From the SelectedWorks of Gregory S. Gordon

September 2007

From Incitement to Indictment? Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework

Contact Author

Start Your Own SelectedWorks

Notify Me of New Work

Available at: http://works.bepress.com/gregory_gordon/1

FROM INCITEMENT TO INDICTMENT? PROSECUTING IRAN'S PRESIDENT FOR ADVOCATING ISRAEL'S DESTRUCTION AND PIECING TOGETHER INCITEMENT LAW'S EMERGING ANALYTICAL FRAMEWORK

Gregory S. Gordon*

"Israel must be wiped off the face of the map."

Iranian President Mahmoud Ahmadinejad[1]

"Let us consult yet, in this long forewhile
How to ourselves we may prevent this ill."

Homer[2]

I. INTRODUCTION

On October 25, 2005, at an anti-Zionism conference in Tehran, Iran's newly elected President, Mahmoud Ahmadinejad, called for Israel to "be wiped off the face of the map."[3] That murderous exhortation turned out to be the first in a series of provocative speeches arguably advocating liquidation of the Jewish state.[4] In the context of his nation's avowed policy to eliminate Israel, develop a nuclear capability,[5] aid terrorist groups bent on destroying Israel,[6] and deny the Holocaust,[7] do the Iranian President's speeches constitute a prosecutable international crime, such as direct and public incitement to commit genocide? Certain commentators, including prominent figures such as Alan Dershowitz, point to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[8] the Rome Statute of the International

---

* © 2007. Assistant Professor, University of North Dakota School of Law.

[1] *See* Nazila Fathi, *Iran's President Says Israel Must Be "Wiped Off the Map,"* N.Y. TIMES, Oct. 26, 2005, at A8.

[2] HOMER, THE ODYSSEY, Book II, (George Chapman trans., J.R. Smith 2d ed. 1857).

[3] Fathi, *supra* note 1.

[4] *See*, *e.g.* Sean Yoong, *Ahmadinejad: Destroy Israel, End Crisis*, WASH. POST, Aug. 3, 2006, at A4; *UN Shocked at Iran's Israel Comment*, WASH. POST, June 7, 2007, at A1 (reporting that Secretary-General Ban Ki-moon was "shocked and dismayed" at a report that Iran's hard-line president said the world would soon witness the destruction of Israel).

[5] *See* Jim VandeHei, *Cheney Warns of Iran as a Nuclear Threat*, WASH. POST, Jan. 21, 2005, at A02 (". . . Iran has a stated policy that their objective is the destruction of Israel. . ."); William J. Broad, et al., *Inspectors Said to Seek Access to Sites in Iran*, N.Y. TIMES, Dec. 2, 2004, at A1; Massimo Calabresi, *Iran's Nuclear Threat*, TIME, Mar. 8, 2003, at 33.

[6] Dr. Daniel Byman, *Iran, Terrorism, and Weapons of Mass Destruction*, BROOKINGS INSTITUTE, Sept. 8, 2005, http://www.brookings.edu/views/testimony/fellows/byman20050908.pdf ("In addition to its support for Hizballah, Iran has also supported a wide array of other groups that have attacked Israel.").

[7] *See Iranian Leader Denies Holocaust*, BBC NEWS, Dec. 14, 2005 http://news.bbc.co.uk/2/hi/middle_east/4527142.stm (reporting that Ahmadinejad explicitly called the Nazi Holocaust of European Jewry a "myth").

[8] Convention on the Prevention and Punishment of the Crime of Genocide, art. III, Dec. 9, 1948, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention]

Criminal Court,[9] and domestic universal jurisdiction statutes and believe they do.[10] In June 2007, the U.S. House of Representatives joined the chorus by voting in support of a non-binding resolution appealing to the United Nations Security Council to charge Ahmadinejad with violating the Genocide Convention based on his calls for the destruction of Israel.[11]

And with weapons of mass destruction nearly within the Iranian president's grasp,[12] it has become increasingly urgent to inquire whether these commentators and the United States Congress have a point. But even if they do, could Ahmadinejad's apocalyptic urgings realistically be prosecuted? While advocates accurately point to relevant international and domestic legal authority regarding incitement to genocide, a closer look reveals that any proposed prosecution of Ahmadinejad would have to clear some imposing substantive, procedural and political hurdles. In discussing how the international community might bring Iran's chief executive to justice,[13] this Article will consider what those hurdles might be and whether they could be overcome. By the same token, it will also examine whether prosecution advocates have perhaps been too narrow in their focus on incitement to genocide, without considering the possibility of prosecuting Ahmadinejad for crimes against humanity.

As it turns out, the Ahmadinejad case is an ideal vehicle for examining the nature and scope of recent groundbreaking developments in incitement law arising from the Rwandan genocide prosecutions. Culling the key principles from these cases, this Article pieces together the emerging analytical framework for incitement law and uses it to examine incitement crimes in a fresh setting and explore some important issues in the Ahmadinejad case. Does this developing body of law permit prosecution of a sitting head of state whose words defy easy translation and whose audience appears amorphous? Even if it does, would prosecution run afoul of the law in the absence of actual, rather than threatened mass atrocity? May a politician face crimes against humanity charges when he has supported attacks by third-party clients against civilians he is

---

[9] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, reprinted in 1 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records (1998) [hereinafter Rome Statute].

[10] *See*, *e.g.*, *Renowned Legal Activist Addresses Packed Toronto Rally*, UJA Federation of Greater Toronto, Dec. 21, 2006, http://www.jewishtoronto.com/page.html?ArticleID=139783; Rony Blum, et al., Op-Ed., *Incitement Deserves Indictment*, Jerusalem Post, Feb. 7, 2006, at 15; Justus Reid Weiner, et al., *Referral of Iranian President Ahmadinejad on the Charge of Incitement to Commit Genocide*, Jerusalem Center for Public Affairs, http://www.jcpa.org/text/ahmadinejad-incitement.pdf [hereinafter Ahmadinejad Referral]; Julian Ku, *Wielding International Law as a Sword: The Growing Case for Prosecuting Ahmadinejad for Inciting Genocide*, OPINIO JURIS, Dec. 20, 2006, http://www.opiniojuris.org/posts/ 1166674797.shtml; David Matas, et al., *Indictment of Iranian President Mahmoud Ahmadinejad for Incitement to Genocide against the Jewish People*, B'nai Brith Canada, March 6, 2007, http://www.bnaibrith.ca/pdf/institute/IndictmentIranianPresidentMarch07.pdf [hereinafter Ahmadinejad Indictment]

[11] *See Rothman-Kirk Resolution Passes: House Calls on UN to Charge Iranian President with Violating the Genocide Convention and UN Charter*, U.S. House of Representatives News Release, June 20, 2007, http://www.house.gov/rothman/news_releases/2007/june20.htm.

[12] *See Iranian Warns against Added Nuclear Sanctions*, N.Y. TIMES, June 6, 2007, at A10 (quoting Ahmadinejad as saying that it was "too late" to stop Iran's nuclear program).

[13] This Article will not consider the wisdom or viability of the international community's availing itself of non-judicial options against Ahmadinejad or Iran, including direct military action or, apart from seeking a referral to the International Criminal Court, resort to U.N. organs such as the Security Council, General Assembly or Human Rights Council. However, it will not limit itself to exploring potential criminal prosecutions exclusively as it will consider the possibility of litigation before the International Court of Justice, a non-criminal venue.

threatening in his speeches but has not perpetrated the attacks directly? And is there nevertheless a risk that such charges could impermissibly infringe on hallowed free expression rights?

Part II of the Article will lay out Ahmadinejad's statements and the circumstances under which they were issued. It will put these words in context by briefly tracing the history of Iran, Ahmadinejad's rise to power, and Iran's state-sponsored eliminationist rhetoric and military policy regarding Israel. Part III will consider the potential legal bases for prosecuting Ahmadinejad and in so doing will examine the state of international incitement law from both a procedural and substantive perspective. This will entail culling from the emerging body of incitement law, including jurisprudence from the Rwandan "Media Case" and the Canadian Supreme Court's Léon Mugesera decision, a structured and integrated set of legal principles. Part IV will then analyze the viability of prosecuting Ahmadinejad within the current form of this evolving legal matrix.

In the end, the Article concludes that, even with potential uncertainty in the definition of the group Ahmadinejad is attacking and the audience he is addressing, ambiguities in the translation of Ahmadinehad's words, the lack of an actual genocide and Iran's use of proxies to attack Israeli civilians, it should be theoretically possible to prosecute Ahmadinejad for direct and public incitement to commit genocide and crimes against humanity. But any such prosecution would have to be brought before the International Criminal Court and would require the ICC prosecutor to put aside political pressure that may arise due to the absence of actual genocide and the toxic political environment in the Middle East. Moreover, given the less direct nexus between the attack on civilians and the speech at issue, it would also require a careful selection of crimes against humanity charges to avoid undue infringement on freedom of expression.

In light of the practical unlikelihood of a prosecution despite Ahmadinejad's extreme and extensive rhetoric, the Article proposes that incitement law turn its focus to deterrence rather than continue its emphasis on post-genocide prosecution. Such a prospective approach would permit early intervention and center incitement to genocide on its core mission of preventing atrocity. It could also lead to greater political acceptance of prosecuting incitement at its outset, rather than punishing it retrospectively after it has its intended effect. The Article also suggests that, to the extent the law is not yet clear on this point, euphemisms often used to disguise incitement, such as "predictions" of destruction, dehumanizing the target or ascribing violent motives to it, or congratulating the audience on past acts of violence, when anchored to direct calls, should also be considered to constitute acts of incitement. Finally, with respect to crimes against humanity, the international community should reaffirm that attacks on a civilian population carried out by a proxy at the insistence of the inciter, rather than directly by the actual inciter himself, should be sufficient to establish liability. At the same time, in the interest of protecting free speech, the crime should not be charged absent evidence of calls for protected-group violence, as opposed to mere hatred.

II. IRAN, AHMADINEJAD AND ISRAEL

A. Iranian History: Setting the Stage for the Rise of Ahmadinejad

Historically known to the West as "Persia,"[14] Iran's long and rich history stretches back to the dawn of civilization.[15] Arab conquests and the introduction of Islam in the seventh century ended a series of empires, including the Achaemenian and Sassanid dynasties.[16] After centuries of invasion and a new series of dynasties, Reza Khan, an army officer, launched a coup in 1921 and made himself Shah of a military dictatorship.[17] His son, Mohammad Reza Pahlavi, succeeded him in 1941.[18]

In 1979, the Shah was overthrown. [19] Ayatollah Ruhollah Khomeini then returned from exile in France to assume control of the revolution and established himself as Supreme Leader of a proclaimed Islamic theocracy.[20] The new government imposed a radical shift toward conservatism – all Western cultural influences were banned and women were forced to return to traditional veiled dress.[21] Khomeini spewed anti-Jewish rhetoric that included condemnation of the state of Israel.[22]

After Khomeini's 1989 death, Islamic clerics chose Iran's outgoing president, Ali Khamenei, to be Supreme Leader.[23] In August of that year, Akbar Hashemi-Rafsanjani, the speaker of the Majles (akin to a parliament), was elected President and re-elected in June 1993.[24] The United States suspended all trade with Iran in 1995, accusing it of supporting terrorist groups and attempting to develop nuclear weapons.[25]

In the meantime, the regime continued its harsh anti-Israel rhetoric. In 2000, Khamenei announced: "We have repeatedly said that this cancerous tumor of a state [Israel] should be removed from the region. . . . There is only one solution to the Middle East problem, namely the

---

[14] The country's name was changed from Persia to Iran in 1935. *See* THE COLUMBIA ENCYCLOPEDIA, *Iran*, 6th Ed. (New York: Columbia University Press 2001), *available at* http://www.bartleby.com/65/ir/ Iran.html (last visited June 11, 2007) [hereinafter Columbia Iran Article].

[15] *Id*.

[16] *Id*.

[17] U.S. Dept. of State, Bureau of Near Eastern Affairs, *Background Note: Iran*, Oct. 2006, http://www.state.gov/r/pa/ei/bgn/5314.htm [hereinafter "State Dept. Note"].

[18] *Id*.

[19] *Id*.

[20] Columbia Iran Article, *supra* note 14.

[21] *Id*.

[22] Mark LeVine, *Why Do Some of "Them" Hate Some of "Us,"* Beliefnet, http://www.beliefnet.com/story/178/story_17865_1.html (last visited July 14, 2007) ("Khomeini's anti-Jewish rhetoric, grounded in negative statements about Jews in the Qur'an that were carried over into Islamic theology, found a wide audience among Iranians . . . ."); Amir Taheri, *Iran's New Israel Rage*, N.Y. POST, Oct. 28, 2005, *available at* http://www.nypost.com/seven/10282005/postopinion/opedcolumnists/56281.htm ("Hostility to Israel has been a key ingredient of the Islamic Republic's foreign policy since its inception in 1979.").

[23] State Dept. Note, *supra* note 17.

[24] *Id*.

[25] Columbia Iran Article, *supra* note 14.

annihilation and destruction of the Jewish state." [26] President Rafsanjani stated in 2002: "If one day...the world of Islam comes to possess [nuclear] weapons - on that day [Israel's] method of global arrogance would come to a dead end. This...is because the use of a nuclear bomb in Israel will leave nothing on the ground, whereas it will only damage the world of Islam."[27] Rafsanjani also acted on his anti-Semitic rhetoric. Argentina has issued an indictment against him for ordering the 1994 bombing of a Jewish community center in Buenos Aires that killed 85 people.[28]

In 1997, Iranians elected Mohammad Khatami, a moderately liberal Muslim cleric, as President, hoping he would usher in greater freedoms and reform.[29] Nevertheless, even Khatami, a relative moderate, called Israel a "racist, terrorist state."[30] In 2004, after flawed parliamentary elections wherein many reformists were barred from contesting their seats, a very conservative group retook control.[31] This set the stage for the ascendancy of a new force in Iranian politics: Mahmoud Ahmadinejad.

B. Mahmoud Ahmadinejad

1. Background

Born on October 28, 1956 into extremely humble circumstances in the village of Gamsar, Iran, Mahmoud Saborjhian was the fourth of seven children.[32] When he was one, his family moved to Tehran, where his father worked as a blacksmith.[33] For religious and economic reasons the family changed its name to "Ahmadinejad," which roughly means "Muhammad's race" or "virtuous race."[34]

Ahmadinejad's strong religious beliefs surfaced early. He is reported to have had an interest in and talent for the Qur'an as a very small child.[35] As he grew, he became a committed Islamic

---

[26] *Iran Leader Urges Destruction of "Cancerous" Israel*, CNN, Dec. 15, 2000, http://archives.cnn.com/2000/WORLD/meast/12/15/mideast.iran.reut/.

[27] *Former Iranian President Rafsanjani on Using a Nuclear Bomb Against Israel*, The Middle East Media Research Institute, Special Dispatch Series No. 325, Jan. 3, 2002, http://www.memri.org/bin/articles.cgi?Area=iran&ID=SP32502.

[28] Oscar Serrat, *Iranian Ex-Leader Sought in Argentina*, WASH. POST, Oct. 26, 2006, at A19.

[29] *Id*.

[30] *Jews in Iran Describe a Life of Freedom Despite Anti-Israel Actions by Tehran*, CHRIST. SCI. MON., Feb. 3, 1998, at 7.

[31] State Dept. Note, *supra* note 17.

[32] Robert Tait, *Humbling Beginning That Shaped Iran's New Hard Man: Ahmadinejad Has Tasted the Poverty He Wants to Eradicate*, THE GUARDIAN (Manchester, UK), July 2, 2005, at 15.

[33] *Id*.

[34] *Id*. According to Robert Tait, the name change provides an insight into the devoutly Islamic working-class roots of Ahmadinejad's brand of populist politics. The name "Saborjhian" derives from "thread painter" -- "sabor" in Farsi -- a once common and humble occupation in the local carpet industry. "Ahmad," by contrast, is a name also used for the prophet Muhammad and means "virtuous"; "nejad" means race in Farsi. *Id*.

