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DE LA PERSONNE DE



LEAGUE FOR
HUMAN RIGHTS OF

B'NAI BRITH CANADA

Hate Jurisdictions of Human Rights Commissions: A System in Need of Reform

Submission by the League for Human Rights
of B'nai Brith Canada
to the Canadian Human Rights Commission

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Joe Bogoroch
National President

Frank Dimant
Executive Vice President

Earl Barish
Chairman of the Board

Ruth Klein
National Director, Advocacy Dept.

David Matas
Senior Legal Counsel

Anita Bromberg
National Director, Legal Affairs

Allan Adel
National Chair
League for Human Rights

Karen Lazar
National Director, Communications

Aubrey Zidenberg
Chair, Special Advisory Council
League for Human Rights

Michael Mostyn
Director of Government Relations

**This document was written by David Matas, Senior Legal Counsel,
and Chair of the Legal Committee, B'nai Brith Canada**

The following National Legal Counsels contributed to this document

Marvin Kurz

Moïse Moghrabi

Steve Slimovitch

We thank the following individuals for their assistance and input:
Harry Abrams, Chair, Western Region, League for Human Rights
Alan Yusim, Regional Director, Midwest Region, B'nai Brith Canada



This document was prepared by the League for Human Rights, an agency of B'nai Brith Canada, dedicated to combating antisemitism and racism. Its objectives include advocating for human rights of all Canadians, building inter-community relations, and the elimination of racial discrimination and bigotry. The League accomplishes these goals through educational programs, community action and legal/legislative interventions.

B'nai Brith Canada National Office 15 Hove Street, Toronto, ON M3H 4Y8
Tel 416-633-6224 Fax 416-630-2159 Email league@bnaibrith.ca Website www.bnaibrith.ca

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I. INTRODUCTION

B'nai Brith Canada has been active in Canada since 1875 as the Jewish community's foremost human rights organization. Through its Institute for International Affairs and League for Human Rights (hereinafter "the League"), its mandate is to protest human right abuses and to advocate on behalf of communities in distress both in Canada and abroad. The organization has been involved with many key cases and issues before human rights commissions and tribunals across Canada.

This brief has been prepared by David Matas, an internationally acclaimed human rights lawyer and Senior Legal Counsel to B'nai Brith Canada. David Matas is the author of *Bloody Words: Hate and Free Speech*¹.

It is the League's position that human rights commissions and tribunals remain valuable institutions. However, human rights commissions are today under a new threat from abusive complaints of incitement to hatred and are not adequately defended against these threats.

Some recent abusive complaints have highlighted procedural and substantive flaws in human rights commissions and tribunals. These flaws have allowed frivolous complainants to run roughshod over the rights of those who are targets of the complaints. Human rights commissions and tribunals need to recognize modern-day challenges to their traditional modes of operation. They must reform and modernize in order to maintain the integrity of their remedies and to ensure their relevancy into the future.

The current spate of abusive complaints has led to questioning of the jurisdiction of human rights commissions and tribunals over the communication of hatred. B'nai Brith Canada brings to this debate a distinctive perspective, because we are involved on both sides. We are the target of what we view as a frivolous human rights complaint, described in this submission. We are also an intervener on the side of the complainant in the Canadian Human Rights Tribunal hearing into the complaint made by Richard Warman against Marc Lemire for communicating hate messages through an Internet website. The complaint was filed in November 2003 with the Canadian Human Rights Commission. The Commission referred the complaint to a Tribunal for inquiry in August 2005. The inquiry continues.

Our overall conclusion is that condemnation of human rights law's jurisdiction over hate has become a surrogate for criticism which is more properly directed elsewhere: to abusive complaints, lack of training for human rights commission staff, and procedural flaws in the system.

Human rights commissions and tribunals have understood the dangers of Nazi, neo-Nazi and white supremacist ideologies when other jurisdictions have not. Indeed, that understanding has been one of the system's strengths. However, now Canada is under threat from a new and different set of ideologies, in particular Islamism and political Islam. Human rights commissions and tribunals have yet to appreciate the dangers these ideologies pose to human rights. When dealing with these ideologies, human rights commissions have presented a disastrous combination of investigative zeal and substantive ignorance.

¹ Matas, David, *Bloody Words: Hate and Free Speech*, Toronto, Bain and Cox, August 2000.

II. A BRIEF HISTORY OF COMMISSION SUCCESSES

Human rights commissions and tribunals have been instrumental in marginalizing the threat of neo-Nazism in Canada. There is a direct link between the collapse of the Heritage Front², the Ku Klux Klan³, the Aryan Nations⁴ and other extreme right-wing groups, and the work of human rights commissions and tribunals. This is also the case in the public demise of such notorious hate mongers as Malcolm Ross, Ernst Zundel, and Terry Long, each of whom has been brought to task by the human rights system. Human rights commissions and tribunals acted against these individuals and groups to combat hatred when no other state institution was up to the task.

A. Malcolm Ross

Malcolm Ross is a former elementary school teacher who believes in a Jewish conspiracy to control the world. He is certain that the Holocaust never happened, that it is a hoax and part of a “world Jewish conspiracy.” He claims that the Jewish religion is worship of the devil.

For Ross, this hatred was not just a private opinion; it was a public cause. He wrote books on his opinions; he gave television and radio interviews; he wrote letters to the editor to newspapers setting out his hate fantasies. Although Ross did not teach his hatred in school, his mere presence in a publicly funded classroom was a highly visible symbol of antisemitic bigotry and caused a stir

A private prosecution for the criminal offence of incitement to hatred is impossible. The prosecution requires the consent of the Attorney General. Successive Attorneys General in New Brunswick refused to consent to the prosecution of Malcolm Ross.

Ross’ employer, New Brunswick School District 15, received complaints from parents that it allowed a known bigot in the classroom. The school board did virtually nothing to respond to these complaints, except occasionally monitor Ross' class to ensure that he was not preaching his hatred in the classroom. The board appointed a review committee that went nowhere. In 1986, the school superintendent warned Ross against further publication of his views. In March 1988, the school board issued a similar warning, saying further publications or public discussion of his views or work could lead to dismissal. This warning remained on Ross' employment file until September 1989.

David Attis, a parent of three Jewish students in the school district in which Ross taught, filed a complaint with the New Brunswick Human Rights Commission in April 1988 claiming that the school board, by its tolerance of Ross, had discriminated against his daughter on the basis of ancestry or religion. The Commission appointed a Board of Inquiry in September 1988, consisting of one member, Brian Bruce. In August 1991, Professor Bruce found that the school board had discriminated against the Attis children by creating a poisoned environment in the school district.

² *Canadian Human Rights Commission v. Heritage Front* [1994] 3 F.C. 710, Tremblay-Lamer J.

³ *League for Human Rights of B'nai Brith Canada v. Manitoba Knights of the Ku Klux Klan* T.D. 15/92, December 16, 1992.

⁴ *Nealy v. Long* T.D. 10/89, July 25, 1989.

Bruce ordered the school board to remove Ross from the classroom, to place him on a leave of absence of eighteen months, to appoint him to a non-teaching position during the leave period if one became available, to terminate his employment after the leave period if during the leave period no non-teaching position became available, and to terminate his employment in any event if at any time he published, sold or distributed his anti-Jewish hate propaganda. A non-teaching librarian position did become available during the leave period and Ross took it up.

Ross challenged the order of Bruce in the courts as a violation of his rights to freedom of expression and religion under the *Canadian Charter of Rights and Freedoms*.⁵ On April 3, 1996, the Supreme Court of Canada upheld the order of the New Brunswick Human Rights Board of Inquiry removing Malcolm Ross from the classroom. However it overturned the restraining order against him.⁶

B. Ernst Zundel

Early in his notorious career, Ernst Zundel used the mail to disseminate his Holocaust denial propaganda. The Canada Post Corporations Act allows the Minister responsible for the Post Office to prohibit the delivery of mail addressed to or received by a person who is committing an offence by means of the mail. The order is an interim order. The person concerned may ask for a review of the order. If he does, the Minister must appoint a Board of Review. The Board then holds a hearing and advises the Minister. The Minister, after receiving the advice of the Board, may make the order final, or lift the order.

Sabina Citron complained about Zundel to the Minister responsible for the Post Office. The Minister issued an interim prohibitory order on the grounds that Zundel was using the mail to commit the offence of willfully promoting hate propaganda. Zundel asked for a review and a Board of Review held a hearing in February and March of 1982. In October, 1982, Minister followed the recommendation of the the Board and lifted the order.

The Zundel Board of Review judgment was short and ignorant. The Board said, for instance, "The Board believes that before it is a much larger problem or struggle between two peoples; i.e. the Germans and the Jews." That, of course, was the position of Zundel. He claimed the Holocaust was a sham, a Jewish hoax, an attack on German honour. He has made a career of denying the Holocaust to defend, so he says, the German people against this Jewish attack.

One hardly expects a tribunal examining hate propaganda to swallow the propaganda whole and accept it as fact. That is what happened in the Zundel postal case. This case illustrates the danger of allowing a board or tribunal to determine the existence of hate propaganda when it is inadequately trained to distinguish hate propaganda from more benign communication.

Another reason the Board of Review gave for its recommendation was the absence of criminal proceedings.⁷ The Board noted that Zundel had not been convicted under the *Criminal Code*.⁸

⁵ *Canadian Charter of Rights and Freedoms, 1982, Constitution Act, 1982, Part B*

⁶ *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825

⁷ David Matas, *Bloody Words: Hate and Free Speech*, (2000) Bain & Cox

⁸ *Criminal Code* (R.S., 1985, c. C-46)

Sabina Citron sought the consent of the Attorney General to prosecute Zundel for wilfully propagating hatred. The Attorney General refused consent. Sabina Citron then launched a private prosecution against Zundel. He was prosecuted under a provision of the *Criminal Code* that prohibited wilful publication of news that the publisher knew to be false and that caused or was likely to cause injury or mischief to a public interest. A false news prosecution could be launched privately; it did not require the consent of the Attorney General.

