

Preventing Genocide

by David Matas

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What lessons can we draw from the Holocaust to prevent genocide? I suggest four.

1) Seek justice

After World War I, the Treaty of Sèvres provided for the prosecution of the perpetrators of the Armenian genocide. However, Turkey refused to sign. In order to get peace with Turkey, the Treaty of Lausanne replaced the Treaty of Sèvres. The second treaty was silent on crimes against humanity¹.

There is a direct link between the immunity given by the Treaty of Lausanne to the Armenian genocide, the attempt to gain peace through the avoidance of justice after World War I, and World War II. Lucy Davidowicz, in her book *The War against the Jews 1933-1945* writes that, in the minds of the Nazi German Leaders, World War II was a cover for its planned murder of the Jews². German leader Adolf Hitler said "Who remembers the Armenians?"

After World War II, there was a half hearted attempt to bring Nazi war criminals to justice through the Nuremberg tribunals. The Allies stopped prosecuting Nazi war criminals in mid stream³, in 1948, with half its docket unprosecuted, including Kurt

¹ David Matas "Prosecuting Crimes against Humanity: The Lessons of World War I" (189-90) 13 Fordham Journal of International Law, 86

² Bantam Edition, 1976, New York, page 122.

³ See David Matas *Justice Delayed: Nazi War Criminals in*

Waldheim who later went on to become Secretary General of the United Nations and President of Austria. The political reasoning at that time was that it was important to have West Germany as an ally in the then developing Cold War with the Soviet Union.

There was no general system of international justice to replace the Nuremberg Tribunal till 2002 when the Rome Treaty establishing the International Criminal Court came into force. In the intervening fifty four years, there was one genocide after another, in Cambodia, in Rwanda, in Bosnia, in Somalia and I could go on. If we define genocide broadly to cover the state sponsored mass murder of innocent civilians for whatever reason, whether political, religious or racial, there were forty-four such episodes from World War II, up until 1988⁴.

We need to establish on sound foundations an international system of criminal justice. In doing so, while we pursue the perpetrators of other genocides, we must not forget the perpetrators of the Holocaust.

The Canadian effort, in this respect, has been pitiful. Let me just mention one embarrassment to you, the outstanding cases of Jacob Fast, Wasyl Odynsky, Helmut Oberlander, Vladimir Katriuk, Jura Skomatzuk and Josef Furman.

The War Crimes Unit launched revocation of citizenship cases against all six of these men because the Unit had compelling evidence that each was complicit in war crimes or crimes against humanity. The Federal Court determined that all six lied their way into Canada, and got citizenship by false representation or fraud or by knowingly concealing material circumstances.

Canada with Susan Charendoff (1987: Summerhill Press).

⁴ B. Harff and T. R. Gurr "Toward Empirical Theory of Genocides and Politicides" (1988) 32 *International Studies Quarterly* 359.

Yet, years later, after they lost in Court, these men still sit in Canada, awaiting what should be a rubber stamp cabinet decision which never comes that their citizenship be revoked. We have now been waiting since August 2006 for a cabinet decision in the cases of Furman and Skomatzuk, since May 2004 in the case of Oberlander, since October 2003 in the case of Fast, since March 2001 in the case of Odynsky, and since January 1999 in the case of Katriuk.

Oberlander lost in Court February 2000. Cabinet actually revoked his citizenship in July 2001. But the Federal Court of Appeal overturned the revocation on a technicality in May 2004 saying it had to be redone.

At some point, the Nazi mass murderers will all be gone. But the work of establishing their guilt must continue. We should not forget the victims. And we should not forget their murderers.

Memorials to victims of mass atrocities, and I have seen many, have this one feature in common, a complete absence of reference to the perpetrators. To look at these memorials, one would think that the victims fell prey to some unfortunate natural disaster. The reality that these victims fell prey to their friends and neighbours, often to the people in the immediate surroundings of the memorial, is lost.

If we are to understand what truly happened, we must continue to identify perpetrators and ascribe blame long after both perpetrators and victims have all died. Only through attributing individual responsibility for these crimes do we develop a complete picture of the crimes, of the perpetrators as well as the victims. It is a delusion to think that we can learn the lessons of the great crimes of the past by remembering only the victims and ignoring the perpetrators.

Unless we see who the criminals were, what their motivation was, the circumstances of their behaviour, the commission of massive crimes is incomprehensible. The worst

crimes are committed by the most ordinary people. Indeed, the very massiveness of the crimes requires the whole scale co-operation of large numbers. It is all too easy to ascribe awful crimes to great devils who have no connection to ordinary humanity. Yet, the very scale of the crimes requires the active participation of ordinary human beings acting in every day ways.

The notion that great crimes are committed by great devils who have nothing in common with ordinary humanity is a self comforting delusion we all share which only attribution of individual responsibility can dispel. Only when we see person after person who is not much different from our friends and neighbours going about their daily routines can we grasp the true horrors of the Holocaust.

For humanity to be deterred from great crimes, we need to see the risks around us of the commission and recommission of these crimes. We need to see how it is possible for our friends and neighbours to become partners in these crimes. Attribution of individual responsibility can tell us that. Ignoring the perpetrators blinds us to it.

