning and allowing the possibility that this is the correct interpretation of the contribution threshold for Article 25(3)(d).

96 T.E. Davies, 'How the Rome Statute Weakens the International Prohibition on Incitement to Genocide', 22 *Harvard Human Rights Journal* (2009) 245-270; Wilson, *supra* note 11, p. 254. Apart from seeing the Rome Statute as weakening incitement to genocide, Wilson also reads the *Nahimana* and *Bikindi* judgments as putting on genocidal speech the condition of contemporaneity with an actual genocide (Wilson, *ibid.*, p. 253). This is however an overstatement of the significance placed on an actual genocide by the two ICTR judgments, which rather consider the existence of actual genocide as a contextual element that may help determine the *mens rea* of the speaker as well as how the intended audiences understood the speech and not a *sine qua non* in establishing the incitement. Other

after paragraphs (b) to (d) dealing with accessorial liability.⁹⁷ The present authors, however, are of the view that the correct interpretation remains that incitement to genocide here also breaks with the dependence of the act of complicity on the actual crime, abandoning the accessory principle that governs paragraphs (b) to (d).⁹⁸ Prominently, the same utterance that will constitute incitement to genocide under paragraph (e) will amount to soliciting or inducing under paragraph (b) when a causal link can be established between the speech and an actual genocide being attempted or committed.⁹⁹ This further demonstrates the *raison d'être* of paragraph (e), which is to provide a tool for possible intervention before the speech has had its desired effect and a genocide actually takes place.¹⁰⁰ In the opposite cases, however, it will be up to the Prosecutor to decide which form of liability should be pursued, under paragraph (e) or (b) in light of the available evidence. Most likely, all available forms would be argued in the indictment as is the standard practice.

Outside the context of incitement to genocide, modes of accessorial liability provide the basic tool for prosecuting hate propagandists and in practice they prove greatly challenging for a successful prosecution in several ways resulting in a high failure rate before the two *ad hoc* tribunals and the ICC.¹⁰¹ Firstly, the law applicable to hate propaganda is too fragmented.¹⁰² The Prosecutorial approach in *Šešelj* reflected this problem as it employed the so-called 'catch-all practice' by firstly drawing a distinction between crimes physically committed by the Accused and other crimes committed by way of JCE and then 'obscur-ing' this framework by alleging *Šešelj's* membership in a JCE for *all* of the crimes.¹⁰³ The Indictment furthermore claimed instigation, JCE as well as aiding and abetting based on what the TC characterised as the same factual

contextual elements may provide sufficient indicators of the *mens rea* and the 'directness' of the incitement as an element of the *actus reus*. See *Nahimana* Appeal Judgment, *supra* note 84, para. 709, fn. 1674.

97 Ambos, 'Article 25', *supra* note 72, p. 1017.

98 *Ibid.*; see also R. Cryer et al. (eds.), *An Introduction to International Criminal Law and Procedure* (4th ed., Cambridge University Press, Cambridge, 2019) 362; A.A. Agbor, 'The Substantial Contribution Requirement: The Unfortunate Outcome of an Illogical Construction and Incorrect Understanding of Article 6(1) of the Statute of the ICTR', 12 *International Criminal Law Review* (2012) 155-191, p. 158; Clark, *supra* note 75; *Nahimana* Appeal Judgment, *supra* note 84, para. 678.

99 Clark, *ibid.*

100 In practice however, no such early intervention has ever taken place, rather prosecutions are initiated after a genocide has already occurred and even using the fact that it had occurred as evidence of the *actus reus* and *mens rea* of incitement.

101 Kearney, *supra* note 8, p. 231.

102 Gordon, *supra* note 71, pp. 20, 253.

103 *Šešelj*, Trial Judgment, *supra* note 10, para. 15.

basis.¹⁰⁴ While the Prosecution was criticised by the Chamber for this ‘circular approach in which practically each crime has multiple qualifications’, it is but a natural consequence of the unfortunate fragmentation of the law and quite common in practice.

It is also worth noting that, while the common law criminal theory does not distinguish between ‘principals’, ‘secondary participants’, ‘accessories and accomplices’ or ‘individuals in a group acting with a common purpose’ in terms of guilt or applicable penalty, many civil law systems perceive modes of participation through a hierarchical lens that implies a lesser penalty for participation falling short of principal perpetration.¹⁰⁵ Thus, if we are to consider hate propaganda merely under accessorial liability, victims might feel that the perpetrators of such propaganda, who are in fact more morally culpable, are found less culpable in law than those who, under its influence, physically carried out the crimes. In German law, however, the *instigator* is punished in the same way as the principal, thus a hierarchy does not apply.¹⁰⁶

Third, the causal link between the speech and subsequent crimes committed, which all modes of accessorial liability require, albeit to differing extents as mentioned above, poses the main challenge for the Prosecution. Many have thus questioned why incitement to international crimes such as war crimes and CAH has not been criminalised in the same way as incitement to genocide, which would not only make prosecutions more straightforward but would also serve the preventative function of the law by providing a tool for intervention before subsequent crimes are committed.¹⁰⁷

Fourth, as mentioned above, mostly left out of criminalisation is speech that does not strictly speaking amount to incitement to violence even if it constitutes a necessary part of the propaganda leading to the success of such incitement.¹⁰⁸ Furthermore even direct incitement may not suffice and the added prerequisite of a causal link with subsequent crimes committed is necessary for the speech to be considered criminal.

The most encouraging development in terms of hate propaganda in recent jurisprudence has been in *Ruggiu* and *Nahimana*, where the ICTR Appeal Chamber held that as part of a widespread and systematic attack against a civilian population, hate speech can also in and of itself constitute the physical

¹⁰⁴ *Ibid.*, para. 17.

¹⁰⁵ Clark, *supra* note 75.

¹⁰⁶ Penal Code (StGB), Art 26.

¹⁰⁷ W.A. Schabas, ‘Prevention of Crimes against Humanity’, 16 *Journal of International Criminal Justice* (2018) 705–728; see also Fletcher, *supra* note 80.

¹⁰⁸ *Nahimana* Appeal Judgment, *supra* note 84, para. 693.

commission of persecution as a crime against humanity.¹⁰⁹ The Appeal Judgment in *Šešelj* has now brought the jurisprudence of the ICTY in line with that of the ICTR on the matter by confirming this possibility.¹¹⁰ It has nevertheless unjustifiably left almost all of Šešelj's hate propaganda outside of this characterisation, save for one speech in Hrtkovci, and even here the finding of persecution mainly rested on a finding of instigation showing a reluctance on the part of the Court to apply criminal responsibility sufficiently broadly with regards to hate propaganda, i.e. beyond successful incitement to violence, i.e. instigation.

Importantly, within the context of the crime of aggression, the ICC Statute in Article 8 *bis* criminalises also its planning and preparation. While not yet tested in the jurisprudence, Dojčinović notes that there are no major evidentiary and jurisprudential obstacles inhibiting the investigation and prosecution of historical and political acts of propaganda and incitement, or instigation, already during the formative period of this act.¹¹¹

3 The Almost Acquittal of *Vojislav Šešelj* as a Reflection of a Fragmented Law and a Poor Judicial Understanding of Hate and Fear propaganda

This section will analyse the case of *Vojislav Šešelj* as a case study of the current problems in dealing with hate and fear propaganda at international criminal tribunals. It will delineate the propagandistic activities of Šešelj, one of the greatest hate mongers of the Balkan wars of the 1990s, and demonstrate how the TC failed to understand the workings of his propaganda while simultaneously being derailed by the fragmentation of the applicable law that manifested itself in the Office of the Prosecutor (OTP) bringing multiple potential qualifications for each crime, none of which could be applied by a straightforward approach. The section will provide a critique of the prosecutorial method in selecting evidences as well as the overly restrictive interpretation of the law by both the TC and the AC in the present case. The analysis of the case will be

¹⁰⁹ *Ibid.*, para. 993.

¹¹⁰ *Prosecutor v. Vojislav Šešelj*, Appeal Judgment, Case No. (MICT-16-99-A), 11 April 2008, para. 134.

¹¹¹ P. Dojčinović, 'The Shifting Status of Grand Narratives in War Crimes Trials and International Law: History and Politics in the Courtroom', in D. Žarkov and M. Glasius (eds.), *Narratives of Justice in and Out of the Courtroom: Former Yugoslavia and Beyond* (Springer, Berlin, 2014) p. 26.

conducted with a view to avoiding mistakes in the future and understanding the underlying legal problems that require a reformulation of the law.

3.1 *Vojislav Šešelj's Hate and Fear Propaganda*

Vojislav Šešelj was the founder and president of the Serbian Radical Party from 23 February 1991, and a member of the Assembly of the Republic of Serbia. In 1989, Šešelj was declared Četnik duke by Momčilo Đujić, a Četnik leader from World War II, with a mandate to make a unitary Serbian state where all Serbs would live, occupying all the Serb lands, the so-called Greater Serbia. Šešelj established a military wing of his party, created a War Staff, promoted the Četnik movement's militaristic traditions, appeared in military attire at front-lines and most importantly, relentlessly spread his fear and hate propaganda aimed mostly at Croats and Bosniaks. Šešelj studied the mass psychology of fascism and in his book, entitled *Ideology of Serbian Nationalism*, published in 2002, he expressed the belief that propaganda is based on the fact that the majority of people are ready to believe indiscriminately in everything they read, hear or see on television.¹¹² Anthony Oberschall conducted a content analysis of Šešelj's 1990-1994 mass media propaganda that revealed that he massively used claims of past and on-going Serb victimhood coupled with claims of a threat being posed to Serbs by an endless list of victimisers, ranging from the West, the Vatican, Germany, the UN, to the communists, Slovenes, the Muslims, and, at the top of the list, the Croats in addition to numerous others.¹¹³ Sometimes the threat was presented as coming from within and Šešelj even accused Serb media of 'anti-Serbian propaganda'.¹¹⁴

Šešelj's claims of Serb victimhood and threat messaging, coupled with a denial of any Serb responsibility formed the moral justification of collective violence and the core of the crisis frame in ethnic relations.¹¹⁵ He rejected the possibility of compromise and non-violent conflict management¹¹⁶ and propagated that the natural sentiment between ethnic groups was that of hatred, antipathy and rejection making co-habitation impossible.¹¹⁷ On top of this basis he outright advocated coercion and violence issuing numerous threats and warnings, particularly the phrase that 'rivers of blood will flow'.¹¹⁸ His claim

112 Šešelj, IT-03-67-T, Transcript of the Testimony of Anthony Oberschall, 11 December 2007, 1201, 1337.

113 Oberschall, *supra* note 57, p. 19.

114 *Ibid.*

115 *Ibid.*, p. 18.

116 *Ibid.*, pp. 34, 36.

117 *Ibid.*, p. 32.

118 *Ibid.*, pp. 21, 27-28.

was that self-defence, revenge and retribution justified the violence.¹¹⁹ A big part of Šešelj's xenophobic and xenomistic narrative was a constant glorification of Serbs and the dehumanising of other nations. While in his theory Serbs were a historic nation, everyone else, i.e. Croats, Macedonians and Muslims, were 'artificial' and as such did not have any right to their own states and were not even worthy of consideration.¹²⁰ Thus Šešelj characterised the Croats as the 'last trash of Europe', a 'genocidal nation', who has 'never been honest with anyone', a 'poisonous snake' who bites Serbs on the heart and whose head Serbs need to smash.¹²¹ In numerous instances he called for the 'amputation' of Croatia. The snake analogy mirrors both Nazi propaganda against the Jews¹²² as well as Hutu propaganda against the Tutsis.¹²³

Misuse of history and fabrication of facts were tools Šešelj constantly employed, using partial, biased, misleading and sometimes outright fabricated information or history (for example claiming that Dubrovnik had always been a Serb town)¹²⁴ as well as the crimes taking place during the war (presenting ethnic cleansing as a consensual, spontaneous and civilised exchange of populations).¹²⁵

In other words, Šešelj carefully used the main persuasion techniques employed in fear and hate propaganda, whereby the out-group was negatively stereotyped and, in its entirety, blamed for historical crimes while at the same time presented as a threat to the Serb nation and its historically legitimate aspirations.

Oberschall's analysis, which scientifically analysed and clearly demonstrated the workings of Šešelj's propaganda was however not given the weight it deserved at trial. Oberschall's expertise was challenged by Šešelj and the Court upheld his objections on two grounds. Firstly, on the ground that Mr Oberschall did not speak Serbian and was not an expert on Serbian mass media or nationalist propaganda and secondly on the absurd ground that he referenced eighty-seven books by authors other than himself showing, according to the

119 *Ibid.*, pp. 28-29.

120 *Ibid.*, pp. 33-34.

121 *Ibid.*, pp. 21-22.

122 See for example E. Hiemer (trans.), *Julius Streicher Der Stürmer, The Mongrel – Translated from the Third Reich Original, Der Pudelmopsdackelpinscher* (2nd ed., RJG Enterprises, Lincoln, 2017) p. 48: 'If we do not kill the Jewish poisonous snake, it will kill us'.

123 *Prosecutor v. Simon Bikindi*, Appeal Judgment, Case No. (ICTR-01-72-A), 18 March 2010, para. 50.

124 Oberschall, *Šešelj's Nationalist Propaganda*, *supra* note 57, pp. 25-26.

125 *Ibid.*, p. 24.

Court, insufficient expertise in the subject.¹²⁶ Oddly the Court nevertheless allowed the testimony, yet failed to grasp its usefulness for a conviction. As Oberschall himself explained the situation:

No matter how I explained my methods to them, I was never going to convince the judges that my social-science approach could help them. Judges are interested in a specific causal sequence that leads to a specific crime... The question is, can you connect the speech of one person to the crimes? That person alone and not the others? No. It's the ensemble that does it. For propaganda to be effective, you don't need to influence 100 percent of the population...[yet] in the judges' way of thinking, if it's not 100 percent, then it's not a cause.¹²⁷

At risk of oversimplification, it was indeed this narrow approach to causality that was at the crux of the TC's failure in finding individual criminal responsibility based on Šešelj's fear and hate propaganda, as analysed below. Yet, the TC shares the responsibility for the failure both with the Prosecution, which decided not to bring to the Court the most essential evidence relevant to the question of causation, as well as with the applicable law, which required the proof of a high level of causality, many times difficult or nearly impossible to demonstrate.

3.2 *Šešelj's Indictment and Trial at the ICTY*

Šešelj was indicted in January 2003 and surrendered voluntarily to the ICTY a month later.¹²⁸ Under the Third Amended Indictment, issued in December 2007, the Prosecution charged Šešelj with persecution, deportation, and other inhumane acts (forcible transfer) as CAH as well as five counts of war crimes. The Prosecution alleged that, acting *individually*, or as part of a JCE with high-ranking Serb politicians and military leaders, such as Slobodan Milošević, Šešelj 'planned, ordered, instigated, committed or otherwise aided and abetted in planning, preparation or execution' of CAH and war crimes that included persecution, murder, sexual assaults, torture, deportation and forcible transfer

126 R.A. Wilson, 'Propaganda Experts in the International Criminal Courtroom', in Dojčinović (ed.), *supra* note 2, p. 73.

127 A. Oberschall in interview with R. Wilson in *ibid.*, p. 75.

128 For a critique of Šešelj Trial judgment see G. Gordon, 'Vojislav Šešelj's Acquittal at the icty: Law in an Alternate Universe', *Jurist* (11 April 2016), online at www.jurist.org/commentary/2016/04/gregory-gordon-seselj-acquittal/, describing the judgment as 'a resounding victory for the culture of impunity'. For a critique of Šešelj at the courtroom see Wilson, *supra* note 11, pp. 107-115 (Cirque Du Šešelj).

of non-Serbs in Croatia and Bosnia.¹²⁹ It alleged that Šešelj through his speeches in Vukovar (Croatia), Mali Zvornik and Hrtkovci (Serbia) in 1991 and 1992, 'physically committed' persecution because of 'direct and public ethnic denigration and forcible transfer'.¹³⁰

The Prosecution did not rely on the totality of Šešelj's propaganda but focused on a particular set of speeches as described. In the speeches in Vukovar, Šešelj stated publicly that 'this entire area will soon be cleared of Ustaša;' and that 'not one Ustaša must leave Vukovar alive'.¹³¹ At Zvornik, Šešelj spoke at a rally, stating: 'Dear Chetnik brothers, especially you across the Drina river, you are the bravest ones. We are going to clean Bosnia of pagans and show them a road which will take them to the east, where they belong'.¹³² At Hrtkovci, Šešelj declared there was 'no room for Croats in Hrtkovci'. He proclaimed that 'we will drive them to the border of Serbian territory and they can walk on from there, if they do not leave before of their own accord'.¹³³ He further stated that Serbs from Hrtkovci and the surrounding villages would 'promptly get rid of the remaining Croats in your village and the surrounding villages'.¹³⁴ The TC also considered two other speeches, delivered in the Serbian Parliament on 1 and 7 April 1992, alleged by the Prosecution to have constituted clear appeals for the expulsion and forcible transfer of Croats.¹³⁵

Thus, the Prosecution claimed, for what were essentially the same speech acts, several modes of liability in a bid to establish criminal responsibility under any of them, albeit in vain. Even claims under JCE, which in the past proved a valuable tool for prosecuting hate and fear propaganda (see discussion *infra* section 3.3), were this time thwarted from the beginning as described below.

The actual trial did not begin until late 2007 and finally ended with an acquittal on 31 March 2016 making it the longest running trial in war crimes history. One of the judges sitting at the Šešelj trial, Judge Frederik Harhoff, was disqualified a few months before the Trial Chamber's judgment was expected

129 *Prosecutor v. Vojislav Šešelj*, Case No. (IT-03-67-T), Third Amended Indictment, 7 December 2007, para. 8(a).

130 *Ibid.*, paras. 5, 15, 17(i), 31-33.

131 *Ibid.*, para. 20.

132 *Ibid.*

133 *Šešelj* Trial Judgment, *supra* note 10, para. 331.

134 *Ibid.*

135 Even though, in the view of the majority, Judge Antonetti dissenting, these speeches were appeals for expulsion, a different majority, Judge Lattanzi dissenting, held that they formed an opposition to the official Serbian policy and were thus an expression of an alternative political programme that would never be put into practice.

and replaced with Judge Niang.¹³⁶ This added to the delay of the case by another eighteen months in order for Judge Niang to familiarise himself with the unwieldy case. In its Closing Brief the Prosecution alleged that Šešelj, through his speeches, pursued a persecutory propaganda campaign against non-Serbs,¹³⁷ and that such a campaign consisted of three stages as follows: firstly, propagating a climate of fear and hatred of non-Serbs;¹³⁸ secondly, encouraging retaliation against non-Serbs for crimes committed in the World War II;¹³⁹ and thirdly, legitimising recourse to force and violence against them in order to gain and retain what Šešelj considered as Serbian lands outside of Serbia.¹⁴⁰

While considered to be somewhat of a 'lone wolf' in his propagandistic endeavours by both the TC and AC, Šešelj's speeches in fact fit perfectly with the mainstream Serbian propaganda at the time, which almost entirely eliminated the marketplace of ideas.¹⁴¹ While previous judgments at the ICTY acknowledged the effects of such a combination, the Šešelj judgments were a significant step backward.

3.3 *Trial Chamber's Dismissal of JCE – Setting Aside Previous Jurisprudence on Hate Speech in the Context of JCE*

The most evident examples in the ICTY trial records of propaganda forming an integral part of a JCE are the concepts of 'Greater Serbia'¹⁴² (also referred to as

¹³⁶ For a critical examination of the removal of Judge Harhoff from the Šešelj case, see M.E. Badar and P. Florijančič, 'The Disqualification of Judge Frederik Harhoff: Implications for the Integrity of the International Criminal Tribunal for the former Yugoslavia', in Morten Bergsmo and Viviane Dittrich (eds.), *Integrity in International Justice* (Torkel Opsahl Academic EPublishers, Brussels, 2020).

¹³⁷ *Prosecutor v. Vojislav Šešelj*, Case No. (IT-03-67-T), Prosecution Closing Brief, 5 February 2012, para. 50.

¹³⁸ *Ibid.*, paras. 51 and 53.

¹³⁹ *Ibid.*, para. 54.

¹⁴⁰ *Ibid.*, paras. 54-55.

¹⁴¹ As noted by Kiper, *supra* note 2, pp. 222-223: 'From 1989 to 1990, Milošević undertook what he called an *anti-bureaucratic revolution*, encouraging a populist revolt with the goal of replacing non-Serbian officials in the Yugoslavian bureaucracy with Serbs. Consequently, when Croatia and Bosnia & Herzegovina sought independence, the Milošević regime was able to propagate misinformation about neighbouring republics. The Serbian media thus became inundated on a daily basis with false news reports and alleged conspiracies about non-Serbs, ranging from fabricated atrocity stories to an alleged Vatican-Tehran conspiracy to destroy the Serbian people.... In terms of linguistic context, Milošević's controlled-media provided the right felicity conditions for Šešelj's inflammatory speeches'.