[35] *Id*. Ahmadinejad appears to be possessed of high intelligence and has compiled a distinguished academic record. In 1976, he took Iran's national university entrance exams (*konkoor*) to gain admission into Iran's top universities. *See Iran's President Launches Weblog*, BBC NEWS, Aug. 14, 2006, http://news.bbc.co.uk/2/hi/middle_east/4790005.stm. His test score ranked him 132nd among over 400,000 participants that year, landing him at the prestigious Iran University of Science and Technology (IUST) as an undergraduate student of civil

revolutionary activist. Before the 1979 Islamic revolution in Iran, he visited Lebanon during that country's civil war and is said to have been active with Shi'a groups there.[36] Also during that time, he printed leaflets at home denouncing the Shah of Iran.[37] On the eve of the revolution, his activities forced the entire Ahmadinejad family to flee Tehran and go into hiding to avoid arrest by the Savak, the Shah's secret police.[38]

There have been differing accounts regarding his role in the 1979 Islamic Revolution. In 1979, Ahmadinejad was a member of the "Office of Strengthening Unity," the student organization that planned the Teheran American Embassy takeover.[39] Six former American hostages who saw Ahmadinejad in a 1979 photo or on television said they thought Ahmadinejad was among the captors who held them for 444 days, and one said he was interrogated by Ahmadinejad.[40] Ahmadinejad has denied being one of the hostage takers and several known hostage-takers - now his strong political opponents - deny he was with them.[41]

Ahmadinejad joined the Revolutionary Guards in 1986 after volunteering to serve in the war against Iraq.[42] After training at Guards headquarters, he saw action in extraterritorial covert operations against Kirkuk, Iraq.[43] Later he also became the head engineer of the sixth army of the Islamic Revolutionary Guards Corps and the head of the Corps' staff in the western provinces of Iran.[44] Ahmadinejad co-founded the Islamic Society of Students and has been an instructor for the Basij, the youth volunteer organization that enforces the Islamic Republic's strict religious mores.[45]

Ahmadinejad was mostly an unknown figure in Iranian politics until his May 3, 2003 election as Mayor of Teheran after a 12% turnout led to the election of the conservative candidates of Alliance of Builders of Islamic Iran in Teheran.[46] While in office, Ahmadinejad reversed many of the changes put into effect by previous moderate and reformist mayors. For example, he emphasized religion in cultural centers and required separate elevators for men and women in the municipality offices.[47]

---

engineering. *Id*. After the revolution, Ahmadinejad entered the Master of Science program for civil engineering in 1984. *See Bio: Mahmoud Ahmadinejad*, JERUSALEM POST, May 16, 2006, *available at* http://www.jpost.com/servlet/Satellite?cid=1145961353570&pagename=JPost/ JPArticle/ShowFull [hereinafter Ahmadinejad Bio]. In 1989, he became a member of the Science faculty at the university where he had studied. *Id*. In 1997, he received his Ph.D. in transportation engineering and planning from the Science and Technology University. *Id*.

[36] Tait, *supra* note 32.

[37] *Id*.

[38] *Id*.

[39] Ahmadinejad Bio, *supra* note 35.

[40] *Id*.

[41] *Id*. A different set of accusations has been leveled against Ahmadinejad in Austria. The newspaper *Der Standard* quoted a top official in Austria's Green Party as saying authorities have "very convincing" evidence linking Ahmadinejad to the 1989 slaying in Vienna of Abdul-Rahman Ghassemlou, an Iranian opposition Kurdish leader. Exiled Iranian dissidents have made the same accusations. *Id*.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] Robert Tait, *Pious Populist ... Presidential?*, THE GUARDIAN (Manchester, UK), June 25, 2005, at 17.

[46] Ahmadinejad Bio, *supra* note 35.

[47] *Id*.

In 2005, Ahmadinejad ran for the presidency.[48] The front-runner in the campaign was former president Rafsanjani. Ahmadinejad campaigned as a "man of the people," the son of a blacksmith who lived in modest circumstances, who would promote the interest of the poor, and return government to the principles of the Islamic revolution during the time of Ayatollah Khomeini.[49] The election took place in two rounds, first on June 17, 2005, and then as a run-off between Ahmadinejad and Rafsanjani on June 24.[50] Two other candidates charged that militias and uniformed Revolutionary Guards had intimidated voters at polling places on behalf of Ahmadinejad in the first round.[51] Ahmadinejad became the 6th President of Iran on August 6, 2005, after winning 62% of the vote in the run-off poll.[52]

After his election he proclaimed, "Thanks to the blood of the martyrs, a new Islamic revolution has arisen and the Islamic revolution of 1384 [the Iranian year at that time] will, if God wills, cut off the roots of injustice in the world." He said, that "the wave of the Islamic revolution" would soon "reach the entire world."[53]

Once in power, Ahmadinejad ratcheted up Iran's anti-Israel policy through eliminationist rhetoric and sponsorship of attacks against Israel through Islamist terrorist groups Hezbollah, Hamas, and Islamic Jihad. For example, soon after Ahmadinejad assumed the Iranian presidency, Iran conducted a military parade during which Shahab-3 missiles (which have a range of 1,300 kilometers—enough to hit Israel) went past the presidential viewing platform.[54] Certain missiles were draped with banners urging that "Israel should be wiped off the map" and "Death to Israel."[55]

U.S. Secretary of State Condoleeza Rice has noted that Iran has become a "central banker for terrorism."[56] And Ahmadinejad's sponsorship of Hezbollah, Hamas and Islamic Jihad accounts for much of this activity. Hezbollah, a Lebanese Shi'a Islamic political and paramilitary organization, follows a distinct version of Islamist Shi'a ideology developed by the Ayatollah Khomeini.[57] Iran founded Hezbollah, and nurtured it early on by helping to unite various Shiite factions and providing the movement with training, money, and ideological support.[58]

---

[48] Karl Vick, *Hard-Line Figure in Iran Runoff*, WASH. POST, June 19, 2005, at A01.

[49] Kenneth Katzman, *Iran: U.S. Concerns and Policy Responses,* CRS Report for Congress, June 2, 2006, http://216.239.59.104/search?q=cache:DOZl4SbEBG4J:fpc.state.gov/documents/organization/67845.pdf+Iran:+U.S.+Concerns+and+Policy+Responses,+by+Kenneth+Katzman&hl=en&ct=clnk&cd=1.

[50] Vick, *supra* note 48.

[51] *Id*.

[52] *Iran's Hardliner Hails Poll Victory*, BBC NEWS, June 25, 2005, http://news.bbc.co.uk/2/hi/middle_east/4622501.stm.

[53] Ramita Navai, *President Invokes New Islamic Wave*, TIMES (London), June 30, 2005, at 37.

[54] *Iran Parades Missiles*, Missilethreat.com, Sept. 22, 2005, http://www.missilethreat.com/archives/id.1892/detail.asp.

[55] *Id*.

[56] *See State Sponsors: Iran*, Council on Foreign Relations, July 2006, *available at* http://www.cfr.org/publication/9362/ [hereinafter State Sponsors].

[57] *Party of God*, Frontline, May 2003, http://www.pbs.org/frontlineworld/stories/lebanon/thestory.html.

[58] *See* Daniel Byman, *Strange Bedfellows: What's Behind the Enduring Alliance Between Syria and Iran*, SLATE, July 19, 2006, http://www.slate.com/id/2146139/; *Peterson v. Islamic Republic of Iran*, Civil Action No. 01-2094 (RCL), Memorandum Opinion (D.D.C. 2003).

Under Ahmadinejad, Iran financed, armed and encouraged Hezbollah to attack Israel in the summer of 2006.[59] The conflict began when Hezbollah fired Katyusha rockets and mortars at civilians in Israeli border villages, diverting attention from another Hezbollah unit that crossed into Israel, killed three Israeli soldiers, and took two others hostage.[60] Israeli troops attempted to rescue the soldiers, but were unsuccessful, losing five more in the attempt.[61] Another five soldiers and five civilians were wounded in the attacks.[62] During the conflict, which lasted until the middle of August, Hezbollah fired approximately 4,000 rockets into Israel and an estimated 23% of these rockets hit built-up areas, primarily civilian in nature.[63] On the one-year anniversary of the conflict, Ahmadinejad reportedly sent a greeting card to Hezbollah leader Hassan Nasrallah, calling him "a soldier in the messiah's army" and proclaiming that "the wonderful victory of the Lebanese people over the Zionist occupiers is a result of faith, unity and resistance."[64]

Ahmadinejad has also provided financial support and military training to Hamas,[65] a Palestinian Sunni Islamist group whose avowed aim is the destruction of Israel.[66] Hamas has carried out dozens of suicide bombings against Israel, killing large numbers of Israeli citizens.[67] Ahmadinejad has furnished the same kind of support to Islamic Jihad,[68] another Palestinian terrorist organization that seeks the destruction of Israel.[69] Islamic Jihad claimed responsibility for six suicide bombing attacks against civilians inside Israel during 2005-2006.[70] These attacks killed 20 civilians and wounded scores, some critically.[71] Islamic Jihad has also boasted of carrying out rocket attacks against Israeli towns, which wounded civilian adults and children.[72]

---

[59] *See* State Sponsors, *supra* note 56; *Iran's Trap for Israel*, BOSTON GLOBE, July 13, 2006, at A8; DonnaAbu-Nasr, *Syria, Iran Seen as Forces behind Abduction of Two Israeli Soldiers*, MINNEAPOLIS STAR-TRIBUNE, July 14, 2006, *available at* http://www.startribune.com/140/story/552647.html.

[60] *Day-by-Day: Lebanon Crisis – Week One*, BBC NEWS, July 19, 2006, http://news.bbc.co.uk/2/hi/middle_east/5179434.stm.

[61] *Id*.

[62] *Id*.

[63] *Mideast War by the Numbers*, GUARDIAN UNLIMITED, Aug. 18, 2006, http://www.guardian.co.uk/worldlatest/story/0,,-6022211,00.html.

[64] Yoav Stern, *Ahmadinejad: Nasrallah Is a Soldier in the Messiah's Army*, HAARETZ, July 30, 2007, *available at* http://www.haaretz.com/hasen/spages/887433.html.

[65] *Hamas Gets $50 Million Boost from Iran*, CBSnews.com, April 16, 2006, http://www.cbsnews.com/stories/2006/04/16/world/main1501210.shtml; *Palestinian Intelligence Chief Accuses Iran of Training, Funding Hamas Militants*, Ynet News.com, June 24, 2007, http://www.ynetnews.com/articles/0,7340,L-3416783,00.html.

[66] *See* Greg Myre, *Israeli Official Says Hamas Has Made Abbas Irrelevant*, N.Y. TIMES, Feb. 27, 2007, at A7 ("The Hamas Charter calls for Israel to be destroyed . . . .").

[67] *Id*. *See also Suicide Bombers Commit Crimes Against Humanity*, HUM. RTS. WATCH NEWS, Nov. 1, 2002, http://www.hrw.org/press/2002/11/isrl-pa1101.htm (noting that Palestinian suicide bombers have killed hundreds of Israeli citizens and injured thousands); Greg Myre, *Suicide Bombing in Israel Kills 9; Hamas Approves*, N.Y. TIMES, April 18, 2006, at A1.

[68] *See* State Sponsors, *supra* note 56.

[69] *Profile of the Palestinian Islamic Jihad*, Intel. and Terrorism Info. Ctr. at the Ctr. for Special Studies, Feb. 28, 2005, http://www.terrorism-info.org.il/malam_multimedia/html/final/eng/sib/3_05/pji.htm.

[70] *Occupied Palestinian Territories: Islamic Jihad Must End Attacks on Civilians*, HUM. RTS. WATCH, Feb. 3, 2006, http://hrw.org/english/docs/2006/02/03/isrlpa12605_txt.htm.

[71] *Id*

[72] *Id*.

And all the while Iran has come perilously close to developing a nuclear weapons capacity. It has passed one of the most significant hurdles by converting yellowcake into uranium hexafluoride gas.[73] And it is now making strides at the next advanced stage of development -- spinning the gas through thousands of centrifuges it has installed at an underground enrichment plant it built secretly in Natanz, south of Tehran.[74] As a result, certain experts now believe Iran may be capable of building an atomic bomb by as early as 2009.[75] Based on this, on July 31, 2006, Russia and China joined the rest of the UN Security Council in ordering Iran to stop its enrichment program.[76] Iran thumbed its nose at the Security Council, which followed up with two resolutions, in December 2006 and March 2007 respectively, repeating its demands and applying sanctions.[77] But as of this date, Iran continues to ignore these resolutions and "the centrifuges spin defiantly on."[78]

2. Incendiary Statements

Against this ominous backdrop, Ahmadinejad has been making a series of extremely hostile, inflammatory public comments about Israel, Jews and the Holocaust. Those statements may be divided into seven categories: (1) calls for Israel's destruction; (2) predictions of Israel's destruction; (3) dehumanization of Israeli Jews; (4) accusing Israel of perpetrating mass murder; (5) condoning past violence against Israel and issuing threats against those who would protect Israel; (6) advocating expulsion of Israeli Jews from the Middle East; and (7) Holocaust denial.

a. Calls for Destruction

Ahmadinejad has publicly called for the annihilation of the state of Israel on several occasions. In addition to his October 25, 2005 "wipe off the map" speech, he has stated that the "'Zionist regime' cannot survive,"[79] and "cannot continue its existence."[80] On August 4, 2006, during the Israel-Hezbollah military conflict, he stated that the "real cure for the (Lebanon) conflict is elimination of the Zionist regime."[81]

b. Predictions of Destruction

Ahmadinejad has also predicted the imminent destruction of the Jewish state on numerous occasions in public. During the infamous "wipe off the map" speech, he also announced that "the growing turmoil in the Islamic world would in no time wipe Israel away."[82] He

---

[73] *See The Riddle of Iran*, ECONOMIST, July 19, 2007, at 9 [hereinafter Riddle of Iran].
[74] *Id*.
[75] *Id*.
[76] *Id*. *See* S.C. Res. 1696, U.N. Doc. S/RES/1624 (July 31, 2006).
[77] *See* S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/17 (March 24, 2007).
[78] Riddle of Iran, *supra* note 73.
[79] *Iran President's Statements on Israel*, EUR. JEWISH PRESS, Dec. 10, 2006, http://ejpress.org/article/news/12146 [hereinafter "President's Statements"]
[80] *Israel's Jews Should Go Home: Ahmadinejad*, Expatica.com, April 24, 2006, http://www.expatica.com/actual/article.asp?subchannel_id=52&story_id=29511.
[81] Patrick Bishop & Sebastian Berger, *"Eliminate" Israel to Solve the Crisis, Says Iranian President*, THE DAILY TELEGRAPH (London), Aug. 4, 2006, at 10.
[82] Fathi, *supra* note 1.

subsequently stated at public appearances over the next two years that the "Zionist regime" is "heading toward annihilation" and "elimination,"[83] and will "soon be wiped out"[84] and "destroyed."[85] He publicly warned Israeli Jews that their country "will vanish,"[86] "will be gone, definitely"[87] and that "they are nearing the last days of their lives."[88] And as Israel defended itself against the summer 2006 Hezbollah attacks, Ahmadinejad said the Jewish state had "pushed the button of its own destruction."[89]

c. Dehumanization

During the same time period, he attempted to dehumanize Israelis, publicly calling their country a "blot" and a "stain."[90] He asked an audience if Israeli Jews are human beings, and answered in the negative: "They are like cattle, nay, more misguided. A bunch of bloodthirsty barbarians. Next to them, all the criminals of the world seem righteous."[91]

d. Accusations of Mass Murder

He has accused Israelis of committing mass murder. He has told audiences, for instance, that Israelis Jews have been allowing "themselves to kill the Palestinian people,"[92] who "are burning in the crimes of Zionists."[93] He has accused residents of the Jewish state of having "no boundaries, limits, or taboos when it comes to killing human beings."[94] He said at another public gathering that Israeli Jews are "fighting a war against humanity."[95]

e. Condoning Violence and Threatening Supporters

At the same time, Ahmadinejad has publicly condoned violence against Israelis. For example, in his October 25, 2005 speech, he commented positively regarding Palestinian terrorist attacks

---

[83] *Iran: Israel Facing Annihilation*, CBS News, April 14, 2006, http://www.cbsnews.com/stories/2006/04/14/world/main1499824.shtml.

[84] *Charge Iran with Incitement to Genocide*, Newsmax.com, Dec. 13, 2006, http://www.newsmax.com/archives/ic/2006/12/13/104328.shtml [hereinafter Charge Iran].

[85] *Ahmadinejad Says Destruction of Israel Is Close, Agency Reports*, INT'L HERALD TRIB., June 3, 2007, *available at* http://www.iht.com/articles/ap/2007/06/03/africa/ME-GEN-Iran-Israel.php.

[86] *Admadinejad Says Israel "Will One Day Vanish*, RADIO FREE EUR., May 11, 2006, http://www.rferl.org/featuresarticle/2006/05/6803f47f-acfb-420e-8d5b-3faceb47a0d0.html [hereinafter Vanish Article].

[87] President's Statements, *supra*, note 79.

[88] *Arrest Ahmadinejad*, N.Y. SUN, Sept. 19, 2006, *available at* http://www.nysun.com/article/39906.

[89] *Iran Leader's Warning to Israel*, BBC News, July 23, 2006, http://news.bbc.co.uk/2/hi/middle_east/5208052.stm [hereinafter Warning Article].

[90] *Iranian Leader: Wipe Out Israel*, CNN.com, Oct. 27, 2005, http://www.cnn.com/2005/WORLD/meast/10/26/ahmadinejad/; *Iranian President Says Israel Should Be Moved to Europe*, USA TODAY, Dec. 9, 2005, *available at* http://www.usatoday.com/news/world/2005-12-09-iran-israel_x.htm [hereinafter Israel Should Be Moved].

[91] *Iranian President Ahmadinejad Asks: Are Jews Human Beings?* IRANIAN NEWS Channel, Aug. 1, 2006, http//www.iranian.ws/cgi-bin/iran_news/exec/view.cgi/15/17028 [hereinafter Are Jews Human Beings?].

[92] Israel Should Be Moved, *supra* note 90.

[93] U.S. Congressman Mark Steven Kirk, *Ahmadinejad in His Own Words*, Dec. 5, 2006, http://www.house.gov/kirk/blog/Ahmadinejad.Comments.doc.

[94] Are Jews Human Beings?, *supra*, note 91.