The failure of comprehensive prosecution of Nazi mass murderers after World War II has allowed all too many people to blame the Holocaust on Adolf Hitler. Yet, the primary responsibility for the Holocaust lay with ordinary Germans⁵, with ordinary people everywhere the Nazi invading armies went. Only the detailed collection of individual responsibility can drive that sort of lesson home.

2) Protect refugees

The United Nations Convention on the Status of Refugees was a direct response to the failure to protect Jewish refugees before and during World War II. Following an

⁵ David Jonah Goldhagen *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* Alfred A. Knopf 1996

intergovernmental conference at Evian, France in 1938, governments of 32 nations formed an inter-governmental committee to assist refugees leaving Nazi Germany and Austria. The Evian system was unsuccessful: everyone favoured resettlement, but no one was prepared to offer it. Without legal recourse available to refugee claimants, antisemitic or anti-alien immigration officials could prevent Evian's good intentions from having concrete results.

The conclusion the international community drew from this history was that voluntary commitments to resettle refugees were worthless. A binding international treaty was needed. The United Nations Convention on the Status of Refugees was the result.

But the problem is not solved. The lesson has not been truly learned. Refugee protection values are accepted everywhere. Instead of rejection of the principle of refugee protection, what we see is hypocrisy, acceptance in principle and violation in practice. A narrow application of the refugee definition, a denial of fairness in refugee determination procedures, harsh treatment of those awaiting determination of their refugee claims, exaggerated scepticism that leads decision makers to disbelieve claimants even when they are telling the truth, insistence on obtaining evidence that is impossible to get, interdiction procedures preventing claimants from coming to a country where they can be protected and insistence on identity documents beyond reason all mean that, in Canada and elsewhere, a commitment to refugee protection in principle has often been coupled with denial of refugee protection in practice⁶.

3) Protest violations

There is a tendency to turn to governments or to the United Nations to promote respect for human rights. Yet, human rights belong to individuals, not governments. If they

⁶ David Matas, *Closing the Doors: The Failure of Refugee Protection* 1989 with Ilana Simon, Summerhill Press.

are to be respected, it is individuals that must promote them. If promotion of respect for human rights is left to governments the defence of those rights will wither.

Nongovernmental organizations are the organized force of individuals speaking out on behalf of individual rights against governments. These organizations mobilize individuals to assert their rights. They are essential to the guarantee of those rights.

The learning of this lesson is all too easily overwhelmed by a sense of helplessness, the sense that human rights violations are so massive and so far away, that nothing can be done about them. Yet, it is my view not only that individuals in countries like Canada far away from gross and flagrant violations can have a positive impact on respect for human rights. It is the voice of individuals around the world speaking through nongovernmental organizations which is most likely to lead to respect for human rights⁷.

4) Prohibit hate speech

Of all of the lessons to be learned from the Holocaust, there is none more important than the need to ban hate speech, because the banning of hate speech, if effective, prevents atrocities from occurring. Punishing mass murderers, protecting refugees, protesting massive violations, all come too late for many victims. The effective banning of hate speech means that there will be no victims.

Yet, of all the lessons to be learned from the Holocaust, the need to ban hate speech is the hardest to learn. The opposition to the banning of hate speech does not come just from racists or xenophobes. It comes from within the human rights community itself, from free speech absolutist civil libertarians.

⁷ David Matas, *No More: The Battle Against Human Rights Violations* 1994, Dundurn.

More than fifty years after the Universal Declaration of Human Rights, the very existence of the right to be free from incitement to hatred, which is in the Declaration⁸, is contested, not only outside, but inside the rights advocacy community. For virtually every other right, the battle to assert its value has been won, even though for many the battle for compliance continues. For one right, however, the battle is more basic, more fundamental. Even fifty years after the Universal Declaration of Human Rights, we still have to convince the human rights community of the importance of this right. In isolation from the general acceptance of human rights, this human right, the right to be protected from incitement to hatred, stands almost alone, neglected and scorned.

It is my view that all human rights have to be read together as a 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; and 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 humanity⁹.

⁸ Articles 7 and 14

⁹ David Matas, *Bloody Words: Hate and Free Speech* 2000, Bain & Cox.

i) Incitement to genocide

The gravest form of incitement to hatred is incitement to genocide. Around the world, there have been several findings of guilt for the crime of incitement to genocide. The International Criminal Tribunal for Rwanda convicted former Prime Minister Jean Kambanda, broadcaster Ferdinand Nahimana, newspaper editor Hassan Ngeze, political leader Jean Bosco Baryagwiza, journalist Georges Ruggiu, Minister of Information Eliezer Niyitegeka and mayor Jean Paul Akeyesu of this crime. In Canada, Rwandan Leon Mugesera lost his permanent residence status and was ordered deported for incitement to genocide.

What these convictions all have in common is that the incitement occurred in the context of an actual genocide. Yet, legally, there is no such requirement¹⁰. The crime of incitement to genocide is meant to be preventive, to stop genocide before it happens, not just after the fact.

When there is incitement to genocide, the international community should act immediately and not wait for genocide to happen. But so far that has not happened. The crime of incitement to genocide sits there unused until when it is too late.