¹⁴² Dojčinović, 'Introduction', *supra* note 8, p. 10, fn 47.

the 'Strategic Plan') and 'Greater Croatia'.¹⁴³ The implementation of these two political objectives, according to the ICTY trial records in the relevant cases, was carried out by criminal means, both military and political.¹⁴⁴ Within the framework of the armed conflict in the former Yugoslavia, the grand narratives of 'Greater Serbia' and 'Greater Croatia' were the geopolitical, ideological and military equivalents of the Nazi narrative of 'Greater Germany'.¹⁴⁵ Just as the latter employed the sub-narrative of *Lebensraum*, 'Greater Croatia' and 'Greater Serbia' meant that areas outside of Croatia and Serbia populated with Croats or Serbs should be used to create additional 'living space'.¹⁴⁶ Dojčinović thus concludes: 'In as much as Hitler's grand narrative of *Lebensraum* was directly linked to the *Endlösung* (Final Solution), the extermination of the Jewish population, the Serbian and Croatian projects were directly linked to the 'ethnic cleansing' of non-Serbs or non-Croats in Croatia and Bosnia and Herzegovina'.¹⁴⁷

While at the IMT, the status of the relevant grand narrative was merely contextual evidence it shifted at the ICTY to constitute the forensic evidence and/or the reasons for the commission of crimes.¹⁴⁸ Most of the so-called 'Serb leadership cases' at the ICTY had the Greater Serbia narrative incorporated into their indictments, pre-trial and final briefs, opening and closing arguments, and judgments.¹⁴⁹ Both in *Šešelj* and *Milošević*, the OTP's theory of the case was largely framed within and by this concept.¹⁵⁰ Thousands of exhibits, from speeches to maps, were introduced as part of the cases to evidence and support the significance of this grand narrative for the commission of crimes.¹⁵¹ Numerous witnesses, including combatants and principal perpetrators, confirmed and confessed that they had been inspired and prompted to join the struggle due to the narratives, implying that they had committed specific

143 See *Prosecutor v. Jadranko Prlić et al.*, Case No. (IT-04-74-T), Second Amended Indictment, 11 June 2008, para. 15. Defining the scope of the JCE, the Prosecution refers to the idea of 'Greater Croatia' as an objective which was to be achieved by joining the so-called 'Croatian Community of Herzeg-Bosna' as part of the Republic of Croatia '[...] by force, fear or threat of force, imprisonment and detention, forcible transfer and deportation, appropriation and destruction of property and other means [...]'

144 Dojčinović, 'Introduction', *supra* note 8, p. 10.

145 *Ibid.*, p. 9.

146 *Ibid.*, p. 16.

147 *Ibid.*

148 *Ibid.*, pp. 2, 23.

149 *Ibid.*, some of these cases include *Momčilo Krajišnik*, *Biljana Plavšić*, *Slobodan Milošević*, *Vojislav Šešelj* and *Radovan Karadžić*.

150 E-mail communication with P. Dojčinović, on file with authors.

151 Dojčinović, 'Introduction', *supra* note 8, p. 16.

crimes precisely *because* of them.¹⁵² In their testimonies, they often made references to the exact pro-Greater Serbian phrases they may have read or heard from the accused or the accused's associates'.¹⁵³ Dojčinović describes phrases such as the one invented by Šešelj, i.e. 'Karlobag-Ogulin-Karlovac-Vitrovitica line' as 'unique mental fingerprints', i.e. when other politicians or principal perpetrators use such a phrase it can be concluded that a specific mind has been cognitively 'fingerprinted' by the originator.¹⁵⁴ Such 'mental fingerprints' should fit into the evidentiary feedback loop as one of the links between the instigator and the instigated.¹⁵⁵

In *Šešelj*, the Prosecution grounded its claim of participation in the JCE amongst other things based on the fact that Šešelj 'espoused and encouraged the creation of a homogeneous 'Greater Serbia', encompassing the territories specified in this indictment, by violence, and thereby participated in war propaganda and incitement of hatred towards non-Serb people'.¹⁵⁶ While presenting great hope for an even stronger recognition of the role played by this grand narrative, the *Šešelj* Trial Judgment instead shifted into the regrettable direction of considering Šešelj's goal of creating a Greater Serbia to have been merely a political project and that the necessary common criminal purpose had not been proven.¹⁵⁷ However, as the Prosecution noted, this finding was due to the fact that the Majority did not engage with the evidence about the substance of the Šešelj's Četnik *ideology* and *goals* that were predicated on ethnic cleansing and the forced expulsion of non-Serb ethnicities making this criminal element an essential part of the political project.¹⁵⁸ While the TC acknowledged that crimes had been committed by Serbian forces in the process, it claimed these were not inherently linked to the fulfilment of the purpose of Greater Serbia. Judge Antonetti's individual opinion reveals the profound confusion of the Presiding Judge in terms of what are the motives of individual participants in a JCE and what is the common criminal purpose of a JCE.¹⁵⁹ While the first

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*, pp. 13-14.

¹⁵⁵ *Ibid.*, pp. 14-15.

¹⁵⁶ *Šešelj* Indictment, *supra* note 129, para. 10 (c).

¹⁵⁷ *Šešelj* Trial Judgment, *supra* note 10, para. 230.

¹⁵⁸ *Prosecutor v. Vojislav Šešelj*, Case No. (MICT-16-99-A), *Notice of Filing of Public Redacted Version of Prosecution Appeal Brief*, 29 August 2016, paras. 71-73, referring to exhs. P00153, 1; P00164, 45-46; P01263, 1-3, 15; P01170; P00141, 2; *Šešelj*, Indictment, *supra* note 129, para. 6.

¹⁵⁹ M. Milanović, 'The Sorry Acquittal of Vojislav Šešelj', *EJIL Talk!*, 4 April 2016, www.ejiltalk.org/the-sorry-acquittal-of-vojislav-seselj/.

may have been political, the latter was undoubtedly criminal, i.e. the forcible displacement of Croats and Bosniaks.¹⁶⁰

By dismissing Šešelj's liability based on a contribution to a JCE the Trial Judgment departed drastically from previous case law involving hate propaganda. Already in its first judgment, in *Tadić*, the TC clearly identified the importance of hate propaganda in fomenting ethnic discord and noted Šešelj, alongside Milošević and Brđanin, as fuelling conflict and crimes by use of such propaganda.¹⁶¹ Subsequently in *Brđanin*, the TC considered the accused's hate propaganda as his most substantial contribution to the so-called Strategic Plan.¹⁶² The defendant was found responsible for instigating forced transfers and deportations as well as aiding and abetting their execution through inflammatory and discriminatory public statements, such as advocating the dismissal of non-Serbs from employment, and stating that only a few non-Serbs would be permitted to stay on the territory of the Autonomous Region of Krajina.¹⁶³ The judgment however fell short of framing the criminal responsibility arising from Brđanin's propaganda within the context of a JCE. This was mainly due to the TC's understanding of the theory of JCE as encompassing only small-scale cases and not enterprises as large as the one claimed in *Brđanin*¹⁶⁴ as well as its view that, in order for the accused to be found responsible for committing a crime under the first category of JCE, there should exist an agreement between the accused and the principal perpetrator of that crime (i.e. they should both be members of the JCE).¹⁶⁵ These understandings of the theory were however found to be erroneous by the AC, which confirmed that principal perpetrators need not be members of the JCE¹⁶⁶ and that JCEs can exist on a large scale.¹⁶⁷ It was only for reasons of trial fairness that Brđanin's

160 See *Prosecutor v. Radovan Karadžić*, Appeal Judgment, Case No. (MICT-13-55), 20 March 2019, para. 395.

161 *Prosecutor v. Duško Tadić*, Trial Opinion and Judgment, Case No. (IT-94-1), 7 May 1997, para. 87.

162 *Brđanin* Trial Judgment, *supra* note 62, para. 80.

163 Kearney, *supra* note 8, pp. 243-244; *Brđanin* Trial Judgment, *supra* note 62, para. 360; *Prosecutor v. Radoslav Brđanin*, Appeals Judgment, Case No. (IT-99-36-A), 3 April 2007, paras. 307-319.

164 *Brđanin* Trial Judgment, *supra* note 62, fn 890.

165 *Ibid.*

166 *Brđanin* Appeal Judgment, *supra* note 163, paras. 408-414 referring to, *Prosecutor v. Radoslav Krstić*, Trial Chamber, Case No. (IT-98-33-T), Judgement, 2 August 2001, paras. 618 and 645.

167 *Brđanin* Appeal Judgment, *ibid.*, para. 422 referring to *Tadić* Appeal Judgment, *supra* note 85, para. 204 envisioning a JCE with the common purpose of ethnically cleansing an entire region; *Brđanin* Appeal Judgment, *ibid.*, para. 423 referring to *Prosecutor v. André Rwamakuba*, Appeal Judgment, Case No. (ICTR-98-44C-A), 13 September 2007, para. 25.

responsibility was not reconsidered under this framework at the appeal phase.¹⁶⁸ Other judgments, such as *Stakić*, *Krajišnik*, *Martić* and *Karadžić*, all found the propaganda of the persons accused as their contribution to a JCE even considering it many times as being at the very core of such enterprises shared by defendants to undertake war crimes and CAH.¹⁶⁹ The TC in *Stakić* found that his propaganda helped to polarise the Prijedor population along ethnic lines and created an atmosphere of fear,¹⁷⁰ while the AC specified that his hate propaganda contributed to an atmosphere that was of such a coercive nature that the persons leaving the municipality cannot be considered as having voluntarily decided to give up their homes.¹⁷¹ In *Krajišnik* the TC found that the accused contributed to the JCE with Milošević and others through:

Supporting, encouraging, facilitating or participating in the dissemination of information to Bosnian Serbs that they were in jeopardy of oppression at the hands of Bosnian Muslims and Bosnian Croats, that territories on which Bosnian Muslims and Bosnian Croats resided were Bosnian-Serb land, or that was otherwise intended to engender in Bosnian Serbs fear and hatred of Bosnian Muslims and Bosnian Croats or to otherwise win support for and participation in achieving the objective of the joint criminal enterprise.¹⁷²

Furthermore Krajišnik's other speeches were found to have instigated, encouraged, and authorised the implementation of the common objective.¹⁷³ In *Martić* the TC found the accused to have contributed to the JCE by fuelling an atmosphere of insecurity and fear through radio speeches.¹⁷⁴ Most importantly, the TC also specified Vojislav Šešelj as a co-member of this JCE¹⁷⁵ as did the TC in *Karadžić* just a week before the Šešelj Trial judgment.¹⁷⁶ In the *Karadžić* case, the TC found that the accused participated in the overarching JCE and

168 *Brdanin* Appeal Judgment, *ibid.*, para. 361.

169 Kearney, *supra* note 8, p. 247.

170 *Prosecutor v. Milomir Stakić*, Trial Judgment, Case No. (IT-97-24-T), 31 July 2003, para. 476.

171 *Prosecutor v. Milomir Stakić*, Appeal Judgment, Case No. (IT-97-24-A), 22 March 2006, paras. 282-283.

172 *Prosecutor v. Momčilo Krajišnik*, Trial Judgment, Case No. (IT-00-39-T), 27 September 2006, para. 1121; *Prosecutor v. Momčilo Krajišnik*, Appeal Judgment, Case No. (IT-00-39-A), 17 March 2009, paras. 216-219.

173 *Ibid.*

174 *Prosecutor v. Milan Martić*, Trial Judgment, Case No. (IT-95-11-T), 12 June 2007, paras. 448-453.

175 *Ibid.*, para. 446.

176 *Karadžić*, Trial Judgment, *supra* note 78, para. 3492.

contributed to the commission of the crimes encompassed within through promoting an ideology of ethnic separation, using a rhetoric that amplified historical ethnic grievances and promoting propaganda to that effect, and creating a climate of impunity for criminal acts committed against non-Serbs¹⁷⁷ in order to promote historical territorial claims and garner support for the creation of a largely ethnically homogeneous Bosnian Serb state in Bosnia and Herzegovina.¹⁷⁸ Interestingly, Karadžić submitted that the TC erred in concluding that he was a member of a JCE since the record allowed another inference: that he was part of a 'joint political enterprise' the aim of which was 'political autonomy, not physical separation through forced displacements'.¹⁷⁹ His arguments were not accepted on appeal.

The twin goals of the propaganda in all these cases were to create an atmosphere of terror such that the victims would feel their only option was to leave their homes,¹⁸⁰ as well as to create a climate where people were prepared to tolerate the commission of crimes and to commit crimes through the incitement of hatred, distrust, strife and fear of subjugation.¹⁸¹ In *Stakić*, the TC recognised that this atmosphere was of such a coercive nature as to satisfy the

177 *Ibid.*, para. 1174. The judgment describes Karadžić's propaganda activities as inciting Bosnian Serb fear and hatred of Muslims and Croats which had the *effect* of exacerbating ethnic divisions and tensions and the *effect* of encouraging his subordinates to follow his example; identifying Muslims and Croats as the historic enemies of the Serbs (*ibid.*, para. 3485, emphasis added) and promoting the idea that the Bosnian Serbs could not live together with the Bosnian Muslims and Bosnian Croats and formed the foundation for the ethnic separation of the three people (*ibid.*, paras. 11089, 11096) and the creation of ethnically homogeneous entities in BiH (*ibid.*, para. 11095). The Trial Chamber further noted that by denying the commission of crimes, justifying them or misleading the international community and the media, the Accused created an environment of impunity.

178 *Ibid.*, paras. 3485-3487, 3505.

179 Karadžić Appeal Judgment, *supra* note 160, para. 395; *Prosecutor v. Radovan Karadžić*, Radovan Karadžić's Notice of Appeal, Case No. (IT-95-5/18), 22 July 2016, para. 11; *Prosecutor v. Radovan Karadžić*, Book of Authorities for Prosecution Appeal Brief, Case No. (IT-95-5/18), 5 December 2016, paras. 461-521.

180 *Stakić* Appeal Judgment, *supra* note 171, para. 476: 'A propaganda campaign helped to polarise the Prijedor population along ethnic lines and created an atmosphere of fear'. *Brđanin*, Trial Judgment, *supra* note 62, para.83; *Martić* Trial Judgment, *supra* note 174, paras. 448-453. 'Milan Martić contributed to this displacement by fuelling the atmosphere of insecurity and fear through radio speeches wherein he stated he could not guarantee the safety of the non-Serb population'. (*ibid.*, para. 450) '[Martić] promoted an atmosphere of mistrust and fear between Serbs and non-Serbs, in particular Croats. In doing so, Milan Martić contributed significantly to the furtherance of the common purpose of the JCE, of which he was a key member in the SAO Krajina and the RSK. The TC considers that these factors are aggravating circumstances when determining Milan Martić's sentence'. (*ibid.*, para. 498).

181 *Brđanin*, Trial Judgment, *ibid.*, para. 80; *Tadić* Trial Judgment, *supra* note 161, para. 88.

condition of 'forced' in the definition of deportation as a crime against humanity.¹⁸² While all these defendants also committed other crimes and contributed to the JCE in other ways, their propaganda activities have been relied upon as evidence of their knowledge of a common plan and their substantial contributions to the JCEs both in the first and third categories.¹⁸³

Dojčinović has bemoaned how the concept of propaganda has been addressed in the judgments of the two *ad hoc* tribunals. He asserted the reader is 'often left with an intuition that propaganda plays an important role, although it is rarely explained why. The interpretation of the concept of propaganda seems to be taken for granted'.¹⁸⁴ However, at a minimum, several judgments translated their sustained condemnation of propaganda and the identification of the crucial role it plays in creating the atmosphere necessary for the commission of the most serious international crimes into individual criminal responsibility through the theory of JCE.¹⁸⁵ The Trial Judgment in *Šešelj* however, took a decisive step backward by not acknowledging the defendant's contribution or indeed the existence of a JCE in itself. The AC furthermore failed to rectify the matter. While it was of the view that there was a discernible pattern of crimes committed by cooperating Serbian forces, including 'Šešelj's men' in furtherance of a common criminal purpose to permanently forcibly remove a majority of the Croatian, Bosnian Muslim, and other non-Serbian populations, it did not consider that the coordination among them was necessarily in pursuance of this purpose but could have merely resulted from the necessities of the war effort.¹⁸⁶ In this way, the effect of Šešelj's hate propaganda as a contribution to the JCE was not even considered.

3.4 *Trial Chamber's Push towards Instigation as the Main Form of Liability – Proving a Substantial Contribution to Subsequent Crimes Committed*

Essentially, the Prosecution was compelled to direct its main focus on instigation. This meant that it needed to prove the necessary causal link between the

182 *Stakić* Appeal Judgment, *supra* note 171, paras. 281-282 281. The AC therefore agrees with the statement made in the *Krnjelac* Trial Judgment that the term 'forced', when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.

183 Kearney, *supra* note 8, pp. 233, 247.

184 Dojčinović, 'Introduction', *supra* note 8, pp. 1, 7.

185 Kearney, *supra* note 8, pp. 231, 247.

186 *Šešelj* Appeal Judgment, *supra* note 110, para. 117.

speeches and subsequent crimes committed according to a higher standard than that for the JCE, i.e. it had to prove a 'substantial contribution'.

Instead of the totality of his hate and fear propaganda, the judgment analysed and qualified certain statements made by Vojislav Šešelj and their potential effect on the perpetrators of the crimes charged in the Indictment, in the light of their context. It specifically examined the substance and context of a) a speech on the Vukovar road on 7 November 1991 where he allegedly stated that 'Very soon, there will not be a single Ustaša left in this area'; b) a speech in Vukovar between 12 and 13 November 1991 when he is said to have stated that 'Not a single Ustaša must leave Vukovar alive' and 'Ustašas, surrender! There is no need to lay down your lives anymore'; c) a speech in Mali Zvornik in March 1992 in which he called on the Serbs to take revenge and 'clear up' Bosnia from the '*pogani*' (*filth*) and the '*balijas*' (a derogatory term for Muslims), and to push them back towards the east, far beyond the Drina river; d) a speech in Hrtkovci (a village in Vojvodina, Serbia) on 6 May 1992 in which Šešelj called for the expulsion of the Croatian population and where he stated among other things, that there was no place for Croats in Hrtkovci.¹⁸⁷

Only the speech in Hrtkovci and the two speeches in the Serbian Parliament were considered by the majority (Judge Antonetti dissenting) as a clear call for the forcible transfer of Croats from the village. For all the other speeches the TC bizarrely concluded that they were not necessarily a call not to spare anyone, but were rather meant to boost the morale of the troops of his camp.¹⁸⁸ A particularly unreasonable interpretation, considering the events that followed. Furthermore, even for the speech in Hrtkovci, the TC nevertheless found that instigation could not be established because the Prosecution failed to show that it *caused* the departure of the Croats or the campaign of persecution alleged by the Prosecution.¹⁸⁹ Similarly, two other speeches, delivered in the Serbian Parliament on 1 and 7 April 1992, were found to have constituted clear appeals for the expulsion and forcible transfer of Croats¹⁹⁰ however they were considered to have formed part of an opposition to the official Serbian policy, and as such an expression of an alternative political programme that would never have been put into practice.¹⁹¹ Here too, the majority considered that there was no causal link or measurable impact established of the speeches on

187 Šešelj Indictment, *supra* note 129, para. 10 (a).

188 *Ibid.*, para. 44.

189 Šešelj Trial Judgment, *supra* note 10, para. 195.

190 *Ibid.*, paras. 335-38.

191 *Ibid.*, para. 338.

the subsequent war crimes committed in Mostar, Zvornik and the Sarajevo area.¹⁹²

This judgment reflects the fact that proving the causal link between the utterances of a leader and the subsequent crimes committed by his followers is extremely challenging for reasons of both law and logistics. The Šešelj TC furthermore raised the threshold by considering that it was necessary to prove, in addition, that the Accused had resorted to various forms of persuasion, such as threats, enticement or even promises, before concluding that he was responsible for instigating crimes.¹⁹³ By doing so, the TC departed from previous case law,¹⁹⁴ which established that instigation means ‘urging, encouraging, or prompting’ another person to commit an offence¹⁹⁵ and that the instigator must, in one way or another, have influenced the physical perpetrator by soliciting, encouraging or otherwise inducing him or her to commit the crime.¹⁹⁶

The Šešelj Trial Judgment eventually showed that the Chamber considered the contribution requirement not to have been met because the speeches were not ‘at the root of the departure of the Croats or the persecution campaign’.¹⁹⁷ This was an additional raising of the threshold for causality to be established and looks like a ‘but for’ test contrary to previous jurisprudence and sound reasoning.¹⁹⁸ For example, in *Akayesu* the ICTR TC ruled that instigation is punishable when the speech is *followed by subsequent* criminal conduct.¹⁹⁹ In the same token, the *Blaškić* TC found that there must be a causal connection between the instigation and the commission of the crime at issue.²⁰⁰ This does not inevitably signify a proof of ‘but for’ causation, as according to the *Kordić* Trial Judgment

192 *Ibid.*, para. 343.

193 *Ibid.*, para. 295.

194 Šešelj Trial Judgment, *supra* note 10, Partially Dissenting Opinion of Judge Flavia Lattanzi, 31 March 2016, para. 92.

