State-Sanctioned Incitement to Genocide:

The Responsibility to Prevent

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Genocide is the most insidious and destructive threat known to humankind. It is the ultimate crime against humanity—the unspeakable crime whose name one should shudder to mention; a horrific and unspeakable act whereby state-sanctioned incitement transforms hatred into catastrophe.

Universal condemnation of genocide brought the international community together in 1948 to draft the *Convention on the Prevention and Punishment of the Crime of Genocide*,¹ thus signalling the world’s disdain for those who would perpetrate genocide in the strongest possible terms. To this day the *Genocide Convention* holds a unique place in international law. It is recognized as compelling and overriding law (*jus cogens*), articulating and establishing obligations owed by all members of the international community to all members of the international community (*obligatio erga omnes*).²

The objective of the Convention is as clear as it is compelling: that State Parties to the Convention are obliged to prevent genocide – the pinnacle of human criminality – and to punish those who orchestrate, carry out, advocate or perpetuate its destructive force.³ At Article 3(b), the Convention expressly prohibits direct and public incitement to genocide, demonstrating the international community’s recognition that incitement is both precondition to, and indicator of,

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¹ Adopted by resolution 260 (III) A of the UN General Assembly, 9 December 1948 [the “*Genocide Convention*” or the “Convention”].
³ Article 1 of the *Genocide Convention*, supra note 1.
genocide. The *Genocide Convention* thus articulates the intertwined principles of a *responsibility to prevent* and a *responsibility to punish* genocide.

Tragically, in the decades since that Convention was signed, the world has become witness to further genocides in the Balkans and in Rwanda, in addition to the genocide by attrition in Darfur, where the first genocide of the 21st century continues to this day. The ultimate horror of these unspeakable genocides is that they were preventable. Nobody could say that we did not know; we knew but we did not act.

Indeed, the enduring lesson of the Holocaust and the genocides since is that genocide occurs not simply because of the machinery of death but because of the state-sanctioned incitement to hate. It is this teaching of contempt, this demonizing of the “other”—this is where is all begins. As the Supreme Court of Canada recognized:

> The repetition of the loathsome messages of Nazi propaganda led in cruel and rapid succession from the breaking of the shop windows of Jewish merchants to the dispossession of the Jews from their property and their professions, to the establishment of concentration camps and gas chambers. The genocidal horrors of the Holocaust were made possible by the deliberate incitement of hatred against the Jewish and other minority peoples.⁴

After the genocides in Rwanda and the former Yugoslavia, the International Criminal Tribunal for Rwanda (the “ICTR”) and the International Criminal Tribunal for the former Yugoslavia (the “ICTY”) were established to hold accountable those individuals who were responsible for these horrific human tragedies. These tribunals have echoed the words of the Supreme Court of Canada in recognizing that *genocide begins with words*: the founding statutes of both the ICTR and the ICTY make direct and public incitement to genocide punishable as an

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offense in its own right. Moreover, these statutes recognize the unique *jus cogens* and obligation *erga omnes* characteristics of the prohibition against genocide and its incitement by removing any possible head-of-state immunity for these crimes. Nonetheless, because such international tribunals are created to mete out justice once genocide has already occurred, they remain incapable of addressing genocidal threats before their destructive effects are wrought.

The preventative measures available through the *Genocide Convention* and the *Charter of the United Nations* are established in international law and ought not remain ignored in practice. Indeed, more than a half-century before the Security Council recognized the Responsibility to Protect (R2P) principle, the *Genocide Convention* had already confirmed a responsibility to prevent principle with respect to genocide.

For these instruments of justice – and not after-the-fact prosecutions, however important they may be – are the ones that will save lives before they are taken. As the United Nations High Commissioner for Human Rights, Navanethem Pillay expressed, the *Genocide Convention* – along with the *Universal Declaration of Human Rights* – “grew out of the Holocaust, but we have yet to learn the lesson of the Holocaust, as genocide continues.” Indeed, the United Nations General Assembly was told bluntly, in September 2008:

> The [Genocide] Convention was born out of the desire to prevent recurrence of genocide, yet it failed to achieve this purpose on several occasions thereafter. The rallying cry ‘Never again!’ can only be used so often before it loses credibility.

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7 *Supra* note 3.


In this context, the present article reviews the legal approaches to preventing genocide by addressing incitement to genocide, including: first, from an evidentiary perspective, the role that incitement plays in the genocide-fostering process is analyzed; second, from a juridical perspective, the mechanisms that exist in international law to take action against genocide are considered; third, specific legal principles and international and domestic jurisprudence confirming the specific evil – and criminality – of genocidal incitement are presented; and finally, the state-sanctioned incitement to genocide that emerges from contemporary Iran is provided as a case study in illegal hate speech—a case study that both highlights the impunity with which the legal prohibition on incitement to genocide is presently treated, and underscores the necessity to act.

**Incitement to Genocide as a Component Part of the Genocidal Process**

Genocide is a crime almost unfathomable in its cruelty and its scale. As defined in the *Genocide Convention*, “genocide” refers to five acts:¹⁰

(a) Killing members of a group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within a group;
(e) Forcibly transferring children of a group to another group.

As heinous as these acts are in themselves, the defining feature of genocide comes from its mental element: that the acts are “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”¹¹

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¹⁰ Article 2 of the *Genocide Convention*, supra note 1.
¹¹ Ibid.
Genocide, then, is not at all indiscriminate. To the contrary, it is calculated. It involves the conscious and deliberate will to annihilate – to exterminate – a people.