The false news was Holocaust denial. The injury to the public interest was incitement of hatred against Jews. The Attorney General of Ontario took over the prosecution and assumed conduct of it. Zundel was convicted by a jury, and sentenced to 15 months in jail and three years probation. A term of the probation order was that Zundel, during the three years, not publish anything about the Holocaust.

The Ontario Court of Appeal nonetheless struck down the conviction for errors in the admission of evidence and the charge to the jury. The Court sent the case back for a new trial.

Zundel was convicted again at his second trial. His sentence this time was nine months in prison. Zundel appealed again first to the Ontario Court of Appeal and then to the Supreme Court of Canada, claiming that the provision of the *Criminal Code* under which he was convicted was unconstitutional. In August, 1992, the Supreme Court of Canada found that the false news provision in the *Criminal Code* violated the constitutional protection of freedom of expression.⁹

Sabina Citron next tried the Canadian Human Rights Commission, this time along with the Toronto Mayor's Committee on Community and Race Relations. The complaints, filed in July and September 1996, stated that Zundel had violated the prohibition in the *Canadian Human Rights Act*¹⁰ against promoting hatred “telephonically.” The complaint was based on the existence of an Internet website hosted in the United States called the Zundelsite.

This complaint generated several issues. For example, the complaint was launched before the current amendment to the legislation which prohibits hate over the Internet. So one question was whether hate over the Internet was hate communicated, in the words of the Act, by “telephonically.” For technical reasons having to do with the Zundelsite, a Canadian Human Rights Tribunal answered yes, it was. Ultimately, in January 2002, the Tribunal found against Zundel on all issues, including the existence of materials likely to expose persons to hatred on his website. It issued a prohibition order against him. The order was to cease communicating telephonically matters of the type found on the Zundelsite, or similar matters likely to expose persons to hatred.

Zundel fled to the United States as a visitor during the course of the Tribunal’s hearing. He overstayed his visa and, after the Tribunal decision, was deported back to Canada. On his return, the Government of Canada in May 2003 issued a security certificate against him for the purpose of removing him from Canada. He challenged the reasonableness of that certificate in Federal Court. In January 2005, Mr. Justice Blais, in upholding the reasonableness of the certificate,

⁹ *R . v. Zundel* [1992] 2 S.C.R. 731

¹⁰ *Canadian Human Rights Act* (*R.S., 1985, c. H-6*)

relied, in part, on the Canadian Human Rights Tribunal decision against Zundel¹¹. Zundel was deported to Germany. There he was convicted of Holocaust denial in February 2007 and sentenced to five years in prison.

C. Terry Long

Terry Long of the Church of Jesus Christ Christian - Aryan Nations used the telephone to communicate a sequence of telephone messages that a Canadian Human Rights Tribunal documented in this way:

A liberal national immigration policy presents a threat to both the physical and moral welfare of the white race. The non-white races are intellectually and morally inferior. They are the dupes of the Jews who are bent on world domination. All of the country's and the world's ills are the workings of a Jewish conspiracy to which the liberal white political establishment is totally blind. Jewish cunning and deviousness are at every turn. Jews control merchandising for their own purposes at the expense of the general public. Judaism condones deception, neglect and murder of Christians. Judaism is satanic and synonymous with international Communism. Jews are members of a world wide Zionist banking conspiracy aimed at the collapse of the Western world. Jews conspire to rid America of the white race by manipulating immigration and subverting its racial purity by encouraging miscegenation.¹²

In May 1989, the Human Rights Tribunal ordered Terry Long to cease communicating the hate message by phone. He complied with the order.¹³

In Terry Long and the Aryan Nations case, B'nai Brith attempted to invoke all possible remedies. It approached the Attorney General of Alberta for a prosecution. It asked the *Red Deer Advocate* not to run the ads containing the Aryan Nations phone number. It complained to the Alberta Press Council about the ads in the Red Deer Advocate. It approached the Alberta Telephone Company to take action against the use of its phones for hate propaganda. None of these avenues was effective. The only administration that showed an interest was the human rights administration. Only the Human Rights Commission was prepared to act.

III. HATE JURISDICTIONS AND THEIR ESSENTIAL ROLE

The right to free speech is the media's favourite human right. It may seem churlish to argue with anyone about their favourite right. In some ways it is like arguing with people about their favourite food or favourite colour. One can expect newspaper columnists to have a special liking for freedom of expression; teachers are inclined towards the right to education; doctors favour the right to medical care; lawyers have a weakness for the right to counsel.

If a mere indication of favouritism was all that was at stake, we could just pass it over without comment. However, those who advocate freedom of expression often go on to deny the equal right to be protected from advocacy of hatred. All human rights have to be read together as a

¹¹ *Re Zundel* 2005 FC 295

¹² *Nealy et al vs. Johnston et al*, CHRC, May 1998 at page 15

http://www.chrt-tcdp.gc.ca/search/files/t149_0788de_07_25.pdf

¹³ *Ibid.*

coherent whole. Each human right is part of a package. Each contributes to the overall goal of enhancing the worth and dignity of the individual. Each needs to be nurtured, protected and developed. No one human right trumps other human rights.

If one human right is considered absolute, or given priority, then other human rights, necessarily, take second place. One facet of human development is thwarted so that another facet can be given free rein. Or, what often happens, the rights of some are given lavish attention; the rights of others are trampled.

The right to be free to say what you want and the right to be free from hate speech targeted against you, are two fundamental human rights that must be kept in balance. Neither is absolute; neither must be given priority over the other. Both are essential for the preservation of humanity.

The *Universal Declaration of Human Rights*¹⁴ does not rank rights, and quite properly so. In a sense, the *Universal Declaration* does not assert many rights, but just one right with many facets, the right to dignity, self realization and self worth of the individual. The *Universal Declaration*, in its preamble, refers to the inherent dignity of all members of the human family. For the inherent dignity of the individual to be respected, all rights must be respected.

Objectively, if we have to rank rights, the right that stands head and shoulders above all others is the right to life. If you are dead, the right to freedom of expression is meaningless. The greatest crimes of this past century were not crimes of censorship. They were crimes of genocide. The Holocaust, the Armenian massacre, the Bosnian ethnic cleansing, the Cambodian killing fields and other mass murders powerfully attest to the need for curtailing hate speech.

If we go beyond the most basic right, the right to life, and ask which human rights violations led to these mass killings, surely the answer must be violations of the right to be free from advocacy of hatred. In the words of Mr. Justice Dickson in the Keegstra case in the Supreme Court of Canada,

"The experience of Germany represents an awful nadir in the history of racism, and demonstrates the extent to which flawed and brutal ideas can capture the acceptance of a significant number of people."

We do not have to look hard to find a direct link between incitement to hatred and the worst violations of human rights. While the ranking of human rights violations, like the ranking of human rights, is invidious, the internment and deportation of Japanese Canadians and the steadfast Canadian refusal to grant asylum to Jews fleeing the Holocaust are amongst the most shameful episodes of recent Canadian history. Neither of these events can be traced to censorship. Both are the direct consequences of the then untrammelled incitement to hatred against ethnic Japanese and Jews.

The Holocaust did not begin with censorship. It began with hate speech. Auschwitz was built with words. The killing fields of Cambodia were sowed with slogans. The genocide of Rwanda was spread by radio. Bosnia was ethnically cleansed by television. The power of words to incite

¹⁴ <http://www.un.org/Overview/rights.html>

to genocide was recognized by the Supreme Court of Canada in the case of *Mugesera v. Canada*, a case in which B'nai Brith Canada intervened.¹⁵

It is a strange logic that leads human rights advocates to deny the very right whose violation led first to the Holocaust and then to the Universal Declaration of Human Rights. Because human rights are an interconnected whole, it is easy to link one right to another. Free expression is important to other rights, but other rights are equally important to respect for freedom of expression. Take any thread out of the quilt of rights and the quilt unravels. To choose only one thread and proclaim that this is the thread that counts is arbitrary.

It is sometimes said that the very life blood of democratic politics is the right to free expression. However, it can just as easily be said that tolerance is the life blood of democracy. Without tolerance, neither democracy nor freedom of expression can survive. Incitement to hate speech is an assault on that very tolerance which is essential to the respect for so many other rights.

If there is one human rights lesson that has to be learned, and only one, from the grave violations of human rights of this century, it is the need to ban hate speech. Yet, it is a lesson that has not been learned.

One argument in the current attack on the hate jurisdictions of human rights commissions is that the threat of neo-Nazism is so marginal that it does not justify the retention of this jurisdiction. That argument fails to recognize the link between the effectiveness of this jurisdiction and the marginalization of neo-Nazism. We would not stop protecting against polio or small pox because the incidence has fallen but not disappeared. The same should be true of the virus of hate.

IV. A BETTER REMEDY

There is a reason why human rights commissions and tribunals have succeeded when other remedies have failed. They are better designed to deal with the problem of hate speech, including hate on the Internet, than other remedies.

One advantage the commission remedy has is that it is a civil remedy. Civil remedies for hate propaganda approximate more closely the remedies for other, unacceptable, abuses of free speech such as libel and slander. Civil remedies are, for that reason, easier to justify as exceptions to free speech than are criminal remedies. In Canada and other countries, civil proceedings for libel and slander are common, and are accepted. While Canada's *Criminal Code* does allow for prosecutions for defamatory libel, prosecutions for this offence are extremely rare.

Civil remedies are more direct than criminal remedies. Criminal remedies prosecute the propagandist, after the propaganda has been disseminated. Civil remedies can prohibit the propaganda before it has been distributed. Civil remedies can work to cut off the avenue of distribution.

¹⁵ David Matas was counsel for B'nai Brith Canada in this intervention, *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100, 2005 SCC 40.

Civil remedies are less onerous than criminal remedies. The remedy may be only an injunction - without a jail sentence, even without a fine. Fines when levied are so low that they come within the jurisdiction of provincial small claims courts.

Since criminal remedies lead to punishment of the propagandist, criminal trials quickly become a forum for the propagandist, who can claim persecution and victimization. It is more difficult for the propagandist to portray himself as a martyr in a civil case when he faces no risk of punishment, when the risk he runs is only that he must cease propagandizing.