195 *Prosecutor v. Laurent Semanza*, Trial Judgment, Case No. (ICTR-97-20-T), 15 May 2003, para. 381; *Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, Case No. (ICTR-96-4-T), 2 September 1998, para. 482; *Prosecutor v. Naser Orić*, Trial Judgment, (IT-03-68-T), 30 June 2006, para. 270; *Prosecutor v. Kordić and Čerkez*, Appeal Judgment, (IT-95-14/2-A), 17 December 2004, para. 27, upholding *Karadžić* Trial Judgment, *supra* note 78, para. 387; *Krstić* Trial Judgment, *supra* note 164, para. 601. See also *Nahimana* Appeal Judgment, *supra* note 84, para. 480; *Prosecutor v. Emmanuel Ndindabahizi*, Appeal Judgment, Case No. (ICTR-01-71-A), 16 January 2007, para. 117.

196 Šešelj Lattanzi Dissenting, *supra* note 194, para. 91.

197 Šešelj Trial Judgment, *supra* note 10, para. 333.

198 Gordon, *Atrocity Speech Law*, *supra* note 71, pp. 20, 344.

199 *Akayesu* Trial Judgment, *supra* note 195, para. 482.

200 *Prosecutor v. Tihomir Blaškić*, Trial Judgment, Case No. (IT-95-14-T) 3 March 2000, para. 278.

it is not necessary to prove that the crime would not have been perpetrated without the accused's involvement' what needs to be proved however is 'that the contribution of the accused in fact had an effect on the commission of the crime.'²⁰¹

This contribution has been described as a 'clear contributing factor' in *Kvočka*²⁰² and in *Kordić* as a 'substantial contribution' to the conduct of the principal perpetrator.²⁰³ In *Ndindabahizi* and *Mpambara* the ICTR found that the contribution also needs to be direct.²⁰⁴

Nevertheless, as determined in the *Orić* Trial Judgment, the instigator need not be the original author of the idea or plan. Even if the principal perpetrator was already pondering the commission of the crime, but did not yet reach the final determination to do so, such a decision can still be brought about by persuasion or strong encouragement of the instigator.²⁰⁵ Only 'if the principal perpetrator is an *'omnimodo facturus'* meaning that he has definitely decided to commit the crime, further encouragement or moral support' cannot constitute instigation, however, it may qualify as aiding and abetting.²⁰⁶ Furthermore, the instigator only needs to possess a certain capability to impress others and does not need to be in a position of superiority in relation to the physical perpetrator.²⁰⁷

The ICC definition of inducing as provided for in Article 25(3)(b) of the ICC Statute and as set out in the *Ntaganda* case confirmed the jurisprudence of the *ad hoc* tribunals:

the following objective and subjective elements must be fulfilled: (a) the person exerts influence over another person to either commit a crime which in fact occurs or is attempted or to perform an act or omission as a result of which a crime is carried out; (b) the inducement has a direct effect on the commission or attempted commission of the crime; and (c) the person is at least aware that the crimes will be committed in the

201 *Prosecutor v. Kordić and Čerkez*, Trial Judgment, Case No. (IT-95-14/2-T), 26 February 2001, para. 387.

202 *Prosecutor v. Miroslav Kvočka et al.*, Trial Judgment, Case No. (IT-98-30/1-T), 2 November 2001, para. 252.

203 *Kordić and Čerkez* Trial Judgment, *supra* note 201, para. 27.

204 *Ndindabahizi* Appeal Judgment, *supra* note 195, para. 139.

205 *Orić* Trial Judgment, *supra* note 195, para. 271.

206 *Ibid.*

207 *Ibid.*, para. 272; see also M.E. Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart, Oxford, 2013), pp. 330-332.

ordinary course of events as a consequence of the realization of the act or omission.²⁰⁸

More recently at the ICC, in her dissenting opinion to the 2019 *Gbagbo and Blé Goudé* decision, Judge Carbuccion referred to instigation as a concept including both soliciting and inducing and relied on the *Orić* Trial Judgment as providing the best definition and the most accurate standard for the 'substantial contribution' test.²⁰⁹

The challenging task of proving a causal link is echoed in other international prosecutions, such as the collapse of three cases against Callixte Mbarushimana, William Samoei Ruto and Joshua Arap Sang at the ICC. Mbarushimana was charged under 25(3)(d), but the Court found that there were no reasonable grounds to believe that he had encouraged the troops on the ground and thus there could be no *significant* contribution on his part to those crimes.²¹⁰ William Ruto was charged with co-perpetration of CAH thus requiring the proof of an *essential* contribution, and the ICC Trial Chamber articulated the requirement for a causal nexus between his speech act and the criminal acts thus:

Even if it were accepted that Mr Ruto's speeches contained a sufficiently clear message that he wanted others to engage in conduct that would, in the ordinary course of events, constitute any of the crimes charged, it still has to be established that this message was actually heeded by the physical perpetrators or that his speeches had a direct effect on their behaviour.²¹¹

On the other hand, Mr Sang was charged with solicitation or inducement and aiding and abetting. Judge Fremr noted that with regard to solicitation or inducement there had to be evidence that any of the physical perpetrators were *influenced* by the alleged words even if it would have been established that he called upon listeners to engage in conduct that would, in the ordinary

208 Situation in the DRC, *Prosecutor v. Bosco Ntaganda*, Pre-Trial Chamber II Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, Case No. (ICC-01/04-02/06), 14 June 2014, para. 153.

209 *Gbagbo and Blé Goudé* decision, Carbuccion Dissenting Opinion, *supra* note 94, para. 559.

210 Situation in the DRC, *The Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, Case No. (ICC-01/04-01/10), 16 December 2011, para. 339.

211 Situation in the Republic of Kenya, *Prosecutor v. William Ruto and Joshua Sang*, Decision on Defence Applications for Judgments of Acquittal, Case No. (ICC-01/09-01/11), 5 April 2016, para. 135.

course of events, result in the commission of one or more of the crimes charged.²¹² It is important to note that the Chamber could not even assess whether the speech amounted to inflammatory or instigating speech as a record of the exact words that were used was not provided by the Prosecution but merely witness testimonies.²¹³ This was particularly problematic since the speech was claimed to be coded and there was great risk that the witnesses provided 'their own, incorrect, interpretation of the obscure wording'.²¹⁴ The fact that the Prosecution could not obtain such evidence was further seen as a sign that Mr Sang was not as *popular* and *influential* as was claimed.²¹⁵ The lack of sufficient reliable evidence prevented the possibility of establishing *any* contribution to the commission of the charged crimes and thus also liability under aiding and abetting.²¹⁶ Sang was further charged under Article 25(3)(d), which requires merely a *significant* contribution, yet this option was excluded for lack of evidence that would prove the existence of the necessary group sharing a common plan.²¹⁷

Even in the landmark case for international criminalisation of speech crimes, i.e. *Nahimana et al.*, the AC acquitted Ferdinand Nahimana of instigating genocide in terms of pre-6 April broadcasts due to what they considered to be at the very least a tenuous link between the speeches and specific acts of genocide considering the time lapse between the speeches and the killings.²¹⁸ The blame for this rests also with the Prosecution as they did not bring a single perpetrator to testify that they had been influenced by the defendants. Most recently in the case of *Gbagbo and Blé Goudé*, the majority of the Trial Chamber held that there was 'no case to answer' including on charges in relation to the contribution of the accused's speech acts to post-election violence.

One of the biggest challenges in proving a causal link to subsequent crimes is bringing witnesses as evidence. Calling as witnesses the very people who had been influenced by the incitement and subsequently committed crimes or who knew others that did, would open the doors for questioning their

²¹² *Ibid.*, para. 139.

²¹³ *Ibid.*, para. 141.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*, para. 142.

²¹⁷ *Ibid.*, para. 131.

²¹⁸ *Nahimana* Appeal Judgment, *supra* note 84, para. 513. However, regarding broadcasts after 6 April 1994, the AC 'observe[d] that Appellant Nahimana does not appear to dispute that the broadcasts [...] contributed to the commission of acts of genocide' (para. 514) and concluded that 'it has not been demonstrated that it was unreasonable for the TC to find that the RTLM broadcasts after 6 April 1994 substantially contributed to the killing of these individuals' (para. 515).

credibility.²¹⁹ In the *Muvunyi* case before the ICTR,²²⁰ the credibility of a witness was doubted, based on their being an *Interahamwe* militiaman who may have been motivated to exaggerate the defendant's role in acts of genocide in order to minimise his own role. More importantly, the phenomenon of recanting by prosecution witnesses, although generally common in international criminal proceedings, is especially endemic in speech crimes cases, in part because the accused are often high-level politicians with continued government backing and a zealous following and witnesses are often subjected to bribery and intimidation.²²¹ Another problem is that international criminal tribunals do not have the leverage of encouraging testimony from subordinates against superiors in exchange for reduced sentences, such as is the practice in the United States.

It is important to note that during the second ICTY investigation into Šešelj's propaganda, which was led by the German prosecutor Hildegard Uertz Retzlaff, a large number of potential fact witnesses were interviewed, including many different types of insiders.²²² Some of the witnesses later retracted their statements to the OTP under threats by Šešelj's men. However, apart from them, there was a dozen or so paramilitary troops, mainly members of Šešelj's forces who gave statements corroborating direct influence on their crimes as charged in the indictment.²²³ As Dojčinović notes, '[t]he proof of direct instigation in these statements was truly overwhelming'.²²⁴ Unfortunately, the prosecution teams and their strategies drastically changed during trial and with a reliance on JCE the view was eventually adopted that instigation or a causal link with crimes committed did not need to be proven.²²⁵ The statements highly regrettably thus ended up not being used. They now sit in the OTP archives and due to their confidentiality cannot be disclosed to the public.²²⁶

In terms of instigation the AC corrected the TC judgment in several ways. Firstly, it made clear that it was not necessary for the instigator to have used different forms of persuasion such as threats, enticement or promises to the

219 Davies, *supra* note 96, p. 250.

220 *Muvunyi* Appeal Judgment, *supra* note 85, para. 129, referring to *Prosecutor v. Tharcisse Muvunyi*, Trial Judgment, Case No. (ICTR-2000-55A-T) 12 September 2006, para. 156.

221 Wilson, *supra* note 11, p. 119; see also R.A. Wilson and M. Gillett, *The Hartford Guidelines on Speech Crimes in International Criminal Law*, Peace and Justice Initiative, online at www.internationalspeechcrimes.org/hartford_guidelines.pdf, p. 70.

222 Dojčinović, communication with authors, *supra* note 150.

223 *Ibid.*

224 *Ibid.*

225 *Ibid.*

226 *Ibid.*

physical perpetrators of the crimes.²²⁷ Secondly, it also clarified that it was not necessary to establish that the crimes would not have been committed without the instigator's involvement but merely that his utterances were a substantial factor contributing to the conduct of the perpetrators.²²⁸

For Šešelj's speech in Hrtkovci, the AC found him responsible for instigating deportation, persecution (forcible displacement) and other inhumane acts (forcible transfer) as CAH. This in turn was based on the AC finding that the speech *substantially contributed* to the conduct of the perpetrators in light of a) Šešelj's *influence* over the crowd; and b) the striking parallels between his inflammatory words and the acts subsequently perpetrated by, *inter alia*, members of the audience.²²⁹ In a positive twist, the AC thus provided two additional criteria for trial chambers to take into consideration when determining the link between speech and subsequent crimes that are more than mere chronology. As far as the *mens rea* is concerned, the AC noted that Šešelj intended to prompt the commission of the crimes or, at the very least was *aware of the substantial likelihood* that they would be committed *in execution of his instigation*.²³⁰

Regrettably, the AC dismissed the Prosecution's appeal regarding all other speeches, that is in the towns of Mali Zvornik and Vukovar, his statements before the Serbian Parliament, and other statements encouraging the creation of a Greater Serbia, claiming that the evidence presented by the Prosecution was insufficient to discern any specific impact on the commission of crimes.²³¹

Considering his speech at Mali Zvornik, the AC found that a *substantial contribution* to the commission of the relevant crimes there did not exist. The AC acknowledged that Šešelj's statements that 'rivers of blood' would follow a Bosnian declaration of independence, were clearly inflammatory when viewed in the *context of the events* that were unfolding at Zvornik at the time, including the detention, torture and murder of Muslim civilians by several factions of the Serbian forces.²³² The AC further acknowledged that Šešelj exerted *influence* over members of his party and some combatants.²³³ It found that the speech in Mali Zvornik where Šešelj implored the Četniks to clear up Bosnia from the 'pagans' and show them the road to the east where they belonged, were a *call for ethnic cleansing*, which *could have* prompted other persons to commit

227 Šešelj Appeal Judgment, *supra* note 110, para. 122.

228 *Ibid.*, para. 131.

229 *Ibid.*, para. 154.

230 *Ibid.*

231 *Ibid.*, paras. 133-134.

232 Šešelj Appeal Judgment, *supra* note 110, para. 130.

233 *Ibid.*, para. 133.

crimes against non-Serbian civilians.²³⁴ Despite this, however, the AC did not find him responsible for instigating the crimes charged in the Indictment as the evidence was insufficient to discern whether the *impact on the commission of the crimes amounted to a substantial contribution*.²³⁵

3.5 Aiding and Abetting

With regard to the alleged responsibility of Vojislav Šešelj on the count of aiding and abetting, the Chamber, by majority, Judge Lattanzi dissenting, rejected it, noting that the underlying allegations of the Prosecution have the same factual basis as its allegations on his responsibility under the JCE and instigation. The TC held that the defendant did not show sufficient criminal intent, and it was not proven that his speeches calling for expulsions and forcible transfers had had a substantial effect on the perpetration of war crimes.²³⁶

As mentioned above, on paper, aiding and abetting requires the same threshold for causality as instigation or ordering and planning, i.e. a 'substantial' effect or contribution, yet the jurisprudence has shown more flexibility in this regard for aiding and abetting.²³⁷ For example, in *Simić*, the AC stated: 'It is not required that a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime be shown, or that such conduct served as a condition precedent to the commission of the crime'.²³⁸ Whether the Court will consider acts as aiding and abetting without a causal link to the offense in question, will depend on the nature of the contribution and the pattern of facts in the case.²³⁹ Furthermore there is no specific threshold for the level of assistance required to establish liability for aiding and abetting other than that it 'must have furthered, advanced or facilitated the commission'²⁴⁰ of the offense.²⁴¹

In *Charles Taylor* it was also confirmed by the AC of the Special Court for Sierra Leone (SCSL) that each individual act does not have to exert a 'substantial

²³⁴ *Ibid.*, para. 130.

²³⁵ *Ibid.*, paras. 133-134.

²³⁶ Šešelj Trial Judgment, *supra* note 10, para. 356.

²³⁷ Wilson and Gillett, *supra* note 221, p. 73.

²³⁸ *Prosecutor v. Blagoje Simić et al.*, Appeal Judgment, Case No. (IT-95-9-A), 28 November 2006, para. 85. See *Bemba* Trial Judgment, *supra* note 89, para. 94; *Prosecutor v. Dominique Ntawukuliyayo*, Appeal Judgment, Case No. (ICTR-05-82-A), 14 December 2011, para. 214; *Mrkšić* Appeal Judgment, *supra* note 85, para. 81; *Prosecutor v. Emmanuel Rukundo*, Appeal Judgment, Case No. (ICTR-2001-70-A), 20 October 2010, para. 52; *Prosecutor v. Callixte Kalimanzirai*, Appeal Judgment, Case No. (ICTR-05-88-A), 20 October 2010, para. 86.

²³⁹ Wilson and Gillett, *supra* note 221, p. 73.

²⁴⁰ *Bemba* Trial Judgment, *supra* note 89, para. 94.

²⁴¹ Wilson and Gillett, *supra* note 221, p. 72.

effect' on the outcome to qualify as aiding and abetting, but rather '[t]he facts of a case may involve multiple acts or conduct which, considered cumulatively, can be found to substantially contribute to the crime charged'.²⁴²

Yet despite the seemingly lower threshold for causation found in the international jurisprudence, Šešelj's acquittal for aiding and abetting CAH was upheld by the AC, on the grounds that Šešelj did not show the requisite awareness that crimes were being committed and his speech acts did not rise to the requisite level of making a substantial contribution to the commission of crimes.²⁴³ The decisions of both chambers thus displayed a departure from previous jurisprudence against a just ruling and again in favour of acquittal.²⁴⁴

3.6 *Committing Persecution through 'Incitement to Hatred'*

It is not however solely under instigation, aiding and abetting or the doctrine of JCE that liability can be attributed to hate propagandists. In *Šešelj*, the Prosecution alleged physical commission of persecution as a CAH through the accused's *speeches* in Hrtkovci, Vukovar and Mali Zvornik based on the violation of the right to dignity and security of the targeted groups. The Prosecution strategy was heavily influenced by the *Nahimana et al.* case where the possibility of such liability was most notably confirmed when taking place in a context of a widespread and systematic attack against a civilian population.

While this position has been criticised as 'essentially ignoring the decision of ICC States parties not to criminalise incitement to war crimes and CAH as such'²⁴⁵ it addresses an apparent gap in ICL in terms of war propaganda. Furthermore, it would not be entirely accurate to equate incitement to war crimes or CAH with incitement to hatred as persecution *per se*. The latter does not require a causal link to any subsequent crimes. However, it is nevertheless

²⁴² *Prosecutor v. Charles Taylor*, Appeals Judgment, Case No. (SCSL-03-01-A), 26 Sep. 2013, para. 362, fn. 1128. See also *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeal Judgment, Case No. (IT-02-60-A), 9 May 2007, para. 284; *Prosecutor v. Jean de Dieu Kamuhanda*, Appeal Judgment, Case No. (ICTR-99-54A-A), 19 September 2005, paras. 71-72.

²⁴³ *Šešelj* Appeal Judgment, *supra* note 110, paras. 171, 173, 181.

²⁴⁴ It seems that a general response to the early criticisms levelled at international criminal judges for adopting approaches that were too pro-conviction and that overlooked rights of the accused has been to lurch in the other direction, with an eagerness to demonstrate their unparalleled care for the accused at the expense of justice. See D. Robinson, 'The Other Poisoned Chalice: Unprecedented Evidentiary Standards in the Gbagbo Case?' (Part 1), *EJIL: Talk!*, online at <https://www.ejiltalk.org/the-other-poisoned-chalice-unprecedented-evidentiary-standards-in-the-gbagbo-case-part-1/>.

²⁴⁵ I. Peterson, 'International Criminal Liability for Incitement and Hate Speech', in M. Böse et al. (eds.), *Justice without Borders: Essays in Honour of Wolfgang Schomburg* (Brill/Nijhoff, Leiden, 2018) p. 356.

defined also in terms of impact and is thus not an inchoate crime as detailed below.²⁴⁶ As an inchoate crime, it is a wrong in itself (a '*malum in se*') and the inciter is being held criminally responsible for his own actions, not those of the incitee.²⁴⁷

Notably, however in his partly dissenting opinion in the *Nahimana* case, Judge Meron clearly disagreed with the majority, insisting that mere hate speech could not be criminal.²⁴⁸ Similarly in the Trial Judgment in *Šešelj* the majority dismissed the notion that incitement to hatred constituted a crime in international law.²⁴⁹ Also against previous ICTY jurisprudence,²⁵⁰ the TC in *Šešelj* furthermore denied the existence of a widespread *and* systematic attack against the non-Serbian population that meant that the consideration of *Šešelj*'s hate speech as a CAH *per se* was *a priori* impossible. Erroneously, in para. 192 of the judgment the TC referred to the element of 'widespread *or* systematic' CAH as conjunctive rather than disjunctive, raising the bar further and contradicting the existing law.

In general, the crime of persecution consists of an act or omission that discriminates in fact against protected groups in the context of a widespread or systematic attack on a civilian population. What is required is not merely the intent to discriminate but 'the act or omission must have discriminatory consequences'.²⁵¹ The persecutory act or omission must deny – or infringe upon – a fundamental human right laid down in international (customary or treaty) law.²⁵² There must be a 'gross or blatant denial' of a fundamental right.²⁵³ Article 7(2) (g) of the Rome Statute states that the act of persecution must result in an 'intentional and severe deprivation of fundamental rights contrary to

²⁴⁶ *Nahimana* Trial Judgment, *supra* note 61, para. 1073; see also *Prosecutor v. Georges Ruggiu*, Trial Judgment, Case No. (ICTR-97-32-I), 1 June 2000, para. 22.

²⁴⁷ J. Jaconelli, 'Incitement: A Study in Language Crime', 12 *Criminal Law and Philosophy* (2018) 245-265, p. 250.

²⁴⁸ *Nahimana* Appeal Judgment, *supra* note 84, Partly dissenting Opinion of Judge Meron, paras. 5-8.

²⁴⁹ *Šešelj* Trial Judgment, *supra* note 10, para. 300.

²⁵⁰ *Prosecutor v. Mile Mrkšić et al.*, Trial Judgment, Case No. (IT-95-13/1), 27 September 2007, paras. 470, 472.

²⁵¹ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Trial Judgment, Case No. (IT-02-60), 17 January 2005, para. 583; *Brđanin* Trial Judgment, *supra* note 62, para. 993.

²⁵² *Prosecutor v. Miroslav Kvočka et al.*, Appeal Judgment, Case No. (IT-98-30/1-A), 28 February 2005, para. 320; *Kordić and Čerkez*, Appeal Judgment, *supra* note 195, para. 101; *Prosecutor v. Tihomir Blaškić*, Appeal Judgment, Case No. (IT-95-14-A), 29 July 2004, para. 131.