As such, genocide is effectively impossible to perpetrate against victims that appear, to the genocidaires, as human—as moral entities deserving of life. Genocide scholar Helen Fein notes that potential victims of genocide must be seen in the minds of the genocidaires as beyond “the boundaries of the universe of obligation.”12

Moreover, for a genocide to be effectively carried out, this psychological element must be present in a sufficient number of people to actively perpetrate the physical acts of genocide, as well as a sufficient number of people to acquiesce in the genocide’s occurrence. It therefore is sensible to speak of a “genocidal process” through which a society’s capacity to engage in genocide is fostered. Genocide is not a spontaneous discrete act, as former US Secretary of State Madeleine Albright and former US Secretary of Defense William Cohen note:

> Genocide is not the inevitable result of “ancient hatreds” or irrational leaders. It requires planning and is carried out systematically.13

In this context, addressing incitement to hatred as it leads into incitement to genocide – especially in its state-sanctioned form – becomes a form of genocide prevention. Albright and Cohen recently drafted a blueprint for American policymakers on preventing genocide in which they remark that both state-led discrimination and exclusionary ideology have been identified as factors associated with an increased risk of genocide or mass atrocities.14

Professor Gregory Stanton develops this idea even further in his analysis, devising a template of the eight stages of genocide. After identifying the initial steps of classifying the

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Classification and symbolization are fundamental operations in all cultures. They become steps of genocide only when combined with dehumanization. Denial of the humanity of others is the step that permits killing with impunity. The universal human abhorrence of murder of members of one’s own group is overcome by treating the victims as less than human. In incitements to genocide the target groups are called disgusting animal names – Nazi propaganda called Jews “rats” or “vermin”; Rwandan Hutu hate radio referred to Tutsis as “cockroaches.” The targeted group is often likened to a “disease”, “microbes”, “infections” or a “cancer” in the body politic.\footnote{Gregory Stanton, “The Eight Stages of Genocide,” first Working Paper (GS 01) of the Yale Program in Genocide Studies, 1998. Available at: http://www.genocidewatch.org/8stages1996.htm.}

This insight – and the horrific history of genocide that testifies to its truth – has led former Secretary-General of the United Nations, Kofi Annan, to exhort:

> We must attack the roots of violence and genocide. These are intolerance, racism, tyranny, and the dehumanizing public discourse that denies whole groups of people their dignity and rights.\footnote{“Genocide is Threat to Peace Requiring Strong, United Action, Secretary-General tells Stockholm International Forum”, Press Release SG/SM/9126, 26 January 2004. Available at: http://www.preventgenocide.org/prevent/UNdocs/KofiAnnanStockholmGenocideProposals26Jan2004.htm. Emphasis added.}

The former Secretary-General’s remarks underscore the fact that as offensive and inflammatory as intolerance, racism, tyranny and dehumanizing public discourse are, they also serve as warning signs—early indicators of a genocidal process that can still be stopped.

In this genocidal process, through stereotyping and singling-out, dehumanization and demonization, would-be victims of genocide are identified, segregated out and targeted. In the context of these precursors to genocide, genocidal incitement emerges almost as commonplace rather than offensive. The banality of evil is thus set in motion. In turn, the calls themselves become more and more inflammatory. The destruction of the victim population is made to seem natural—even pre-ordained.
During the period that the genocidal incitement is ignored or dismissed as mere rhetoric, the would-be *genocidaires* exploit the opportunity to accumulate the means to carry out genocide. Indeed, as Prof. Stanton notes, the stage of dehumanization comes even before the *genocidaires* plan and organize the genocide. It is success during the stage of dehumanization that effectively empowers the *genocidaires* to continue the process:

"Impunity breeds contempt for law, and emboldens genocidists, who can literally get away with murder."\(^{17}\)

Despite the elaborate effort to orchestrate the genocide, would-be *genocidaires* are equally consistent in establishing a narrative that denies the intent or imminence of widespread destruction.\(^{18}\) Indeed, with all other conditions in place, the would-be *genocidaires* thus deny the reality that they have started down the road to genocide, implicitly recognizing that the international community which is outside the dehumanizing and demonizing process – the genocidal web of hate – would vehemently object to such genocidal intentions. Accordingly, the world finds itself duped into complicity until it is too late.

For the international community, the psychological effect of this protracted genocide-fostering process is that genocide never appears to be imminent. A false sense of security takes hold, as despite the objective warnings, it always feels as if no preventative action need be taken immediately. The would-be *genocidaires’* constant denials pray on this false hope, offering the world a reason to stand back. The seeds of hate, planted years ago, are ignored, sanitized or dismissed as unimportant, even though they will soon morph into tragedy; the physical threat of harm, which is proceeding apace, is dismissed as a fiction precisely because it has not yet materialized. Indeed, because the genocide has not occurred, the international community

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\(^{17}\) *Supra* note 15.

\(^{18}\) Prof. Stanton explains that “[e]very genocide is followed by denial:” see *ibid*. The events in Darfur, however, where the horror of genocide has been drawn out for over five years under the world’s watch, confirm that denial does not only take place after the genocide is over.
continues to proclaim there is no genocide—thus ignoring the genocidal path that has been embarked upon and the responsibility to prevent before it is too late.

It is during this genocide-fostering period that the possibility of genocide transforms into reality. After this time frame has passed, the only remaining step is for the tragedy to actually unfold. Accordingly, it is during this developmental stage that the international community must learn to act. Solutions short of military intervention, once the genocide-fostering process nears an end, will be almost impossible to implement.¹⁹

**Preventing Genocide in International Law**

After 60 years, the *Genocide Convention* remains the bedrock international legal treaty on preventing genocide. The First Article of the Convention attaches legal significance to the moral imperative of preventing genocide by stating:

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.²⁰

The *Genocide Convention* thus declared that the international community could no longer acquiesce in genocide. It expressly imposed the obligation on its signatories to take action to prevent genocide. As then High Commissioner for Human Rights Louise Arbour stated:

> [U]nder the Genocide Convention and its norms, which have been incorporated into international customary law, *States have a duty to prevent genocide.*

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> *The prevention of genocide is a legal obligation,* and it is a justiciable obligation that one State effectively owes to the citizens of another State, outside its own territory.²¹

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¹⁹ As Prof. Stanton states, once the preparation stage is over, “[e]xtermination whether carried out by governments or by patterned mob violence, can only be stopped by force:” see *ibid.*

²⁰ Emphasis added.
The effect of Article 1 extends beyond even the impressive list of State Parties to the Convention itself. Indeed, the preventative purpose of Article 1 has been elevated to a peremptory norm of international law – *jus cogens* – with the effect that no State, whether signatory to the *Genocide Convention* or not, may ignore its mandatory nature.\(^\text{22}\)

The obligation to take action to prevent genocide is also recognized as an obligation *erga omnes*: it is a responsibility owed to all members of the international community.\(^\text{23}\) The combination of the *jus cogens* and *erga omnes* principles implies that the obligation to take action to prevent genocide in international law is overriding. Every State must prevent genocide, it must do so on behalf of every potential victim, and every State in the community of nations can hold its neighbours to account for their failure to join in upholding this obligation.