If we take away from a propagandist his means of communication, we have effectively stymied the propaganda. If the propagandist cannot use radio or television, if he cannot import or export, if he cannot print or publish, if he cannot phone or mail, then the propaganda is stopped. He may, nonetheless, be able to communicate his hatred to his neighbours, the people he meets in the streets. However, for all effective purposes, he is stopped.

Civil remedies have this advantage as well: the standard of proof is less stringent. The standard of proof in criminal cases is proof beyond a reasonable doubt. The standard of proof in civil cases is proof on the balance of probabilities. In a civil case, if a court believes it is more likely than not that the material will incite hatred, then the remedy is available. In a criminal case, if there is a 49% chance that the material will not incite hatred, then there is a reasonable doubt. The jury will have to acquit. If eleven jurors think, beyond a reasonable doubt, that the material will incite hatred, but one does not, the jury cannot convict.

Proof is easier with a civil remedy for a second reason. A criminal remedy requires proof of intent, while a civil remedy does not. All that has to be proved is that hate propaganda was disseminated. It need not be proved that the hate propaganda was distributed for the purpose of promoting hatred. The disseminator may claim some other motive. In a civil case it will not matter. In a criminal case, unless the prosecution can prove that the distribution was done with the intention of promoting hatred, the court must acquit.

Civil remedies of prohibition, as well, lessen the chilling effect on freedom of speech. When civil libertarians criticize hate propaganda laws, the point of criticism most often made is that the offence of hate propaganda is too vague.

Under the civil remedy of prohibition or injunction, a person is never punished later for disseminating something he thought at the time might be legal. A court order of prohibition is a warning. A person is told in advance what is punishable and what is hate propaganda. If he wants to avoid prosecution for violation of the prohibition order, he knows very specifically what not to do.

Of course, for prohibition orders, as well as for prosecutions, there are court proceedings. However, in a civil proceeding, as opposed to a criminal proceeding, the person concerned does not have to be present. An accused is required to be present at his own criminal trial. If he fails to show up, he will be arrested and brought forcibly to court. If he wants to avoid punishment, he has to defend himself.

In civil prohibition proceedings, the person concerned need not appear. Even the possibility of legal proceeding where you do not have to appear, where you do not have to incur any legal

costs, where you run no risk of punishment, may have some chilling effect. However, the chilling effect is obviously a good deal less.

All this is true of all civil remedies. But the civil remedy of a human rights commission complaint is particularly effective because it is state-directed. Where a whole group is vilified, it becomes onerous to expect one member of the group to assume the burden of the litigation alone. Volunteer organizations are chronically underfinanced. It is asking too much to expect organizations to which the victims belong to assume the burden of the litigation.

Hate propaganda is not just an attack on the vilified group. It is an attack on the whole community and its values. If we leave responsibility for addressing the wrong to the vilified group, we absolve society from its duty to redress the wrong. We send a false message to members of the vilified group, that the community as a whole does not care about their victimization. We isolate the victim and leave him to his own recourses.

A state-directed remedy is a public comment that the community at large cares about the propaganda, that it rejects the propaganda. A state-directed remedy avoids the vagaries of individual direction. It does not require finding someone willing and able to undertake the burden of carrying forward a court proceeding to its conclusion.

It is regrettable that both Ontario and British Columbia amended their human rights legislation to remove human rights commissions from the procedure for determining whether complaints merit a hearing before a tribunal. British Columbia abolished its commission altogether. Ontario left its commission alive but sidelined it, leaving it to deal with other matters. Both left the determination of disputes to tribunals alone, without benefit of a commission. By eliminating the commission's vital gatekeeping role regarding hate cases, the Ontario and B.C. governments also eliminated an essential safeguard against malicious, politically motivated, or ill-founded hate complaints.

V. THE COMPLAINTS - TRIGGERING A NEED FOR CHANGE

Some recent human rights complaints illustrate the need for procedural reform. Two complaints have received a great deal of notoriety, while the third has been suspended in limbo for almost five years.

A. The Western Standard

The Danish newspaper *Jyllands-Posten* asked twelve cartoonists to draw cartoons of the prophet Mohammed as a test of whether the threat of Islamic terrorism had limited freedom of expression in Denmark. The publication of the cartoons in September 2005 caused a global uproar.

The Alberta publications *Western Standard* and *Jewish Free Press* republished the cartoons. In February 2006, Syed Soharwardy, president of the Islamic Supreme Council of Canada, complained to the Alberta Human Rights Commission. The Edmonton Council of Muslim Communities filed a similar complaint.

Soharwardy settled his complaint with publisher Richard Bronstein of the *Jewish Free Press* in March 2007 after mediation. In February 2008, he dropped his complaint against the *Western Standard* and publisher Ezra Levant in reaction to the widely-expressed view that pursuit of the

complaint amounted to an undue restriction on freedom of expression. The Alberta Human Rights Commission dismissed the complaint by the Edmonton Council of Muslim Communities in August 2008 as being without merit.

B. Maclean's

The Canadian Islamic Congress filed a complaint against *Maclean's* magazine with the British Columbia Human Rights Tribunal, the Ontario Human Rights Commission and the Canadian Human Rights Commission for publishing in October 2006 an excerpt from Mark Steyn's book, *America Alone*.¹⁶ The Ontario Human Rights Commission dismissed the complaint on jurisdictional grounds, while the Canadian Human Rights Commission dismissed the complaint on the ground that the excerpt was polemical but not extreme. The British Columbia complaint has been heard by a tribunal, which has yet to give its decision.

C. B'nai Brith Canada

In February 2004, Shahina Siddiqui filed a complaint against B'nai Brith Canada with the Manitoba Human Rights Commission for sponsoring a presentation in October 2003. The seminar, she claimed, was biased against Muslims.

The seminar was directed to first responders to terrorist attacks against the infrastructure of our civil society, such as officials responsible for local, regional and national law enforcement and border security (Canada and US), representatives from the three levels of government, security officers charged with protecting our water, hydro, and gas supplies, transportation lines, firefighters, and emergency medical technicians. The presentation was made by the US-based Higgins Counterterrorism Research Centre, held in several cities in Canada.

No one who attended the seminar filed a complaint with the Manitoba Human Rights Commission. Shahina Siddiqui herself was not present at the Winnipeg seminar but based her complaint on what she had been told about the seminar. There were no complaints to B'nai Brith Canada or to human rights commissions from anyone attending the seminars presented by Higgins in any of the other Canadian cities.

The evidence of the alleged violation came from sources who have never been disclosed to B'nai Brith, despite a disclosure request. The complaint itself refers only to "comments from some in attendance" without indicating who those "some" might be or even how many they were. B'nai Brith was unable to confirm, from its own investigations, by questioning several people who attended the event, that the alleged offending remarks were ever made.

After the complaint was more than four years old, the Manitoba Human Rights Commission decided to appoint an independent expert to make a "determination" on the merits of the complaint. B'nai Brith Canada asked the Commission to indicate the name of the expert and to disclose the information provided to the expert so that it could correct inaccuracies in materials submitted and fully respond to the complaint. The Commission refused disclosure of the information requested "at this time" and indicated that the information requested would be disclosed later, before the Commission decided on the complaint, but only after the expert had provided his/her written report.

¹⁶ Mark Steyn, *America Alone: The End of the World As We Know It*, New York, NY, Regnery Pub., 2006

B'nai Brith did not participate in the Winnipeg seminar. A B'nai Brith representative attended only briefly. None of the alleged comments was made in the presence of the B'nai Brith representative. B'nai Brith representatives did attend similar seminars in other cities in their entirety, but did not hear anything untoward. Almost five years later, the complaint has yet to be resolved.

Shahina Siddiqui is Executive Director of The Islamic Social Services Association of the United States and Canada, and a member of the Executive Board of the Canadian branch of the Council on American Islamic Relations. In May 2006, she filed an unsuccessful complaint of racism with the hate crimes unit of the Winnipeg Police against several Winnipeg Jewish community groups for co-sponsoring the movie 'Obsession: Radical Islam's War Against the West'.

VI. UNDERSTANDING THE GEO-POLITICAL CONTEXT

Political Islam poses a threat to the hate jurisdictions of Canadian human rights commissions and tribunals. Political Islam has to be distinguished from both the Islamic religion and Islamism.

The twentieth century was the century of crimes against humanity. Incitement to hatred preceded and accompanied mass victimization. After the violations, the ideology of hatred ebbed. Indeed, it was the very tragedies wrought by these ideologies which led to their being undermined.

The ideologies of communism, fascism, Nazism, apartheid and the national security state in the last century each arose, advanced and then collapsed. Francis Fukuyama was bold enough to write that with the collapse of the Communist regimes of Eastern and Central Europe, ideological history had come to an end.¹⁷ But it was not to be.

Ideologies of hatred come and go, but hatred remains. Hatred is a basic human emotion and will always be with us. The twenty-first century has seen the rise of a new ideology of hatred. It is antisemitic, anti-Zionist and anti-American at its core. It is variously called Islamism, Islamic fundamentalism or Islamo-Fascism. The names can be misleading, but the threat is real.

Islamism is an ideology of hatred, terror and power. The aim of purveyors is to kill their identified enemies and rule over others in pursuit of their own self-glorification and self-gratification.

The most dramatic attacks come from mass killings. The most worrisome threats are repeats of these sorts of attacks, for example the danger of a repetition of the assault on the twin towers of the World Trade Centre. However, that is far from the only threat. Armed rebellion, as we saw in Iran, means that fundamentalists seize hold of the machinery of state.

Identifying the murderers and torturers of Hamas, or the Government of Iran, or Al Qaeda with the Islamic religion is as much an insult to Islam as it would be to Christianity to identify the

¹⁷ Fukuyama, Francis, *The End of History and The Last Man*, New York, NY, Avon Books, 1992

purveyors of Nazi or apartheid ideology with the Christian religion. The offence of equating Nazism with Christianity, or Islamism/Islamic fundamentalism with the Islamic religion, is not just an insult to these religions; it also bestows undue credit on hate promoters and conflict entrepreneurs. We should not be suggesting that people who kill and torture innocents have the sanction of established religions. When people mask a murderous agenda of hatred behind any one of the world's great religions, we should pull the mask away, not pretend the mask presents the true face of the inciters.

