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

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Israel must be wiped off the face of the map.

—Iranian president Mahmoud Ahmadinejad[1]

Let us consult yet, in this long forewhile

How to ourselves we may prevent this ill.

—Homer[2]

On October 25, 2005, at an anti-Zionism conference in Tehran, Iran's president, Mahmoud Ahmadinejad, called for Israel to "be wiped off the face of the map"—the first in a series of incendiary speeches arguably advocating liquidation of the Jewish state. Certain commentators contend that these statements constitute direct and public incitement to commit genocide. This Article analyzes this assertion by examining the nature and scope of recent groundbreaking developments in incitement law arising

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[1] *See* Nazila Fathi, *Iran's New President Says Israel Must Be 'Wiped Off the Map,'* N.Y. TIMES, Oct. 27, 2005, at A8.

[2] HOMER, THE ODYSSEY, BOOK II, at l. 256 (George Chapman trans., J.R. Smith 2d ed. 1857).

from the Rwandan genocide prosecutions. It pieces together an analytical framework based on principles derived from these cases, including the Canadian Supreme Court's opinion in the Leon Mugesera matter. Using this framework, this Article demonstrates that while a successful prosecution would entail clearing significant substantive and procedural hurdles, it could include both incitement and crimes against humanity charges in light of the incitement's nexus with Iran's sponsorship of terrorist attacks against Israel. However, the International Criminal Court would have to put aside political pressures related to the Middle East's toxic political environment and the absence of causation, and agree to take the case. Given incitement law's track record to date, with prosecutions occurring only post-genocide, the odds against such a prosecution are long. As a result, the Article proposes that incitement law shift its focus from punishment to deterrence. This would permit early intervention and center incitement on its core mission of atrocity prevention. This Article also suggests that euphemisms employed to disguise incitement, such as "predictions" of destruction, when anchored to direct calls for violence, should also be considered acts of direct incitement. Finally, with respect to crimes against humanity, the Article explains that attacks on a civilian population carried out by a proxy at the insistence of the inciter, rather than directly by the actual inciter himself, should be sufficient to establish liability. At the same time, in the interest of protecting free speech, the crime should not be charged absent evidence of calls for protected-group violence, as opposed to mere hatred.

I. INTRODUCTION

On October 25, 2005, at an anti-Zionism conference in Tehran, Iran's newly elected president, Mahmoud Ahmadinejad, called for Israel to "be wiped off the face of the map."[3] That murderous exhortation turned out to be the first in a series of provocative speeches arguably advocating liquidation of the Jewish state.[4] In the context of his nation's avowed policy to eliminate Israel, develop a nuclear capability,[5] aid terrorist groups

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[3] Fathi, *supra* note 1.

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

[5] *See* William J. Broad et al., *Arms Inspectors Said to Seek Access to Iran Sites*, N.Y. TIMES, Dec. 2, 2004, at A1; Massimo Calabresi, *Iran's Nuclear Threat*, TIME, Mar. 17, 2003, at 14; Jim VandeHei, *Cheney Warns of Iran as a Nuclear Threat*, WASH. POST, Jan. 21, 2005, at A2 ("Iran has a stated policy that their objective is the destruction of Israel . . . .") .

bent on destroying Israel,[6] and deny the Holocaust,[7] do the Iranian president's speeches constitute a prosecutable international crime, such as direct and public incitement to commit genocide? Certain commentators, including prominent figures such as Alan Dershowitz, cite to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,[8] the Rome Statute of the International Criminal Court,[9] and domestic universal jurisdiction statutes and believe they do.[10] In June 2007, the U.S. House of Representatives joined the chorus by voting in support of a non-binding resolution appealing to the United Nations Security Council to charge Ahmadinejad with violating the Genocide Convention based on his calls for the destruction of Israel.[11] In October 2007, one of Australia's most influential political figures, Labor Party leader Kevin Rudd, announced that Ahmadinejad should be brought before the International Criminal Court (ICC) on charges of incitement to genocide based on his statements regarding Israel.[12] Rudd was subsequently elected Australian Prime Minister, and in May of this year he announced that his government

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[6] Daniel Byman, *Iran, Terrorism, and Weapons of Mass Destruction*, 31 STUD. IN CONFLICT & TERRORISM 169, 171 (2008) ("In addition to its support for Hizballah, Iran has also supported a wide array of other groups that have attacked Israel.").

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

[8] Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[9] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf [hereinafter Rome Statute].

[10] *See, e.g.*, Rony Blum et al., Op-Ed., *Ahmadinejad: Incitement Deserves Indictment*, Jerusalem Post, Feb. 8, 2006, at 15; http://opiniojuris.org/2006/12/20/wielding-international-law-as-a-sword-the-growing-case-for-prosecuting-ahmadinejad-for-inciting-genocide/; DAVID MATAS ET AL., B'NAI BRITH CANADA, INDICTMENT OF IRANIAN PRESIDENT MAHMOUD AHMADINEJAD FOR INCITEMENT TO GENOCIDE AGAINST THE JEWISH PEOPLE (2007), *available at* http://www.bnaibrith.ca/pdf/institute/IndictmentIranianPresidentMarch07.pdf [hereinafter B'NAI BRITH PROPOSED INDICTMENT]; *Indict Ahmadinejad, Says Alan Dershowitz: Renowned Legal Activist Addresses Packed Toronto Rally*, UJA FEDERATION OF GREATER TORONTO, Dec. 21, 2006, http://www.jewishtoronto.com/page.html?ArticleID=139783; JUSTUS REID WEINER ET AL., JERUSALEM CTR. FOR PUB. AFFAIRS, REFERRAL OF IRANIAN PRESIDENT AHMADINEJAD ON THE CHARGE OF INCITEMENT TO COMMIT GENOCIDE (2006), *available at* http://www.jcpa.org/text/ahmadinejad-incitement.pdf [hereinafter REFERRAL OF AHMADINEJAD].

[11] *See* H.R. Con. Res. 21, 110th Cong. (as passed by House of Representatives, June 20, 2007).

[12] *See* Dennis Shanahan, *Rudd Vows to Charge Iran Leader*, AUSTRALIAN, Oct. 3, 2007, *available at* http://www.theaustralian.news.com.au/story/0,25197,22522722-601,00.html.

was contemplating an incitement claim against Iran to be brought before the International Court of Justice.[13]

And with weapons of mass destruction nearly within the Iranian president's grasp,[14] it is increasingly urgent to inquire whether these commentators and politicians have a point. But even if they do, could Ahmadinejad's apocalyptic urgings realistically be prosecuted? Advocates accurately point to relevant international and domestic legal authority regarding incitement to genocide. A closer look, however, reveals that any proposed prosecution of Ahmadinejad would have to clear some imposing substantive, procedural, and political hurdles. In discussing how the international community might bring Iran's chief executive to justice,[15] this Article considers what those obstacles might be, and analyzes whether they could be overcome. By the same token, it also considers whether prosecution advocates have perhaps been too narrow in their focus on incitement to genocide and have failed to contemplate the additional possibility of prosecuting Ahmadinejad for crimes against humanity.

As it turns out, the Ahmadinejad case is an ideal vehicle for examining the nature and scope of recent groundbreaking developments in incitement law arising from the Rwandan genocide prosecutions.[16] Culling the key principles from these cases, this Article pieces together the emerging analytical framework for incitement law and uses it to examine incitement crimes in a fresh context that raises some important issues. For example, does this developing body of law permit prosecution of a sitting head of state whose words defy easy translation and whose audience appears amorphous? Even if it does, would such prosecution run afoul of the law in the absence of actual, rather than threatened, mass atrocity? May a politician face charges for crimes against humanity when he has supported

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[13] Patrick Goodenough, *Indict Ahmadinejad for Inciting Genocide*, CYBERCAST NEWS SERVICE, May 19, 2008, *reposted at* http://www.unitedjerusalem.com/index2.asp ?id=1068957&Date=5/19/2008. It was reported that Australia is more interested in proceedings before the International Court of Justice (ICJ), as opposed to the International Criminal Court (ICC), because the structure of ICJ proceedings would permit Australia to "have much more control over the proceedings." *Id.*

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

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

[16] *See* Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 527 (2008) (noting that in examining the contours of incitement law, "analysis of Ahmadinejad's remarks is . . . instructive").

attacks by third-party clients against civilians he is threatening in his speeches, but has not perpetrated the attacks directly? And is there nevertheless a risk that such charges could impermissibly infringe on hallowed rights of free expression?

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

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

In light of the practical unlikelihood of a prosecution despite Ahmadinejad's extreme and extensive rhetoric, this Article proposes that incitement law turn its focus to deterrence rather than continue its emphasis on post-genocide prosecution. Such a prospective approach would permit early intervention and center the crime of incitement to genocide on its core mission of preventing atrocity. It could also lead to greater political acceptance of prosecuting incitement at its outset, rather than punishing it retrospectively after it has its intended effect. The Article also suggests that, to the extent the law is not yet clear on this point, euphemisms often employed to disguise incitement—"predictions" of destruction, dehumanizing the target or ascribing violent motives to it, or congratulating the audience on past acts of violence, when anchored to direct calls—should also be considered to constitute acts of incitement. Finally, with respect to

crimes against humanity, the international community should reaffirm that attacks on a civilian population carried out by a proxy at the insistence of the inciter, rather than directly by the actual inciter himself, should be sufficient to establish liability. At the same time, in the interest of protecting free speech, the crime should not be charged absent evidence of calls for violence against protected groups, as opposed to mere hatred.

II. IRAN, AHMADINEJAD, AND ISRAEL

A. IRAN'S ISLAMIC REVOLUTION: SETTING THE STAGE FOR THE RISE OF AHMADINEJAD

With the 1979 overthrow of the Shah of Iran, Ayatollah Ruhollah Khomeini established himself as Supreme Leader of a proclaimed Islamic theocracy in Iran.[17] The new government imposed a radical shift toward conservatism, banning all Western cultural influences and forcing women to return to traditional veiled dress.[18] Khomeini spewed anti-Jewish rhetoric that included condemnation of the state of Israel.[19]

After Khomeini's death in 1989, Islamic clerics chose Iran's outgoing president, Ali Khamenei, to be Supreme Leader.[20] In August of that year, Akbar Hashemi-Rafsanjani, the speaker of the Majles (akin to a parliament), was elected president and re-elected in June 1993.[21] The United States suspended all trade with the Islamic Republic in 1995, accusing it of supporting terrorist groups and attempting to develop nuclear weapons.[22]

In the meantime, the regime continued its harsh anti-Israel rhetoric. On December 31, 1999, Khamenei stated that the "only possible solution" to political unrest in the Middle East would be "the annihilation and destruction of the Zionist state."[23] In 2000, Khamenei announced: "We

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[17] *See Iran*, *in* THE COLUMBIA ENCYCLOPEDIA 1407, 1409 (6th ed. 2000), *available at* http://www.bartleby.com/65/ir/Iran.html.

[18] *Id.*

[19] Mark LeVine, *Why Do Some of 'Them' Hate Some of 'Us,'* BELIEFNET, http://www.beliefnet.com/story/178/story_17865_1.html (last visited Aug. 15, 2008) ("Khomeini's anti-Jewish rhetoric, grounded in negative statements about Jews in the Qur'an that were carried over into Islamic theology, found a wide audience among Iranians . . . ."); Amir Taheri, *Iran's New Israel Rage*, N.Y. POST, Oct. 28, 2005 ("Hostility to Israel has been a key ingredient of the Islamic Republic's foreign policy since its inception in 1979.").

[20] U.S. DEP'T OF STATE, BUREAU OF NEAR EASTERN AFFAIRS, BACKGROUND NOTE: IRAN (Oct. 2006), http://www.state.gov/outofdate/bgn/i/74169.htm.

[21] *Id.*

[22] *See Iran*, *supra* note 17.

[23] *Israel's Destruction Way to End Mideast Strife, Leader Exhorts*, CHI. TRIB., Jan. 1, 2000 at C10.

have repeatedly said that this cancerous tumor of a state [Israel] should be removed from the region . . . ."[24] President Rafsanjani stated in 2002:

> If one day . . . the world of Islam comes to possess . . . [nuclear] weapons—on that day [Israel's] method of global arrogance would come to a dead end. This . . . is because the use of a nuclear bomb in Israel will leave nothing on the ground, whereas it will only damage the world of Islam."[25]

Rafsanjani acted on his anti-Semitic rhetoric when he ordered the 1994 bombing of a Jewish community center in Buenos Aires that killed eighty-five people. In 2006, Argentina issued an indictment against him for his actions.[26]

In 1997, Iranians elected as president Mohammad Khatami, a moderately liberal Muslim cleric, hoping he would usher in greater freedoms and reform.[27] Nevertheless, even Khatami, a relative moderate, called Israel a "racist, terrorist state."[28] In 2004, after flawed parliamentary elections in which many reformists were barred from contesting their seats, a very conservative group retook control.[29] This set the stage for the ascendancy of a new force in Iranian politics: Mahmoud Ahmadinejad.

B. MAHMOUD AHMADINEJAD

1. Background

Born the son of a poor blacksmith in 1956, Mahmoud Ahmadinejad's strong religious beliefs surfaced early.[30] He is reported to have had an interest in and talent for the Qur'an as a very small child.[31] He eventually

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

[25] *Former Iranian President Rafsanjani on Using a Nuclear Bomb Against Israel*, 325 SPECIAL DISPATCH SERIES (Middle East Media Research Inst., Jan. 3, 2002), http://www.memri.org/bin/articles.cgi?Area=iran&ID=SP32502.

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

[27] *Id.*

[28] Michael Theodoulou, *Jews in Iran Describe a Life of Freedom Despite Anti-Israel Actions by Tehran*, CHRISTIAN SCI. MONITOR (Boston), Feb. 3, 1998, at 7, *available at* http://www.csmonitor.com/durable/1998/02/03/intl/intl.3.html.

[29] BACKGROUND NOTE: IRAN, *supra* note 20.

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

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

became a committed Islamic revolutionary activist both in and outside of Iran.[32]

Various primary sources present differing accounts regarding Ahmadinejad's role in the 1979 Islamic Revolution. In 1979, he was a member of the Office of Strengthening Unity, the student organization that planned the Teheran American Embassy takeover.[33] Six former American hostages who saw Ahmadinejad in a 1979 photo or on television said they thought he was among the captors who held them for 444 days, and one said he was interrogated by Ahmadinejad.[34] Ahmadinejad has denied being one of the hostage takers and several known hostage-takers, now his strong political opponents, deny he was with them.[35]

Ahmadinejad joined the Revolutionary Guards in 1986 after volunteering to serve in the war against Iraq.[36] Later, he co-founded the Islamic Society of Students and was an instructor for the Basij, the youth volunteer organization that enforces the Islamic Republic's strict religious mores.[37]

Despite his penchant for revolutionary activity, Ahmadinejad was mostly an unknown figure in Iranian politics until his May 3, 2003, election as Mayor of Teheran.[38] While in office, Ahmadinejad reversed many of the changes put into effect by previous moderate and reformist mayors. For example, he emphasized religion in cultural centers and required separate elevators for men and women in the municipality offices.[39]

In 2005, Ahmadinejad ran for the presidency.[40] He "campaigned as a 'man of the people,' . . . who live[d] in modest circumstances, . . . would

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Iran University of Science and Technology (IUST) as an undergraduate student of Civil Engineering. *Id.* After the Revolution, Ahmadinejad entered the Master of Science program for Civil Engineering in 1984. *See Bio: Mahmoud Ahmadinejad*, JERUSALEM POST, May 16, 2006, http://www.jpost.com/servlet/Satellite?cid=1145961353570&pagename=JPost/JPArticle/ShowFull. In 1989, he became a member of the Science faculty at the university where he had studied. *Id.* In 1997, he received his Ph.D. in transportation engineering and planning from IUST. *Id.*

[32] Tait, *supra* note 30.

[33] *Bio: Mahmoud Ahmadinejad*, *supra* note 31.

[34] *Id.*

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

[36] *Id.*

[37] Robert Tait, *Pious, Populist . . . Presidential?*, GUARDIAN (U.K.), June 25, 2005, at 17.

[38] *Bio: Mahmoud Ahmadinejad*, *supra* note 31.

[39] *Id.*

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

promote the interests of the poor, and [would] return government to the principles of the Islamic revolution during the time of Ayatollah Khomeini."[41] His strategy worked, and Ahmadinejad became the sixth President of Iran on August 6, 2005.[42]

After his election, Ahmadinejad proclaimed: "'Thanks to the blood of the martyrs, a new Islamic revolution has arisen and the Islamic revolution of 1384 [the Iranian year at that time] will, if God wills, cut off the roots of injustice in the world.'"[43] He said that "'[t]he wave of the Islamic revolution [would] soon reach the entire world.'"[44]

Once in power, Ahmadinejad ratcheted up Iran's anti-Israel policy through eliminationist rhetoric and sponsorship of attacks against Israel through Islamist terrorist groups Hezbollah, Hamas, and Islamic Jihad. For example, soon after Ahmadinejad assumed the Iranian presidency, Iran conducted a military parade during which Shahab-3 missiles (which have a range of 1,300 kilometers—enough to hit Israel) went past the presidential viewing platform.[45] Certain missiles were draped with banners proclaiming "Israel should be wiped off the map" and "Death to Israel."[46]

U.S. Secretary of State Condoleezza Rice has noted that Iran has become a "central banker for terrorism."[47] Ahmadinejad's sponsorship of Hezbollah, Hamas, and Islamic Jihad accounts for much of this activity. Hezbollah, a Lebanese Shi'a Islamic political and paramilitary organization, follows a distinct version of Islamist Shi'a ideology developed by the Ayatollah Khomeini.[48] Iran founded Hezbollah, and nurtured it early on by helping to unite various Shiite factions behind the movement and by providing it with training, money, and ideological support.[49]

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[41] KENNETH KATZMAN, CONGRESSIONAL RESEARCH SERVICE, IRAN: U.S. CONCERNS AND POLICY RESPONSES, CRS REPORT FOR CONGRESS 4 (2006), *available at* http://fpc.state.gov/documents/organization/67845.pdf.

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

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

[44] *Id.*

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

[46] *Id.*

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

[48] Frontline World, Lebanon: Party of God (May 2003), http://www.pbs.org/frontlineworld/stories/lebanon/thestory.html.

[49] *See* Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46 (D.D.C. 2003); Daniel Byman, *Strange Bedfellows: What's Behind the Enduring Alliance Between Syria and Iran*, SLATE, July 19, 2006, http://www.slate.com/id/2146139/.