The International Court of Justice has recently explained that the “obligation on each contracting State to prevent genocide is both normative and compelling.”\(^\text{24}\) It elaborated that this obligation means that State parties must “employ all means reasonably available to them, so as to prevent genocide so far as possible.”\(^\text{25}\) Further, this obligation – “and the corresponding duty to act” – will arise not simply when genocide is on the cusp of materializing, but rather “at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.”\(^\text{26}\)

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\(^{21}\) “The Responsibility to Protect as a Duty of Care in International Law and Practice”, United Nations High Commissioner for Human Rights Louise Arbour (address delivered at Trinity College, Dublin, 23 November 2007). Available at: http://www.unhchr.ch/hurricane/hurricane.nsf/0/5F1298CB9E6043BEC125739C0058FB02?opendocument.


The obligation to prevent genocide in the *Genocide Convention* dovetails with more recent international efforts to confirm the responsibility that all States have in the family of nations. The R2P movement, for instance, moves States away from the absolute paradigm of state sovereignty and towards a more nuanced one that recognizes their obligations to their own populations and, more generally, to those at risk of mass-atrocity crimes elsewhere.\(^{27}\)

United Nations Secretary-General Ban Ki-moon describes R2P as being “the obligation accepted by all States to act collectively, through the Security Council, when a population is threatened with genocide, ethnic cleansing or crimes against humanity.”\(^{28}\) Indeed, by its reference to the 2005 World Summit Outcome Document, the Security Council has confirmed not only the responsibility of States to take action to prevent genocide, but also its own responsibility to prevent the incitement that is a condition and indicator of genocide:

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. *This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.* We accept that responsibility and will act in accordance with it. *The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*\(^{29}\)

The responsibility to protect is particularly compelling and accentuated where the danger of indifference and inaction is greatest – as in the case of genocide – and where the probability of the danger materializing is most pronounced. As the leading expert on the subject, Gareth Evans, has explained, a true “R2P situation” is one “where genocide, or ethnic cleansing, or other crimes against humanity, or war crimes were either actually occurring or could foreseeably occur at


some time in the future – immediate, medium term or long term – unless appropriate preventive measures are taken.”  

The responsibility to prevent genocide is therefore underpinned not only by the text of the Genocide Convention – itself elevated to a jus cogens norm of international law – but also by the emerging R2P doctrine as endorsed by the Security Council. Yet the problem in preventing genocide has never been the argument that this obligation does not exist; it has been the practical difficulty in convincing State actors to respond to their acknowledged legal and moral imperative. For that reason, the corpus of international law is infused with jurisprudence detailing situations of genocidal incitement in the context of genocidal murder—but is silent on the application of these anti-incitement principles as mechanisms of prevention.

**Incitement to Genocide in International Law**

The legal basis for prohibiting and prosecuting incitement to genocide in international law is well-established. True to its ideal of both preventing and punishing genocide, the Genocide Convention was the first international treaty to prohibit “[d]irect and public incitement to commit genocide.”

Notably, the unqualified wording of the Convention makes it clear that direct and public incitement to genocide is punishable whether or not it can be shown to have caused the commission of genocide. This wording was specifically deliberated upon by the drafters of the Convention and accords with the preventative purpose elaborated in Article 1 thereof. The international community does not need to wait for actual genocide to transpire before taking

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31 Article 3 of the *Genocide Convention*, supra note 1.
action to respond to its warning signs, including incitement. The crime of “incitement” therefore contrasts specifically with “instigation” in international law, the latter being punishable only when it leads to the actual commission of the offense intended by the instigator.  

Direct and public incitement to genocide has formed the basis of criminal indictments at the ICTR, pursuant to Article 2(3)(c) and 6(1) of the ICTR Statute, and the tribunal’s treatment of these cases is largely responsible for building the edifice of modern international legal jurisprudence on the subject. This jurisprudence emphasizes the gravity with which this offence is to be treated, even if there is no evidence that the incitement led to any loss of life. The mere prospect of genocide, as intended by the inciter, suffices to confirm the dire nature of the crime:

[G]enocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.  

The foundational trial decision in the Akayasu case – the origin of the above quote – considered the charge of incitement to genocide alleged against Jean-Paul Akayasu, a commune bourgmestre (equivalent to a mayor) and former teacher in Rwanda. On April 19, 1994, Akayasu led a gathering of over 100 people assembled around the dead body of a young Hutu. He urged the population to unite in order to eliminate the Tutsi, which he referred to using a derogative term and calling them the sole enemy. Akayasu even read out a list of names of individuals,

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32 See supra note 26.
34 Note, however, that the concept of punishing those who engage in direct and public incitement to genocide predates the ICTR significantly. See, e.g., the case of Julius Streicher, Nuremberg Proceedings, Vol. 22, at 502.
36 The Akayasu trial judgment was affirmed on appeal, 1 June 2001. The Trial Chamber decision remains a cornerstone precedent in international incitement law: see, e.g., Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 100 [Mugesera], at paras. 84, 86 and 88; Prosecutor v. Bikindi, Case no. ICTR-01-72-T, Judgment (Trial Chambers), 2 December 2008 [Bikindi], at para. 387.
whom he identified as being accomplices of the Rwandan Patriotic Front (which defended the Tutsi).

