CAN THE CRIME OF "PERSECUTION" ENCOMPASS HATE SPEECH?*

¿PUEDE EL CRIMEN DE "PERSECUCIÓN" INCLUIR EL DISCURSO DE ODIO?

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RESUMEN: El presente artículo discute los intentos de los fiscales y de los tribunales penales internacionales de encuadrar el discurso de odio dentro del tipo penal del crimen de "persecución". La vaguedad de la definición de este crimen le permite al intérprete utilizarlo como un contenedor en el cual poner actos criminales que, debido a fallas sustanciales o probatorias, no puede de otra manera ser penalizado. Esta situación, junto con las condiciones que presupone, pone en peligro el principio de legalidad, y por lo tanto demanda un análisis cuidadoso por parte de los juristas, con el fin de probar la precisión de aplicaciones inciertas tales como aquella con respecto al discurso de odio.
Palabras clave: derecho penal internacional, persecución, discurso de odio, libertad de expresión.

ABSTRACT: The present paper discusses attempts by prosecutors and International Criminal Tribunals to encompass hate speech within the model fact situation of the crime of "persecution". The vagueness of this crime definition enables the interpreter to use it as a container in which to place criminal acts that, due to substantial or evidentiary shortcomings, cannot otherwise be penalized. This situation, and the conditions it presupposes, endanger the principle of legality and therefore demand careful analysis on the part of the jurist in order to test the accuracy of dubious enforcement such that with respect to hate speech.
***Descriptors**: international criminal law, persecution, hate speech, freedom of expression.*

RÉSUMÉ: Cet article décrit les tentatives des procureurs et des tribunaux pénaux internationaux pour l'incitation à la haine dans le cadre infraction de crime de "persécution". L'imprécision de la définition de ce crime permet à l'interprète de l'utiliser comme un contenant dans lequel des actes criminels qui mettent des échecs ou des preuves ne peuvent pas être pénalisées. Cette situation, ainsi que les conditions assumé, menace la primauté du droit et requiert donc une analyse attentive par les avocats dans le but de tester la précision des applications telles que l'incertitude à l'égard de l'incitation à la haine.

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SUMMARY: I. *Foreword*. II. *Recapitulation of the Facts of the Šešelj Case*. III. *The Statutes of the International Criminal Tribunals and of the Permanent Court and the Doctrines of International Criminal Law*. IV. *The Teachings of the European Court of Human Rights Case Law on Freedom of Expression*. V. *Conclusion*.

I. FOREWORD

The most grievous international crimes of modern times reveal a recurring factor that intrudes as a sinister preamble to the escalation thereof, namely, hate speech. This is vented at rallies and in the media and is a veritable "pernicious tree"[1] rooted in the suffering and fear of the population. It instils a feeling of hatred towards the "other", levers on ideals of greatness and purity and accuses its prey of treason and conspiracy. The "prophets of chaos",[2] as the practitioners of hate speech have been called, are often intellectuals and skilled orators familiar with the present and past of their target audience, its social and economic difficulties, its concerns and its grievances. They are, therefore, in possession of the appropriate tools with which to mould "inflammatory" speeches capable of creating a breach in the hearts and minds of their listeners and, consequently, of pushing the latter into committing acts of crime. Although the key social role played by hate speech in setting the stage for a number of international crimes must be acknowledged, the question whether such conduct can in itself be referred to as an international crime is highly problematic.[3]

First of all, "hate speech" needs to be better defined. For this purpose it is useful to resort to the definition contained in Recommendation No. 20 adopted by the Committee of Ministers of the Council of Europe on 30 October 2007, where the term is understood as covering "all forms of expressions which spread, incite, promote or justify racial hatred, xeno-

1 See Jacques Sémelin, *Purify and Destroy. The Political Uses of Massacre and Genocide* 77 (Columbia University Press ed., New York 2007).

2 *Ibidem*, at 68.

3 On the other hand it should be remembered that the criminalization of hate speech is common practice at national level (see note 50 below). We cannot discuss this here, but will focus, rather, on the international criminal law which should, however, serve as a useful starting point for constructive criticism of choices made at national level.

phobia, anti-Semitism or other forms of hatred based on prejudice, including intolerance expressed by means of aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin".[4] At a very general level, hate speech can appear under four different profiles[5] in international criminal law: (i) moral complicity in the perpetration of an international crime;[6] (ii) evidence for the existence of a Joint Criminal Enterprise (JCE) to which the "prophet" belongs; (iii) direct and public incitement to genocide; (iv) "persecution". Under the first profile, hate speech constitutes secondary involvement, while under the second it appears as conduct which, while neutral at the substantial level of typicity, could, in a court trial, take on the role of minor premise (or secondary fact) in an inferential line of reasoning, the outcome of which would be the involvement of the perpetrator in a JCE;[7] finally, under the third and fourth profiles hate speech autonomously encompasses an international crime.

The present article attempts to deal exclusively with the issue of the autonomous relevance of hate speech as an international crime and, in particular, as a crime of "persecution". In the light of the numerous bench warrants and cases of doctrinal indecision that underscore the difficulty of defining the crime of "persecution", it will be argued that this

4 The notion of hate speech explicitly or implicitly adopted in the most important sentences or trials can be easily traced back to the abovementioned definition. See the charges brought against Vojislav Šešelj, Count No. 1, par. 17, letter k, as well as the pretrial brief of the prosecution under paragraph 141. See also the charges brought against Dario Kordic, Count No. 1, par. 37, letter c, as well as the sentence of the Trial Chamber on the latter under paragraph 209. Finally, see the sentence of the Streicher case at the Nuremberg Trials, *http://avalon.law.yale.edu/imt/judstrei.asp*.

5 These profiles will be the subject of further considerations in the remaining part of the article.

6 When the objective and subjective prerequisites for partnership in a crime are met, hate speech can appear as a form of instigation, as an order by a superior or as abetting. See Enrico Amati, Matteo Costi, "Autoria e forme di compartecipazione criminosa", *Introduzione al diritto penale internazionale* 94 (Enrico Amati, Valentina Caccamo, Matteo Costi, Emanuela Fronza, Antonio Vallini eds., Giuffrè ed., Milano 2006); Stefano Manacorda, *Imputazione collettiva e responsabilità personale* 177 ff., (Giappichelli ed., Torino 2008).

7 With due caution, this conclusion can be reached with reference to individuals belonging to an elite, political or cultural organisation, when evidence is available that some members of these groups have been involved in the perpetration of international crimes.

profile represents the most problematic of the four as far as establishing the international criminal importance of hate speech is concerned and, indeed, that it is not possible to link hate speech with the international crime of "persecution". The method adopted follows two apparently different, but nevertheless interrelated, approaches. First, the contributions of international criminal statutes and the ensuing case law in defining the crime of "persecution", as well as the rare sentences which have been passed on the specific subject, will be examined. Secondly, case law of the European Court of Human Rights (hereinafter ECtHR) regarding the restriction of freedom of expression will be considered, with particular emphasis on the criteria the court adopts in order to define under what circumstances this can be done legitimately. The addition of the latter approach, which will be discussed in more detail later on, was made on the basis of the persuasiveness of the criteria laid down by the ECtHR regarding freedom of expression and because of the conceptual and legal possibility of exporting those criteria outside the legal system of origin.

While not without its references to legal maxims, the present article does not intend to neglect the complexity of real-life facts. Indeed, as a case study it will explore the presentation of evidence in the case of Vojislav Šešelj before the International Criminal Tribunal for the former Yugoslavia (ICTY). Reference to this specific case is not meant to imply that it alone represents an inexorable necessity for arriving at the conclusion that hate speech cannot be defined as an international crime of "persecution". However, it does draw attention to the problematic nature of the issues and also provides a concrete framework in which to examine the methodology adopted as well as the detailed criteria laid down by the ECtHR.

We can begin with a brief summary of the facts. In the absence of any kind of sentence pronounced in the Šešelj trial, the reading of the indictment and the prosecution's pre-trial brief[8] will be considered, obviously bearing in mind that the particulars described therein are only attempts to reconstruct facts which still need to be fully examined by the court. Reference will, however, be made to the records of the hearings of 11, 12 and 13 December 2007, when, during examination and cross-examination, a key witness for the prosecution, Anthony Oberschall, professor of political sociology at North Carolina University, presented a re-

8 The documents are available at *www.un.org/icty*.

port analysing the content and structure of about 400 speeches made by the defendant between 1991 and 1994.

II. Recapitulation of the Facts of the Šešelj Case

Vojislav Šešelj, a professor of political science at the University of Sarajevo, as well as president of the Serbian Radical Party (SRS), is charged before the ICTY of crimes against humanity (art. 5, ICTY Statute) and violation of the laws and customs of acceptable conduct in war (art. 3, ICTY Statute). The crimes attributed to him by the prosecution are, in particular, "persecution", "deportation", "forcible transfer", "murder", "torture and cruel treatment", "wanton destruction" and "plunder of public or private property". According to the prosecution, said crimes were committed between August 1991 and September 1993 on Serbian, Croatian and Bosnian soil, against the Croatian, Bosnian-Muslim and other non-Serbian populations.

The charges refer to the art. 7 first subsection of the ICTY Statute which states that the defendant planned, ordered, instigated and committed the crimes for which he is charged, or at any rate aided and abetted in their planning, preparation and execution. The prosecution intends to show in particular that Šešelj formed part of a Joint Criminal Enterprise finalised towards the commission of the abovementioned crimes and has directly (*i. e*. "physically") committed the crimes of "persecution", "deportation" and "forcible transfer".

The conduct that takes on central importance in the Šešelj trial is the propaganda made through speeches containing direct and public ethnic denigration. This conduct, as far as can be made out from the charges, appears under three different and non-alternative profiles. Firstly, it autonomously encompasses the crime of "persecution" (see Count no. 1, par. 17, letter k as well as the pre-trial brief, par. 141). Secondly, it constitutes a method for instigating the perpetration of an international crime. Finally, it is evidence for the defendant's membership of a JCE finalised towards the commission of international crimes. As already mentioned, under the first profile the practice of discriminatory propaganda can be considered an autonomous crime, while under the second it is deemed ancillary conduct and under the third as neutral conduct from which it is thought possible to infer membership of a JCE.