We should as well keep these general principles in mind:

1. Incitement to genocide does not require any particular verbal formulation. The legal definition of genocide does not have to be repeated in the impugned speech for incitement to genocide to occur. For the crime of inciting genocide to be committed, the words used need not be the same as the words used to incite past genocides.

¹⁰ See William Schabas, "Genocide in International Law" Cambridge University Press, page 266.

2. It is sufficient to establish that the crime of incitement to genocide was committed to show that the speaker intended to incite genocide, without the need of show that a desire or willingness in any potential audience to participate in genocide is the likely result. Similarly, it is sufficient to establish that the crime of incitement to genocide was committed to show that a desire or willingness in any potential audience to participate in genocide is the likely result without the need to show that the speaker intended to incite genocide.

3. Provided that the likely result, the reasonably foreseeable consequence of the speech, is that any potential audience is moved to participate in genocide, the requisite mental element is only that the person intended the speech. Furthermore, there is a legal presumption that a person's mind goes with his or her speech.

4. Where the test is reasonably foreseeable consequence, the focus is on any potential audience for the speech. Reasonably foreseeable consequence does not mean that the reasonable person would want, as a result of the speech, to commit genocide. Rather, it means that any potential audience, no matter how ill informed or unreasonable, would likely be moved to take part in genocide.

5. For the crime of incitement to genocide to be committed, there is no need to establish that genocide is the likely result. It is sufficient to establish either that the speaker intended genocide or that a desire or willingness in the target audience to participate in genocide is the likely result.

6. For the crime of inciting genocide to be committed, it is not necessary to show that the impugned expression actually caused others to want to inflict genocide. It is sufficient to show only a likelihood of impact, that the impugned speech was likely to lead any potential audience to want to inflict genocide or to accept complicity in the infliction of genocide.

7. The obligation to prevent includes an obligation to influence. The International Court of Justice affirmed this principle as recently as February 26, 2007 in case brought by Bosnia against Serbia for genocide. The Court found Serbia had failed to take measures within its powers to prevent genocide in Srebrenica in July 2005 by violating its obligation to comply with provisional measures the Court ordered in April 1993. One of those provisional measures, directed to the Former Republic of Yugoslavia, was that "any organizations and persons which may be subject to its control, direction or influence, do not commit any acts ... of direct and public incitement to commit genocide".

The Court stressed the obligation to influence. It wrote:

"it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result - averting the commission of genocide - which the efforts of only one State were insufficient to produce¹¹."

States can be held responsible for failure to prevent an event when and if the event occurs and not otherwise. The obligation to prohibit incitement to genocide is both an obligation in itself and a manner of preventing violation of another obligation, the obligation not to commit genocide. States can be held responsible for the obligation to prevent genocide only where there is a genocide. At the time of the World Court case, genocide had occurred; the Court focused on the failure to prevent the genocide rather than on the failure to prevent incitement to genocide. But the obligation in the Genocide Convention is more than just an obligation to prevent genocide. It is also an

¹¹

Paragraph 430

obligation to prevent incitement to genocide. That event occurs when there is incitement to genocide. State responsibility for incitement to genocide occurs when a state fails to prevent incitement to genocide.

The obligation is not just to stop incitement to genocide within the jurisdiction and legislative power of the state. It is also an obligation to influence other states using all means reasonably available to the state. Failure to use those means to prevent incitement to genocide implicates state responsibility for the crime of incitement of genocide.

It is no excuse that, even if the State employs all means reasonably at its disposal, its action would not suffice to prevent incitement to genocide. This is difficult to prove. As well, the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might achieve the result - averting the commission of incitement to genocide - which the efforts of only one State is insufficient to produce.

There is much hand wringing in the international community about the need for armed intervention to stop a genocide in course. Many people have expressed the opinion that the international community should have intervened militarily as soon as the genocide in Rwanda began. But introducing armed troops into a foreign conflict, even a genocidal conflict, raises a whole host of political hesitations. The fact that these hesitations may be both legally and morally ill founded does not counter the fact they exist. The international community, when asked to intervene militarily to prevent genocide, is immobilized. I need only refer to the ongoing genocide in Darfur, happening while we sit here, to make my point.

It should be far easier and straightforward to prosecute for incitement to genocide. Prosecution for incitement to genocide means enforcing obligations to which states have committed. It means resorting to legal institutions rather than using force. It

means acting when there is still time, rather than after it is too late.

Genocides are inevitably preceded by incitement to genocide. These incitements occur months and years before the genocide occurs. For instance, the incitement to genocide for which Leon Mugesera was ordered deported from Canada occurred in November 1992. The genocide did not begin till April 1994 over fifteen months later. If Mugesera and others like him had been prosecuted at the time, the genocide could have been prevented without use of arms.

ii) A case study: Mahmoud Ahmadinejad

The litmus test today for the viability of the crime of incitement to genocide is the willingness of the international community to prosecute Mahmoud Ahmadinejad, President of Iran, for incitement to genocide against the Jewish people¹². In the case of Mahmoud Ahmadinejad, the crime of incitement to genocide has been committed in two forms. He has intended to incite genocide against the Jewish people. He has also expressed himself in a manner likely to promote in a part of his audience a desire or willingness to participate in genocide, whether or not he intended to incite genocide.