²⁵³ *Prosecutor v. Théoneste Bagosora et al.*, Decision on Motions for Judgment of Acquittal, Case No. (ICTR-98-41-T), 2 February 2005, para. 32; *Kvočka* Trial Judgment, *supra* note 202, para. 184; *Prosecutor v. Vlatko Kupreškić et al.*, Trial Judgment, Case No. (IT-95-16-T), 14 January 2000, para. 620.

international law'. The aim of such a deprivation of an individual's rights is 'the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself'.²⁵⁴

An act is discriminatory when a victim is targeted because of his or her membership in a group defined by the perpetrator on a political, racial or religious basis.²⁵⁵ It is thus the perpetrator's subjective perception of the group or community and who belongs to it, which is determinative and not some objectifiable characteristics that connect the group.²⁵⁶

A number of accused have been found guilty of persecution by denigration through speech. In *Prosecutor v. Ruggiu* the ICTR found that hate speech, even without proof of causally related violence could be the basis for charging persecution as CAH. The Trial Judgment in that case characterised the acts of persecution as consisting of:

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.²⁵⁷

As Gordon puts it, the Chamber thus considered that the words themselves assaulted the victims with the consequence of denying them their fundamental rights and were not merely a means through which to inspire others to commit violent acts.²⁵⁸ The TC in *Nahimana* expressly recognised that such speech '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'.²⁵⁹ This approach is reflected also in the Supreme Court of Canada in *Mugesera*.²⁶⁰

²⁵⁴ *Kupreškić* Trial Judgment, *ibid.*, paras. 634, 750-752.

²⁵⁵ *Blagojević and Jokić* Trial Judgment, *supra* note 251, para. 583.

²⁵⁶ S. Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (Berliner Wissenschafts-Verlag, Berlin 2004), p. 240.

²⁵⁷ *Ruggiu* Trial Judgment, *supra* note 246, para. 22.

²⁵⁸ Gordon, *supra* note 71, p. 173.

²⁵⁹ *Nahimana* Trial Judgment, *supra* note 61, paras. 405, 1073.

²⁶⁰ *Streicher* Indictment, p. 11.

Until the Šešelj Appeal, the jurisprudence at the ICTY was, however, the opposite of the above. The first time the ICTY dealt with incitement to hatred as a crime within the subject matter jurisdiction of the Tribunal was in the *Kordić & Čerkez* case in which the indictment included 'encouraging and promoting hatred on political and other grounds' as a CAH.²⁶¹ However the TC did not find this act to constitute a CAH due to the fact that such incitement was not enumerated as a crime in the Statute and according to the Chamber, its prohibition had not reached customary international law either.²⁶² Furthermore it considered the gravity of such an act not to rise to the level of other acts enumerated in Article 5 of the ICTY Statute.²⁶³ All three justifications were dismissed in the *Nahimana* appeal judgment, which noted the consistent AC jurisprudence by which it does not matter whether a specific act of persecution was criminalised or whether its gravity amounted to other CAH as the underlying acts of persecution could be considered together.²⁶⁴

The ICTR in the *Nahimana* appeals judgment set a two-step test to determine whether incitement to hatred amounts to persecution. Firstly, the hate speech has to involve the denial of a fundamental right and discriminate in fact and secondly, the violation of these rights needs to be of equal gravity to the other CAH. Where the hate speech targets a population based on ethnicity, or any other discriminatory grounds, it violates the *right to respect for the human dignity* of the members of the group, whereas where the speech constituted a *call for violence* against a population on such grounds, it violated the group members' *right to security*.²⁶⁵ Both violations constitute *discrimination in fact*.²⁶⁶ According to the Chamber, speech itself cannot however constitute a violation of the *right to life, freedom or physical integrity*, without a third person's interference.²⁶⁷ Peterson criticises the decision for thus extending the crime of persecution to 'rather intangible harm'.²⁶⁸

261 *Kordić and Čerkez* Trial Judgment, *supra* note 201, para. 209, referring to Indictment, Count 1 (Persecutions, para. 37(c)).

262 *Kordić and Čerkez* Trial Judgment, *ibid.*, para. 209, fn 272.

263 *Ibid.*, fn 271.

264 *Nahimana* Appeal Judgment, *supra* note 84, fn 2264.

265 *Ibid.*, para. 986; *see also* *Prosecutor v. Simon Bikindi*, Trial Judgment, Case No. (ICTR-01-72-T), 2 December 2008, para. 392: 'hate speech may in certain circumstances constitute a violation of fundamental rights, namely a violation of the right to respect for dignity, when that speech incites to hate and discrimination, or a violation of the right to security when it incites to violence'.

266 *Bikindi* Trial Judgment, *ibid.*, para. 986.

267 *Nahimana* Appeal Judgment, *supra* note 84, para. 986.

268 Peterson, *supra* note 245, p. 356.

Where the hate speech did not incite to violence, the ICTR determined that it is not necessary to decide whether it was in itself of a gravity equivalent to the other CAH. This is because, as mentioned, it is only necessary for the *cumulative effect* of all the underlying persecutory acts to be of equal gravity to the other CAH and not for each underlying act.²⁶⁹ The Chamber therefore considered that hate speeches and calls for violence uttered after the beginning of a systematic and widespread attack against a population themselves constitute underlying acts of persecution, and when they substantially contribute to the commission of other acts of persecution they further constitute instigation to such crimes.²⁷⁰ After 6 April 1994, in Rwanda, the context was that of calls for genocide and a massive persecutory campaign against the Tutsis, therefore the gravity threshold was clearly met.²⁷¹

The *Šešelj* Trial Judgment however dismissed hate speech as persecution *per se* entirely. In terms of the speech in *Hrtkovci* it stated that the mere use of insulting or defamatory language was insufficient to amount to persecution.²⁷² On the other hand, in her dissenting opinion, Judge Lattanzi considered that at least the speech in *Hrtkovci* constituted a physical commission of the denigration of the non-Serb populations, particularly Croats, as an underlying act of persecution.²⁷³ The AC confirmed this opinion and considered that said speech denigrated the Croatians of that town on the basis of their ethnicity, in violation of their right to respect for dignity as human beings.²⁷⁴ Furthermore it violated the right to security of the Croatians since *Šešelj*'s instigation of their forcible expulsion incited violence that denigrated and violated this right.²⁷⁵ Based on this the speech in *Hrtkovci* constituted commission of persecution as a crime against humanity. This finding of commission of persecution as CAH was thus partly based on initially finding *Šešelj* responsible for instigating deportation, persecution (forcible displacement) and other inhumane acts (forcible transfer) as CAH. Other speeches that violated the right to dignity and the right to security of targeted groups went unrecognised as acts of persecution.

One of the most contentious issues when it comes to hate speech as persecution *per se* is the question whether it can amount to said crime without an

269 *Nahimana* Appeal Judgment, *supra* note 84, para. 987.

270 *Ibid.*, para. 988.

271 *Nahimana* Trial Judgment, *supra* note 61, para. 1076; *Nahimana* Appeal Judgment, *supra* note 84, fn 2264.

272 *Šešelj* Trial Judgment, *supra* note 10, para. 283.

273 *Šešelj* Lattanzi Dissenting, *supra* note 194, para. 48.

274 *Šešelj* Appeal Judgment, *supra* note 110, para. 163.

275 *Ibid.*

actual incitement to violence. The *Nahimana* Trial Judgment concluded that calls to violence were not necessary and in *Ruggiu*²⁷⁶ the Tribunal relied on the *Streicher* judgment in its reference to ‘the poison that Streicher injected into the mind of thousands of Germans’.²⁷⁷ Hate speech as persecution *per se* was thus considered as notably wider than instigation or direct and public incitement to include advocacy of ethnic hatred in other forms.²⁷⁸ Thus in the *Nahimana* Trial Judgment examples such as describing Tutsis as cunning and tricky or the portrayal of Tutsi women as *femmes fatales* or seductive agents of the enemy were all considered to constitute persecution.²⁷⁹ In support of this approach Gordon states:

speech in service of widespread and systematic attacks directed against civilian populations... not calling directly for action should nevertheless be criminalized. It cannot wrap itself in the mantle of democracy-promotion, self-governance, diversity-enhancement, community-building, or individual-empowerment in light of its link to a pervasive or well-organized attack on ordinary citizens in a community.²⁸⁰

On the contrary and mostly influenced by the American theory on the matter, those opposing such a wide definition have relied on the fact that Streicher was only convicted because of incitement to murder and they furthermore consider the acquittal of Fritzsche on grounds that his hate speeches did not seek ‘to incite the Germans to commit atrocities against the conquered people’.²⁸¹ They furthermore understand the *Ruggiu* Trial Judgment as showing that it is only speech whose ultimate aim is to destroy life that constitutes persecution²⁸² and criticise the TC for having failed to follow the *Čerkez and*

²⁷⁶ *Ruggiu* Trial Judgment, *supra* note 246, para. 19.

²⁷⁷ *Ibid.*

²⁷⁸ *Nahimana* Trial Judgment, *supra* note 61, para. 178.

²⁷⁹ *Ibid.*, para. 1079.

²⁸⁰ Gordon, *Atrocity Speech Law*, *supra* note 71, p. 402.

²⁸¹ *Nahimana* Appeal Judgment, *supra* note 84, para. 979; Open Society Justice Initiative, *Amicus curiae brief in Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Negeze v. The Prosecutor*, 15 December 2006, www.justiceinitiative.org/uploads/0777227e-8c7c-4684-84ac-34175f508095/ictr-nahimana-amicus-brief-20061215.pdf; *Nahimana* Meron Dissenting, *supra* note 248, paras. 12-13; *see also* D.F. Orentlicher, ‘Criminalizing Hate Speech in the Crucible of the Trial: Prosecutor v. Nahimana’, 21 *American University International Law Review* (2006) 557-596; K.W. Goering et al., ‘Why U.S. Law Should Have Been Considered in the Rwanda Media Convictions’, 22 *Communications Lawyer* (2004) 10-18, pp. 10-12.

²⁸² Gordon, *supra* note 71, p. 153.

Kordić Trial Judgment, which had found that mere hate speech could not constitute persecution.²⁸³

The *Nahimana* Appeal Judgment refrained from settling the matter in its entirety, while the partially dissenting opinions were split between Judge Meron and Judges Shahabudeen and Pocar. Relying on *Kordić* and US jurisprudence, Meron simply dismissed the possibility of hate speech ever forming a basis for criminal conviction save for incitement to violence.²⁸⁴ On the contrary, Judges Shahabudeen and Pocar were of the opinion that the Appeal judgment should have made it clear that speech not inciting violence can constitute an underlying act of persecution.²⁸⁵ Pocar felt that in the case at hand the circumstances were a perfect example of where hate speech fulfils the conditions necessary for it to be considered as an underlying act of persecution and that the relevant speeches taken together and in their context amounted to a violation of sufficient gravity.²⁸⁶ Furthermore Shahabudeen claimed that in the case of *Fritzsche* his acquittal was based on the fact that he did not form part in originating or formulating the propaganda campaign and not on the fact that he did not call to violence.²⁸⁷ Citing furthermore the decisions in *Flick* and *Einsatzgruppen* he interpreted Nuremberg jurisprudence as not necessitating incitement to violence for persecution as a CAH but rather 'harm to life and liberty' or 'acts committed in the course of wholesale and systematic violation of life and liberty' that may include economic and political discrimination and not necessarily a physical attack. In his argument: '[T]he court may well regard the 'cumulative effect' of harassment, humiliation, and psychological abuse as impairing the quality of 'life', if not 'liberty', within the meaning of the tests laid down in *Einsatzgruppen*.'²⁸⁸

Shahabudeen also criticised the *Kordić* judgment, which he claimed contradicted the *Ministries* case, other cases of the ICTY and customary international law by excluding the hate act from its context:

283 Open Society Justice Initiative, *Amicus curiae brief*, *supra* note 281.

284 *Nahimana*, Meron Dissenting, *supra* note 248, para. 13.

285 *Nahimana* Appeal Judgment, *supra* note 84, Partly Dissenting Opinion of Judge Shahabudeen, paras. 7-8.

286 *Nahimana* Appeal Judgment, *ibid*, Partly Dissenting Opinion of Judge Pocar, para. 3. Pocar also stated that RTLM hate screeds caused Hutus to discriminate against Tutsis.

287 *Nahimana*, Shahabudeen Dissenting, *supra* note 285, paras. 7-8; '[h]is position and official duties were not sufficiently important... to infer that he took part in originating or formulating propaganda campaigns'; *Streicher* Judgment, para. 161 convicting Streicher for Crimes against Humanity; F. Pocar, 'Persecution as a Crime under International Criminal Law', 2 *Journal of National Security Law and Policy* (2008) 355-365, p. 359.

288 *Nahimana*, Shahabudeen Dissenting, *ibid*, paras. 10-12.

it is not possible fully to present a campaign as persecutory if integral allegations of hate acts are excluded... The subject of indictment is the persecutory campaign, not the particular hate act. This was why non-crimes were included with crimes in the *Ministries* case.²⁸⁹

Thus, despite the strong dissents, the AC in the *Media* case left the issue unresolved.²⁹⁰ The *Šešelj* Appeal did not settle the matter either, as it does not give a definitive answer but rather implies that a call to violence is necessary. There is scope to understand the mention of a violation of dignity in the *Šešelj* Appeal Judgment as allowing for a finding of persecution without a call for violence, yet there are two issues that arise in this context. Firstly, as mentioned, the Appeal Judgment does not mention the violation of dignity in the actual disposition, and secondly, it is not clear what is meant by 'dignity'.²⁹¹ As David Weisstub theorises, human dignity can be violated through disrespect whereby a person is 'reduce[d] [...] to behave in a less than dignified manner'.²⁹² As Timmermann writes, it is also violated when a person is made to lose 'self-respect or the feeling of self-assurance that results from social recognition that individuals experience when they are respected as equal members of the community'.²⁹³ Margalit explains that humiliation 'shows the victims that they lack even the most miniscule degree of control over their fate – that they are helpless and subject to the good will [...] of their tormentors'.²⁹⁴ These definitions would seem to imply a policy of persecution beyond mere words to include instead a significant degree of coercion. In the context of speech, they thus suggest words that carry at least an implied threat of physical force or violence. This would seem to loosely correspond with the Appeal Judgment since it did not find a violation of dignity in Šešelj's other speeches despite clearly using severely derogatory terms for the out-groups.

289 *Ibid.*, para. 16, fn omitted.

290 Gordon, *supra* note 71, p. 239.

291 See C. O'Mahony, 'There is No Such Thing as a Right to Dignity', 10 *International Journal of Constitutional Law* (2012) 551-574. Note that countries such as Germany, Denmark, The Netherlands and South Africa prohibit or criminalise incitement to hatred because of its perceived violation of human dignity. See Timmermann, *supra* note 6, p. 39.

292 D.N. Weisstub, 'Honor, Dignity, and the framing of Multiculturalist Values', in D. Kretzmer and E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, The Hague, 2002) pp. 263, 270 as quoted in Timmermann, *ibid.*, p. 41.

293 Timmermann, *ibid.*, p. 41, referring to C. Menke and A. Pollmann, *Philosophie der Menschenrechte zur Einführung* (Junius Verlag, Hamburg, 2007), pp. 139-143.

294 A. Margalit, *The Decent Society* (N. Goldblum (trs), Harvard University Press, Cambridge, 1996) p. 116 as quoted in Timmermann, *ibid.*, pp. 49-50.

Limiting the scope of persecution to hate speech inciting to violence leaves essential parts of any successful hate propaganda campaign out of criminalisation. In this sense it mirrors the situation with incitement to genocide, where only words that directly call for genocide fall within the definition of the crime, whereas all other propaganda surrounding such calls can merely provide context for the purpose of determining the intent of the speaker or the directness of his calls to genocide.²⁹⁵

In her dissenting opinion in *Gbagbo and Blé Goudé*, Judge Carbuccia referred to *Féret v. Belgium* to highlight that a politician's comments constituted public incitement to racial hatred against outsiders, and without requiring a call to this or that act of violence or another delinquent act, violated the dignity and security of the effected groups of people, posing a danger for social peace and the political stability of democratic states.²⁹⁶ This said, the Judge did not clarify what implications she wanted to infer from this for the purpose of interpreting the ICC Statute on such incitement.

If there is no need for a direct call to violence or causality between the uttered speech and any subsequent atrocities committed, proving guilt of hate speech as persecution *per se* is inherently easier. However, it nevertheless does not solve the issue of the potential preventative function of hate speech as a crime in itself. This is because hate speech as persecution *per se* still demands the contemporaneity of the speech with a widespread or systematic attack directed against a civilian population, since such contemporaneity has always been a part of the definition of CAH. The AC in *Nahimana* thus insisted that the hate speech in question be contemporaneous with the atrocities committed against the Tutsis after 6 April 1994. This leaves out all the propaganda leading up to the genocide, which was essential for the success of the actual incitement to genocide. Judge Pocar drew the distinction between hate speeches prior to 6 April 1994, that is, prior to the beginning of the systematic and widespread

295 *Nahimana* Appeal Judgment, *supra* note 84, para. 726; 'It appears from the *travaux préparatoires* of Genocide Convention that only specific acts of direct and public incitement to commit genocide were sought to be criminalized and not hate propaganda or propaganda tending to provoke genocide'. Despite this, the AC made it clear that context is a factor to consider in deciding whether the relevant discourse constitutes direct incitement to commit genocide and that uttered speech which does not by itself amount to this crime can nevertheless provide such a context. As other contextually important information, it could explain how the listeners perceived the relevant speech and the impact the speech may have had. *See also, ibid.*, paras. 715, 725.

296 *Féret v Belgium*, App no. 15615/07 (ECtHR, 16 July 2009) para. 73, as quoted in *Gbagbo and Blé Goudé* decision, Carbuccia Dissenting Opinion, *supra* note 94, para. 569

attack against the Tutsi ethnic group, and hate speeches that occurred after that date. In his opinion the later speeches were *per se* underlying acts of persecution,²⁹⁷ whereas the former ones could be considered instigation.²⁹⁸

4 Law Not Fit to Deal with War Propagandists

As it stands, the sort of hate and fear propaganda that was employed in the former Yugoslavia is not criminalised in its complex entirety. Unless it is a matter of direct incitement to genocide, large chunks of speech employing persuasion techniques that prime a society for the commission of atrocities remain outside the ambit of criminalisation. The consideration of the totality of one's hate propaganda and the context in which it is uttered is crucial for recognising the role it plays. This section will take a multi-disciplinary approach to identifying the reasons behind the failure of international criminal law to adequately recognise the effects of propaganda and effectively address it. It will furthermore highlight the necessary shifts in legal perception of this phenomenon that would allow more meaningful conclusions in the jurisprudence in line with the findings of social sciences experts.

Predrag Dojčinović noted already before the decisions in *Šešelj*, that there was a conceptual vacuum in the interaction of propaganda and international law.²⁹⁹ In his words: 'Propaganda is used in a manner which leaves the impression of an intellectual embellishment, a prosthesis of deliberative thinking, rather than a concept which is first clearly understood and only then situated in law'.³⁰⁰ He further notes that after reading judgments from the ICTY and ICTR 'we are often left with an intuition that propaganda plays an important role in the text, although it is rarely explained why'.³⁰¹ Richard Wilson goes a step further and claims that while international tribunals use forceful declarations regarding the deleterious effects of propaganda, they are seldom supported by extensive and reliable evidence 'and it could be argued that the chasm between the claims regarding propaganda's consequences and the evidence presented to support such claims is wider than in any other area of

297 *Nahimana* Judge Pocar Dissenting, *supra* note 286, para. 3.

298 *Ibid.*

299 Dojčinović, *Propaganda, War Crimes Trials*, *supra* note 8, p. 7.

300 *Ibid.*

301 *Ibid.*

international criminal law'.³⁰² In their view, a closer insight into its mechanism would contribute much required precision and logical coherence to the analysis in the judgments.³⁰³

Wilson warns against relying on common sense reasoning when trying to construct causal models of speech at international tribunals.³⁰⁴ In his words, 'our ability to understand the effects of speech through intuition and *a priori* reasoning alone is actually quite limited. Many recent findings in persuasion research and communication theory are counterintuitive, or at least not immediately obvious, even to seasoned political and legal observers'.³⁰⁵ While regretting the lack of social research expertise during trials of hate propagandists, Wilson at the same time notes that not even such research can determine with absolute certainty the concrete effects of a particular speech act uttered in the context of widespread and systematic violations, however it can identify which types of speech acts are most likely to elevate the risk of violence in a particular context.³⁰⁶

The above indicates that proving a causal link between a speech and an act from a member of the audience beyond reasonable doubt may be a near impossible task, particularly since, as Wilson notes, there is no guidance on how to understand such a causal link in ICL jurisprudence or scholarly works.³⁰⁷ Aksenova observes the intrinsic problem in relying on causation in the strict sense of the word in the context of speech acts. In the physical world, a causal chain is considered broken when interrupted by the free choice of an individual, even one acting under an accomplice's influence.³⁰⁸ In this sense it cannot be said that an accomplice should be understood as a necessary prerequisite for harm caused by the primary perpetrator; rather he merely affects the freely chosen behaviour of the principal perpetrator.³⁰⁹ In his *Causation and Responsibility*, Michael Moore delves extensively into how complicity need not be causal with respect to the crime, claiming that all causes are by definition

302 R.A. Wilson, 'Propaganda and History in International Criminal Trials', 14 *Journal of International Criminal Justice* (2016) 519-541, p. 533.