Under Ahmadinejad, Iran financed, armed, and encouraged Hezbollah to attack Israel in the summer of 2006.[50] The conflict began when Hezbollah fired Katyusha rockets and mortars at civilians in Israeli border villages, diverting attention from another Hezbollah unit that crossed into Israel, killed three Israeli soldiers, and took two others hostage.[51] Israeli troops attempted to rescue the soldiers, but were unsuccessful, with five Israeli soldiers killed in the attempt.[52] Another five soldiers and five civilians were wounded in the attacks.[53] During the conflict, which lasted until the middle of August, Hezbollah fired approximately 4,000 rockets into Israel and an estimated twenty-three percent of these rockets hit primarily civilian areas.[54] On the one-year anniversary of the conflict, Ahmadinejad reportedly sent a greeting card to Hezbollah leader Hassan Nasrallah, calling him "a soldier in the messiah's army" and proclaiming that "the wonderful victory of the Lebanese people over the Zionist occupiers is a result of faith, unity and resistance."[55] In March 2008, a Hezbollah terrorist cell infiltrated a Jewish seminary in Jerusalem and murdered eight religious students.[56]

Ahmadinejad has also provided financial support and military training to Hamas,[57] a Palestinian Sunni Islamist group whose avowed aim is the destruction of Israel.[58] Hamas has carried out dozens of suicide bombings against Israel, killing large numbers of Israeli citizens.[59] Ahmadinejad has

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[50] *See* Donna Abu-Nasr, *Syria, Iran Seen as Forces behind Abduction of Two Israeli Soldiers*, STARTRIBUNE.COM (Minneapolis-St. Paul), July 14, 2006, http://www.startribune.com/140/story/552647.html; Editorial, *Iran's Trap for Israel*, BOSTON GLOBE, July 13, 2006, at A8; *State Sponsors: Iran*, *supra* note 47.

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

[52] *Id.*

[53] *Id.*

[54] *Mideast War by the Numbers*, SFGATE, Aug. 17, 2006, http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2006/08/17/international/i120620D58.DTL&type=tech.

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

[56] Ben Wedeman et al., *Sources: Israel Attack Linked to Hezbollah*, CNN.COM, Mar. 7, 2008, http://www.cnn.com/2008/WORLD/meast/03/07/mideast/.

[57] *Hamas Gets $50 M Boost from Iran*, CBS NEWS, Apr. 16, 2006, http://www.cbsnews.com/stories/2006/04/16/world/main1501210.shtml; *Palestinian Intelligence Chief Accuses Iran of Training, Funding Hamas Militants*, YNETNEWS.COM, June 24, 2007, http://www.ynetnews.com/articles/0,7340,L-3416783,00.html.

[58] *See* Greg Myre, *Israeli Official Says Hamas Has Made Abbas Irrelevant*, N.Y. TIMES, Feb. 27, 2006, at A7 ("The Hamas Charter calls for Israel to be destroyed . . . .").

[59] *Id. See also* Press Release, Human Rights Watch, Suicide Bombers Commit Crimes Against Humanity (Nov. 1, 2002), http://www.hrw.org/press/2002/11/isrl-pa1101.htm (noting that Palestinian suicide bombers have killed hundreds of Israeli citizens and injured thousands); Greg Myre, *Suicide Bombing in Israel Kills 9; Hamas Approves*, N.Y. TIMES,

furnished the same kind of support to Islamic Jihad,[60] another Palestinian terrorist organization that seeks the destruction of Israel.[61] Islamic Jihad claimed responsibility for six suicide bombing attacks against civilians inside Israel during 2005 and 2006.[62] These attacks killed twenty civilians and wounded scores of others, some critically.[63] Islamic Jihad has also boasted of carrying out rocket attacks against Israeli towns, which wounded civilian adults and children.[64]

All the while, Iran has come perilously close to developing a nuclear weapons capacity. It has passed one of the most significant hurdles by converting yellowcake into uranium hexafluoride gas.[65] It is now making strides at the next advanced stage of development, spinning the gas through thousands of centrifuges installed at a secretly built underground enrichment plant in Natanz, south of Tehran.[66] As a result, certain experts now believe the Islamic Republic may be capable of building an atomic bomb by as early as 2009.[67] Based on this estimation, on July 31, 2006, the U.N. Security Council—including Russia and China—ordered Iran to stop its enrichment program.[68] Iran thumbed its nose at the Security Council, which followed up with three resolutions, in December 2006, March 2007, and March 2008, repeating its demands and applying sanctions.[69] The European Union has imposed its own sanctions, "target[ing] loans to companies trading with Iran and allow[ing] for tougher cargo inspections" of Iranian imports and exports.[70] As of this writing, Iran continues to ignore these resolutions and "[t]he centrifuges spin defiantly on."[71]

April 18, 2006, at A1 (quoting a Hamas spokesman as stating that a suicide bombing carried out by the Islamic Jihad faction was "a legitimate response to . . . Israeli aggression.").

[60] *See State Sponsors: Iran*, *supra* note 47.

[61] INTELLIGENCE AND TERRORISM INFO. CTR. AT THE CTR. FOR SPECIAL STUDIES, PROFILE OF THE PALESTINIAN ISLAMIC JIHAD, PERPETRATOR OF A SUICIDE BOMBING ATTACK IN TEL AVIV, FEBRUARY 25, 2005, (2005), *available at* http://www.terrorism-info.org.il /malam_multimedia/html/final/eng/sib/3_05/pji.htm.

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

[63] *Id.*

[64] *Id.*

[65] *See Nuclear Proliferation: The Riddle of Iran*, ECONOMIST, July 19, 2007, at 58.

[66] *Id.*

[67] *Id.*

[68] *Id. See* S.C. Res. 1696, U.N. Doc. S/RES/1624 (July 31, 2006).

[69] *See* S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008).

[70] *E.U. Expands Iran Nuclear Sanctions*, B.B.C. NEWS, Aug. 8, 2008, http://news.bbc.co.uk/2/hi/middle_east/7549879.stm.

[71] *Nuclear Proliferation: The Riddle of Iran*, *supra* note 65.

Although a U.S. National Intelligence Estimate (NIE) stated last year that Iran technically halted its nuclear weapons program in 2003,[72] the country has apparently only suspended attempts to construct a warhead. This is seemingly the easiest and quickest step in creating nuclear weapons.[73] According to Henry Kissinger and other experts, though, this may be less important than Tehran's accelerated production of fissile material and success at increasing the range of its missiles, much more difficult hurdles to overcome in the nuclear weapon production process.[74] Iran's vast oil reserves, its defiant, longstanding clandestine nuclear activity, and its parading Shahab-3 missiles—capable of hitting Tel Aviv and festooned with words such as "Death to Israel"—suggest less than irenic motives.[75] Consistent with this, at the end of January 2008, all six permanent members of the U.N. Security Council agreed to introduce a new resolution likely to tighten sanctions against Iran to persuade it once again to abandon its nuclear program.[76] The following month, the U.N.'s nuclear watchdog, the International Atomic Energy Agency, released a report calling weaponization "the one major . . . unsolved issue relevant to the nature of Iran's nuclear program."[77] On the heels of this, the Security Council adopted its latest sanctions resolution.[78]

2. Incendiary Statements

Against this ominous backdrop, Ahmadinejad has been making a series of extremely hostile, inflammatory public comments about Israel, Jews, and the Holocaust. Those statements may be divided into seven

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[72] *See* Mark Mazzetti, *U.S. Intelligence Finding Says Iran Halted Its Nuclear Arms Efforts in 2003*, N.Y. TIMES, Dec. 4, 2007, at A1.

[73] *See* Henry A. Kissinger, *Misreading the Iran Report: Why Spying and Policymaking Don't Mix*, WASH. POST, Dec. 13, 2007, at A35.

[74] *Id. See also* Valerie Lincey & Gary Milhollin, *In Iran We Trust?*, N.Y. TIMES, Dec. 6, 2007, at A41 (noting that Iran halted only its "secret enrichment and weapon design efforts," but "has continued other work, crucial to the ability to make a bomb, that it can pass off as having civilian applications.").

[75] *Id.* ("Iran is also building a heavy water reactor . . . [which] is ideal for producing plutonium for reactor fuel . . . . And why, by the way, does Iran even want a nuclear energy program, when it is sitting on an enormous pool of oil that is now skyrocketing in value? And why is Iran developing long-range Shahab missiles, which make no military sense without nuclear warheads to put on them?").

[76] Christian Retzlaff & Kim Murphy, *Six-Nation Pact Takes Aim at Iran*, L.A. TIMES, Jan. 23, 2008, at 3, *available at* http://www.latimes.com/news/nationworld/world/la-fg-iran23jan23,1,6146892.story?track=rss.

[77] Veronika Oleksyn, *U.S.: IAEA Report Raises Questions on Iran*, SFGATE, Feb. 28, 2008, http://www.sfgate.com/cgi-bin/article.cgi?file=/n/a/2008/02/28/international/i184009S69.DTL.

[78] *See* S.C. Res. 1803, *supra* note 69.

categories: (1) calling for Israel's destruction; (2) predicting Israel's destruction; (3) dehumanizing Israeli Jews; (4) accusing Israel of perpetrating mass murder; (5) condoning past violence against Israel and issuing threats against those who would protect Israel; (6) advocating expulsion of Israeli Jews from the Middle East; and (7) denying the Holocaust.[79]

a. Calls for Destruction

Ahmadinejad has publicly called for the annihilation of the state of Israel on several occasions. In addition to his October 25, 2005, "wipe off the map" speech, he has stated that the "'Zionist regime . . . cannot survive,'"[80] and "[cannot] continue its existence."[81] On August 4, 2006, during the Israel-Hezbollah military conflict, he stated that the "real cure for the [Lebanon] conflict is elimination of the Zionist regime."[82] In February 2008, he focused his eliminationist invective specifically on Israeli Jews when he told the French newspaper *Le Monde* that "these false people, these fabricated people [the Israeli people] cannot continue to exist . . . ."[83]

b. Predictions of Destruction

Ahmadinejad has also publicly predicted the imminent destruction of the Jewish state on numerous occasions. During the infamous "wipe off the map" speech, he also announced that "the growing turmoil in the Islamic world would in no time wipe Israel away."[84] He subsequently stated at public appearances over the next two years that the "Zionist regime" is "heading toward annihilation" and "elimination,"[85] and will "soon be wiped

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[79] In her thoughtful article on defining incitement, Professor Susan Benesch identifies many of these direct and indirect speech "techniques" as "hallmarks of incitement to genocide . . . ." Benesch, *supra* note 16, at 503.

[80] *Iran President's Statements on Israel*, EUR. JEWISH PRESS, Dec. 10, 2006, http://ejpress.org/article/news/12146.

[81] *Israel's Jews Should Go Home: Ahmadinejad*, EXPATICA.COM, Apr. 24, 2006, http://www.expatica.com/de/articles/news/israels-jews-should-go-home-ahmadinejad-29511.html.

[82] Patrick Bishop & Sebastian Berger, *'Eliminate' Israel to Solve the Crisis, Says Iranian President*, DAILY TELEGRAPH (London), Aug. 4, 2006, at 10.

[83] *Une heure avec le président iranien, Mahmoud Ahmadinejad*, LE MONDE, Feb. 5, 2008, http://www.lemonde.fr/proche-orient/article/2008/02/05/une-heure-avec-mahmoud-ahmadinejad_1007469_3218.html (author's translation) ("Un peuple falsifié, inventé [le peuple israélien] ne va pas durer . . . .").

[84] Shirzad Bozorghmehr, *Iranian Leader: Wipe Out Israel*, CNN.COM, Oct. 27, 2005, http://www.cnn.com/2005/WORLD/meast/10/26/ahmadinejad/.

[85] *Iran: Israel Facing Annihilation*, CBS NEWS, Apr. 14, 2006, http://www.cbsnews.com /stories/2006/04/14/world/main1499824.shtml [hereinafter *Israel Facing Annihilation*].

out."[86] He publicly warned Israeli Jews that their country "will one day vanish,"[87] "will be gone, definitely,"[88] and that "they are nearing the last days of their lives."[89] Furthermore, as Israel defended itself against Hezbollah attacks in the summer of 2006, Ahmadinejad said the Jewish state had "pushed the button of its own destruction."[90] In January 2008, he indicated to a television audience that Israel was "doomed."[91] Most recently, as Israel celebrated the sixth decade of its existence, Ahmadinejad told an audience that Israel was "dying" and its sixtieth anniversary festivities were an attempt to prevent its "annihilation."[92]

c. Dehumanization

During the same time period, Ahmadinejad attempted to dehumanize Israelis, publicly calling their country a "blot"[93] and a "stain."[94] Opening a conference on supporting the Palestinians, Ahmadinejad described Israel as "a rotten, dried tree that will be eliminated by one storm."[95]

He asked an audience if Israeli Jews are human beings, and answered his own question in the negative: "They are like cattle, nay, more misguided. A bunch of bloodthirsty barbarians. Next to them, all the criminals of the world seem righteous."[96] In October 2007, he told a large

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[86] *Charge Iran with 'Incitement to Genocide,'* NEWSMAX.COM, Dec. 13, 2006, http://www.newsmax.com/archives/ic/2006/12/13/104328.shtml.

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

[88] *Iran President's Statements on Israel*, *supra* note 80.

[89] Joshua Rozenberg, *Four Ways to Act Against Ahmadinejad: Charging Iran's President with Incitement to Commit Genocide Would Face World Leaders with a Range of Options*, DAILY TELEGRAPH (London), Feb. 15, 2007, at 26.

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

[91] *Ahmadinejad Scorns U.S. and Israel*, BBC News, Jan. 18, 2008, http://news.bbc.co.uk/1/hi/world/middle_east/7195240.stm.

[92] Ali Akbar Dareini, *Iranian Leader Marks Israeli Anniversary with Menace*, THE HERALD, May 15, 2008, http://www.theherald.co.uk/news/foreign/display.var.2272254.0.0.php#comments.

[93] *Iranian President Says Israel Should Be Moved to Europe*, USA TODAY, Dec. 9, 2005, http://www.usatoday.com/news/world/2005-12-09-iran-israel_x.htm [hereinafter *Israel Should Be Moved*].

[94] *Iranian President at Tehran Conference*, 1013 SPECIAL DISPATCH SERIES (Middle East Media Research Inst., Oct. 28, 2005), http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP101305.

[95] *Israel Facing Annihilation*, *supra* note 85.

[96] *Iranian President Ahmadinejad Addresses Rally & Warns the U.S. & England*, 1229 SPECIAL DISPATCH SERIES (Middle East Media Research Inst., Aug. 3, 2006),

gathering of Iranians that Israel's continued existence was an "insult to human dignity,"[97] and in January 2008, he referred to the Jewish state as "filthy."[98] The following month, he variously described Israel to supporters at a rally as a "filthy bacteria," a "wild beast," and a "scarecrow."[99]

d. Accusations of Mass Murder

Ahmadinejad has also accused Israelis of committing mass murder. He has told audiences, for instance, that Israelis Jews have allowed "themselves to kill the Palestinian people,"[100] who "are burning in the crimes of Zionists."[101] He referred to residents of the Jewish state as having "no boundaries, limits, or taboos when it comes to killing human beings."[102] He said at another public gathering that Israeli Jews are "fighting a 'war against humanity.'"[103] On October 5, 2007, Ahmadinejad marked Al-Quds Day by declaring that Israel is committing "genocide" against the Palestinians.[104]

e. Condoning Violence and Threatening Supporters

At the same time, Ahmadinejad has publicly condoned violence against Israelis. For example, in his October 25, 2005, speech, he commented approvingly regarding Palestinian terrorist attacks against Israel: "There is no doubt that the new wave of attacks in Palestine will erase this stain [Israel] from the face of Islam."[105] In the same speech, he issued threats against those who would come to Israel's aid, declaring:

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http://www.memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP122906 [hereinafter *Ahmadinejad Addresses Rally*].

[97] Mike Carney, *Ahmadinejad Rails against Israel for 'Genocide' against Palestinians*, USA TODAY, Oct. 5, 2007, http://blogs.usatoday.com/ondeadline/2007/10/ahmadinejad-rai.html.

[98] David Blair, *Cheap Attack on Israel*, TELEGRAPH.CO.UK, Jan. 30, 2008, http://blogs.telegraph.co.uk/foreign/davidblair/jan2008/ahmadinejad-israel.htm.

[99] *Ahmadinejad: Israel Is Filthy Bacteria*, NEWSMAX.COM, Feb. 20, 2008, http://www.newsmax.com/insidecover/Ahmadinejad:_Israel_Is_Fi/2008/02/20/74171.html.

[100] *Israel Should Be Moved*, *supra* note 93.

[101] 152 Cong. Rec. H8675, H8713-H8714 (2006) (statement of Rep. Kirk) (presenting and commenting upon a report of the Congressional Research Service compiling remarks made by President Ahmadinejad).

[102] *Ahmadinejad Addresses Rally*, *supra* note 96.

[103] Bishop & Berger, *supra* note 82.

[104] Carney, *supra* note 97.

[105] *The Extermination Speech*, HA'ARETZ, Oct. 29, 2005, http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=638926.

"Anybody who recognizes Israel will burn in the fire of the Islamic nation's fury."[106]

f. Calling for Expulsion

Ahmadinejad has also publicly advocated for the expulsion of Israeli Jews from the Middle East. He once exclaimed that Jews had "no roots in Palestine" and he urged their removal to Germany or Austria.[107] On another occasion, Ahmadinejad asked that Israeli Jews be removed to Europe, the continental United States, Canada, or Alaska.[108] He again called for their removal to Alaska at an anti-Israel rally in October 2007.[109]

g. Holocaust Denial

Ahmadinejad has consistently denied the existence of the Holocaust in public. In December 2005, he complained that some European countries "insist" that Hitler "burned millions of Jews and put them in concentration camps" and argued that people who doubt the Holocaust should not be subjected to adverse treatment.[110] Later that month, he said: "They have created a myth that Jews were massacred and place this above God, religions and the prophets."[111] At Ahmadinejad's urging, the Institute for Political and International Studies, an arm of the Iranian Foreign Ministry, held a two-day conference in December 2006 entitled "Review of the Holocaust: Global Vision." Ahmadinejad addressed the conference as did other Holocaust deniers such as former Ku Klux Klan leader David Duke and Nazi sympathizers such as French professor Robert Faurisson.[112]

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

Were the international community to consider putting Ahmadinejad in the dock for incitement crimes, on what legal authority, if any, could it rely? In what jurisdiction would such a crime be prosecuted? To determine this, a review of incitement law from Nuremberg to the Rwandan genocide

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[106] *Ahmadinejad Quotes*, JERUSALEM POST ONLINE EDITION, May 16, 2006, http://www.jpost.com/servlet/Satellite?cid=1145961353170&pagename=JPost%2FJPArticle%2FPrinter.