[95] Bishop & Berger, *supra* note 81.

against Israel: "There is no doubt that the new wave of attacks in Palestine will erase this stain [Israel] from the face of Islam."[96] He has also issued threats against those who would come to Israel's aid. "Anybody who recognizes Israel will burn in the fire of the Islamic nations' fury."[97]

f. Calling for Expulsion

Ahmadinejad has also publicly advocated for the expulsion of Israeli Jews from the Middle East. He once exclaimed that Jews had "no roots in Palestine" and he urged their removal to Germany or Austria.[98] On another occasion, he asked that Israeli Jews be removed to Europe, the United States, Canada or Alaska.[99]

g. Holocaust Denial

Finally, Ahmadinejad has consistently denied the existence of the Holocaust in public. In December 2005, he complained that some European countries "insist" that Hitler "burned millions of Jews and put them in concentration camps" and that people who doubt this should not be subjected to adverse treatment.[100] Later that month, he said: "Today, they have created a myth in the name of the Holocaust and consider it to be above God, religion and the prophets.[101] And at Ahmadinejad's urging, the "Institute for Political and International Studies," an arm of the Iranian Foreign Ministry, held a two-day conference in December 2006 entitled "Review of the Holocaust: Global Vision." He addressed the conference as did other Holocaust deniers such as former Ku Klux Klan leader David Duke and Nazi sympathizers such as French professor Robert Faurisson.[102]

III. PIECING TOGETHER THE FRAMEWORK: THE POTENTIAL LEGAL BASES FOR PROSECUTION

Were the international community to consider putting Ahmadinejad in the dock for incitement crimes, on what legal authority, if any, could it rely? In what jurisdiction would such a crime be prosecuted? To determine this, a review of incitement law from Nuremberg to the Rwandan genocide prosecutions will be necessary. This will permit construction of a developing analytical framework through which to examine Ahmadinejad's statements. As noted above, the three main sources of law necessary for piecing together this framework would be the Genocide Convention, the Rome Statute, and domestic universal jurisdiction statutes. The two criminal offenses that could be charged would be direct and public incitement to commit genocide and crimes against humanity.[103] Each of these sources and crimes will be considered in turn. The

---

[96] *The Extermination Speech*, HAARETZ, Oct. 29, 2005, *available at* http://www.haaretz.com/hasen/spages/638926.html.

[97] Israel Should Be Moved, *supra*, note 90.

[98] *Id*.

[99] *Iran Leader Renews Furor, Calling Holocaust a "Myth,"* INT'L HERALD TRIB., December 14, 2005, *available at* http://www.iht.com/articles/2005/12/14/news/iran.php [hereinafter Leader Renews Furor].

[100] Israel Should Be Moved, *supra*, note 90.

[101] Leader Renews Furor, *supra* note 99.

[102] Charge Iran, *supra* note 84.

[103] Thus far, experts and commentators have not proposed crimes against humanity as a viable charge against Ahmadinejad. However, this Article will demonstrate that if certain factual matters could be established, such a count could be added to the indictment.

Article will then consider the potential judicial bodies that could exercise jurisdiction: (1) the International Court of Justice (ICJ); (2) the International Criminal Court; and (3) municipal criminal courts.

A. Potential Crimes

1. Genocide

a. The Genocide Convention

i. Overview

Through the prodding and guidance of Raphael Lemkin, a Holocaust survivor and legal scholar who coined the term "genocide,"[104] the United Nations General Assembly began work on a Genocide Convention with the passage of Resolution 96(1), establishing genocide as a crime carrying individual accountability under international law.[105] The finished product, adopted in 1948, listed the acts that constitute genocide and then enumerated a separate set of acts that warrant punishment. Article II of the Convention defines genocide as a series of acts (including, for example, killing and causing serious bodily or mental harm and inflicting on the group conditions of life calculated to bring about its physical destruction) committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Article III then states that a number of related acts committed in furtherance of Article II shall also be punishable. This includes, at Article III(b), "direct and public incitement to commit genocide."[106]

Guidance regarding the interpretation of Article III(b) can be found in the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) as Article II 3(c) of the ICTR Statute[107] essentially mirrors Article III (b) of the Genocide Convention.[108] And several defendants have been prosecuted and convicted pursuant to this section of the ICTR Statute.[109] By culling the important principles issuing from these cases, a grid of analytic criteria emerges on the substantive axis of the incitement matrix.

ii. The Akayesu Case: The *Mens Rea*, Direct and Public Elements

---

[104] *See* SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 29, 61-63 (2002).

[105] G.A. Res. 96(I), U.N. GAOR, 6th Comm., 55th plen. mtg. at 189, U.N. Doc. A/64/Add.1 (1946).

[106] G.A. Res. 260(III), U.N. GAOR, 3rd Sess., Part I (A/810), p. 174.

[107] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955 [hereinafter ICTR Statute].

[108] *See* Gregory S. Gordon, *"A War of Media, Words, Newspapers and Radio Stations": The ICTR Media Trial Verdict and a New Chapter in the International Law of Hate Speech*, 45 VA. J. INT'L L. 139, 150 (2004).

[109] *See* Ahmadinejad Referral, *supra* note 10, at 29 (indicating that nine men have thus far been convicted for incitement at the ICTR). This Article will describe the most significant and relevant ICTR incitement cases *infra*.

ICTR's first conviction, of Taba Commune mayor Jean-Paul Akayesu, laid the initial groundwork for interpreting the crime of direct and public incitement to commit genocide.[110] The incitement charge stemmed from Akayesu's address to a public gathering in Taba on April 19, 1994, during which he urged the population to unite in order to eliminate what he referred to as the sole enemy: the accomplices of the "Inkotanyi"—a derogatory reference to Tutsis.[111] This was understood to be a call to kill the Tutsis in general[112] and Tutsis were in fact massacred in Taba soon after the speech.[113]

In finding Akayesu guilty, the Tribunal fleshed out three important aspects of the crime: (1) *mens rea*; (2) the "public" element; and (3) the "direct" element.[114] With respect to *mens rea*, the Tribunal held that it lies in the intent directly to prompt or provoke another to commit genocide. The person who incites others to commit genocide must himself have the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnic, racial or religious group.[115] Based on the circumstances surrounding Akayesu's conduct, the Tribunal found he had the requisite *mens rea*.[116] Additionally, Akayesu's incitement was "public" because it constituted "a call for criminal action to a number of individuals in a public place" or to "members of the general public at large by such means as the mass media, for example, radio or television."[117]

Finally, the Tribunal held that the "direct" element of incitement should be viewed "in the light of its cultural and linguistic content."[118] Thus, while a particular speech may be perceived as "direct" in one country, it would not, depending on the audience, be so perceived in another country.[119] So it would be necessary to conduct a case-by-case factual inquiry to determine "whether the persons for whom the message was intended immediately grasped the implication thereof."[120]

The Tribunal relied on both expert and fact witness testimony to conduct this inquiry. In particular, the Tribunal considered the testimony of Dr. Mathias Ruzindana, Professor of Linguistics at the University of Rwanda.[121] In his speech, Akayesu insisted that his listeners kill the "Inkotanyi." Dr. Ruzindana examined several Rwandan publications and broadcasts by RTLM (Radio Télévision Libre des Milles Collines), which had been encouraging extermination of Tutsis, and concluded that, at the time of the events in question, the term "Inkotanyi" was equivalent to "RPF sympathizer"[122] or "Tutsi." This testimony, corroborated by fact witnesses

---

[110] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998) [hereinafter Akayesu Judgment]

[111] *Id*.

[112] *Id* ¶ 673.

[113] *Id*.

[114] The Tribunal also addressed the issue of causation – in other words, whether Akayesu's incitement caused the massacres that followed. However, the Tribunal's holding was vague -- it held that causation was not an element of the crime but analyzed whether causation was present nonetheless. Akayesu Judgment, *supra* note 110, ¶¶ 348-357, 673(vii).

[115] *Id.* ¶ 560.

[116] *Id*. ¶ 674.

[117] Akayesu Judgment, *supra* note 110, ¶ 556.

[118] *Id*. ¶ 557.

[119] *Id*.

[120] *Id*. ¶ 558.

[121] *Id*. ¶¶ 340, 673 (iv).

[122] "RPF" stands for the "Rwandan Patriotic Front," a group of primarily Ugandan Tutsi exiles who launched an

who testified to their understanding of the words, convinced the Tribunal that in the context of the time, place and circumstances of Akayesu's speech, "Inkotanyi" meant "Tutsi."[123]

iii. The Kambanda Case: The Role of State Leaders

Two days after Akayesu's conviction, the Prime Minister of Rwanda's caretaker government during the genocide, Jean Kambanda, was also convicted by ICTR, pursuant to a guilty plea, of among other crimes, direct and public incitement to commit genocide and crimes against humanity.[124] It was the first conviction in history of a head of government for genocide and crimes against humanity by an international court.[125] The factual basis for the guilty plea to incitement arose out of Kambanda's announcing on RTLM that the radio station should "continue to incite the massacres of the Tutsi civilian population, specifically stating that this radio station was "an indispensable weapon in the fight against the enemy."[126]

Kambanda further acknowledged that during the genocide he instigated and abetted both local government officials and members of the population to massacre civilian Tutsis and moderate Hutus.[127] Kambanda also admitted visiting several prefectures during this time to incite and encourage the population to kill. Such incitement included congratulating the people who had already killed.[128] It also included uttering the following incendiary phrase, which was repeatedly broadcast: "You refuse to give your blood to your country and the dogs drink it for nothing."[129]

iv. The Ruggiu Case: The Role of Euphemisms

Less than two years later, Belgian national Georges Ruggiu pled guilty to, *inter alia*, one count of direct and public incitement to commit genocide in connection with ethnic hate screeds he broadcast against Tutsis on RTLM during the genocide.[130]

In sentencing Ruggiu, the Tribunal noted that his broadcasts urged the population to finish off "the 1959 revolution"—code words for incitement to massacre the entire Tutsi population.[131] Within the context of the 1994 civil war, it noted, the term "Inyenzi," used extensively by Ruggiu, became synonymous with the term "Tutsi." Ruggiu admitted that the word "Inyenzi", as used in the socio-political context of the time, came to designate the Tutsis as "persons to be killed.[132] He also admitted that, as part of encouraging "civil defense," he made public

---

armed invasion of Rwanda after the genocide began. *Id*. ¶¶ 93, 111. "Inkotanyi" translates roughly as "warrior." *Id*. ¶ 147. "Inyenzi" means "cockroach." *Id.* ¶ 90.

[123] *Id.* ¶¶ 361, 709.

[124] *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998) [hereinafter Kambanda Judgment].

[125] *See* Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26-FALL FLETCHER F. WORLD AFF. 21, 37 n.40 (2002).

[126] Kambanda Judgment, *supra* note 124, ¶ 39(vii).

[127] *Id*. ¶ 39(viii).

[128] *Id*.

[129] *Id*. ¶ 39(x)

[130] *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I, Judgment and Sentence, ¶ 10 (2000) [hereinafter Ruggiu Judgment].

[131] *Id*. ¶ 44(vii).

[132] *Id*. ¶ 44(iii).

broadcasts to the population on several occasions to "go to work." Again, within the socio-political context, the expression was understood as meaning: "go kill the Tutsis and Hutu political opponents of the interim government."[133]
Among the acts that formed the basis of the incitement charge against Ruggiu, the Judgment noted that Ruggiu: (1) congratulated perpetrators of massacres of Tutsis;[134] and (2) warned the Hutu population to be vigilant against attacks by Tutsi infiltrators.[135]

v. The ICTR Media Case: Content and Causation

While the Akayesu, Kambanda and Ruggiu Judgments provided important guidance regarding the interpretation and scope of direct and public incitement to commit genocide, questions remained regarding two important elements of the crime: (1) content and (2) causation. Those aspects of incitement were addressed by the Tribunal in its landmark December 2003 decision in *The Prosecutor v. Nahimana*, *et al*. -- ICTR's so-called "Media Case."[136] The three defendants in that case -- RTLM founders Ferdinand Nahimana and Jean Bosco Barayagwiza and Hassan Ngeze, editor-in-chief of the extremist Hutu newspaper Kangura -- were convicted of, among other crimes, direct and public incitement to commit genocide.[137] Like RTLM, Kangura had urged Rwanda's Hutus to slaughter the Tutsi minority.[138]

One of the key questions confronting the Tribunal was whether, in transmitting the content of the messages at issue, the defendants had engaged in the permissible exercise of free speech or in non-protected criminal hate advocacy. From examining existing international law precedent, the Tribunal gleaned four criteria through which speech content regarding race or ethnicity could be analyzed as either legitimate expression or criminal advocacy: (1) purpose; (2) text; (3) context; and (4) the relationship between speaker and subject.[139]

With respect to the "purpose" criterion, the Tribunal provided some examples of legitimate objectives: historical research, dissemination of news and information, and public accountability of government authorities.[140] At the opposite end of the spectrum, explicit calls for violence would evince a clearly illegitimate purpose.

---

[133] *Id*. ¶ 44 (iv).
[134] *Id*. ¶ 50.
[135] *Id*. ¶ 44 (v).
[136] *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, Case No. ICTR 99-52-T, Judgment and Sentence (Dec. 3, 2003) [hereinafter Nahimana Judgment].
[137] *See* Gordon, *supra* note 108, at 141.
[138] *Id*. For their crimes, Nahimana and Ngeze were sentenced to life imprisonment, while Barayagwiza was sentenced to 35 years imprisonment. *Id*.
[139] The first two criteria, purpose and text, are lumped together by the Tribunal, but I have argued elsewhere that they should be considered separately. *See* Gordon, *supra* note 108, at 172. Moreover, the Tribunal did not explicitly characterize as a separate criterion the relationship between the speaker and the subject. I have also demonstrated that this should be considered as a distinct point of analysis given a close reading of the Nahimana Judgment. *See id*. at 173-74. *See also* Robert H. Snyder, *"Disillusioned Words Like Bullets Bark": Incitement to Genocide, Music, and the Trial of Simon Bikindi*, 35 GA. J. INT'L & COMP. L. 645, 666 (2007) (adopting this analysis).
[140] Nahimana Judgment, *supra* note 136, ¶ ¶ 1000-1006.

The Tribunal indicated the "text" criterion, for its part, would help further reveal the purpose of the speech. To illustrate, the Tribunal referenced *Robert Faurisson v. France*,[141] wherein the United Nations Human Rights Committee (HRC) had to reconcile Article 19 (protecting freedom of expression) and Article 20 (forbidding incitement to national, racial, or religious discrimination) of the International Covenant for Civil and Political Rights (ICCPR).[142] Faurisson's Complaint had challenged his conviction in France for publishing his view doubting the existence of gas chambers at Nazi concentration camps (he referred to them as "magic gas chambers" in the Complaint).[143] The Tribunal focused on the HRC's analysis that the text "magic gas chamber" suggested the author was motivated by anti-Semitism rather than the pursuit of historical truth.[144] The Tribunal contrasted this with *Jersild v. Denmark*, a case decided under the European Convention on Human Rights (ECHR), which overturned the incitement conviction of a journalist who interviewed members of a racist group but did not condemn them.[145] The interviewer in *Jersild*, noted the Tribunal, distanced himself from a message of ethnic hatred by referring to his interviewees as "racist" and "extremist youths."[146] According to the Tribunal, this textual analysis allowed the *Jersild* Court to conclude that the purpose of the program was news dissemination, rather than the propagation of racist views.[147]

For the "context" criterion, the Tribunal stressed that circumstances external to and surrounding the text must be considered to grasp the text's significance. Once again, the Tribunal looked to the *Faurisson* case, where the Human Rights Committee noted that, in context, the impact of challenging the existence of gas chambers -- a well-documented historical fact -- would promote anti-Semitism. Similarly, the Tribunal considered the case of *Zana v. Turkey*,[148] where the ECHR considered, in the context of violent clashes between government and Kurdish separatist forces, a former regional mayor's statement seemingly condoning Kurdish massacres by saying "anyone can make mistakes."[149] The Tribunal noted that, given the massacres taking place at that time, the ECHR upheld the underlying incitement conviction since the statement was "likely to exacerbate an already explosive situation. . ."[150] The Tribunal further fleshed out the "context" criterion by indicating the fact finder should consider the tone of the speaker in uttering the words.[151]

---

[141] International Covenant on Civil and Political Rights, Communication No. 550/1993: France (Jurisprudence) P 7.5, U.N Docs. CCPR/C/58/D/550/1993 (1996) (Robert Faurisson v. France).

[142] *Id*. ¶ 1001.

[143] *Id*.

[144] Nahimana Judgment, *supra* note 136, ¶ 1001.

[145] *Jersild v. Denmark*, 19 Eur. Ct. H.R. 1, 27 (1995). The ECHR has developed jurisprudence balancing the right to freedom of expression (Article 10(1) of the Convention) with the right to restrict expression for national security or protection of the rights and reputations of others (Article 10(2) of the Convention). *See* Gordon, *supra* note 108, at 146.

[146] Nahimana Judgment, *supra* note 136, ¶ 1001.

[147] *Id*.

[148] *Zana v. Turkey*, 27 Eur. Ct. H.R. 667, 670 (1999).

[149] Nahimana Judgment, *supra* note 136, ¶ 1001.

[150] *Id*.

[151] *Id*. ¶ 1022.