303 *Ibid.*

304 Wilson, *supra* note 11, p. 223.

305 *Ibid.*, p. 224.

306 *Ibid.*

307 *Ibid.*, p. 8.

308 S.H. Kadish, 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine', 73 *California Law Review* (1985) 323-410, p. 334.

309 M. Aksenova (ed.), *Complicity in International Criminal Law* (Hart Publishing, London, 2016), p. 99.

merely chance-raising.³¹⁰ On the other hand, many have questioned how much 'free will' there can be in a propagandistically determined context.³¹¹

Regardless of the theory, a more appropriate approach than searching for causation in the strict sense would be to establish that a certain speech is or was *likely to elevate the risk of violence in a particular context* including the cultural, political and historical context. This way the inquiry could be done through an objective expert evaluation of outwardly manifestations and would not necessitate the testimony of principal perpetrators as to the effects the propaganda had on them. As Joseph Jaconelli notes generally on incitement, it may prove impossible to ascertain the number, location or identity of the incited and how incited they were.³¹² In fact, in the present context, it would require bringing to the court perpetrators who: a) have a perfect recollection of their own thought process behind the commission of the crimes; b) have the willingness to honestly speak about it; and c) have an extraordinary ability of self-analysis to the extent that they can determine with surgical precision how far their thought process at the time was 'their own' and to what degree it was influenced by the subconscious effects of propaganda or the general context created or permitted by other individuals under its influence.

Considering the potential risk, instead of strict causation, would mirror the approach taken by human rights courts in assessing the legitimacy of limiting freedom of expression in the sense that it would consider the *dangerousness* of the speech.³¹³ It is important to note that the cases in question at international criminal tribunals generally do not consider the legitimacy of a restriction of the freedom of speech of a minority group versus the national security considerations of the government as is the situation at the human rights courts. Rather it is the opposite: the speech under consideration is that of the so-called 'majority population', in support of the government and as a supposed defence of national security.³¹⁴ Thus the standards that have evolved in international

310 M. Moore, *Causation and Responsibility: An Essay in Law, Morals and Metaphysics* (Oxford University Press, Oxford, 2009) 299-323.

311 P. Dojčinović, 'Word Scene Investigations: Toward a Cognitive Linguistic Approach to the Criminal Analysis of Open Source Evidence in War Crimes', in Dojčinović (ed.), *supra* note 8; A.R. Melle, *Irrationality: An Essay on Akrasia, Self-Deception, and Self-Control* (Oxford University Press, Oxford, 1987); J.M. Fischer, R. Kane, D. Pereboom, and M. Vargas, *'Libertarianism', Four Views on Free Will* (Blackwell Publishing, Oxford, 2007), p. 14; D.M. Wegner, *'The Mind's Compass', The Illusion of Conscious Will* (The MIT Press, Cambridge, MA, 2002), p. 336.

312 Jaconelli, *supra* note 247, 253.

313 ECtHR, *Sürek and Özdemir v. Turkey*, Merits and Just Satisfaction, App No. 24277/94, (ECtHR, 8 July 1999).

314 *Nahimana* Trial Judgment, *supra* note 61, paras. 1008-1009.

law largely to deal with the former situations required some adaptation in the sense of lowering protections, 'so that ethnically specific expression would be *more* rather than *less* carefully scrutinized to ensure that minorities without equal means of defence are not endangered'.³¹⁵

A broader understanding of causation in propaganda cases would thus allow for more effective prosecution of hate and fear propagandists, even if a substantial reform of the law in terms of expanding liability remains unattainable.

Whether propaganda can lead to atrocities depends on the context more so than particular words uttered. Several studies have confirmed that ordinary people are capable of committing atrocities in the name of nationalist imperatives, religious principles and righteous ideology.³¹⁶ When it comes to ethnic collective violence, Oberschall analyses three instances spanning three different continents and concludes that this occurs under the following conditions:

when there are contentious issues between [the groups], when their political leaders advocate hostility and aggression in ethnic conflict management, and when threat and hate messages in the mass media amplify danger to the group, incite hostility to adversaries, and justify collective violence against them as a solution to outstanding issues.³¹⁷

As Gordon suggests, of all the elements to consider in incitement, *context* is the most important.³¹⁸ The Hartford Guidelines advance a risk assessment framework informed by the latest social science research that has identified many of the key ingredients of mass persuasion.³¹⁹ They provide a checklist of indicative factors known to elevate the risk of speech acts prompting mass crimes, including: (a) the political context of the speech act, (b) the emotional state of the audience, (c) the historical and political context of the country, (d) the perceived charisma, credibility and authority of the speaker, (e) their use of graphic and dehumanising language, (f) the degree to which they summon up cultural symbols and cultivate historical grievances, (g) their calls for revenge,

³¹⁵ *Ibid.*, para. 1009.

³¹⁶ E. Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge University Press, Cambridge, 1989); M. Mann, *The Dark Side of Democracy. Explaining Ethnic Cleansing* (Cambridge University Press, Cambridge, 2005), p. 9; D. Horowitz, *The Deadly Ethnic Riot* (University of California Press, Berkeley, 1985); J. Waller, *Becoming Evil* (Oxford University Press, Oxford, 2002); C. Browning, *Ordinary Men. Reserve Battalion 101 and the Final Solution in Poland* (Harper Collins, New York, 1992).

³¹⁷ Oberschall, *Šešelji's Nationalist Propaganda*, *supra* note 57, p. 44.

³¹⁸ Gordon, *Atrocity Speech Law*, *supra* note 71, p. 296.

³¹⁹ Wilson and Gillett, *Hartford Guidelines*, *supra* note 221, pp. 120-121.

(h) their ability to access and control an array of means of communication, and (i) their identification of a clear path of violent action that their audience can follow.³²⁰

While the TC in *Šešelj* acknowledged its duty to analyse and qualify *Šešelj*'s statements and their potential impact in light of the cultural, historical and political context,³²¹ it essentially considered it as a sort of mitigating circumstance. The Chamber construed the 'context' in such way that any effects and any responsibility that went beyond the concrete situation were dismissed. As Posselt describes, hate speech and hate crime necessarily have a historical and iterative character:

For every performative requires for its functioning that it can be reiterated, that it evokes and affirms the historical sedimented norms, structures and conventions that ultimately enable it. This becomes particularly apparent, when we recall that the one who performs hate speech or commits hate crime never acts 'alone', but as a representative of social structures, attitudes and dispositions that his or her (speech) acts invoke and actualize. Hence, hate speech and hate crime are never simply expressions of an individual, but always also a reflection and reiteration of 'in-built tendencies and predispositions of societal structures that make those acts possible.'³²²

Posselt continues however, that this should not be an excuse for diminished but rather a strengthened concept of responsibility. Quoting Butler, he concludes that responsibility is not linked with speech as origination, but precisely with its citational and repetitive character, i.e. its invocation and reiteration of norms, conventions, traumas, and exclusions that are sedimented in language with which the speaker renews the linguistic tokens of a 'community', reissuing and reinvigorating such speech.³²³

320 *Ibid.*, pp. 120-121.

321 *Šešelj*, Trial Judgment, *supra* note 10, para 300; referencing in this regard *Nahimana* Trial Judgment, *supra* note 61, paras 1011, 1020-1022; *Nahimana* Appeal Judgment, *supra* note 84, paras. 698-703; *Akayesu* Trial Judgment, *supra* note 195, para. 557; *Bikindi* Trial Judgment, *supra* note 265, para. 247; *Prosecutor v. Callixte Nzabonimana*, Appeal Judgment, Case No. (ICTR-98-44D-A), 29 September 2014, para. 134; ECtHR, *Perinçek v. Switzerland*, Appeal Judgment, App No. 27510/08, (ECtHR, 15 October 2015), paras 207, 234 and 280.

322 G. Posset, 'Can Hatred Speak? Or the Linguistic Dimensions of Hate Crime', 82 *Linguistik Online* (2017) 6-25, pp. 21-22, DOI: <https://doi.org/10.13092/lo.82.3712>; see also J. Butler (ed.), *Excitable Speech. A Politics of the Performative* (Routledge, London, 1997), p. 39.

323 Posset, *ibid.*, p. 22.

4.1 *A Broader Approach to Causality Considering the Context of the Speech*

In her dissenting opinion in *Šešelj*, Judge Lattanzi claimed there was ample admitted evidence to establish instigation, which if taken into account in its entirety, analysed meticulously and in accordance with previous ICTY/ICTR jurisprudence, would lead to the only reasonable conclusion that instigation did take place as well as material perpetration of the crime of persecution through the underlying act of denigration.³²⁴ Her assessment is correct despite the fact that a vast amount of evidence remained unused as previously mentioned.³²⁵ What evidence was available was simply not factually analysed.³²⁶ Dojčinović points out for example how the word 'Ustaša' referred to by Šešelj, had already been recognised as one of the strongest derogatory hate speech references to Croats in the ICTY jurisprudence.³²⁷ Yet the TC did not even mention it, so the AC could not have taken it into account.³²⁸

Unfortunately, according to Lattanzi, in the context of instigation the Chamber

accorded no weight at all to the evidence showing that the Accused exerted a great influence on his followers and the SRS volunteers involved in the crimes...[and] failed to take into account important elements such as the means used by the Accused to influence the behaviour of the perpetrators of crimes, the repetition of the same incriminating discourse over time, the general background of the disintegration of the former Yugoslavia and the extreme inter-ethnic tensions against which these acts took place, and the fact that the existing situation worsened following the speeches in dispute.³²⁹

Judge Lattanzi, as well as the Prosecution's Appeal Brief, faulted the TC for not having taken into account more of Šešelj's statements in order to deliberate on his instigation liability; however, it is important to note that while there were

³²⁴ *Šešelj* Lattanzi Dissenting, *supra* note 194, paras. 49, 95-105.

³²⁵ Dojčinović, communication with authors, *supra* note 150.

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *Šešelj* Lattanzi Dissenting, *supra* note 194, para. 12; Similarly, the Prosecution submitted in its Appeal Brief, there was a failure by the Trial Chamber to engage with its core argument that Šešelj's relentless propaganda campaign instigated the commission of crimes against non-Serbsians and that the Trial Chamber only addressed a limited number of speeches without assessing the evidence in its proper context, offering little, if any, reasons of analysis. *Šešelj*, IT-03-67-T, Notice of Filing of Public Redacted Version of Prosecution Appeal Brief, 29 August 2016, (*Šešelj*, Appeal Brief) paras. 109-117.

at least over five hundred exhibits presented to address the *mens rea*, the indictment only mentioned five speeches as the specific crime base.³³⁰ As Wilson notes, 'a full comprehension of the ensemble of conditions that were jointly sufficient [for crimes to take place] is often lost as prosecutors and defense counsel seize upon opposite poles of the same continuum of causation'.³³¹ In the same way, the Prosecution in *Šešelj* sought to show how those five speeches were each 'directly causal and set in motion criminal actions'.³³² Yet such an approach misses the most important findings of recent social science research, i.e. that certain types of speech, while not attaining a *sine qua non* threshold, nevertheless elevate the probability conditions that a criminal harm or injury will ensue³³³ for example by lowering empathy towards an out-group,³³⁴ heightening fear, disgust,³³⁵ anger³³⁶ and an indifference to their well-being³³⁷ as well as morally justifying particularly brutal violence against its members.³³⁸

While some find it 'problematic to suggest speeches pleaded and not pleaded in the indictment, 'taken together', satisfied the requirements of instigation', this is precisely what should have been done in the *Šešelj* case, for a more appropriate consideration of the effects of his propaganda.³³⁹ It is rather shocking that among all of his speeches and writings, only one, that is the

330 *Šešelj*, Indictment, *supra* note 129, paras. 20, 22, 33.

331 Wilson, *Incitement on Trial*, *supra* note 11, p. 284.

332 *Ibid.*

333 *Ibid.*, p. 285.

334 C. Guillard and L.T. Harris, 'The Neuroscience of Dehumanization and its Implications for Political Violence', in Dojčinović, *supra* note 2, 201 citing A. Bandura et al., 'Disinhibition of Aggression through Diffusion of Responsibility and Dehumanization of Victims', 9 *Journal of Research in Personality* (1975) 253-269.

335 *Ibid.*, citing L.T. Harris and S.T. Fiske, 'Dehumanizing the Lowest of the Low Neuroimaging Responses to Extreme out-groups', 17 *Psychological Science* (2006) 847-853; R.T. Azevedo et al., 'Cardiac Afferent Activity Modulates the Expression of racial Stereotypes', 8 *Nature Communications* (2017); C.M. Lillie et al., 'This is the Hour of Revenge: The Psychology of Propaganda and Mass Atrocities' 2015, online at www.semanticscholar.org/paper/This-Is-the-Hour-of-Revenge%3A-The-Psychology-of-and-Lillie-Knapp/2255450149577e80cb2f0d2510bbaz2be18da2a4.

336 *Ibid.*, citing S. M. Utych, 'How Dehumanization Influences Attitudes toward Immigration', 71 *Political Research Quarterly* (2018) 440-452.

337 *Ibid.*, citing T. Rai et al., 'Our Enemies Are Human: That's Why We Want to Kill Them', *Behaviour Scientists*, 18 August 2017, <https://behavioralscientist.org/enemies-human-thats-want-kill/>.

338 *Ibid.*, citing A. Bandura et al., 'Mechanisms of Moral Disengagement in the Exercise of Moral Agency', 71 *Journal of Personality and Social Psychology* (1996) 364-374; N. Kteily, 'The Ascent of Man: Theoretical and Empirical Evidence for Blatant Dehumanization', 109 *Journal of Personality and Social Psychology* (2015) 901-931.

339 Peterson, *supra* note 245, p. 357; see *Šešelj* Appeal Brief, para. 110.

speech in Hrtkovci, was eventually found on Appeal to be criminally relevant. In other words, had Šešelj not given that particular speech, he would have still been considered innocent of any international crime. In view of the entirety of his propaganda portfolio, this would undoubtedly have been a grave injustice and would send a message that hate propaganda will go unpunished unless a particular speech can be linked with overwhelming evidence of causality to a specific crime committed as a result.

In the *Gbagbo and Blé Goudé* case at the ICC, the Prosecutor brought a much larger sample of potentially relevant speech to the Court and pursued a holistic approach to proving causation taking into consideration the combined effects of the words and actions.³⁴⁰ In delivering his reasons for joining Judge Tarfusser in deciding to end the case against Mr Laurent Gbagbo and Mr Charles Blé Goudé, Judge Henderson acknowledged that the Prosecutor was 'correct in emphasising the importance of evaluating all the evidence together and to take into consideration the combined effect' of the accused's actions and words.³⁴¹ However, he was unconvinced by the implications drawn therefrom and essentially expected evidence proving straightforward causation.

The Prosecution claimed, for example, that Mr Blé Goudé's words led to violence by creating a climate of fear with threats of genocide posed by France, the UNOCI and the supporters of the opposition, who he branded as the 'rebels'.³⁴² According to the Prosecutor, this primed the youth to be ready for a '*mot d'ordre*' to be issued by him in response to this threat.³⁴³ The latter referred to a speech in which Mr Blé Goudé instructed the audience to (a) prevent UNOCI from moving in the neighbourhoods, and (b) to coordinate with the '*présidents de quartier*' in order to be aware of and verify the comings and goings in their neighbourhoods and to 'denounce' strangers entering their neighbourhoods.³⁴⁴ While the said '*mot d'ordre*' did not include calls to violence, according to the Prosecutor explicit language did not need to be used for the message to be understood after the audience was primed with fear and in the context of pre-existing tension between the relevant neighbourhoods that made it foreseeable that inflammatory words stigmatising 'foreigners' would lead to violence.³⁴⁵

Henderson rejected such a general presentation of a causal link and stated that while the speech contained potentially inflammatory passages, which, in

340 *Gbagbo and Blé Goudé* decision, Reasons of Henderson, *supra* note 94, para. 1984.

341 *Ibid.*

342 *Ibid.*, para. 1986.

343 *Ibid.*

344 *Ibid.*, para. 1988.

345 *Ibid.*, para. 1993.

a volatile context, may well have caused some individuals to act in a manner going beyond what the words actually called for, such an effect must be established through evidence and cannot simply be assumed.³⁴⁶ Again the best evidence in this regard was considered to be examples of those who attended the speech and subsequently committed crimes and who were demonstrably influenced by the words.³⁴⁷ What exactly is meant by 'demonstrably influenced' is, however, unclear.

Contrary to this approach, in her dissenting opinion Judge Carbuccia considered that a reasonable Trial Chamber could find, from the evidence, that Blé Goudé's speeches, '*mots d'ordre*' and calls during the post-election violence, considered as a whole, and in the light of the particular social and political context of that post-election violence, contributed substantially to the acts of violence committed.³⁴⁸

While direct perpetrators testifying to the effects that certain speeches had on them may be the ideal scenario for judges, it should not be a necessary requirement for the Prosecution for the reasons described above. When it comes to causality, it is furthermore important to acknowledge that the link not only runs directly from the words uttered to the perpetrators in the form of persuasion or other direct effects on their cognition. Rather, there exists an important indirect causal link through intermediaries as well as through a signalling of a new societal order and morality which individuals either feel compelled to join or are willing to join voluntarily for personal reasons. In other words, most perpetrators do not need to be persuaded into the ideology being spread in order for propaganda to have an effect on them and thereby contribute substantially to the commission of the crimes.

4.2 *The Context of a Severely Skewed Marketplace of Ideas*

It is not merely the totality of an individual's propaganda that should be taken into account, but rather the totality of all state and non-state propaganda with essentially the same messaging and its constant repetition that surrounded the speech of the accused and that makes such speech more effective. As was the case with Streicher, Šešelj was seen as a lone wolf. Yet the mere fact that their propaganda campaigns took place in the context of a complete breakdown of the marketplace of ideas, where all opposing views were strictly marginalised and to a large extent eliminated, invalidates the idea that their acts could not be considered as part of the broader campaigns and were mutually reinforcing.

³⁴⁶ *Ibid.*, para. 1994.

³⁴⁷ *Ibid.*, para. 1995.

³⁴⁸ *Gbagbo and Blé Goudé* decision, Carbuccia Dissenting Opinion, *supra* note 94, para. 642.

The US model for freedom of speech, which arguably allows the fewest exceptions to it, includes the important precondition that the state remains neutral and protects public discourse as a sphere that remains equally open to all communities.³⁴⁹ Šešelj's words were not uttered in a vacuum or in the context of a rich marketplace of ideas. Rather they were spread in an environment in which the media and, in particular, national television, laid the necessary emotional foundations for conducting a wartime propaganda campaign by building up hateful stereotypes of Croats and Muslims.³⁵⁰ There was generally no marketplace of ideas during the Yugoslav wars in the 1990s as each side controlled its media to give its public a distorted version of reality and cut off broadcasts from the other side.³⁵¹

Renaud de la Brosse presented an expert report detailing the methods employed by those controlling the media during the Yugoslav wars and the use of media for ultra-nationalist goals.³⁵² In 1986 Slobodan Milošević began his efforts to gain control over the state media until by the summer of 1991 he held a monopoly over Serbian state media, albeit that there was a growing number of niche independent media created by liberal, progressive and independent journalists. Milošević and his regime waged an intense media battle of hateful propaganda and biased and untrue information. According to Eric Gordy,

Under the pressure of the political authorities, the media had to attempt to convince the citizens of Serbia that they were the victims of an international conspiracy to eliminate them and remove Serbia from the face of the earth. The fact that the media and, in particular, national television built up such hateful stereotypes incontestably laid the necessary emotional foundations for conducting a wartime propaganda campaign.³⁵³

Milošević 'personally appointed editors-in-chief of the newspapers and news programs, especially directors-general of the radio and television' and was 'in direct communication with all editors who 'fed' the public with the news,

349 Post, *supra* note 29, p. 133: 'J.S. Mills argues that nobody has a monopoly on truth, neither has the majority in society any right to suppress the opinions of the minority however much they dislike them. The theory demands that all discussion be kept open however true or false they might be. In American judicial writings, this is characterised as the 'market-place of ideas', doctrine through which truth, it is assumed will ultimately surface'.

350 R. de la Brosse, *Political Propaganda and the Plan to Create a 'State for all Serbs': Consequences of Using the Media for Ultra-Nationalist Ends* (University of Reims, Ardennes, 2003), para. 31.