Sui generis, specific labels like Nazism present their own problems. The Nazi label has been used as a pretence by those who were complicit in the Holocaust but were not associated with Nazi organizations to claim diminished responsibility.

Generic labels like Islamism or Islamic fundamentalism present an opposite problem, their overbreadth. They are over-inclusive, wrongly suggesting that there is something wrong with the Islamic religion as such, or all followers of Islam.

As well, they shift responsibility from individuals to texts. When people commit crimes against humanity in the name of Islam, the fault lies with the individuals, not the texts they wilfully misinterpret to serve their own ends. Blaming the text is a form of exoneration of the perpetrator. Yet, the buck stops with the perpetrator, not the text. Because the texts of established religions are ambiguous, they can all too easily be misinterpreted and misapplied. When the Devil quotes the Bible to serve his own ends, the fault does not lie with the quoted text; the Devil is alone fully to blame.

Despite the limitations of phenomenon-specific labels, it is regrettable that there is no appropriate label for what has come to be called Islamism, Islamic fundamentalism, or political Islam. Nonetheless, it is far beyond our powers to change accepted usage. So we will conform to it, with this overlong caveat: we do not mean to suggest, when using the labels of Islamism, Islamic fundamentalism or political Islam, that there is a problem with the Islamic religion, the Islamic texts or the democratic involvement of Muslims in politics. We do not believe people so labeled deserve the credit of any association whatsoever with the Islamic religion.

If somebody who is a member of a group to which I belong does something wrong, I bear no special responsibility for that wrong, and I have no special duty to correct the wrong. Indeed it is a form of racism to suggest otherwise. If someone who is Jewish steals, other Jews bear no special responsibility for that theft simply because they are Jewish; their Jewish affiliation imposes no special responsibility on them to denounce that theft any more than their non-Jewish neighbour.

However, the matter is different when someone says, in stealing, that he is acting out the dictates of the Jewish religion. In that circumstance, for Jews to remain silent allows a misrepresentation of the Jewish religion to hold sway. Silence in this context becomes an endorsement of the perverse views of the thief.

Silence, the evil twin of condemnation, leaves the outsider at the very least uncertain what is the true content of a religion when crazies speak and act in the name of a religion. As well, would-be copycats are emboldened, believing that they can claim the cover of religion for planned

dastardly deeds without fear of contradiction. Once Islamists start calling for the killing of Jews in the name of the prophet Mohamed, Muslims have a special duty to say that this is not Islam.

Today, this is not happening within Islam to the extent that it should. Ideally, Muslims should be in the vanguard of the fight against Islamism and political Islam. However, in the case of political Islam, with notable exceptions in Canada like Irshad Manji or Tarek Fatah and the Muslim Canadian Congress, that is not the case.

All the same, we have to distinguish between the cowardice and indifference of the many and the deliberate acts of terror of the few. It is sometimes said that the worst place in hell is reserved for those who are indifferent. That may be so in the final accounting. But on this Earth, the greatest culpability goes with the worst harm inflicted. Even though many Muslims are not rejecting Islamists the way they should, even though all too many Muslims reinforce and share elements of Islamist ideology, there is a difference between Islam and Islamism, between a major religion and an ideology of hate.

Islamists have a political agenda. However, theirs is not the only political agenda connected to Islam. There is an intermediate phenomenon between Islamic fundamentalism on the one hand and the mainstream followers of the Islamic religion on the other. It is political Islam, most easily defined as the political agenda of the Organization of Islamic Conference (OIC).

The Canadian Islamic Congress (CIC) meets annually with ambassadors to Canada of the OIC, referring to that body as "the UN of the Muslim world".

The Organization of Islamic Conference groups together 57 states. There is nothing like it for other religions. There is no Organization of Christian Conference, no Organization of Hindu Conference, no Organization of Buddhist Conference. Judaism does not have two states it can bring together. In contrast, the Organization of Islamic Conference, as set out in Appendix A, is a major, controlling presence because of regional bloc voting and the heavy concentration of Islamic states in Africa and Asia. The Organization of Islamic Conference states are using their majority to pursue their agenda. Elements of this agenda are set out in Appendix B.

VII. THE THREAT OF POLITICAL ISLAM

Political Islam can be defined as an ideology which

- a) supports limits to freedom of religion by advocating the use of state power to encourage and impose the Islamic religion,
- b) urges limits to freedom of expression by using state coercion to oppose what it sees as defamation of the Islamic religion,
- c) tolerates terrorism by exempting from the definition of terrorism targeted attacks on innocents where the attacks were committed in
"people's struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony aimed at liberation and self determination",
- d) seeks impunity from human rights criticism of Islamic states and their friends,
- e) engages in exaggerated, unfounded attacks on the human rights record of Israel,
- f) attempts to seize control of human rights mechanisms to pursue its own agenda.

The complaints against Levant, Steyn/*Maclean's* and B'nai Brith Canada highlight procedural defects in human rights commissions and tribunals. Nonetheless the extreme reactions to these defects, that human rights commissions should be abolished, or their hate jurisdictions repealed, are misplaced.

A. International institutions

Recent developments in a number of international arenas show the vigilance that is needed to avoid abuse of human rights jurisdictions, which should be strengthened, not destroyed.

Canadian human rights commissions have not yet deteriorated to the level that we have witnessed at various international fora, most notably those spearheaded by the United Nations and its various human rights organs. However, the Canadian bodies have not adequately laid in their defences against abusive attacks.

Leading the charge of political Islam on the international scene is the Organization of Islamic Conference (OIC), which has successfully hijacked UN institutions to impose its own radicalized agenda.¹⁸ The Organization of Islamic Conference is indifferent to the fate of human rights institutions. It is shameless in the pursuit of its own agenda no matter what the cost to the integrity of human rights mechanisms. Given a choice between the integrity of human rights institutions and the pursuit of its own agenda, the OIC agenda wins out every time.

Notable examples are the World Conference against Racism, the defunct United Nations Human Rights Commission and its successor, the United Nations Human Rights Council. Though there has been a tendency to focus on the travesty of the Durban NGO forum, the 2001 intergovernmental World Conference against Racism (WCAR) also went off the rails.¹⁹ The WCAR decided on a follow-up conference, which is to be held in 2009. The preparatory meetings for this conference indicated a replay of Durban was already in the works, which led Canada, in January 2008, to withdraw.²⁰

The decision of Canada to boycott the World Conference against Racism review was the right decision. However, the decision of Canada to seek election to the UN Human Rights Council was also right. Even for those votes at the Council where Canada is a minority of one, its voice is important. The failure of the UN to deal effectively with human rights is too major a failure just to decry. What is wrong has to be made right. None of the efforts of Canada may work, singly or together. But the importance of the goal means that Canada has to try.

The virus which has felled the World Conference against Racism, the United Nations Human Rights Commission and now the United Nations Human Rights Council is seeping into Canada. It is a virus against which Canada has no natural immunity, against which Canada needs to build

¹⁸ See Annex B for the Organization of Islamic Conference: A Case Study in Political Islam

¹⁹ The concluding text of the intergovernmental conference expressed concern for the plight of the Palestinians under foreign occupation. Additional text supported a right of return of refugees to their homes. The text was under the rubric "Middle East" and was a coded reference to Israel.

²⁰ The Government issued a statement that it "had hoped that the preparatory process for the 2009 Durban Review Conference would remedy the mistakes of the past ... We have concluded that, despite our efforts, it will not. Canada will therefore not participate in the 2009 conference."

up its defences. That is the threat which human rights mechanisms in Canada face, a threat to which they have so far shown themselves to be oblivious.

B. Answering the threat

It is no answer to the threat from abusive attacks to dismantle the institutions under attack. The first institutions under attack in Canada are human rights commissions and tribunals. However, anyone who believes the attacks will stop if we dismantle these institutions is ignoring the nature of the threat. If we proceed to abolish every remedy that an abusive attacker tries to invoke, the dismantling of the Canadian legal system will continue without end.

Robert Bolt's play "A Man for All Seasons" has this exchange:

"Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

Roper: Yes, I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down (and you're just the man to do it!), do you really think you could stand upright in the winds that would blow then?" Yes, I'd give the Devil benefit of law, for my own safety's sake!"

If someone tries to hit you with a chair, of course, you want to fend off the attack from the chair. However, it is a mistake to blame the chair, to decide you will never sit on a chair again because of the attack. Surely, the blame must be put on the attacker. The chair is wholly innocent. Refusing never to sit on a chair again because of such an attack does nothing to prevent further attacks. It is just a self-inflicted harm.

No matter how seriously we dislike the recent complaints made to human rights commissions and tribunals, repealing their jurisdictions is exactly the wrong response. Human rights remedies face a grave risk, as we have seen internationally, of co-optation. The proper response to that threat is to defend against it, not abolish the remedies. If we do that, we have lost the human rights struggle.

Appendix C at the end of this document has an elaboration of this argument.

VIII. THE COMPLAINTS AND WHAT WE LEARN FROM THEM

A. The Maclean's complaint

In April 2008, the complaint by the Canadian Islamic Congress against *Maclean's* to the Ontario Human Rights Commission was dismissed on jurisdictional grounds. The statement of Chief Commissioner Barbara Hall at that time was problematic on procedural grounds. The statement was justly criticized as coming out of the blue without any opportunity for prior submissions. However, even more worrisome was its content.

The statement accuses the *Maclean's* excerpt of the Steyn work of

"portraying Muslims as all sharing the same negative characteristics, including being a threat to the West".

Other than the reference to "a threat to the West", the Ontario Human Rights Commission statement does not specify what in the excerpt caused the Commission concern. Moreover, the phrase "a threat to the West" does not appear in the excerpt.

The word "threat" appears in the excerpt in three contexts. The statement which comes closest to the concerns expressed by the Commission is this: "it [big government] increases your vulnerability to threats like Islamism". Yet there is a significant difference between Islamism and Muslims. Is the Commission equating a threat from Islamism to a threat from Muslims?

The phrase "the West" appears in six contexts. The statement in the excerpt which comes closest to the Commission's paraphrase is this:

"On the Continent and elsewhere in the West, native populations are aging and fading and being supplanted remorselessly by a young Muslim demographic."