Finally, the Tribunal indicated the finder of fact should examine the relationship between the speaker and the subject. The analysis should be more speech-protective when the speaker is part of a minority criticizing the government or the country's majority.[152]

Based on this analysis, the Tribunal was able to distinguish between permissible speech and illegal incitement in the cases of Kangura and RTLM.[153] The Tribunal noted, for example, that some of the articles and broadcasts offered into evidence conveyed historical information, political analysis, or advocacy of ethnic consciousness regarding the inequitable distribution of privilege between Hutus and Tutsis in Rwanda.[154]

For example, the Tribunal alluded to a December 1993 broadcast made by Barayagwiza in which he spoke of the discrimination he experienced as a Hutu child.[155] Using the Tribunal's analytic criteria, the purpose of the speech appeared to be advocacy of ethnic consciousness. The text itself used language conveying historical inequities and not incitement. Moreover, the context at that point was not that of widespread genocide, as would be the case after April 6, 1994, but a period of social instability and political debate. Finally, the speaker described his experience as a member of the politically dispossessed criticizing the establishment of that era. In characterizing Barayagwiza's broadcast as a permissible exercise of free speech, the Tribunal described it as "a moving personal account of his experience of discrimination as a Hutu."[156]

At the other end of this spectrum was a June 4, 1994 broadcast by Kantano Habimana calling on listeners to exterminate the "Inkotanyi" (another name for Tutsis), who would be known by height and physical appearance. Habimana concluded: "Just look at his small nose and then break it."[157] The purpose and text of this broadcast clearly amounted to impermissible incitement to ethnic violence. The speaker was part of the majority ethnic group, supporting government policies, and attacking the minority. Moreover, the external context was one of an ongoing genocide. Finally, in terms of context, the speaker in no way attempted to distance himself from the message.[158]

Causation was the other important aspect of incitement addressed in the Nahimana Judgment. Did the crime of direct and public incitement to commit genocide require a showing of violence occasioned by the incitement? The answer was "no" -- according to the Nahimana Judgment.

---

[152] *Id*. ¶ 1006. According to the Tribunal:

> The dangers of censorship have often been associated in particular with the suppression of political or other minorities, or opposition to the government. The special protections developed by the jurisprudence for speech of this kind, in international law and more particularly in the American legal tradition of free speech, recognize the power dynamic inherent in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government. . .. The special protections for this kind of speech should accordingly be adapted, in the Chamber's view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered.

Id. ¶ 1008. *See also* Gordon, *supra* note 108, at 173-74.

[153] *Id*. at 174.

[154] *Id*.

[155] Nahimana Judgment, *supra* note 136, ¶ 395.

[156] *Id*. ¶ 1019.

[157] *Id*. ¶ 396.

[158] *Id*. ¶ 1024. *See also* Gordon, *supra* note 108, at 175-76.

"The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement."[159]

vi. The Mugesera Case: Putting All the Elements Together

The Nahimana Judgment was soon followed by another significant incitement decision related to the Rwandan Genocide. On June 28, 2005, the Canadian Supreme Court issued its judgment in *Mugesera v. Canada (Minister of Citizenship and Immigration)*.[160] Léon Mugesera was Vice President of the Gisenyi Province branch of the governing Rwandan hard-line Hutu "MRND" party.[161] In November 1992, in the midst of the ethnic unrest that would eventually result in genocide,[162] Mugesera delivered an infamous speech, widely interpreted by Rwandans at the time as advocating the massacre of Rwanda's Tutsis.[163] The following are relevant portions of that speech, delivered to approximately 1,000 people at a political meeting in Kabaya, Gisenyi province:

> You know there are 'Inyenzis' (cockroaches) in the country who have taken the opportunity of sending their children to the front, to go and help the 'Inkotanyis'.... Why do they not arrest these parents who have sent away their children and why do they not exterminate them? Why do they not arrest the people taking them away and why do they not exterminate all of them? ... [We] must do something ourselves to exterminate this rabble.... I asked if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! [I] am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly'.... Another important point is that we must all rise, we must rise as one man ... if anyone touches one of ours, he must find nowhere to go.[164]

Based on the content of the speech, Rwandan authorities issued the equivalent of an arrest warrant against Mugesera, who soon fled to Canada. By 1995, however, the Canadian government had become aware of Mugesera's background and his November 1992 speech and it sought to remove him from the country as having entered illegally based on human rights violations and misrepresentations.[165] The allegations against Mugesera included incitement to commit genocide.[166]

---

[159] Nahimana Judgment, *supra* note 136, ¶ 1015.

[160] *Mugesera v. Canada (Minister of Citizenship and Immigration*), 2 S.C.R. 91, 2005 SCC 39 (2005) [hereinafter Mugesera Judgment].

[161] *See* Joseph Rikhof, *Hate Speech and International Criminal Law: The Mugesera Decision by the Supreme Court of Canada*, 3 J. INT'L CRIM. JUST. 1121, 1121-22 (2005).

[162] *Id*.

[163] *Id*.

[164] Mugesera Judgment, *supra* note 160, App. III.

[165] Rikhof, *supra* note 161, at 1123.

[166] *Id*. The allegations were fivefold: (1) "counseling" to commit murder; (2) advocating or promoting genocide (equivalent to incitement to genocide); (3) public incitement of hatred; (4) committing a crime against humanity; and (5) misrepresenting his background when applying for permanent residence. *Id*.

After nine years of wending its way through a multi-layered appeals process, the Canadian Supreme Court finally upheld a 1996 lower court finding that Mugesera should be deported.[167] In the process, the Court had occasion to analyze the elements of incitement to genocide. Canada's domestic law criminalizing genocide was modeled directly after Article II of the Genocide Convention so the opinion relied on international law to interpret incitement to genocide.[168]

With respect to *mens rea*, and the direct and public aspects of the crime, the Supreme Court was largely in accord with the Akayesu and Nahimana judgments.[169] In order for a speech to constitute direct incitement, the Court held, the words used must be clear enough to be immediately understood by the intended audience, in light of the speech's cultural and linguistic content.[170] The guilty mind must contain two levels of intent: (1) the intent directly to prompt or provoke another to commit genocide; and (2) the specific intent to commit genocide.[171]

The Court instructed that intent can be inferred from the circumstances.[172] Thus, for example, genocidal intent of a particular act can be inferred from: (1) the systematic perpetration of other culpable acts against the group; (2) the scale of any atrocities that are committed and their general nature in a region or a country; or (3) the fact that victims are deliberately and systematically targeted on account of their membership in a particular group while the members of other groups are left alone.[173] Moreover, the Court emphasized that a speech given in the context of a genocidal environment will have a heightened impact, and for this reason the environment in which a statement is made can be an indicator of the speaker's intent.[174]

In Mugesera's case, the Court found the allegation of incitement to the crime of genocide to be well founded.[175] In the first place, Mugesera's message was delivered in a public place at a public meeting and would have been clearly understood by the audience.[176] The Court provided a detailed analysis. It began by emphasizing that the individual to whom Mugesera was speaking in his speech (where he refers to the "Falashas") was a Tutsi.[177] He referred specifically to the events of 1959 when many Tutsi were massacred or went into exile, and he mentioned Ethiopia. It is common lore in Rwanda that the Tutsi originated in Ethiopia. This belief was even taught in public schools.[178]

Moreover, based on his reference to the "Nyabarongo River," the Court found that Mugesera was suggesting that Tutsi corpses be sent back to Ethiopia.[179] Mugesera argued that he was only telling his audience that, just as the Falasha had left Ethiopia to return to Israel, their place of

---

[167] *Id*.
[168] Mugesera Judgment, *supra* note 160, ¶ 82.
[169] *Id*. ¶¶ 86-89.
[170] *Id*. ¶ 87.
[171] *Id*. ¶ 88.
[172] *Id*. ¶ 89.
[173] *Id*.
[174] *Id*.
[175] *Id*. ¶ 98.
[176] *Id*. ¶ 94.
[177] *Id*. ¶ 91.
[178] *Id*.
[179] *Id*. ¶ 92.

origin, so should the Tutsi return to Ethiopia.[180] In their case, the return trip would be by way of the Nyabarongo River, which runs through Rwanda toward Ethiopia.[181] This river is not navigable, however, so the return would not be by boat. In earlier massacres, Tutsi bodies had been thrown into the Nyabarongo.[182]

The Court also found significant the reference to the year "1959" because the group that was exiled then was essentially Tutsi. The Court found that the speech clearly advocated that these "invaders" and "accomplices" should not be allowed to "get out," suggesting that the mistake made in 1959 was to drive the Tutsi out of Rwanda, instead of killing them, with the result that they were now attacking the country.[183] In this context, it was clear that Mugesera was recounting a discussion he supposedly had with a Tutsi and that when Mugesera said "we will send you down the Nyabarongo," "you" meant the Tutsi and "we" meant the Hutu.[184] Finally, although it was not equally clear to the Court that Mugesera was suggesting that Tutsi *corpses* be sent back to Ethiopia via the Nyabarongo River, the content of the rest of the speech, and the context in which it was delivered, demonstrated a call for mass murder of Rwanda's Tutsis.[185]

The Court therefore concluded that the overall message satisfied both the "public" criterion as it was delivered in a public place at a public meeting and the "direct" criterion since, based on Rwandan language, history and culture, it would have been clearly understood by the audience as advocating the genocide of the Tutsis.[186]

The Court also ruled that Mugesera had the requisite mental intent. It reasoned that since he knew approximately 2,000 Tutsis had been killed since October 1, 1990, the context left no doubt as to his intent: he intended specifically to provoke Hutu citizens to act violently against Tutsi citizens.[187]

Causation was also considered. Given the absence of proof that the speech directly resulted in ethnic massacres and in light of the large gap in time between the speech and the Rwandan genocide, causation would be difficult, if not impossible to prove.[188] Significantly, the Court found that the prosecution need not establish a direct causal link between the speech and any acts of murder or violence.[189] Because of its inchoate nature, incitement is punishable by virtue of the criminal act alone -- irrespective of the result.[190] In fact, per the Court, the government is not even required to prove that genocide actually took place.[191]

---

[180] *Id*.
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *Id*. ¶ 94.
[185] *Id*.
[186] *Id*.
[187] *Id*.
[188] *See* Rikhof, *supra* note 161, at 1125.
[189] Mugesera Judgment, *supra*, note 160, ¶ 85.
[190] *Id*.
[191] *Id*. ¶ 84.

b. The Rome Statute

Through Articles 6 (setting forth the general crime of genocide) and 25 (setting forth specific instances of genocide), the Rome Statute of the International Criminal Court, consistent with the Genocide Convention and the Statutes for the ICTR[192] and the International Criminal Tribunal for the Former Yugoslavia (ICTY),[193] criminalizes direct and public incitement to commit genocide.[194] Rome Statute Articles 6 and 25 contain language identical to Genocide Convention Articles II and III,[195] and ICTR/ICTY Articles 2 and 4, respectively.[196] The ICC provisions have yet to be litigated but would presumably be interpreted consistent with the precedents analyzed above.

c. Universal Jurisdiction Statutes

Certain crimes so shock the conscience of humanity that they violate "*jus cogens*" norms and states have an obligation to prosecute them regardless of where they are committed.[197] Genocide is one of those crimes.[198] From a procedural perspective, the notion of "universal jurisdiction," permits any state to prosecute *jus cogens* offenses, even when the prosecuting state ("the forum state") has no link to the alleged perpetrator, his victims, or the actual crime (pursuant to an *obligatio erga omnes*).[199]

Amnesty International reports that approximately 125 states had legislation of varying degrees of effectiveness and scope permitting the exercise of universal jurisdiction over crimes and courts in 12 countries had exercised such jurisdiction.[200] A number of states, including states parties to the Genocide Convention, such as Belgium,[201] Canada,[202] Germany,[203] and Israel,[204] expressly provide for universal jurisdiction over genocide.

---

[192] ICTR Statute, *supra* note 107, art. 2.

[193] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute], art. 4.

[194] Rome Statute, *supra* note 9, arts. 6 & 25.

[195] Genocide Convention, *supra* note 8, arts. II & III.

[196] Rome Statute, *supra* note 9, arts. 6 & 25.

[197] *See generally* Restatement (Third) Foreign Relations Law of the United States § 404 (1987). M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996). The term "*jus cogens*" means "the compelling law" and, as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles. *Id*. at 67. As a consequence of that standing, *jus cogens* norms are deemed to be "peremptory" and non-derogable. *Id*. *Jus cogens* refers to the legal status that certain international crimes reach, and the term "*obligatio erga omnes*" pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*. The term *erga omnes* means "flowing to all," and so obligations deriving from *jus cogens* are presumably *erga omnes*. *Id*. Essentially, these terms are two sides of the same conceptual coin.

[198] *See* Bassiouni, *supra* note 197, at 68. Experts consider the following international crimes to be *jus cogens:* aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. *Id*.

[199] *See* Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L. J. 1057, 1059 (2004).

[200] Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation*, *available at* http://web.amnesty.org/library/index/engior530022001 (last visited July 12, 2007).

[201] Criminal Code of 1867 (Code Penal), art. 136 bis, *available at* http://www.juridat.be/cgi_loi/ legislation.pl (last visited July 12, 2007).

And genocide has been prosecuted in domestic courts under universal jurisdiction.[205] Adolf Eichmann was famously convicted in Israel in 1961, *inter alia*, of "Crimes against the Jewish People" (essentially equivalent to genocide) for his role as chief of operations in the deportation of Jews to extermination camps.[206] Bosnian Serb Nikolai Jorgic was convicted of genocide in Germany in 1997 for his activities in Bosnia and sentenced to life imprisonment by the Düsseldorf High Court.[207] And Désiré Munyaneza is currently on trial for genocide in Canada related to 1994 mass killings of Tutsi in Rwanda.[208]

2. Crimes against Humanity

Ahmadinejad's incitement could also be potentially prosecuted as a crime against humanity.

a. The Rome Statute

Article 7 of the Rome Statute states, in pertinent part that:

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . .(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court . . . "[209]

As a threshold matter, a case of crimes against humanity against Ahmadinejad would have to satisfy the crime's "chapeau" or threshold elements. In other words, a court would have to find that Ahmadinejad's advocacy against Israel was "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[210] The chapeau also requires that the offenses flow from "a State or organizational policy."[211]

---

[202] *See* Crimes against Humanity and War Crimes Act, R.S.C., ch. 24(8) (2000), *available at* http://laws.justice.gc.ca/en/showdoc/cs/C-45.9///en? page=1 (last visited July 12, 2007).

[203] *See* German Code of Crimes against International Law, *Völkerstrafgesetzbuch* (VStGB) v. 30.6.2002 (BGBl. I S.2254) (2002), *available at* www.iuscomp.org/gla/statutes/VoeStGB.pdf (last visited July 12, 2007).

[204] *See* Israeli Crime of Genocide (Prevention and Punishment) Law, Israeli Law No. 5710-1950, *available at* http://preventgenocide.org/il/law1950.htm (last visited July 15, 2007) [hereinafter Israeli Genocide Law].

[205] *See generally* William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes'*, 1 J. INT'L CRIM. JUST. 39 (2003).

[206] *See* Ralph Ruebner, *The Evolving Nature of the Crime of Genocide*, 38 J. MARSHALL L. REV. 1227, 1228 (2005) (["The Genocide] Convention's definition of genocide corresponded to the Crimes against the Jewish People.").

[207] *Public Prosecutor v. Jorgic*, Oberlandesgericht Düsseldorf (September 26, 1997). *See also* Schabas, *supra* note 205, at 57 n.91.

[208] *See Those Who Died Quickly Were Luckiest: Witness*, MONTREAL GAZETTE, April 11, 2007, at A5.

[209] Rome Statute, *supra* note 9, art. 7.

[210] *Id*.

[211] *Id*.

i. The Nuremberg Cases: Injecting Poison

Hate speech targeting a population on the discriminatory grounds identified in Article 7 has been found to constitute the crime against humanity of persecution.[212] Jurisprudence to this effect finds its origins in the prosecution of Nazi war criminals Julius Streicher and Hans Fritzsche by the International Military Tribunal (IMT) at Nuremberg.[213] Although the IMT acquitted Fritzsche, Head of the Nazi Propaganda Ministry Radio Section during the war, for lack of evidence of clear incitement and lack of control over formulation of propaganda policy, it convicted Streicher of incitement as a crime against humanity.[214]

The latter conviction was based on Streicher's anti-Semitic articles in his newspaper *Der Stürmer*.[215] The IMT quoted numerous instances where *Der Stürmer* called for the extermination of Jews.[216] Despite Streicher's denying awareness of Jewish massacres, the IMT found he regularly received information on the deportation and killing of Jews in Eastern Europe.[217] The judgment does not acknowledge any direct causal link between Streicher's publication and specific acts of violence. Rather, it characterizes his work as a poison "injected in to the minds of thousands of Germans which caused them to follow the [Nazi] policy of Jewish persecution and extermination."[218] The IMT found that "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes as defined by the [IMT] Charter, and constitutes a Crime against Humanity."[219]

ii. The Ruggiu Case: Denial of Fundamental Rights

Over fifty years later, Georges Ruggiu pled guilty to one count of crimes against humanity (persecution) in connection with his RTLM broadcasts. In sentencing him, the Tribunal summarized the elements that comprise the crime against humanity of persecution as follows: (1) those elements required for all crimes against humanity under the Statute; (2) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5; and (3) discriminatory grounds.[220]

With respect to the *mens rea* required for the crime, the Tribunal held:

---

[212] *See* Ruggiu Judgment, *supra* note 130, ¶¶ 22-23. *See also* Gordon, *supra* note 108, at n.70.