[107] *Israel Should Be Moved*, *supra* note 93.

[108] Nahid Siamdoust, *Iranian President Calls the Holocaust a 'Myth,'* L.A. TIMES, Dec. 15, 2005, at 5.

[109] *Millions of Iranians Rally for Jerusalem Day*, USA TODAY, Oct. 5, 2007, http://www.usatoday.com/news/world/2007-10-05-iran_N.htm.

[110] *Israel Should Be Moved*, *supra* note 93.

[111] Siamdoust, *supra* note 108.

[112] *Charge Iran with 'Incitement to Genocide,' supra* note 86.

prosecutions is necessary. Such a review permits construction of an analytical framework through which to examine Ahmadinejad's statements. The three main sources of law necessary for piecing together this framework are the Genocide Convention, the Rome Statute, and domestic universal jurisdiction statutes. The two criminal offenses that could be charged are direct and public incitement to commit genocide and crimes against humanity.[113] Each of these sources and crimes will be considered in turn. The Article then considers the potential judicial bodies that could exercise jurisdiction: the International Court of Justice (ICJ); the ICC; and municipal criminal courts.

A. POTENTIAL CRIMES

1. Direct and Public Incitement to Commit Genocide

Any prosecution of Ahmadinejad for direct and public and incitement to commit genocide would involve interpreting both the Genocide Convention and cases interpreting its provisions, as well as the ICC's Rome Statute and universal jurisdiction statutes. This Section considers each of these sources in turn.

a. The Genocide Convention

i. Overview

Through the prodding and guidance of Raphael Lemkin, a Holocaust survivor and legal scholar who coined the term "genocide,"[114] the United Nations General Assembly began work on a Genocide Convention with the passage of Resolution 96(I), which established genocide as a crime carrying individual accountability under international law.[115] The finished product, adopted in 1948, listed the acts that constitute genocide and then enumerated a separate set of acts that warrant punishment. Article II of the Convention defines genocide as a series of acts—including, for example, killing, causing serious bodily or mental harm, and inflicting on the group conditions of life calculated to bring about its physical destruction—committed with the intent to destroy, in whole or in part, a national, ethnic,

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

[114] *See* SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 29, 42, 61-63 (2002).

[115] G.A. Res. 96(I), at 188-89, U.N. GAOR, 1st Sess., 55th plen. mtg., U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

racial, or religious group, as such. Article III then states that a number of related acts committed in furtherance of Article II shall also be punishable. This includes, at Article III(b), "direct and public incitement to commit genocide."[116]

As Article II 3(c) of the ICTR Statute[117] essentially mirrors Article III (b) of the Genocide Convention,[118] the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) provides significant assistance regarding the interpretation of Article III(b). And several defendants have been prosecuted and convicted pursuant to this section of the ICTR Statute.[119] Of these, five cases have significantly contributed to the development of incitement law: *Prosecutor v. Akayesu*;[120] *Prosecutor v. Kambanda*;[121] *Prosecutor v. Ruggiu*;[122] and *Prosecutor v. Nahimana, Barayagwiza & Ngeze.*[123] Additionally, a Rwandan incitement case from the Canadian Supreme Court, *Mugesera v. Canada*,[124] serves as an excellent capstone that applies and elucidates the standards established by the ICTR precedents.

By culling the important principles from these cases, a grid of analytic criteria emerges. To determine if an utterance constitutes incitement, the finder of fact must consider: (1) *where* the utterance was issued (is it sufficiently public?); (2) its *interpretation* by the audience (is it sufficiently direct?); (3) its *content* (is it permissible free speech or criminal incitement?); and (4) the *state of mind* (or mens rea) of the person uttering the words (is there sufficient intent?).

These cases also establish important collateral principles: (a) the official position of the speaker will not shield him from liability; (b) employing euphemisms does not necessarily affect the directness calculus;

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

[117] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 Jan. 1994 and 31 Dec. 1994, Annex to S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

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

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

[120] Case No. ICTR 96-4-T, Judgement (Sept. 2, 1998).

[121] Case No. ICTR 97-23-S, Judgement and Sentence (Sept. 4, 1998) .

[122] Case No. ICTR 97-32-I, Judgement and Sentence, ¶ 10 (June 1, 2000).

[123] Case No. ICTR 99-52-T, Judgement and Sentence (Dec. 3, 2003).

[124] [2005] 2 S.C.R. 100, 2005 SCC 40 (Can.).

and (c) whether the incitement leads to actual violence is of no moment—causation is not an element of the crime of incitement.

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

The ICTR's earliest jurisprudence established the initial foundation of incitement's analytic matrix—the mens rea, "direct," and "public" elements. On September 2, 1998, the ICTR (Tribunal) handed down the world's first conviction for genocide after trial before an international court. In finding Taba Commune mayor Jean-Paul Akayesu guilty, the Tribunal laid the initial groundwork for interpreting the crime of direct and public incitement to commit genocide.[125] More specifically, the Tribunal's decision was particularly useful in shedding light on the mens rea, "direct," and "public" elements of the crime.

The incitement charge against Akayesu stemmed from his address to a public gathering in Taba on April 19, 1994. He called on town residents to unite so they could eliminate what he described as the sole enemy: the accomplices of the "Inkotanyi"—a derogatory reference to Tutsis.[126] This was understood as an exhortation to murder Tutsis in general,[127] and Tutsis were in fact massacred in Taba soon after the speech.[128]

In its opinion finding Akayesu guilty, the Tribunal fleshed out three important aspects of the crime: (1) mens rea; (2) the "public" element; and (3) the "direct" element.[129] With respect to mens rea, the Tribunal held that the requisite mental state lies in the intent directly to prompt or provoke another to commit genocide. The person who incites others to commit genocide must himself have the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnic, racial, or religious group.[130] Based on the circumstances surrounding Akayesu's conduct, the Tribunal found he had the necessary mens rea.[131] Additionally, Akayesu's incitement was "public" because it constituted "a call for criminal action to a number of individuals in a public place" or to "members of the general

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[125] *Akayesu*, Case No. ICTR 96-4-T.

[126] *Id.* ¶ 673.

[127] *Id.*

[128] *Id.*

[129] The Tribunal also addressed the issue of causation—whether Akayesu's incitement caused the massacres that followed. However, the Tribunal's holding was vague; it held that causation was not an element of the crime, but analyzed whether causation was present nonetheless. *Id.* ¶¶ 348-57, 673(vii).

[130] *Id.* ¶ 560.

[131] *Id.* ¶ 674.

public at large by such means as the mass media, for example, radio or television."[132]

Finally, the Tribunal held that the "direct" element of incitement should be viewed "in the light of its cultural and linguistic content."[133] Thus, while a particular speech may be perceived as "direct" in one country, it would not be considered as such in another country.[134] So it would be necessary to conduct a case-by-case factual inquiry to determine "whether the persons for whom the message was intended immediately grasped the implication thereof."[135]

The Tribunal considered both expert and fact witness testimony in conducting this inquiry. In particular, it evaluated the testimony of Dr. Mathias Ruzindana, Professor of Linguistics at the University of Rwanda.[136] In his speech, Akayesu urged his listeners to kill the "Inkotanyi." Dr. Ruzindana examined several Rwandan publications and broadcasts by RTLM (Radio Télévision Libre des Milles Collines), which encouraged the extermination of Tutsis, and determined that, when the Taba massacres occurred, the term *Inkotanyi* meant RPF sympathizer[137] or Tutsi. This testimony, corroborated by fact witnesses who testified to their understanding of the words, convinced the Tribunal that in the context of the time, place, and circumstances of Akayesu's speech, *Inkotanyi* was tantamount to Tutsi.[138]

iii. The *Kambanda* Case: State Leaders and Euphemisms

Two additional components of incitement's analytical framework, the role of state leaders and the problem of euphemisms, were soon provided by the ICTR. Two days after Akayesu's conviction, the ICTR made history again by becoming the first international court to convict a head of government for genocide and crimes against humanity.[139] Pursuant to a guilty plea, the Tribunal convicted Jean Kambanda, the Prime Minister of Rwanda's rump government during the genocide, for direct and public

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[132] *Id.* ¶ 556.

[133] *Id.* ¶ 557.

[134] *Id.*

[135] *Id.* ¶ 558.

[136] *Id.* ¶¶ 340, 673(iv).

[137] RPF stands for the Rwandan Patriotic Front, a group of primarily Ugandan Tutsi exiles who launched an armed invasion of Rwanda after the genocide began. *Id.* ¶¶ 93, 111. *Inkotanyi* translates roughly as warrior. *Id.* ¶ 147. *Inyenzi* means cockroach. *Id.* ¶ 90.

[138] *Id.* ¶¶ 361, 709.

[139] *See* Jeremy Greenstock, *International Human Rights and Standards*, 23 FORDHAM INT'L L.J. 398, 400 (1999); Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 37 n.40 (2002).

incitement to commit genocide and crimes against humanity, among other crimes.[140] Although the high level of Kambanda's government position did not factor directly into the Tribunal's legal analysis, the decision nevertheless established that heads of state could be convicted for incitement crimes. The factual basis for the guilty plea to incitement arose out of Kambanda's announcement on RTLM that the radio station should continue to encourage the massacres of the Tutsi civilian population, specifically stating that this radio station was "an indispensable weapon in the fight against the enemy."[141]

Kambanda further acknowledged that during the genocide he instigated and abetted both local government officials and members of the population to massacre civilian Tutsis and moderate Hutus.[142] He admitted visiting several prefectures during this time to incite and encourage the population to kill.[143] This included congratulating the people who had already killed.[144] Kambanda's incitement also consisted of uttering the following incendiary phrase, which was repeatedly broadcast: "[Y]ou refuse to give your blood to your country and the dogs drink it for nothing."[145]

iv. The *Ruggiu* Case: More on the Role of Euphemisms

Less than two years later, the ICTR explored in greater depth the important role played by euphemisms in relation to the crime of direct and public incitement to commit genocide. On June 1, 2000, Belgian national Georges Ruggiu pled guilty to, *inter alia*, one count of direct and public incitement to commit genocide in connection with ethnic hate screeds he broadcast against Tutsis on RTLM during the genocide.[146] In sentencing Ruggiu, the Tribunal noted that his broadcasts, in a superficially innocuous manner, urged the population to finish off "the 1959 revolution."[147] In fact, as the Tribunal explained, these were code words for incitement to massacre the entire Tutsi population.[148] The Tribunal noted that within the context of the 1994 civil war, the term *Inyenzi*, used extensively by Ruggiu, became

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[140] Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgement and Sentence (Sept. 4, 1998).

[141] *Kambanda*, Case No. ICTR 97-23-S, ¶ 39(vii).

[142] *Id.* ¶ 39(viii).

[143] *Id.*

[144] *Id.*

[145] *Id.* ¶ 39(x).

[146] Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgement and Sentence (June 1, 2000).

[147] *Id.* ¶¶ 44(iii), 50.

[148] *Id.* ¶ 44(vii).

synonymous with the term *Tutsi*. Ruggiu admitted that the word *Inyenzi*,[149] as used in the socio-political context of the time, came to designate the Tutsis as "persons to be killed."[150] He also admitted that, as part of encouraging "civil defense," he made public broadcasts to the population on several occasions to "go to work."[151] Again, within the socio-political context, the expression was understood as meaning "go kill the Tutsis and Hutu political opponents of the interim government."[152] Among the acts that formed the basis of the incitement charge against Ruggiu were that he congratulated perpetrators of massacres of Tutsis,[153] and that he warned the Hutu population to be vigilant against attacks by Tutsi infiltrators.[154]

v. The ICTR *Media Case*: Content and Causation

While the *Akayesu*, *Kambanda*, and *Ruggiu* decisions provided important guidance regarding the interpretation and scope of direct and public incitement to commit genocide, questions remained regarding two important elements of the crime: (1) content and (2) causation. Those aspects of incitement were addressed by the Tribunal in its landmark December 2003 decision in *The Prosecutor v. Nahimana*, the ICTR's so-called *Media Case*.[155] The three defendants in that case, RTLM founders Ferdinand Nahimana and Jean Bosco Barayagwiza, and Hassan Ngeze, editor-in-chief of the extremist Hutu newspaper *Kangura*, were convicted of, among other crimes, direct and public incitement to commit genocide.[156] Like RTLM, *Kangura* had urged Rwanda's Hutus to slaughter the Tutsi minority.[157]

One of the key questions confronting the Tribunal was whether, in transmitting the content of the messages at issue, the defendants had engaged in the permissible exercise of free speech or in non-protected hate advocacy. By examining existing international law precedent, the Tribunal discerned four criteria through which speech content regarding race or ethnicity could be classified as either legitimate expression or criminal

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[149] *Id.* ¶ 44(iii).

[150] *Id.*

[151] *Id.* ¶ 44(iv).

[152] *Id.*

[153] *Id.* ¶ 50.

[154] *Id.* ¶ 44(v).

[155] Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, Judgement and Sentence (Dec. 3, 2003).

[156] *See* Gordon, *supra* note 118, at 141.

[157] *Id.* For their crimes, Nahimana and Ngeze were sentenced to life imprisonment, while Barayagwiza was sentenced to thirty-five years imprisonment. *Id.* (citations omitted).

advocacy: (1) purpose; (2) text; (3) context; and (4) the relationship between speaker and subject.[158]

With respect to the purpose criterion, the Tribunal furnished some examples of legitimate endeavors: historical research, dissemination of news and information, and public accountability of government authorities.[159] At the other end of the gamut, explicit calls for violence would evince a clearly illegitimate objective.

The Tribunal indicated the text criterion, for its part, would help further reveal the purpose of the speech. To illustrate, the Tribunal referenced *Robert Faurisson v. France*.[160] In that case, the United Nations Human Rights Committee (HRC) had to reconcile Article 19 of the International Covenant for Civil and Political Rights (ICCPR), protecting freedom of expression, with Article 20, forbidding incitement to national, racial, or religious discrimination.[161] Faurisson's Complaint had challenged his French conviction for publishing his view doubting the existence of gas chambers at Nazi concentration camps (he referred to them as "magic gas chambers" in the Complaint).[162] The Tribunal focused on the HRC's conclusion that the term *magic gas chamber* suggested the author was motivated by anti-Semitism rather than the pursuit of historical truth.[163] The Tribunal contrasted this result with that reached in *Jersild v. Denmark*, a case decided under the European Convention on Human Rights (ECHR), which overturned the incitement conviction of a journalist who interviewed members of a racist group but did not condemn them.[164] The interviewer in *Jersild*, noted the Tribunal, distanced himself from a message of ethnic

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[158] The first two criteria, purpose and text, are lumped together by the Tribunal, but I have argued elsewhere that they should be considered separately. *See id.* at 172. Moreover, the Tribunal did not explicitly characterize as a separate criterion the relationship between the speaker and the subject. I have also demonstrated that this should be considered as a distinct point of analysis given a close reading of the *Nahimana* judgment. *See id.* at 173-74; *see also* Robert H. Snyder, *"Disillusioned Words Like Bullets Bark": Incitement to Genocide, Music, and the Trial of Simon Bikindi*, 35 GA. J. INT'L & COMP. L. 645, 666 (2007) (adopting this analysis). *But see* Benesch, *supra* note 16, at 489 n.17 (contending that the Tribunal was not precise in its formulation of the test and finding it deficient).

[159] *Nahimana*, Case No. ICTR 99-52-T, ¶¶ 1000-06.

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

[161] *Id.* ¶ 1001.

[162] *Id.*

[163] *Nahimana*, Case No. ICTR 99-52-T, ¶ 1001.

[164] *Jersild v. Denmark*, 19 Eur. Ct. H.R. 1, 27 (1994). The ECHR has developed jurisprudence balancing the right to freedom of expression, Article 10(1) of the Convention with the right to restrict expression for national security or protection of the rights and reputations of others, Article 10(2) of the Convention. *See* Gordon, *supra* note 118, at 146.

hatred by referring to his interviewees as "racist" and "extremist youths."[165] According to the Tribunal, this textual analysis allowed the *Jersild* court to conclude that the purpose of the program was news dissemination, rather than the propagation of racist views.[166]

For the "context" criterion, the Tribunal stressed that circumstances external to and surrounding the text must be considered to grasp the text's significance. Once again, the Tribunal looked to the *Faurisson* case, where the HRC observed that, in context, challenging the well-documented historical existence of Holocaust gas chambers would promote anti-Semitism. The Tribunal also considered the case of *Zana v. Turkey*.[167] There, the ECHR considered, in the context of violent clashes between government and Kurdish separatist forces, a former regional mayor's statement seemingly condoning Kurdish massacres by saying "anyone can make mistakes."[168] The Tribunal reasoned that the ECHR had upheld the underlying conviction because, given the massacres taking place at the time, the statement was "likely to exacerbate an already explosive situation . . . ."[169] The Tribunal further fleshed out the context criterion by indicating the fact finder should consider the tone of the speaker in uttering the words at issue.[170]

Finally, the Tribunal indicated the fact-finder ought to scrutinize the relationship between the speaker and the subject.[171] The analysis should be more speech-protective when the speaker is part of a minority criticizing either the government or the country's majority population.[172]

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[165] *Nahimana*, Case No. ICTR 99-52-T, ¶¶ 993, 1001.

[166] *Id.*

[167] *Zana v. Turkey*, 27 Eur. Ct. H.R. 667, 670 (1997).

[168] *Nahimana*, Case No. ICTR 99-52-T, ¶ 1001.

[169] *Id.*

[170] *Id.* ¶ 1022. Some commentators have criticized the ICTR's analysis because it looked to international law on discrimination and hate speech for guidance. *See, e.g.*, Benesch, *supra* note 16, at 515 (complaining that the ICTR "mixed legal standards"). However, as suggested by the ICTR Appeals Chamber in the *Media Case* decision, such a general reference point is not entirely unreasonable: "In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech [but indicating they are ultimately different]." *See Nahimana*, Case No. ICTR 99-52-A, ¶ 692. Still, the Appeals Chamber noted that it could not conclude that the Trial Chamber referred to this jurisprudence to "defin[e]" direct and public incitement to commit genocide. *Id.* ¶ 693.

[171] *Id.* ¶ 1006.