A. Intent to incite genocide

The facts on which the accusation that Mahmoud Ahmadinejad has an intent to incite genocide is based have a number of elements. It is the combination of these elements which lead to the conclusion that Mahmoud Ahmadinejad has an intent to incite genocide against the Jewish people.

¹² See "Referral of Iranian President Ahmadinejad on the Charge of Incitement to Commit Genocide" published by the Jerusalem Center for Public Affairs, principal author, Justus Reid Weiner, available on the internet at <www.jcpa.org>.

Holocaust denial

1. Holocaust denial is a form of incitement to hatred against the Jewish people. Mahmoud Ahmadinejad has incited hatred against the Jewish people. He has done this most visibly by actively promoting Holocaust denial. Holocaust denial either asserts or implies Jewish fraud, Jewish control of the all the libraries, museums, means of communication, courts and other institutions where the Holocaust is portrayed. Holocaust denial either asserts or implies as well Jewish greed, that the Jewish people have fabricated this event for their own evil purposes.

Example

"As I have said before, as far as several aggressive European governments are concerned, and as far as the Great Satan [the U.S.] is concerned, it is permissible to harm the honour of the divine prophets, but it is a crime to ask questions about the myth of the Holocaust, and about how the false regime occupying Palestine came into being."

February 14, 2006, Jaam-e Jam 2 TV, Middle East Media and Research Institute (MEMRI)

General antisemitism

2. The incitement to hatred of Mahmoud Ahmadinejad against the Jewish people is not limited to Holocaust denial. It repeats and extends standard antisemitic propaganda of Jewish greed, Jewish world control. Mahmoud Ahmadinejad refers to Jews in his antisemitic statements as Zionists. By Zionists, he means all Jews who have not renounced Zionism.

Examples

"Today, it has been proven that the Zionists are not opposed only to Islam and the Muslims. They are opposed to humanity as a whole. They want to dominate the entire world. They would even sacrifice the Western regimes for their own sake. I have said in Teheran, and I say it again here -- I say to the leaders of some Western countries: Stop supporting these corrupt people. Behold, the rage of the Muslim peoples is accumulating. The rage of the Muslim peoples may soon reach the point of explosion. If that day comes, they must know that the waves of this explosion will not be restricted to the boundaries of our region. They will definitely reach the corrupt forces that support this fake regime."

July 13, 2006, Iranian News Channel (IRINN), MEMRI

"They have no boundaries, limits, or taboos when it comes to killing human beings. Who are they? Where did they come from? Are they human beings? 'They are like cattle, nay, more misguided.' A bunch of blood thirsty barbarians. Next to them, all the criminals of the world seem righteous."

August 3, 2006, IRINN, MEMRI

Calling for the killing of Jews

3. Incitement to kill members of a national, ethnic, racial or religious group with an intent to destroy the group in whole or in part amounts to genocide when the part of the group which the inciter intends to destroy is defined by their actual or presumed political beliefs. Mahmoud Ahmadinejad has called for the killing of Jews as Jews. The only caveat he puts on these incitements to murder is that Jews who denounce the existence of the Jewish state will be spared. His call for the death of Zionists is a call for the death of Jews.

Example

"They should know that they are nearing the last days of their lives."

August 2, 2006, IRINN, MEMRI

Endorsing suicide bombing

4. Suicide bombing is a crime against humanity. Mahmoud Ahmadinejad has called for and endorsed suicide bombers killing innocents in Israel. Mahmoud Ahmadinejad glorifies these incitements to suicide bombing by calling the bombers "martyrs".

Example

"Art reaches perfection when it portrays the best life and best death. After all, art tells you how to live. That is the essence of art. Is there art that is more beautiful, more divine, and more eternal than the art of martyrdom? A nation with martyrdom knows no captivity. Those who wish to undermine this principle undermine the foundations of our independence and national security. They undermine the foundation of our eternity."

July 29, 2005, Iranian Channel 1 (television), MEMRI

Participating in grave human rights violations

5. US hostages from the 1979 takeover of the US Embassy in Teheran have identified as a ringleader of the takeover. Austrian officials have accused Mahmoud Ahmadinejad of the murder of Kurdish leader Abdul Ghassemlou in Vienna. When he was mayor of Teheran, Mahmoud Ahmadinejad was one of the principal forces in the campaign to recruit and train suicide bombers, specifically targeting the US, Britain, and Israel. The

past personal history of Mahmoud Ahmadinejad reflects on his current intent. It shows that he would be willing to inflict grave violations of human rights on Jewish victims who do not share his beliefs.

Joseph Farah, "The Terrorist with Diplomatic Immunity"
<<http://jewishindy.com/modules.php?name=News&file=article&sid=6046>>

Denial of the right to self determination of the Jewish people

6. The existence of the State of Israel is the expression of the right to self determination of the Jewish people. Denial of the right of the Israel to exist is a denial of the right to self determination of the Jewish people. Mahmoud Ahmadinejad has called for denial of the right to self determination of the Jewish people through destruction of the Jewish state, the State of Israel. These are not just calls to change, by peaceful means, the boundaries of Israel nor the Government of Israel nor the name of Israel. Nor are they just calls to engage in war with Israel while respecting the laws of war, nor a call to kill people because of their political beliefs alone. They are calls to exterminate physically all Jews other than those who share the anti-Zionist views of Mahmoud Ahmadinejad.