The discriminatory propaganda of which Šešelj is accused mainly took place at political rallies held in the presence of military groups and civilians, in a climate of palpable tension due to the ethnic and religious conflicts in the former Yugoslavia which worsened following the Bosnian declaration of independence. The propaganda is primarily targeted at the forced expulsion of non-Serb populations, not only from Serb territory, but also from a considerable part of the Croatian and Bosnian territory, so as to constitute a new territorial entity according to the nationalistic idea of a Greater Serbia. A primary example of this is the speech given by Šešelj on 6 May 1992 in the village of Hrtkovci, in the Vojvodina region of Serbia, in which the defendant incited his audience to the expulsion of Croatian inhabitants by reading out a list of names of those who were to leave the area. Numerous episodes of violence and ethnic cleansing followed this speech.

Various and recurrent examples given by the prosecution shed light on the central importance of hate speech in this case: "Šešelj made inflammatory speeches in the media, during public events and during visits to the volunteer units and other Serb forces... instigating... to commit crimes" (par. 10, b); Šešelj "participated in war propaganda and incitement of hatred towards non-Serb people" (par 10, c); "Šešelj called for the expulsion of Croat civilians from parts of the Vojvodina region in Serbia" (par 10, d); "persecution" by the defendant consisted of "direct and public denigration through 'hate speech' of the Croat, Muslim and other non-Serb populations" (par. 17, k).

III. The Statutes of the International Criminal Tribunals and of the Permanent Court and the Doctrines of International Criminal Law

"Persecution" is a crime against humanity. Objectively speaking, it consists of the intentional and severe deprivation of fundamental rights committed in the presence of the elements constituting the *chapeau* of the relevant category. The subjective element, on the other hand, involves the specific wilful practice of discrimination. The Statute of the International Criminal Court,[9] as well as the Statutes of the International

9 See Statute of the International Criminal Court art. 7, July 17, 1998, 37 *ILM* 1002 [hereinafter Statute of the International Criminal Court or ICC Statute].

Criminal Tribunal for Rwanda[10] and the International Criminal Tribunal for the former Yugoslavia,[11] as integrated by unanimous case law,[12] agree upon the contents of this essential hendiadys.

Nonetheless, there are some differences between the three statutes. The ICC Statute provides a definition of "persecution",[13] while the other statutes mention the *nomen iuris*[14] only, and thus require case law to supplement them. Furthermore, the discriminatory reasons mentioned in the Statute of the ICC are more numerous than those listed in the other statutes, and the document also contains a final opening clause referring to "other grounds that are universally recognised as impermissible under international law" (art. 7, subsection 1, letter h). Unlike the other statutes, the Statute of the ICC links "persecution" "with any act referred to in this paragraph or any crime within the jurisdiction of the Court" (*ibidem*). Finally, the "contextual elements" differ considerably in the different statutes analysed.[15]

10 See Statute of the International Criminal Tribunal for Rwanda art. 3, November 8, 1994, 33 *ILM* 1598 [hereinafter Statute of the International Tribunal for Rwanda].

11 See Statute of the International Tribunal for the former Yugoslavia art. 5, May 25, 1993, 32 *ILM* 1159 [hereinafter Statute of the International Tribunal for the former Yugoslavia].

12 As will be discussed later, the two latter statutes give no definition of the crime "persecution". It was left to international case law to interpret the practice of "persecution" as a "serious violation of human rights". See the sentences of the *ad hoc* Tribunals which will be cited in the present section.

13 Art. 7, 2nd subsection, letter "g" of the Statute of the International Criminal Court (see *supra* note 9) affirms that "persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

14 Art. 5, letter h of the Statute of the International Criminal Tribunal for the former Yugoslavia (see *supra* note 11) and art. 3, letter h, of the Statute of the International Criminal Tribunal for Rwanda (see *supra* note 10) only speak of "persecutions on political, racial and religious grounds".

15 The contextual elements of the ICC Statute and of the Statute of the International Criminal Court for Rwanda differ only for the expressed prerequisite of the psychological element of "knowledge" in the first statute and for the prerequisite of the discriminatory purpose in the second statute. Both of them require that the crime be committed as part of an extended or systematic attack against civilians. The contextual element in the Statute of the International Criminal Tribunal for former Yugoslavia differs from the other statutes as it neither requires the commission of a crime as part of a widespread or systematic attack against civilians nor requires the element of knowledge, but demands,

The elements that go to make up "persecution" as defined by statutes, by international law and in doctrine, cannot be all discussed here. Indeed, the question of whether or not hate speech can instantiate "persecution" is critical only under the specific profile of the conduct. Neither the *chapeau*, nor the discriminatory intent,[16] nor the connection with other crimes, seem to shed light on the resistance to the subsumption in question: in truth these elements, some of which only refer to the context, can undoubtedly be instantiated by a concrete case involving hate speech.

Once the typical conduct of the crime of "persecution" has been defined as the "severe deprivation of a fundamental right", it becomes necessary first and foremost to go deeper into the meaning of such terminology and to ask which specific acts might come under this typical conduct. Once this has been done, we can then move on to analyse the specific issue of hate speech.

1. *What constitutes a conduct of "persecution"?*

As proof of the difficulties encountered in defining the crime of "persecution", it needs to be borne in mind that, during the drafting phase of the ICC Statute, various states requested to exclude the crime from the document on account of the ambiguity of the term and because "persecution" lacked a definition in international criminal law. In the final draft, it was opted to include the crime with due specification of the constituting elements thereof.[17] As regards the problem of identifying

rather, the connection of the crime with an international or internal armed conflict and the direction of the crime against civilian populations. For an efficient analysis of the congruencies and differences between the statutes examined with reference to crimes against humanity see Enrico Amati, "I crimini contro l'umanità", in Amati *et al*., *supra* note 6, at 339.

16 As will be seen further on, in evaluating the conduct of hate speech it will be necessary to adopt a concept of *actus reus* incorporating both physical element and the specific intent.

17 See: Herman von Hebel, Darryl Robinson, "Crimes Within the Jurisdiction of the Court", *The International Criminal Court. The Making of the Rome Statute* 79, 101 (R. S. Lee ed., Kluwer Law International ed., The Hague 2002); D. Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference", 93 *Am. J. Int'l L.* 43, 53 ff.(1999). Referring to the notion of "persecution" the following remarks by Bassiouni are indicative: "there is no crime known by the label 'persecution' in the world's major criminal

acts that come under the crime of "persecution", there are two main theories.[18] The "restrictive" theory argues that such conduct consists exclusively in the violation of social, cultural, political and economic rights and, therefore, that the crime of "persecution" cannot be intended as having occurred when an act violating individual freedom, the life or the physical or mental integrity of an individual has been committed. In the light of this interpretation, the acts already foreseen as crimes against humanity do not constitute the *actus reus* of "persecution" precisely because they are violations of the rights belonging to the latter group mentioned. This theory is supported by an absolute minority and finds little echo in international law.[19] However, it does have the great benefit of maintaining the autonomy of the crime of "persecution", which always

justice systems... It is the conclusion of this writer that 'persecution' is neither a crime in the world's major legal systems, nor an international crime *per se* unless it is the basis for the commission of other crimes". See Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 318 (Martinus Nijhoff Publishers, Dordrecht 1992).

18 For a profound analysis of the debate see Jerome de Hemptinne, "Controverses relatives à la définition du crime de persecution", 53 *Rev. Trim. Dr. H*. 15, 20 ff. (2003).

19 This theory is taken up in the Prosecutor *vs*. Tadic sentence (Case no. IT-94-1-A), Judgment, 15 July 1999, par. 702. All the same it has to be remembered that the reason for which the analysed sentence follows the abovementioned theory is that the Trial Chamber has deemed it appropriate to extend the operational field of the prerequisite of the discriminatory character to all crimes against humanity. Following such an interpretation, it is clear that in order to maintain an autonomous nature for the crime of "persecution" it is necessary to adopt a restrictive approach in the identification of its *actus reus*, which has to exclude the acts already revealed as crimes against humanity. More consistent support for this theory can be found in the Statutes of the Tribunals of Tokyo and Nuremberg under articles 5, letter "c" and 6, letter "c" respectively. These split crimes against humanity into two categories. The first includes murder, extermination, enslavement, deportation, torture, rape and other inhumane acts committed against a civilian population. The second includes "persecution" for political, racial or religious reasons. This division was taken up by the United Nations War Commission which distinguished between "crimes of the 'murder-type'" and "persecutions" (see UNWCC, *History of the United Nations War Commission and the Development of the Laws of War* 192-194 (HMSO ed., London 1948)). It is clear that the aforementioned distinction makes sense only if a differentiation between the acts falling under the first or the second category is made, and it can therefore be excluded that the *actus reus* of "persecution" can consist in the *actus reus* of another crime against humanity. On this point see de Hemptinne, *supra* note 15, at 25 ff. and William J. Fenrick, "The crime against humanity of persecution in the jurisprudence of the ICTY", 31 *Netherlands Yearbook Int'l L.* 81, 83 (2001).

seems to have been accepted by International Criminal Statutes, by specifically including the incrimination in a distinct letter.[20]

The "extensive" theory, on the other hand, affirms that the *actus reus* of "persecution" is not only given by the violation of social, cultural, political and economical rights, but also by the violation of the right to life, individual liberty and physical and mental integrity, which are already protected by the provisions of law covering other crimes against humanity. According to this theory, therefore, the crime of "persecution" is integrated (1) by acts punishable as crimes against humanity but aggravated by discriminatory intentions and (2) by other acts not protected by laws dealing with crimes against humanity. This broader interpretation is affirmed in the jurisdiction of the International Criminal Tribunal for the former Yugoslavia[21] and confirmed by international customary law.[22]

Without going any deeper into this debate, our analysis will proceed by maintaining the abovementioned dominant case law as its benchmark. As can be seen, notwithstanding the fact that such case law follows the "extensive" theory, the considerations which will be made with regard to

20 De Hemptinne is in favour of this theory and, like others, points out that an interpretation in this sense, where the overlapping between the model fact situation of "persecution" and the model fact situations of the other crimes against humanity is excluded, would avoid the typical confusion of those charges in which multiple juridical qualifications are attributed to the same criminal action (see de Hemptinne, *supra* note 18, at 30-31).

21 With particular reference to the sentences Prosecutor *vs*. Kupreskic *et al.* (Case no. IT-95-16-T), Judgment, 24 January 2000, par. 605; Prosecutor *vs*. Kvocka *et al*. (Case no. IT-98-30/1-T), Judgment, 2 November 2001, par. 185; Prosecutor *vs*. Kordic (Case no. IT-95-14/2-T) Judgment, 26 February 2001), par. 198; Prosecutor *vs*. Krnojelac (Case no. IT-97-25-T), Judgement, 15 March 2002, par. 433; Prosecutor *vs*. Blaskic (Case no. IT-95-14-T), par. 220. The Kordic sentence seems to affirm that war crimes can also constitute the *actus reus* of a "crime of persecution" (see Prosecutor *vs*. Kordic, *supra* note 21, par. 198, 202 ff.). It has been rightly stated that an approach of this kind elevates to crimes against humanity acts which do not always deserve this legal qualification and, at the same time, creates confusion as far as the necessity of the presence of an armed conflict is concerned (always a prerequisite in cases of war crimes). See also Kai Ambos, Steffen Wirth, "The current law of crimes against humanity. An analysis of UNTAET Regulation 15/2000", 13 *Crim. L. Forum* 1, 75 (2002).