[213] *See* IMT Judgment, Oct. 1, 1946, reprinted in 22 The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany 501-02 (1946) [hereinafter Streicher Judgment]; id. at 525-26 [hereinafter Fritzsche Judgment].

[214] *See* Streicher Judgment, *supra* note 213, at 529-30; Fritzsche Judgment, *supra* note 213, at 525-526. The reasoning of the Fritzsche Judgment has been criticized as inconsistent with the evidence and out of step with the important international criminal law principles established by the IMT at Nuremberg. *See* Gordon, *supra* note 108, at n.17.

[215] *See* Streicher Judgment, *supra* note 213, at 529-30.

[216] *Id*. at 501-02.

[217] *Id*.

[218] *Id*.

[219] *Id*.

[220] *Id*. ¶ 21 (citing *Prosecutor v. Zoran Kupreskic*, Case No. IT-95-16, Judgment (2000)).

> The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. […] Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct. Therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.[221]

The Tribunal then found that Ruggiu's broadcast satisfied these elements:

> [When] examining the [admitted] acts of persecution . . . it is possible to discern a common element. Those acts were direct and public radio broadcasts all aimed at singling out and attacking the [Tutsi ethnic group] on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.[222]

Significantly, the Tribunal noted the Streicher judgment was particularly relevant since Ruggiu, like Streicher, infected people's minds with ethnic hatred and persecution.[223]

iii. The ICTR "Media" Case: No Call to Action

The defendants in the ICTR Media Trial were similarly found guilty of crimes against humanity (persecution) for their incendiary broadcasts and writings urging the population to murder the Tutsi minority.[224] In so finding, the Tribunal reaffirmed that hate speech targeting a population on discriminatory group identity grounds constitutes the crime against humanity of persecution:

> Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.[225]

The Tribunal pointed out that persecution is not a provocation to cause harm – it is the harm itself:

---

[221] *Id*. ¶ 20 (citing *Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment (1999)).
[222] *Id*. ¶ 22.
[223] *Id*. ¶ 19.
[224] Nahimana Judgment, *supra* note 136, ¶¶ 1081-84.
[225] *Id*. ¶ 1072.

> Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. The Chamber notes that Julius Streicher was convicted by the International Military Tribunal at Nuremberg of persecution as a crime against humanity for anti-Semitic writings that significantly predated the extermination of Jews in the 1940s. Yet they were understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people. In Rwanda, the virulent writings of Kangura and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed.[226]

iv. The Mugesera Case: Defining the Limits of Widespread or Systematic Attack

The Canadian Supreme Court also considered whether group discriminatory hate speech could constitute a crime against humanity in the Mugesera Judgment. A lower court had found that Mugesera's 1992 speech had not taken place in the context of a widespread or systematic attack, since the massacres which had occurred to that point were not part of a common plan and since there was no evidence that Mugesera's speech was part of an overall strategy of attack.[227]

The Supreme Court rejected this analysis. First, it held that, as a threshold matter, a speech inciting hatred meets the initial criminal act requirement for persecution as a crime against humanity when the speech "actively encourages ethnic hatred, murder and extermination" and "creates in its audience a sense of imminent threat and the need to act violently against an ethnic minority and against political opponents.[228] In such circumstances, according to ICTR precedent, it represents the criminal act of persecution, which is the gross or blatant denial of a fundamental right on discriminatory grounds.[229] The guilty mental state for this crime is discriminatory intent to deny the right.[230]

Turning again to ICTR precedent for guidance, the Supreme Court found that Mugesera's speech occurred in a volatile situation characterized by rampant ethnic tensions and political instability, which had already led to the commission of massacres.[231] A speech such as Mugesera's, the Court opined, which actively encouraged ethnic hatred, murder and extermination and which created in its audience a sense of imminent threat and the need to act violently against an ethnic minority and against political opponents, bore the hallmarks of a gross or blatant act of discrimination equivalent in severity to the other underlying acts listed in the Canadian crimes

---

[226] *Id*. ¶ 1073.
[227] Mugesera Judgment, *supra* note 160, ¶ 124.
[228] *Id*. ¶ 148.
[229] *Id*. ¶ 145
[230] *Id*. The Court pointed out, however, that the ICTY, in contrast, found in *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Judgment, ¶ 209 (Feb. 26, 2001) that the hate speech alleged in the indictment did not constitute persecution because it did not rise to the same level of gravity as the other enumerated acts. Mugesera Judgment, *supra* note 160, ¶ 146.
[231] *Id*. ¶ 148

against humanity statue (s. 7(3.76)). The criminal act requirement for persecution was therefore met.[232]

The Court also concluded that Mugesera targeted Tutsi and political opponents on the sole basis of ethnicity and political affiliation with the intent to compel his audience into action against these groups.[233] Thus he possessed the requisite criminal intent for the crime against humanity of persecution.[234]

b. Universal Jurisdiction Statutes

As noted previously, crimes against humanity are among those *jus cogens* crimes that give rise to universal jurisdiction.[235] Many of the states that have universal jurisdiction statutes conferring subject matter jurisdiction over the crime of genocide also extend that jurisdiction to crimes against humanity.[236] Applying the precedents set forth above, these states could prosecute Ahmadinejad for crimes against humanity (persecution) in connection with his advocating the destruction of Israel.

B. Potential Jurisdictions

The other part of the analysis involves examining possible jurisdictions. Prosecution advocates have suggested three procedural avenues: (1) the International Court of Justice; (2) the International Criminal Court and (3) municipal criminal courts. Each of these options shall be considered in turn.

1. The International Court of Justice

Article IX of the Genocide Convention declares that "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[237] The ICJ was created by the UN Charter (art. 92) and is the primary judicial organ of the UN.[238] The ICJ exercises jurisdiction solely over claims arising between nations.[239] Article IX of the Genocide Convention has been the basis of ICJ litigation. In 1993, Bosnia and

---

[232] *Id*.

[233] *Id*. ¶ 149.

[234] *Id*.

[235] *See* Bassiouni, *supra* note 197, at 68. *But see* Jill C. Maguire, *Rape under the Alien Tort Statute in the Post-Sosa v. Alvarez-Machain Era*, 13 GEO. MASON L. REV. 935, 968 ("Crimes against humanity are not considered *jus cogens* norms.").

[236] *See* Amnesty International, *supra* note 200, Chapter 6 (noting that approximately 95 states have enacted laws which would permit their courts to exercise universal jurisdiction over persons suspected of at least some crimes against humanity, and that, for example, Canada, Belgium, New Zealand, and Venezulea have adopted legislation expressly providing for universal jurisdiction over crimes against humanity).

[237] Genocide Convention, *supra* note 8, art. IX.

[238] *See* William L. Hurlock, *The International Court of Justice: Effectively Providing a Long Overdue Remedy for Ending State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)*, 12 AM. J. I'NTL L. & POL'Y 299, 309 (1997).

[239] *See* Andreas L. Paulus, *From Neglect to Defiance: The United States and International Adjudication*, 15 EUR. J. INT'L L. 783, 802 (2004).

Herzegovina instituted proceedings in the ICJ against Serbia and Montenegro alleging violations of the Genocide Convention in connection with the civil war then being fought over the break-up of the former Yugoslavia.[240]

Certain commentators have urged signatories to the Genocide Convention, such as Israel, the United States or the United Kingdom, to file a complaint asking the International Court of Justice for a ruling that Iran, through Ahmadinejad's incitement, violated the Genocide Convention: "Should not states whose citizens include Holocaust survivors, such as Canada or Germany, be considered "parties to the dispute?" [241] Such a ruling would presumably include enjoining Ahmadinejad from committing further incitement.

2. The International Criminal Court

As noted above, Ahmadinejad could theoretically be prosecuted at the ICC under the Rome Statute for committing direct and public incitement to commit genocide or crimes against humanity (persecution). Proceedings at the ICC may be initiated in one of three ways: a State Party referring a crime the Prosecutor for investigation; (2) the Prosecutor initiating an investigation; and (3) the Security Council (acting under Chapter VII of the UN Charter) referring a case to the Prosecutor.[242] The first two ways are based on consent -- parties consent to the jurisdiction of the ICC by: (1) becoming a signatory to the Rome Statute or (2) consenting, on a case by case basis, to allow the Court to exercise jurisdiction over its nationals.[243] In these cases, the crimes at issue must be committed on the territory of a State party or by a national of a State Party.[244] The Security Council may refer States that are not signatories or have not consented to ICC jurisdiction.[245]

3. Municipal Criminal Courts

For those states that criminalize the *jus cogens* crimes of genocide or crimes against humanity, regardless of the crime's location or perpetrator, the universality principle would provide a basis for asserting jurisdiction.[246] Alternative means for asserting jurisdiction might also be

---

[240] *See* Geoffrey S. DeWeese, *The Failure of the International Court of Justice to Effectively Enforce the Genocide Convention*, 26 DENV. J. INT'L L. & POL'Y 625, 627 (1998). The ICJ found that Serbia had not committed genocide but had violated its duties under the Genocide Convention by failing to prevent the massacre of Bosnian males at Srebrenica. *See Serbia Cleared of Genocide, Failed to Stop Killing*, Reuters, Feb. 26, 2007, http://www.reuters.com/article/homepageCrisis/idUSL26638724._CH_.24 00.

[241] Ahmadinejad Referral, *supra* note 10, at 34. *See*, *also* Joshua Rosenberg, *Four Ways to Act against Ahmadinejad*, DAILY TELEGRAPH (London), Feb. 16, 2007, at 026 (". . . Britain, America or pretty well any other country could request a ruling from the UN court over whether Iran was responsible for its president's remarks and what amends the country should make.").

[242] Rome Statute, *supra* note 9, art. 13. *See also* Lance Phillip Timbreza, *Captain Bridgeport and the Maze of ICC Jurisdiction*, 10 GONZ. J. INT'L L. 348, 351 (2007).

[243] Rome Statute, *supra* note 9, art. 12. *See also* Timbreza, *supra* note 242, at 364.

[244] Rome Statute, *supra* note 9, art. 12.

[245] *See* Linnea D. Manashaw, *Genocide and Ethnic Cleansing: Why the Distinction? A Discussion in the Context of Atrocities Occurring in Sudan*, 35 CAL. W. INT'L L. J. 303 n.7 (2005). This was the situation in connection with the Security Council's referral of the Darfur case to the ICC. *Id*.

[246] Bassiouni, *supra* note 197, at 68.

available.[247] For example, under the "passive personality" principle, a state may exercise jurisdiction when one of its nationals is a crime victim.[248] This could potentially empower Israel to assert jurisdiction against Ahmadinejad in an incitement prosecution.[249] Other countries with expansive genocide legislation and a relatively large Jewish population, such as Canada,[250] might also consider exercising jurisdiction under this principle.

Israel might also assert jurisdiction under the "protective principle." Under this rule, jurisdiction is asserted by the forum state over non-nationals of the forum state for acts committed outside the forum state that may impinge on the territorial integrity, security, or political independence of the forum state.[251] In this case, Ahmadinejad's threats to destroy Israel, coupled with his country's apparent efforts to develop nuclear weapons,[252] represent a credible threat to Israel's integrity or security.

IV. APPLYING THE FRAMEWORK: ANALYZING THE VIABILITY OF PROSECUTION

A. Substantive Analysis

1. Direct and Public Incitement to Commit Genocide

a. General Genocidal Intent

To review, genocide consists of certain harmful acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.[253] As a threshold matter, would Israel or the Jewish people of Israel, the group Ahmadinejad targets in his speeches, constitute a national, ethnic or religious group? In the very document that gave the nation its existence, Israel referred to itself as a "Jewish" state.[254] Moreover, it is generally understood that

---

[247] The most common bases for asserting jurisdiction, the "territorial" and "nationality" or "active personality" principles, would presumably not be available in this case. *See* Matthew D. Campbell, *Bombs over Baghdad: Addressing Criminal Liability of a U.S. President for Acts of War*, 5 WASH. U. GLOBAL L. REV. 235, 254 (2006). The "territorial principle" permits assertion of jurisdiction over the defendant when the crime at issue is committed on the territory of the forum state. *Id*. The "nationality principle" gives rise to jurisdiction when the alleged defendant is a national of the forum state. *Id*.

[248] *See* Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 711-712 (2007).

[249] Israeli Genocide Law, *supra* note 204. Section 5 of this law states: "A person who has committed outside Israel an act which is an offence under this Law may be prosecuted and punished in Israel as if he had committed the act in Israel." Section 3(a)(2) criminalizes "incitement to genocide." *Id*.

[250] Canada is estimated to have the world's fourth largest Jewish population. *See World Jewish Population, 2005*, American Jewish Committee Archives, http://www.ajcarchives.org/AJC_DATA/Files/ 2005_4_WJP.pdf (last visited July 15, 2007).

[251] Giardino, *supra* note 248, at 711.

[252] *See* Calabresi, *supra* note 5, at 33.

[253] Genocide Convention, *supra* note 8, art. II.

[254] *See* Declaration of the Establishment of the State of Israel, May 14, 1948, *available at* http://www.truman library.org/israel/declare.htm (last visited Aug. 3, 2007) (stating that the new nation is re-establishing in "Eretz Israel [the "land of Israel"] the Jewish State . . .").

Ahmadinejad utters his harangues in "a politically charged environment that often equates all Jews with Israel and routinely witnesses the burning of the 'enemy' flag."[255]

If he were brought to court on incitement to genocide charges, Ahmadinejad might respond that approximately 25,000 Jews live in Iran[256] -- if he meant to destroy all Jews, certainly he would kill the easily accessible Iranian Jews first. But that argument would be unavailing. In the first place, the Genocide Convention applies to the intent to destroy in whole *or in part* a specified group.[257] Thus, in *Prosecutor v. Krstic*, the ICTY had to determine whether the execution by Bosnian-Serb forces of 8,000 to 10,000 military-aged Bosnian Muslim men in Srebrenica in July 1995, only a fraction of Bosnian Muslims in the area, constituted genocide.[258] The ICTY concluded that "the Bosnian Muslim men of military age . . . represented a sufficient part of the Bosnian Muslim group so that the intent to destroy them qualifies as an 'intent to destroy the group in whole or in part . . . .'"[259] Similarly, it is likely that a court would find that Ahmadinejad's intent to destroy the Jews of Israel, only a part of the world's Jews (albeit a significant part) would, at a minimum, qualify as intent to destroy the Jewish group in part for purposes of the Genocide Convention.

Moreover, even if the prosecution could not prove that Ahmadinejad, in desiring the destruction of Israel, did not have the intent to destroy a religious or ethnic group in part, it would still have the option of proving Ahmadinejad aimed to destroy a "national" group. "Israeli" Jews, at the very least, certainly constitute a "national" group.[260]

Failing that, the prosecution could rely on the ICTR's holding in the Akayesu Judgment, that, regardless of any so-called objective ethnographic or demographic classification of them, if Israelis could be considered a "stable and permanent group," they would qualify as a protected group within the meaning of the Genocide Convention.[261] The *Akayesu* Chamber held that there is an objective and a subjective factor in this. Objectively, Israeli Jews could be considered a "stable and permanent group" insofar as they have existed continuously for nearly sixty years.[262] Subjectively, according to the Akayesu Judgment, it would be enough that Ahmadinejad *perceived* the Israeli Jews as a distinct religious, national, or ethnic group.[263] In *Prosecutor v. Jelisic*,[264] the ICTY discarded the objective part of the equation and held that subjective factors alone -- particularly, the perspective of the perpetrator of the crime -- should determine group membership for purposes of finding genocide.[265] The Chamber held that a community's stigmatization of a certain group as a distinct national, ethnic, or racial group is the dispositive

---

[255] Scott Peterson, *In Ahmadinejad's Iran, Jews Still Find Space*, CHRIST. SCI. MON., April 27, 2007, at 1.
[256] *Id*.
[257] Genocide Convention, *supra* note 8, art. II.
[258] *Prosecutor v. Krstic*, Case No. IT 98-33, Judgment (Trial Chamber),¶ 581.
[259] *Id*.
[260] *See Judaism 101*, What Is Judaism?, http://www.jewfaq.org/judaism.htm (last visited Aug. 5, 2007) ("The traditional explanation, and the one given in the Torah, is that the Jews are a nation.").
[261] Akayesu Judgment, *supra* note 110, ¶ 516.
[262] *See* THE COLUMBIA ENCYCLOPEDIA, *Israel*, 6th Ed. (New York: Columbia University Press 2001), *available at* http://www.bartelby.com/65/is/Israel.html (last visited Aug. 5, 2007).
[263] *Id*. ¶ 171.
[264] *Prosecutor v. Jelisic*, Case No. IT-95-10, Judgment (Dec. 14, 1999).
[265] *Id*. ¶ 70.

factor in judging whether the alleged perpetrators perceive the target group as such.[266] Although this would be a question of fact, Ahmadinejad's derogatory rants regarding Israelis appear to constitute strong proof of such a perception.[267]

b. The Elements of Direct and Public Incitement

It will be recalled that, based on existing jurisprudence, a grid of five analytic elements must be analyzed to determine if Ahmadinejad has committed the crime of direct and public incitement to commit genocide: (1) the "public" element; (2) the "direct" element; (3) the "incitement" element (or speech "content"); (4) *mens rea*; and (5) causation.

i. The Public Element

This is perhaps the easiest element to analyze. The *Akayesu* Trial Chamber found that public incitement is characterized by a call for criminal action to a number of persons in a public place or to members of the general public at large by such means as the mass media, for example, radio or television.[268] Ahmadinejad's hate advocacy satisfies both these tests. For example, much of his doomsday rhetoric against Israel was uttered at public gatherings, such as "anti-Zionism" conferences or during press conferences. Moreover, all of his eliminationist urgings regarding Israel (at least those cited herein), were widely disseminated through the mass media.

ii. The Direct Element

This element would certainly be more challenging to prove. The *Akayesu* Trial Chamber held "that the direct element of incitement should be viewed in the light of its cultural and linguistic content."[269] As noted above, a case-by-case factual inquiry is necessary. That inquiry would consist of determining "whether the persons for whom the message was intended immediately grasped the implication thereof."[270]

At first blush, this might not seem to present too difficult a challenge for prosecutors. After all, among other things, Ahmadinejad stated in October 2005 that Israel should be "wiped off the face of the map." However, a closer look reveals three potential proof hurdles: (1) translation issues; (2) difficulties defining the incitement's target; and (3) determining the intended audience for the incitement.