[172] *Id.* According to the Tribunal:

> The dangers of censorship have often been associated in particular with the suppression of political or other minorities, or opposition to the government. The special protections developed by the jurisprudence for speech of this kind, in international law and more particularly in the American legal tradition of free speech, recognize the power dynamic inherent in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government . . . . The special protections for this kind of speech

Applying these analytic criteria enabled the Tribunal to "distinguish between permissible speech and illegal incitement in the cases of *Kangura* and RTLM."[173] In particular, "[t]he Tribunal noted . . . that some of the articles and broadcasts offered into evidence . . . conveyed historical information, political analysis, or advocacy of ethnic consciousness regarding the inequitable distribution of privilege [between Hutus and Tutsis] in Rwanda."[174]

For example, the Tribunal discussed a December 1993 broadcast made by Barayagwiza in which he alluded to the discrimination he experienced as a Hutu child.[175] Employing the Tribunal's diagnostic elements, the purpose of the discourse seemed to be promotion of ethnic consciousness. The text itself consisted of words that alluded to historical inequities but did not call for violence. Further, the context then was not that of fully-realized genocide, as would be the case after April 6, 1994, but rather social volatility and political discord.[176] Finally, the speaker depicted his experience as a member of the politically dispossessed condemning the establishment of that era. In distinguishing Barayagwiza's transmission as an acceptable instance of free speech, the Tribunal characterized it as "a moving personal account of his experience of discrimination as a Hutu."[177]

At the other end of this spectrum was a June 4, 1994, broadcast by Kantano Habimana urging listeners to exterminate the "Inkotanyi," or Tutsis, who would be known by height and physical appearance.[178] Habimana concluded: "Just look at his small nose and then break it."[179] The purpose and text of this broadcast readily reveal illicit advocacy of ethnic violence. The speaker belonged to the majority ethnic group, backing government policies, and attacking the minority. In addition, the context at issue was one of an ongoing genocide. Finally, regarding the

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> should accordingly be adapted, in the Chamber's view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered.

Id. ¶ 712. *See also* Gordon, *supra* note 118, at 173-74.

[173] Gordon, *supra* note 118, at 174.

[174] *Id.*

[175] *Nahimana*, Case No. ICTR 99-52-T, ¶ 368.

[176] *But see* Mugesera v. Canada, [2005] 2 S.C.R. 100, 2005 SCC 40 (Can.), ¶ 148 (finding sufficient ethnic violence during this period to satisfy the requirement for a "widespread and systematic attack" against the Tutsis for purposes of crimes against humanity).

[177] *Nahimana*, Case No. ICTR 99-52-T, ¶ 1019.

[178] *Id.* ¶ 396.

[179] *Id.*

relationship between the speaker and the subject, the broadcaster "in no way attempted to distance himself from his message."[180]

Causation was the other important aspect of incitement addressed in the *Nahimana* judgment. Did the crime of direct and public incitement to commit genocide require a showing of violence occasioned by the incitement? The Tribunal's answer was no. "The Chamber notes that this causal relationship is not requisite to a finding of incitement. It is the potential of the communication to cause genocide that makes it incitement."[181]

vi. The *Mugesera* Case: Putting All the Elements Together

The *Nahimana* case was soon followed by another significant incitement decision related to the Rwandan Genocide, *Mugesera v. Canada*, issued on June 28, 2005.[182] The *Mugesera* decision's main significance lay in taking all the strands of analysis from the ICTR incitement cases, re-

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[180] *Id.* ¶ 1024. *See also* Gordon, *supra* note 118, at 175-76.

[181] *Nahimana*, Case No. ICTR 99-52-T, ¶ 1015. On November 28, 2007, the ICTR Appeals Chamber issued its decision in the *Media Case* and left undisturbed those portions of the judgment analyzing the elements of direct and public incitement to genocide. *See* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-A, ¶ 695 (Nov. 28, 2007) ("The Appeals Chamber considers that the Trial Chamber did not alter the constituent elements of the crime of direct and public incitement to commit genocide in the media context (which would have constituted an error)."); *id.* ¶ 696 ("Furthermore, the Appeals Chamber notes that several extracts from the [Trial Chamber] Judgement demonstrate that the Trial Chamber" did a good job of distinguishing "between hate speech and direct and public incitement to commit genocide . . . ."); *id.* ¶ 697 ("The Appeals Chamber will now turn to the Appellants' submissions that the Trial Chamber erred (1) in considering that a speech in ambiguous terms, open to a variety of interpretations, can constitute direct incitement to commit genocide, and (2) in relying on the presumed intent of the author of the speech, on its potential dangers, and on the author's political and community affiliation, in order to determine whether it was of a criminal nature. The Appellants' position is in effect that incitement to commit genocide is direct only when it is explicit and that under no circumstances can the Chamber consider contextual elements in determining whether a speech constitutes direct incitement to commit genocide. For the reasons given below, the Appeals Chamber considers this approach overly restrictive."). Although the Appeals Chamber found that, based on the evidence, certain pre-genocide speech could not be considered incitement beyond a reasonable doubt, *see, e.g.*, *id.* ¶¶ 740-51, and that the pre-1994 conduct of the defendants, which the Trial Chamber considered part of the incitement crimes at issue, was outside the ICTR's temporal jurisdiction--and this resulted in a reduction of the defendants' respective sentences, *see, e.g.*, *id.* ¶ 314--the elements of incitement and their analysis, as set forth by the Trial Chamber, were upheld. Professor Susan Benesch states that the Appeals Chamber "rebuked" the Trial Chamber for "not drawing a clear line between hate speech and incitement to genocide." *See* Benesch, *supra* note 16, at 489. As indicated clearly by ¶ 696, however, her statement is simply not supported by the actual text of the decision.

[182] [2005] 2 S.C.R. 100, 2005 SCC 40 (Can.).

examining them, and then weaving them into an integrated conceptual fabric.

Leon Mugesera was Vice President of the Gisenyi Province branch of the governing Rwandan hard-line Hutu MRND party.[183] In November 1992, in the midst of the ethnic unrest that would eventually result in genocide,[184] Mugesera delivered an infamous speech, widely interpreted by Rwandans at the time as advocating the massacre of Rwanda's Tutsis.[185] The following are relevant portions of that speech, delivered to approximately 1,000 people at a political meeting in Kabaya, in Gisenyi Province:

> You know there are "Inyenzis" [cockroaches] in the country who have taken the opportunity of sending their children to the front, to go and help the "Inkotanyis". . . . Why do they not arrest these parents who have sent away their children and why do they not exterminate them? Why do they not arrest the people taking them away and why do they not exterminate all of them? . . . . [We] must do something ourselves to exterminate this rabble . . . . I asked if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! . . . "I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly". . . . Another important point is that we must all rise, we must rise as one man . . . if anyone touches one of ours, he must find nowhere to go.[186]

Within a few days, Rwandan authorities issued the equivalent of an arrest warrant, based on the content of the speech, against Mugesera, who soon fled to Canada.[187] By 1995, however, the Canadian government had become aware of Mugesera's background and his November 1992 speech, and it sought to remove him from the country as having entered illegally, due to his human rights violations and misrepresentations.[188] The allegations against Mugesera included incitement to genocide.[189]

After nine years of wending its way through a multi-layered appeals process, the Canadian Supreme Court finally upheld a 1996 lower court decision finding that Mugesera should be deported.[190] In the process, the

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

[184] *Id.*

[185] *Id.*

[186] *Mugesera*, [2005] 2 S.C.R. 100 app. III, ¶¶ 15-29.

[187] *Id.* ¶ 3; GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 171-72 (1995).

[188] Rikhof, *supra* note 183, at 1123.

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

[190] *Id.*

Court had occasion to analyze the elements of incitement to genocide. Canada's domestic law criminalizing genocide was modeled directly after Article II of the Genocide Convention. As a result, the opinion relied on international law to interpret the requirements for incitement to genocide.[191]

With respect to the mens rea, and the direct and public aspects of the crime, the Supreme Court was largely in accord with the *Akayesu* and *Nahimana* decisions.[192] In order for a speech to constitute direct incitement, the Court held, the words used must be clear enough to be immediately understood by the intended audience, in light of the speech's cultural and linguistic content.[193] The guilty mind must contain two levels of intent: (1) the intent directly to prompt or provoke another to commit genocide; and (2) the specific intent to commit genocide.[194]

The Court instructed that intent can be inferred from the circumstances.[195] Thus, for example, genocidal intent of a particular act can be inferred from: (1) the systematic perpetration of other culpable acts against the group; (2) the scale of any atrocities that are committed and their general nature in a region or a country; or (3) the fact that victims are deliberately and systematically targeted on account of their membership in a particular group while the members of other groups are left alone.[196] Moreover, the Court emphasized that a speech given in the context of a genocidal environment will have a heightened impact, and for this reason the circumstances under which a statement is made can be an indicator of the speaker's intent.[197]

In Mugesera's case, the Court found the allegation of incitement to the crime of genocide to be well founded.[198] The Court provided a detailed analysis. First, Mugesera's message was delivered in a public place at a public meeting and would have been clearly understood by the audience.[199] The individual to whom Mugesera was speaking in his speech (where he referred to the "Falashas") was a Tutsi.[200] He referred specifically to the events of 1959 when many Tutsi were massacred or went into exile, and he

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[191] *Mugesera*, [2005] 2 S.C.R. 100.
[192] *Id.* ¶¶ 86-89.
[193] *Id.* ¶ 87.
[194] *Id.* ¶ 88.
[195] *Id.* ¶ 89.
[196] *Id.*
[197] *Id.* ¶ 89.
[198] *Id.* ¶ 98.
[199] *Id.* ¶ 94.
[200] *Id.* ¶ 91.

mentioned Ethiopia.[201] It is common lore in Rwanda that the Tutsis originated in Ethiopia. This belief was even taught in public schools.[202]

Moreover, based on his reference to the "Nyabarongo River," the Court found that Mugesera was suggesting that Tutsi corpses be sent back to Ethiopia.[203] Mugesera argued that he was only telling his audience that, just as the Falasha had left Ethiopia to return to Israel, their place of origin, so should the Tutsis return to Ethiopia.[204] In their case, the return trip would be by way of the Nyabarongo River, which runs through Rwanda toward Ethiopia.[205] This river is not navigable, however, so the return could not be by boat. In earlier massacres, Tutsi bodies had been thrown into the Nyabarongo.[206]

The Court also found significant the reference to the year "1959" because the group that was exiled then was essentially Tutsi. The Court found that the speech clearly advocated that these "invaders" and "accomplices" should not be allowed to "get out," suggesting that the mistake made in 1959 was to drive the Tutsi out of Rwanda, instead of killing them, with the result that they were now attacking the country.[207] In this context, it was clear that Mugesera was recounting a discussion he supposedly had with a Tutsi and that when he said "we will send you down the Nyabarongo," *you* meant the Tutsi and *we* meant the Hutu.[208] Finally, although it was not equally clear to the Court that Mugesera was suggesting that Tutsi *corpses* be sent back to Ethiopia via the Nyabarongo River, the content of the rest of the speech, and the context in which it was delivered, demonstrated a call for mass murder of Rwanda's Tutsis.[209]

The Court therefore concluded that the overall message satisfied both the "public" criterion as it was delivered in a public place at a public meeting and the "direct" criterion since, based on Rwandan language, history, and culture, it would have been clearly understood by the audience as advocating the genocide of the Tutsis.[210]

The Court also ruled that Mugesera had the requisite mental intent. It reasoned that since he knew approximately 2,000 Tutsis had been killed since October 1, 1990, the context left no doubt as to his intent. He

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[201] *Id.*
[202] *Id.* ¶ 91.
[203] *Id.* ¶ 92.
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.* ¶ 93.
[208] *Id.* ¶ 94.
[209] *Id.*
[210] *Id.*

intended specifically to provoke Hutu citizens to act violently against Tutsi citizens.[211]

The Court also considered causation. Given the absence of proof that the speech directly resulted in ethnic massacres, and in light of the large gap in time between the speech and the Rwandan genocide, causation would be difficult, if not impossible, to prove.[212] Significantly, the Court found that the prosecution need not establish a direct causal link between the speech and any acts of murder or violence.[213] Because of its inchoate nature, incitement is punishable by virtue of the criminal act alone—irrespective of the result.[214] In fact, per the Court, the government is not even required to prove that genocide actually took place.[215]

b. The Rome Statute

Through Articles 6, setting forth the general crime of genocide, and 25, laying out specific instances of genocide, the Rome Statute of the ICC, consistent with the Genocide Convention and the Statutes for the ICTR[216] and the International Criminal Tribunal for the Former Yugoslavia (ICTY),[217] criminalizes direct and public incitement to commit genocide.[218] Rome Statute Articles 6 and 25 contain language identical to Genocide Convention Articles 2 and 3,[219] and ICTR and ICTY Statute Articles 2 and 4, respectively.[220] The ICC provisions have yet to be litigated, but would presumably be interpreted consistent with the precedents analyzed above.

c. Universal Jurisdiction Statutes

Certain crimes so shock the conscience of humanity that they violate *jus cogens* norms and states have an obligation to prosecute them regardless of where they are committed.[221] Genocide is one of those crimes.[222] From

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[211] *Id.*

[212] *See* Rikhof, *supra* note 183, at 1125.

[213] Mugesera v. Canada, [2005] 2 S.C.R. ¶ 85.

[214] *Id.*

[215] *Id.* ¶ 84.

[216] ICTR Statute, *supra* note 117, art. 2.

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

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

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

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

[221] *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63 (1996). The term *jus cogens* means the

a procedural perspective, the notion of "universal jurisdiction" permits any state to prosecute *jus cogens* offenses, even when the prosecuting State, or "the forum state," has no link to the alleged perpetrator, his victims, or the actual crime, pursuant to the *obligatio erga omnes*.[223]

Amnesty International reports that approximately 125 states have legislation of varying degrees of effectiveness and scope permitting the exercise of universal jurisdiction over crimes.[224] A number of states, including State Parties to the Genocide Convention such as Belgium,[225] Canada,[226] Germany,[227] and Israel,[228] expressly provide for universal jurisdiction over genocide.

Moreover, domestic courts have already prosecuted perpetrators of genocide under doctrines of universal jurisdiction.[229] Adolf Eichmann was famously convicted in Israel in 1961, *inter alia*, of "Crimes against the Jewish People," essentially equivalent to genocide, for his role as chief of

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compelling law, and, as such, a *jus cogens* norm holds the highest hierarchical position among all other norms and principles. *Id.* at 67. As a consequence of that standing, *jus cogens* norms are deemed to be "peremptory" and non-derogable. *Id. Jus cogens* refers to the legal status that certain international crimes reach, and the term *obligatio erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens.* The term *erga omnes* means "flowing to all," and so obligations deriving from *jus cogens* are presumably *erga omnes. Id.* Essentially, these terms are two sides of the same conceptual coin.

[222] *See* Bassiouni, *supra* note 221, at 68. Experts consider the following international crimes to be *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. *Id.*

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

[224] AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION (2001), *available at* http://www.amnesty.org/en/library/asset /IOR53/002/2001/en/dom-IOR530022001en.pdf.

[225] Criminal Code of 1867 (Code Pénal), art. 136 bis, *available at* http://www.juridat.be /cgi_loi/legislation.pl (last visited Aug. 15, 2008).

[226] *See* Crimes against Humanity and War Crimes Act, R.S.C., ch. 24(8) (2000), *available at* http://laws.justice.gc.ca/en/showdoc/cs/C-45.9///en?page=1 (last visited Aug. 15, 2008).

[227] *See* German Code of Crimes Against International Law [CCAIL], *Völkerstrafgesetzbuch* (VStGB) v. 30.6.2002 (BGBl. I S.2254) (2002), *available at* www.iuscomp.org/gla/statutes/VoeStGB.pdf.

[228] *See* Israeli Crime of Genocide (Prevention and Punishment) Law, Israeli Law No. 5710-1950, *available at* http://preventgenocide.org/il/law1950.htm (last visited Aug. 15, 2008) [hereinafter Israeli Genocide Law].

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

operations in the deportation of Jews to extermination camps.[230] Bosnian Serb Nikolai Jorgic was convicted in Germany in 1997 of genocide for his activities in Bosnia, and sentenced to life imprisonment by the Düsseldorf High Court.[231] Désiré Munyaneza is currently on trial in Canada for genocide related to 1994 mass killings of Tutsis in Rwanda.[232]

2. Crimes Against Humanity

Ahmadinejad's incitement might also be prosecuted as a crime against humanity under the ICC's Rome Statute and pursuant to universal jurisdiction statutes. This section examines each of those sources, and scrutinizes related case law giving rise to an additional grid of analytic criteria.

a. The Rome Statute

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

> For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . . (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court . . . .[233]

As a threshold matter, a case of crimes against humanity against Ahmadinejad would have to satisfy the crime's "chapeau" or threshold elements. In other words, a court would have to find that Ahmadinejad's advocacy against Israel was "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[234] The chapeau also requires that the offenses flow from "a State or organizational policy."[235]

Guidance regarding the interpretation of these chapeau elements can be found in the ICTR incitement jurisprudence, as the ICTR crimes against humanity provision, Article 3, contains many of the same elements as

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

[231] Public Prosecutor v. Jorgic, Oberlandesgericht Düsseldorf (Sept. 26, 1997). *See also* Schabas, *supra* note 229, at 57 n.91.

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

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

[234] *Id.* art. 7(1).

[235] *Id.* art. 7(2).

Article 7 of the Rome Statute. As discussed above and again in this context, there are important ICTR decisions, in the *Ruggiu* and *Nahimana* cases, that have significantly contributed to the development of this area of incitement law. Additional insight is gained by examining the *Mugesera* judgment as well as the judgments of the Nuremberg Tribunal in the cases of Nazi media figures Julius Streicher and Hans Fritzsche.

By distilling the important principles from these cases, an additional grid of analytic criteria emerges. To determine if an utterance constitutes crimes against humanity (persecution), the finder of fact must consider: (1) whether the speaker has discriminatory intent and is aware that his statements are part of a widespread and systematic attack (the mens rea element); (2) whether the statements constitute a gross or blatant denial of a fundamental right (the persecution element); and (3) whether the statements are based on certain discriminatory grounds, such as ethnicity or political affiliation (the discrimination element).