The excerpt immediately follows this statement with a list of what Steyn calls "the obligatory of courses". He writes:

"of course, not all Muslims are terrorists though enough are hot for jihad to provide an impressive support network of mosques from Vienna to Stockholm to Toronto to Seattle. Of course, not all Muslims support terrorists though enough of them share their basic objectives (the wish to live under Islamic law in Europe and North America) to function wittingly or otherwise as the "good cop" end of an Islamic good cop/bad cop routine. But, at the very minimum, this fast moving demographic transformation provides a huge comfort zone for the jihad to move around in. And in a more profound way it rationalizes what would otherwise be the nuttiness of the terrorists' demands... When a European jihadist blows something up, that's not in defiance of democratic reality but merely a portent of democratic reality to come. He's jumping the gun, but in every respect things are moving his way."

So Steyn states that the existence of a large, growing population of Muslims provides "a comfort zone for the jihad to move around in" and an indicator that things are "moving his way". These statements are directed to the perception of jihadists, what they would think, not to what Muslims are. Elsewhere in the book, not excerpted in *Macleans*, Steyn decries the fact that moderate Muslims are quiescent, not audible.²¹

These words are not that much different from what was written here earlier. Unless mainstream Islam rejects extremists, outsiders become uncertain what the content of the religion is and extremists become emboldened. Extremists with a large demographic at their heels will delude themselves into thinking that this demographic is behind them unless faced with clear, mainstream rejection. Yet, mainstream Islam has been too quiet in rejecting Islamism; moreover, it is only the few within the Islamic community who have rejected political Islam.

So the condemnation by the Commission is unfounded. There is nothing to which the Commission points in the *Macleans* article that justifies the condemnation. More generally, the Commission fails to distinguish between criticism of people based on their religion and criticism of a political ideology derived from a religion. The Commission does not differentiate between

²¹ Page 86.

condemnation of Muslims and condemnation of Islamism or political Islam. The Commission decries Islamophobia without reference to the Organization of Islamic Conference definition of Islamophobia as defamation of the Islamic religion, as well as without reference to the literal meaning of the word.

B. The Western Standard complaint

Of the twelve Danish cartoons that Levant republished in the *Western Standard*, the one which caused the most controversy was a drawing of the head of the prophet Mohamed with a lit smoking fuse of an explosive poking out of his turban. Is this cartoon objectionable by human rights standards?

To call all Muslims terrorists is a slur against Muslims and legitimately the subject of a complaint to a human rights commission or tribunal. It is an attack against individuals based on their religious affiliation. However, a criticism of the prophet Mohamed is more in the nature of an attack against Islam than an attack against Muslims, more blasphemy than hate speech.

Moreover, as noted, the Organization of Islamic Conference endorses a definition of terrorism which excludes from the definition a common form of terrorism, targeted attacks on innocents where the attacks were committed in

"people's struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony aimed at liberation and self determination".

In practical terms, what this means is targeted attacks on innocent Jewish civilians in Israel is permissible. Though this definition of terrorism is highly politicized, the Organization of Islamic Conference justifies it by relying on Islam. The Charter of the Organization asserts that the organization bases its stances on Islamic values.

It is hypocritical, on the one hand, to assert that terrorism in the name of a "people's struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony aimed at liberation and self determination" is an Islamic value and, on the other hand, to complain about a cartoon that illustrates Islam being hijacked by terrorism through a depiction of an explosive peering out of a turban worn by the prophet Mohamed. The cartoon, in this context, is fair comment.

The Islamic Supreme Council of Canada, the organization headed by Syed Soharwardy, and the Edmonton Council of Muslim Communities, the complainants against Levant, do not invoke the OIC exception to the definition of terrorism. It would be unfair to attribute the OIC exception to the two Councils, but it is not unfair in a cartoon format to attribute the exception to the founder of Islam when the Organization of Islamic Conference itself does that.

The Alberta Human Rights Commission has the power to dismiss at any time a complaint it considers without merit.²² The Soharwardy complaint sat on the books for two years before it was withdrawn. The Commission dismissed the complaint of the Edmonton Council of Muslim Communities as being without merit more than two years after the Commission received it. A complaint without merit should be dismissed a lot more quickly than that.

²² Alberta Human Right, *Citizenship and Multiculturalism Act*, section 22(1).

C. The B'nai Brith Canada complaint

The complaint against B'nai Brith presented these disturbing features:

- a) The complaint was made by a third party based on rumour only. No one present at the event complained to the Commission.
- b) The complaint was made against B'nai Brith only and not the presenting organization.
- c) The identity of the accuser has not been disclosed to B'nai Brith despite requests to that effect.
- d) The Commission expressly denied a request for disclosure of the identity of an independent expert whom the Commission asked to make a "determination" on the complaint.
- e) The Commission further expressly denied a request for disclosure of the documents provided to the independent expert with an opportunity for comment before the independent expert made the requested "determination".
- f) The complainant has previously used a human rights mechanism to complain unsuccessfully against Jewish organizations.
- g) The complaint has dragged on for over four years at a preliminary stage without resolution.

This pattern domestically echoes the international gang-up by Organization of Islamic Conference states against Israel. Internationally, no matter what the Jewish state does to attempt to defend itself against terrorist attacks, the OIC asserts that international human rights standards are being violated and urges the effort to stop. The only sure way for Israel to avoid OIC criticism is to do nothing to respond to terrorism.

We are starting to see a domestic counterpart of this pattern in Canada. When Jewish organizations do something as innocent as sponsor or host events warning against terrorism, they are at risk of complaints that they are violating Canadian human rights standards. The only sure way for Jewish organizations to avoid these complaints is to do nothing to warn about terrorism.

The Manitoba Human Rights Commission has the power to dismiss a complaint which it considers frivolous or vexatious. This complaint has been outstanding for over four years. That power should have been used long ago.

IX. REFORM

A. Contrary complaints

How do we sensitize human rights commissions and tribunals to the threat of Islamism and political Islam? One way would be to bring the threat from these ideologies to commissions and tribunals by way of complaint.

The League for Human Rights of B'nai Brith Canada, in conjunction with Harry Abrams, has done just that with a complaint to the Canadian Human Rights Commission against the Canadian based website <PEJ.org>. The website, though not itself Islamist, shares one element in common with Islamism - the demonization of Israel and the Jewish people as actual or presumed supporters of this supposedly demon state.

The website is replete with concocted charges against Israel of the most extreme human rights violations imaginable. The Jewish people world wide, variously described as the Jewish lobby or the chosen people, are deemed complicit in these imagined atrocities through their support for existence of Israel. The website states: "the Jewish Lobby has systematically undermined the principal pillars of our fragile democracy". The Holocaust is ridiculed as "an immensely

profitable shake down operation for Israel". The web site calls for genocide against the Jewish people "to preserve world peace". Under the heading "We should nuke Israel" a posting by Lex dated September 03, 2006 states

" if we are to preserve world peace. Put boldly and simply, we have to drop a nuclear bomb on Israel..."

Peter Golden, for the website, has responded to Abrams/B'nai Brith complaint by arguing it is "an attempt to stifle legitimate political debate on issues related to the political situation in the Middle East". Yet it is not legitimate political debate to incite hatred against the Jewish people world wide and call for mass killing of Jews. The fact that this incitement is based on fabricated charges of atrocities leveled against the Jewish state, invented to support an argument that this state should not exist, does not convert illegitimate incitement into legitimate political debate.

The Canadian Human Rights Commissioner has recommended discontinuance of the complaint because the owner of PEJ has withdrawn the articles that are the subject of the complaint from public view. B'nai Brith Canada has accepted the recommendation.

B. Education

It is apparent that human rights commissions are unaware of the threat the ideologies of Islamism and political Islam pose to human rights in Canada. The most egregious example was the Ontario Human Rights Commission treatment of the Canadian Islamic Congress complaint.

Author Mark Steyn and *Maclean's Magazine* point to an ideological threat. The Commission accuses both of racism. It is little wonder that defenders of freedom of expression get concerned.

Yet, it is unfair to blame this Commission's ignorance on the existence of commissions. There is a real threat to respect for human rights coming from both Islamism and political Islam. The fact that the Commission does not see the reality of the threat and confuses it with something else makes the risk greater.

When it comes to this particular threat to human rights, human rights commissions just don't get it. One explanation is that the dangers against which Mark Steyn and *Maclean's Magazine* have been warning have already come to pass, that we are already seeing in Canada our human rights institutions being corroded by commission and tribunal fears and misunderstandings about political Islam in the same way that international human rights institutions have been corrupted by the voices of the Organization of Islamic Conference states.

A more benign explanation is just plain ignorance. Human rights commissions, like generals, are fighting the last war. They do not see new threats until they are overwhelmed by them. If, out of generosity than for no other reason, we should assume ignorance rather than wilful blindness, the remedy is education and training. Human rights commissions and tribunals need to be educated on the threat that Islamism and political Islam pose for human rights.

C. Costs

One element of justice is equality of arms. Where commissions interpose between the complainant and the target, complaints are cost free. However, the target may be put to great expense. The principle of equality of arms is not respected.

Generally in civil proceedings in superior courts, costs go with the cause. This is more than just a brake to frivolous proceedings. Costs can be awarded against an unsuccessful party even if there is some merit to his or her case. The awarding of costs against the losing side serves to prevent litigation from being undertaken lightly. When a party knows that the financial loss from an unsuccessful case is substantial, the party will think twice before commencing or defending the proceedings.

Human rights commissions and tribunals need to have the power to award costs to the winning side. Where a commission has assumed conduct of a case on the side of the complainant but then loses at the tribunal level, the tribunal should have the power to award costs not just against the complainant but also against the commission.

D. Screening

Human rights commissions have been overwhelmed by complaints. Investigating and then conducting them have caused substantial delays. The response has been, in British Columbia, to abolish its commission and allow instead direct access of complainants to tribunals. In Ontario, the commission survived, but it has been taken off case work and complaints will go straight to the Tribunal.

These reforms, while dealing with a substantial problem, have been misplaced. The screening and conduct functions of commissions need to be decoupled. Commissions should be screening complaints in every case. They should as well be able to have the power to take ownership of a case, its investigation and pursuit, in selected cases as they see fit.

