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Chair

Mr. Scott Reid

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• (1305)

[English]

The Chair (Mr. Scott Reid (Lanark—Frontenac—Lennox and Addington, CPC)): Order, please.

We are the Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development. This is our 17th meeting of the second session of the 40th Parliament, and today we are honoured to have as our guest Professor Alan Dershowitz. Sometimes we say that an individual needs no introduction, and that's literally true in the case of Professor Dershowitz, and moreover, I would be doing him a disservice to attempt to start here, given his extraordinary curriculum vitae.

Without further ado, I'll turn the floor over to Professor Dershowitz, and I'll inform him that under our rules what happens is that we allow the witness time to speak and then we turn to the members of the committee and go through a round of questioning from each of the four parties, and hopefully, if there's time, which there may not be in this case, we'll do a second round from two of the parties, a total then of somewhere between four and six questions all told.

Without further ado, Professor Dershowitz, please, we'd enjoy hearing what you have to say.

Professor Alan Dershowitz (Professor of Law, As an Individual): Thank you so much. It's a great and distinct honour for me to have been invited to speak at this very important session. I'm only sorry I can't be there in person. I appreciate your willingness to allow me to do this by video conference.

I have read some of the previous testimony, and of course I've read the excellent petition for protection that was prepared with the assistance of the Honourable Irwin Cotler. I will not repeat what has been said previously or what is in the petition, though I certainly incorporate by reference much of the material that has previously been presented to you.

I have devoted my entire professional life to defending free speech, even of those such as Nazis, Holocaust deniers, virulent anti-Semites, and other bigots whom I fundamentally despise. I stand for a maximalist view of freedom of expression, and this has brought me into conflict even with some of my closest friends and associates. For example, I've debated the Honourable Irwin Cotler on several occasions with regard to hate crimes, group defamation, falsification of history, Holocaust denial, and advocacy of criminal conduct. I

believe that all these forms of expression, despicable and dangerous as they are, should be protected.

In my recent book, *Finding Jefferson*, I present arguments for why censorship laws are generally more dangerous than the speech that they seek to censor. Yet I'm here today calling for the criminalization of incitement to genocide as practised by the Iranian regime in general, and President Mahmoud Ahmadinejad in particular. Is there not a conflict between my lifelong defence of free speech and my support for treating Ahmadinejad as an international criminal? Let me explain why there is not, and indeed why my support for a maximalist view of free speech actually provides an important justification for indicting Ahmadinejad and his government for incitement to genocide.

The paradigm of free speech is the individual dissident protesting the actions of government. Censorship is a tool employed by governments against dissidents. This has been the case since the beginning of recorded history. The classic arguments in favour of freedom of speech presuppose the private individual confronting the power of government. The dissenter stands alone, often despised, not only by those in power but also by his fellow citizens. He or she often represents an extreme minority view unpopular with the general public. The awful powers of government sanctions and mass condemnation stand against the individual dissenter. Sometimes the dissenter is virtuous. Sometimes he is vicious. Sometimes he advocates peace. Sometimes he calls for violence.

We are incapable of writing laws that protect only the virtuous. Accordingly, for the marketplace of ideas to remain open, it is imperative that freedom of speech be available to those we despise. As H. L. Mencken once put it quite colourfully, the trouble about fighting for human freedom is that you have to spend so much of your life defending SOB's, for oppressive laws are always aimed at them originally, and oppression must be stopped in the beginning if it is to be stopped at all.

Experience has taught us that there cannot be free speech for me but not for thee. Accordingly, because I wanted freedom of expression for Martin Luther King to march through Birmingham, Alabama, I had to support freedom of expression for neo-Nazis to march through Skokie, Illinois. Because I support the right of Robert Mapplethorpe to exhibit beautiful art, I've had to support the right of Larry Flynt to publish the ugliest pornography.