These cases from the Nuremberg Tribunal, ICTR, and Canada also establish important collateral principles. First, statements made in the context of sporadic ethnic violence, which are not made in strategic coordination with the violence, may satisfy the "widespread and systematic attack" requirement of the crime's chapeau. Second, demonstrating a direct causal link between the statements and violence is not necessary, as it is sufficient to show the statements worked generally as a "poison," injected into the polity's collective consciousness and leading to mass violence. Finally, persecution is not a provocation to cause harm. Rather, it is the harm itself for purposes of establishing a crime against humanity through hate speech.

i. The Nuremberg Cases: Injecting Poison

International tribunals have found that hate speech targeting a population on the discriminatory grounds identified in Article 7 of the Rome Statute constitutes crimes against humanity (persecution).[236] Jurisprudence to this effect finds its origins in the prosecution of Nazi war criminals Julius Streicher and Hans Fritzsche by the International Military Tribunal (IMT) at Nuremberg.[237] The IMT acquitted Fritzsche, head of the Nazi Propaganda Ministry Radio Section during the war, for lack of evidence of clear incitement and lack of control over formulation of

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[236] *See* Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgement and Sentence, ¶¶ 22-23 (June 1, 2000). *See also* Gordon, *supra* note 118, at 153 n.70.

[237] *See* IMT Judgment, Oct. 1, 1946, reprinted in 22 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 501-02 (1946) [hereinafter Streicher Judgment]; *id.* at 525-26 [hereinafter Fritzsche Judgment].

propaganda policy. However, it convicted Streicher of incitement as a crime against humanity.[238]

The conviction was based on Streicher's anti-Semitic articles in his newspaper *Der Stürmer*.[239] The IMT quoted numerous instances where *Der Stürmer* called for the extermination of Jews.[240] Although Streicher denied awareness of any Jewish massacres, the IMT found he regularly received information on the deportation and killing of Jews in Eastern Europe.[241] The judgment does not acknowledge any direct causal link between Streicher's publication and specific acts of violence. Rather, it characterizes his work as a poison "injected in to the minds of thousands of Germans which caused them to follow the [Nazi] policy of Jewish persecution and extermination."[242] The IMT found that "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes as defined by the [IMT] Charter, and constitutes a Crime against Humanity."[243]

ii. The Ruggiu Case: Establishing the Requirements of Denial of Fundamental Rights on Discriminatory Grounds and Awareness of the Attack

More than fifty years after the Nuremburg judgments, the ICTR had occasion to further elucidate the elements of incitement by holding that it consists of the denial of fundamental rights on certain discriminatory grounds and awareness that the charged conduct is part of a widespread and systematic attack. In June 2000, Georges Ruggiu pled guilty to one count of crimes against humanity (persecution), in connection with his RTLM broadcasts. In its sentencing judgment, the Tribunal summarized the elements that comprise persecution as follows: (1) proving those elements required for all crimes against humanity under the Statute; (2) finding of a gross or blatant denial of a fundamental right reaching the same level of

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[238] *See* Fritzsche Judgment, *supra* note 237, at 525-26; Streicher Judgment, *supra* note 237, at 529-30. The reasoning of the Fritzsche Judgment has been criticized as inconsistent with the evidence and out of step with the important international criminal law principles established by the IMT at Nuremberg. *See* Gordon, *supra* note 118, at 144 n.17.

[239] *See* Streicher Judgment, *supra* note 237, at 529-30.

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

[241] *Id.*

[242] *Id.*

[243] *Id.*

gravity as the other acts prohibited under Article 5; and (3) discriminatory grounds.[244]

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

> The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. . . . Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct. Therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.[245]

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

> [W]hen examining the [admitted] acts of persecution . . . it is possible to discern a common element. Those acts were direct and public radio broadcasts all aimed at singling out and attacking the Tutsi ethnic group . . . on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity enjoyed by members of wider society. The deprivation of these rights can be said to have as its aim the death and removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.[246]

Significantly, the Tribunal noted the *Streicher* judgment was particularly relevant since Ruggiu, like Streicher, infected people's minds with ethnic hatred and persecution.[247]

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

Over three years later, the ICTR made clear that crimes against humanity (persecution) did not depend upon explicit calls for violence. In December 2003, the ICTR found that the *Media Case* defendants were guilty of this crime as a result of their incendiary broadcasts and writings urging the public to murder the Tutsi minority.[248] In so finding, the Tribunal reaffirmed that hate speech targeting a population on discriminatory group identity grounds constitutes persecution:

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[244] *See* Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgement and Sentence, ¶ 21 (June 1, 2000) (citing Prosecutor v. Kupreskic, Case No. IT-95-16, Judgement (2000)).

[245] *Id.* ¶ 20 (citing Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgement (May 21, 1999)).

[246] *Id.* ¶ 22.

[247] *Id.* ¶ 19.

[248] Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, Judgement and Sentence, ¶¶ 1081-84 (Dec. 3, 2003).

> Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.[249]

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

> Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence. The Chamber notes that Julius Streicher was convicted by the International Military Tribunal at Nuremberg of persecution as a crime against humanity for anti-Semitic writings that significantly predated the extermination of Jews in the 1940s. Yet they were understood to be like a poison that infected the minds of the German people and conditioned them to follow the lead of the National Socialists in persecuting the Jewish people. In Rwanda, the virulent writings of Kangura and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed.[250]

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

Even after the *Media Case* trial judgment, though, questions remained regarding the scope of a "widespread and systematic attack" within the crimes against humanity hate speech context. Some of those questions were answered in the Canadian Supreme Court's *Mugesera* decision. A lower court had found that Mugesera's 1992 speech had not taken place in the context of a widespread or systematic attack, since the massacres which had occurred to that point were not part of a common plan and since there was no evidence that Mugesera's speech was part of an overall strategy.[251] As such, the lower court determined that Mugesera's speech did not constitute a crime against humanity.

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[249] *Id.* ¶ 1072.

[250] *Id.* ¶ 1073. This portion of the decision was upheld by the Nahimana Appeals Chamber. *See* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-A, ¶ 988 (Nov. 28, 2007). The Appeals Chamber observed that hate speech could be considered to be as serious as other crimes against humanity where, as in the present case, it is accompanied by a "massive" campaign of persecution characterized by acts of violence and destruction of property. *Id*. Although the appellants and the amicus curiae submitted that hate speech which does not incite violence does not constitute persecution as a crime against humanity, the Appeals Chamber refused to rule on this issue, leaving the question open. *Id*. ¶ 987. It noted, however, that the acts of persecution need not be considered individually but should be looked at cumulatively to determine if they reach the same gravity as other crimes against humanity. *Id*.

[251] Mugesera v. Canada, [2005] 2 S.C.R. 100, ¶ 124, 2005 SCC 40 (Can.).

The Canadian Supreme Court rejected this analysis. It found that Mugesera's speech occurred in a volatile situation characterized by rampant ethnic tensions and political instability, which had already led to the commission of massacres.[252] The Court opined that a speech such as Mugesera's, which actively encouraged ethnic hatred, murder, and extermination, and which created in its audience a sense of imminent threat and the need to act violently against an ethnic minority and against political opponents, bore the hallmarks of a gross or blatant act of discrimination equivalent in severity to the other underlying acts listed in the Canadian crimes against humanity statue.[253] The criminal act requirement for persecution was therefore met.[254]

The Court also found that Mugesera's speech met the other required elements to constitute crimes against humanity (persecution). First, the Court held that a speech inciting hatred meets the initial criminal act requirement for persecution as a crime against humanity when the speech "actively encourage[s] ethnic hatred, murder and extermination" and "create[s] in its audience a sense of imminent threat and the need to act violently against an ethnic minority and against political opponents."[255] In such circumstances, according to ICTR precedent, such speech represents the criminal act of persecution, which is the gross or blatant denial of a

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[252] *Id.* ¶ 148. It should be noted that the Nahimana Appeals Chamber found that, for purposes of crimes against humanity analysis, there was no "widespread or systematic attack" against Tutsis or opposition Hutus from the period January 1, 1994 through April 5, 1994—in other words, the period immediately before the outbreak of the genocide. *See Nahimana*, Case No. ICTR 99-52-A, ¶ 933. Perhaps the Appeals Chamber considered this brief interlude as the proverbial "calm before the storm" since it recognized that Tutsis were mass murdered during the period before 1994. *Id.* ¶ 931. The Appeals Chamber stated it found insufficient support in the record for the Trial Chamber's determination (based on the testimony of Rwanda expert Alison Des Forges) that there were "seventeen attacks" against Tutsis between 1990 and 1993—the period during which Mugesera delivered his nefarious oration. *Id*. It did not affirmatively find, however, that no such massive violence occurred during that period. In fact, though, there is solid evidence of large-scale violence against Tutsis in the period before and leading up to Mugesera's November 1992 speech. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Comm. on Hum. Rts., *Report by Special Rapporteur, on his Mission to Rwanda from 8 to 17 April 1993*, ¶ 27, U.N. Doc. E/CN.4/1994/7/Add. 1 (Aug. 11, 1993) (*prepared by* B.W. Nidaye) (reporting that between October 1990 and January 1993, at least 2,000 civilians in Rwanda were victims of extrajudicial, summary or arbitrary executions).

[253] Section 7(3.76) of the Criminal Code of Canada, R.S.C., ch. C-46 (1985).

[254] *Mugesera*, [2005] S.C.R. 100, ¶ 148.

[255] *Id.*

fundamental right on discriminatory grounds.[256] The guilty mental state for this crime is discriminatory intent to deny the right.[257]

Finally, the Court concluded that Mugesera targeted Tutsi and political opponents on the sole basis of ethnicity and political affiliation with the intent to compel his audience into action against these groups.[258] He thus possessed the requisite criminal intent for crimes against humanity (persecution).[259]

b. Universal Jurisdiction Statutes

As noted previously, crimes against humanity are among those *jus cogens* crimes that give rise to universal jurisdiction.[260] Many of the states that have universal jurisdiction statutes conferring subject matter jurisdiction over the crime of genocide also extend that jurisdiction to crimes against humanity.[261] Applying the precedents set forth above, these states could prosecute Ahmadinejad for crimes against humanity (persecution) in connection with his advocating the destruction of Israel.

B. POTENTIAL JURISDICTIONS

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

1. The International Court of Justice

Article IX of the Genocide Convention declares that "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the International Court of Justice at the request of any of the parties to the

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[256] *Id.* ¶ 145.

[257] *Id.* The Court pointed out, however, that the ICTY, in contrast, found in *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgement, ¶ 209 (Feb. 26, 2001), that the hate speech alleged in the indictment did not constitute persecution because it did not rise to the same level of gravity as the other enumerated acts. *Mugesera*, [2005] 2 S.C.R. 100, ¶ 146.

[258] *Mugesera*, [2005] S.C.R. 100, ¶ 149.

[259] *Id.*

[260] *See* Bassiouni, *supra* note 221, at 68. *But see* Jill C. Maguire, Note, *Rape Under the Alien Tort Statute in the Post-*Sosa v. Alvarez-Machain *Era*, 13 GEO. MASON L. REV. 935, 968 (2006) ("Crimes against humanity are not considered *jus cogens* norms.").

[261] *See* AMNESTY INTERNATIONAL, *supra* note 224, ch. 6 (noting that approximately ninety-five states have enacted laws which would permit their courts to exercise universal jurisdiction over persons suspected of at least some crimes against humanity, and that, for example, Canada, Belgium, New Zealand, and Venezuela have adopted legislation expressly providing for universal jurisdiction over crimes against humanity).

dispute."[262] Article 92 of the U.N. Charter established the ICJ, and it is the U.N.'s primary judicial organ.[263] The ICJ exercises jurisdiction solely over claims arising between nations,[264] and Article IX of the Genocide Convention has served as the basis of ICJ litigation. In 1993, Bosnia and Herzegovina instituted proceedings in the ICJ against Serbia and Montenegro alleging violations of the Genocide Convention in connection with the civil war then being fought over the break-up of the former Yugoslavia.[265]

Certain commentators have urged signatories to the Genocide Convention, such as Israel, the United States, or the United Kingdom, to file a complaint asking the ICJ for a ruling that Iran, through Ahmadinejad's incitement, violated the Genocide Convention: "Should not states whose citizens include Holocaust survivors, such as Canada or Germany, be considered 'parties to the dispute?'"[266] Such a ruling would presumably include enjoining Ahmadinejad from committing further incitement.[267]

2. The International Criminal Court

As noted above, Ahmadinejad could theoretically be prosecuted at the ICC under the Rome Statute for committing direct and public incitement to commit genocide, or crimes against humanity (persecution). Proceedings at the ICC may be initiated in one of three ways: (1) a State Party may refer a crime to the Prosecutor for investigation; (2) the Prosecutor may initiate an investigation; and (3) the Security Council, acting under Chapter VII of the

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[262] Genocide Convention, *supra* note 8, art. 9.

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

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

[265] *See* Geoffrey S. DeWeese, Comment, *The Failure of the International Court of Justice to Effectively Enforce the Genocide Convention*, 26 DENV. J. INT'L L. & POL'Y 625, 627 (1998). The ICJ found that Serbia had not committed genocide, but had violated its duties under the Genocide Convention by failing to prevent the massacre of Bosnian males at Srebrenica. *See* Alexandra Hudson, *Serbia Cleared of Genocide, Failed to Stop Killing*, REUTERS FOUNDATION, Feb. 26, 2007, http://www.alertnet.org/thenews/newsdesk/L26638724.htm.

[266] REFERRAL OF AHMADINEJAD, *supra* note 10, at 34. *See also* Rozenberg, *supra* note 89 ("Britain, America or pretty well any other country could request a ruling from the UN court over whether Iran was responsible for its president's remarks and what amends the country should make.").

[267] As noted previously, Australia is currently evaluating the prospects of filing such a case. *See* Goodenough, *supra* note 13.

U.N. Charter, may refer a case to the Prosecutor.[268] The first two ways are based on consent. Parties consent to the jurisdiction of the ICC by either becoming a signatory to the Rome Statute or by consenting, on a case-by-case basis, to allow the ICC to exercise jurisdiction over their nationals.[269] In these cases, the crimes at issue must be committed on the territory of a State Party or by a national of a State Party.[270] The Security Council may also refer to the ICC states that are not signatories to the Rome Statute or that have not consented to ICC jurisdiction.[271]

3. Municipal Criminal Courts

For those states that criminalize the *jus cogens* crimes of genocide or crimes against humanity, regardless of the crime's location or perpetrator, the universality principle would provide a basis for asserting jurisdiction.[272] Alternative means for asserting jurisdiction might also be available.[273] For example, under the "passive personality" principle, a state may exercise jurisdiction when one of its nationals is a victim of the alleged crime.[274] This could potentially empower Israel to assert jurisdiction against Ahmadinejad in an incitement prosecution.[275] Other countries with expansive anti-genocide legislation and a relatively large Jewish population,

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

[269] Rome Statute, *supra* note 9, art. 12. *See also* Timbreza, *supra* note 268, at 364.

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

[271] *See* Linnea D. Manashaw, Comment, *Genocide and Ethnic Cleansing: Why the Distinction? A Discussion in the Context of Atrocities Occurring in Sudan*, 35 CAL. W. INT'L L. J. 303, 305 n.7 (2005). This was the situation in connection with the Security Council's referral of the Darfur case to the ICC. *Id.*

[272] Bassiouni, *supra* note 221, at 68.

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

[274] *See* Anthony E. Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV. 699, 711-12 (2007).

[275] Israeli Genocide Law, *supra* note 228, § 5. Section 5 of this Law states: "A person who has committed outside Israel an act which is an offence under this Law may be prosecuted and punished in Israel as if he had committed the act in Israel." *Id.* Section 3(a)(2) criminalizes "incitement to genocide." *Id.* § 3(a)(2).

such as Canada,[276] might also consider exercising jurisdiction under this principle.

Israel could possibly assert jurisdiction as well under the "protective principle." Pursuant to this rule, the forum state asserts jurisdiction over non-nationals for acts committed outside the forum state that may impinge on its territorial integrity, security, or political independence.[277] In this case, Ahmadinejad's threats to destroy Israel, coupled with his country's apparent efforts to develop nuclear weapons,[278] represent a credible threat to Israel's integrity and security.

IV. APPLYING THE FRAMEWORK: ANALYZING THE VIABILITY OF PROSECUTION

To determine whether Ahmadinejad could be prosecuted for his violent outbursts, the substantive framework just constructed must be applied to the Iranian president's statements. Even if this analysis suggests that Ahmadinejad could be charged on the merits, a procedural examination must be undertaken to see if there is a viable forum in which to prosecute him. Thus, both substantive and procedural analyses follow.

A. SUBSTANTIVE ANALYSIS

As indicated above, the Iranian chief executive could be charged with direct and public incitement to commit genocide and/or crimes against humanity (persecution). Each of these shall be considered in turn.

1. Direct and Public Incitement to Commit Genocide

In considering whether Ahmadinejad is guilty of incitement, it must first be ascertained whether he possesses the requisite genocidal intent. If this can be established, then the specific elements of incitement, such as its "direct" and "public" nature, must be considered.

a. General Genocidal Intent

To review, genocide consists of certain harmful acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such.[279] As a threshold matter, would Israel or the Jewish people of Israel, the group Ahmadinejad targets in his speeches,

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[276] Canada is estimated to have the world's fourth largest Jewish population. *See* World Jewish Population, 2005, American Jewish Yearbook, http://www.ajcarchives.org /AJC_DATA/Files/2005_4_WJP.pdf (last visited Aug. 15, 2008).

[277] Giardino, *supra* note 274, at 711.

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

[279] Genocide Convention, *supra* note 8, art. 2.

constitute a national, ethnic, or religious group? In the very document that gave the nation its existence, Israel referred to itself as a "Jewish" state.[280] Moreover, it is generally understood that Ahmadinejad utters his harangues in "a politically charged environment that often equates all Jews with Israel and routinely witnesses the burning of the 'enemy' flag."[281]

If he were brought to court on incitement to genocide charges, Ahmadinejad might respond that approximately 25,000 Jews live in Iran[282]—if he meant to destroy all Jews, certainly he would kill the easily accessible Iranian Jews first. But that argument would be unavailing. In the first place, the Genocide Convention applies to the intent to destroy in whole *or in part* a specified group.[283] Thus, in *Prosecutor v. Krstic*, the ICTY had to determine whether the execution by Bosnian-Serb forces of 8,000 to 10,000 military-aged Bosnian Muslim men in Srebrenica in July 1995, only a fraction of Bosnian Muslims in the area, constituted genocide.[284] The ICTY concluded that "the Bosnian Muslim men of military age . . . represented a sufficient part of the Bosnian Muslim group so that the intent to destroy them qualifies as an 'intent to destroy the group in whole or in part' . . . ."[285] Similarly, it is likely that a court would find that Ahmadinejad's intent to destroy the Jews of Israel, only a part of the world's Jews, albeit a significant part, would, at a minimum, qualify as intent to destroy the Jewish group in part for purposes of the Genocide Convention.