351 Tadić, Trial Judgment, *supra* note 161, para. 130.

352 Brosse, *supra* note 350, pp. 6-7.

353 *Ibid.*

comments and generally with information'.³⁵⁴ Milošević-controlled media reached more than 3.5 million people every day, while he used several ways of controlling independent media to ensure that their reach was minimal. It is important to note that due to significant demonstrations against regime control of the state media, the largest of which were in Belgrade in March of 1991, the regime left some room for independent media to survive albeit with limited means, circulation, viewers and listeners and subject to constant harassment and attacks.³⁵⁵ A Special Report by the Belgrade Institute of Political Studies found that in 1994 'the Milošević regime controlled 90% mass media penetration, i.e. 90% of information on public affairs and news reaching the public was through regime media'.³⁵⁶ By 1995, the independent media were largely restricted to Belgrade, thus the majority of Serbs only received regime propaganda.³⁵⁷ As one of Milošević's closest collaborators explains: 'He was deeply convinced that citizens formed their view of the political situation on the basis of what they were presented and not on the basis of their real material and political position. What is not published has not happened at all – that was Milošević's motto'.³⁵⁸

During a strike at the cultural and music service of *Radio Belgrade* that broke out in protest of political control, Šešelj himself held a press conference to disclose a list of radio and TV journalists he wanted eliminated because of their lack of patriotism and obedience to political masters.³⁵⁹ Most were subsequently put on 'compulsory leave' or marginalised³⁶⁰ while other purges followed, eventually getting rid of 200 journalists and thousands of staff.³⁶¹

In the Serb majority territories of Bosnia, Oberschall describes the control of mass media as physical and coercive.³⁶² Eight months before the start of war in Bosnia-Herzegovina, Serb paramilitaries supported by the Yugoslav army seized the Kozara mountain transmitter, followed by other such seizures in

354 B. Jović (ed.), *Last Days of the SFRY, Journal of Excerpts Translated by David Stephenson for the ICTY* (Politika, Belgrade, 1995), p. 15.

355 E. Gordy, *The Culture of Power in Serbia: Nationalism and the Destruction of Alternatives* (Penn State University Press, Philadelphia, 1999), cited in Oberschall, *supra* note 57, pp. 42-43.

356 K. Kurspahić, *Prime Time Crime, Balkan Media in War and Peace* (United States Institute of Peace, Washington, D.C., 2003), p. 53, in Oberschall, *ibid.*, pp. 41-42.

357 Oberschall, *ibid.*, p. 43.

358 Jović, *supra* note 354, p. 294.

359 Oberschall, *supra* note 57, p. 42.

360 *Ibid.*; M. Milošević, 'The Media Wars: 1987-1997', in J. Udovički and J. Ridgeway (eds.), *Burn This House Down: The Making and Unmaking of Yugoslavia* (Duke University Press, Durham, 1997), in Oberschall, *ibid.*

361 Oberschall, *ibid.*, pp. 42-43.

362 *Ibid.*, p. 43.

areas with Bosnian Serb populations in order to cut off Sarajevo TV signals and ensure exposure to Belgrade TV only.³⁶³

Tadeusz Mazowiecki, Special Rapporteur appointed by the UN Human Rights Commission described how the media of the former Yugoslavia was mainly spreading nationalist discourse and generalised attacks and insults aimed at the other peoples.³⁶⁴ He added that 'it comes as no surprise that the phenomenon has *directly led* to the perpetration of horrible atrocities on the fields of battle and throughout the entire territory'.³⁶⁵

In understanding the diminished marketplace of ideas, it is also essential to note that in Yugoslavia, the national question overshadowed all other issues after the end of communism and all Serb political parties, including the opposition, subscribed to the national crisis frame, though less strident and more nuanced than Milošević's SPS or Šešelj's SRS.³⁶⁶

Genocide and *mutatis mutandis* other atrocities against a targeted group, arise from a pattern, or gestalt, rather than from any single source.³⁶⁷ A measure of the effectiveness of a defendant's use of propaganda is how their forms of speech shaped the language of the time. The question to ask is whether the accused's vocabulary and forms of expression became part of the general public's universe after the propaganda campaign began.³⁶⁸ In the former Yugoslavia, words like '*Ustaša*' and '*Balija*', derogatory terms for Croats and Muslims respectively, became common in the documents of Serbian armed forces and Serbian government bodies, as did the use of words like '*Četnik*' to denote Serbs in Bosnian Muslim army and civilian records. This kind of evidence demonstrates how effective propaganda becomes part of the public's ideology and daily life.³⁶⁹

4.3 *Ideological Context and Historical Anchors*

Related to this is the need to consider the ideological context of particular words uttered as it indicates how they are meant to be understood and how they are in fact understood by the followers of said ideology (see discussion on Greater Serbia above). Furthermore, the history of the peoples involved is

363 Kurspahić, *supra* note 356, p. 98.

364 UN Human Rights Commission, *Report of the Special Rapporteur submitted pursuant to Commission resolution 1994/72*, UN Doc. E/CN.4/1995/54 (13 December 1994), p. 35.

365 *Ibid.*

366 Oberschall, *supra* note 57, p. 41.

367 Staub, *supra* note 316, p. 25.

368 Catherine Merridale (ed.), *Ivan's War, the Red Army 1939 – 1945* (Faber and Faber, London, 2005), p. 330.

369 D. Saxon, 'Propaganda as a Crime under International Humanitarian Law: Theories and Strategies for Prosecutors', in Dojčinović (ed.), *supra* note 8, 123-124.

essential context to consider. In *Tadić*, the TC described how the media was very effectively directed towards stirring up Serb nationalist feelings and converting an apparently friendly atmosphere as between Muslims, Croats and Serbs in Bosnia and Herzegovina into one of fear distrust and mutual hostility.³⁷⁰ De la Brosse described how history and the revival of ancient Serbian myths were used in this sense to keep the masses mobilised.³⁷¹ Historical facts were imbued with mystical qualities to evoke a feeling of desire for revenge directed at the 'others', i.e. the Croats and Muslims.³⁷² In this de la Brosse found parallels with Nazi propaganda:

Nazi propaganda had shown that myths bind the masses together tightly. Indeed, it was through myths and, therefore, the appeal to the forces of the unconscious, to fear and terror, the instinct of power and the lost community that the propaganda orchestrated by Goebbels had succeeded in winning over the Germans and melding them into a compact mass. The Serbian regime would use a similar technique. To weld the population together official propaganda drew on the sources of the Serbian mystique, that of a people who were the mistreated victims and martyrs of history and that of Greater Serbia, indissolubly linked to the Orthodox religion.³⁷³

Political, historical and cultural propaganda each played their part.³⁷⁴ Oberschall notes in this respect the private aspect of the propaganda campaign, in the sense that Yugoslavs experienced ethnic relations through the frames of personal and family experience and through community memories of the Balkan wars.³⁷⁵ These memories were repeated in culture and in public life in collective myths and in history books and literature.³⁷⁶ The television and newspapers were filled with historical features glorifying medieval Greater Serbia and listing, many times in an exaggerated manner:

³⁷⁰ *Tadić*, Trial Judgment, *supra* note 161, para. 83.

³⁷¹ *Ibid.*, para. 46.

³⁷² Brosse, *supra* note 350, para. 31.

³⁷³ *Ibid.*, para. 46.

³⁷⁴ See joint research and analytical project of a group of academic researchers from Croatia and Serbia in: N. Skopljanac Brunner, S. Gredelj, A. Hodžić and B. Kristofić (eds.), *Media and War* (Centre for Transition and Civil Society Research, Belgrade, Zagreb, 2000); M. Thompson (ed.), *Forging War: The Media in Serbia, Croatia and Bosnia-Herzegovina* (Article XIX – International Center Against Censorship, London, 1994).

³⁷⁵ A. Oberschall (ed.), *Conflict and Peace Building in Divided Societies: Responses to Ethnic Violence* (Routledge, London, 2007), pp. 100–101.

³⁷⁶ *Ibid.*

the injustices and attacks suffered by the Serbs, beginning with the battle of Kosovo Polje in 1389 – which the Ottomans won and which put an end to Serbia's autonomy – and going through to the 1943 'genocide' committed against the Serbian populations by the independent Croatian state recognised by Hitler and Mussolini and run by Ante Pavelić, leader of the nationalist movement of the Ustaša responsible for the assassination of King Alexander in 1934.³⁷⁷

Only days before Milošević's death, the OTP team preparing the Final Brief were thinking of beginning it with a historical argument starting with the battle of Kosovo Polje.³⁷⁸ As their evidence showed, this myth played one of the most important roles in the commission of the crimes throughout the region.³⁷⁹ In the context of several intergroup conflicts one can observe how 'politicians tapped into historical narratives and mythologies that anchored their communications in a pre-existing animus (whether real or conjured)'.³⁸⁰ In Rwanda the colonial 'Hamitic myth' was revived, according to which Tutsis were a distinct race of foreigners who invaded Rwanda from Ethiopia and North Africa.³⁸¹ Kenyan Vice-President William Ruto resuscitated colonial narratives in the 2007 elections to vilify the Kikuyu ethnic group and encourage his Kalenjin followers to commit violent attacks and drive Kikuyus and other ethnic groups out of the Eldoret and Nandi Hills areas.³⁸² As Jowett and O'Donnell have noted:

[p]eople are reluctant to change; thus, to convince them to do so, the persuader has to relate the change to something in which the persuadee already believes. This is called an *anchor* because it is already accepted by the persuadee and will be used to tie down new attitudes or behaviours.³⁸³

³⁷⁷ *Ibid.*

³⁷⁸ Dojčinović, communication with authors, *supra* note 150.

³⁷⁹ *Ibid.*

³⁸⁰ Wilson, *Incitement on Trial*, *supra* note 11, p. 232.

³⁸¹ N. Eltringham (ed.), *Accounting for Horror: Post-Genocide Debates in Rwanda* (Pluto Press, London, 2004); N. Eltringham, "Invaders Who Have Stolen the Country" The Hamitic Hypothesis, Race and the Rwandan Genocide', 12 *Social Identities* (2006) 425-46; C.C. Taylor, *Sacrifice as Terror: the Rwandan Genocide of 1994* (Berg Press, Oxford, 1999).

³⁸² ICC, *Case Information Sheet Situation in the Republic of Kenya The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, online at www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf.

³⁸³ Jowett and O'Donnell, *supra* note 2, p. 32.

4.4 *Shifting the Cognitive Frames*

Paranoia propaganda was extremely effective in Yugoslavia. As the head of the International Committee for the Red Cross mission in Croatia in 1991-92 stated: 'the conflict [in Bosnia] was the first time I have seen such strong and effective propaganda on both sides. When you are talking to either side, they are absolutely convinced they will be slaughtered by the other side'.³⁸⁴ Jovan Rašković, the Serb leader in Croatia, whose campaign for Serb autonomy highlighted Ustaša atrocities against Serbs in World War Two, reflected thus on the effect it had: 'I feel responsible for this [Croatian] war. If I hadn't created this emotional stress in the Serb people, nothing would have happened. My party was the fuse of Serb nationalism'.³⁸⁵

As Oberschall observed, Yugoslavs experienced ethnic and nationality relations through two competing frames, both culturally available: a normal frame in peaceful times expressing cooperative relations in workplaces, neighbourhoods, and in public affairs, and a rival crisis frame for times of tension and conflict.³⁸⁶ The crisis frame was grounded in the experiences and memories of the Balkan wars, the first and second world wars – and other wars and conflicts before those in which civilians were not distinguished from combatants.³⁸⁷

Politicians, and other elites pursuing the nationalist agenda did not invent the crisis; they activated and amplified it while discrediting the normal frame.³⁸⁸ This was first achieved over the plight of the Kosovo Serbs who were subject to intimidation and violence.³⁸⁹ Serb intellectuals activated the crisis frame with fears of extinction.³⁹⁰ The public was fed exaggerations of sexual assault and rape numbers in Kosovo and a false claim that they were a matter of Albanians against Serbs, instead of the reality, which was that they mostly occurred within, and not across nationalities, and where they were overall lower than in central Serbia or the rest of Yugoslavia.³⁹¹

At the ICC in the *Gbagbo and Blé Goudé* case, the Prosecutor sought to establish a causal link between propaganda of an impending genocide and the spread of violence in Côte d'Ivoire. Yet the majority opinion dismissed the gravity of such a narrative. Judge Henderson recognised that some of the

384 Oberschall, *supra* note 57, p. 10.

385 *Ibid.*; Kurspahić, *supra* note 356, p. 53.

386 Oberschall, *ibid.*, p. 14.

387 *Ibid.*, p. 15.

388 *Ibid.*

389 *Ibid.*, p. 16.

390 *Ibid.*

391 S. Popović et al., *Kosovski Čvor: Odrešiti ili Seći* [Kosovo Knot: Untie It or Cut It] (Biblioteka Kronos, Belgrade, 1990), cited in Oberschall, *ibid.*, p. 16.

speeches could have constituted fear-mongering that instilled a certain level of fear and resentment among the listeners, however he considered it 'possible to understand these utterances first and foremost as an effort to delegitimise political opponents and their international backers'.³⁹² He thus stated that:

the fact that the pro-Gbagbo population was projected as being the potential victim of genocide does not imply an approval or encouragement to reciprocate. Even though the threat and actual instances of use of violence by the opponent's side was repeatedly emphasised, speakers systematically reassured their audiences that the situation was under control and that their side would prevail. This reinforces the impression that talk about atrocities was mainly designed to foster unity among Mr Gbagbo's supporters and loyalty to his regime.³⁹³

Furthermore, Judge Henderson reached the same conclusions regarding speeches that characterised the opposition supporters as rebels and bandits or those that insisted on crimes allegedly committed by the pro-opposition forces.³⁹⁴ From this opinion one can again observe how a dangerous propaganda technique is downplayed by the judges as normal political talk and not properly evaluated through expert opinion. There is also an insistence on express encouragement of violence as the only indicator of speech that can lead to atrocities.

4.5 *Looking Beyond Isolated Words*

While historical and present facts used in hate propaganda can be true, the intent of the speaker and the context in which they are conveyed to the public can mean the difference between such propaganda and neutral reporting. As Gordon observes, out of all the elements considered in evaluating hate speech as incitement, *context* is the most important.³⁹⁵ Some of the Kangura and RTLM articles and broadcasts conveyed historical information, political analysis or advocacy of an ethnic consciousness regarding the inequitable distribution of privilege in Rwanda.³⁹⁶ Prosecution Expert Witness Alison Des Forges stated her view that undue emphasis on ethnicity and presentation of all issues in ethnic terms exacerbated ethnic tensions.³⁹⁷ However, the TC considered it

³⁹² *Gbagbo and Blé Goudé* decision, Reasons of Henderson, *supra* note 94, para. 1064.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ Gordon, *supra* note 71, p. 296.

³⁹⁶ *Nahimana* Trial Judgment, *supra* note 61, para. 1019.

³⁹⁷ *Ibid.*

critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred. When words move listeners to take action to remedy discrimination based on the reality conveyed by the words this is not incitement and it falls squarely under freedom of expression.³⁹⁸ On the other hand stereotyping of ethnicity combined with its denigration constitutes the promotion of ethnic hatred.³⁹⁹ While this does not include calls on listeners to take action of any kind and therefore does not constitute direct incitement, it is a progression from ethnic consciousness to harmful ethnic stereotyping particularly when combined with a tone that conveys hostility and resentment.⁴⁰⁰

When looking at whether speech intended to educate or to provoke, the Chamber looked at intent and potential impact. When determining the intent it considered the content, the accuracy and the tone of a statement.⁴⁰¹ For example making predictions of killings in an inflammatory language and a threatening tone rather than in a descriptive and dispassionate tenor of journalism would be an indication of genocidal intent.⁴⁰² The context of the speech was considered to be a further indicator of intent.⁴⁰³ Thus a statement of ethnic generalisation provoking resentment against members of that ethnicity in the context of a genocidal environment would be an indicator that incitement to violence was the intent of the statement.⁴⁰⁴ The context was also considered in the determination of the potential impact of the speech.⁴⁰⁵ Turning to the ECtHR case law the focus rests on the need for less attention to be given to the form of the words used and more attention to the general context in which they are used and their likely impact, that is whether there is a genuine risk that they may incite to violence.⁴⁰⁶

398 *Ibid.*, para. 1020.

399 *Ibid.*, para. 1021.

400 *Ibid.*

401 *Ibid.*, para. 1022.

402 *Ibid.*, para. 226.

403 *Ibid.* 'In the Chamber's view, the accuracy of the statement is only one factor to be considered in the determination of whether a statement is intended to provoke rather than to educate those who receive it. The tone of the statement is as relevant to this determination as is its content...The Chamber also considers the context in which the statement is made to be important. A statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement'.

404 *Ibid.*

405 *Ibid.*

406 *Sürek and Özdemir v. Turkey*, *supra* note 313, para. 184.

The Court thus clearly drew the line between legitimate educational messages involving historical facts and political analysis on the one hand and statements intended to inflame ethnic resentment, calling on history as an aide in this effort.⁴⁰⁷ As mentioned above, unfortunately the AC took a much narrower approach in considering what criminally relevant hate speech was.

Another neglected aspect of hate propaganda in the search for a causal link is the indirect effects it has on criminality beyond direct persuasion. There is a significant difference between micro- and macro-criminality in the way a person examines the morality of their own actions. When all one can hear in the media is denigrating speech and exhortations of violence from authority figures, they may conclude that the usual strictures have been lifted and that now assaulting members of other ethnical or religious groups will go unpunished.⁴⁰⁸ Le Bon describes this as such:

The isolated individual may be submitted to the same exciting causes as the man in a crowd, but as his brain shows him the inadvisability of yielding to them, he refrains from yielding. This truth may be physiologically expressed by saying that the isolated individual possesses the capacity of dominating his reflex actions, while a crowd is devoid of this capacity.⁴⁰⁹

Further, Le Bon notes:

The violence of the feelings of crowds is also increased, especially in heterogeneous crowds, by the absence of all sense of responsibility. The certainty of impunity, a certainty the stronger as the crowd is more numerous, and the notion of a considerable momentary force due to number, make possible in the case of crowds sentiments and acts impossible for the isolated individual. In crowds the foolish, ignorant, and envious persons are freed from the sense of their insignificance and powerlessness, and are possessed instead by the notion of brutal and temporary but immense strength.⁴¹⁰

Propaganda helps produce public support for collective violence in inter-group relations that would normally be condemned, prosecuted and limited.⁴¹¹ One

⁴⁰⁷ *Ibid.*

⁴⁰⁸ Wilson, *Incitement on Trial*, *supra* note 11, p. 231.

⁴⁰⁹ G. Le Bon, *The Crowd: A Study of the Popular Mind* (2nd ed., Dover Publications Inc, New York, 2012), p. 11.

⁴¹⁰ *Ibid.*, p. 22.

⁴¹¹ Oberschall, *supra* note 57, p. 9.

could go further and claim that a new morality emerges in such circumstances in which such violence will not merely go unpunished but will be perceived as a necessary, good and moral deed for the protection of the survival of one's nation and/or family. This is a completely different situation from normal instigation in which the law and morality of a society remain intact. In the latter situation the potential physical perpetrator weighs whether to commit the act or not against a backdrop of societal condemnation of such acts. In situations where the media, politicians and other respected public figures together create a new set of rules and a new morality and the society seemingly accepts the new norm, the decision-making process in the mind of a physical perpetrator becomes strikingly different. As Welzer notes, this should not be mistaken with an absent morality. Rather the altered normative framework leads to a concomitant change in the view as to what constitutes morality and the mass murders could not be committed without this new morality.⁴¹² The 'new' morality or climate is a consequence of both propaganda and the systematic persecution of a specific out-group organised by the leadership of the State or a similar State-like organisation.⁴¹³ Similarly in Le Bon's analysis of the crowd, the latter is not devoid of morals. It just has a different set of morals:

A crowd may be guilty of murder, incendiarism, and every kind of crime, but it is also capable of very lofty acts of devotion, sacrifice, and disinterestedness, of acts much loftier indeed than those of which the isolated individual is capable. Appeals to sentiments of glory, honour, and patriotism are particularly likely to influence the individual forming part of a crowd, and often to the extent of obtaining from him the sacrifice of his life.⁴¹⁴

Furthermore, criminal acts carried out in accordance with the atmosphere created by the hate propaganda, in a sense become a part of it. Germans' participation in anti-Jewish activities and propaganda built on and reinforced one another.⁴¹⁵ Explaining the complex entanglement of language and violence, Posselt points out that hate crime is a form of speaking in itself, stating:

⁴¹² H. Welzer (ed.), *Täter: Wie aus ganz normalen Menschen Massenmörder werden* (S. Fischer Verlag GmbH, Frankfurt, 2006), citing H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, 2nd ed. (Penguin Books Ltd, New York, 1986), in Timmermann, *supra* note 6.

⁴¹³ Timmermann, *ibid.*, p. 37.

⁴¹⁴ Le Bon, *supra* note 409, pp. 26-27.

⁴¹⁵ Staub, *supra* note 316, pp. 120.

[I]n hate crime, a person is attacked not randomly, but precisely for being perceived *as* X. In other words, hate crime identifies, categorizes, and labels persons according to real or supposed features such as sex, race, class, sexual orientation etc. This act of labelling a person *as someone* or *something* is in itself already a linguistic act of positing, an act of denomination and determination that attributes a social status to a person. This tendency to differentiate and to discriminate can go as far as to restrict the use of the term 'human' exclusively for the designation of one's own social group.⁴¹⁶

Thus, before considering the effects of hate propaganda on the 'reasonable man' with no previous inclinations towards violent action, we need to recognise the fact that in any society there are also men (or women) eager to take on any cause that would allow them to act out their aggressive tendencies. Although it is hard to determine exactly the percentage of psychopaths, sociopaths and individuals with other relevant personality disorders in a society, what we do know is that there exists a significant number of them. One could say, they are the main reason criminal law and the outwardly affirmations of basic principles of morality exist, since these individuals lack an internal 'golden rule'. Propaganda, on the other hand, creates the perception that the law no longer applies or, better yet, that there is a new law and a new morality established in the society thereby enabling rampant criminal behaviour. 'Propaganda defines or creates our reality and describes what is socially acceptable and considered to be morally right. It determines how people's actions are viewed and evaluated'.⁴¹⁷ Arguably psychopaths or sociopaths do not need such a 'new law or morality' in order to act out their evil tendencies, as they tend to do it regardless, however the impression of a suspension of all societal sanction empowers them to act out these tendencies on an exponentially larger scale. However, even people who become perpetrators as a result of their personality (self-selected or selected by their society for the role) evolve along a continuum of destruction, while others who were initially bystanders become involved with the destructive system and become perpetrators.⁴¹⁸ In most societies there are those who are prepared to turn against other groups, however it is the population as a whole that provides or denies support for this.⁴¹⁹ As Staub explains:

⁴¹⁶ Posset, *supra* note 322, p. 279.