Why then do I not also support the right of Ahmadinejad to incite genocide against the Jewish state, its citizens, and the Jewish people? There are several reasons. The first and most important is that he is not an individual speaking as a dissenter against his government. He is the Government of Iran speaking to suppress the rights of the individual. Governments do not have rights as such; individuals have rights in relation to the power of government. When Ahmadinejad incites genocide, he does so with the full force of the Iranian government behind him. This is especially dangerous in a regime that permits no dissent.

I was recently in the presence of Ahmadinejad and several dozen of his Iranian subjects at the Durban II conference in Geneva. I took the opportunity to have discussions with many Iranian citizens of different ages. I engaged them in conversation about Ahmadinejad's views. It was clear that they were terrified that anything they might say might be construed as disagreement with Ahmadinejad. I asked several young people whether they thought the Holocaust was a myth, as Ahmadinejad had told them, or whether Israel was a cancer that must be wiped off the map. They quickly agreed with Ahmadinejad's views. I asked them whether they knew any people who disagreed. They said no.

There is no marketplace of ideas, at least not officially, in Ahmadinejad's Iran. Accordingly, Ahmadinejad's incitement to genocide is not offered as an idea to be debated. Instead, it is a direction, an instruction. It is closely analogous to the incitements to genocide that have been punished in Rwanda by the international courts. It is the equivalent of a military order given by a commander to his troops, by a mafia don to his soldiers, or by a religious leader to followers. It is to be followed without question or without dissent. In this respect, it is the antithesis of freedom of speech, the opposite of the marketplace of ideas. It closes off discussion, debate, and dissent.

The second reason I support prosecution of Ahmadinejad is that the combination of such incitement to genocide and the development of nuclear weapons presents a clear and present danger of actual genocide to the world in general and to Israel and the Jewish people in particular.

There are those who argue that Ahmadinejad's call to wipe Israel off the map is intended as a metaphor, or has been translated incorrectly, or is merely a political statement. This misses the point.

Ahmadinejad well knows that his statements will be understood by many as a call for genocide. When a leader of a nation that will soon have nuclear weapons dehumanizes an entire group, as Ahmadinejad and the Iranian regime have dehumanized the citizens of Israel and the Jewish people—all of this is spelled out in the petition to which I referred previously—a demand from that leader to wipe Israel off the map is more than an incitement to genocide. It is a specific direction and instruction to use nuclear weapons to create the firestorm that Ahmadinejad has called for. These weapons need not be fired from rocket launchers or dropped from planes. They can be smuggled into a country as dirty bombs by individuals who have been incited by what they regard as superior orders or religious obligations.

Nor is Ahmadinejad alone. Listen to an account of a statement made by Hashemi Rafsanjani to an American journalist, in which he boasted that:

...an Iranian [nuclear] attack would kill as many as five million Jews. Rafsanjani estimated that even if Israel retaliated by dropping its own nuclear bombs, Iran would probably lose only fifteen million people, which he said would be a small "sacrifice" from among the billion Muslims in the world.

Now, leaders of a nuclear-armed nation that offers such genocidal and suicidal calculations are, in effect, issuing instructions to their citizens. They are guilty of incitement to genocide and worse. They must be stopped before the genocide is carried out. Words matter. Instructions matter. They should be prosecuted, not only for what they've said but for what they've done and for what they have urged others to do. They should be put on watch lists. They should be denied entry into peaceful nations that are committed to preventing genocide.

The world cannot afford once again to look back after genocide and regret that we did not take seriously the incitements to genocide that preceded the awful event. We have had too long a history, with two repeated episodes, of looking back at genocides that were preventable and saying we wish we had done something earlier.

Now is the opportunity to satisfy our international obligation to prevent genocide before it occurs. As Edmund Burke observed many years ago, all that is required for evil to succeed is for good men—and, I would add, good women—to remain silent. I know that you will not remain silent in the face of this demonstrable evil.

Thank you very much.

• (1310)

The Chair: Thank you, Professor.

We'll start our questioning with seven-minute rounds.

Professor Cotler.