Moreover, even if the prosecution could not prove that Ahmadinejad, in desiring the destruction of Israel, had the intent to destroy a religious or ethnic group in part, it would still have the option of proving that Ahmadinejad aimed to destroy a "national" group. Israeli Jews, at the very least, certainly constitute a "national" group.[286]

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[280] *See* DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, May 14, 1948, http://www.trumanlibrary.org/israel/declare.htm (stating that the new nation is re-establishing in "Eretz Israel [the 'and of Israel'] the Jewish State . . . .").

[281] Scott Peterson, *In Ahmadinejad's Iran, Jews Still Find Space*, CHRISTIAN SCI. MONITOR (Boston), Apr. 27, 2007, at 1, *available at* http://www.csmonitor.com /2007/0427/p01s03-wome.htm.

[282] *Id.*

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

[284] Case No. IT-98-33, Judgement, ¶ 581 (Aug. 2, 2001).

[285] *Id.*; *see also id.* ¶ 598 ("[T]he intent to kill all the Bosnian Muslim men of military age in Srebrenica constitutes an intent to destroy in part the Bosnian Muslim group within the meaning of Article 4 and therefore must be qualified as a genocide.").

[286] *See* Judaism 101, What Is Judaism?, http://www.jewfaq.org/judaism.htm (last visited Aug. 15, 2008) (explaining that the "traditional explanation, and the one given in the Torah, is that the Jews are a nation," but also noting that the Torah's translation of *nation* refers to a group of people with a common history, not a political or territorial state—the definition most commonly used today).

Failing that, the prosecution could rely on the ICTR's holding in the *Akayesu* case that, regardless of any so-called objective ethnographic or demographic classification, Israelis would qualify as a protected group within the meaning of the Genocide Convention if they could be considered a "stable and permanent group."[287] The *Akayesu* Chamber held that there are objective and subjective factors to evaluate in applying the "stable and permanent group" analysis. Objectively, Israeli Jews could be considered a "stable and permanent group" insofar as they have existed continuously for nearly sixty years.[288] Subjectively, according to the *Akayesu* judgment, it would be enough that Ahmadinejad *perceived* the Israeli Jews as a distinct religious, national, or ethnic group.[289] In *Prosecutor v. Jelisic*,[290] the ICTY discarded the objective part of the equation and held that subjective factors alone—particularly, the perspective of the perpetrator of the crime—should determine group membership for purposes of finding genocide.[291] The Chamber held that a community's stigmatization of a certain group as a distinct national, ethnic, or racial group is the dispositive factor in judging whether the alleged perpetrators perceive the target group as such.[292] Although this would be a question of fact, Ahmadinejad's derogatory rants regarding Israelis appear to constitute strong proof of such a perception.[293]

b. The Elements of Direct and Public Incitement

It will be recalled that, based on existing jurisprudence, a grid of five analytic elements must be examined to determine if Ahmadinejad has committed the crime of direct and public incitement to commit genocide. These are (i) the "public" element; (ii) the "direct" element; (iii) the "incitement" element (or speech "content"); (iv) mens rea; and (v) causation.

i. The Public Element

The "public" element of incitement is perhaps the easiest to analyze. The *Akayesu* Trial Chamber found that public incitement is characterized by a call for criminal action to a number of persons in a public place or to

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[287] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 516 (Sept. 2, 1998).

[288] *See Israel*, *in* THE COLUMBIA ENCYCLOPEDIA 1424 (6th ed. 2000), *available at* http://www.bartelby.com/65/is/Israel.html.

[289] *Akayesu*, Case No. ICTR 96-4-T, ¶ 171.

[290] Case No. IT-95-10, Judgement (Dec. 14, 1999).

[291] *Id.* ¶ 70.

[292] *Id.* ¶¶ 70-71.

[293] The issue of whether Ahmadinejad's audience would *perceive* his statements as calls to destroy the people of Israel will be considered, *infra*, in subsection IV.A.1.b.ii under the analysis of the direct element requirement.

members of the general public at large by such means as the mass media, for example, radio or television.[294] Ahmadinejad's hate advocacy satisfies both these tests. He uttered much of his doomsday rhetoric against Israel at public gatherings, such as "anti-Zionism" conferences or during press conferences. Moreover, the mass media widely disseminated his eliminationist urgings regarding Israel (as cited throughout this Article).

ii. The Direct Element

The "direct" element of incitement would certainly be more challenging to prove than the public element. The *Akayesu* Trial Chamber held "that the direct element of incitement should be viewed in the light of its cultural and linguistic content."[295] As noted above, a case-by-case factual inquiry is necessary. That inquiry would consist of determining "whether the persons for whom the message was intended immediately grasped the implication thereof."[296]

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

a. Potential Translation Issues

It is generally accepted that Ahmadinejad called for Israel to be wiped off the map. But is that really what he said? We are reading, after all, a translation into English of something originally communicated in Farsi (otherwise known as Persian), Ahmadinejad's mother tongue and the primary language spoken in Iran.[297] Some experts have disputed the "wipe off the face of the map" translation.[298]

For example, Professor Juan Cole, a Middle East specialist at the University of Michigan, has argued that the Iranian president was misquoted.[299] Professor Cole, a critic of the Bush Administration's Iran policy, acknowledged that "[Ahmadinejad] did say he hoped its regime, i.e.,

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[294] *Akayesu*, Case No. ICTR 96-4-T, ¶ 556.

[295] *Id.* ¶ 557.

[296] *Id.* ¶ 558.

[297] *See Iran*, *supra* note 17 at 1407.

[298] *See* Ethan Bronner, *Just How Far Did They Go, Those Words Against Israel?*, N.Y. TIMES, June 11, 2006, at 4-4.

[299] *Id.*

a Jewish-Zionist state occupying Jerusalem, would collapse."[300] But given that Iran has not "attacked another country aggressively for over a century," Professor Cole added that he smelled "the whiff of war propaganda" in the "wipe off the face of the map" translation.[301]

Jonathan Steele, a Middle East commentator for the U.K. newspaper *The Guardian*, has likened the interpretation of Ahmadinejad's October 2005 Israel speech to that of Nikita Kruschev's "we will bury you" comment made at a Kremlin reception for western ambassadors in 1956.[302] Calling Kruschev's comment the "greatest misquotation of the cold war," Steele noted that "those four words were seized on by American hawks as proof of aggressive Soviet intent."[303] In fact, according to Steele, Khrushchev actually said: "'Whether you like it or not, history is on our side. We will bury you.'"[304] It was, Steele contends, a harmless boast about socialism's eventual victory in the ideological competition with capitalism. Steele insists that Khrushchev was "not talking about war."[305]

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

> The Iranian president was quoting an ancient statement by Iran's first Islamist leader, the late Ayatollah Khomeini, that "this regime occupying Jerusalem must vanish from the page of time" just as the Shah's regime in Iran had vanished. He was not making a military threat. He was calling for an end to the occupation of Jerusalem at some point in the future. The "page of time" phrase suggests he did not expect it to happen soon. There was no implication that either Khomeini, when he first made the statement, or Ahmadinejad, in repeating it, felt it was imminent, or that Iran would be involved in bringing it about. But the propaganda damage was done, and western hawks bracket the Iranian president with Hitler as though he wants to exterminate Jews. At the recent annual convention of the American Israel Public Affairs Committee, a powerful lobby group, huge screens switched between pictures of Ahmadinejad making the false "wiping off the map" statement and a ranting Hitler.[306]

But there is ample evidence that the translation is accurate. Most persuasive, perhaps, is the fact that all official translations of Ahmadinejad's statement, including a description of it on his web site

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[300] *Id.*

[301] *Id.*

[302] Jonathan Steele, *If Iran Is Ready to Talk, the U.S. Must Do So Unconditionally*, GUARDIAN (U.K.), June 2, 2006, at 33, *available at* http://www.guardian.co.uk /commentisfree/2006/jun/02/comment.usa.

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.*

(www.president.ir/eng/), refer to "wiping Israel away."[307] Further, prominent Iranian translators say *wipe off* or *wipe away* is more accurate than *vanish* because the Persian verb is active and transitive.[308]

The second translation issue concerns the word *map*. Khomeini's words, repeated by Ahmadinejad, were allegedly abstract: "Sahneh roozgar." *Sahneh* means *scene* or *stage*, and *roozgar* means time.[309] The phrase was consistently translated as *map*. Before Ahmadinejad's October 2005 speech, no one seemed to object to this translation. In his October 2005 speech, however, Ahmadinejad apparently misquoted Khomeini, saying not "*Sahneh* roozgar" but "*Safheh* roozgar," meaning "pages of time" or *history*. No one noticed the change, though,[310] and news agencies, as well as the Iranian government, continued to use the word *map*.[311]

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

> It seems that in the early days of the revolution the word *map* was used because it appeared to be the best meaningful translation for what he said. The words *sahneh roozgar* are metaphorical and do not refer to anything specific. Maybe it was interpreted as "book of countries," and the closest thing to that was a map. Since then, we have often heard "Israel bayad az naghshe jographya mahv gardad"—Israel must be wiped off the geographical map. Hard-liners have used it in their speeches.[312]

Yet another translation issue concerns Ahmadinejad's supposed use of the term "occupying regime of Jerusalem" rather than plain *Israel*.[313] Ethan Bronner of the *New York Times* points out that, to some analysts, this means he was calling for regime change, not war, and therefore it need not be regarded as a call for military action.[314] In support of this interpretation, Professor Cole states: "'I am entirely aware that Ahmadinejad is hostile to Israel. The question is whether his intentions and capabilities would lead to a military attack, and whether therefore pre-emptive warfare is prescribed. I am saying no, and the boring philology is part of the reason for the no."[315]

However, the *New York Times* also notes that, to others, "occupying regime" signals more than opposition to a certain government; but rather

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[307] Bronner, *supra* note 298.
[308] *Id.*
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] *Id.*
[315] *Id.*

indicates "the depth of the Iranian president's rejection of a Jewish state in the Middle East because he refuses even to utter the name Israel."[316] Ahmadinejad has said that the Palestinian issue "does not lend itself to a partial territorial solution" and has called Israel "a stain" on Islam that must be erased.[317]

Moreover, it is not as if he uttered the October 2005 pronouncement in isolation. A review of Ahmadinejad's statements since taking the helm in Tehran reveals other occasions where he has spoken of Israel's destruction,[318] and these statements have apparently not been the subject of translation controversies.

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

This interpretation is consistent with the jurisprudence of the ICTR *Akayesu*, *Kambanda*, and *Nahimana* precedents, as well as the Canadian *Mugesera* judgment. Those cases teach that even facially ambiguous statements can constitute "direct" incitement. Examples of such statements include references to *Inkotanyi* (roughly translated as *warrior*), *Inyenzi* (meaning *cockroach*),[319] blood drunken by dogs, and/or members of an ethnic group being returned to their supposed homeland using river transportation. Given the history of Rwanda, the context of the place and time of these pronouncements, and the evolved special meaning of the words, incitement was established. So may it be arguably established in the case of Ahmadinejad's statements regarding Israel.

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

While at first blush this argument may have some traction, it is not likely to hold up. In the first place, there is credible evidence that Ahmadinejad supports terrorist groups attacking Israeli civilians and that

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[316] *Id.*
[317] *Id.*
[318] *See supra* notes 80-112 and accompanying text.
[319] *See supra* note 137.

he, therefore, has had a hand in violence against the group he is verbally attacking. Moreover, his country is attempting to develop nuclear weapons for the ostensible purpose of annihilating Israel. The slogans on the Shahab-3 missiles paraded before Ahmadinejad—that Israel should be destroyed—strongly suggest what Ahmadinejad would seek to do with the missiles once his scientists fortify them with nuclear warheads.

Some of Ahmadinejad's other urgings, when considered within the larger body of his statements calling for Israel's destruction, might also be interpreted as sufficiently "direct" to qualify as incitement. Examples including his August 1, 2006, speech equating Israeli Jews to "cattle," "bloodthirsty barbarians," and "criminals," and his April 14, 2006, statement likening the Israeli nation to a "rotten, dried tree" that will soon vanish in a "storm" had the effect of dehumanizing Israelis. In the Rwandan context, the *Kambanda* judgment found comparable dehumanization (such as the Rwandan Prime Minister's equating Tutsis to "dogs" that were "drinking" Hutu blood) in tandem with other incendiary pronouncements, sufficiently direct to constitute incitement.[320]

The incitement finding in Kambanda's case was also based, in part, on his telling Hutus that they were being attacked by Tutsis and were not fighting back (i.e., telling Hutus that Tutsis were drinking their blood without any repercussions).[321] Ahmadinejad's statements indicated that Muslims were under attack by Israel, thereby suggesting that the Islamic world should attack Israel to stop the violence. When placed within the framework of his other shouts for Israel's destruction, these suggestions might be sufficiently direct to constitute incitement. For example, Ahmadinejad exclaimed in December 2005 that Israel was "killing" Palestinians,[322] and in April 2006, he stated that the Palestinians were "burning" as the result of Israel's crimes.[323]

Similarly, based on ICTR precedent, Ahmadinejad's congratulating or condoning violence against Israelis, when anchored to his direct calls for destruction, would seem to be direct enough to constitute incitement. The ICTR explicitly held that Kambanda's congratulating Hutus for massacring Tutsis constituted incitement.[324] This was also the case with Ruggiu's

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[320] Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgement and Sentence (Sept. 4, 1998).

[321] *Id.* This type of incitement is sometimes referred to as "accusation in a mirror." *See* Gordon, *supra* note 118, at 186. Through this tactic, one imputes to "the adversary one's own intentions and plans." *Id.* It is used to persuade the audience that attack by the enemy justifies taking whatever "measures are necessary for legitimate defense." *Id.*

[322] *See supra* text accompanying note 100.

[323] *See supra* text accompanying note 101.

[324] *Kambanda*, Case No. ICTR 97-23-S, ¶ 39(viii).

congratulating Rwandan killers for slaughtering Tutsis on RTLM radio.[325] Thus, Ahmadinejad's positive comments regarding Palestinian terrorist attacks against Israel in October 2005 arguably constitute incitement.[326]

ICTR precedent also suggests that Ahmadinejad's "prediction" speeches are direct enough to constitute incitement. For example, his April 14, 2006, "prediction" that the "Zionist regime" would be annihilated could be contextually interpreted as directly calling for the destruction of the people of Israel, as could his other predictions regarding Israel's destruction.[327] In the *Nahimana* judgment, for example, certain RTLM broadcasts that predicted destruction of the "Inyenzi" were among those emissions found to constitute incitement, including the following:

> I think we are fast approaching what I would call dawn . . . dawn, because—for the young people who may not know—dawn is when the day breaks. Thus when day breaks, when that day comes, we will be heading for a brighter future, for the day when we will be able to say 'There isn't a single Inyenzi left in the country.' The term *Inyenzi* will then be forever forgotten, and disappear for good . . . .[328]

b. Difficulties Defining the Incitement's Target

Ahmadinejad could respond that, even if he were inciting to destruction, his incitement was direct only insofar as it targeted the "Zionist regime" or the Israeli government, not the Jewish people of Israel themselves. But experts note that hate rhetoric aimed at Zionism is readily perceived as an attack on Judaism itself.[329] For example, eminent historian Yehuda Bauer, Professor of Holocaust Studies at the Hebrew University of Jerusalem, has argued:

> If you advocate the abolition of Israel . . . that means in fact that you're against the people who live there. If you are, for example, against the existence of Malaysia, you are anti-Malay. If you are against the existence of Israel, you are anti-Jewish.[330]

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[325] Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Judgement and Sentence, ¶ 50 (June 1, 2000).

[326] *See* Bozorghmehr, *supra* note 84.

[327] *See supra* text accompanying notes 85-92.

[328] Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, Judgement and Sentence, ¶ 405 (Dec. 3, 2003). *See also* Gordon, *supra* note 118, at 185-87 (explaining that "incitement can take many forms" and speech which does not explicitly order its listeners to commit murder can nevertheless constitute incitement because, in certain contexts, it conditions a population for genocide).

[329] *See, e.g.*, B'NAI BRITH PROPOSED INDICTMENT, *supra* note 10, Section II.A, ¶ 2 ("The accused refers to Jews in his anti-Semitic statements as Zionists.").

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

The U.S. Commission on Civil Rights announced in 2006 that anti-Israelism or anti-Zionism is the equivalent of anti-Semitic bigotry on American college campuses.[331] It concluded that "anti-Semitic bigotry is no less morally deplorable when camouflaged as anti-Israelism or anti-Zionism."[332]

And any argument that Ahmadinejad's motives in urging the destruction of Israel are anti-Semitic is given further credence by his fervent Holocaust denial, which many see as another form of anti-Semitism. Noted historian Deborah Lipstadt flatly refers to Holocaust denial as "anti-Semitic ideology."[333] Holocaust denial has also been characterized as "manufactured myth" and a "groundless belief" that is "used to stir up Jew-hatred."[334] This is especially true in the context of Middle Eastern politics: "One predictable strand of . . . Islamic anti-Semitism is Holocaust denial . . . ."[335]

Responding to those who would note that Ahmadinejad has not explicitly called for the murder of Israel's Jews, William Schabas notes that "[t]he history of genocide shows that those who incite the crime speak in euphemisms."[336] As stated bluntly by Australian Prime Minister Kevin Rudd: "The Iranian President's . . . statements are . . . anti-Semitic and express[] a determination to eliminate the modern state of Israel from the map . . . ."[337] In the end, any prosecution of Ahmadinejad for incitement would certainly entail a battle of the experts (possibly including historians, social linguists, and political scientists) regarding the translation of his words, their contextual meaning, and his audience's interpretation of them.

c. Determining the Intended Audience for the Incitement

Audience interpretation may also be a significant issue. In particular, any judgment of Ahmadinejad on incitement charges would have to determine exactly what constituency or population segment was the intended audience for his anti-Israeli outpourings. While in certain cases

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[331] U.S. COMM'N ON CIV. RTS, FINDINGS AND RECOMMENDATIONS OF THE U. S. COMM'N. ON CIV. RTS. REGARDING CAMPUS ANTI-SEMITISM (April 3, 2006), *available at* http://www.usccr.gov/pubs/050306FRUSCCRRCAS.pdf.

[332] *Id.*

[333] DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 1 (1993).

[334] MARVIN PERRY & FREDERICK M. SCHWEITZER, ANTISEMITISM: MYTH AND HATE FROM ANTIQUITY TO THE PRESENT 3 (2002).

[335] *Id.* at 10.

[336] William A. Schabas, *Mugesera v. Minister of Citizenship and Immigration*, 93 AM. J. INT'L L. 529, 530 (1999). *See also* Benesch, *supra* note 16, at 506.