In analyzing the crime of incitement to genocide, the trial chamber specifically noted the role that such speech plays in the genocide-fostering process:

At the time the Convention on Genocide was adopted, the delegates agreed to expressly spell out direct and public incitement to commit genocide as a specific crime, in particular, because of its critical role in the planning of a genocide, with the delegate from the USSR stating in this regard that, “It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized.” [...]

The ICTR found Akayesu guilty of inciting to genocide and, in so doing, elaborated three important dimensions to the crime of incitement to genocide: the mens rea element, the “public” element, and the “directness” element. Hateful speech not satisfying these elements, though potentially heinous and inflammatory, is not considered illegal under international law.

The mens rea element of the crime immediately distinguishes it from protected speech. Indeed, the mental component of incitement to genocide alone suffices to ensure that legitimate expression will not be caught by the prohibition. The Trial Chamber explained that

The mens rea required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

The “public” element of the speech is deduced in large part from the forum in which the comments are aired. The Trial Chamber thus referred to a line of authority that interpreted “public” to refer to any comments spoken in a public place, as well as the International Law

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37 Supra note 35 at para. 151. Emphasis added.
38 Ibid., at para. 560. Emphasis added.
Commission characterization of “public incitement” as occurring where there is “a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television.”

Finally, the “directness” element is satisfied where the incitement “specifically provoke[s] another,” as contrasted with “mere vague or indirect suggestion.” The Trial Chamber took care to emphasize that the incitement must be viewed “in the light of its cultural and linguistic content,” and that it would determine this question by “focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.”

Later case law also stressed the need to understand the impugned comments in context in order to determine whether they constitute “incitement” or not. The ICTR has explained that context alone can define the line between hateful rhetoric and illegal incitement:

A statement of ethnic generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement.

Accordingly, just as incitement contributes to the genocidal process, the existence of this larger process will inform the legal analysis of the incitement.

In the Ruggiu case, context was analyzed for a slightly different purpose—not to understand its intended impact, but simply to understand its intended meaning. This inquiry was necessary because of the accused’s use of euphemism. In rendering its decision after Georges

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39 Ibid., at para. 556.
40 Ibid., at para. 557.
41 Ibid., at paras. 557-558.
Ruggiu pled guilty to incitement to genocide, the Trial Chamber explained not only how Ruggiu’s phrases were spoken, but more importantly, how they were understood. Notably, the tribunal alluded to how the meaning of phrases could change over time:

The accused acknowledges that the widespread use of the term “Inyenzi” conferred the de facto meaning of “persons to be killed”. Within the context of the civil war in 1994, the term “Inyenzi” became synonymous with the term “Tutsi”. The accused acknowledges that the word “Inyenzi”, as used in a socio-political context, came to designate the Tutsis as “persons to be killed”.

[...]

The accused admits that as part of the move to appeal for, or encourage, “civil defence”, he made a public broadcast to the population on several occasions to “go to work”. The phrase “go to work” is a literal translation of the Rwandan expression that Phocas Habimana, Manager of the RTLM, expressly instructed the accused to use during his broadcasts. With time, this expression came to clearly signify “go fight against members of the RPF and their accomplices.” With the passage of time, the expression came to mean, “go kill the Tutsis and Hutu political opponents of the interim government.”

The principle that euphemism cannot exculpate a genocidaire was again affirmed through the tribunal’s reasoning in the Media Case, as it became known. In this decision, the ICTR elaborated the analysis to pursue in determining whether hateful speech regarding race, ethnicity, and nationality, falls under the banner of legitimate expression or criminal advocacy. Professor Gregory Gordon has distilled from the tribunal’s decision four specific elements useful in analyzing allegedly inciteful content: purpose, text, context, and the relation of the speaker to the subject.

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44 Ibid., at paras. 44(iii)-(iv).
45 Supra note 42.
With regard to purpose, the determining factor is whether the intent “in publicly transmitting the material was of a bona fide nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities).”\(^{47}\) For instance, the tribunal reviewed case law to the effect that when an interviewer takes care to distance himself from the remarks of his interview subject, it operates as an indicator that the purpose in question was to disseminate news rather than to propagate racist views.\(^ {48}\)

With regard to text, the ICTR referred back to the Faurisson case,\(^ {49}\) a decision involving a Holocaust denier in which the United Nations Human Rights Committee considered the meaning of the term “incitement” at Article 20(2) of the International Covenant on Civil and Political Rights.\(^ {50}\) The ICTR noted how the Committee focused on the use of the term “magic gas chamber” in determining that Faurisson was motivated by anti-Semitism and not the pursuit of historical truth.\(^ {51}\)

Examination of context – the importance of which has already been discussed – involves analysis of how such language is used in the immediate as well as the historical context, operating to shed light on the words uttered. On this point, the tribunal referred to jurisprudence from the European Court of Human Rights emphasizing how a general statement about massacres needs to be understood in the context of the massacres taking place at that time. The ICTR quoted the European Court’s statement that, understood as such, the speaker’s words were “likely to exacerbate an already explosive situation...”\(^ {52}\)

\(^{47}\) \textit{Supra} note 42, at para. 1001.
\(^{50}\) 999 U.N.T.S. 171 (1966).
\(^{51}\) \textit{Supra} note 42, at para. 1001.
\(^{52}\) \textit{Ibid.}, at para. 1004. The case being referenced by the Trial Chamber is the Zana case: Zana \textit{v. Turkey}, ECHR, 1997-VII, no. 57.
Prof. Gordon’s fourth factor – the relationship of the speaker to the subject – is based on the Trial Chamber’s recognition that “special protections” have been developed in jurisprudence to take into account “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.” While the Appeals Chamber appeared lukewarm to the formulation of a rule based on this principle as such, it did ultimately agree with the Trial Chamber’s overall analysis.