Right now there is this decoupling of screening and conduct of cases in the criminal law. Most crimes can proceed by way of private prosecution without any government consent. The assumption of conduct of prosecution by the Crown in these cases is a choice of the Crown, but not a legal obligation. There are some offences for which the consent of the Attorney General is necessary. There are yet others where conduct by the Crown is required.

Incitement to hatred is a criminal offence for which consent is necessary. Once consent is given, the prosecution can be conducted either by the Crown or a private prosecutor.

Whether the requirement of consent by the state is necessary or advisable for a criminal prosecution for incitement to hatred, it is certainly advisable and may even be legally necessary, by Charter standards, for civil proceedings. For, once a proceeding is civil, the standard of proof is less. In a civil proceeding, proof on a balance of probabilities is sufficient, rather than the criminal standard of proof beyond a reasonable doubt. The higher standard in criminal proceedings serves as its own brake on frivolous proceedings. A consent requirement for civil proceedings is necessary, at least in practice if not in law, to compensate for the lower standard of proof.

It is perverse that, right now in British Columbia, the civil remedy for incitement to hatred has no screening mechanism but the criminal remedy does. It is the absence of this screening mechanism which made the tribunal hearing against *Maclean's Magazine* possible. In light of the Canadian Human Rights Commission's decision to reject an identical complaint against *MacLean's*, it is almost certain that such a screening mechanism would have prevented the BC human rights case against that magazine.

E. Choice of forum

As the complaint against *Maclean's* showed, it is possible to pursue essentially the same complaint in several Canadian jurisdictions simultaneously. Each forum addresses the complaint as a matter of substance, without regard to the fact that the same complaint has been filed elsewhere.

Multiple frivolous complaints against the same respondent, coupled together with the powerlessness of the tribunals to award costs to the successful side, compound the injustice. Targets of frivolous complaints wrack up costs fighting off the same complaint in several fora at one and the same time.

The *Canadian Human Rights Act* provides that the Commission,

"In addition to its duties ... with respect to complaints regarding discriminatory practices ... shall maintain close liaison with similar bodies or authorities in the provinces...to avoid conflicts respecting the handling of complaints in cases of overlapping jurisdiction;"²³

Is this a power to refuse consideration of a complaint on the ground that the complaint in substance is already under consideration by a provincial jurisdiction? It would seem not. For one, the provision refers to the obligation to avoid conflicts as something different from the duties with respect to complaints. For another, the Commission, if it had such a power, could and should have dismissed the complaint against *Maclean's* on this basis. But it did not do so.

The ability to make several complaints at once in different jurisdictions against the same target means that the complaint power can be used as a way of harassing the object of the complaint. That avenue of harassment needs to be cut off. Complaints should be heard in one forum only. The appropriate forum should be the one with the most substantial connection to the complaint and the parties. No other jurisdiction should have the power to entertain essentially the same complaint.

F. Due process

Human rights commissions and tribunals should follow due process. The general power commissions have to promote human rights should not be used to comment on the merits of complaints over which they have no jurisdiction, particularly when they have not heard from the other side on the merits.

Altogether apart from its content, the reaction of the Ontario Human Rights Commission to the complaint against Steyn and *Maclean's*, commenting on the substance of the complaint at the same time as the complaint was dismissed on jurisdictional grounds, was inappropriate. Even if one puts aside the wrongheadedness of the content, the procedure was unfair.

No tribunal or commission, once it dismisses a complaint on jurisdictional grounds, should pronounce on the merits. It certainly should not do so before hearing both sides to a dispute.

²³ Section 27(1)(c).

Fairness requires that both sides be heard. The absence of jurisdiction, in the case of the Ontario Human Rights Commission, prevented the convening of a tribunal hearing. That jurisdictional gap does not excuse a pronouncement on the merits without a hearing. On the contrary, absence of jurisdiction imposes silence on the merits.

For those with a sense of fairness, the behaviour of the Ontario Human Rights Commission was appalling. But for those imbued with the spirit of Islamism or political Islam, it was a reinforcement. The Ontario Human Rights Commission, by its behaviour, made a human rights threat more acute.

G. The right to know your accuser

It would seem basic to a respect for human rights that a person should not be asked to answer anonymous accusations based on rumour. Then Canadian Privacy Commissioner John Grace, in his testimony before the Standing Committee on Public Accounts on December 12, 1989, stated that one of the rights conferred by the Privacy Act:

"is to know what accusations against us are recorded in government files and who has made them. Whether such accusations are true and well intentioned, as some may be, or false and malicious, as other may be, it is fundamental to our notion of justice that accusations not be secret nor accusers faceless."²⁴

Yet, there is nothing in the *Human Rights Acts* or *Codes* preventing the pursuit of anonymous complaints. A complaint can be based on rumour, and the source of the rumour need not be disclosed to the target of the complaint.

This is what happened with the complaint against B'nai Brith. B'nai Brith is the victim of faceless accusers. Human rights legislation which allows for this manner of proceeding is defective, not itself respectful of human rights. The legislation should require that those who make an accusation be identified to the target of the complaint.

H. The right to disclosure

As fundamental to justice as the right to know your accuser is the right to know your judge and the case against you and to have an opportunity to respond. The Manitoba Human Rights Commission case against B'nai Brith Canada, in substance, violates these basic principles.

The opinion of the independent expert sought by the Manitoba Commission is likely to be so influential as to be dispositive. Indeed, the letter from the Commission to B'nai Brith notifying it of the appointment of the independent expert refers to the opinion of the independent expert as a "determination" and not merely advice.

The principle of openness is not satisfied merely because the identity of the Commissioners and the materials submitted to them are known, if neither the name of the expert nor the material submitted to the expert are disclosed in advance of the report of the expert. B'nai Brith, in addition to a faceless accuser, has become the victim of secret proceedings.

²⁴ Minutes of Proceedings and Evidence on the Standing Committee on Public Accounts, Issue No. 20 (12/12/89), at p. 10

There needs to be express provision to prevent such a sequence of events from reoccurring. The law must provide that whenever a human rights commission engages an independent expert to advise on a complaint, the identity of the expert and the materials disclosed to the expert must be made available to the parties with an opportunity to respond before the report of the expert is written.

X. CONCLUSION

Human rights commission and tribunal hate jurisdictions should not be dismantled, but their procedures need to be improved.

Moreover, the best procedures in the world cannot guard against ideological corruption. No matter what the procedures of the jurisdiction, any jurisdiction dealing with Islamism or political Islam without any awareness of what these ideologies are or the dangers they pose, will not function effectively. Canadian institutions generally, and human rights commissions and tribunals in particular, need to lay in their defences against these ideologies.

APPENDIX A

THE BALANCE OF POWER IN THE UN HUMAN RIGHTS SYSTEM

The membership of the old United Nations Human Rights Commission was 53 states; the membership of the new United Nations Human Rights Council is 47 states. The geographic distribution for the Commission was 15 from Africa, 12 from Asia, 5 from Eastern Europe, 11 from Latin America and the Caribbean, and 10 from the Western Europe and Others Group. For the Council, the geographic distribution is Africa 13; Asia 13; Eastern Europe 6; Latin American and the Caribbean 8; and Western Europe and Others Group 7.

So Africa went from 15 to 13, or a loss of two. Asia went from 12 to 13, or a gain of one. Latin America and the Caribbean went from 11 to 8, or a loss of three. Eastern Europe went from five to six or a gain of one. The Western Europe and Others Group went from 10 to 7, or a loss of three. Even in the old Commission, Asia and Africa had a razor thin majority, 27 out of 53, or a majority of one. With the new Council, the majority became more pronounced, 26 out of 47, or a majority of two.

None of the states in Latin America and the Caribbean or the Western Europe and Others Group is a member of the Organization of Islamic Conferences (OIC). These non-Islamic regions were the big losers in the shift of geographical memberships. The other groupings all have significant numbers of Islamic states. In other words, the greater majority for Asia and Africa combined makes it easier for the Organization of Islamic Conference states to control the Council than it was for them to control the Commission.

At its inception, the Organization of the Islamic Conferences had 16 members on the Council, seven in the Asian region and nine in the African region. The Organization of Islamic Conference states, accordingly, had a majority of both the African and Asian region, and those two regions together, counting 26 states, had a majority of the Council. The Organization of the Islamic Conference states at the inception of the Council, in effect, controlled the Council once there was bloc voting.

The story was the same after the 2007 elections. Fourteen seats on the Council came up for election in 2007. With the change in membership, the Council in 2007 had seven OIC states in the Africa region. Algeria, Morocco and Tunisia left; Egypt joined. Since, in total, the Africa bloc is 13, the OIC still had a majority in the Africa bloc.

In Asia, the terms of Indonesia and Bahrain expired. Indonesia was re-elected and Qatar joined. So the OIC membership and majority in the Asian bloc remained the same.

2008 continued this story. In May 2008, the terms of four Council members in the Africa region expired, two of whom were OIC member states - Gabon and Mali. Gabon was re-elected. Mali was replaced by another OIC member state, Burkina Faso.

In Asia, matters got worse. In Asia also in 2008, the terms of four Council members expired. Only one was an OIC member state, Pakistan. Pakistan was re-elected. Also elected to an Asian slot was OIC member state Bahrain, adding to the Asian OIC majority. Accordingly, the OIC continues to control the Council.

APPENDIX B

THE ORGANIZATION OF ISLAMIC CONFERENCE (OIC) - A CASE STUDY IN POLITICAL ISLAM

A. State encouragement and imposition of the Islamic religion

i) Da'wa

The Organization of Islamic Conference endorses the concept of Da'wa or invitation, the religious obligation of Muslims to invite others to Islam. An OIC summit conference resolution in 1997 requested all member states to incorporate an Islamic Da'wa strategy into the national policies of member states, to be followed by joint Islamic action.²⁵

It is one thing for the faithful to proselytize. It is quite another thing for the state itself to proselytize. When the state proselytizes, the weight of state power is directed towards a religious goal of conversion. A state which proselytizes in favour of one religion does not respect the principle of freedom of religion. Freedom of religion is denied not just when the state imposes penalties on the practice of religion. It is also denied when the state uses its power to proselytize for one religion alone.