[337] *See* Dareini, *supra* note 92.

the speeches were made before exclusively Iranian audiences, they were typically disseminated internationally.[338] Perhaps an expert could divine the significance of certain words heard by an Iranian audience but would the same understanding of the words extend to an international audience? Of what would the "international audience" consist? Could the international audience be Muslims in general, or could it be more narrowly categorized as extreme Islamist? Australian Prime Minister Kevin Rudd sees a good argument for perceiving the entire Muslim world as Ahmadinejad's intended audience: "It's not just hyperbole from the bully pulpit of Tehran, it's the roll-on effect across the Islamic world, particularly those who listen to Iran for their guidance."[339]

Such factual issues would have to be resolved by those who would sit in judgment of Ahmadinejad. At the very least, it seems an analysis of the meaning of the speeches from an Iranian perspective would have to be conducted. Assuming the target audience is Iranian, the question arises as to what exactly the incitement is urging the population to do. If Ahmadinejad himself, or the Iranian government, would push the button launching nuclear missiles against Israel, why must Iranian civilians be persuaded to attack? The answer may lie in Ahmadinejad's efforts to create consensus for an Iranian policy that would result in mass murder and could trigger a war that Iranian citizens would have to fight. The Iranian population has expressed dissent against Ahmadinejad, and he has attempted to quell such opposition through both rhetoric and repression.[340] Ultimately this is an issue of fact that would have to be resolved at trial.

In any event, even if Ahmadinejad could successfully argue that he has not been advocating for the "destruction" of Israel or the "murder" of Israeli Jews, he has indisputably urged their forced expulsion from the geographic territory now recognized as Israel.[341] It will be recalled that on December 8, 2005, Ahmadinejad called for removing Jews from Israel and forcefully relocating them to Europe.[342] One week later, he advocated ethnically or religiously cleansing the Middle East of Israeli Jews by redistributing them from Israel to Europe, the continental U.S., Canada, or Alaska.[343]

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[338] *See supra* notes 76-107.

[339] Dareini, *supra* note 92.

[340] *See, e.g.*, Robert Tait, *Students Protest Against Ahmadinejad*, GUARDIAN (U.K.), Dec. 12, 2006, at 16, *available at* http://www.guardian.co.uk/world/2006/dec/12/highereducation.iran; Alireza Jafarzadeh, *Mahmoud Ahmadinejad's Gas Rationing Causes Riots in Iran*, FOXNEWS.COM, June 29, 2007, http://www.foxnews.com/story/0,2933,287424,00.html?sPage=fnc.foxfan/blogs.

[341] *See Israel Should Be Moved*, *supra* note 93.

[342] *Id.*

[343] *See* Siamdoust, *supra* note 108.

Prosecutors could argue that, at the very least, Ahmadinejad has advocated for acts that would cause serious mental, if not bodily, harm to Israeli Jews. Forced relocation, apart from the fact that it is typically accompanied by other human rights abuses, results in destruction of identity, residence, family structure, livelihood, and general physical protection.[344]

For the same reasons, prosecutors may also argue that such forced expulsion would amount to deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. In the *Akayesu* case, the ICTR interpreted acts constituting "conditions of life calculated to bring about [an ethnic group's] . . . physical destruction . . . [as] subjecting a group of people to a subsistence diet, *systematic expulsion from homes* and the reduction of essential medical services below minimum requirement."[345]

iii. The Incitement Element

As explained above, the *Nahimana* judgment identified four criteria to determine whether hate speech constitutes the legitimate exercise of freedom of expression or the commission of criminal incitement: (1) purpose; (2) text; (3) context; and (4) the relationship between speaker and

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

[345] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 506 (Sept. 2, 1998) (emphasis added). On the other hand, it is not clear that "ethnic cleansing" would necessarily qualify as genocide. Ethnic cleansing has been defined as "rendering an area ethnically homogenous by using force or intimidation to remove from a given area persons from another ethnic or religious group." *See* Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, U.N. SCOR, Annex IV, at 1, U.N. Doc. S/1994/674/Add.2 (1994), *available at* http://www.osa.ceu.hu/db/fa/304-0-1-1.htm. Professor William Schabas notes that the drafters of the Genocide Convention proposed to add "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" to the list of acts considered genocide. *See* William A. Schabas, *Universal Jurisdiction: Myths, Realities, and Prospects: Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287, 296 (2001). Ultimately, the proposed addition resembling the crime of ethnic cleansing was not included in the Genocide Convention's definition of genocide because of U.N. members' concerns over already completed "forced transfers of minority groups" by the U.N. itself. *Id.* Nevertheless, certain commentators believe that "ethnic cleansing" fits the definition of genocide. *See, e.g.*, John Webb, *Genocide Treaty—Ethnic Cleansing—Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia*, 23 GA. J. INT'L & COMP. L. 377, 379 (1993) ("The practice of 'ethnic cleansing,' also referred to as 'ethnic purification,' involves the elimination of rival ethnic groups of political opposition. The practice may also constitute genocide which requires condemnation by the international community under the Genocide Convention.") (footnote omitted).

subject.[346] Ahmadinejad's statements regarding Israel would appear to meet each of these criteria.

With respect to purpose, Ahmadinejad's mind-set is revealed by the evidence just discussed—the ensemble of his remarks regarding Israel, including those murderous words festooned to his parade missiles, his active support of terrorist organizations devoted to eliminating Israel and engaged in murdering Israeli civilians, and his fervent Holocaust denial.[347] Furthermore, the Islamic Republic's long-standing eliminationist policy toward Israel and its clandestine development of a nuclear weapons capacity further reflect Ahmadinejad's objectives rather clearly.[348] His words in no way appear to be cloaked in even a nominal patina of legitimacy, such as raising ethnic consciousness, journalistic reporting, or detached historical exegesis.

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

The context of Ahmadinejad's statements, for the reasons stated above, strongly supports the argument that they constitute illegal incitement, rather than legitimate free speech. As demonstrated previously, circumstances external to and surrounding the text of each chargeable statement clarify the text's significance. These circumstances include overall Iranian policy goals, the entire body of Ahmadinejad's public comments about Israel, his support of terrorists, and his blatant Holocaust denial. Also potentially relevant is the fact that Israeli civilians were killed by terrorist groups supported by Ahmadinejad during the period in which Ahmadinejad was issuing these proclamations.[349]

Moreover, Ahmadinejad has in no way attempted to distance himself from the statements by attributing them to someone else, for instance, or proposing them hypothetically for the sake of academic argument. Additionally, the tone of the statements ought to be considered. If, from a

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[346] *See supra* text accompanying note 153.
[347] *See supra* text accompanying notes 77-109.
[348] *See supra* text accompanying notes 64-76.
[349] *See supra* text accompanying notes 102-03.

vocal perspective, they were issued in a pitched, bellicose manner, the argument for incitement becomes stronger. A milder academic intonation, on the other hand, could be used by the defense to help negate this element.

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

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

iv. The Mens Rea Element

The evidence just considered also supports a finding that Ahmadinejad made his statements with a guilty mind. As elucidated by the *Akayesu* decision, the person who incites others to commit genocide must himself have the specific intent to commit genocide, "namely, to destroy, in whole or in part, a national, ethnic, racial or religious group."[350] Marshaling proof of mens rea here is intimately tangled up with establishing the directness element and the purpose and context sub-elements under the incitement criterion. The evidence considered herein appears rather convincing in support of guilt but, as previously indicated, the issue would ultimately be decided by a thorough presentation of the evidence and an attendant battle of the experts.

v. The Causation Element

This element likely would be the proverbial "big white elephant" in the courtroom for any prosecution of Ahmadinejad for incitement. The *Nahimana* and *Mugesera* judgments are crystal clear that proof of causation is not necessary to make out a case for incitement to genocide.[351]

This jurisprudence, however, may not be determinative. In the first place, the ICTR and Canadian judgments, although extremely persuasive,[352]

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[350] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 560 (Sept. 2, 1998).

[351] *See supra* text accompanying notes 173 and 206-08.

[352] *See* David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT'L L. 53, 99 (2006) ("Furthermore, the decisions

are not binding on any court that could try Ahmadinejad.[353] Moreover, even without a formal causation requirement, no international court has ever brought an incitement prosecution in the absence of a subsequent genocide or other directly-related large-scale atrocity.[354] Given Ahmadinejad's status as head of a sizable, relatively powerful state in an unstable region and the messy foreign policy implications of attempting to prosecute him for genocide, odds are low any jurisdiction would go to the trouble. Even if it did, the absence of directly-related mass murder or widespread violence might prove fatal to any prosecution case not otherwise bulletproof.

2. Crimes against Humanity

For prosecutors successfully to establish that Ahmadinejad's speeches constitute crimes against humanity, they must overcome two imposing hurdles. The first is proving that the speeches were part of a widespread and systematic attack directed against a civilian population with Ahmadinejad's awareness that the speeches were part of the attack. The second is demonstrating that such charges are not unduly restrictive of free speech.[355]

a. Part of a Widespread and Systematic Attack of which Ahmadinejad Was Aware?

For Ahmadinejad's Jeremiads against Israel to constitute crimes against humanity, his advocacy would have to be "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[356] This would be a difficult obstacle for prosecutors to overcome. Given the absence of direct Iranian attacks on Israeli civilians,

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of international criminal tribunals have as close to a stare decisis effect as international law recognizes."); Peggy E. Rancilio, *From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation*, 78 U. DET. MERCY L. REV. 299, 324 (2001) ("Although these decisions would not have the precedential value of *stare decisis*, they would serve to create a body of jurisprudence upon which other systems could rely when interpreting the same human rights provisions.").

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

[354] *See, e.g.*, JUSTUS REID WEINER, SCHOLARS FOR PEACE IN THE MIDDLE EAST, REFERRAL OF IRANIAN PRESIDENT MAHMOUD AHMADINEJAD ON THE CHARGE OF INCITEMENT TO COMMIT GENOCIDE, ¶ 71 (Dec. 19, 2006), http://www.spme.net/cgi-bin/articles.cgi?ID=1565#_ftnref138 ("Sadly, the historical record shows that the international community has never before prosecuted incitement until after thousands or millions were killed.").

[355] See *supra* Part II.A.2 of this Article for analysis.

[356] Rome Statute, *supra* note 9, art. 7(1).

they would have to tie Ahmadinejad's calls for Israel's destruction to attacks on Israeli citizens by Iran's clients—Hezbollah or Hamas/Islamic Jihad.

While this might prove quite challenging, it is nevertheless legally possible. International law recognizes the responsibility of sponsor states for atrocities committed by clients in territory outside the control of the sponsor state. For example, the International Court of Justice in *Nicaragua v. United States* held that a state could incur international responsibility for violations of international humanitarian law if it exercised "effective control" over armed rebels fighting in another state.[357] In *Prosecutor v. Tadic*, the ICTY held that there was an international armed conflict, not an internal armed conflict, in Bosnia and Herzegovina where the Army of Republika Srpska was sufficiently linked to the Federal Republic of Yugoslavia.[358] In so finding, the ICTY criticized the ICJ's *Nicaragua* linkage test as "at variance with international judicial and State practice" and required a "lower degree of control" to find linkage between the sponsor state and its client.[359] Although it presents a question of fact to be resolved at any eventual trial, it is certainly conceivable that Ahmadinejad's support of Hezbollah and Hamas/Islamic Jihad sufficiently links him to those organization's attacks against Israeli civilians for his "destroy Israel" speeches to be tied to those attacks.

Moreover, "to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population

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

[358] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement (July 15, 1999).

[359] *Id.* ¶ 124. *But see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 108, 390-93 (Feb. 26) (applying the *Nicaragua v. United States* "effective control" test, not the *Tadic* "overall control" test, in finding that Serbia did not control the military and paramilitary units responsible for genocide in Srebrenica). The ICJ's use of the "effective control" test has been criticized. *See, e.g.*, Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*, 31 FORDHAM INT'L L. J. 871, 896 (2008) ("The difficulty with an indiscriminate application of the Nicaragua control test soon emerged in *Bosnia v. Serbia*, where, unlike *Nicaragua*, the shared objective is the commission of international crimes."). One could plausibly assume that in genocide cases with comparable linkage issues between superior and subordinate sovereigns, an international criminal adjudicatory body, such as the ICC, would opt to follow the *Tadic*, as opposed to the *Bosnia v. Serbia*, precedent. Abass notes that "the jurisprudence of other international tribunals treats the required control with some degree of flexibility." *Id*. at 894.

(occurring during an armed conflict) . . . ."[360] Again, this will be a question of fact at trial but the available evidence suggests that Ahmadinejad's "eliminate Israel" advocacy is related to the attacks on Israeli civilians sponsored by Ahmadinejad and perpetrated by Hezbollah and Islamic Jihad.[361] The *Mugesera* judgment indicates, moreover, that the connection between the incitement and the attacks on the civilian population may be somewhat attenuated.[362] In any event, the evidence underlying this issue would have to be further developed at trial.

Based on the currently accessible evidence, perhaps the statements most directly related to attacks are those made by Ahmadinejad during Hezbollah's summer 2006 war against Israel. In his July 23, 2006, remarks, for example, he exclaimed that Israel had "pushed the button of its own destruction" and advised the Jewish state "to pack up and move out of the region before being caught in the fire they have started in Lebanon."[363] Approximately two weeks later he declaimed: "The Zionist regime is fraudulent and illegitimate and cannot survive."[364] The following day, his words were even more direct. Accusing Israel of fighting a "war against humanity," he concluded that the "real cure for the [Lebanese] conflict is elimination of the Zionist regime."[365] These words urge destruction and are self-referentially tied to Hezbollah's attack on Israeli civilians.

b. Unduly Restrictive of Free Speech?

Even if viable, any charge of crimes against humanity arising from these statements may be met with stiff resistance by free speech advocates. There is a split between the ICTR and ICTY as to whether hate speech can constitute persecution. In a questionable decision, a Trial Chamber of the ICTY rejected liability for this crime in *Prosecutor v. Kordic & Cerkez*, finding that "it [did] not rise to the same level of gravity as the other acts enumerated in [the ICTY's crimes against humanity provision, Article 5] . . . and had not attained the status of customary international law."[366]

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[360] *Tadic*, Case No. IT-94-1-A, ¶ 271.

[361] *See supra* text accompanying notes 77-109.

[362] *See supra* text accompanying notes 206-08.

[363] *Iran Leader's Warning to Israel*, *supra* note 90.

[364] *Iran President's Statements on Israel*, *supra* note 80.

[365] Bishop & Berger, *supra* note 82.

[366] Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgement, ¶ 209 (Feb. 26, 2001). However, the *Kordic* judgment did not even acknowledge the *Ruggiu* judgment, which clearly held that hate speech can constitute the crime against humanity of persecution. Moreover, it attempted to distinguish the *Streicher* judgment by characterizing it as an "incitement" case. *Id.* at n.270. The Chamber superficially took the word *incitement* from the Judgement and, citing *Akayesu*, apparently concluded that was the crime for which Streicher was convicted. *Id.* In fact, Streicher was convicted of crimes against humanity

They may also rely on Nazi Radio chief Hans Fritzsche's acquittal by the Nuremberg IMT. The IMT found that Fritzsche's speeches, while "show[ing] definite anti-Semitism . . . did not urge persecution or extermination of Jews."[367] While Fritzsche "sometimes made strong statements of a propagandistic nature in his broadcasts," the IMT was "not prepared to hold that they were intended to incite German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged."[368]

Regardless of the precedential value of *Kordic* and *Fritzsche*, many experts, particularly Americans, believe that charging defendants with this crime entails an impermissible trampling on freedom of expression rights.[369] Joel Simon, deputy director of the Committee to Protect Journalists, points out that many governments in Africa have "exploited the perception that the violence in Rwanda was fueled by the media to impose legal restrictions on the press in their own countries."[370] Simon concludes that "the misuse of hate-speech laws by repressive African governments may well be a greater threat right now than hate speech itself."[371] Echoing that concern, American First Amendment expert Kevin Goering has opined that the *Nahimana* persecution convictions "would be considered as attacking mere advocacy, and would not have been sustained in the United States."[372]

These experts may have a good point. Still, they appear to be more concerned about criminalizing speech that calls for *hatred* towards a group (*e.g.* a particular race or religion), as opposed to speech that calls for *violence* against the group.[373] The U.S. Supreme Court in *Brandenburg v.*

(persecution). *See* Streicher Judgment, *supra* note 237, at 529-30. The Chamber tried inartfully to duck the question but it never managed to distinguish the *Streicher* judgment. The Chamber's position is further undercut by the *Nahimana* appeals judgment, which upheld the Trial Chamber's finding that hate speech can constitute crimes against humanity (persecution) in the proper circumstances. *See* Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-A, ¶ 988 (Nov. 28, 2007). There is, in fact, a good argument that this has ripened into a rule of customary international law.

[367] Fritzsche Judgment, *supra* note 237, at 526. The IMT failed to explain how the virulent Nazi anti-Semitism spewed over the airwaves by Fritzsche amounted to anything other than persecution.

[368] *Id.*

[369] *See, e.g.*, Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana*, 12 NEW ENG. J. INT'L & COMP. L. 17, 46-47 (2005).

[370] Joel Simon, *Of Hate and Genocide: In Africa, Exploiting the Past*, 44 COLUM. JOURNALISM REV. 9, 9 (2006).

[371] *Id.*

[372] Kevin W. Goering et al., *Why U.S. Law Should Have Been Considered in the Rwandan Media Convictions*, 22 COMM. LAW. 10, 12 (2004).

[373] Orentlicher, *supra* note 369, at 39.

Ohio[374] placed great emphasis on direct calls for violence in formulating a test for whether hate speech would qualify for constitutional protection. It held that the First Amendment will not protect speech that "is directed to inciting or producing imminent lawless action and is likely to produce such action."[375]

Based on the analysis presented in this Article, Ahmadinejad's "destroy Israel" speeches arguably would not qualify for Constitutional protection under *Brandenburg*.[376] This seems especially true in the context of Iran's violent proxy attacks on Israel through the terrorist organizations it supports. On the other hand, should the calls for Israel's annihilation be actionable only if tied to Iran's nuclear strike capability, which might not exist until 2009 at the earliest? If so, *Brandenburg* might imply that Ahmadinejad's words do not call for sufficiently "imminent lawless action." Given the enormous scale of the potential destruction, and the comparatively slower reaction time of any potential collective global law enforcement effort necessary to deal with the threat, perhaps Ahmadinejad's calls for destruction are sufficiently imminent.[377]

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[374] 395 U.S. 444, 447 (1969).