Examples

"As the Imam said, Israel must be wiped off the map."

October 26, 2005, Al-Jazeera

<http://english.aljazeera.net/NR/exeres/15E6BF77-6F91-46EE-A4B5-A3CE0E9957EA.htm>

"Iran's president, Mahmoud Ahmadinejad, declared Sunday that Israel had 'pushed the button of its own destruction.' "

July 13, 2006, Iranian News Channel (IRINN), MEMRI

"Very soon, this stain of disgrace [i.e. Israel] will be purged from the center of the Islamic world - and this is attainable."

"I hope that the Palestinians will maintain their wariness and intelligence, much as they have pursued their battles in the past 10 years. This will be a short period, and if we pass through it successfully, the process of the elimination of the Zionist regime will be smooth and simple."

"We say that this fake regime [Israel] cannot logically continue to live."

April 25, 2006, Al-Jazeera

<http://english.aljazeera.net/NR/exeres/06244378-DDED-4CF6-A9C9-AFA0038B2774.htm>

Demonizing Israel

7. Mahmoud Ahmadinejad has demonized Israel in an attempt to delegitimize it. He has charged the Jewish state and by implication the Jewish people other than those who renounce Zionism with the worst crimes imaginable. These charges are made constantly, without foundation, mischaracterizing every Israeli act of legitimate self defense as a violation of international law and moral standards. Mahmoud Ahmadinejad either knows or is wilfully blind to the fact that the charges he makes against Israel have no foundation in fact or law. In any case, neither truth nor reasonable belief in truth is a defence to the offence of incitement to genocide.

Examples

"Oh dear people, look at this global arena. By whom are we confronted? We have to understand the depth of the disgrace of the enemy, until our holy hatred expands

continuously and strikes like a wave."

October 28, 2005, Iranian Students News Agency (ISNA), MEMRI

"He also warned the 'great powers' against supporting the 'crimes of the Zionist regime...' [since] the continuation of these crimes and of the support [for them] will fan the flames of Muslim rage, which will annihilate them all."

July 14, 2006, Islamic Republic News Agency (IRNA), MEMRI

Inciting crimes against humanity against Israelis

8. Mahmoud Ahmadinejad has promoted war propaganda against the Jewish state and incited crimes against humanity inflicted on the Jewish people. He has asserted the right of surrogates of Iran, Hamas and Hezbollah, to attack and kill innocent civilians in Israel. Hezbollah and Hamas are terrorist organizations. The Hezbollah and Hamas attacks against Israel have amounted to crimes against humanity. Mahmoud Ahmadinejad has promoted these attacks and then defended them while they were occurring. He has endorsed the supplying of arms by Iran to these surrogates so that they could launch their murderous attacks against innocents.

Example

"There is no doubt that the new wave of attacks in Palestine will erase this stain from the face of Islam." (Mahmoud Ahmadinejad, as part of his propaganda, refuses to mention Israel by name. Here he refers to Israel as Palestine.)

November 29, 2005, Haaretz

<http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=638926>

Threatening to attack Israel

9. Mahmoud Ahmadinejad threatens Israel with unprovoked attacks. He at one and the same time asserts that Iran would not attack Israel except in self defense and claims that Iran faces a constant danger from the mere existence of the State of Israel. His continued threats of unbridled attacks against its enemies in self defense amounts to a threat to use any and all weapons in its possession against Israel without any real basis in self defense, since he fabricates a constant danger from Israel to Iran because of the mere existence of the Jewish state. The right of self defense and belief in self defense are not legally permissible answers to a charge of incitement to genocide.

Example

"Arrogant powers have set up a base for themselves to threaten and plunder nations in the region," said Ahmadinejad. "But today, the occupier regime [Israel] -- whose philosophy is based on threats, massacre and invasion -- has reached its finishing line."

July 23, 2006, Jerusalem Post

<http://www.jpost.com/servlet/Satellite?cid=1153291976348&pagename=JPost%2FJPAr ticle%2FShowFull>

Promoting the development of nuclear weaponry

10. Iran has violated and continues to violate the Nuclear Non-Proliferation Treaty which it has signed and ratified. Mahmoud Ahmadinejad has promoted the development of nuclear weaponry by Iran which would be used to kill indiscriminately all those living within the boundaries of the Jewish state in order to kill as many Jews as possible. His continued assertions of the right of Iran to develop nuclear energy

without regard to the standards imposed by the International Atomic Energy Agency and its non-proliferation safeguards can have no other purpose than the development of nuclear weaponry.

Example

In response to UN Security Council resolution 1737/2006 of December 23, 2006 which imposes sanctions on Iran to prevent the transfer of all material and technology which could contribute to Iranian uranium enrichment or reprocessing or nuclear weapons delivery systems, Mahmoud Ahmadinejad said:

"Whether the West likes it or not, Iran is a nuclear country and it is in their interests to live alongside Iran....Today they want to disturb the unity of the Iranian people with this scrap of paper [the sanctions resolution]...This move not only will not do any harm to Iranian people, but the signatories of this resolution against Iran will soon regret this superficial and trivial move."