⁴¹⁷ Timmermann, *supra* note 6, p. 20.

⁴¹⁸ Staub, *supra* note 316, p. 18.

⁴¹⁹ *Ibid.*, p. 20.

The people's support, opposition, or indifference largely shapes the course of events. Opposition from bystanders, whether based on moral or other grounds, can change the perspective of perpetrators and other bystanders, especially if the bystanders act at an early point on the continuum of destruction. They may cause the perpetrators to question the morality of their violent acts or become concerned about the consequences for themselves.⁴²⁰

The illusion of a new set of rules and morals created by hate propaganda directly impacts bystander behaviour by making them reluctant to interfere for the sake of their own personal safety. Thus, hate propaganda does not lead to crime merely through persuasion. In fact, the support of the propagated ideas by the public only needs to be outwardly. That is to say, the populace needs only to be seemingly convinced of such actions' legitimacy. While large numbers of individuals or even the majority of the population may have strong doubts about the veracity of the propaganda and objections regarding the criminal acts that it seeks to enable, such doubts and objections are irrelevant. Anyone challenging the narrative is at best branded a conspiracy theorist and dismissed as part of only a 'fringe group' of people and at worst arrested and persecuted. The only thing that matters is the upholding of an image that society at large is on board with the actions of the leaders. By doing so, individual members of the society either a) feel free to engage in criminal behaviour; b) feel a duty to their comrades or their group to engage in such behaviour; c) feel frightened or powerless to act against it while d) the targeted group directly perceives a threat to its safety and security. Furthermore, bystanders who passively observe as innocent people are victimised, will eventually also come to devalue the victims and justify their own passivity.⁴²¹

In this context so-called in-group solidarity or the 'bonds of comradeship' need to be mentioned. Hate propaganda presents the violation of the new norms or morality as an abandonment of one's rightful duties. In his study of the SS's anti-Semitic ideological indoctrination of Reserve Police Battalion 10, Browning finds that the men were not exactly deprived of capacity for independent thought, which seems to be the main narrative of literature relying on racism and anti-Semitism as a factor explaining why ordinary men could commit murder and other atrocities against Jews.⁴²² Rather, for a member of a police or military unit not to participate in mass killings was considered

⁴²⁰ *Ibid.*, p. 21.

⁴²¹ *Ibid.*, p. 18.

⁴²² Browning, *supra* note 316, p. 178.

disloyal to his peers, a violation of group norms and an abandonment of one's rightful duties.⁴²³ In Timmermann's words:

Incitement to hatred is an integral, necessary and inevitable part of any persecutory campaign. It is needed to convince those carrying out the physical elements of the campaign of its necessity, and of the lesser value and perniciousness of the group to be ostracized. It serves to create a common bond between those carrying out the persecutory campaign in that it creates a barrier between those who are part of the community or 'in-group' and those excluded from the community, the 'out-group'.⁴²⁴

A good example of this from the Yugoslav wars can be observed in the video depicting the events surrounding the murder of 6 Bosnian civilians by the Scorpion paramilitary unit. One of the Scorpions turns to a 17-year old victim on the ground and asks him in a mocking and vulgar manner whether he had ever had sexual intercourse, proceeding to answer his own question with a blunt answer 'well, you never will'.⁴²⁵ Interestingly, the same man who spoke so brutally to the petrified young man does not shoot when the time for it comes just minutes after.⁴²⁶ He keeps his barrel raised in the air, and does not fire, suffering ridicule and humiliation from his comrades.⁴²⁷

An important study by Scott Straus into the effects of RTLM Radio on the genocide in Rwanda shows a far less straight forward causal link between the broadcasts and the crimes than generally assumed. As he points out, there were examples of RTLM broadcasts giving specific names and places, which were followed by attacks on those individuals and locations, however they were a tiny fraction of the total violence and the *Nahimana* Trial Judgment lists a mere 10 instances.⁴²⁸ A survey involving 210 sentenced and self-confessed perpetrators, who were sampled randomly in 15 prisons nationwide in 2002 showed rather that '[t]o the extent radio mattered, it had a second-order

423 Wilson, *supra* note 11, p. 246.

424 Timmermann, *supra* note 6, p. 175.

425 Fond za humanitarno pravo (ed.), *Škorpioni: od zločina do pravde* (Publikum, Beograd, 2007), p. 365.

426 I. Vukušić, 'Nineteen Minutes of Horror: Insights from the Scorpions Execution Video', 12 *Genocide Studies and Prevention: An International Journal* (2018) 35-53, p. 44.

427 Fond za humanitarno pravo, *supra* note 425, p. 100.

428 S. Straus, 'Rwanda and RTLM Radio Media Effects', paper prepared for a workshop at the Committee on Conscience at the United States Holocaust Memorial Museum, <https://www.ushmm.org/m/pdfs/20100423-atrauss-rtlm-radio-hate.pdf>, p. 7. The paper is based on a condensed version of S. Straus, 'What Is the Relationship between Hate Radio and Violence? Rethinking Rwanda's 'Radio Machete'', 35 *Politics and Society* (2007) 609-637.

impact'.⁴²⁹ Mostly the perpetrators said they chose to participate in the genocide after face-to-face solicitation, usually from an authority, elite figure or a group of young violent men; only 52% of them even owned a radio and only 15% said the radio had lead them to take part in the attacks.⁴³⁰ As their main motivations they cited intra-ethnic coercion and intimidation, obedience, wartime fear, a desire for revenge, anger, a desire to loot or gain land, and interpersonal rivalries, among other factors.⁴³¹ However it is important to note that those who said that radio incited them held more negative and racist views towards Tutsis, were more likely to commit more violence and were more likely to be the leaders of the killing.⁴³² On the other hand those who claimed that radio was not a major influence on them, said that broadcasts were intended for the authorities.⁴³³ Thus while radio did not present the direct reason for the majority to participate in the genocide, it categorised Tutsis as 'the enemy', catalysed some key actors, served as a coordinating device for the elites, and signalled the power of those advocating violence thereby narrowing the choices individuals believed they had and asserting the hardliners' dominance.⁴³⁴

The effect of propaganda thus is not merely, or perhaps not at all, the persuasion of some individuals of the morality or desirability of their criminal behaviour but the atmosphere where such behaviour is enabled. In this framework it would be naïve to consider the criminal responsibility of the mass-propagandists on par with inciters, instigators or aiders or abettors in everyday criminal situations where their words do not impact society as a whole. While in the latter situation the links to the physical perpetrator and the crime itself may be more direct and apparent and therefore a causal link is easier to prove, in the case of mass-propaganda the danger of creating a space where mass atrocities can flourish is infinitely greater, albeit all its workings and connections to the crimes may forever remain elusive from exact judicial determination. Despite its perniciousness, such propaganda thus remains inadequately addressed in law, even in what appear to be clear cut cases of the use of all forms of propaganda techniques in order to create an atmosphere favourable for the commission of mass atrocities such as that of Vojislav Šešelj's rhetoric.

429 *Ibid.*, pp. 8, 11.

430 *Ibid.*, pp. 8, 9.

431 *Ibid.*, p. 9.

432 *Ibid.*

433 *Ibid.*, p. 10.

434 *Ibid.*, p. 11.

4.6 *Temporal Link*

A narrow view on the effects of hate propaganda through the lens of instigation has furthermore placed an undue emphasis on a temporal link between words uttered and crimes committed. In *Šešelj*, the Prosecution relied heavily on chronology to prove the causal link, structuring the Indictment in the form of stating certain speeches by Šešelj, each followed by a crime as a direct consequence. Based on the interviews he conducted, Wilson furthermore concludes that the view that 'chronology proves causation' was also present in the minds of the judges, and he criticises this approach as insufficient as evidence of causation.⁴³⁵ The AC held that a reasonable trier of fact could find it to be too tenuous to be regarded as proof of substantial contribution in circumstances where there was a significant lapse of time between the statement and the offences and other factors may have influenced the conduct of the perpetrators.⁴³⁶ Similarly in *Nahimana* the AC found that 'the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it'.⁴³⁷

This emphasis on an immediate temporal link is problematic since the Chambers seem to neglect the effects of systematic propaganda over a prolonged period and focus on speech only as a one-time provocation or an immediate trigger of violence. Although both propaganda and provocation achieve a certain disconnect in the mind of the physical perpetrator, they achieve this in different time frames. Furthermore, any particular provocation by Šešelj would not have been successful without the prior priming of the audience with systematic propaganda.

In Mill's famous corn dealer illustration of the workings of mob mentality, the mob is already angry.⁴³⁸ While in Mill's example their grievances may have originated in actual injustice, in the case of Šešelj's audience, they originated in the extensive propaganda by Šešelj and others that portrayed Serbs as the perpetual victims of the 'other'.

435 Wilson, *supra* note 11, p. 129 fn. 121, interview conducted by R.A. Wilson, October 2013.

436 *Šešelj*, Appeal Judgment, *supra* note 110, para. 132, referring to *Nahimana* Appeal Judgment, *supra* note 84, para. 513; *Ndindabahizi*, Appeal Judgment, *supra* note 195, para. 116.

437 *Nahimana*, Appeal Judgment, *supra* note 84, para 513.

438 J.S. Mill, *On Liberty* (1859) (Batoche Books, Kitchener, 2001), p. 52: 'An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmo-
lested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard'. Mill thus envisions a 'mob' which is already 'excited' and gathering on its own outside the corn-dealer's house for what can only be reasons of prior discontent.

Provocation may have also existed in the context of Šešelj's speeches, however it was by no means more important or effective than hate propaganda and indeed the success of the provocations rested on the background of extensive propaganda. Had the population not been already primed through systematic and repetitive propaganda, any individual speech would not have had the explosive effect the judges were looking for. As the expert described in *Šešelj*, propaganda techniques are used 'to convince, persuade and influence public opinion' and they 'focus on manipulating emotions and preconceptions, at the expense of the faculties of reasoning and judgment'.⁴³⁹ In the words of Gustave Le Bon:

When it is wanted to stir up a crowd for a short space of time, to induce it to commit an act of any nature ... it is necessary that the crowd should have been previously prepared ... When, however, it is proposed to imbue the mind of a crowd with ideas and beliefs ... the leaders have recourse to different expedients ... affirmation, repetition, and contagion. Their action is somewhat slow, but its effects, once produced, are very lasting.⁴⁴⁰

Judge Henderson delivering the majority opinion in the *Gbagbo and Blé Goudé* case, confirmed the focus on the temporal and special link when adjudicating propaganda charges. He stated that:

[a]lthough there is no fixed level of spatio-temporal proximity between the act(s) of inducement and the induced act(s), there must be a clear connection between the two. Simply arguing that everything Mr Gbagbo [the accused] said during a particular time-period influenced all criminal conduct that occurred during the same period is unacceptably vague.⁴⁴¹

Such an approach fails to grasp the nature of how propaganda works and its many subtle and subconscious effects that accumulate in time.

4.7 *Undue Emphasis Placed on an Identity between Words Uttered and Acts Committed*

Furthermore, the fact that the judges were looking for the crimes committed to be nearly identical to what was said in the speeches shows a reluctance to consider any speech whose message may not be as direct as possible instigation.

439 Šešelj Lattanzi Dissenting, *supra* note 194, para. 107.

440 Le Bon, *supra* note 409, p. 77.

441 *Gbagbo and Blé Goudé* decision, Reasons of Henderson, *supra* note 94, para. 1982.

This sends the message that hate propaganda is acceptable as long as it is clever enough not to directly call for crimes.

In the *Babić* case, the defendant pleaded guilty for his participation in persecution against Croats and other non-Serbs as a CAH in accordance with JCE by making 'ethnically based inflammatory speeches that added to the atmosphere of fear and hatred amongst Serbs living in Croatia and convinced them that they could only be safe in a state of their own... [u]ltimately this kind of propaganda led to the unleashing of violence against the Croat population and other non-Serbs'.⁴⁴²

In *Prlić et al.* the TC concluded that 'in several official and public statements, Jadranko Prlić did indeed engender fear, mistrust and hatred of the Muslim population among Bosnian Croats... and exacerbated nationalist sentiments among the Bosnian Croats, thus contributing to the realization of the JCE'.⁴⁴³ It is clear that the causal link between the accused's messages and the effect on his audience was more broadly understood in these cases than the very narrow look at causality in *Šešelj*. This kind of reasoning is more similar to the case law of the Nuremberg Tribunal than the very narrowly construed causal link in *Šešelj*. This is in line with Wilson's study that suggests that revenge speech has the most powerful effects overall, and references to past atrocities (conceptually related to revenge speech) enhance moral justifications for violence.⁴⁴⁴ Babić claimed to have been strongly influenced and mislead himself by Serbian propaganda, which repeatedly referred to an imminent threat of genocide by the Croatian regime against the Serbs in Croatia, thus creating an atmosphere of hatred and fear of the Croats.⁴⁴⁵ The argument was unsuccessfully claimed as a mitigating circumstance the same as in the *Banović* case, where the defence argued that 'with his low education and modest intellectual capabilities, the Accused easily succumbed to the war propaganda that spread collective hatred and rumours about the enemy's brutality'.⁴⁴⁶ These arguments show how such ideas spread from one person to another and how the causal link with the subsequent crimes committed may not be straightforward and may be impossible to prove, however it nevertheless exists.

442 *Prosecutor v. Milan Babić*, Trial Sentencing Judgment, Case No. (IT-03-72-S), 29 June 2004, para 24(g).

443 *Prosecutor v. Jadranko Prlić et al.*, Trial Judgment, Case No. (IT-04-74-T), 6 June 2014, paras. 265, 267.

444 Wilson, *Incitement on Trial*, *supra* note 11, p. 245.

445 *Babić*, Trial Sentencing Judgment, *supra* note 442, para. 24(g).

446 *Prosecutor v. Predrag Banović*, Trial Sentencing Judgment, Case No. (IT-02-65/1-S), 28 October 2003, para. 78.

4.8 *Position of the Speaker*

A further important contextual element to be considered in evaluating hate propaganda and its potential impact is the position of the speaker and the influence he exerts on an audience. Importantly, a number of social science studies also confirm a pervasive and deep obedience to authority figures.⁴⁴⁷ For example, Šešelj portrayed himself as a military leader and established a military wing of his party, created a War Staff, promoted the Četnik movement's militaristic traditions, appeared in military attire at frontlines, and took on the title *Vojvoda* (duke) for himself, as well as bestowing it on Šešeljevci, including those found to have committed serious crimes.⁴⁴⁸ As Gordon details, analysis of the context of the speech should:

embrace aspects of the speaker herself: her background and professional profile, her previous publications/broadcast history, and her personal manner of transmission (including tone of voice). It would also include the authority of the speaker. Are we dealing with a high-level government official (or even lower-ranking but with sufficient stature to have a significant impact on public opinion) or a private person with other indicia of authority, such as media personality, tycoon, or political activist?⁴⁴⁹

In *Gacumbitsi*, the TC considered the impact of the accused driving around, using a megaphone, asking Hutu young men whom girls had refused to marry, to have sex with young Tutsi girls, and killing them in an atrocious manner, if they refused to do so. It concluded that:

Placed in *context*, and considering the attendant audience, such an utterance from the Accused constituted an incitement, directed at this group of attackers on which the *bourgmestre* (mayor), had *influence*, to rape Tutsi women. *That is why*, immediately after the utterance, a group of attackers attacked Witness TAQ and seven other Tutsi women and girls with whom she was hiding, and raped them.⁴⁵⁰

447 H.G. Kelman, 'Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers', 29 *Journal of Social Issues* (1973) 25-61; S. Milgram (ed.), *Obedience to Authority: An Experimental View*. (Harper and Row, New York, 1974); J.M. Burger, 'Replicating Milgram: Would People Still Obey Today?', 64 *American Psychologist* (2009) 1-11.

448 Šešelj, Appeal Brief, para. 29.

449 Gordon, *Atrocity Speech Law*, *supra* note 71, pp. 296-297.

450 *Prosecutor v. Sylvestre Gacumbitsi*, Trial Judgment, Case No. (ICTR-2001-64-T), 17 June 2004, para. 215, emphasis added.

While the paragraph does not really delve into the reasons for his influence, except for mentioning his position as *bourgmestre*, his exceedingly high status in the community went beyond this title. One witness described him in an interview as:

a big man; a pillar of church and community. He was the man you went to if you had problems with education for your children, or disputes over farmland. Mr Gacumbitsi was the man who preserved order in the crowded hills. Who kept a signed blessing from the Pope on the walls of his home. His was the face of authority.⁴⁵¹

The importance of the position of the speaker for the ability to instigate large-scale atrocities is already recognised in the ICTY and ICTR jurisprudence. While no hierarchical relationship is required for instigation, cases related to instigation that have set precedents have either been those of military commanders or political leaders who wielded substantial military and political authority, such as Gacumbitsi, Šešelj or Kordić.

In terms of aiding and abetting, in the case of *Brdanin* the TC considered that his inflammatory and discriminatory statements amounted to encouragement and moral support to the physical perpetrators of the crimes, *in light of the positions of authority that he held*.⁴⁵² As Judge Lattanzi noted in her dissenting opinion in Šešelj, in *Féret v. Belgium* the ECtHR stressed as a general rule that: 'it is vitally important that in their public speeches, politicians should avoid making comments likely to foster intolerance'.⁴⁵³

5 Failing the Preventative Function of the Law

Regrettably, the drafters of the Charter of the IMT did not consider that the significant role played by hate speech during the Holocaust 'might necessitate formulation of a specific offence accounting for the unique characteristics of incendiary rhetoric in the atrocity context'.⁴⁵⁴ Similarly, when the drafters of the 1948 Convention on the *Prevention* and Punishment of the Crime of

451 F. Keane, 'The Day I Met a Mass Killer – and He Smirked, Knowing He'd Escape Justice', *The Independent*, 20 June 1998, <https://www.independent.co.uk/arts-entertainment/the-day-i-met-a-mass-killer-and-he-smirked-knowing-hed-escape-justice-1166079.html>.

452 *Brdanin* Trial Judgment, *supra* note 62, para. 368.

453 *Féret v. Belgium*, *supra* note 296, para. 75; Šešelj Lattanzi Dissenting, *supra* note 194, para. 109.

454 Gordon, *Atrocity Speech Law*, *supra* note 71, p. 21.

Genocide considered hate speech, they did so exceptionally within the context of a plan to destroy in whole or in part particular groups. Such narrow focus animated the drafting and the inclusion of Article III in the Genocide Convention and ultimately the criminalisation of direct and public incitement to commit genocide. To date, there is no international treaty like the Genocide Convention declaring direct and public *incitement* to CAH or war crimes to be, in itself, a crime under international law.⁴⁵⁵ Focusing on verbal acts before they escalate to physical violence will directly enhance the preventive function of international criminal courts and tribunals. This will be discussed in subsequent sections. As Fletcher notes:

[w]e should generalize from the Rwandan case as the Rome Statute has developed a general aversion to impunity as expressed in the Preamble. The argument should be that 'directly and publicly inciting' any of the major four crimes should be punishable.⁴⁵⁶

5.1 *The Proposed International Convention for the Prevention and Punishment of CAH*

The *Proposed Convention on CAH* that was concluded in 2010 by a group of international law experts meeting at the Washington University School of Law in St. Louis (Proposed Convention)⁴⁵⁷ contains extensive requirement to outlaw incitement of various forms and requesting States 'to endeavour to take measures' to 'prevent crimes against humanity', including, but 'not limited to, ensuring that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law'.⁴⁵⁸ In the same fashion as in Article III(c) of the Genocide Convention

455 Peterson, *supra* note 245, p. 338.

456 Fletcher, *The Grammar*, *supra* note 78, p. 283.

457 Crimes Against Humanity Initiative, *Proposed International Convention on the Prevention and Punishment of Crimes against Humanity*, Whitney R. Harris World Law Institute (Washington University School of Law, St. Louis, 2010); see also L.N. Sadat, 'A Comprehensive History of the Proposed International Convention on the Prevention and Punishment of Crimes against Humanity', in L.N. Sadat, *Forging a Convention for Crimes against Humanity* (2nd ed., Cambridge University Press, Cambridge, 2013).