(a) Potential Translation Issues

It is generally accepted that Ahmadinejad called for Israel to be wiped off the map. But is that really what he said? We are reading, after all, a translation into English of something originally communicated in Farsi (otherwise known as Persian), Ahmadinejad's mother tongue[271] and the

---

[266] *Id*. ¶¶ 70-71

[267] The issue of whether Ahmadinejad's audience would *perceive* his statements as calls to destroy the people of Israel will be considered in sub-section IV.A.1.b.ii herein, under the "Direct Element."

[268] Akayesu Judgment, *supra* note 110, ¶ 556.

[269] *Id*. note 119, ¶ 557.

[270] *Id*. ¶ 558.

[271] *See* Michelle Malkin, *Letters to Ahmadinejad*, Nov. 29, 2006, *available at* http://michellemalkin.com/2006/11/29/letters-to-ahmadinejad/.

primary language spoken in Iran.[272] Some experts have disputed the "wipe off the face of the map" translation.[273]

For example, Professor Juan Cole, a Middle East specialist at the University of Michigan has argued that the Iranian president was misquoted.[274] Professor Cole, a critic of the Bush Administration's Iran policy, acknowledged that "[Ahmadinejad] did say he hoped its regime, *i.e.*, a Jewish-Zionist state occupying Jerusalem, would collapse."[275] But given that Iran has not "attacked another country aggressively for over a century," Professor Cole added that he smelled in the "wipe off the face of the map" translation "the whiff of war propaganda."[276]

Another Middle East commentator, Jonathan Steele of the UK Guardian newspaper, has likened the interpretation of Ahmadinejad's October 2005 Israel speech to Nikita Kruschev's "we will bury you" comment made at a Kremlin reception for western ambassadors in 1956.[277] Calling it the "greatest misquotation of the Cold War," he noted that "those four words were seized on by American hawks as proof of aggressive Soviet intent."[278] In fact, according to Steel, Khrushchev had actually said: "Whether you like it or not, history is on our side. We will bury you."[279] It was, Steele contends, a harmless boast about socialism's eventual victory in the ideological competition with capitalism. Steele insists that Khrushchev was not talking about war."[280]

Steele goes on to argue that Ahmadinejad's statement was not merely taken out of context, as was Khrushchev's, it was also mistranslated and is now being used for propaganda purposes:

> The Iranian president was quoting an ancient statement by Iran's first Islamist leader, the late Ayatollah Khomeini, that "this regime occupying Jerusalem must vanish from the page of time" just as the Shah's regime in Iran had vanished. He was not making a military threat. He was calling for an end to the occupation of Jerusalem at some point in the future. The "page of time" phrase suggests he did not expect it to happen soon. There was no implication that either Khomeini, when he first made the statement, or Ahmadinejad, in repeating it, felt it was imminent, or that Iran would be involved in bringing it about. But the propaganda damage was done, and western hawks bracket the Iranian president with Hitler as though he wants to exterminate Jews. At the recent annual convention of the American Israel Public Affairs Committee, a powerful lobby group, huge screens switched between pictures of Ahmadinejad making the false "wiping off the map" statement and a ranting Hitler.[281]

---

[272] *See* Columbia Iran Article, *supra*, note 14.
[273] *See* Ethan Bronner, *Just How Far Did They Go, Those Words Against Israel?*, N.Y. TIMES, June 11, 2006, at 4.4.
[274] *Id*.
[275] *Id*.
[276] *Id*.
[277] Jonathan Steele, *If Iran Is Ready to Talk, the U.S. Must Do So Unconditionally*, THE GUARDIAN (Manchester, UK), June 2, 2006, at 33.
[278] *Id*.
[279] *Id*.
[280] *Id*.
[281] *Id*.

But there is plenty of evidence indicating the translation is accurate. Most persuasive, perhaps, is the fact that all official translations of Ahmadinejad's statement, including a description of it on his web site (www.president.ir/eng/), refer to "wiping Israel away."[282] And prominent Iranian translators say "wipe off" or "wipe away" is more accurate than "vanish" because the Persian verb is active and transitive.[283]

The second translation issue concerns the word "map." Khomeini's words, repeated by Ahmadinejad, were allegedly abstract: "Sahneh roozgar." "Sahneh" means "scene" or "stage," and "roozgar" means time.[284] The phrase was consistently translated as "map," and leading up to Ahmadinejad's October 2005 speech, no one seemed to object to this translation. In his October 2005 speech, however, Ahmadinejad apparently misquoted Khomeini, saying not "Sahneh roozgar" but "Safheh roozgar," meaning "pages of time" or "history." No one noticed the change, though, and news agencies, as well as the Iranian government, used the word "map" again.[285]

Ahmad Zeidabadi, a professor of political science in Tehran whose specialty is Iran-Israel relations, explains that "map" is perhaps the most accurate rendering of the term:

> It seems that in the early days of the revolution the word 'map' was used because it appeared to be the best meaningful translation for what he said. The words 'sahneh roozgar' are metaphorical and do not refer to anything specific. Maybe it was interpreted as 'book of countries,' and the closest thing to that was a map. Since then, we have often heard 'Israel bayad az naghshe jographya mahv gardad' — Israel must be wiped off the geographical map. Hard-liners have used it in their speeches.[286]

Yet another translation issue concerns Ahmadinejad's supposed use of the term "occupying regime of Jerusalem" rather than plain "Israel."[287] The New York Times points out that, to some analysts, this means he was calling for regime change, not war, and therefore it need not be regarded as a call for military action.[288] In support of this interpretation, Professor Cole states: "I am entirely aware that Ahmadinejad is hostile to Israel. The question is whether his intentions and capabilities would lead to a military attack, and whether therefore pre-emptive warfare is prescribed. I am saying no, and the boring philology is part of the reason for the no."[289]

However, the New York Times also notes that, to others, "occupying regime" signals more than opposition to a certain government -- the phrase indicates "the depth of the Iranian president's rejection of a Jewish state in the Middle East because he refuses even to utter the name Israel."[290]

---

[282] Bronner, *supra* note 273.
[283] *Id*.
[284] *Id*.
[285] *Id*.
[286] *Id*.
[287] *Id*.
[288] *Id*.
[289] *Id*.
[290] *Id*.

Ahmadinejad has said that the Palestinian issue "does not lend itself to a partial territorial solution" and has called Israel "a stain" on Islam that must be erased.[291]

Moreover, it is not as if the October 2005 pronouncement were uttered in isolation. A review of Ahmadinejad's statements since taking the helm in Tehran reveals other occasions where he has spoken of Israel's destruction[292] and they have apparently not been the subject of translation controversies.

In any event, analysis of Ahmadinejad's words entails more than mere "boring philology." Regardless of translation, when the statements are placed in the context of Iran's longstanding anti-Israel policy, its support for terrorist organizations bent on annihilating the Jewish state, its parading missiles marked with words urging Israel's liquidation, and Ahmadinejad's refusal to acknowledge the Holocaust, a solid argument can be made that the recipient of his messages immediately grasped the implication of the messages – advocacy for the destruction of Israel.

This interpretation is consistent with the jurisprudence of the ICTR Akayesu, Kambanda and Nahimana Judgments, as well as the Canadian Mugesera Judgment. Those cases teach that even facially ambiguous statements -- those that refer, for instance, to "*Inkotanyi*" (roughly translated roughly as "warrior"), "*Inyenzi*" (cockroach),[293] blood drunken by dogs, or members of an ethnic group being returned to their supposed homeland using river transportation can constitute "direct" incitement. Given the history of Rwanda, the context of the place and time of these pronouncements, and the evolved special meaning of the words, incitement was established. So may it be arguably established in the case of Ahmadinejad's statements regarding Israel.

Ahmadinejad could respond that, in each of the cited Rwandan cases, the utterances issued during times of violence against the targeted group. Without specific instances of violence perpetrated directly by Iran against Israel, his argument would go, the words uttered against the target group in this case could not be considered sufficiently direct.

While at first blush this argument may have some traction, it is not likely to hold up. In the first place, there is credible evidence that Ahmadinejad has been supporting terrorist groups attacking Israeli civilians and that he therefore has had a hand in violence against the group he is verbally attacking. Moreover, his country is attempting to develop nuclear weapons for the ostensible purpose of annihilating Israel – the slogans on the Shahab-3 missiles paraded before Ahmadinejad – that Israel should be destroyed – strongly suggest what Ahmadinejad would seek to do with the missiles once his scientists fortify them with nuclear warheads.

Certain of Ahmadinejad's other urgings, when considered within the larger body of his statements calling for Israel's destruction, might also be interpreted as sufficiently "direct" to qualify as incitement. For example, his August 1, 2006 speech equating Israeli Jews to "cattle," "bloodthirsty barbarians," and "criminals" and his April 14, 2006 statement likening the Israeli nation to a "rotten, dried tree" that will soon vanish in a "storm" had the effect of dehumanizing Israelis. In the Rwandan context, comparable dehumanization (where the Rwandan Prime

---

[291] *Id*.
[292] *See supra* notes 79-89 and accompanying text.
[293] *See supra* note 122.

Minister equated Tutsis to "dogs" that were "drinking" Hutu blood), in tandem with other incendiary pronouncements, was found to be sufficiently direct to constitute incitement in the Kambanda Judgment.[294]

The incitement finding in Kambanda was also based, in part, on his telling Hutus that they were being attacked by Tutsis and were not fighting back (*i.e.*, telling Hutus that Tutsis were drinking their blood without any repercussions).[295] Ahmadinejad's statements indicating that Muslims were under attack by Israel, thereby suggesting that the Islamic world should attack Israel to stop the violence, when placed within the framework of his other shouts for Israel's destruction, might similarly be considered sufficiently direct to constitute incitement. For example, Ahmadinejad exclaimed in December 2005 that Israel was "killing" Palestinians[296] and in April 2006 he stated that the Palestinians were "burning" as the result of Israel's crimes.[297]

Similarly, based on ICTR precedent, Ahmadinejad's congratulating or condoning violence against Israelis, when anchored to his direct calls for destruction, would seem to be direct enough to constitute incitement. The ICTR explicitly held that Kambanda's congratulating Hutus for massacring Tutsis constituted incitement.[298] This was also the case with respect to Ruggiu's congratulating Rwandan killers for slaughtering Tutsis on RTLM.[299] Thus, Ahmadinejad's commenting positively regarding Palestinian terrorist attacks against Israel in October 2005 arguably constitutes incitement.[300]

ICTR precedent also suggests that Ahmadinejad's "prediction" speeches are direct enough to constitute incitement. For example, his April 14, 2006 "prediction" that the "Zionist regime" would be "annihilated" could be contextually interpreted as directly calling for the destruction of the people of Israel (as could his other predictions regarding Israel's destruction).[301] In the Nahimana Judgment, for example, certain RTLM broadcasts, such as the following, which predicted destruction of the "Inyenzi," were among those emissions found to constitute incitement:

> . . . I think we are fast approaching what I would call dawn… dawn, because--for the young people who may not know--dawn is when the day breaks. Thus when day breaks, when that day comes, we will be heading for a brighter future, for the day when we will be able to say "There isn't a single Inyenzi left in the country." The term Inyenzi will then be forever forgotten, and disappear for good…[302]

---

[294] Kambanda Judgment, *supra* note 124.

[295] *Id*. This type of incitement has been referred to as "accusation in a mirror." *See* Gordon, *supra* note 108, at 186. Through this tactic, one imputes to the adversary one's own intentions and plans. *Id*. It is used to persuade the audience that attack by the enemy justifies taking whatever measures are necessary for legitimate defense. *Id*.

[296] *See supra* note 92.

[297] *See supra* note 93.

[298] Kambanda Judgment, *supra* note 124, ¶ 39(viii).

[299] Ruggiu Judgment, *supra* note 130, ¶ 50.

[300] *See* Israel Should Be Moved, *supra* note 90.

[301] *See supra* notes 82-89.

[302] Nahimana Judgment, *supra* note 136, ¶ 405. *See also* Gordon, *supra* note 108, at 185-86 (explaining that "incitement can take many forms" and speech which does not explicitly order its listeners to commit murder can nevertheless constitute incitement because, in certain contexts, it "conditions a population for genocide . . .").

(b) Target of the Incitement?

Ahmadinejad could respond that, even if he were inciting to destruction, his incitement was direct only insofar as it targeted the "Zionist regime" or the Israeli government, not the Jewish people of Israel themselves. But experts note that hate rhetoric aimed at Zionism is readily perceived as an attack on Judaism itself.[303] For example, eminent historian Yehuda Bauer, Professor of Holocaust Studies at the Hebrew University of Jerusalem, has argued:

> If you advocate the abolition of Israel ... that means in fact that you're against the people who live there. If you are, for example, against the existence of Malaysia, you are anti-Malay. If you are against the existence of Israel, you are anti-Jewish.[304]

The U.S. Commission on Civil Rights announced in 2006 that anti-Israelism or anti-Zionism is the equivalent of anti-Semitic bigotry on American college campuses. It concluded that "anti-Semitic bigotry is no less morally deplorable when camouflaged as anti-Israelism or anti-Zionism."[305]

And any argument that Ahmadinejad's motives in urging the destruction of Israel are anti-Semitic is given further credence by his fervent Holocaust denial, which many see as another form of anti-Semitism. Noted Historian Deborah Lipstadt flatly refers to Holocaust denial as "anti-Semitic ideology."[306] Holocaust denial has also been characterized as "manufactured myth" and a "groundless belief" that is "used to stir up Jew-hatred."[307] And this is especially true in the context of the Middle East: "One predictable strand of . . . Islamic anti-Semitism is Holocaust denial..."[308]

Responding to those who would note that Ahmadinejad has not explicitly called for the murder of Israel's Jews, William Schabas notes that "[t]he history of genocide shows that those who incite the crime speak in euphemisms."[309] In the end, any prosecution of Ahmadinejad for incitement would certainly entail a battle of the experts (possibly including historians, social linguists, and political scientists) regarding the translation of his words, their contextual meaning, and his audience's interpretation of them.

---

[303] *See*, *e.g.*, Ahmadinejad Indictment, *supra* note 10, Section II.A., ¶ 2 ("The accused refers to Jews in his anti-Semitic statements as Zionists.").

[304] Yehuda Bauer, Interview with Michael Krasney on KQUED, Jan. 11, 2005, http://www.kqed.org/epArchive/R501111000.

[305] *Findings and Recommendations of the U. S. Comm'n. on Civ. Rts. Regarding Campus Anti-Semitism*, U.S. Comm'n on Civ. Rts., April 3, 2006, http://www.usccr.gov/pubs/050306FRUSCCRRCAS.pdf.

[306] DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 11 (1994).

[307] FREDERICK M. SCHWEITZER & MARVIN PERRY, ANTI-SEMITISM: MYTH AND HATE FROM ANTIQUITY TO THE PRESENT 3 (Palgrave Macmillan 2002).

[308] *Id*. at 10.

[309] William A Schabas, *Mugesera v. Minister of Citizenship and Immigration*, 93 AM. J. INT'L L. 529, 530 (1999).

(c) The Intended Audience?

Audience interpretation may also be a significant issue. In particular, any body judging Ahmadinejad on incitement charges would be obliged to determine exactly what constituency or population segment was the intended audience for his anti-Israeli outpourings. While in certain cases the speeches were made before exclusively Iranian audiences, they were typically broadcast internationally. Perhaps an expert could divine the significance of certain words heard by an Iranian audience but would the same Persian understanding of the words extend to an international audience? What would the "international audience" consist of? Could the international audience be considered Moslem in general or could it be more narrowly categorized as extreme Islamist?