[375] *Id.*

[376] This assumes, of course, that American First Amendment standards, which are by far the most speech protective in the world and are not in line with international law, would be used at all. In the international context, that is not likely. As the *Nahimana* judgment points out: "The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards." Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR 99-52-T, Judgement and Sentence, ¶ 1010 (Dec. 3, 2003).

[377] In this regard, an analogy might be drawn to another area of international law. With respect to national self-defense, customary law has traditionally recognized a limited right of pre-emptive self-defense that implicates "imminence" pursuant to the so-called "*Caroline* doctrine." In diplomatic negotiations resulting from the British burning an American ship (the *Caroline*) used to supply anti-British rebels in Canada, the U.S. and Britain agreed that permissible anticipatory self-defense meant a necessity for self-defense that was "instant, overwhelming, leaving no choice of means and no moment for deliberation" and the action taken must not be "unreasonable or excessive." Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 225 n.67 (2004). Certain American counter-terrorism experts have attempted to redefine imminence to shift the inquiry from timing to the probability of harm. *See* Jules Lobel, *9/11 Five Years on: A Look at the Global Response to Terrorism: The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1418 (2007). In their view, the imminence standard applied literally to a world of modern weaponry, rogue states, and terrorists "would be a suicide pact." *Id.* Instead of defining imminence as the moment when a blow is just about to land, they would define imminence in terms of the likelihood of the attack occurring. *Id.* Where the magnitude of the harm is great, as in a potential terrorist nuclear attack on the United States, they would require a lesser probability. If the *Brandenburg* standard were applied here, given Ahmadinejad's doomsday calls in the context of weapons of mass

On the other hand, any persecution charges arising from Ahmadinejad's less incendiary statements should be scrutinized carefully to segregate those calling for hatred from those calling for violence. Only the latter should be prosecuted. This is extremely important in a case, such as this one, where the nexus between attacks on the civilian population and the speech is less direct.

B. PROCEDURAL ANALYSIS

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

1. Immunity

Although the *Kambanda* judgment demonstrated that a *former* head of state can be prosecuted for atrocity crimes, would the same be true of an *acting* head of state, such as Ahmadinejad? Head of state immunity has long protected state leaders and ministers from criminal prosecution for acts performed under the cloak of state leadership,[378] and is recognized by customary international law.[379] Acting heads of state, such as Ahmadinejad, enjoy two different types of immunity: functional and personal.[380]

"Functional immunity . . . attaches to the official or public nature of the acts" performed by a state official in the exercise of her functions.[381] Its rationale is grounded in the assumption "that acts performed by [a] state official[] are to be ascribed only to the state that [she] represent[s]."[382] "Hence, functional immunity is substantial in nature and survives the cessation of office."[383]

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destruction and reliance on terrorist organizations, a similar rethinking of "imminence" might also be in order for this case.

[378] *See* ELLEN S. PODGOR, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 81 (2004).

[379] *Id.*

[380] *See* Micaela Frulli, *The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?*, 2 J. INT'L CRIM. JUST. 1118, 1125 (2004).

[381] *Id.*

[382] *Id.*

[383] *Id.*

Conversely, personal immunity, "enjoyed only by limited categories of high-ranking state officials, [is] absolute because [it] attach[es] to a specific *status* or position and to the important functions associated with it."[384] The principle of personal immunity is:

> [E]ssentially based on the notion of functional necessity: certain categories of state officials (heads of state, heads of governments, foreign ministers and diplomatic agents) need to exercise their functions without any threat, impediment or interference in order to ensure the smooth and peaceful conduct of international relations. Though absolute, personal immunities come to an end when the state official relinquishes her official position . . . .[385]

This type of immunity is "therefore [a] procedural bar[] to the exercise of jurisdiction."[386] Incumbent heads of state enjoy both functional and personal immunity; former heads of state are protected only by functional immunity.[387]

Despite appearing inviolable in the first part of the 20th century, head of state immunity seemed to be eroding by century's end. Treaties, such as the Genocide Convention, and institutions, such as the ICTR, ICTY, and ICC, all removed immunity for heads of state and state actors accused of atrocity crimes.[388] In the epochal immunity decision of the British House of Lords regarding former Chilean leader Augusto Pinochet, the Law Lords viewed waiver of immunity as an obligation that fell upon any state with access to the perpetrator of a *jus cogens* crime, such as torture.[389]

Nevertheless, millennial reports of sovereign immunity's demise in human rights cases were apparently premature. In *Democratic Republic of Congo v. Belgium*, the ICJ in 2002 held that Belgium's issuance of an arrest warrant for Congo's foreign minister in a human rights criminal case violated the sovereign immunity principle in international law.[390] The ICJ held that the inviolability from the jurisdiction of another state's courts that

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[384] *Id.*

[385] *Id.* at 1126.

[386] *Id.*

[387] *Id.* at 1126 n.29.

[388] *See* Genocide Convention, *supra* note 8, art. 4; ICTY Statute, *supra* note 217, art. 7(2) ("The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."); ICTR Statute, *supra* note 117, art. 6(2); Rome Statute, *supra* note 9, art. 27. "Atrocity" crimes refer to the most heinous international offenses including genocide, crimes against humanity, and war crimes. *See* David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 389, 393-402 (2002).

[389] *See Regina v. Bartle*, 37 I.L.M. 1302, 1333 (Lord Nichols) (1998). S*ee also* Gilbert Sison, *A King No More: The Impact of the* Pinochet *Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L. Q. 1583, 1598 n.115 (2000).

[390] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 70 (Feb. 14), *available at* http://www.icj-cij.org/docket/files/121/8126.pdf.

attaches to a foreign minister prohibited that state from engaging in even the preliminary stages of investigation and prosecution for *jus cogens* crimes during the foreign minister's term of office.[391] The ICJ rejected the argument that a post-World War II customary international law exception had developed to preclude immunity for state actors in national courts for *jus cogens* crimes such as genocide.[392] However, the scope of this decision is somewhat circumscribed. While acknowledging the "irrelevance of official capacity . . . in conventional texts or in the statutes of international criminal tribunals," it implied that "national courts should respect the functional immunity accruing to state officials accused of the most serious international crimes."[393]

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

2. Personal Jurisdiction

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

a. The International Court of Justice

As noted previously, certain commentators have urged states such as Israel, the United Kingdom, or the United States to file a complaint against Iran in the International Court of Justice pursuant to Article IX of the Genocide Convention. Australia, a party to the Genocide Convention, is currently considering a claim against Iran in the ICJ.[394] However, ICJ jurisdiction is normally based on the consent of the parties,[395] and Iran is not likely to consent to ICJ jurisdiction in this case.

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[391] *Id.* ¶ 58.

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

[393] Frulli, *supra* note 380, at 1126-27.

[394] *See* Goodenough, *supra* note 13.

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

Nevertheless, if a treaty includes a "compromissory clause" that specifically includes the ICJ as an appropriate forum for dispute resolution, the States that are parties to it may file a unilateral application to the Court, thus making jurisdiction compulsory for respondent States.[396] Many dispute, however, whether this is actually "compulsory."[397]

In 2006, the United States, not wanting interference in its death penalty cases involving foreign nationals, withdrew from the Optional Protocol to the Vienna Convention on Consular Relations.[398] It did so because the Vienna Convention compromissory clause mandates ICJ jurisdiction when foreign nationals report they have been illegally denied the right to see a home-country diplomat when jailed abroad.[399] Iran could similarly reject the Genocide Convention's compromissory clause with few or no consequences. It is already flouting Security Council Resolutions demanding the closure of its nuclear program.[400]

b. The International Criminal Court

Iran is not a signatory to the Rome Statute[401] and Ahmadinejad's chargeable incitement crimes appear not to have been committed on the territory of a signatory. Thus, the only realistic way that the ICC could assert jurisdiction over Ahmadinejad is through Security Council referral.[402] Such a referral would indicate international acquiescence to prosecution and would furnish the most realistic possibility, given the globally broad consensus and Security Council support, for enforcement of ICC actions.

c. Municipal Courts

While certain domestic courts, especially Israel's, could in theory exercise jurisdiction over Iran's leader under the theories of passive personality, national security, or universality, the odds of enforcing the

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[396] *Id.*

[397] Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: Just How Compulsory Is It?*, 5 CHINESE J. INT'L L. 29, 31 (2006) ("This jurisdiction of the Court is not really compulsory [as States] cannot be 'compelled' to enter into a treaty in the ordinary meaning of that term, let alone to accept the jurisdiction of the Court to resolve disputes under the treaty in question.").

[398] *See* Charles Lane, *U.S. Quits Pact Used in Capital Cases; Foes of Death Penalty Cite Access to Envoys*, WASH. POST, Mar. 10, 2005, at A01.

[399] *Id.*

[400] *See, e.g.*, Michael Slackman & Dan Bilefsky, *Iran Says It Will Ignore U.N. Deadline on Uranium Program*, N.Y. TIMES, Aug. 7, 2006, at A3.

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

[402] *See* Rome Statute, *supra* note 9, art. 13; Manashaw, *supra* note 271, at 305 n.7.

exercise of such jurisdiction would be long indeed. This is not a very realistic option. As acknowledged by prosecution advocate Justus Reid Weiner:

> While Israel and other national states may be entitled to exercise jurisdiction over Ahmadinejad, it is unclear that they would be willing or able to do so. Germany . . . might exercise the profound historical courage necessary to undertake such a challenge. Otherwise it is doubtful that any state would be willing to accept the political fallout of such a move.[403]

C. THE FINAL ANALYSIS

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

The ICJ would certainly allow Genocide Convention signatories to seek a judgment as to whether Ahmadinejad's speeches amount to genocidal incitement. But Iran would not very likely submit to the ICJ's jurisdiction, and it is doubtful that the Genocide Convention's compromissory clause would persuade them otherwise. Even if Iran did acknowledge jurisdiction, what would be the value of such a judgment?

In the first place, it would take years for the ICJ to rule on the question.[404] By then, Iran might have already unleashed its nuclear wrath on Israel. Even if it arrived more expeditiously, an ICJ judgment might represent symbolic vindication but would not ultimately be enforceable.[405] Finally, the ICJ only permits complaints against *states*, not individuals.[406] But the recent trend in international law is to focus liability for *jus cogens* transgressions on the *individuals* who commit them.[407] In other words, the

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[403] Weiner, *supra* note 354, ¶ 86.

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

[405] *See* Rebecca Trail, *The Future of Capital Punishment in the United States: Effects of the International Trend Towards Abolition of the Death Penalty*, 26 SUFFOLK TRANSNAT'L L. REV. 105, 121 n.130 (2002) ("The IACHR, the ECHR, and the ICJ are currently unenforceable courts, which deliver decisions that are intended to be complied with through an honor system.").

[406] *See* Paulus, *supra* note 264, at 802.

[407] *See* Alberto Costi, *Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-Conflict Situations*, 22 NEW ZEALAND U. L. REV. 213, Part III.E (2006) ("The emergence of a new culture of human rights and individual criminal responsibility has heralded the principle that there can be no impunity for international

concern is to remove the cloak of collective national guilt and focus the world's opprobrium on the person and his individual responsibility for the criminal acts at issue.[408] Adjudicating the world's claims against Ahmadinejad via an action against Iran, as one large, monolithic entity, would contravene that purpose.[409]

Prosecution of Ahmadinejad before a municipal criminal court might be similarly problematic. In the first place, based on the ICJ's decision in the *Democratic Republic of Congo v. Belgium*, sovereign immunity is most probably a bar to any such prosecution in municipal courts against sitting heads of state.[410] Even were that not the case, absent military intervention, one country's unilateral efforts to obtain custody of Ahmadinejad would likely be futile.

So that leaves the ICC. As mentioned previously, a Security Council referral would likely be the only realistic way of calling Ahmadinejad to account for his crimes. Although it might seem a long shot, there is reason to think it possible. The Security Council has recently found consensus on the issue of Iran's nuclear program and has issued resolutions demanding an end to it.[411] Iran, however, has openly defied the Council.[412] If Iran continues with its program and Ahmadinejad continues to incite to genocide, the Security Council might feel more disposed to refer an incitement case against the Iranian president to the ICC, particularly if Australia presses ahead with an ICJ case against Iran. That might be a more comforting initial course of action than military intervention. As observed by noted legal expert David Matas:

> 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

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crimes."); Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MICH. ST. U. DET. C. L. J. INT'L L. 595, 602 (1999).

[408] *See* Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 574 (2006).

[409] In addition, at least one expert has noted there could be a potential issue as to whether the Iranian state bears legal responsibility under the Genocide Convention for statements made by its president. See Goodenough, *supra* note 13.

[410] *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 70 (Feb. 14), *available at* http://www.icj-cij.org/docket/files/121/8126.pdf.

[411] *See supra* notes 69-71.

[412] *See Riddle of Iran*, *supra* note 65.

> resorting to legal institutions rather than using force. It means acting when there is still time, rather than after it is too late.[413]

If the Security Council did refer Ahmadinejad to the ICC, what are the odds of a successful prosecution on the merits? With respect to incitement to genocide, apart from disputes over the group targeted and the meaning of specific words and translations, the most vexing issue is causation. No prosecutor has ever brought such an incitement charge without a genocide having already occurred. But refusal to prosecute pre-genocide effectively eviscerates the crime's rationale. Direct and public incitement to commit genocide is an "inchoate crime" that is, by definition, "punished before the harm that is the ultimate concern of society occurs . . . ."[414] It is axiomatic that an inchoate crime is committed prior to, and independently of, the object crime. "Indeed, the main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime."[415]

In *Prosecutor v. Musema*, the ICTR noted that inchoate crimes (in that case conspiracy) are "punishable by virtue of the criminal act as such and not as a consequence of the result of that act."[416] In an accompanying footnote, the Tribunal explicitly stated that this applied to the inchoate crime of direct and public incitement to commit genocide. It added that this crime carries such a high risk for society that it must be punished without reference to subsequent acts, if any, of genocide.[417]

That conclusion was echoed in both the *Nahimana* and *Mugesera* judgments. But such pronouncements ring hollow indeed if no judicial body is willing to apply them before the mass graves are dug. Ahmadinejad's incendiary speeches present the world with a golden opportunity to use the incitement charge for its intended purpose: to prevent genocide, not merely to punish it ex post facto. After all, were humanity to wait for Israel's nuclear annihilation, it could certainly thereafter prosecute Ahmadinejad for genocide. At that late date, though, an incitement charge might seem superfluous or redundant. Given the staggering loss of human life that would have occurred, a criminal conviction would be an act of

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[413] DAVID MATAS, AMNESTY INTERNATIONAL USA, JUSTICE FOR GENOCIDE, http://www.amnestyusa.org/Justice_for_Genocide/David_Matas/page.do?id=1051082&n1=3&n2=35&n3=1398 (last visited Aug. 15, 2008).

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

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

[416] Case No. ICTR 96-13-A, Judgement and Sentence, ¶ 193 (Jan. 27, 2000).

[417] *Id.* at n.37 (citing Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 52 (Sept. 2, 1998)).

empty symbolic vindication but nothing more. As Hitler expert Ron Rosenbaum explains:

> It has never happened before, this kind of preemptive indictment, but that doesn't mean it can't happen now, or that it shouldn't happen now, or that the international law making incitement a separate crime shouldn't be applied to Ahmadinejad and his genocidal incitement against the Jewish state . . . . Considering the hideous historical record of failure in the past to prevent genocide, failure to pursue this course (in addition to any others that may be necessary to stop or prevent genocide) would itself be a crime.[418]

Aside from generating legitimate concerns among defenders of free speech, a charge of crimes against humanity (persecution) would be rather vulnerable with respect to the chapeau element of connection to a "widespread and systematic attack."[419] Could the prosecution prove that Ahmadinejad's inflammatory speeches against Israel were delivered as part of Hezbollah's widespread and systematic attack against Israeli civilians in the summer of 2006?[420] If so, would there be sufficient evidence of coordination between Ahmadinejad and Hezbollah to prove Ahmadinejad's knowledge of the attacks and that the crimes flowed from a State or organizational policy? Again, while these are questions of fact, given Iran's strong support of Hezbollah, it is not unreasonable to imagine that the connection could be established.[421]

Moreover, as noted above, there is legal precedent to support a connection to widespread attacks carried out by a nominally separate organization on foreign soil. In the context of Balkan atrocities of the 1990s: "The Bosnian War led drafters to weaken the 'state action' requirement because the Serb militias were unofficial and only loosely affiliated with the Yugoslav state."[422] In Ahmadinejad's case, even if Hezbollah could only be considered "loosely affiliated" with the Iranian state, international law suggests that its widespread murder of Jewish civilians in the summer of 2006 could be pinned to Ahmadinejad and his contemporaneous violent verbal campaign against Israeli Jews.[423]

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[418] Posting of Ron Rosenbaum to PAJAMAS MEDIA, Incitement Indictment: Time to Bring Ahmadinejad to Justice, http://ronrosenbaum.pajamasmedia.com/2006/12/20/incitement_indictment_time_to.php (Dec. 20, 2006, 6:19 AM).

[419] For analysis of "widespread and systematic attack," *see supra* text accompanying notes 249-52.

[420] *See supra* text accompanying notes 77-109.

[421] *See supra* text accompanying notes 46-55.

[422] David Luban, *A Theory of Crimes against Humanity*, 29 YALE J. INT'L L. 85, 96 (2004). *But see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 108, 390-93 (Feb. 26), (applying the more rigorous "effective control" test).

[423] *See supra* text accompanying notes 77-110.

V. CONCLUSION

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

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

Any successful prosecution of Ahmadinejad would require deference to incitement precedent (not technically required in international law), a minimal expansion of current doctrine and conventional wisdom, and strong vigilance for freedom of expression in choosing the proper charges. This Article has shown that such an effort would be consistent with the trends that have given rise to incitement's developing analytical framework.[424] Still, in the current political and legal environment, the odds of prosecution are quite long. Perhaps only when Iran gives the world incontrovertible proof of its nuclear weapons capacity and begins training its fortified missiles directly on Israel will the international legal community seriously contemplate judicial action against Mahmoud Ahmadinejad. Unfortunately, that might be too late.

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[424] As pointed out in the Benesch article on defining incitement to genocide, and as I have indicated here and elsewhere, the crime should be fleshed out even more systematically than it already has been. A case against Ahmadinejad would certainly provide an opportunity to do so. However, focusing exclusively and narrowly on the "wipe off the map" speech, Benesch concludes that Ahmadinejad has not committed incitement to genocide. *See* Benesch, *supra* note 16, at 490-91.