Hon. Irwin Cotler (Mount Royal, Lib.): Here is my first question to Professor Dershowitz, who indeed is the primary exponent of the first amendment doctrine in the U.S. Would it be fair to say that Ahmadinejad's incitement, as you appreciate it, if it were in the United States, would also be, in terms of incitement to violence, not protected speech even under the first amendment, though, for all the other reasons you have mentioned, clearly prohibited and criminal speech under the international law and genocide convention prohibition against the direct and public incitement to genocide? That's the first one.

The second and not unrelated question is this. You've made reference to the criminal law remedy of prosecution. One, is that remedy indeed possible? As we know, Iran is not a state party to the International Criminal Court treaty; therefore, it would require a reference from the UN Security Council. Number one, is that possible, and should we pursue it even if it is not possible because of the intrinsic value of making the case? Second, what other remedies are there to bring Ahmadinejad's Iran, as a country, to account, as well as individual liability remedies?

•(1315)

Prof. Alan Dershowitz: As to the first question, I have absolutely no doubt that even under the United States law, which, as you all know, states the most extreme position on freedom of speech under our first amendment, this would constitute criminally punishable conduct.

First of all, incitement to violence, which satisfies the clear and present danger test, is not a protected speech, but what I've argued is that this is more than merely an incitement, as if incitement were not enough. This is more like a direction. This comes under the principle that when you tell somebody to do something, if you're the CEO of a company and you even indirectly instruct somebody to commit a crime, that conduct, the statement that you made to them, is not protected speech if it's in the form of a direction in a hierarchical situation.

Moreover, in the United States freedom of speech is an individual right. It's not a right of government. Indeed, there are restrictions on what governments can do under the doctrine of state action. For example, although I as an individual citizen can make certain statements that perhaps are racist or sexist, for a government official or the President of the United States to make such statements as part of state action might constitute punishable violations.

So I think there are many reasons under traditional approaches to the U.S. constitution, under the so-called Brandenburg test, which sets out when incitement to violence can be punished. Under Oliver Wendell Holmes' famous formulations, yes, he said every idea is an incitement, but it wouldn't include this kind of hierarchical idea.

I know of no case that gives the government the right, under any kind of first amendment or analogous doctrine, to direct his subjects to engage in this kind of genocide. So I am confident that American law would not provide any kind of a barrier to successful prosecution of Ahmadinejad's statements.

The second question is whether or not the International Criminal Court has jurisdiction over this matter, and of course, as Professor Cotler correctly suggested, because Iran is not a signatory it has to go through much more complicated mechanisms, which include veto power. I personally wish that the International Criminal Court were universally recognized. Its excellent chief prosecutor has indicated that he would look very seriously at all attempts to instigate or incite genocide, but I think it's unlikely that there would be a successful mandate from the Security Council to the International Criminal Court to go forward with this kind of prosecution.

Nonetheless, there's no reason not to begin an investigation, not to formulate an indictment, and not to, in the court of public opinion, make the case against Ahmadinejad and the Iranian regime. And there are also other sanctions, government to government, that can be proposed. I mentioned watch lists in my original statement. We saw just yesterday that the British government indicated a series of people who would not be welcomed into Great Britain. Ahmadinejad should be on any such list. Yes, he has to be invited to the United Nations, but he doesn't have to be welcomed by the country.

My only view is that it was a mistake for the President of Switzerland to offer a hand of friendship to Ahmadinejad on behalf of the Swiss government and perhaps even on behalf of the United

States government, which does the diplomatic work in relation to Iran, when Ahmadinejad made his racist and horrible genocidal speeches at the United Nations. There's a distinction between tolerating a speaker like this, because he is the head of state and the state is a member state of the United Nations, and extending him an arm of friendship.

I think there are many sanctions. There is also the possibility of civil lawsuits by potential victims. There is of course sovereign immunity, which is a barrier. But everything should be tried. This is too serious a matter to simply say that because there is no certainty of success we shouldn't try. We should try every legal option available to the civilized world to prevent this kind of uncivilized incitement and the potential of such horrible conduct.