22 See de Hemptinne, *supra* note 18, at 21. To back up this statement further the author recalls the precedent of the Nuremberg Tribunals and of the Supreme Courts of Israel, as well as law no. 10 of 20 December 1945 adopted by the Allied Control Council in Germany (it can be found at *http://avalon.law.yale.edu/imt/imt10.asp*).

the relationship between hate speech and "persecution" are of general significance, that is, they are not limited to this theory, but easily attach also to the "restrictive" one.

As far as the method of selection for the fundamental rights deserving protection through the crime of "persecution" is concerned, it is important to remember the Kupreskic[23] sentence, according to which it is necessary to identify those human rights which have a solid basis in customary or conventional international law and consider as "persecution" the severe privation thereof. It should be stressed that this approach is in perfect consonance with the disposition of art. 7, subsection 2, letter g of the ICC Statute. In the light of said approach, the definition of "persecution" proposed in the sentence is the following: "gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in article 5".[24]

According to the aforementioned sentence, in order to label a crime as "persecution" it is thus necessary to reflect on which acts entail the denial of a fundamental right as recognised by international law. The Kordic sentence does precisely this providing the following list:

> [T]he seizure, collection, segregation and forced transfer of civilians to camps, calling out of civilians, beatings and killings'; 'murder, imprisonment, and deportation' and such attacks on property as would constitute 'a destruction of the livelihood of a certain population'; and the 'destruction and plunder of property', 'unlawful detention of civilians' and the 'deportation or forcible transfer of civilians', and physical and mental injury. In the Blaskic case, the Trial Chamber found that the crime of "persecution"

23 Prosecutor *vs*. Kupreskic, *supra* note 21.

24 Prosecutor *vs*. Kupreskic, *supra* note 21, par. 621. Moreover, should be mentioned that this definition of "persecution" is compatible with that foreseen by the UNTAET Regulation 15/2000, 6 June 2000 (see Ambos, Wirth, *supra* note 21, at 70 ff.) as well as the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in its forthy-third session, in 1991, which stated that "persecution" "relates to human violations other than those covered by the previous paragraphs... (which) seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or constantly denied" (see U. N. Doc. A/46/10, p. 268, quoted in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, article by article 165* (Nomos Verlagsesellschaft ed., Baden-Baden 1999).

encompasses both bodily and mental harm and infringements upon individual freedom.[25]

The acts listed in the Kvocka sentence need to be added to the latter. On that occasion the Court affirmed that the acts of "psychological abuse", "harassment" and "humiliation"[26] can also instantiate the crime of "persecution" and, in particular, it gave the example of psychological abuse inflicted upon detainees by forcing them to see or listen to the brutal interrogations of their fellow prisoners. Furthermore, it should be remembered that in the Tadic sentence it was asserted that a "physical element" is not necessary for an act to come under "persecution", since a legal provision which puts a certain group of people "outside the law" is perfectly capable of constituting "persecution".[27] Lastly, in the Kupres- kic sentence it has become clear that, even if a single act of particular gravity can encompass "persecution", this term generally defines a whole series of acts, and that, consequently, "acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed 'inhumane'".[28] This approach has been taken in the Kordic,[29] Kvocka[30] and Krnojelac[31] sentences, as well as in the recent sentence of appeal in the Nahimana[32] case.

Once this vast group of acts (and any manifestation thereof) with which legislation tends to encompass the crime of "persecution" has been identified, it is necessary to enter the heart of the problem and ask whether, in the light of the abovementioned definition of "persecution" and with the findings of international law, it might also be possible for this set of crimes to include hate speech. First, however, a preliminary question needs to be resolved. As mentioned earlier, the act of "persecu-

25 Prosecutor *vs*. Kordic, *supra* note 21, par 198.

26 See Prosecutor *vs*. Kvocka *et al*., *supra* note 21, par. 190.

27 Prosecutor *vs*. Tadic, *supra* note 19, par. 707.

28 Prosecutor *vs*. Kupreskic, *supra* note 21, par. 622.

29 Prosecutor *vs*. Kordic, *supra* note 21, par. 199.

30 Prosecutor *vs*. Kvocka, *supra* note 21, par. 185.

31 Prosecutor *vs*. Krnojelac, *supra* note 21, par. 434.

32 Prosecutor *vs*. Nahimana (Case No. ICTR-99-52-A), Judgment, 8 November 2007, par. 975 and par. 987.

tion" should amount to a serious violation of a fundamental right acknowledged by international law. In order to instantiate the crime of "persecution", such conduct would have to be accompanied not only by the *chapeau* and the subjective "generic" element, but also by the specific intent of discrimination. It is appropriate to note that, if the notion of hate speech is severed from the discriminatory intent, what remains is nothing more than a neutral conduct of expression and diffusion of ideas,[33] which could never be considered a serious violation of a fundamental right. If, therefore, in order to instantiate "persecution", it is required that the act considered be autonomously a serious violation of human rights,[34] it would follow that hate speech could never encompass "persecution".

However, the issue of the relationship between "persecution" and hate speech cannot be exhausted here, because the preceding technical-dogmatic reasoning does not seem to have found an echo in legal judgements on the matter. Basing oneself on it would, therefore, mean ignoring current law and virtually wangling one's way around the problem. Rather, we must consider both the material and the psychological factors as complementary elements of the conduct under analysis. Indeed, hate speech has similar features to the so-called crimes of *animus* or of specific intent (*Tendenzen-Delikte*) in which the psychic element influences the manner in which the objective element (or *actus reus*) is achieved, in as much as it impregnates the act with an intrinsically damaging character and "marks the conduct with a meaning that justifies its

33 It could very well also include the diffusion of discriminatory ideas, but, for example, in order to inform the collectivity of an injurious fact which has happened.

34 This is the position clearly stated by Valerio Pocar, former President of the International Criminal Tribunal for the former Yugoslavia, during his "Address at the meeting of legal advisers of the Ministries of Foreign Affairs" of 29 October, 2007, for which see *http://www.un.org/icty/pressreal/2007/pr1194e-annex.htm*. In a later talk on the subject, Pocar stated that hate speech can constitute an "underlying act of persecution" insofar as it represents a violation of the right of respect for human dignity, which, in his view, has found consistent acknowledgement in the limitations to the freedom of expression imposed by international law. See F. Pocar, "Persecution as a Crime Under International Criminal Law", 2 *J. Nat. Sec. L. & Pol.* 355, 360-361 (2008). The impression is that in this latter speech Pocar does not follow the approach described in the text and taken up by him in the aforementioned "Address", but on the contrary considers hate speech as a whole, without separating the subjective element from the conduct. For this approach see below.

punishability, through the relevance of a preceding moment (impulse or intent – *Absicht*) that is normally irrelevant".[35] Arguably, therefore, it is not possible to separate the evaluation of the *actus reus* of hate speech from that of the specific intent of discrimination. If present, the latter cannot but influence the damaging type and ability of the conduct, thereby becoming an integral part of the *actus reus* itself.[36]

2. *Can hate speech instantiate the crime of "persecution"?*

In order to be able to trace hate speech back to the crime of "persecution", at this stage it is important to recall the most important sentences which have been passed on the issue. First of all, there is the Streicher case before the Nuremberg Military Tribunals,[37] where it is asserted that, through his propagandistic activity in public speeches and articles published in the weekly paper *Der Stürmer*,[38] the defendant "infected" the minds of the German people with the virus of anti-Semitism and that the conduct of "incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions

35 Personal translation of F. Bricola, *Dolus in Re Ipsa 82* (Giuffrè ed., Milan 1960). The *Tadic* sentence needs to be recalled: "it is not necessary to have a separate act of an inhumane nature to constitute "persecution"; the discrimination itself makes the act inhumane" (see Prosecutor *vs*. Tadic, *supra* note 19, par. 697). Even though this statement needs to be weighed up carefully, it confirms the fundamental role that the discriminatory character plays in determining the prejudicial nature of the act.

36 Referring to "persecution" in general, the concerns of de Hemptinne regarding the discriminatory character as specific intent are not shared. The author affirms that the sole requirement of the specific intent without requesting the presence of a "système de discrimination conçu à grande échelle", as well as the assent of the perpetrators for the same, can lead to a strong decrease in the disvalue of the crime of "persecution" with respect to other crimes against humanity (See de Hemptinne, *supra* note 18, at 45). In the light of the case law of the International Criminal Tribunal for the former Yugoslavia which has interpreted the *chapeau* of the crimes against humanity requesting the presence of a "policy element" (See Robinson, *supra* note 17, at 49), as well as the knowledge of the contents of the *chapeau* itself (See Fenrick, *supra* note 19, at 88), it is not deemed necessary to adhere to the interpretation as proposed by the author. The prerequisites identified in the *chapeau* seem to ensure the stature of international crime to the "underlying conduct" of "persecution" together with the specific intent of discrimination without further additions. Considering art. 7 of the ICC Statute the same conclusion can be drawn.

37 Streicher case, Nuremberg Judgement, *supra* note 3.

38 Of which the defendant was also editor from 1923 to 1933.

clearly constitutes "persecution" on political and racial grounds in connection with War Crimes as defined in the Charter and constitutes a Crime Against Humanity".[39] In an *obiter dictum* the Tadic sentence follows this approach quoting it word for word.[40] Secondly, the Ruggiu[41] sentence asserts that "public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society"[42] amount to inhumane acts of "persecution". Finally, mention should be made of the recent sentence of the Appeals Chamber of the International Criminal Tribunal for Rwanda in the Nahimana[43] case, where the court asserts that

39 Streicher case, *supra* note 3 Referring to the conduct of the defendant, the sentence later affirms: "As early as 1938 he began to call for the annihilation of the Jewish race. Twenty-three different articles of 'Der Sturmer' between 1938 and 1941 were produced in evidence, in which the extermination 'root and branch' was preached. Typical of his teachings was a leading article in September, 1938, which termed the Jew a germ and a pest, not a human, being, but 'a parasite, an enemy, an evil-doer, a disseminator of diseases who must be destroyed in the interest of mankind'. Other articles urged that only when world Jewry had been annihilated would the Jewish problem have been solved, and predicted that fifty years hence the Jewish graves 'will proclaim that this people of murderers and criminals has after all met its deserved fate'" .