Daily Telegraph December 25, 2006 "Iran vows to defy UN sanctions".

Endorsing nuclear conflagration

11. A nuclear attack by Iran on Israel would amount to genocide of the Jewish people even though Jews not resident in Israel at the time of the attack would survive and even though many non-Jews would also die. Mahmoud Ahmadinejad has endorsed general nuclear conflagration through perverted religious discourse. He has asserted that the advent of the hidden twelfth imam would be hastened by massive catastrophe. The right to freedom of religious expression is not a legally permissible answer to a charge of incitement to genocide.

Example

Mahmoud Ahmadinejad asserts that Twelfth Imam gave him the presidency for a single task: provoking a "clash of civilizations" in which the Muslim world, led by Iran, takes on the "infidel" West and defeats it in a slow but prolonged contest."

Daily Telegraph April 16, 2006 Amir Taheri "The frightening truth of why Iran wants a bomb"

B. Likelihood of Instilling a Willingness to Inflict Genocide

For the crime of incitement to genocide committed by means of instilling a desire or willingness in any potential audience to inflict genocide, a prosecution would rely on all the elements previously set out. In addition, the prosecution would be based on the following elements. Again here, it is the combination of these elements which justify the prosecution.

Repression in Iran

1. Iran is a state which denies freedom of expression. It is difficult, if not impossible, to contradict openly and freely in Iran the anti-Zionist inflammatory discourse of Mahmoud Ahmadinejad. This uncontradicted status makes it more likely that his inflammatory discourse will find converts.

The status of office of Mahmoud Ahmadinejad

2. The persuasive effect of the anti-Zionist inflammatory discourse of Mahmoud Ahmadinejad is enhanced by the office he holds. Iranians are more likely to give credence to his inflammatory anti-Zionist discourse because of his position as President of Iran.

Iranian anti-Zionist rhetoric

3. Anti-Zionism, demonization of the Jewish state and its delegitimization are part of the conventional rhetoric and ideology of the current Iranian regime and its supporters. When the rhetoric of Mahmoud Ahmadinejad adds to that demonization, he finds a receptive audience who accept the core assumptions on which that rhetoric is based.

Iranian anti-Zionist repression

4. Iran has repressed anti-Zionists within its own borders causing their disappearance or prosecuting them for treason. Since the Islamic Revolution in 1979, Iran has condemned seventeen Jews to death on various national security charges. Iran arrested thirteen Jews in January and March 1999. Charges were never made public nor even communicated to the accused. Prior to trial the accused were held in incommunicado detention for over a year. Ten of the thirteen were convicted in July 2000 and sentenced from four to thirteen years in prison. What appeared to precipitate the charges was, according to their advocates, "increasingly fervent brand of Orthodox Judaism" of the accused. This anti-Zionist repression shows that the inflammatory anti-Zionist rhetoric of Mahmoud Ahmadinejad falls on receptive ears.

"Safeguarding the rule of law", Canadian Jewish News, July 13, 2000.

Michael Jordan "Three Iranian Jews Released from Prison" Canadian Jewish News October 31, 2002.

Killing of innocent Jews

5. A suicide bomber drove a car bomb in the Israeli embassy in Buenos Aires Argentina in March 1992. The attack killed 29 people and injured 100. A second suicide car bomb terrorist, attacked the Jewish community centre, called the Israeli-Argentine

Mutual Association, in Buenos Aires in July 1994, killing 85 and wounding over 200. There is compelling evidence that the current Iranian regime directed and organized both of these attacks. Incitement by Mahmoud Ahmadinejad is more likely to persuade people who participated in such incidents than people who have done no wrong.

Mass killing of innocents

6. The Government of Iran massacred an estimated thirty thousand people, including women and teenage children, in 1988. They were massacred because they were actual or perceived supporters of an opposition group, the People's Mojahedin Organization, because they were leftists, intellectuals or students, or because they belonged to ethnic minority groups. Ayatollah Khomeini ordered the executions of the Mojahedin because they were "fighters against God". He ordered the execution of leftists, intellectuals and students because they were "apostates from Islam". Those executed were already in prison, as political prisoners, and were no threat to anyone at the time of their deaths. People complicit in these crimes as well as those who have passed them over in silence since form a ready and receptive audience to the inflammatory discourse of Mahmoud Ahmadinejad.

Veronique Mistiaen "Memories of a slaughter in Iran" Toronto Star, September 5, 2004.

Iranian support for Hezbollah and Hamas

7. The Government of Iran established Hezbollah in 1982. Hezbollah has emerged as a major internationally functioning terrorist organization because of Iran. Iran has been arming both Hezbollah and Hamas, also a terrorist organization. Iran has used these terrorist organizations to inflict crimes against humanity on innocent Israelis. People complicit in the terrorism, the crimes against humanity of Hamas and Hezbollah as well as those who endorse this terrorism, those crimes are a susceptible target audience for the incitement of Mahmoud Ahmadinejad.

Development of a nuclear weapons capability

8. The development of nuclear weapons and rocket delivery systems by Iran would give Iran a means to inflict genocide against the Jewish people. The availability of a means to inflict genocide makes the desire to inflict genocide more plausible and therefore more likely. Once a means to inflict genocide exists, the temptation to inflict genocide by those that way inclined becomes more real.