Such factual issues would have to be resolved by those who would sit in judgment of Ahmadinejad but, at the very least, it seems an analysis of the meaning of the speeches from an Iranian perspective would have to be included. Assuming the target audience is Iranian, the question arises as to what exactly the incitement is urging the population to do. If Ahmadinejad himself, or the Iranian government, would push the button launching nuclear missiles against Israel, why must Iranian civilians be persuaded to attack? The answer may lie in Ahmadinejad's efforts to create consensus for an Iranian policy that would result in mass murder and could trigger a war that Iranian citizens would have to fight. The Iranian population has expressed dissent against Ahmadinejad and he has attempted to quell such opposition through both speechifying and repression.[310] This argument would certainly be available to prosecutors but ultimately this is an issue of fact that would have to be resolved at trial.

In any event, even if Ahmadinejad could successfully argue that he has not been advocating for the "destruction" of Israel or the "murder" of Israeli Jews, he has indisputably urged their forced expulsion from the geographic territory now recognized as Israel. It will be recalled that on Dec. 8, 2005, Ahmadinejad called for removing Jews from Israel and forcefully relocating them to Europe.[311] One week later, he advocated ethnically or religiously cleansing the Middle East of Israeli Jews by redistributing them from Israel to Europe, the United States, Canada or Alaska.[312]

Prosecutors could argue that, at the very least, Ahmadinejad has advocated for acts that would cause serious mental (if not bodily) harm to Israeli Jews. Forced relocation, apart from the fact that it is typically accompanied by other human rights abuses, results in destruction of identity, residence, family structure, livelihood, and general physical protection.[313]

For the same reasons, prosecutors may also argue that such forced expulsion would amount to deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. In the Akayesu Judgment, the ICTR interpreted acts constituting "conditions of life calculated to bring about [an ethnic group's] . . . physical destruction . . . [as]

---

[310] *See*, *e.g.*, Robert Tait, *Students Protest Against Ahmadinejad*, THE GUARDIAN (Manchester UK), Sept. 12, 2006, at 16; Alireza Jafarzadeh, *Mahmoud Ahmadinejad's Gas Rationing Causes Riots in Iran*, FOXNews.com, June 29, 2007, http://www.foxnews.com/story/0,2933,287424,00.html?sPage=fnc. foxfan/blogs.

[311] *See* Israel Should Be Moved, *supra* note 90.

[312] *See* Leader Renews Furor, *supra* note 99.

[313] *See* Marco Simons, *The Emergence of a Norm against Arbitrary Forced Relocation*, 34 COLUM. HUM. RTS. L. REV. 95, 112 (2002).

subjecting a group of people to a subsistence diet, *systematic expulsion from homes* and the reduction of essential medical services below minimum requirement."[314]

iii. The Incitement Element

It will be recalled that the Nahimana Judgment identified four criteria to determine whether hate speech constitutes the legitimate exercise of freedom of expression or the commission of criminal incitement: (1) purpose; (2) text; (3) context; and (4) the relationship between speaker and subject. Ahmadinejad's statements regarding Israel would appear to meet each of these criteria.

With respect to "purpose," Ahmadinejad's mind-set is revealed by the evidence just discussed – the ensemble of his remarks regarding Israel, including those murderous words festooned to his parade missiles, his country's long-standing eliminationist policy toward Israel, Iran's clandestine and assiduous development of a nuclear weapons capacity, Ahmadinejad's active support of terrorist organizations devoted to eliminating Israel and engaged in murdering Israeli civilians, and his fervent Holocaust denial. His words in no way appear to be cloaked in even a nominal patina of legitimacy – such as raising ethnic consciousness, journalistic reporting, or detached historical exegesis.

The "wipe off the map" speech of October 2005 seems to satisfy the "text" element on its face. For the reasons stated in connection with the directness element, the other pronouncements dehumanizing Israeli Jews, congratulating murderers of Israeli civilians, and predicting Israel's destruction are also textually incriminatory. The import of the words is an exhortation to raze the Jewish state. Granted, the Holocaust denial statements are a closer call. While they may not be facially incriminating from an incitement perspective, and therefore not the subject of separate counts in an indictment, they serve as damning circumstantial evidence of the textual and mental criminality in relation to the other chargeable statements.

---

[314] Akayesu Judgment, *supra* note 110, ¶ 506 (emphasis added). On the other hand, it is not clear that "ethnic cleansing" would necessarily qualify as genocide. "Ethnic cleansing" has been defined as "rendering an area ethnically homogenous by using force or intimidation to remove from a given area persons from another ethnic or religious group." *See* Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, U.N. SCOR, Annex IV, at 1, S/1994/674/Add.2 (1994), *available at* http://www.ess.uwe.ac.uk/comexpert/ANX/IV.htm#Debut (last visited Aug. 4, 2007). Professor William Schabas notes that the drafters of the Genocide Convention proposed to add "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" to the list of acts considered genocide. *See* William A. Schabas, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Problems of International Codification -- Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287, 296 (2001) [hereinafter Problems of International Codification]. Ultimately, the proposed addition resembling the crime of ethnic cleansing was not included in the Genocide Convention's definition of genocide because of U.N. members' concerns over already completed "forced transfers of minority groups" by the U.N. itself. *See* Schabas, Problems of International Codification, at 296. Nevertheless, certain commentators believe that "ethnic cleansing" fits the definition of genocide. *See*, *e.g.*, John Webb, *Genocide Treaty -- Ethnic Cleansing -- Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377, 379 (1993) ("The practice of "ethnic cleansing," also referred to as "ethnic purification," involves the elimination of rival ethnic groups of political opposition. The practice may also constitute genocide which requires condemnation by the international community under the Genocide Convention.").

The context of the statements, for the reasons stated above, strongly supports the argument that they constitute illegal incitement, rather than legitimate free speech. As demonstrated previously, circumstances external to and surrounding the text in each of Ahmadinejad's chargeable statements help the finder of fact grasp the text's significance. These circumstances include overall Iranian policy goals, the entire body of Ahmadinejad's public comments about Israel, his support of terrorists and his blatant Holocaust denial. Also potentially relevant, in this regard, is the fact that Israeli civilians were being killed by terrorist groups supported by Ahmadinejad during the period in which Ahmadinejad was issuing these proclamations.

Moreover, Ahmadinejad in no way attempted to distance himself from the statements by attributing them to someone else, for instance, or proposing them hypothetically for the sake of academic argument. Additionally, the tone of the statements ought to be considered. If, from a vocal perspective, they were issued in a pitched, bellicose manner, the argument for incitement becomes stronger. A milder academic intonation, on the other hand, could be used by the defense to help negate this element.

With regard to the relationship between the speaker and the subject, the Ahmadinejad rants against Israel do not seem to implicate a minority or disenfranchised group expressing dissent related to the policies or practices of a majority or controlling group. Ahmadinejad has been speaking as President of Iran, a sovereign nation equal in status to other sovereigns in the family of nations, including Israel.

Ahmadinejad could potentially argue that Israel is supported by the United States, the world's only superpower and nominally an enemy of Iran that has been controlling Iran's actions around the world to the benefit of American and Israeli interests. His expression, he could therefore argue, represents dissent against the American-Israeli hegemony. But Ahmadinejad might have difficulty convincing a court that calls for the total destruction of a nation represents a legitimate form of dissent.

iv. The *Mens Rea* Element

The evidence just considered also supports a finding that Ahmadinejad made his statements with a guilty mind. As elucidated by the Akayesu Judgment, the person who incites others to commit genocide must himself have the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnic, racial or religious group.[315] Marshaling proof of *mens rea* here is intimately tangled up with establishing the "directness" element and the "purpose" and "context" sub-elements under the "incitement" criterion. The evidence considered herein appears rather convincing in support of guilt but, as previously indicated, the issue would ultimately be decided by a thorough presentation of the evidence and an attendant battle of the experts.

v. The Causation Element

This element likely would be the proverbial "big white elephant" in the courtroom for any prosecution of Ahmadinejad for incitement. The Nahimana and Mugesera Judgments are crystal clear that proof of is not necessary to make out a case for incitement to genocide.

[315] Akayesu Judgment, *supra* note 110, ¶ 560.

But this jurisprudence may not be determinative. In the first place, the ICTR and Canadian judgments, although extremely persuasive,[316] are not binding on any court that tries Ahmadinejad.[317] Moreover, even without a formal causation requirement, no incitement prosecution has ever been brought in the absence of a subsequent genocide or other directly-related large-scale atrocity.[318] Given Ahmadinejad's status as head of a sizable, relatively powerful state in an unstable region and the messy foreign policy implications of attempting to prosecute him for genocide, odds are low any jurisdiction would go to the trouble. Even if it did, the absence of directly-related mass murder or widespread violence might prove fatal to any prosecution case not otherwise bulletproof.

2. Crimes against Humanity

For Ahmadinejad's Jeremiads against Israel to constitute crimes against humanity, his advocacy would have to be "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[319] This would be a difficult hurdle for prosecutors to overcome. Given the absence of direct Iranian attacks on Israeli civilians, they would have to tie Ahmadinejad's calls for Israel's destruction to attacks on Israeli citizens by Iran's clients -- Hezbollah or Hamas/Islamic Jihad.

While this might prove quite challenging, it is nevertheless legally possible. In the first place, international law recognizes the responsibility of sponsor states for atrocities committed by clients in territory outside the control of the sponsor state. For example, the International Court of Justice in *Nicaragua v. United States* held that a state could incur international responsibility for violations of international humanitarian law if it exercised "effective control" over armed rebels fighting in another state. [320] In *Prosecutor v. Tadic*, the ICTY held that there was an international armed conflict (not an internal armed conflict) in Bosnia & Herzegovina where the Army of Republika Srpska was sufficiently linked to the Federal Republic of Yugoslavia.[321] In so finding, the ICTY criticized the ICJ's *Nicaragua* linkage test as "at variance with international judicial and State practice" and required a "lower degree of control" to find linkage between the

---

[316] *See* David Marcus, *The Normative Development of Socioeconomic Rights through Supranational Litigation*, 42 STAN. J. INT'L L. 53, 99 (2006) ("Furthermore, the decisions of international criminal tribunals have as close to a *stare decisis* effect as international law recognizes."); Peggy E. Rancilio, *From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation*, 78 U. DET. MERCY L. REV. 299, 324 (2001) (Although these decisions would not have the precedential value of *stare decisis*, they would serve to create a body of jurisprudence upon which other systems could rely when interpreting the same human rights provisions.").

[317] *See* Alison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 35 (2006) ("*Stare decisis* does not formally operate in international law.").

[318] *See*, *e.g.*, Justus Reid Weiner, *Referral of Iranian President Mahmoud Ahmadinejad on the Charge of Incitement to Commit Genocide*, Scholars for Peace in the Middle East, Dec. 19, 2006, ¶ 71, http://www.spme.net/cgi-bin/articles.cgi?ID=1565#_ftnref138 ("Sadly, the historical record shows that the international community has never before prosecuted incitement until after thousands or millions were killed.").

[319] Rome Statute, *supra* note 9, art. 7.

[320] *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14, 62, 64-65, ¶ 109 (June 27) (requiring a certain degree of "dependence on the one side and control on the other"); *Id.* (finding "no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf"); *Id.* ¶ 115 (requiring "effective control").

[321] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Appeals Chamber, Judgment (May 7, 1997) [hereinafter 1997 Tadic Judgment]. For a helpful contemporaneous analysis of the holding, *see generally* Michael P. Scharf, *International Decisions*, 91 AM. J. INT'L L. 718 (1997).

sponsor state and its client.[322] Although it presents a question of fact to be resolved at any eventual trial, it is certainly conceivable that Ahmadinejad's support of Hezbollah and Hamas/Islamic Jihad sufficiently links him to those organization's attacks against Israeli civilians such that his "destroy Israel" speeches could be tied to those attacks.

Moreover, "[t]o convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict). . . ."[323] Again, this will be a question of fact at trial but the available evidence suggests that Ahmadinejad's "eliminate Israel" advocacy would be nominally related to the attacks on Israeli civilians seemingly sponsored by Ahmadinejad and perpetrated by Hezbollah and Islamic Jihad. And the Mugesera Judgment indicates that the connection between the incitement and the attacks on the civilian population may be somewhat attenuated. In any event, this issue would have to be fleshed out at trial.

But based on the available evidence, perhaps the statements most directly related to attacks would be those made by Ahmadinejad during Hezbollah's summer 2006 war against Israel. In his July 23, 2006 remarks, for example, he exclaimed that Israel had "pushed the button of its own destruction" and he advised the Jewish state "to pack up and move out of the region before being caught in the fire they have started in Lebanon."[324] Approximately two weeks later he declaimed: "The Zionist regime is fraudulent and illegitimate and cannot survive."[325] The following day, his words were even more direct. Accusing Israel of fighting a "war against humanity," he concluded that the "real cure for the (Lebanon) conflict is elimination of the Zionist regime."[326] These words urge destruction and are self-referentially tied to Hezbollah's attack on Israeli civilians.

Still, even if viable, any charge of crimes against humanity arising from these statements could be met with stiff resistance by free speech advocates. For one thing, they might point to a split between the ICTR and ICTY as to whether hate speech can constitute the crime against humanity of persecution. In a questionable decision, a Trial Chamber of the ICTY rejected liability for this crime in *Prosecutor v. Kordic*.[327]

They may also rely on Nazi Radio chief Hans Fritzsche's acquittal by the IMT at Nuremberg. The IMT found that Fritzsche's speeches, while "show[ing] definite anti-Semitism . . . did not urge persecution or extermination of Jews."[328] Moreover while Fritzsche "sometimes made

---

[322] 1997 Tadic Judgment, *supra* note 321, ¶ 124.

[323] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Appeals Chamber, Opinion and Judgment, ¶ 271 (July 15, 1999) (emphasis added).

[324] Warning Article, *supra* note 89.

[325] President's Statements, *supra* note 79.

[326] Crisis Article, *supra* note 81.

[327] *Prosecutor v. Kordic*, Case No. IT-95-14/2-T, Judgment, ¶ 209 (Feb. 26, 2001). For example, the *Kordic* Judgment does not even acknowledge the Ruggiu Judgment, which clearly held that hate speech can constitute the crime against humanity of persecution. Moreover, it attempts to distinguish the Streicher Judgment by characterizing it as an "incitement" case. *Id*. n. 270. The Chamber superficially takes the word "incitement" from the Judgment and, citing *Akayesu*, apparently concludes that was the crime for which Streicher was convicted . In fact, Streicher was convicted of a crime against humanity (persecution). The Chamber tries inartfully to duck the question but it never manages to distinguish the Streicher Judgment.

[328] Fritzsche Judgment, *supra* note 213, at 525-26. The IMT failed to explain how the virulent Nazi anti-Semitism spewed over the airwaves by Fritzsche did not amount to persecution.

strong statements of a propagandistic nature in his broadcasts," the IMT was "not prepared to hold that they were intended to incite German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged."[329]

Regardless of the precedential value of *Kordic* and *Fritzsche*, many experts, Americans in particular, believe that charging defendants with this crime entails an impermissible trampling on freedom of expression rights.[330] And they may have a good point. Still, these experts appear to be more concerned about criminalizing speech that calls for group (*e.g.* racial or religious) *hatred*, as opposed to speech that calls for *violence* against the group.[331] Ahmadinejad's "destroy Israel" statements would clearly fall into the latter category. Any persecution charges arising from Ahmadinejad's less incendiary statements, however, should be scrutinized carefully to cull those calling for hatred from those directly calling for violence. Only the latter should be prosecuted. This is extremely important in a case such as this where the nexus between attacks on the civilian population and the speech is less direct.

B. Procedural Analysis

Assuming prosecutors could prove beyond a reasonable doubt that Ahmadinejad committed the crimes of direct and public incitement to commit genocide and crimes against humanity, equally challenging procedural issues could derail any potential prosecution. These procedural issues bifurcate into two general categories: (1) immunity for Ahmadinejad as an acting head of state; and (2) obstacles to the exercise of personal jurisdiction over Ahmadinejad by the various judicial bodies that have been proposed. Each of these shall be considered.

1. Immunity

Although the Kambanda Judgment demonstrated that a *former* head of state can be prosecuted for atrocity crimes, would the same be true of an *acting* head of state, such as Ahmadinejad? "Head of state" immunity has long protected state leaders and ministers from criminal prosecution for acts performed under the cloak of state leadership.[332] Head of state immunity is recognized by customary international law.[333] Acting heads of state, such as Ahmadinejad, enjoy two different types of immunity: functional and personal.[334]

---

[329] *Id*.

[330] *See*, *e.g.*, Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 NEW ENG. J. INT'L & COMP. L. 34-42 (2005); Kevin W. Goering, et al., *Why U.S. Law Should Have Been Considered in the Rwandan Media Convictions*, 22 COM. LAW. 10, 12 (2004) ("However, the charges for persecution would be considered attacking mere advocacy, and would not have been sustained in the United States.").

[331] Orentlicher, *supra* note 330, at 39. The U.S. Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) formulated a test for whether hate speech would qualify for constitutional protection. It held that the First Amendment will not protect speech that "is directed to inciting or producing imminent lawless action and is likely to produce such action." *Id*. Based on the analysis herein, Ahmadinejad's "destroy Israel" speeches would not appear to qualify for Constitutional protection under *Brandenburg*.

[332] ELLEN S. PODGOR, UNDERSTANDING INTERNATIONAL CRIMINAL LAW, 20 (2004).

[333] *Id*.

[334] *See* Micaela Frulli, *The Question of Charles Taylor's Immunity*, 2 J. INT'L CRIM. JUST. 1118, 1125 (2004).