40 Prosecutor *vs*. Tadic, *supra* note 19, par. 209.

41 Prosecutor *vs*. Ruggiu (Case No. ICTR-97-32-I), Judgment and Sentence, 1 June 2000.

42 *Ibidem*, par. 22.

43 Prosecutor *vs*. Nahimana, *supra* note 32. The trial against Ferdinand Nahimana together with those against Jean Bosco Barayagwiza and Hassan Ngeze is part of the so-called "Media trial" before the International Criminal Tribunal for Rwanda. In the sentence concluding the proceedings of the first instance (in which the three men were co-defendants) the Court takes up the definition of "persecution" given in the Kupreskic case and, based on very few precedents (only the cases Ruggiu and Streicher), on the laws of a few legal systems (German, Russian, Vietnamese, Icelandic, Irish, Ukrainian, Finnish, Slovak, Chinese) and on a few International Charters (the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination) holds that it is possible to conclude that hate speech violates norms of customary international law. Furthermore, the Court stresses that it constitutes a "discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity... can be an irreversible harm" (Prosecutor *vs*. Nahimana, Barayagwiza, Ngeze, Case No. ICTR-99-52-T, Judg-

hate speech can be considered as a crime of "persecution", while acknowledging, however, that "a speech cannot, in itself, directly kill members of a group, imprison or physically injure them".[44] According to the Court, therefore, hate speech assumes relevance not when considered separately, but in conjunction with other similar and contextual acts[45] and with the peculiar circumstances in which these are carried out.[46] Only the multiplicity of acts of hate speech and the presence of a delicate context such as the one described by the *chapeau* can constitute a "gross or blatant denial of a fundamental right reaching the same level of gravity' as the other acts enumerated as crimes against humanity under the Statute".[47]

The opposite thesis is adopted in the Kordic case. The passage of the sentence in which the Trial Chamber decides on the charge of "Encouraging and promoting hatred on political etc. grounds" should be mentioned. "The Trial Chamber", states the Court, "notes that the Indictment against Dario Kordic is the first indictment in the history of the International Tribunal to allege this act as a crime against humanity. The Trial Chamber, however, finds that this act, as alleged in the Indictment, does not

ment and Sentence, 3 December 2003, par. 1072). The Court concludes by asserting that hate speech is a supplement to the crime of "persecution". The reasoning of the Court, which has been summarised and interpreted, is in fact much more contorted in the original text.

44 *Ibidem*, par. 986.

45 In the absence of any indications to the contrary, this should hold true also whenever the acts are committed by different perpetrators, evidently creating tensions with the principle of the personality of criminal responsibility. Indeed, the individual risks having to answer for an *actus reus* made up of different interconnected acts, some of which may have been committed without his/her participation or knowledge.

46 Under paragraph 987 the Court writes: "it is the cumulative effect of all the underlying acts of the crime of "persecution" which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity". The Court held that defendant's hate speeches after the death of the president of Rwanda, Hbyarimana, on 6 April 1994, and, therefore, in the context of the violent upsurges caused by this event, can, taken together, encompass the "underlying act of persecution". Some of these discourses have been furthermore considered as instances of the crime of "direct and public incitement to genocide". Prosecutor *vs*. Nahimana, *supra* note 32.

47 This is how the Court described under paragraph 983 the crime of "persecution" quoting the Trial Chamber which in its turn takes up the Kupreskic sentence, *supra* note 21, par. 621.

by itself constitute "persecution" as a crime against humanity. It is not enumerated as a crime elsewhere in the International Tribunal Statute, but most importantly, it does not rise to the same level of gravity as the other acts enumerated in article 5. Furthermore, the criminal prohibition of this act has not attained the status of customary international law. Thus to convict the accused for such an act as is alleged as "persecution" would violate the principle of legality".[48] The content of note 272 to the quoted paragraph is essential. It states that international criminal law supplies very few cases of imputation and conviction for hate speech (*e. g*. the abovementioned Streicher case and the Akayesu case before the International Criminal Tribunal for Rwanda)[49] and that, moreover, the only type of discourse acknowledged as crime by the statutes of the Nuremberg Tribunals, the International Criminal Tribunals for former Yugoslavia and for Rwanda and the International Criminal Court is incitement to genocide. Note 272 goes on to say that there are no common guidelines in the Treaties and the Charters of Human Rights referring to the need to punish hate speech. Finally, it asserts that the vast range of approaches regarding the protection or prohibition of hate speech means that there is no international consensus on the criminalisation of such acts.[50]

48 Prosecutor *vs*. Kordic, *supra* note 21, par. 209.

49 Anyhow, in this case the hate speech is lead back to the model fact situation of direct and public incitement to genocide. See Prosecutor *vs*. Akayesu (Case No. ICTR-96-1-A), Judgment, 1 June 2001.

50 The content of the second part of note 272 is as follows: "The sharp split over treaty law in this area is indicative that such speech may not be regarded as a crime under customary international law. The International Convention on the Elimination of All Forms of Racial Discrimination, for example, states that parties to the Convention 'shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, and incitement to racial discrimination'. Article 20 of the ICCPR (Prohibitions of Propaganda for War) provides that '(1) any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. Although initial drafts of article 20 made incitement to racial hatred a crime, only the obligation to provide for a prohibition by law prevailed. This formulation does not require a prohibition by criminal law. *See* Manfred Nowak, United Nations Covenant on Civil and Political Rights (1993), at 361. A significant number of States have attached reservations or declarations of interpretations to these provisions. The broad spectrum of legal approaches to the protection and prohibition of "encouraging, instigating and promoting hatred, distrust and strife on political, racial, ethnic or religious grounds, by propaganda, speeches or otherwise" also

Much is to be said for the position expressed in the Kordic sentence. There is no doubt that hate speech endangers various interests the importance of which is acknowledged internationally, first among which are all those indicated in the preamble to the already quoted COE Recommendation on "hate speech": namely, cultural cohesion, pluralism and a

indicates that there is no international consensus on the criminalisation of this act that rises to the level of customary international law. Germany and the United States mark the opposite ends of this spectrum, although various other countries, including the former Yugoslavia, have provided for some form of regulation of hate speech. See, *e. g*., South Africa Constitution (1996), Art. 16(c) (excluding 'advocacy of hatred that is based on race, ethnicity, gender and religion, and that constitutes incitement to cause harm'), Canadian Criminal Code, section 319(2) (prohibiting the communication of statements that wilfully promote hatred against any identifiable group distinguished by colour, race, religion or ethnic origin), and French Criminal Code, article 32 ('Those, who by publication by any of various means, provoke discrimination, hatred, or violence with regard to a person or a group of persons by reason of their origin or their membership or nonmembership in an ethnic group, nation, race, or particular religion, shall be punished by a term of imprisonment of one year and by a fine'). Article 133 of the Yugoslav Federal Criminal Code prohibited the publication of information that could "disrupt the brotherhood, unity and equality of nationalities'. The German Criminal Code provides for the punishment of those who incite hatred, or invite violence or arbitrary acts against parts of the population, or insult, maliciously degrade, or defame part of the population, in a manner likely to disturb the public peace (*StGB*, § 130). The United States, in contrast, is exceptional in the extent of its free speech guarantees. Hate speech finds protection in the United States constitutional regime provided it does not rise to the level of 'incitement', a very high threshold in American jurisprudence. See United States Constitution, 1st amendment". See Prosecutor *vs*. Kordic, *supra* note 21, note 272. As to the relationship between hate speech and the First Amendment of the U.S. Constitution see James B. Jacobs, Kimberly Potter, *Hate Crimes. Criminal Law and Identity Politics* 111 ff. (Oxford University Press, New York 1998). As regards Italy, it is well to remember law no. 205/1993 (the so-called Mancino Law. which amends law no. 654/1975 ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (December 21, 1965, 660 UNTS 195). Art. 1, letter "a" thereof punishes "with imprisonment of up to three years anyone who diffuses in any way ideas founded on racial or ethnic superiority or hatred, or incites to commit or commits discriminatory acts for racial, ethnic, national or religious reasons" (personal translation). Art. 1, letter "b" punishes "with imprisonment of between six months and four years anyone who incites, in any way, to commit violence or acts of provocation to violence for racial, ethnic, national or religious reasons or commits them him/herself" (personal translation). It should be noted that the subsequent law no. 85/2005 has greatly altered the article quoted, considerably reducing the punishments and substituting the term "diffuses" with the term "promotes" and the term "incites" with the term "instigates". The intention to restrict the area of criminally relevant acts and to alleviate the severity of the punishment therefore becomes quite evident. Finally, the recent Framework Decision no. 2008/913 of the Council of the Euro-

safe democracy. More specifically, hate speech jeopardises freedom of thought, of religious faith, of conscience,[51] human dignity,[52] protection from discrimination[53] and the right to democracy.[54] It should be stressed, however, that, in the wake of the Kordic sentence, there is no unanimous position in the Charters of Rights, in the Treaties or in the Criminal Codes of the "civil nations"[55] regarding the need to criminalise acts of hate speech.[56] If, therefore, it is indisputable that Charters, Treaties and

pean Union on combating certain forms of racism and xenophobia by means of criminal law needs to be mentioned. The combined provisions of articles 1 a) and 3 thereof state that each Member State shall take measures to punish with effective, proportionate and dissuasive criminal penalties any public incitement to violence or hatred directed against groups of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.

51 Acknowledged in art. 9 of the European Convention on Human Rights (November 4, 1950, 213 UNTS 221 [hereinafter European Convention on Human Rights or ECHR]), in art. 18 of the Universal Declaration of Human Rights (December 10, 1948, UN Doc A/810 at 71), in art. 18 and 19 of the International Covenant on Civil and Political Rights (December 16, 1966, 999 UNTS 302), in art. 3 and 4 of the American Declaration of the Rights and Duties of Man (May 2, 1948, 43 AJIL Supp. 133).

52 Acknowledged in art. 1, 22 and 23 of the Universal Declaration of Human Rights (see *supra* note 51), in the preamble and in art. 10 of the International Covenant on Civil and Political Rights (see *supra* note 51), in the preamble and in art. 23 of the American Declaration of the Rights and Duties of Man (see *supra* note 51). On the subject of human dignity see the position expressed by Pocar, referred to in note 31.