Iranian nuclear threats

9. Another Iranian president has already threatened Israel with nuclear devastation. Former president of Iran Hashemi Rafsanjani, said in 2001:

"The survival of Israel depends on the interest of global arrogance and colonialism, and as long as this base is beneficial to them, they will preserve it. Muslims must surround colonialism and force them [the colonialists] to see whether Israel is beneficial to them or not. If one day the world of Islam comes to possess the weapons currently in Israel's possession [meaning nuclear weapons] - on that day this method of global arrogance would come to a dead end. This is because the use of a nuclear bomb in Israel will leave nothing on the ground, whereas it will only damage the world of Islam."

Middle East Media & Research Institute, MEMRI Latest News, January 7, 2002, Special Dispatch No. 325.

"In due time the Islamic world will have a military nuclear device and then the strategy of the West would reach a dead end, since one bomb is enough to destroy all Israel".

Gerald M. Steinberg "When will the West confront Iran?" National Post, July 14, 2004.

This discourse makes real the unthinkable, a nuclear attack on Israel, and justifies it. This normalization of the horror of a nuclear attack on Israel by a predecessor of Mahmoud Ahmadinejad means that the incitement of the accused is likely to find in Iran fertile ground amongst members and supporters of the current Iranian regime.

C) Incitement to destroy part of a group

For the crime of genocide to be committed, there must be an intent to destroy in whole or in part a national, ethnical, racial or religious group. For the crime of incitement to genocide to be committed, there must be an incitement to destroy the group in whole or in part.

Despite the persecution of Jews within Iran and the suppression of their Zionism, there remains nonetheless a Jewish community in Iran. I have heard it said that Mahmoud Ahmadinejad could not be guilty of incitement to genocide against the Jewish people because of the survival within Iran of this Jewish community. The survival of this community, so it is argued, shows that no genocide is intended.

This argumentation ignores the "in part" requirement. Where a group is defined in national, ethnical, racial or religious terms, there is not a 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.

In the case of *Krstic*, the International Criminal Tribunal for the Former Yugoslavia found that genocide was committed by a mass killing of Bosnian Muslims males of

military age in Srebrenica¹³. 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 either by nationality, or ethnicity, or race or religion. Yet it was still genocide.

Incitement to kill Jews within the boundaries of Israel would meet the test of genocide even where there is no incitement to kill Jews outside of Israel. This "in part" requirement would also be met by an incitement to kill Jews who ascribe to Zionism even though there is no incitement to kill Jews who renounce Zionism.

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 an incitement to kill 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 over all group¹⁴.

All that is true of Jews in Israel or Zionist Jews. Jews in Israel and Zionist Jews are prominent or emblematic parts of the Jewish people. They are essential to the survival of the Jewish people as a whole. So any defence Mahmoud Ahmadinejad might make that the intended or likely target of his incitement is Zionists and not Jews or the geographical entity Israel and not Jews is to no avail.

D. Remedies

What are we going to do about it? I suggest that Canada and other states should ban the entry of Mahmoud Ahmadinejad under any circumstances; prosecute him for incitement to genocide against the Jewish people should he show up despite the ban

¹³ IT-98-33, August 2, 2001

¹⁴ *Krstic* case, IT-98-33-A, April 19, 2004, *Bosnia v. Serbia*, ICJ February 26, 2007, paragraph 200.

on entry; ask the Security Council to refer to the International Criminal Court the situation of incitement to genocide of the Jewish people by persons in authority in Iran¹⁵; and ask the International Court of Justice to find Iran in violation of the Genocide Convention for failure to prosecute Ahmadinejad for incitement to genocide against the Jewish people¹⁶. Canada has an obligation to do this under the Genocide Convention because of its duty to prevent incitement to genocide in other states as well as its own, using whatever influence it might have.

i) International Court of Justice

Because both Iran and your State are parties to the Genocide Convention, the Court would have jurisdiction over the case. The obligation not to incite genocide in the Convention is a peremptory norm of international law (*jus cogens*) which is an obligation each states owes to all states (*erga omnes*). For that reason, the obligation is enforceable by every state party to the Genocide Convention against every other state party to that Convention. There is no need to show that the violation of the Convention is inflicted on nationals of the state party or committed on the territory of the state party bringing the matter before International Court of Justice.

Indeed, because genocide is a crime against all humanity, it is important that more than just the State of Israel bring Iran to the International Court of Justice. I am confident that, should other states bring Iran to the Court, Israel would join in the application. However, for only Israel to bring Iran to the Court would send an inappropriate message of the nature of the crime; the message should be that this is a crime against all humanity and not just the Jewish people.

ii) International Criminal Court

¹⁵ Under Court Statute article 13(b)

¹⁶ Under Article IX of the Genocide Convention

Iran is not a signatory to the treaty establishing the International Criminal Court. But, then, neither is Sudan and the Security Council has referred to that Court the situation in Darfur.