Two final ICTR decisions on incitement to genocide are noteworthy in the context of the present review. The Kambanda case implicated the leader of Rwanda’s caretaker government during the genocide (Jean Kambanda) and stands as a testament to the principle that nobody – not even heads of State – is above the law against incitement to genocide. Indeed, Kambada’s conviction marked the first conviction in history of a head of State for this crime. Kambanda pled guilty to directly and publicly inciting genocide (among other crimes); the acts for which he was convicted on this charge included encouraging a radio station on-air to continue inciting violence and calling it an “indispensable weapon in the fight against the enemy,” congratulating individuals who already killed victims, and speaking before different audiences encouraging massacre.

One judgment that is presently on appeal – the Bikindi decision – marks a more recent application of incitement principles by the ICTR. Simon Bikindi was a popular singer in Rwanda

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53 Supra note 42, at para. 1008.
54 “The Appeals Chamber has a certain difficulty with these paragraphs. It notes, on the one hand, that the relevant issue is not whether the author of the speech is from the majority ethnic group or supports the government’s agenda (and by implication, whether it is necessary to apply a stricter standard), but rather whether the speech in question constitutes direct incitement to commit genocide. On the other hand, it recognises that the political or community affiliation of the author of a speech may be regarded as a contextual element which can assist in its interpretation:” supra note 42, at para. 713.
55 Ibid., at para. 715.
57 Supra note 36.
and his charge of direct and public incitement to genocide was based both on his songs, which
the prosecution argued in themselves satisfied the elements of the crime, and on two speeches he
gave over a vehicle’s loudspeaker while travelling. Applying the jurisprudential principles noted
above, and on consideration of the evidence, the Trial Chamber determined that Bikindi’s songs
were not illegal incitement per se, but his two speeches were. Interestingly, the Trial Chamber
elaborated how it was able to reach this conclusion despite Bikindi’s positive personal
relationships with Tutsi:

In reaching its conclusion, the Chamber has considered the evidence that
Bikindi’s second wife was Tutsi, and that he lived and worked with Tutsi
on good terms. It has also considered the evidence that Bikindi assisted
some Tutsi during the genocide while in Nyundo and supported some
Tutsi while in exile in Zaire. However, the Chamber is of the view that
Bikindi’s direct and public address on the Kivumu-Kayove road leaves no
doubt as to his genocidal intent at the time. Bikindi could not have been
unaware of the targeting of Tutsi throughout Rwanda, including Gisenyi
préfecture, at the time, a targeting that he had encouraged in the past by
exhorting people to kill Tutsi in 1993 in Kivumu. Likewise, he could not
have been unaware of the impact that his words would have on the
audience, the words of a well-known and popular artist, an authoritative
figure for the Interahamwe and a man perceived as an influential member
of the [National Revolutionary Movement for Development].

The Bikindi case also raised explicitly a tension that underlies many judgments on
incitement to genocide: the appropriate balance between freedom of expression and the
criminalization of genocidal incitement. Recognizing the right to freedom of expression, the
Trial Chamber explained:

However, this right is not absolute. It is restricted by the very same
conventions and international instruments that provide for it. For example,
the [Universal Declaration of Human Rights] states that everyone should
be free from incitement to discrimination. Similarly, the [International
Covenant on Civil and Political Rights] prohibits war propaganda, as well
as the advocacy of national, racial or religious hatred that constitutes
incitement to discrimination, hostility, or violence, and the [International
Convention on the Elimination of All Forms of Racial Discrimination]

58 Ibid., at para. 425.
aims to outlaw all forms of expression that explicitly lead to discrimination. Each of the regional conventions mentioned above also restrict the freedom of expression: the [European Convention on Human Rights] recognises that there are “duties and responsibilities” that accompany the freedom of expression and thus limit its application; the [American Convention on Human Rights] allows for legal liability regarding acts that harm the rights or reputations of others, or that threaten the protection of national security, public order, or public health or morals and considers as offences punishable by law any propaganda for war and advocacy of national, racial or religious hatred that constitute incitements to lawless violence; and the [African Charter on Human and People’s Rights] restricts the right to that which is “within the law”. The Chamber notes that the restrictions on this right have been interpreted in the jurisprudence of the various adjudicating bodies created from the international and regional instruments above. The Chamber also notes that a large number of countries have banned the advocacy of discriminatory hate in their domestic legislation.\(^{59}\)

In fact, among those countries banning the advocacy of discriminatory hate in their domestic legislation is Canada. The Canadian laws on hate propaganda have passed scrutiny under the _Charter of Rights and Freedoms_ by the Supreme Court of Canada.\(^{60}\) And recently, the Supreme Court had the opportunity to examine the offence of incitement to genocide directly.

In the watershed _Mugesera_ decision (in which I was implicated in my former capacity as Minister of Justice and Attorney General of Canada),\(^{61}\) the Supreme Court considered the validity of a deportation order issued against Léon Mugesera. Mugesera was a formerly active member of a hard-line Hutu political party who incited to murder, genocide and hatred in a speech to 1,000 people; after fleeing from Rwanda, Mugesera successfully applied for Canadian permanent residency. The Supreme Court upheld the deportation order that was issued against Mugesera when the government discovered his past incitement, holding that the content of Mugesera’s speech rendered him inadmissible to Canada.

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\(^{59}\) _Ibid._, at para. 380.


\(^{61}\) _Supra_ note 36.
Basing itself substantially on international jurisprudence, the Court in *Mugesera* lent its support to the principles on incitement to genocide established by the ICTR, including the insight that it is not necessary to establish a causal link between the incitement and genocidal acts that followed (if any).\(^6\) Indeed, confirmation of this point is crucial not only in the prosecution of past incidents of incitement to genocide, but equally in the prevention of future cases of genocide. The bottom line – echoed now in both Canadian and international legal jurisprudence – is that the world need not wait until genocide has occurred to take action against those who would perpetrate it. To the contrary, international law mandates immediate action.

Holding those who incite to genocide responsible for their crimes under international law, even before the genocides they preach have materialized, has the potential to be an effective juridical tool in combating genocide. This insight finds particular application in the case of contemporary Iran.