53 Acknowledged in art. 14 of the European Convention on Human Rights (see *supra* note 51) in art. 2 of the Universal Declaration of Human Rights (see *supra* note 51), in art. 26 of the International Covenant on Civil and Political Rights (see *supra* note 51), in art. 2 of the American Declaration of the Rights and Duties of Man (see *supra* note 51).

54 Acknowledged in art. 21 of the Universal Declaration of Human Rights of 1948. Reference to democracy is made in the art. 6, 8, 9, 10, 11 of the European Convention on Human Rights (see *supra* note 51), in art. 14, 21, 22 of the International Covenant on Civil and Political Rights (see *supra* note 51) and in art. 28 of the American Declaration of the Rights and Duties of Man (see *supra* note 51).

55 See art. 38 of the Statute of the International Court of Justice.

56 See note 22. It should be noted in particular that the Convention for the Elimination of All Forms of Racial Discrimination (see *supra* note 50) foresees under art. 2, letter "d", the obligation for States to prohibit discrimination, and under art. 4, letter "a", the obligation to punish, apparently with the means of criminal law, "the dissemination of ideas based on racial superiority or hatred", the discriminatory acts of violence and the incitement to such acts. Art. 1 of the Convention states that the term "racial discrimination" means discrimination "based on race, colour, descent, or national or ethnic origin". Contrarily, the International Covenant on Civil and Political Rights (see *supra* note 51)

Codes protect the abovementioned rights and interests, it is not possible to identify a consensus on the need to punish hate speech. Hence in addition to the silence of the statutes on the correlation between hate speech and the crime of "persecution", one cannot find in international customary law, or in the generally acknowledged principles of law, a clear and unanimous solution to the problem. Furthermore, case law is evidently divided. The principle of legality, already put under severe strain by the systems of sources of international criminal law, forces the judge to halt before this perspective of major uncertainty.

In addition to this finding, it is vital to note that hate speech does not constitute a "violation" or "privation" of an internationally acknowledged right,[57] but only a "threat" thereto.[58] It does not directly harm a fundamental right (*e. g*. the freedom of religion), but creates the conditions for its violation (*e. g*. a worsening of latent tensions which lead to acts of aggression against those who belong to a certain religious faith). The prerequisite of the "*serious privation* of a fundamental right", the necessity of which is acknowledged unanimously by international law and in the statutes for the integration of "persecution", does not, therefore, seem instantiated by hate speech even if this act was implemented in connection with various similar acts[59] and in a situation of tension and conflict which potentially turns even the mere word into an indirect means of violence. Indeed, the cumulative effect and the gravity of the context cannot raise an act which only has a risky nature to the level of

under art. 20 encourages States to prohibit propaganda, but does not state which means need to be adopted in the punishment.

57 It might be argued that hate speech can damage one's honour and reputation. This thesis would be doubtless correct, but it would be extremely difficult to prove that generally recognised fundamental rights to honour and reputation exist, despite the fact that the Universal Declaration of Human Rights (see *supra* note 51) and the International Covenant on Civil and Political Rights (see *supra* note 51) foresee a right for the protection, by law, against interference or harm which target honour and the reputation (art. 12 and 17, second subsection, respectively). Moreover, it is arguably the case that such acts could never be of such gravity as to justify incrimination as crimes against humanity.

58 One can certainly say that hate speech does not only constitute a danger to the usual rights refereed to herein, but could also represent a danger to the rights to life, physical and mental integrity and individual freedom.

59 See the abovementioned case law on this point, in particular the sentence of the Appeal Court in the Nahimana case.

an harmful act. The obvious prerequisite foreseen in the Kupreskic[60] sentence (and taken up by subsequent case law), according to which an act can instantiate the crime of "persecution" only if it is of the same gravity as other crimes against humanity, seems even less satisfied by hate speech.

Notwithstanding the conclusion reached on the basis of the Kordic sentence, the sabres of international criminal law do not seem to be completely drawn. The possibility of charging the "prophet of chaos" with moral complicity in the carrying out of an international crime or possibly with participation as co-author in the planning of an international crime[61] remains, on the understanding, however, that those crimes have been effectively executed, that the subject has contributed to the realisation thereof[62] and that the necessary psychological element subsists. Finally, in the event that the typical prerequisites are found, it is possible to resort to the crime of "direct and public incitement to genocide". Resort, on the part of some judiciaries, to the crime of "persecution" in order to punish hate speech seems to be informed by the intention to overcome the evidential difficulties associated with the forms of accusation cited above and, in particular, those concerning ascertainment of causality or facilitation. Or again, an operation of this type seems to aim at prosecuting hate speech when it is carried out intentionally and in contexts other than genocide. The blurred definition of the concept of "persecution" has allowed these erroneous assumptions to be made, turning this crime into a sort of "container" into which one can pour, as residues, facts that could not have instantiated more precise crimes, and thereby endangering the reasonable predictability of law. Once the essential content of the crime of "persecution" are reconstructed in its typical elements, we have all the more reason to presume that the operations criticised herein cannot be permitted. They would, in fact, constitute a clear violation of substantive legality and would imply a great danger of taking advantage of international criminal law, which could easily be inclined to punish legally irrelevant or even innocuous forms of expression.

60 Prosecutor *vs*. Kupreskic, *supra* note 21, par. 621.

61 On this point see the Foreword and the Conclusion.

62 The importance of contribution and, therefore, the related evidence, varies depending on whether one is dealing with instigation, an order from a superior, abetting or JCE. See Amati, Costi, *supra* note 6.

IV. The Teachings of the European Court of Human Rights Case Law on Freedom of Expression

Having considered the most important statutes and international criminal laws and reached a negative conclusion with respect to hate speech instantiating "persecution", we now move on to explore the case law of the ECtHR on freedom of expression. More specifically, we need to assess whether its doctrines on interferences with the freedom of expression lead to the same conclusion as the one reached above.[63] Since carrying out this analysis means "importing" into the system of international criminal law legal argumentations which have been elaborated externally, some preliminary remarks justifying the method and the validity of the results achieved are required. It can be convincingly argued that the legitimacy of resorting to legal argumentation foreign to a given system depends on two factors: firstly, the juridical and/or conceptual possibility of communication between different systems (*i. e*. the possibility that the foreign subject matter maintains its exact significance in the system into which it is imported)[64] and the persuasive capacity of the subject matter emerging from outside the system.[65]

63 The following paragraphs on ECtHR case law are based on a review of the sentences, the decisions and the reports quoted subsequently, as well as on the following studies: Tulkens, F., *Liberté d'expression et racisme dans la jurisprudence de la Cour européenne des droits de l'homme*, speech given at the "Séminaire d'experts organisé par l'ECRI: lutter contre le racisme tout en respectant la liberté d'expression" held in Strasburg on 16 and 17 November 2006; A. Weber, *La jurisprudence de la Cour européenne des droits de l'homme relative à l'article 10 et la lutte contre le racisme et l'intolérance*, speech given at the "Séminaire d'experts organisé par l'ECRI: lutter contre le racisme tout en respectant la liberté d'expression" held in Strasburg on 16 and 17 November; M. Macovei, *Freedom of expression. A guide to the implementation of article 10 of the European Convention on Human Rights*, document found on *www.coe.help.org*, from where it is also possible to download the sentences, decisions and reports which will be quoted later on.

64 Even if influenced by the structure and the basic contents of the legal systems considered, the juridical/conceptual "possibility of the communication" is a qualification regarding the subject matter and not the system as a whole. In the relationship between two same legal systems it may indeed be possible to find subject matters with this quality and others without it.

65 Said relationship could be expressed through a simple equation of the type L=PC, where L is the legitimacy of the method, P is the juridical/conceptual possibility of the communication and C is the persuasive capacity of the argument emerging from outside

As far as the first factor is concerned, a number of considerations need to be made. Article 10 ECHR[66] regulates the freedom of expression and, like the whole Charter, mainly refers to the relationship between the State (or the domestic law) and the individual. This is why it is important to ask whether, by varying the basic terms mentioned in this relationship and consequently altering the nature of the context where it takes place, the regulations regarding the same should also be modified. In other words, it is necessary to assess whether, in the case of the relationship between the international community (or the international criminal law) and the individual, the criteria according to which a violation of the freedom of expression is legitimate also vary. If this is the case, an analysis of the criteria given by ECHR case law is of little use, since with reference to hate speech there would be no possibility of communication between the systems examined. On the basis of the following considerations, it can be argued that this possibility does in fact exist.

First of all, the ECHR provides a catalogue of "human rights", *i. e.* of prerogatives and liberties which are attributed to humans *as* humans. Man is here conceived in a Kantian manner as an "end" and not, according to a strictly functionalist approach, as a simple means to other ends. The fact that man is at the centre of this system constitutes the highest common denominator which allows for an interpretation of hate speech in the light of the principles and rules dictated by the Charter. Indeed,

the system. On the circulation of legal argumentation see, in particular: A. Lollini, "La circolazione degli argomenti: metodo comparato e parametri interpretativi extra-sistematici nella giurisprudenza costituzionale sudafricana", 1 *Riv. Dir. Pub. Comp. Eur*. 479 (2007); A. Lollini, "Legal argumentation based on foreign law. An example from a case law of the South African Constitutional Court", 3 *Utrecht Law Review* 60 (2007).

66 The article states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". See ECHR *supra* note 51.

also in international criminal law, the starting and end point is the individual and his/her inviolable human dignity. Both the legitimacy and the restrictions of international criminal law have been constituted precisely so as to protect those human rights which are generally acknowledged.[67] Furthermore, the second subsection of art. 10 (*i. e.* the one most relevant here) and art. 17 ECHR[68] (which too plays an important role in the present discussion), are characterised by an open formulation focusing on the relationship they seek to regulate rather than on the entity (or the law) in relation to the individual. The text does not prevent the possibility of linking the precepts and criteria indicated by those articles to a different relationship to the one between the citizen and the State (or domestic law).[69]

It could be argued that the ECtHR and the international criminal courts decide upon facts that took place in completely different contexts. The *chapeaux*, for example, confirm the exclusive relevance for the international criminal system of crimes committed in states of emergency, unlike what occurs in the ECHR system. This is why the criteria laid down in the latter might not be suitable for the solution of problems in the context of international criminal law.[70] This objection can be an-

67 On this point see Kai Ambos, *La parte general del derecho penal internacional* 61 ff. (Konrad Adenauer – Stiftung eds., Berlin-Montevideo 2005).

68 The article states: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". See ECHR *supra* note 51.

69 In the second subsection of art. 10 ECHR, the centrality of the term "democratic society" is evident. This cannot be limited to the State alone, but must go beyond national borders and is an inexorable necessity of any system (regional, national, international) that has the protection of the rights mentioned in the Charter at heart.