•(1320)

Hon. Irwin Cotler: I have one brief question.

The Obama administration has indicated that it is going to be engaging Iran. Do you see that in any way as contradictory to seeking to hold Iran accountable?

Prof. Alan Dershowitz: I favour the Obama administration's efforts to reach out to everybody. You negotiate with everybody. You make peace not with your friends but with your enemies. That reaching out to negotiate does not in any way negate accountability; indeed, it increases the need for accountability. If you're going to reach out, then you have to hold accountable those to whom you are reaching out.

The great mistake of the 1930s was not negotiating with the Nazi regime, with Hitler, with Mussolini, with Japan, but in not holding them accountable, particularly the German government, for what it had promised it would do, threatened it would do. There just wasn't enough accountability. There was too much legitimization of the Nazi regime by other governments. So I see no inconsistency between the Obama administration reaching out and also holding a stick.

I think a metaphor for what the Obama administration might likely do was how it dealt with the Somali pirates when they captured an American citizen. They negotiated, they talked, but when it became clear there was a substantial risk that an American citizen might be killed, they acted. So with one hand always extend the olive branch of peace, always negotiate, always talk; but action must be kept as an option, and holding governments accountable for their own talk. After all, if we're talking, that means we take words seriously. If we take words seriously, then we must take the words of those with whom we are negotiating and extending an arm of discussion and hold them accountable for their words.

The Chair: Unfortunately, that's it, Mr. Cotler.

[*Translation*]

Ms. Thi Lac, you have the floor.

Mrs. Ève-Mary Thāi Thi Lac (Saint-Hyacinthe—Bagot, BQ): Good afternoon, Professor. I thank you for your presentation.

I have few small questions. You referred to individuals being indicted in Rwanda, but I think these indictments were issued after the fact. You also stated that we should convict individuals for promoting genocide. How could we carry out these anticipatory convictions?

[English]

Prof. Alan Dershowitz: It's a very important and great question.

I think everybody in this room and certainly many around the world wish we could have prevented the Rwanda genocide. The great tragedy is that while the genocide was going, the United Nations and the United States did so little. I think it was the greatest failing of the United States administration during that period of time. One of the reasons the International Criminal Code was created was that it has a mandate not only to prosecute genocidal crimes but to seek to prevent them. After all, Oliver Wendell Holmes once said that all law is preventive. Its goal is to prevent horrible crimes from occurring.

One of the great challenges—and I've been writing for 40 years about this issue—is when it's appropriate to engage in preventive actions. I wrote a book called *Preemption: A Knife That Cuts Both Ways*, which deals with many of these issues. This is a clear case. This is an easy case, just as the case would have been easy against Adolf Hitler in the 1920s and 1930s. Ahmadinejad could not be clearer about what his intentions and goals are. Rafsanjani could not be clearer in his calculation about how many deaths it would take to destroy the Jewish people and that it would be worth it. There are going to be close cases. There are going to be difficult cases. This is not a close case. This is a case where Ahmadinejad is essentially challenging the free world, the civilized world, to respond. He's not hiding his views. He is stating them very directly.

I was in the room when Ahmadinejad made his notorious speech at the United Nations a week or two ago. For me the most disturbing thing was not the speech itself, but the raucous, enthusiastic applause that his speech got from so many representatives of nations around the world. I walked out with the delegations that walked out in protest. As I was walking out, I was watching these representatives of these nations, and I can tell you, it was not polite applause. I've seen polite applause at UN meetings. This was enthusiastic, raucous applause as if to say in the most uncertain terms, we agree with you. That's why this is such a grave danger and why the world not only has the right but the obligation to step in and do whatever it can to prevent it.

It won't be easy. It won't be easy to make a case. It's always harder to make a case in anticipation of genocide or in anticipation of a terrorist attack. That's why we have conspiracy laws and attempt laws and other such laws. But it is possible. If you have the will to do it, it is possible to do it and stop this genocide before it occurs.