**Iran: A Case Study in State-Sanctioned Incitement to Genocide**

In President Mahmoud Ahmadinejad’s Iran,\(^6\) one finds the toxic convergence of the advocacy of the most horrific of crimes embedded in the most virulent of hatreds. It is dramatized by the parading in the streets of Teheran of a Shihab-3 missile draped in the words “Israel must be wiped off the map”\(^6\) while the assembled thousands are exhorted to chants of “Death to Israel.”\(^6\) Moreover, Ahmadinejad’s Iran increasingly resorts to incendiary and

\(^6\) *Ibid.*, at paras. 84-85.

\(^6\) From the outset, it should be noted that the comments herein on Iran refer uniquely to the current regime, embodied most notably by Supreme Leader Ayatollah Ali Khamenei and President Mahmoud Ahmadinejad. In particular, the present regime must be distinguished from the peoples of Iran who are themselves increasingly the target of massive human rights repression, as will be discussed in further detail below.


\(^6\) Video evidence of numerous “Death to Israel” chants is available online through the *Middle East Media Research Institute*, accessible at: http://www.memritv.org/content/en/search.htm.
demonizing language, including epidemiological metaphors reminiscent of Nazi and Rwandan incitement. As one involved as Minister of Justice in Canada in the prosecution of Rwandan incitement, I can state that the aggregate of precursors of incitement in the Iranian case are more threatening than were those in the Rwandan one. In the sections that follow, the early stages of a genocidal process can be discerned, as Iran engages in dehumanization, demonization and genocidal incitement against Jews and Israel.

Delegitimization

Iran has started the delegitimization process by impugning the legitimacy of Israel as a nation, and Israelis and Jews as a people, and singling them out for opprobrium and enmity warranting their demise. In segregating out these intended victims from the Iranian population, the Government of Iran has framed this relationship as a zero-sum game, in which inherently competing interests can never be reconciled, a peaceful co-existence cannot be imagined, and the only solution is the elimination of the adversarial enemy:

There is only one solution to the Middle East problem, namely the annihilation and destruction of the Jewish state.66

In this artificial dialectic, Israel is wrongly portrayed as being the anti-thesis to “Muslims,” a broad group in no way represented by the contemporary Iranian leadership. The consequence is that the issue becomes falsely framed as a clash of civilizations, where none, in truth, exists:

Who are Israelis? They are responsible for usurping houses, territory, farmlands and businesses. They are combatants at the disposal of Zionist operatives. A Muslim nation cannot remain indifferent vis-a-vis such

people who are stooges at the service of the arch-foes of the Muslim world.\textsuperscript{67}

Death to America and death to Israel are not only words written on paper, but a symbolic approach that reflects the desire of all the Muslim nations.\textsuperscript{68}

This delegitimating paradigm finds further expression in the rhetoric treating Israel as a foreign and alien entity that has no rightful place in the Middle East. Indeed, Israel is often referred to simply as the “Zionist regime”—a convenient euphemism that avoids any implicit recognition of the State and is itself utilized as a means of delegitimation. Accordingly, Foreign Minister Manouchehr Mottaki has stated:

The West has tried to impose a fabricated regime on the Middle East, but even after 60 years, the Zionist regime has neither gained any legitimacy nor played any role in this region.\textsuperscript{69}

President Mahmoud Ahmadinejad has frequently – and publicly – referred to the illegitimate “other” – Israel and its people – in a similar manner. For example, on a visit to Rome, he called Israel a “false regime.”\textsuperscript{70} And in front of the United Nations General Assembly, he labelled Israel a “criminal” and “forged” regime of “murderers” that “invade[s]” and “assassinate[s],” the whole created on “other people’s land by displacing, detaining, and killing the true owners of that land.”\textsuperscript{71}


\textsuperscript{71} Text of the speech delivered by President Mahmoud Ahmadinejad at the United Nations General Assembly, 23 September 2008, as translated by the Presidency of the Islamic Republic of Iran News Service \textit{[UNGA Speech]}. Available at: http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.html?itemNo=1024097.
This exclusionary rhetoric underpins the antimony that Ahmadinejad’s Iran seeks to promulgate: between the false Israel “other,” seen as a Zionist Western regime that was artificially placed in the Middle East; and between Muslims, held out as not only the rightful inhabitants of the region, but also as a group usurped by this alien “other.” As the words of Supreme Leader Ayatollah Ali Khamenei demonstrate, this basic distinction provides the foundation on which the edifice of hatred is constructed, underpinned by ugly anti-Semitic tropes:

What are you? A forged government and a false nation. They gathered wicked people from all over the world and made something called the Israeli nation. Is that a nation? All the malevolent and evil Jews have gathered there. . . . Those [Jews] who went to Israel were malevolent, evil, greedy thieves and murderers.\textsuperscript{72}

\textit{From delegitimization to dehumanization}

Against this context of the singling-out and delegitimization of the alien “other” Israel, the next genocidal precursor is the dehumanization of Israelis and Jews through the use of epidemiological metaphors reminiscent of the dehumanization of the Jews during the Holocaust and the dehumanization of Tutsi during the genocide in Rwanda. Indeed, in the genocide-fostering process, biological euphemisms are not just rhetorical tools; they seek to preclude the intended victims from even being considered human to begin with. Thus, just as Jews were labelled as “vermin” by the Nazis and the Tutsi were labelled as “cockroaches” in Rwanda, so too have Israelis and Jews been dehumanized and labelled in Iran as:

(a) a “filthy germ” and “savage beast;”

(b) a “cancerous tumour;”

(c) a “stain of disgrace” on the “garment of the world of Islam;”

(d) a “stinking corpse;”

(e) a “cancerous bacterium;”

(f) stuck in a “cesspool created by itself and its supporters;”

(g) “like cattle—nay, more misguided;”

(h) a “rotten, dried tree;” and

(i) an “unclean regime.”