458 For critical views for the inclusion of such a provision in the Proposed Convention see, T. Weber, 'The Obligation to Prevent in the Proposed Convention Examined in Light of the Obligation to Prevent in the Genocide Convention', in M. Bergsmo and S. Tianying (eds.), *On the Proposed Crimes against Humanity Convention* (Torkel Opsahl Academic EPublisher, 2014), pp. 173, 193-197: 'The requirement that States outlaw hate speech understandably attempts to attack the root of the problem, but is likely to have difficulty gaining

that makes the '[direct] and public incitement to commit genocide' punishable, Article 4(2)(e) of the Proposed Convention states that a 'person shall be criminally responsible and liable for punishment for a crime against humanity if that person ... *directly and publicly incites others to commit crimes against humanity*'. If we compare the preventive measures included in both the Genocide Convention and the Proposed Convention we find that the latter contains more detailed language regarding the obligation to prevent.⁴⁵⁹ As noted by Leila Sadat, 'the *Proposed Convention* included 'incitement' in Article 4(2)(e), to enhance the treaty's preventive dimension'.⁴⁶⁰ Sadat recalled what was noted by the former US Ambassador for War Crimes Stephen Rapp in his Keynote address to the Crimes against Humanity Initiative, 'incitement is often a key precursor to the commission of crimes against humanity'.⁴⁶¹

5.2 *The International Law Commission's Draft Articles on a Global Convention for CAH – The Missing Inchoate Crimes*

The Proposed Convention discussed above has prompted the International Law Commission (ILC) to include, at its 66th session in 2014, the topic of CAH on its long-term work programme.⁴⁶² Sadat has noted that during the Commission's 2016 plenary of the Second Report submitted to the Commission by the Special Rapporteur Sean Murphy, some Members were of the position to include 'incitement' as a *mode of liability* in the ILC's draft articles on CAH along the lines of Article III(C) of the Genocide Convention.⁴⁶³ It is significant in this regard to draw a distinction between incitement or instigation as a mode of participation in a criminal conduct i.e. CAH and 'direct and public incitement to commit CAH'. The latter stands as an inchoate offence.

Surprisingly, the Commission's draft articles on CAH which were adopted by the Drafting Committee in 2017 lacks any provision criminalising 'incitement

support among States with more vigorous free speech laws and policies, and distracts the focus of the Proposed Convention from the essence of addressing crimes against humanity – prevent the murderous acts themselves.

459 *Ibid.*, p. 174; see also L.N. Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes against Humanity', 16 *Journal of International Criminal Justice* (2018) 683-704.

460 Sadat, *ibid.*, paras. 19-20.

461 *Ibid.*, para. 20.

462 UN General Assembly, *Report of the International Law Commission*, 69th Session (1 May – 2 June and 3 July – 4 August 2017), UN Doc. A/CN.4/L.892, (26 May 2017) (UNGA ILC Report, 69th Session).

463 Sadat, *A Contextual and Historical Analysis*, *supra* note 459, para. 19.

to commit crimes against humanity' as an inchoate offence.⁴⁶⁴ Article 6, which is titled 'criminalization under national law' provides:

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.
2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:
 - (a) committing a crime against humanity;
 - (b) attempting to commit such a crime; and
 - (c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.⁴⁶⁵

There is nothing in the Commission's work which could support an argument that the drafters had a real intention to prohibit incitement to hatred or incitement to violence by spoken or written words and allow for the early intervention of ICL, thereby making it possible to thwart potential crimes in their initial stages. The official commentary by the Commission on the then draft Article 5(2) gives the impression that Members of the Commission understood accessory responsibility to include 'ordering', 'soliciting', 'inducing', 'instigating', '*inciting*', 'aiding and abetting', 'conspiracy to commit', 'being an accomplice to', 'participating in' or 'joint criminal enterprise'⁴⁶⁶ and particularly that 'soliciting', 'inducing' and 'aiding and abetting' the crime 'are generally regarded as including planning, instigating, conspiring and, *importantly, directly inciting* another person to engage in the action that constitutes the offence'.⁴⁶⁷ The summary records of the ILC reveal that 'Members of the Drafting Committee had considered that the concept of incitement was covered under the concepts of 'soliciting' and 'inducing' in subparagraph (c) and that would be reflected in the commentary'.⁴⁶⁸ This statement proves to be imprecise as 'the omission of 'direct and public incitement' and 'conspiracy' is not discussed in the general commentary on the draft articles although the provision is mentioned indicating that it had not been entirely overlooked by the

464 UNGA ILC Report, 69th Session, *supra* note 462, Article 6.

465 *Ibid.*: 'Crimes against Humanity'. The nexus between persecution as a CAH and genocide or war crimes was retained in Article 3(1)(h): 'persecution against any identifiable group or collectivity on political, racial, national, ethnic, 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 in connection with the crime of genocide or war crimes'.

466 UN General Assembly, *Report of the International Law Commission*, 68th Session (2 May-10 June and 4 July – 12 August 2016), UN Doc. A/71/10, (12 August 2016).

467 *Ibid.*

468 Schabas, *supra* note 107, para. 21.

Commission.⁴⁶⁹ When the ILC invited feedback from States, Iceland (on behalf of the Nordic countries) and Sierra Leone suggested that the forms of liability should not be interpreted narrowly and should include conspiracy and incitement for all core crimes.⁴⁷⁰ Yet the reaction from the Special Rapporteur was merely to note that the Rome Statute does not refer to incitement with respect to CAH, 'and hence the Commission elected also not to use such terms'.⁴⁷¹ If this implies a stance that the law of 1998 should remain as it is, just because it is formulated this way, it would defeat entirely the mission of the ILC to progressively develop the law in light of the new challenges that arise with time.

The Commission's position has been criticised by eminent scholars and by a member of the ILC who actively participated in the drafting process.⁴⁷² From the Summary records, it is clear that the ILC's reasoning for the non-inclusion of the term 'incitement' in the draft articles was based in part on the fact that the term 'incitement' had not been included in certain international treaties, such as the Rome Statute, and in part on the fact that 'the concept did not exist in some national legal systems'.⁴⁷³ Schabas comments that this 'is not a good reason to omit direct and public incitement and conspiracy to commit crimes against humanity from the draft articles' and reminds that 'there are unfortunate gaps in Article 25 of the ICC Statute' which should be addressed.⁴⁷⁴ Van Sliedregt calls the absence of 'incitement' as an inchoate form of criminal responsibility noteworthy, especially in light of the Genocide Convention where it is punishable as such.⁴⁷⁵ From the point of view of morality the criminalisation of incitement to CAH is essential. Van Sliedregt argues that 'promoting an individual to commit a crime may be even more reprehensible than assisting someone who has already decided to commit a crime'.⁴⁷⁶

469 *Ibid.*, referring to the UNGA ILC Report, 69th Session, *supra* note 462, para. 13.

470 Iceland (on behalf of the Nordic countries), *Official Records of the General Assembly, Seventy-first Session, Sixth Committee*, 24th meeting (A/C.6/71/SR.24), para. 59; and CAH: Comments and observations received from Governments, international organizations and others (A/CN.4/726), chapter II.B.7, Sierra Leone.

471 UN A/CN.4/725 Fourth Report on Crimes against Humanity by Sean D. Murphy, Special Rapporteur, (18 February 2019), p. 57.

472 Schabas, *ibid.*

473 *Ibid.*, referring to ILC, *Provisional summary record of the 3312th meeting*, UN Doc. A/CN.4/SR.3312, (9 June 2016), para. 4.

474 Schabas, *ibid.*

475 E. van Sliedregt, 'Criminalization of Crimes against Humanity under National Law', 16 *Journal of International Criminal Justice* (2018) 729-749, 735. Sliedregt suggested the insertion and explicit recognition of conspiracy and incitement as inchoate offences, *ibid.*, p. 748.

476 *Ibid.*

Even though the ILC's draft articles on a global convention for CAH included the obligations of prevention in several provisions, such prevention could be enhanced, as suggested by Leila Sadat, by requiring states 'to prohibit, consistent with their obligations under international human rights law, advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence' under draft Article 4 on prevention.⁴⁷⁷

In the lead-up to the annual meeting of the States Parties to the International Criminal Court in December 2017 the Peace and Justice Initiative and the University of Connecticut Human Rights Institute propose an amendment to the Rome Statute to broaden the ambit of Article 25(3)(e) to criminalise not only the incitement of genocide, but also CAH, war crimes and (potentially) the crime of aggression. They formulated an amendment of Article 25(3)(e) of the Rome Statute to read as follows: 'Intentionally, directly, and publicly incites others to commit any of the crimes in the Statute, thereby substantially increasing the likelihood of their occurrence. For the purpose of this provision it is not necessary that the incited crime(s) be committed or attempted'.⁴⁷⁸

In light of the above, one might argue that a consensus has emerged among scholars for the inclusion of 'direct incitement to commit crimes against humanity' in the ILC's draft articles and that, as rightly suggested by Gordon, 'there is no reason inchoate liability in reference to speech should be exclusively affixed to genocide'.⁴⁷⁹

6 Conclusion

Freedom of expression is essential for personal realisation and the well-being of individuals as well as a precondition of any positive societal development. Thus, there is no doubt that limiting speech or even assigning criminality to any form of expression should be approached with utmost caution, even when the speech is unpleasant. Yet social research can methodically distinguish between speech that may be merely repugnant but is generally harmless and the types of speech that are known to elevate the risk of criminal acts in a statistically significant manner. Grand narratives and the spread of fear and hate propaganda do not merely accompany grand-scale atrocities but also make them possible. The current international criminalisation and jurisprudence show a

477 Sadat, *supra* note 459, paras. 19–20.

478 In the lead-up to the annual meeting of the States Parties to the International Criminal Court in December 2017.

479 Gordon, *supra* note 71, p. 22.

deep fragmentation and inadequacy in recognising the role played by hate propagandists in this respect. These shortcomings have manifested themselves dramatically in the *Šešelj* case, particularly in the TC and consequently in the AC as well. The mission 'to do justice' was not fulfilled and a worrying signal has been sent in terms of impunity for future such propagandists. Furthermore, in terms of deterrence, it would be far more desirable for law to be able to step in at an earlier stage and prevent hate and fear propaganda from spreading before it achieves its ultimate goal of physical violence against a targeted group. Particularly in situations 'where direct and public calls are being made for atrocity crimes to occur, the international community should not have to wait, like an ambulance at the bottom of the cliff, for the violence to manifest before measures can be taken against those urging the crimes'.⁴⁸⁰ Our study shows that the ILC has lost a golden opportunity in 2017 by excluding from its draft articles on CAH 'incitement to commit CAH' as an inchoate offence, showing a disregard for the significance of the preventative function of ICL.⁴⁸¹ However, in practice, it is highly unlikely that incitement to hatred *per se*, criminalised as an inchoate crime, without the materialisation of the incited crimes, could ever reach the gravity threshold required.

Several proposals have been made to tackle the *status quo* and ensure a better conviction rate for the likes of *Šešelj* at international tribunals. Gordon suggests a new 'Unified Liability Theory for Atrocity Speech Law' that would allow the entire range of potential criminal speech to be charged in connection with each of the core international offences.⁴⁸² The new model would thus include direct incitement to any of the core crimes without the requirement of it being 'public',⁴⁸³ 'ordering' both as an inchoate and non-inchoate offense,⁴⁸⁴ and a completely new offence, called 'speech abetting' which would cover the 'egging on' type of rhetoric voiced contemporaneously with acts that could be characterised as any of the core crimes.⁴⁸⁵ This innovative mode of liability roughly corresponds to the current hate speech as a CAH (persecution)⁴⁸⁶

480 Peace and Justice Initiative and the University of Connecticut's Human Rights Institute, *Incitement, Hate Speech, and the Preventive Function of the International Criminal Court, Beyond the Hague*, 31 August 2017, online at <https://beyondthehague.com/2017/08/31/incitement-hate-speech-and-the-preventive-function-of-the-international-criminal-court/>.

481 See *supra* Section 5.2.

482 Gordon, *supra* note 71, p. 377.

483 *Ibid.*, p. 392.

484 *Ibid.*, p. 251.

485 *Ibid.*, p. 377.

486 *Ibid.*, pp. 376-377.

but is wider in scope (not being saddled with persecution's specific intent requirement) and would aim to deter those who watch the violence and are tempted to cheer from the side-lines, aggravating the situation.⁴⁸⁷

Without the possibility of substantial amendments to the existing international criminal norms, Wilson suggests a resort to aiding and abetting as the most justified form of liability due to the 'chance-rising' effects of inciting speech.⁴⁸⁸ He furthermore finds that the minimally higher sentencing applied on average for instigation does not merit the investment into proving it.⁴⁸⁹ Wilson and Gillett in the Hartford Guidelines consider aiding and abetting 'the most accurate way of conceptualising how non-military propagandists and demagogic politicians actually contribute to a collective criminal enterprise', i.e. through assistance and encouragement, as supportive accomplices, rather than as direct instigators.⁴⁹⁰ They also suggest recourse to this form of liability due to the lower causation requirement in practice.⁴⁹¹

A fundamental principal of criminal justice is the fair labelling principle, which aims to ensure that the label describing the criminal conduct accurately reflects both its wrongfulness and its severity.⁴⁹² Resorting to the current option of aiding and abetting seems the most practical approach in achieving a higher conviction rate due to the lower threshold required for the causal link. However, beyond that, it would be hard to imagine those who orchestrate and aggressively propagate theories of fundamental and unsolvable conflict between peoples in order to achieve their political aims, merely as aiders of the perpetrators who physically carried out the atrocities. Particularly, if we are to question the existence of the free will of the physical perpetrators in such a propagandistically determined society, the philosophical question of who is really aiding whom gives a starkly different answer. Thus aiding and abetting does not reflect the *essence* and the *totality* of the criminal conduct which a proper label would.⁴⁹³ Instigation or inducement in this sense provides a more appropriate theoretical model, as the instigator is 'the intellectual author of

487 C. Pauli, 'Atrocity Speech Law: Addressing Hate that Does Grave Harm', 40 *Human Rights Quarterly* (2018) 718-729, p. 722.

488 Wilson, *supra* note 11, p. 299.

489 *Ibid.*

490 Wilson and Gillett, *supra* note 221, pp. 71-72.

491 *Ibid.*

492 D.L. Nersessian, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity', 43 *Stanford Journal of International Law* (2007) 221-264, p. 255.

493 *Ibid.*

the crime' and unlike the mere aider and abettor, he sets in motion a chain of events that eventually leads to the commission of the crime.⁴⁹⁴

In terms of fair labelling there is also the broader question of characterising as 'principal perpetrators' those who physically commit the crimes, whereas all others are mere 'accomplices', despite the fact that 'the typical executor of mass crimes is just one among many participants in universal crimes and works in tandem with others who may not merit the label of principal perpetrator'.⁴⁹⁵ It has been argued that senior officials as well as hate mongers should be considered as accomplices who can nonetheless be more culpable than physical perpetrators, 'because they are aggregators of responsibility'.⁴⁹⁶ This is in line with the point made by the AC in *Tadić* that 'the moral gravity of... participation is often no less – or indeed no different – from that of those actually carrying out the acts in question'.⁴⁹⁷ At the ICC, in *Katanga* the TC also rejected a hierarchy between modes of liability, however this is in contrast to the majority of ICC case law.⁴⁹⁸ Furthermore, from the victims' perspective such an understanding of who is the principal and who the accomplice may prove a bit too abstract and thus appear to understate the gravity and magnitude of the propagandist's actions. The principle function of label is not sentencing, but rather the fact that it appropriately 'addresses both the offender and the larger community, stigmatising the former for his culpable conduct and conveying the nature of his transgression'.⁴⁹⁹ It is thus the view of the present authors that hate and fear propagandists, such as Šešelj, are best described as co-perpetrators in a common criminal enterprise. This allows for the recognition of the responsibility of the physical perpetrators and the propagandists without diminishing the role of either. It furthermore recognises the fact that

494 W.K. Timmerman and W.A. Schabas, 'Incitement to, in P. Behrens and R.J. Henham (eds.), *Elements of Genocide* (Routledge, New York, 2013), p. 171.

495 T. Einarsen and J. Rikof, *A Theory of Punishable Participation in Universal Crimes* (Torkel Opsahl Academic EPublisher, Brussels, 2018) p. 13.

496 D. Guilfoyle, 'Responsibility for Collective Atrocities: Fair Labelling and Approaches to Commission in International Criminal Law', 64 *Current Legal Problems* (2001) 255-286, p. 255.

497 *Tadić* Appeal Judgment, *supra* note 85, para. 191.

498 *Katanga* Trial Judgment, *supra* note 77, para. 1387; *see also* Situation in the DRC, *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute – Concurring opinion of Judge Van den Wyngaert, Case No. (ICC-01/04-02/12), 18 December 2012, para. 22: '[t]he fact that principals are connected more directly to the bringing about of the material elements of the crime than accessories does not imply that the role of the former should be regarded as inherently more blameworthy'.

499 Nersessian, *supra* note 488, p. 256.

hate and fear propaganda leading to atrocities is necessarily a common endeavour of a multitude of persons.

While JCE does not exist under the ICC Statute, the liabilities formerly considered under this theory now fit under co-perpetration (Art. 25(3)(a)) and common purpose liability (Article 25(3)(d)), both designed for group crimes in which multiple persons worked together towards a joint criminal endeavour. The ICC jurisprudence has considered that joint perpetrators are principals with control over the crime, who make an essential contribution to it and can frustrate it by withholding their assigned tasks.⁵⁰⁰

In contrast, the requirements for liability under Art. 25(3)(d) in theory set a relatively low threshold of criminal responsibility, which has given it the name 'residual'. However, in practice Art. 25(3)(d) covers a variety of conduct entailing different levels of responsibility and blameworthiness, thus not necessarily representing a hierarchically lower form of liability.⁵⁰¹ Which option better suits the hate and fear propagandist in question will depend on the particular circumstances. While it may be difficult to argue that such a propagandist had 'control over the crime', their contribution can nevertheless be essential. The Rome Statute itself, does not specify anything more or less than the commission of a crime 'jointly' allowing room for a less strict interpretation in the future, more in line with JCE I. However, in cases such as the hate propaganda spread by the Myanmar military, the option of co-perpetration based on functional control over the crime (Art. 25(3)(a)) is best suited to attribute individual criminal responsibility to those senior officials in the Tatmadaw.

The practical question of course remains of how to prove the causal link. Whether future prosecutions and trial chambers opt for co-perpetration, inducement (formerly instigation) or aiding and abetting or they make a recourse to common purpose liability, the question of causation will always remain, regardless of how high or low its threshold is set. While it might seem practical to remove causation as a necessary element altogether when dealing with fear and hate propaganda, this would create the impression that such a causation does not exist, when in reality it merely works in a more complex manner than judges usually look for in small-scale crime or what they expect from typical instances of threatening or denigrating speech at national criminal courts.

⁵⁰⁰ Situation in the DRC, *Prosecutor v. Thomas Lubanga*, Judgment on the appeal of Mr. Thomas Lubango Dyilo against his conviction, Case No. (ICC-01/04-01/06), 1 December 2014, para. 469; *Blé Goudé* confirmation of charges decision, *supra* note 88, para. 135.

⁵⁰¹ Cupido, *supra* note 77, p. 914.

As Wilson describes, atrocity speech typically influences the mindsets of other people who participate in the criminal enterprise in indirect ways.⁵⁰² What is contributed to the crime by an act of instigation is often only a causal factor in the whole criminal enterprise and only indirectly a causal factor in the crime eventually perpetrated.⁵⁰³ Wilson strongly criticises the current theories of direct causation for presenting an inaccurate account of the consequences of speech and argues that international tribunals should make a clearer distinction between material and legal causation which would allow the trial chamber to consider the entire constellation of conditions jointly sufficient to result in a harm or injury using a broad formulation of cause and effect.⁵⁰⁴ In this respect social science experts can answer general causation questions but not the specific contribution of the accused to the crime or his *mens rea*.⁵⁰⁵ In terms of legal causation, the international tribunals need to be explicit that the attribution of responsibility is determined by the conduct that the defendant should have taken reasonable steps to avoid since an offence was a foreseeable consequence of their act or omission, acknowledging that the scope of liability is a policy decision derived from the statutes and the case law.⁵⁰⁶

Several studies in the social sciences have identified how nationalistic, religious or other ideologies are capable of manipulating ordinary people into committing atrocities. As mentioned, the Hartford Guidelines advance a risk assessment framework informed by the latest social science research that has identified many of the key ingredients of what makes successful mass persuasion in this regard.⁵⁰⁷ In the same vein, Gordon creates a set of evaluative criteria to be considered by the courts. This includes whether there was dehumanising language or accusations in a mirror; the channel of communication (i.e., whether it was broadcast, social media, or printed); the temporality and instrumentality (i.e., how close in time the speech was uttered with its republication and how much control the speaker had over the republication).⁵⁰⁸ Most importantly the courts should look at the context of the speech, both internal and external; this includes the speaker's background, authority and personal tone, the political climate, the media environment, the outbreak or imminent outbreak of armed conflict, instability, a dictatorial regime and the

⁵⁰² Wilson, *supra* note 11, p. 299.

⁵⁰³ *Ibid.*

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*, p. 300.

⁵⁰⁶ *Ibid.*, p. 301.

⁵⁰⁷ Wilson and Gillett, *supra* note 221, pp. 120-121.

⁵⁰⁸ Gordon, *supra* note 71, pp. 300-301.

lack of an atmosphere of diverse voices.⁵⁰⁹ To avoid further miscarriages of justice, ICL has to incorporate into its theories of causality the broader picture of the role hate and fear propaganda play in enabling international crimes in terms of persuasion and beyond and the expertise of social scientists are essential in this regard.

509 *Ibid.*, pp. 296-297.