From the very nature of Da'wa, the concept of separation between mosque and state is rejected. The state, according to OIC principles, becomes a vehicle for the promotion of Islam. The barrier between religion and state is not watertight in many non-Islamic states. Yet, no state outside the Islamic world gives itself a proselytizing mandate. Israel, for instance, though a Jewish state, does not have a policy of proselytizing for Judaism either abroad or at home. Indeed, Judaism is a non-proselytizing religion.

While the concept of Da'wa is compatible with freedom of religion, the OIC embrace of that concept is not. The call of the Organization of Islamic Conference to member states to incorporate a Da'wa strategy into their national policies is a call to reject freedom of religion. This is incompatible with the Canadian approach to human rights.

ii) Shari'ah

The Organization of Islamic Conference gives priority to Islamic religious law, Shar'ia, over international human rights law. The Cairo Declaration on Human Rights in Islam adopted by the Islamic Conference of Foreign Ministers in August 1990 provides:

"it is prohibited to take away life except for a Shari'ah prescribed reason."²⁶

"it is prohibited to breach it [the right to safety from bodily harm] without a Shari'ah prescribed reason".²⁷

"The country of refuge shall ensure his [a persecuted asylum seeker's] protection until he reaches safety, unless asylum is motivated by an act which Shari'ah regards as a crime."²⁸

²⁵ Resolution 37/8-C.

²⁶ Article 2(a).

²⁷ Article 2(d).

²⁸ Article 12.

"Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming therefrom, provided that such production is not contrary to the principles of Shari'ah."²⁹

"There shall be no crime or punishment except as provided for in the Shari'ah."³⁰

"Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah."³¹

"He [everyone] shall also have the right to assume public office in accordance with the provisions of Shari'ah."³²

"All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah."³³

"The Islamic Shari'ah is the only source of reference for the explanation or clarification to any of the articles of this Declaration."³⁴

Human rights as conceived and promoted by the Organization of Islamic Conference are not really human rights. The problem is not just that religious law takes precedence over human rights law. It is also that human rights law in an Islamic state is to be explained or clarified only by reference to religious law, and not by reference to international human rights jurisprudence. This precedence of religious law over human rights law means that, in some cases, human rights can be violated in the name of the Islamic religion. In particular, in an Islamic state which respects the Cairo Declaration, the freedom of religion of those asserting human rights who are either not Muslim or who are only nominally so - *i.e.*, non-believers - will be violated .

B. Defamation of Islam

One of the elements of the ten year programme of action endorsed at the Islamic summit conference in December 2005 is "Combating Islamophobia". The programme of action provides under this heading:

"Emphasize the responsibility of the international community, including all governments, to ensure respect for all religions and combat their defamation."³⁵

Accordingly, Islamophobia is, to the Organization of Islamic Conference, disrespect and defamation of the Islamic religion.

State members of the Organization of Islamic Conference shepherded through the United Nations Human Rights Council in March 2007 and in April 2008 a resolution entitled

²⁹ Article 17

³⁰ Article 19(d)

³¹ Article 22(a)

³² Article 23(b)

³³ Article 24

³⁴ Article 25

³⁵ Article VII(1).

"Combating defamation of religions." The resolutions note "with concern that defamation of religions is among the causes of social disharmony".

The resolutions single out defamation of the Islamic religion as a matter of special concern. The resolutions note "with deep concern the increasing trend in recent years of statements attacking religions," "Islam and Muslims in particular" (2007), "including Islam" (2008). Islam is the only religion mentioned.

The 2008 resolution suggests that the prohibition of defamation of religion is a justifiable limitation on freedom of expression. The resolution states "that the exercise of this right [freedom of expression] carries with it special duties and responsibilities, and may therefore be subject to certain restrictions."³⁶

Defamation of religion has not traditionally been recognized as a limitation on freedom of expression. The International Covenant on Civil and Political Rights, which requires states to prohibit hate propaganda and war propaganda, does not require states to prohibit defamation of religion. In light of the fact that the Covenant states explicitly the situations where freedom of expression is limited, the silence on defamation of religion must be read to mean that a prohibition on defamation of religion is an unjustifiable limitation on the guarantee of freedom of expression.

Canada, which sought and won election to the Human Rights Council, voted against these resolutions in both 2007 and 2008. In 2007, Canada gave an explanation of vote in which Canadian ambassador Paul Meyers said:

"we are troubled by the fact that the protection of religions themselves, rather than the protection and promotion of the rights of the adherents of religions, including of persons belonging to religious minorities, is the topic of this resolution. We also remain concerned that the current resolution continues to stress the protection of one religion above all others."

The very name "Islamophobia" highlights the problem the Canadian speech identifies. Literally, Islamophobia means fear of Islam. A human rights concern should be Muslimophobia, not Islamophobia. Human rights are designed to protect people, not religious ideologies.

Defamation of religion is different from defamation of the religious. It is a matter of common everyday knowledge that the major world religions are subject to a variety of interpretations. If someone says that Judaism means something derogatory, it can be argued that they have misinterpreted Judaism; it should not be automatically assumed that they have attacked Jews personally.

The *Canadian Criminal Code* has a prohibition against blasphemous libel which survives on the statute book³⁷. However, there has not been a reported prosecution since 1935. The law allows for private prosecution, but no one, even the most vociferous critics of Islamophobia, has

³⁶ Paragraph 12.

³⁷ Section 296.

invoked it. The conventional wisdom is that such a prosecution today would violate the *Canadian Charter of Rights and Freedoms* guarantee of freedom of expression³⁸.

C. Definition of terrorism

The definition of terrorism is simple and straightforward. It is set out in the International Convention for the Suppression of the Financing of Terrorism. It is defined as any act

"intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."³⁹

In a nutshell, terrorism is targeted killing of civilians with a political motive. The Supreme Court of Canada has endorsed this definition in the case of *Suresh*⁴⁰.

The Organization of Islamic Conference rejects this definition. The 1999 Organization of Islamic Conference Convention on Combating International Terrorism excludes from its definition of terrorism acts committed in

"people's struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony aimed at liberation and self determination."⁴¹

This is an exception which swallows the rule, since virtually all contemporary terrorists, including the attack on the World Trade Centre, justified their attacks in this way. According to the Organization of Islamic Conference, targeted killing of innocents for a political purpose is acceptable as long the purpose is the right one in their eyes. Put another way, the Organization of Islamic Conference states accept terrorism as it is practised in everyday reality. Political Islam, as defined by the Organization of Islamic Conference, tolerates terrorism.

The Organization of Islamic Conference is not an international law debating society, but rather a political organization. The reason the organization punches such a gaping hole in the definition of terrorism is that it wants to excuse and justify terrorism directed against innocent Jewish Israeli citizens. The exception is a verbal cover for this terrorism.

Canadian Islamic Congress, the complainant against *Maclean's* and Steyn, is headed by Mohamed Elmasry. He has said that all Israeli citizens over the age of 18 are "legitimate targets" for suicide bombers⁴². This statement is an apology for terrorism and a justification for genocide. Genocide is defined in the statute of the International Criminal Court as any one of a set of acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Note the phrase "in whole or in part". The crime of genocide does not require an intent to destroy the whole group. The crime of genocide is committed where there is an intent to destroy only part of the group.

³⁸ Jeremy Patrick "Not Dead, Just Sleeping: Canada's Prohibition on Blasphemous Libel as a Case Study in Obsolete Legislation"

³⁹ Article 2(1)(b)

⁴⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1 paragraph 96.

⁴¹ Article 2.

⁴² Marina Jimenez "Israelis Legitimate Targets, Canadian Muslim Says", *Globe and Mail*, October 23, 2004.

Where a group is defined in national, ethnical, racial or religious terms, there is no further requirement that the sub group also be defined in national, ethnical, racial or religious terms. The sub group can be defined in terms of politics, or territory, or age, or gender, or any other terms.

The "in part" requirement is a requirement to kill a substantial part of the group defined in national, ethnical, racial or religious terms. The substantiality requirement has a qualitative component. There is killing of a substantial part of the group where the sub-group is a prominent or emblematic part of the overall group, or is essential to the survival of the overall group.⁴³

This was the finding of both the International Criminal Tribunal for the Former Yugoslavia in the case of Krstic, and the International Court of Justice in the case of Bosnia against Serbia. Both tribunals found that genocide was committed by a mass killing of Bosnian Muslims males of military age in Srebrenica⁴⁴. The group was Bosnian Muslims. The part of the group - males of military age in Srebrenica - was defined by age, gender and territory and not by nationality, nor ethnicity, nor race, nor religion. Yet it was still genocide. Now, if young men killed in Srebrenica because they were Bosnian Muslims amounts to genocide, surely persons 18 or over killed because they are Israeli citizens also amounts to genocide.

One can see the connection between the position of the Organization of Islamic Conference on the definition of terrorism, and the statement of Canadian Islamic Congress president on the killing of Israeli civilians over the age of eighteen. Elmasry justified his statement by asserting that Israel is "an occupying power", one of the exceptions to the Organization of Islamic Conference ban against terrorism.⁴⁵

D. Anti-Zionism

The U.S. Department of State, in a report released by the Office of the Special Envoy to Monitor and Combat Anti-Semitism, titled "Contemporary Global Anti-Semitism Report" issued March 2008 wrote:

"governments, in particular members of the Organization of the Islamic Conference (OIC), have used the United Nations system as a venue to engage in polemics against Israel that go beyond legitimate criticism of Israel's policies and instead demonize Israelis and, implicitly, Jews generally."

The animus of the OIC against Israel is upfront. The OIC introduces and speaks to resolution after resolution in the UN Human Rights Council against Israel. Take for instance the most recent Council session in March 2008. Pakistan, for the OIC, introduced the tendentiously titled "Human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly the recent ones in the occupied Gaza Strip"⁴⁶.

⁴³ *Krstic* case, IT-98-33-A, April 19, 2004, *Bosnia v. Serbia*, ICJ February 26, 2007, paragraph 200.