From dehumanization to demonization

Related to the dehumanization process is the demonizing process. Under this paradigm, the would-be victims of genocide are portrayed as inspirations of the devil. Dehumanization


75 President Mahmoud Ahmadinejad, in a speech on 26 October 2005. See Teitelbaum, supra note 73.


coupled with demonization accomplishes the dual purpose of making the would-be victim appear not only to be less than human (if not sub-human), but also to appear more threatening, thereby providing a warrant for genocide.

Indeed, demonization of Israel and Jews is frequent in Ahmadinejad’s Iran. In this vein, President Mahmoud Ahmadinejad:

(a) has stated that “Zionists are the true manifestation of Satan,” and that the “Zionist regime” is the “flag of Satan;”

(b) has remarked that “[n]ext to them, all the criminals of the world seem righteous;”

(c) has called Israelis “bloodthirsty barbarians,” stated that they have “no boundaries, limits, or taboos when it comes to killing human beings,” that Israel is “fighting a war against humanity,” and that Zionism is the main cause of all corruption and wickedness in the contemporary era;

(d) has further referred to Israel as a “criminal and terrorist Zionist regime which has 60 years of plundering, aggression and crimes in its file;” and

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86 Ibid.
builds on this demonic paradigm using different adjectives and metaphors in his speeches, referring, for instance, to Israel as the “epitome of perversion.”

He has elaborated:

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

The demonization of Jews in Ahmadinejad’s Iran often fits within the traditional antisemitic canard of a small cabal of Jews running the world:

The dignity, integrity and rights of the American and European people are being played with by a *small but deceitful number of people called Zionists*. Although they are a miniscule minority, they have been *dominating an important portion of the financial and monetary centers as well as the political decision-making centers of some European countries and the US in a deceitful, complex and furtive manner*. It is deeply disastrous to witness that some presidential or premiere nominees in some big countries have to visit these people, take part in their gatherings, swear their allegiance and commitment to their interests in order to attain financial or media support.

This means that the great people of America and various nations of Europe need to obey *the demands and wishes of a small number of acquisitive and invasive people*. These nations are spending their dignity and resources on the crimes and occupations and the threats of the Zionist network against their will.

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92 *UNGA Speech, supra* note 71. Emphasis added.
Iranian Presidential Advisor Ali Ramin has even resurrected the historic falsehood of dirty Jews poisoning Christian wells—a pernicious and demonizing myth used to fuel antisemitism in the Middle Ages:

But among the Jews there have always been those who killed God’s prophets and who opposed justice and righteousness. Throughout history, this religious group has inflicted the most damage on the human race, while some groups within it engaged in plotting against other nations and ethnic groups to cause cruelty, malice and wickedness. Historically, there are many accusations against the Jews. For example, it was said that they were the source for such deadly diseases as the plague and typhus. This is because the Jews are very filthy people. For a time people also said that they poisoned water wells belonging to Christians and thus killed them.  

Supreme Leader Ali Khamenei has combined these two images – of Jews conspiring against the world and of Jews waging covert war on a people – in elaborating to his audience what he saw as the “satanic design:”

[T]he occupation of Palestine [by the Jews] is part of a satanic design by the world domineering powers, perpetrated by the British in the past and being carried out today by the United States to weaken the solidarity of the Islamic world and to sow the seeds of disunity among us.

Ultimately, the strategy of demonization seamlessly leads to prophecy—and incitement:

A Zionist organization with 2,000 [members] and with 7,000 or 8,000 activists have brought the world to a state of confusion. Let me tell them that if they themselves do not wrap up Zionism, the strong arm of the peoples will wipe these germs of corruption off the face of the earth.

From incitement to hate to incitement to genocide

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Empowered by the culture of hate it has planted with impunity, Ahmadinejad’s Iran feels no need to leave its genocidal intentions as an unspoken conclusion. To the contrary, the calls for Israel’s destruction by Iranian officials are explicit and without ambiguity.

Thus, President Mahmoud Ahmadinejad has publicly called for Israel to be “wiped off the map.”

The context of this comment is important, lest its clear message be somehow misunderstood. When President Ahmadinejad called for Israel to be “wiped off the map,” he was speaking to thousands of students at a conference entitled the “World Without Zionism.” Indeed, President Ahmadinejad hosted this conference in Tehran. Despite international condemnation, when given the opportunity to retract his statement, President Ahmadinejad chose instead to add to their weight, remarking: “My words are the Iranian nation’s words.”

In his call for annihilation, President Ahmadinejad referenced the former Iranian Supreme Leader Ayatollah Ruhollah Khomeini. On June 2, 2008, speaking at the shrine where the Ayatollah is buried, President Ahmadinejad repeated:

[Ayatollah Khomeini’s] ideal is about to be materialized today... The Zionist regime is in a total dead end and, *God willing, this desire will soon be realized and the epitome of perversion will disappear off the face of the world.*

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99 Hossein Jaseb and Fredrik Dahl, “Ahmadinejad says Israel will ‘disappear,’” *Reuters*, 2 June 2008. Available at: http://www.reuters.com/article/idUSL02612506200806062?pageNumber=2&virtualBrandChannel=0&sp=true. This quote has also been translated as ending “this germ of corruption will be wiped off:” see the translation by the *Middle East Media Research Institute* at: http://www.memritv.org/clip_transcript/en/1784.htm. Emphasis added.
President Ahmadinejad has repeated this call for genocide many other times as well. To cite a few occasions:

Israel’s days are numbered… [T]he people of the region would not miss the narrowest opportunity to annihilate this false regime.\(^{100}\)

[T]he Zionist regime is heading toward annihilation.\(^{101}\)

We will witness [the] dismantling of the corrupt regime in [the] very near future.\(^{102}\)

The region and the world are prepared for great changes and for being cleansed of Satanic enemies.\(^{103}\)

God willing, in the near future we will witness the destruction of the corrupt occupier regime.\(^{104}\)

This [Zionist] regime is on the verge of death, and we advise you to start thinking about your long-term interest and long-term relations with the peoples of the region. At the end of the day, these are all ultimatums.\(^{105}\)