70 It could be said that art. 15 ECHR provides an indication in that sense, admitting that in states of emergency one could depart from the principles of the Charter. At any rate, on further analysis this conclusion is premature. Differently from art. 10 ECHR, art. 15 exclusively refers to the relationship between the State (or the domestic law) and the citizen, as it defines an emergency situation as "time of war or other public emergency threatening the life of the nation". Departing from the principles of the Charter, therefore, represents an inevitable measure dictated by a state of emergency where the State's sovereignty is put under serious threat. Even if international criminal law includes crimes which are exceptional for their gravity and for the context in which they are carried out, it surely cannot embrace a logic of emergency as the one mentioned above. Not only is international criminal law supra-national (at least as far as the creative phase of the law

swered by stating that the assessment of the context is one of the essential points identified by the ECtHR case law concerning the freedom of expression. Therefore, far from being a factor excluding the applicability of the criteria analysed, the peculiarity of the context is a fundamental intrinsic part thereof.[71] Moreover, it needs to be stressed that the ECtHR has judged on contexts which have included strong tensions as well as ethnic, national and social conflicts, which can be assimilated to the relevant context in the case of crimes against humanity.[72]

To the above we can add that resort to the system of criteria worked out by the ECHR Charter and the ECtHR case law is also justified on the grounds of the second factor of legitimation identified above, i. e. the "persuasive capacity" of the system itself. This derives both from its theoretical precision and from the fact that it sticks to the reality of facts and the concrete issues that this reality gives rise to. The following paragraphs clearly prove the presence of this important factor.

From these brief remarks it can be concluded that ECtHR sentences can be a very important "reserve tank" from which principles and criteria can be drawn to give international criminal courts the opportunity to broaden their horizons and judge better those cases in which the freedom of expression of the person accused of hate speech is examined. It needs to be borne in mind that, even if they do not have any binding value for

is concerned) and not only does it exist on the basis of a partial overcoming of the national sovereignty protected by art. 15 (which shows that the relevant perspective to be adopted is no more the domestic one, but the one of the international community), but it has a permanent and humanitarian imprint and therefore cannot work physiologically according to emergency rules, otherwise the *ius dicere* would be transformed into a mere repression without guarantees. International criminal law aims at the protection of the basic human rights and therefore cannot be compatible with an emergency logic according to which those rights are continuously compromised (on this point see Ambos, *supra* note 67, at 53 ff. and at 61 ff.). Moreover, it has to be pointed out that the states of emergency mentioned under art. 15 ECHR do not exhaust the range of contexts in which international criminal law is applied. Finally, it has to be underlined that the article requests respect of the principle of proportionality between the departing from the principles of the Charter and the need of the particular situation, as well as respect of the restrictions on the State imposed by international law. The latter two dispositions limit in a consistent manner the power to adopt measures that derogate from the Convention.

71 See below, section 4.2.3.

72 In particular, the tensions and conflicts currently taking place in Turkey, which have the Kurds and Christian minorities as victims. See, for example, the decisions of the ECtHR cited in footnotes no. 88 and no. 98.

an international criminal court, those sentences can become an integral part of that "network" of principles, treaties, customs and pronouncements which the court needs both for orientation and in order to "weave"[73] his or her decisions. It is not superfluous to state that these courts have already resorted to the instruments of ECtHR case law on matters both analogous and different to the one at issue.[74]

Moreover, those criteria mainly stem from real case studies which induces us to constantly keep in mind the facts of which Vojislav Šešelj was accused. Hence an attempt will be made to assess the functioning of each and every criterion against the background of those facts. We will proceed starting from the "margins" of the Convention's system and then moving towards a particular disposition. We therefore first consider the "rule of closure" expressed in art. 17 ECHR and later move on to discuss art. 10 ECHR with its related case law.

1. *The case law on article 17 of the European Convention on Human Rights*

In the event of an individual reporting the violation of his/her freedom of expression by a Member State, the ECtHR can, in the first instance, assess if the right was exercised according to art. 17 of the Char-

73 On the figure of the international criminal judge as "weaver" of right see Massimo Vogliotti, "Production du droit en réseau et juge 'tisseur'. De quelques épiphanies de l'expérience juridique médiévale au sein de la justice pénale internationale", *Les Sources du Droit International Pénal* 361 (Mireille Delmas-Marty, Emanuela Fronza, Elisabeth Lambert-Abdelgawad eds., Société de législation comparée ed., Paris, 2004). See also Massimo Vogliotti, "Al di là delle dicotomie: ibridismo e flessibilità del metodo di ricostruzione del fatto nella giustizia penale internazionale", 46 *Riv. It. Dir. Proc. Pen.* 294 (2003). On this point see also A. Lollini, "L'expansion "interne et externe" du rôle du juge dans le processus de création du droit international pénal", *Les Sources du Droit International Pénal* 223 (Mireille Delmas-Marty, Emanuela Fronza, Elisabeth Lambert-Abdelgawad eds., Société de législation comparée ed., Paris 2004)

74 With reference to the same question tackled hereunder see, for example, the first instance sentence of the Nahimana case (Case No. ICTR-99-52-T, 3 December 2003. See amongst others par. 991 ff.), and the appeal sentence of the same case (*op. cit*., see par. 694 ff. and par. 705 ff.). With reference to different questions see, for example, the decision of 29 January 2007 in the Prosecutor *vs*. Thomas Lubanga Dyilo case (No. ICC-01/04-01/06) where the International Criminal Court turns to ECHR case law with regards to "respect of one's private and family life" (art. 8 ECHR).

ter, which, in its function as "rule of closure" of the system, excludes the protection of the defendant in those cases where he/she allegedly abused his/her right or used it in contrast to the contents of the Charter. In the event of uncertainty over whether an abuse has actually taken place, the ECtHR moves over to the specific "territory" of art. 10. In reality, there are very few cases of "direct recourse" to art. 17 ECHR by the ECtHR. Most of the time the article is used only indirectly as an instrument of interpretation of art. 10.[75] The following paragraphs give a brief outline of the decisions of the (now abolished) Commission and of the ECtHR on the points which are most relevant for hate speech.

1) Kuhnen *vs*. Germany:[76] The defendant was head of an organisation which aimed at the re-foundation of the Nazi Party and had circulated publications in praise of the struggle for a great "socialist" and "independent" Germany. The Commission stated in its report that the reference to national-socialism and the elements of racial and religious discrimination given in the publication promoted a conduct that was in contrast with the spirit and the letter of the Convention and therefore with art. 17 thereof.

2) Garaudy *vs*. France:[77] The defendant was a philosopher who supported ideas of historical negation. The ECtHR stated that he had used his right to freedom of expression for aims that were in contrast with the letter and spirit of the Convention. The negation or revision of historical facts of such kind places doubt on the values that lie at the heart of the fight against racism and anti-Semitism and are of such a nature as to represent a serious threat to public order.[78]

3) Norwood *vs*. The United Kingdom:[79] The defendant complained about the fact that he had been forced to remove a banner saying "Islam Out" from his window. The ECtHR applied art. 17, with reference to anti-Islamic racism, for the first time.

75 On this point see Weber, *supra* note 63, at 5.

76 Kuhnen *vs*. Germany, App. No. 12194/86, 56 *Eur. Comm'n H.R. Dec. & Rep*. 205, 12 May 1988.

77 See Garaudy *vs*. France, App. No. 65831/01, *Eur. Ct. H. R*., 24 June 2003.

78 *Ibidem*, par. 29.

79 Norwood *vs*. The United Kingdom, App. No. 23131/03, *Eur. Ct. H. R*., 16 November 2004.

The common denominator of the cases just mentioned[80] is the discriminatory character, for racial or religious reasons, of the speech. If this element is present, the defendant can no longer enjoy the protection granted by the Convention, insofar as his/her conduct is informed by values and aims that are in contrast to it. It should be mentioned that the Convention does not only exclude expressions of racial or religious discrimination, but all expressions which fall under the definition of "hate speech" given by the abovementioned Recommendation of the Committee of Ministers of the Council of Europe no. 20, 30 October 1997. From the above considerations it can be concluded that, even if discrimination for racial or religious reasons does not emerge in the speeches by Vojislav Šešelj, the proof of their nationalistic content and their hostile attitude towards minorities and non-Serb groups would nevertheless be sufficient to regard them as contrary to the values expressed by the Charter. Indeed, there are numerous examples where the defendant used such expressions as "amputate" or "rivers of blood will flow" with reference to the Croats and the Bosnian Muslims.[81]

From the brief examination of the application of art. 17 ECHR it can be asserted with a certain degree of certainty that the behaviour of Šešelj, as described in the indictment, would not be protected by the Charter. However, two considerations suggest that the issue does not end here. First, it has to be remembered that there are very few cases in which the ECtHR resorts to art. 17 ECHR directly, and that even in cases where the contents of the speech have a discriminatory character, the ECtHR tends to use art. 17 only as a "principle of interpretation" for the contents

80 Other relevant cases for this point are: Seurot *vs*. France, App. No. 57383/00, *Eur. Ct. H. R*., 18 May 2004; Glimmerveen and Hagenbeek *vs*. the Netherlands, App. No. 8348/78, 18 *Eur. Comm'n H.R. Dec. & Rep*. 187, 11 December 1979.

81 With reference to same, during the cross-examination of the key witness, Anthony Oberschall, in the hearing of 12 December 2007, the defendant stated that the expressions used by him were recurrent in epic Serb literature and therefore customary and without connotations of a threatening or violent nature. Šešelj's words give rise to an insidious problem, i.e. that of assessing the expressions used in the light of the language and culture of the author and the listener. The difficulty for the international criminal trial in making an assessment in this regard is evident. Problems of linguistic understanding and contextualisation of the expression in the culture of reference do emerge and often lead the court to call expert witnesses, which, however, means the judge risks having to remain in the background and being unable to evaluate the expert witnesses' assessments.

of art. 10. Thus, a thorough analysis of the subject matter cannot neglect case law on this latter article. Secondly, it needs to be specified that stating that a certain conduct does not fall under the sphere of protection of the Charter does not thereby imply approval of the legitimacy of any penalty meted out for such conduct. The ECtHR denies its protection because it has proved the abuse of a right provided by the Charter. Nevertheless, the author of such an abuse is not out of law and cannot be punished by whatever means, otherwise one would run the risk of allowing a violation of other principles of the Charter. If, therefore, also the issue of the legitimacy of an interference with the freedom of expression is to be analysed, it is necessary to focus on the contents of art. 10, which is the only one dealing with this specific problem.