• (1325)

[Translation]

Mrs. Ève-Mary Thaï Thi Lac: Have anticipatory convictions ever occurred? Has it already been done?

[English]

Prof. Alan Dershowitz: That is a very good question, and the answer is that it has not occurred under international law, as far as I know, although international law....

The reason I cited the Rwanda case is that it undercuts the notion that there's never a possibility of prosecuting people for what they have said. The media people and government people were prosecuted for the directions they offered—the instructions, the locations of people—and of course, infamously, at Nuremberg the editor of *Der Stürmer* magazine was prosecuted and executed solely for what he said. That's why I cited the Rwanda case.

There are, of course, cases around the world of countries that abide human rights having punished people not after the crimes have occurred, but in anticipation of the crimes, in conspiracy-type cases, attempt cases, and solicitation cases. Take, for example, a solicitation case in which somebody offers somebody money to kill an important public official. We obviously don't have to wait until that terrible act of assassination occurs. We do prosecute people for what they have said and the directions they have given, if we're fortunate enough to catch them before the crimes have occurred. We are fortunate enough, because there is a public record of the directions issued by Ahmadinejad and a firm basis for anticipatory conviction without compromise of civil liberties and human rights.

[Translation]

Mrs. Ève-Mary Thaï Thi Lac: In your presentation, you also referred to tolerance, on the one hand, and to the fact that some countries or delegations support the President of Iran, on the other. What do you think would be acceptable requirements, if we consider even a minimum level of tolerance?

Finally, you referred to prosecuting individuals for incitement to genocide. Given that no one has ever been convicted by anticipation for genocide, how do we decide between the rights of individuals and those of government, in the case of the President of Iran?

[English]

Prof. Alan Dershowitz: International law clearly provides that incitement to genocide is a punishable offence, which means that the international community has reached a consensus that, in an appropriate case, legal action can be taken before a genocide occurs. Mostly it hasn't happened; mostly we've waited far, far too long and too late, and the landscape has been riddled, unfortunately, with the corpses of individual victims whom we haven't saved from genocide. Nobody thinks that's a good situation, and that's why it's important to try to formulate a jurisprudence.

In my writings I'm trying to formulate a jurisprudence of anticipatory action, of preventive action. I'm working on a new book called *The Preventive State*, which deals with the jurisprudence of harm prevention, focusing, of course, on the worst of harms: genocide. I think we are capable of constructing such a jurisprudence. Through international law, we already have the statutory framework of preventing genocide and of the obligation to prevent; now we have to fill that in.

Much of the law that relates to what happens after the fact—the former Yugoslavia court, the former Rwanda court, the International Criminal Court—are working in new areas and are developing new jurisprudential principles. As long as they're consistent with fair warning and due process, as I think this would be, we have to go forward.

When I mentioned “tolerating”, I had in mind specifically that when a person comes in a diplomatic capacity, that person comes with immunity, which means we can't arrest him as he comes to the United Nations, but what I was suggesting is that there's a difference between tolerating a regime of this kind and honouring it, legitimizing it, and taking steps that suggest that what they're doing and saying is acceptable.

One of the things we have to stop doing is legitimizing and honouring, as we did Nazi Germany and as my own university did in the 1930s by accepting honorary doctorates, giving honorary degrees, and having business as usual with the Nazi regime and with Nazi universities that had excluded people on racial grounds. That kind of legitimization, as I think we've learned, produces only dangerous consequences.

• (1330)

The Chair: Mr. Marston, you're up next.

Mr. Wayne Marston (Hamilton East—Stoney Creek, NDP): Thank you, Professor. It's great to have you before the committee.

Some would see Ahmadinejad as the problem, I guess mostly because he's the one who gives the clear demonstration of hatred, but from my perspective and from the testimony we've heard here that the supreme leader holds very close to the same opinions, this is more systemic than simply pointing at one individual. I understand that the process would be that we would charge this individual, get a conviction, then put the nation on notice. I have to wonder how much of this, on the part of Iran, is to designate themselves as the visible leader in the Middle East. Of course, with that comes certain major concerns for Israel.