[T]oday, the occupier regime [Israel] – whose philosophy is based on threats, massacre and invasion – has reached its finishing line.\(^{106}\)

[T]his fake regime [Israel] cannot logically continue to live.\(^{107}\)

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It is not only President Ahmadinejad who calls for the annihilation of Israel. The Supreme Leader of Iran, Ayatollah Ali Khamenei, makes it clear that this is the basic premise upon which the State operates:

It is the mission of the Islamic Republic of Iran to erase Israel from the map of the region. ¹⁰⁸

Iran’s stance has always been clear on this ugly phenomenon [Israel]. We have repeatedly said that this cancerous tumour of a state should be removed from the region. ¹⁰⁹

There is only one solution to the Middle East problem, namely the annihilation and destruction of the Jewish state. ¹¹⁰

[W]e are on a collision course with the occupiers of Palestine and the occupiers are the Zionist regime. This is the position of our regime, our revolution and our people. ¹¹¹

Nor is this core State principle dependent on the vicissitudes of short-term foreign policy objectives. For example, in the context of the 2006 Lebanon War, President Mahmoud Ahmadinejad advocated an “immediate cease-fire” while also emphasizing that “the main solution is for the elimination of the Zionist regime.” ¹¹²

Repeated calls for the destruction of Israel, and “prophecies” of its demise, all work to normalize the idea of genocide to the Iranian population. Articulated in the context of

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¹⁰⁸ Ahmadinejad: The Secret History of Iran’s Radical Leader, Kasra Naji (Los Angeles: University of California Press, 2008), at p. 144. This quote has also been translated as stating that “the perpetual subject of Iran is the elimination of Israel from the region:” See Teitelbaum, supra note 73.

¹⁰⁹ “Iran leader urges destruction of ‘cancerous’ Israel,” Reuters, 15 December 2000. Available at: http://archives.cnn.com/2000/WORLD/meast/12/15/mideast.iran.reut/. This quote has also been translated as ending “the cancerous tumour called Israel must be uprooted from the region:” see Teitelbaum, supra note 73.

¹¹⁰ Supra note 66.


demonizing rhetoric implying a clash of civilizations, calls for the annihilation of the Jewish State begins to appear not only moral and justifiable, but natural as well.

Chillingly, all this incitement appears to be sinking into the popular consciousness. President Ahmadinejad’s audience responds to his words instantly with chants of “Death to Israel.” And the media follows the Government’s lead in inciting genocide as well. For instance, on October 22, 2006, Resalat, an Iranian newspaper, mirroring an Qods (Jerusalem) Day speech by President Mahmoud Ahmadinejad, wrote in an editorial:

> The nation of Muslims must prepare for the great war, so as to completely wipe out the Zionist regime, and remove this cancerous growth. Like the Imam [Ayatollah] Khomeini said: ‘Israel must collapse’.

### Conclusion

State-sanctioned incitement to genocide is a singular and unique threat to international peace and security. While over 60 years have passed since the international community sought to address it by prohibiting genocidal incitement, this juridical response – absent tangible action to enforce it – has proven manifestly inadequate. We continue to be haunted by the recent preventable genocides in Rwanda and the former Yugoslavia, while our collective failure to end genocide in Darfur results in more lives lost on a daily basis. Meanwhile, Ahmadinejad’s Iran has emerged as the world’s first realistic threat – albeit still a nascent one – of a nuclear genocide.

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113 Supra note 65.
114 See “Qods (Jerusalem) Day in Iran: ‘The Nation of Muslims Must Prepare for the Great War So As to Completely Wipe Out the Zionist Regime and to Remove This Cancerous Growth,’” Middle East Media Research Institute, Special Dispatch Series no. 1357, 15 November 2006. Available at: http://www.memri.org/bin/articles.cgi?Page=countries&Area=iran&ID=SP135706.
Such incitement should not be allowed to continue with impunity. Indeed, there is a moral and legal imperative to stop it. Among the many remedies available to the international community are the following:

- The incitement to genocide by Ahmadinejad and other Iranian leaders could be referred to the appropriate UN agencies. For instance, such referral may be accomplished pursuant to the Secretary-General’s authority under Article 99 of the *Charter of the United Nations* or by any state party to the *Genocide Convention* pursuant to its Article 8.
- The situation of genocidal incitement by Ahmadinejad and other Iranian leaders – including their complicity in crimes against humanity – could be referred by the UN Security Council to the Prosecutor of the International Criminal Court for investigation and prospective prosecution.\(^{115}\)
- State parties to the Genocide Convention could initiate an inter-state complaint against Iran before the International Court of Justice for its “direct and public incitement to commit genocide” in violation of the *Genocide Convention*, to which Iran is also a state party.\(^{116}\)
- Sanctions from the international community could be targeted not only against Iran’s illegal nuclear program, but its illegal genocidal incitement as well. The nuclear program represents merely the means to carry out genocidal intentions; the international community ought be focused on the latter as well.

A group of prominent international jurists, genocide experts and survivors has already united to call attention to Iran’s illegal genocidal incitement, and to call for action from state parties to the *Genocide Convention*, the United Nations, and the international community in

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\(^{116}\) *Supra* note 1, at arts. 3(c) and 9.
general in response. If genocide prevention is to have any meaning, the ubiquitous incitement to genocide of Ahmadinejad’s Iran must not be allowed to continue with impunity.

The legal apparatus for effectively preventing genocide exists. The jurisprudence, which both affirms the criteria of incitement to genocide and testifies to its harm, has been written. What remains is for preventative action to be taken on the basis of these already-established principles. As we have learned all too well, the cost of ignoring our responsibility to prevent is incalculable.

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117 See the Danger of a Genocidal and Nuclear Iran: The Responsibility to Prevent, a Petition released by the author and signed by leading jurists, genocide experts and survivors from around the world. It is available for consultation online at http://www.irwincotler.parl.gc.ca/documents/081209_petition.pdf.