Conclusively, considering the comprehensiveness of the contents of art. 10 (which, as will become clear later, considers the legitimacy of the expression and of the interference in a complementary manner), it seems we can conclude that the prevailing tendency of the ECtHR to resort to the "incomplete" art. 17 (which considers exclusively the legitimacy of exercising the right) only as a "principle of interpretation" of the former article is correct.

2. *The case law on article 10 of the European Convention on Human Rights*

As already mentioned, in most cases the Commission and the ECtHR consider the suit directly from the perspective of art. 10 ECHR and, therefore, assess the legitimacy of the interference by the State with the freedom of expression in the light of the criteria listed under the second subsection of the same article. Art. 10, first subsection, ECHR, provides the right to freedom of expression and identifies its contents. Art. 10, second subsection, ECHR, foresees that the exercise of these freedoms may be subject to such conditions, restrictions or penalties where three criteria are met: A) the restriction has to be provided for by law; B) the restriction has to be "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"; C) the restriction has to be a measure necessary in and for a democratic

society. These three criteria will be analysed separately in the following paragraphs.

A. *The legality of the measure*

The sentence in the Sunday Times *vs*. The United Kingdom[82] trial is essential for understanding the first criterion. The ECtHR states that the measure has to be provided for by a "law" formulated with sufficient precision so as to allow the addressee to foresee the consequences of his/her actions with a reasonable degree of certainty with respect to the circumstances. Absolute foreseeability is not requested. The law could also adopt more or less open formulations which would allow adaptation to time and circumstances, as long as the interpretation and application guarantee the reasonable foreseeability of the consequences. With this decision the ECtHR declared that restrictive measures contained in common law are lawful.

In other decisions the ECtHR stated that the treaties of international law can constitute the legal basis for a restrictive measure to freedom of expression (see the Groppera Radio AG *vs*. Switzerland[83] and Autronic *vs*. Switzerland[84] cases).

Considered from the perspective of ECtHR case law, the criterion of legality doubtlessly represents a relevant obstacle to the international criminalisation of hate speech as a crime of "persecution". Here it is sufficient to recall the abovementioned considerations referring to the significance of the expression "severe deprivation of a fundamental right" with which the crime of "persecution" is generally described. The only admissible conclusion seems to be that the vague character of the formulation of the crime of "persecution", as well as the lack of a solid and constant interpretation in case law, exclude the "reasonable foreseeability" requested by the ECtHR, and therefore do not allow us to hold that the criterion of legality of the measure has been met.

82 Sunday Times *vs*. The United Kingdom, App. No. 6538/74, *Eur. Ct. H. R.*, 26 April 1979, par. 49.

83 Groppera Radio AG *vs*. Switzerland, App. No. 10890/84, *Eur. Ct. H. R.*, 28 March 1990, par. 65 ff.

84 Autronic *vs*. Switzerland, App. No. 12726/87, *Eur. Ct. H. R.*, 22 March 1990, par. 54 ff.

B. *Scope of the measure*

It is not our intention here to go deeper into the second prerequisite foreseen in art. 10, second subsection, ECHR. Case law of the ECtHR is rich with examples in which the aim of individual restrictive measures to the freedom of expression is considered in order to assess the congruency between this finality and those identified by the law. Considering the blatant contradiction between hate speech and numerous interests and rights amongst those listed under the subsection, and considering that international criminal law expressly protects some of the latter,[85] it can be said that the criterion of legitimate end can be easily satisfied by a restrictive measure that could punish hate speech.

C. *The necessity of the measure in and for a democratic society*

As a last criterion for the legitimacy of a restrictive measure to the freedom of expression, art. 10 ECHR, second subsection, foresees that it has to be necessary in a democratic society or respond to an imperious social need (Observer and Guardian *vs*. The United Kingdom).[86]

In general terms, this criterion can be identified as a request for proportionality between actual restraints imposed and the aims pursued (Observer and Guardian *vs*. The United Kingdom)[87] and for coherence with the State's behaviour as a whole (Erbakan *vs*. Turkey[88] and Lehideux and Isorni *vs*. France).[89] This consideration alone is sufficient to raise some questions on the opportunity of criminalising hate speech at international level. It being understood that international crimes are characterised at the naturalistic level for their massiveness (in terms of victims and perpetrators) and for their gravity and at the legal level for their imprescribability and indifference to amnesties and immunities, it is im-

85 Amongst the aims mentioned in the article, those prosecuted by international criminal law are, in particular, "public safety", "prevention of disorder and crime" and "protection of rights".

86 Observer and Guardian *vs*. The United Kingdom, App. No. 13585/88, *Eur. Ct. H. R*., 26 November 1991, par. 40.

87 *Idem*.

88 Erbakan *vs*. Turkey, App. No. 59405/00, *Eur. Ct. H. R*., 6 July 2006, par. 58.

89 Lehideux and Isorni *vs*. France, App. No. 24662/94, *Eur. Ct. H. R*., 23 September 1998, par. 56.

portant to ask whether it is possible to state that elevating hate speech to an international crime, even in the presence of the context foreseen by the *chapeau*, respects the principle of proportionality. More specifically, we can ask if it is possible to affirm the proportionality and the coherence of the recourse to "persecution" considering the evident minor gravity of hate speech with respect to the other crimes against humanity. As far as this last question is concerned, it is arguably possible to give a negative answer straight away. However, both points will be taken up again below.

The criterion under examination can be broken down into different sub-criteria that the ECtHR has identified in the analyses of the cases brought to its attention and which constitute valid parameters for the assessment of proportionality and coherence. As will be discussed below, these sub-criteria have a double validity in that they are useful not only for formulating *abstract assessments* of the options of criminalisation in the light of the proportionality principle, but also for assessing the effective danger of the conduct and, therefore, ensuring a *concrete* proportion between the penalty meted out and the specific deed. The criteria that can take on relevance in the paradigmatic case identified and, more in general, in the international criminal context, will be analysed.

a. The aim pursued by the perpetrator

For the ECtHR, it is important to decide whether the perpetrator has the aim of practicing hate speech or informing the public about facts of general interest. In the first case, the restrictive measure is considered necessary, whilst in the latter the ECtHR hardly admits that it is necessary to interfere (see Gündüz *vs*. Turkey,[90] Jersild *vs*. Denmark,[91] Lehideux and Isorni *vs*. France,[92] Soulas and Others *vs*. France).[93] It should be noted, amongst other things, that such sub-criterion is often difficult to assess, as it requires the insidious proof of a subjective ele-

90 Gündüz *vs*. Turkey, App. No. 35071/97, *Eur. Ct. H. R.*, 4 December 2003, par. 42 ff.

91 Jersild *vs*. Denmark, App. No. 15890/89, *Eur. Ct. H. R.*, 23 September 1994, par. 31 ff.

92 Lehideux and Isorni *vs*. France, *supra* note 89, par. 47.

93 Soulas and Others *vs*. France, App. No. 15948/03, *Eur. Ct. H. R.*, 10 July 2008, par. 43.

ment. With reference to the Šešelj case, it is interesting to note that during the cross-examination of the witness Oberschall, Šešelj openly acknowledged that his speeches had a threatening character, while denying their discriminatory content.

b. The content of the speech

The content of the speech is a second indicator for the assessment of the legality of the conduct. The ECtHR pays particular attention to the discriminatory character of the content which, as mentioned above, determines the illegality or otherwise of the speech. If the speech disputes historical facts, the ECtHR distinguishes on the basis of whether they have been "clearly proved" (Lehideux and Isorni *vs*. France)[94] or are still being debated by the scientific community. In the first case, the dispute of the facts is considered inadmissible (see also Garaudy *vs*. France).[95] Again in the Šešelj case, it is interesting to recall once again the cross-examination of the witness Oberschall, who accused Šešelj of having supplied decidedly false figures in his speeches concerning Serbs who had died in the concentration camps during the Second World War and of having used these inflated numbers to diffuse a feeling of fear and vengeance amongst his audience.

c. The context of the speech

It is important to assess the context in which the speech is given. In the first place, the ECtHR has affirmed that, notwithstanding the speech might be a violent attack against a group of individuals, the fact that this takes place in a pluralistic debate in which different other speeches could counter-balance it, is sufficient reason for retaining it legal (Gündüz *vs*. Turkey).[96] The fact that the speech is targeted at a well-informed and culturally mature public is a further reason in favour of its legality (Jersild *vs*. Denmark).[97] Finally, it is essential to consider the social and geo-political context insofar as the presence of open or latent tensions or con-

94 *Idem*.
95 Garaudy *vs*. France, *supra* note 77.
96 Gündüz *vs*. Turkey, *supra* note 90, par. 42 and par. 49.
97 Jersild *vs*. Denmark, *supra* note 91, par. 34.

flicts is a condition that aggravates the dangerousness of the speech and can therefore legitimise a restrictive measure (see the Sürek and Ödzemir *vs*. Turkey[98] and Soulas and Others *vs*. France sentences).[99] All the aforementioned sub-criteria are an argument in favour of a hypothetical punishment for the propaganda by Vojislav Šešelj. For one thing, if it is true that the President of the Serbian Radical Party had preferential access to the media, then his speeches did not take place in a pluralistic context. Furthermore, the areas reached by the propaganda of the defendant were characterised by profound ethnic and national tensions and by bloody conflicts. In such a context, words risk becoming a dangerous, albeit indirect, instrument of devastation and death. In any event, it is important to note that the ECtHR supports a greater extension of the freedom of expression during election campaigns (Bowman *vs*. United Kingdom).[100] Different speeches by Šešelj were held in such circumstances. His renown speech of 6 May 1992 in particular was held during the campaign for the election in December that year.

d. The capacity of disclosure

The capacity of disclosure is relevant under the need to restrict the speech according to the principles of a democratic society. The potential impact of a speech is in fact directly proportional to its disclosure. For this reason the ECtHR treads with particular caution when mass media, and in particular audio-visual media, are involved (Jersild *vs*. Denmark).[101] With respect to the capacity of disclosure of a speech, the ECtHR reflects on its form, and, in particular, on the ability of the target audience to understand it. There is a heightened necessity for caution if the speeches, on account of their form, are vastly diffused (Soulas and Others *vs*. France).[102] On the basis of research that he had carried out, the witness Oberschall sustained that Vojislav Šešelj had stipulated an agreement with Slobodan Milosevic which gave him privileged access to the

98 Sürek and Ödzemir *vs*. Turkey, App. No. 23927/94, *Eur. Ct. H. R.*, 8 July 1999, par. 63.

99 Soulas and Others *vs*. France, *supra* note 93, par. 37.

100 Bowman *vs*. The United Kingdom, App. No. 24839/94, *Eur. Ct. H. R.*, 19 February 1998, par. 42.

101 Jersild *vs*. Denmark, *supra* note 91, par. 31.

102 Soulas and Others *vs*. France, *supra* note 93, par. 39.

media and therefore enabled him to diffuse his propaganda. While recognising that this needs to be proved, its weight in the assessment of the impact that the defendant's hate speech could have had on Serb soldiers and civilians is clear.

e. The role of the perpetrator

Finally, it is important to consider what the role of the acting person is. Even if the ECtHR affirms that, in a context of public or political debate, the freedom of expression has to be protected with particular care, it also sustains that if the speaker is a politician it is of "crucial importance" that he/she does not express ideas which can nurture intolerance (Erbakan *vs*. Turkey).[103] The reason for this statement is the particular visibility politicians enjoy and their ability to subjugate their unwitting supporters morally. As mentioned earlier, Šešelj was member of the Serb Parliament and President of the Serbian Radical Party at the time the facts of which he is accused occurred.