The incitement to genocide of President Mahmoud Ahmadinejad against the Jewish people coupled with the development of nuclear technology in Iran in violation of the Non-Proliferation Treaty safeguards are an obvious threat to the peace in the Middle East. Any incitement to genocide is a threat to peace because genocide is, by definition, not peaceful. As well, genocide triggers the responsibility to protect and armed intervention to stop the genocide. In the Iranian context, incitement to genocide coupled with nuclear technology development in violation of International Atomic Energy Agency safeguards raise the spectre of preventive armed attacks.

iii) Strategy and tactics

A resolution to refer to the International Criminal Court the situation of incitement to genocide in Iran against the Jewish people and an application to the International Court of Justice raise both legal and political questions. Provided there is a legal case to be made, the political questions remain. These political questions are both strategic and tactical.

In particular, there are ongoing negotiations with Iran over its development of nuclear technology to attempt to have Iran comply with its obligations under the Non-Proliferation Treaty. In my view, the referral to the ICC or an application to the ICJ would assist these negotiations, and not complicate them.

The Security Council passed a resolution imposing limited sanctions on Iran in December 2006 to prevent the transfer of material and technology which could contribute to Iranian uranium enrichment or reprocessing or nuclear weapons delivery

systems. The General Assembly in December 2006 passed a resolution expressing "serious concern" about human rights violations in Iran. The General Assembly in January 2007 passed another resolution condemning "without reservation" Holocaust denial shortly after Mahmoud Ahmadinejad organized a Holocaust denial conference in Teheran. These resolutions were considered compatible with ongoing nuclear negotiations with Iran and, indeed, endorsed in the hope of assisting those negotiations.

As well, the Security Council referred the situation in Darfur to the International Criminal Court before the negotiations were completed which led to the Abuja peace agreement. The Security Council Sudan referral to the Court was March 31, 2005. The Abuja peace agreement was reached nonetheless, on May 5, 2006, in part because of the Security Council referral.

The Government of Uganda, in December 2003, referred the to the International Criminal Court the situation concerning the Lord's Resistance Army. Uganda is a state party to the Court treaty. The Lord's Resistance Army and the Government of Uganda nonetheless negotiated and signed a Cessation of Hostilities Agreement which came into effect August 29, 2006.

The Sudan and Uganda referrals were warnings to perpetrators of crimes within the jurisdiction of the Court that they would be brought to justice. The referrals created an incentive for a peace which would remove the context within violations within the jurisdiction of the Court were being committed.

All that can be said of Iran. One component of the charge of incitement to genocide against Mahmoud Ahmadinejad is his promotion of the development of nuclear weaponry by Iran. Iran has violated and continues to violate the Nuclear Non-Proliferation Treaty which it has signed and ratified. The continued assertions of Mahmoud Ahmadinejad of the right of Iran to develop nuclear energy without regard to

the standards imposed by the International Atomic Energy Agency and its non-proliferation safeguards can have no other purpose than the development of nuclear weaponry.

This discourse about nuclear development can not be divorced from other explicitly antisemitic, anti-Zionist discourse of Mahmoud Ahmadinejad. The combination provides both a means (nuclear weaponry) and an end, wiping Israel off the map by killing as many Jews (whom Mahmoud Ahmadinejad calls "Zionists") as possible. This combination manifests an intent to incite to genocide of the Jewish people. As well, it makes converts in Iran to the cause of genocide of the Jewish people a more likely result.

The charge of incitement to genocide addresses elements which go beyond the subject matter of the nuclear negotiations with Iran. By addressing a combination, one component of which is the nuclear threat from Iran, a referral to the ICC or an application to the ICJ would form a pressure on those negotiations to succeed, to undercut the referral/application. If there were no realistic possibility of the development of nuclear weaponry by Iran, the inflammatory anti-Zionist discourse of Mahmoud Ahmadinejad would, realistically, be a good deal more hollow. One would have more room to question his intent to incite genocide as well as the likelihood of his discourse winning converts in Iran. Just as in Sudan, a referral of Iran to the Security Council would impel those in Iran who seek exoneration or immunity towards negotiations rather than away from them.

At the tactical level, one can ask whether this proposed initiative has any real prospect of success, in the sense of putting of Mahmoud Ahmadinejad and others behind bars, even if one accepts its legal and strategic soundness. To this I would say that the ultimate goal of the initiative is to stop incitement to genocide against the Jewish people. That goal would be achieved if Ahmadinejad and others stop the incitement. It is not necessary for Mahmoud Ahmadinejad and others to be behind bars for the

discourse to stop.

Ahmadinejad has become subject to increased public criticism within Iran in part because of Security Council and General Assembly resolutions already passed against Iran. Pursuing the initiatives proposed here would undermine and discredit, within Iran, the discourse of Ahmadinejad which prompted the legal action, weakening before any conclusion of the initiative, the incitement to genocide in which Ahmadinejad and others are engaged. The mere fact that your Government would view the discourse of Mahmoud Ahmadinejad and others in Iran worthy of a referral to the ICC or an application to the ICJ would have an impact both on the continuation of that discourse and its persuasiveness within Iran long before the Court would come to any conclusion on the application.

The discourse of Mahmoud Ahmadinejad is a precursor, a warning, a threat of genocide. Legal initiatives may discredit him, shut him up, lead him to moderate what he says. The law can help to contain the threat he represents.

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