Functional immunity attaches to the official or public nature of the acts performed by a state official in the exercise of her functions.[335] Its rationale is grounded in the assumption that acts performed by a state official are to be ascribed only to the state that she represents.[336] Hence, functional immunity is substantial in nature and survives the cessation of office.[337]

Conversely, personal immunity - enjoyed only by limited categories of high-ranking state officials - is absolute because it attaches to a specific status or position and to the important functions associated with it.[338] Personal immunity is based on the notion of functional necessity: certain categories of state officials (heads of state, foreign ministers and diplomatic agents) need to exercise their functions without any threat, impediment or interference in order to ensure the smooth and peaceful conduct of international relations.[339] Though absolute, personal immunities come to an end when the state official relinquishes her official position. This type of immunity is therefore a procedural bar to the exercise of jurisdiction.[340] Incumbent heads of state enjoy both functional and personal immunity; former heads of state are protected only by functional immunity.[341]

Despite its appearance of inviolability in the first part of the 20th century, head of state immunity seemed to be eroding by century's end. Treaties, such as the Genocide Convention, and institutions such as the ICTR, ICTY, and ICC all removed immunity for heads of state and state actors accused of atrocity crimes.[342] In the epochal immunity decision of the British House of Lords regarding former Chilean leader Augusto Pinochet, the Law Lords viewed waiver of immunity as an obligation that fell upon any state that had access to the perpetrator of a *jus cogens* crime, such as torture.[343]

Nevertheless, millennial reports of sovereign immunity's death in human rights cases were apparently premature. In *Democratic Republic of Congo v. Belgium*, the ICJ held in 2002 held that Belgium's issuance of an arrest warrant for Congo's foreign minister in a human rights criminal case violated the sovereign immunity principle in international law.[344] The ICJ held that the inviolability from the jurisdiction of another state's court that attached to a foreign minister prohibited another state from engaging in even the preliminary stages of investigation and prosecution for *jus cogens* crimes during the foreign minister's term of office.[345] The ICJ

---

[335] *Id*.
[336] *Id*.
[337] *Id*.
[338] *Id*.
[339] *Id*.
[340] *Id*.
[341] Frulli, *supra* note 334, n. 29.
[342] *See* Genocide Convention, *supra* note 8, art. 4; ICTY Statute, *supra* note 193, art. 7(2), ("The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."); ICTR Statute, *supra* note 107, art. 6(2); Rome Statute, *supra* note 9, art. 27.
[343] *See Regina v. Bartle*, 37 I.L.M. 1302, 1333 (Lord Nichols) (1998) [hereinafter 1998 Ex parte Pinochet]. S*ee also* Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L. Q. 1583, n.115 (2000).
[344] *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.*), 2002 I.C.J. 3 (Feb. 14), *available at* http://www.icjcij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF [hereinafter Congo Case].
[345] *Id*. at 21.

rejected the argument that a post-World War II customary international law exception had developed to preclude immunity for state actors in national courts for *jus cogens* crimes such as genocide.[346]

However, the scope of this decision is somewhat circumscribed. While acknowledging the irrelevance of official capacity in conventional texts or in the statutes of international criminal tribunals, it implied that national courts should respect the functional immunity accruing to state officials accused of the most serious international crimes.[347]

So what impact would sovereign immunity have on any potential criminal prosecution of the incumbent Iranian President? The answer is that it would not affect any prosecution brought before the ICC. However, it would likely bar any municipal prosecution under a universal jurisdiction statute. It is now necessary to consider whether a municipal court could even exercise personal jurisdiction over Ahmadinejad.

2. Personal Jurisdiction

The other procedural issue that must be considered is the extent of personal jurisdiction that courts could exercise over Ahmadinejad. As explained above, three judicial bodies are implicated: the ICJ, the ICC and municipal criminal courts.

a. The International Court of Justice

As noted previously, certain commentators have urged states such as Israel, the U.K. or the U.S. to file a complaint against Iran in the International Court of Justice pursuant to Art. IX of the Genocide Convention. ICJ jurisdiction is normally based on the consent of the parties.[348] Iran is not likely to consent to ICJ jurisdiction in this case.

Nevertheless, if a treaty includes a 'compromissory clause' that specifically includes the ICJ as an appropriate forum for dispute resolution, the States party to it may file a unilateral application to the Court, thus making jurisdiction compulsory for respondent States.[349] Many dispute, however, whether this is actually "compulsory."[350]

Thus, in 2006, the United States, not wanting interference in its death penalty cases involving foreign nationals, withdrew from the Optional Protocol to the Vienna Convention on Consular Relations.[351] Its compromissory clause mandates ICJ jurisdiction when foreign nationals report

---

[346] *Id*. *See also* Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853, 868 (2002) (discussing the legal implications of the ICJ decision).

[347] Frulli, *supra* note 334, at 1126-27.

[348] *See* ARTHUR EYFFINGER, THE INTERNATIONAL COURT OF JUSTICE 127 (1996).

[349] *Id*.

[350] Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: Just How Compulsory Is It?*, 3/22/06 CHINESE J. INT'L L. 29, 2006 WLNR 23447415 (2006) ("However, this jurisdiction of the Court is not really compulsory [as States] cannot be "compelled" to enter into a treaty in the ordinary meaning of that term, let alone to accept the jurisdiction of the Court to resolve disputes under the treaty in question.").

[351] *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, March 10, 2005, at A01.

they have been illegally denied the right to see a home-country diplomat when jailed abroad. Iran could similarly reject the Genocide Convention's compromissory clause with little or no consequences – it is already flouting Security Council Resolutions demanding it close down its nuclear program.[352]

b. The International Criminal Court

Iran is not a signatory to the Rome Statute[353] and Ahmadinejad's chargeable incitement crimes appear not to have been committed on the territory of a signatory.[354] Thus, the only realistic way that the ICC could assert jurisdiction over Iran is through Security Council referral.[355] Such a referral would indicate international acquiescence to such a prosecution and would furnish the most realistic possibility, through the wide-ranging consensus and Security Council support, for enforcement of ICC actions.

c. Municipal Courts

While certain domestic courts, especially Israel's, could in theory exercise jurisdiction over Iran's leader per the passive personality principle, national security, or universality, the odds of enforcing the exercise of such jurisdiction would be long indeed. This is not a very realistic option. As acknowledged by prosecution advocate Justus Reid Weiner:

> While Israel and other national states may be entitled to exercise jurisdiction over Ahmadinejad, it is unclear that they would be willing or able to do so. Germany . . . might exercise the profound historical courage [necessary] to undertake such a challenge. Otherwise it is doubtful that any state would be willing to accept the political fallout of such a move.[356]

C. The Final Analysis

Given the available options, which of the jurisdictions and claims discussed above would be the most viable for prosecuting Ahmadinejad? Consider the available jurisdictions first. At the outset, two of them appear problematic.

The International Court of Justice would certainly allow Genocide Convention signatories to seek a judgment as to whether Ahmadinejad's speeches amount to genocidal incitement. But Iran would not very likely submit to the ICJ's jurisdiction and it is doubtful that the Genocide

---

[352] *See e.g.*, *Iran Rejects UN Resolution to Suspend Nuclear Program*, ABC News Online, Aug. 1, 2006, http://www.abc.net.au/news/newsitems/200608/s1703259.htm.

[353] *See* Anthony Dworkin, *The International Criminal Court: An End to Impunity?*, CRIMES OF WAR PROJECT MAG., Dec. 2003, *available at* http://www.crimesofwar.org/icc_magazine/icc-intro.html.

[354] Ahmadinejad did make statements in Indonesia and Malaysia, which are members of the ICC. Although these statements are arguably chargeable, it is unlikely either of these Muslim countries would refer Ahmadinajad to the ICC for prosecution or that the Prosecutor would launch his own investigation and prosecution arising out of these statements alone.

[355] *See* Rome Statute, *supra* note 9, art. 13; Manashaw, *supra* note 245, at n.7.

[356] Weiner, *supra* note 318, ¶ 86.

Convention's compromissory clause would persuade them otherwise. But even if it did, what would be the value of such a judgment?

In the first place, it would take years for the ICJ to rule on the question.[357] By then, Iran might have already unleashed its nuclear wrath on Israel. Moreover, even if it arrived more expeditiously, an ICJ judgment might represent symbolic vindication but would not ultimately be enforceable.[358] Finally, the ICJ only permits complaints against *states*, not individuals.[359] But the recent trend in international law has been to focus liability for *jus cogens* transgressions on the *individuals* who commit them.[360] In other words, the concern is to remove the cloak of collective national guilt and focus the world's opprobrium on the person and his personal responsibility for the criminal acts at issue.[361] Adjudicating the world's claims against Ahmadinejad by an action against Iran, as one large, monolithic entity, would contravene that purpose.

Prosecution of Ahmadinejad before a municipal criminal court might be similarly problematic. In the first place, based on the ICJ's decision in the *Dem. Rep. Congo v. Belgium*, sovereign immunity is most probably a bar to any such prosecution in municipal courts against sitting heads of state. [362] Even were that not the case, absent military intervention, one country's unilateral efforts to obtain custody of Ahmadinejad, as an incumbent head of state in a region brimming over with anti-Israeli hatred, would likely be futile.

So that leaves the International Criminal Court. And as mentioned previously, a Security Council referral would likely be the only realistic way of calling Ahmadinejad to account for his crimes. Although it might seem a long shot, there is reason to think it possible. The Security Council has recently found consensus on the issue of Iran's nuclear program and has issued Resolutions demanding an end to it.[363] Iran, however, has openly defied the Council.[364] If Iran continues with its program and Ahmadinejad continues to incite to genocide, the Security Council might feel more disposed to refer an incitement case against the Iranian president to the ICC. That might be a more comforting initial course of action than military intervention. As observed by noted legal expert David Matas:

---

[357] *See* Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1327 (2004) ("[T]he ICJ process is slow and time-consuming, so that prospective power positions at the time of filing are unlikely to remain constant through the proceedings. This means states' initial interest in coordination may be in fact moot by the time the court produces a decision.").

[358] *See* Rebecca Trail, *The Future of Capital Punishment in the United States: Effects of the International Trend Towards Abolition of the Death Penalty*, 26 SUFFOLK TRANSNAT'L L. REV. 105 n. 130 (2002) ("The IACHR, the ECHR, and the ICJ are currently unenforceable courts, which deliver decisions that are intended to be complied with through an honor system.").

[359] *See* Paulus, *supra* note 239, at 802.

[360] *See* Alberto Costi, *Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-Conflict Situations*, 22 NEW ZEALAND U. LAW REV. 213 (2006) ("The emergence of a new culture of human rights and individual criminal responsibility has heralded the principle that there can be no impunity for international crimes."); Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT'L L. 595, 602 (1999).

[361] *See* Jonathan A. Bush, *The Supreme . . . Crime and Its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2325 (2002).

[362] *See* Congo Case, *supra* note 344.

[363] *See supra* notes 76 & 77.

[364] *See* Riddle of Iran, *supra* note 73.

> The international community, when asked to intervene militarily to prevent genocide, is immobilized. I need only refer to the ongoing genocide in Darfur, happening while we sit here, to make my point. It should be far easier and straightforward to prosecute for incitement to genocide. Prosecution for incitement to genocide means enforcing obligations to which states have committed. It means resorting to legal institutions rather than using force. It means acting when there is still time, rather than after it is too late.[365]

But if the ICC did refer Ahmadinejad, what are the odds of a successful prosecution on the merits? With respect to incitement to genocide, apart from disputes over the group targeted and the meaning of specific words and translations, the most vexing issue is causation. No prosecutor has ever brought such an incitement charge without a genocide having already occurred. But refusal to prosecute pre-genocide effectively eviscerates the crime's rationale. Direct and public incitement to commit genocide is an "inchoate crime" that is, by definition, "punished before the harm that is the ultimate concern of society occurs. . ."[366] That an inchoate crime is committed prior to, and independently of, the object crime is axiomatic. "Indeed, the main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime."[367]

In *Prosecutor v. Musema*, the ICTR noted that inchoate crimes (in that case conspiracy) are "punishable by virtue of the criminal act as such and not as a consequence of the result of that act."[368] In an accompanying footnote, the Tribunal explicitly stated that this applied to the inchoate crime of direct and public incitement to commit genocide. It added that this crime carries such a high risk for society that it must be punished without reference to subsequent acts, if any, of genocide.[369]

That conclusion was echoed in both the Nahimana and Mugesera Judgments. But such pronouncements ring hollow indeed if no judicial body is willing to apply them before the mass graves are dug. Ahmadinejad's incendiary speeches present the world with a golden opportunity to use the incitement charge for its intended purpose: to *prevent* genocide, not merely to punish it *ex post facto*. After all, were humanity to wait for Israel's nuclear annihilation, it could certainly prosecute Ahmadinejad for genocide – at that late date, though, an incitement charge might seem superfluous or redundant. Given the staggering loss in human life, it would be empty symbolic vindication but nothing more. As Hitler expert Ron Rosenbaum explains:

> It has never happened before, this kind of preemptive indictment, but that doesn't mean it can't happen now, or that it shouldn't happen now, or that the international law making incitement a separate crime shouldn't be applied to Ahmadinejad and his genocidal incitement against the Jewish state . . .

---

[365] David Matas, *Justice for Genocide*, Amnesty International USA, http://www.amnestyusa.org/Justice_for_Genocide/David_Matas/page.do?id=1051082&n1=3&n2=35&n3=1398 (last visited Sept. 3, 2007).

[366] Nick Zimmerman, *Attempted Stalking: An Attempt-To-Almost-Attempt-To-Act*, 20 N. ILL. U. L. REV. 219, 222 (2000).

[367] Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 3 (1989).

[368] *Prosecutor v. Alfred Musema*, Case No. ICTR 96-13-A, Judgment and Sentence, ¶ 193 (2000).

[369] *Id*. at n.37 (citing Akayesu Judgment, *supra* note 110, ¶ 52).

> Considering the hideous historical record of failure in the past to prevent genocide, failure to pursue this course (in addition to any others that may be necessary to stop or prevent genocide) would itself be a crime.[370]

Aside from generating legitimate concerns among defenders of free speech, a charge of crimes against humanity (persecution) would be rather vulnerable with respect to the chapeau element of connection to a "widespread and systematic attack." Could the prosecution prove that Ahmadinejad's inflammatory speeches against Israel were delivered as part of Hezbollah's widespread and systematic attack against Israeli civilians in the summer of 2006? If so, would there be sufficient evidence of coordination between Ahmadinejad and Hezbollah to prove Ahmadinejad's knowledge of the attacks and that the crimes flowed from a State or organizational policy? Again, while these are questions of fact, given Iran's strong support of Hezbollah, it is not unreasonable to imagine that the connection could be established.

Moreover, as noted above, there is legal precedent to support a connection to widespread attacks carried out by a nominally separate organization on foreign soil. In the case of Balkan atrocities in the 1990s: "The Bosnian War led drafters to weaken the 'state action' requirement because the Serb militias were unofficial and only loosely affiliated with the Yugoslav state."[371] In Ahmadinejad's case, even if Hezbollah could only be considered "loosely affiliated" with the Iranian state, its widespread murder of Jewish civilians last summer, international law indicates, could be pinned to Ahmadinejad and his contemporaneous violent verbal campaign against Israeli Jews.

V. CONCLUSION

The strange witch's brew of current Iranian politics includes prominent doses of hatred for Israel and Israeli Jews, Holocaust denial, support of anti-Israel terrorist groups and the development of nuclear weapons. And while stirring this toxic potion, Iranian President Mahmoud Ahmadinejad has been chanting to his people a call for the death and destruction of the Jewish state. Should the world wait until Iran has operable weapons of mass destruction before it responds to Ahmadinejad's urging to mass murder?

This Article has demonstrated that a more viable option exists: taking legal action against Ahmadinejad for crimes arising out of his doomsday invective. And by cobbling together the emerging pieces of incitement law, an analytical framework emerges that suggests prosecution of the Iranian leader would be possible. Three forums exist to take such action – the International Court of Justice, the International Criminal Court and municipal courts. And two distinct crimes could be the basis of such legal action: direct and public incitement to commit genocide and crimes against humanity (persecution). Prosecution before the ICC via Security Council referral would be the most viable option and would confer the distinct advantage of the international community's blessing.

Although any successful prosecution of Ahmadinejad would require deference to incitement precedent (not required in international law), a minimal expansion of current doctrine and

---

[370] Ron Rosenbaum, *Incitement Indictment: Time to Bring Ahmadinejad to Justice*, Pajamas Media, Dec. 20, 2006, http://ronrosenbaum.pajamasmedia.com/2006/12/20/incitement_indictment_time_to.php.

[371] David Luban, *A Theory of Crimes against Humanity*, 29 YALE J. INT'L L. 85, 96 (2004).

conventional wisdom, and strong vigilance for freedom of expression in choosing the proper charges, this Article has shown that such an effort would be consistent with the trends that have given rise to incitement's new analytical framework. Still, in the current political and legal environment, the odds of prosecution are quite long. Perhaps only when Iran gives the world incontrovertible proof of its nuclear weapons capacity and begins training its fortified missiles directly on Israel will the international legal community seriously contemplate judicial action against Mahmoud Ahmadinejad. Unfortunately, that might be too late.