Analysis of the criteria identified in art. 10 ECHR allows some vital conclusions on the topic under discussion. As seen, the criterion concerning the aims pursued by the interference does not seem to be an obstacle to the legitimacy of an international punishment meted our for hate speech as "persecution". It is, therefore, necessary to consider the other criteria of the legality of the penalty and its necessity in and for a democratic society. The first criterion excludes the legality of punishing hate speech as "persecution" in the perspective *de jure condito*, as the vague formulation of the abstract crime and the lack of a constant interpretation which leads back to the same the examined conduct impede the "reasonable foreseeability" of the Statute's response as requested by the ECtHR. The second criterion allows some remarks both in the *de jure condito* perspective and in *de jure condendo* perspective with reference to an hypothetical future criminalisation of hate speech at international level. The principles of proportionality and coherence (which we used to better express the second criterion) give rise to serious doubts concerning the possibility of considering such conduct as a crime of the same gravity as crimes against humanity. They therefore exclude *de jure condito* that hate speech could be punished as a crime of "persecution". In turn, the

103 Erbakan *vs*. Turkey, *supra* note 88, par. 64.

sub-criteria, in a hypothetical *de jure condendo* perspective, force the "international legislator" who wants to punish hate speech to mould a crime which can express a considerable disvalue, in particular encompassing references to the aims pursued by the author, the content of the speech and the conflictual context in which the speech is made. If these elements, that add to the harmfulness of the crime, are not included in it, the principles of proportionality and coherence impede that it is given the stature of international crime. Furthermore, the aforementioned criteria require that the judge assess the concrete danger inherent in the conduct, with special emphasis on the possibility of the disclosure of hate speech, the role played by its author and, finally, the context. Only when these indications are adopted will it be possible for the means of international criminal law to be considered proportionate to the act of hate speech.

V. Conclusion

Two approaches have been adopted in this paper to answer the same question: can hate speech be penalised as a crime of "persecution"? Both routes have led to a negative answer. The conceptual parallelisms encountered in both approaches are also evident, and perhaps even predictable. The criterion of the legality of the penalty acknowledged by the ECHR corresponds to a concern on the part of international criminal case law to define the meaning of the expression "deprivation of a fundamental right". In both cases the focus is on the necessity of guaranteeing the predictability of the responses of legal systems and the impossibility of applying the law retroactively. The proportionality criterion requested by ECtHR case law corresponds to the character of "gravity" of the deprivation which is considered to be necessary in order to be able to classify a criminal act as crime against humanity of "persecution". Thus, while the institutions and legal texts referred to differ according to the route undertaken, it would appear that not only the conclusions reached but also the arguments suggested are similar.

These conclusions cannot but reverberate on the trial of Vojislav Šešelj which has been chosen as the background to our analysis. Nonetheless, precisely the facts of this trial, which are very similar to other recent acts of inhumane violence, contain worrying features and lead to wonder the possibility and appropriateness of punishing hate speech by means other than the crime of "persecution", which, as has been seen,

cannot be applied. The distinct roles that could be played by international criminal law and national criminal laws need to be assessed in particular.

As already mentioned, some possibilities of penalising the "prophet of chaos" remain viable under current international criminal law, but additional elements are required with respect to the simple act of hate speech in order to extend its disvalue and above all to allow it to fall under clear and predictable existing laws and case law. The broad opinion is that hate speech is an instrument equipped with causal efficacy with respect to the most brutal international crimes. The serious problem facing international criminal trials is that this causal efficacy, in the various forms demanded by the law,[104] cannot be proved if not in very rare cases. Under such circumstances, and if the necessary subjective element with reference to the crime committed exists, it is possible to resort to the imputation for moral complicity in the same. Apart from this solution, there are the cases already mentioned where hate speech could be deemed to instantiate a "direct and public incitement to genocide" or it could constitute significant proof for the participation of its author in a joint criminal enterprise. In the latter case, even if remaining a neutral act at the substantive level of the typical fact, hate speech can acquire significance at the procedural level of the secondary facts and (subject to the satisfaction of the standard of proof beyond a reasonable doubt) thus become a relevant act, albeit by other means than direct incrimination. Moreover, the dangerousness of hate speech would, in this case, be underlined by the role played by its author in the JCE. However, this operation does not represent a punitive option, as it is not founded on an abstract judgement of the worthwhileness of, and need for, a direct punishment for hate speech. Rather, it simply constitutes an important instrument at the probatory level which the judge can use in order to infer a further concrete punishable crime (participation in the JCE) from evidence external to the crime itself.

104 For the act of instigation the evidence of a "causal relationship" between the instigation and the crime has to be found, demonstrating that the instigator has effectively given rise to or fostered a criminal intent (see, amongst others, Prosecutor *vs*. Blaskic, *supra* note 21, par. 278). For the acts of "abetting", on the other hand, the less imperative presence of a "substantial and direct contribution" is required (see, for example, Prosecutor *vs*. Tadic, *supra* note 19, par. 688).

Apart from these possibilities, once the inadequacy of the crime of "persecution" has been shown, it appears that international law cannot supply any other instruments for penalising hate speech. One needs to ask, therefore, if there is an effective lack of protection against hate speech and if cases exist in which the prerequisites of worthwhileness of, and need for, a penalty are present at international level but cannot be adequately satisfied due to the absence of an appropriate law.[105] If the answer to this question is affirmative, there is an absolute urgency to find a new law that punishes hate speech and reflects the widespread conviction of its criminal role in a context of strong conflicts and tensions.

In order to fill the gap, one could devise an inchoate crime which must concretely endanger fundamental rights protected by the international law and must be committed in a context of tension or conflict.[106] This kind of crime would not request proof of a causal nexus between the conduct and the violation of the fundamental right, but merely the ascertainment of the endangerment of the latter.[107] Moreover, the legally relevant act of hate speech would not consist in a generic incitement to hatred and violence, but would have to be oriented towards committing specific international crimes, even if they are not identified *hic et nunc* (*i. e.* with the precise indication of their concrete characteristics), being therefore similar to an inchoate crime of instigation.[108] A crime of this na-

105 For example, in the case of a "prophet of chaos" acting absolutely alone (*i. e.* not in a JCE) in a context of systematic or diffused attacks against a civilian population which does not constitute the context for genocide, and aiming his words at the perpetration of a specific crime, but without creating a factual and intentional link to same. Indeed, situations of this kind are not rare.

106 See the *chapeau* in art. 7 ICC St. See also the important consideration in footnote 105.

107 Ascertainment which, for example, could be supplied by demonstrating a time link between the incriminated speech and the perpetration of the incited international crime. Also the concrete contextual circumstances could constitute important elements to infer the danger the hate speech gives rise to.

108 A possible model could be the act of *criminal solicitation* foreseen in Section 5.02 (1) of the Model Penal Code: "A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission". With respect to such an act it would be necessary to insert the specific intent of discrimination, reduce the counts to the crimes against hu-

ture would satisfy the criteria identified by the abovementioned ECtHR case law. The criterion of legality would be satisfied by the explicit incriminating law adopted and, in particular, by the precise selection of the crimes whose incitement is prohibited and, therefore, of those rights protected by the new law. The criterion of proportionality between the international penalty and the crime would be met through the necessary relevance of the specific context (the conflicts and the tensions), of the purposes of the speech (the commission of an international crime), of the content of the speech (hatred and discrimination), and of the capacity of disclosure and the position of the acting person. These latter elements together with the former, would be relevant under the profile of the existence of a concrete endangerment of a fundamental right protected by the incited international crime.[109]

By way of a proposal, an autonomous crime of discriminatory incitement to the commission of a crime against humanity, enriched by the same *chapeau* as the one foreseen for crimes against humanity and by the general requirement of a concrete endangerment of the right protected by the incited crime, could be inserted into the Statute of the International Criminal Court. Of course, it would be a crime connoted with a minor disvalue than the one peculiar to the crimes against humanity (and therefore also in line with the criteria of "proportionality" and "coherence"), but whose inclusion would help satisfy the shared need to penalise dangerous acts of hate speech and avoid incorrect and confusing subsumptions as well as opportunistic exploitation of international criminal justice.

Contrarily, if not oriented towards the realisation of a specific international crime, if executed in a non-conflictual context and, in general, if not concretely endangering a fundamental right, simple hate speech,

manity alone and, finally, interpret the prerequisite of the "specificity" of the instigated crime by retaining legally relevant the general instigation to the perpetration of a crime against humanity against a group, without the need for any concrete indication of the victims, the time, the place, the means etc.

109 The element of context, of course, is not only relevant as circumstantial evidence of the endangerment of a specific right by the incitement of a specific crime. It is, indeed, the very element that distinguishes an international crime from a common one by highlighting the possible reverberation that such crime could have in a delicate situation of tension and conflict.

even if repeated, cannot be penalised as an international crime.[110] Even if it is an act the insidious nature of which has been taught to us by history, its connotations make it punishable only by domestic law. This is where national criminal legal systems need to come in. Such conclusion is dictated by the criteria of "gravity",[111] "proportionality"[112] and "coherence" which have been examined in the present study.

110 The general characteristics of international crimes, *i. e*. their massive character (in terms of victims and perpetrators) and their peculiar gravity, have been already discussed in the main text. These lead to important legal consequences, namely, imprescribability and indifference to amnesties and immunities.

111 Moreover, this criterion (which, as mentioned earlier, is present in the definition of the crime of "persecution") constitutes a general principle of admissibility of the International Criminal Court's jurisdiction. See art. 5, first subsection and art. 17, first subsection, letter d, ICC St.

112 As defined by the already mentioned ECHR case law.