⁴⁴ IT-98-33, August 2, 2001

⁴⁵ The notion that Israel is a foreign occupier in its own state is just so much nonsense. Even the notion that Israel is an occupying power in Gaza and the West Bank is questionable, since the control Israel has over Gaza and the West Bank is no different, at international law, from the control Egypt and Jordan had over those territories before the 1967 war, and Egypt and Jordan were never considered occupying powers. For an elaboration, see David Matas *Aftershock: Anti-Zionism and Antisemitism*, Dundurn, Chapter Four.

⁴⁶ A/HRC/7/L.1

The resolution is typical anti-Zionist blather. Terrorists, disguised as civilians, fire rockets at Israel using innocent civilians as shields. The resolution "calls for urgent international action to put an immediate end to the grave violations [of international humanitarian law and of the human rights of the Palestinian people therein] committed by the occupying Power, Israel". Yet, Israel does not violate international law by defending itself against terrorist attacks. As well, the fact that Israel has withdrawn from Gaza is ignored.

A statement of the OIC given by Pakistan in support of the resolution refers to Israeli "attacks on Palestinian people in Gaza", ignoring the military purpose and value of the Israeli response to the rocket attacks. In the condemnation of the Israeli response, the disguise of terrorists as civilians and their using civilians as shields are ignored.

The resolution creates a false equivalence between Hamas rocket assaults, which are terrorist attacks targeting civilians and the Israeli response, which targets terrorists. Indeed, the Hamas aggression is downplayed at the same time as the Israeli action in self defence is distorted and exaggerated.

The resolution

"Calls for the immediate cessation of all Israeli military attacks throughout the Occupied Palestinian Territory and the firing of crude rockets by Palestinian combatants".

That phrase is the only mention in a long resolution referring to the cause of the problem, the Hamas rocket attacks on Israel.

The resolution

"Expresses its shock ... at the Israeli policy of inflicting collective punishment against the civilian population, which constitute a war crime, and calls for bringing the perpetrators to justice;"

Yet, Israel has no policy of inflicting collective punishment against civilian populations. The suggestion of such a policy is a concoction of the authors of the resolution.

There are many other such resolutions like that presented regularly by the OIC at the UN Human Rights Council. No matter what the state of affairs in the Middle East, one can count on the OIC to present to the Council an anti-Zionist resolution and use its power over the Council to ensure its passage.

In fact, the United Nations Human Rights Commission disintegrated under the assault of the Organization of Islamic Conference. The United Nations General Assembly resolution which abolished the Commission and replaced it with the Council noted in a preambular paragraph:

"the importance of ensuring universality, objectivity and non selectivity in the consideration of human rights issues, and the elimination of double standards and politicization."⁴⁷

⁴⁷ UN Document number A/RES/60/251, 3 April 2006.

The very phrase "the elimination of double standards and politicization" was an acknowledgement that there had been double standards and politicization of the international human rights system. Which state was the greatest victim of the lack of universality and objectivity, the most obvious target of selectivity and double standards, the scapegoat of politicization? It was plainly Israel. The resolution could only have been clearer if, instead, this paragraph referred to

"the importance of not ganging-up on Israel to the exclusion of real violator states".

And which states were the culprits in this ganging up? Again, the answer is straightforward - the Organization of Islamic Conference member states.

E. Impunity

The OIC runs the Council to prevent criticism of the human rights record of its own members. The president of the UN Human Rights Council announced on Monday, March 26, 2007 that the Council decided to discontinue consideration of both Uzbekistan and Iran. Both states are members of the Organization of Islamic Conference.

Uzbek government forces on May 13, 2005 shot into a crowd of peaceful demonstrators gathered at the main square of Andijan, killing hundreds. Fifteen defendants were convicted of crimes relating to these events at a trial which began on September 20, 2005. According to Human Rights Watch, the trial gave rise to concerns that the defendants, who had all confessed to the charges, could have been subjected to torture or coercion. Human Rights Watch reported on a crackdown on civil society following the Andijan events. Human rights defenders attempting to document these events and calling for accountability or speaking about the government's role in the massacre were particularly vulnerable.⁴⁸ And yet the OIC managed to engineer removal of this item from consideration by the Council

The removal of Uzbekistan from the agenda of the Council confidential procedure is dwarfed by the dropping of Iran. Ignoring human rights violations in Iran, even in a confidential Council environment, is as explicit an abandonment of the human rights vocation of the Human Rights Council as one could imagine. When the Human Rights Council asserts that it is not prepared to discuss Iranian human rights violations, even behind closed doors, it is stating that it is not concerned with human rights violations period, but merely with manipulating the system to its own advantage.

For the Organization of Islamic Conference to run the Council to prevent criticism of the human rights record of its own members is bad enough. But beyond that, the OIC trades off impunity for anti-Zionism. Any violator state, no matter how bad its violations, will have the weight of the OIC behind its efforts to avoid criticism of its violations, provided only the violator state is willing to join in the OIC anti-Zionist agenda.

A striking example is Cuba, a member of the Council. The very election of Cuba to the Council was a disgrace, not just because of their human rights record, but because of their election efforts. According to a report from the B'nai Brith International delegation to the last session of

⁴⁸ Human Rights Watch World Report, 2006.

the Commission as well as at the first two sessions of the Council, Cuba went from state to state promising to vote how the state wanted, offering to say what the state wanted, provided only that the state voted for Cuban membership on the Council.

Cuba did get elected and, at the first session of the Council, on the agenda item dealing with substantive human rights violations, devoted its whole speech to denouncing Israel with the standard anti-Zionist clichés. The Cubans were so preoccupied with Israel they could not find even one word for the behaviour of the United States, usually a favourite Cuban whipping boy. What was going on here was payback. Cuba had traded its way onto the Council with the 57 states and votes of the Organization of the Islamic Conference. For the Organization of the Islamic Conference, what mattered was anti-Zionism. Cuba was more than happy to oblige.

Cuban anti-Zionism did not end there. Whenever at the Council there was a vote to be cast, or a speech to be made beating up on the Jewish state, Cuba was ready, willing and able. Cuba, in principle, has no obvious domestic or geopolitical interest in what happens in the Middle East. The country is thousands of miles away from Israel. It does not have a significant Muslim or Arab population. Yet, at the UN, it has been a lead critic of the Jewish state.

In June 2007, the Council heard from and decided to continue the special procedures for Cambodia, Congo (DRC), Somalia and Haiti. The Council heard from and decided to discontinue the special procedures on Belarus and Cuba. There was no noticeable improvement in the human rights records of Belarus and Cuba before the 2007 discontinuation. The Cuba discontinuation was immunity bought with anti-Zionism.

APPENDIX C

INSTITUTIONAL ABUSES

A. Law Societies

Law Societies are also fora that need to be considered in this debate. A recent example illustrates how a remedy can be misused in this arena as well.

The Government of Canada has a policy of seeking revocation of citizenship of those who entered Canada by false representation or fraud, or by knowingly concealing material circumstances, against whom there is substantial evidence of complicity in war crimes or crimes against humanity. In application of that policy, the Government sought the revocation of citizenship of Wasyl Odynsky.

In March 2001, Mr. Justice MacKay of the Federal Court of Canada found that Odynsky had entered Canada in 1949 by false representation or fraud, or by knowingly concealing material circumstances. The next step in the process was a decision by the Federal Cabinet whether or not to revoke citizenship. Cabinet sat on this decision for years and during those years, B'nai Brith urged Cabinet action on the file.⁴⁹

The daughter of Wasyl Odynsky, Olya Odynsky, made a complaint to the Law Society of Manitoba against David Matas for advocacy on behalf of B'nai Brith Canada that the citizenship of Wasyl Odynsky be revoked and, in particular, claimed that he had misrepresented the judgment of Mr. Justice MacKay. Matas responded to the complaint, in part, by writing:

"This strikes me as not a proper matter of complaint to the Law Society. What the judgment says is a matter of public record. I have no special or privileged access to this judgment. Neither I, nor the client B'nai Brith Canada was involved in the case in Federal Court in any way. Our observations about the case come from reading the judgment and from no other source. Obviously, people can disagree about the meaning of any particular court judgment. It is inappropriate to resolve those disagreements through rulings on complaints to Law Societies."

In October 2002, the Law Society ruled against the complaint.⁵⁰ If this complaint had succeeded, it would have been a threat to freedom of expression, a far more serious threat than a successful complaint to a human rights commission, since the Law Society has the power to disbar, to take away one's licence to practice and to prevent a lawyer from carrying on his or her profession. Yet, it never occurred to David Matas nor B'nai Brith Canada then, and they would not now,

⁴⁹ Odynsky argued in Federal Court that he was not guilty of war crimes. Mr. Justice MacKay noted that he did not have the authority to decide that issue. His mandate was limited to determining whether Odynsky had entered Canada by false representation or fraud, or by knowingly concealing material circumstances. Mr. Justice MacKay nonetheless observed in an aside:

"there was no evidence of any incident in which he [Odynsky] was involved that could be considered as directed wrongfully at any other individual, whether a forced labourer prisoner, or any other person"

However, that is not the same as finding that there was no evidence of complicity in war crimes or crimes against humanity.

⁵⁰ The exchange of correspondence can be found in Federal Court file T-1162-07, *League for Human Rights of B'nai Brith Canada v. The Queen*

advocate that because of this complaint, the disciplinary powers of law societies over lawyers be abolished. A poorly-founded attempt to invoke a remedy is not an argument against the existence of the remedy.

B. Criminal Law

British magistrate Tim Workman issued an arrest warrant against Israeli major general Doron Almog in September 2005 for violation of the British Geneva Conventions Act. The arrest warrant flowed from a politically motivated private prosecution acting out the anti-Zionist ideology that every Israeli effort of self defence is a grave violation of international human rights or humanitarian law. To avoid arrest, the General, who got word of the warrant, stayed on his plane till take-off once he landed at Heathrow Airport, rather than disembarking.

The prosecution was an egregious abuse of the British criminal law system, which cries out for procedural reform, so that these prosecutions would require the consent of the Attorney General, and there should be no possibility of private prosecution. That is the law in Canada⁵¹. But the prosecution does not argue for the abolition of the possibility of prosecuting war crimes.

⁵¹ Geneva Conventions Act section 3(4).