Would you agree, at least in part, that his disgusting statements are to focus his citizens, as well as the rest of the Middle Eastern countries—some of the ones, perhaps, that you saw cheering—on a common enemy? In doing so, Iran again would be a leader, and they fortify that position in the Middle East with the intention of nuclear weapons.

We have ourselves a significant problem. I wonder if you could comment on that.

Prof. Alan Dershowitz: I think you have made an excellent point.

Remember, back in the 1930s, Nazi Germany wanted to solidify its position as the leader of Aryan Europe. Its goal was to try to get Austria to join, and to try to get even Great Britain and the Scandinavian and other Aryan countries, and Italy, to join with it. It used incitement to genocide as one way of bringing together that coalition. Simply because there were political ends, that doesn't mean that the means used—incitement to genocide—are in any way protected.

I do think that the greatest fears and dangers posed by a nuclear Iran are not necessarily directed at Israel alone. Israel does have the

military capacity on its own, and with the help of allies, to at least respond—hopefully it will never come to that—and if necessary to act preventively. And hopefully it will never come to that as well. But the great threat is to the other countries. Imagine if Iraq had been allowed to develop nuclear weapons and then went into Kuwait. They'd still be there today, because you cannot end a country's aggression if it has nuclear weapons that it's capable of using.

The other great threat is that it will begin an arms race. Saudi Arabia has the capacity to buy nuclear weapons. Probably Egypt and Jordan, and maybe even some of the Emirates, would feel so vulnerable and exposed, because remember that Ahmadinejad, in his speech at the UN in Geneva last week, directed his attention not only against Israel but against “all liberal democracies in the world”—Canada, the United States, Western Europe. His goal is to end democracy. He thinks democracy is a dinosaur and would substitute a kind of religious fundamentalism, backed by nuclear weapons.

I agree with you completely that Ahmadinejad is the symbol and the symptom. It's different from Nazi Germany, in the sense that Adolf Hitler was the supreme leader and was the chancellor and was the visible manifestation and the führer in every sense of the word. Iran is more complicated. There will be an election in Iran coming up in June, and we don't know the outcome of the election. But in a society based on overt acts in what you say and what you do, Ahmadinejad has presented himself as the person issuing these directions and instructions, and it would be appropriate to him to be the first person prosecuted.

• (1335)

Mr. Wayne Marston: Further, thinking in terms of the United Nations and the duty to protect, in some sense that's what we're saying here with the proposition of indicting this individual.

I'm a little concerned these days when I do hear the Obama administration talking about trying to warm relations with Iran. Facing this election that's going to take place...and I think there might be a shift in leadership there, simply to placate people to some extent for the short term. It has been 20 years that this country's been seeking nuclear weapons. This is not something new, and it's not this one individual, although he's very repugnant in what he's said and done. But he's symptomatic of something that has been going on for a long time.

So I'm very concerned about the Obama administration and how that's managed. Maybe you could comment on that.

Prof. Alan Dershowitz: Well, I keep an open mind on how my government will manage this negotiation. It's very, very difficult, and my government cannot take the military option off the table. The idea of an Iran with nuclear weapons that could be used either through its rocket-launching mechanism or through the filtering of nuclear material to make dirty bombs that could be used in Montreal and Toronto and Ottawa, and Paris and London and New York City, is simply something the international community can't accept.

I agree with you that a very tough issue would be posed if a more “moderate” leader were elected in June as the result of the supreme leader basically saying, we have to put a new face forward. Let’s remember it was Rafsanjani, the so-called moderate in their administration, who made that suicidal/genocidal calculation, suggesting that it would essentially be a worthwhile trade-off to kill five million Jews in exchange for 15 million Muslims killed, because there are more Muslims than Jews. That kind of genocidal/suicidal calculation came not from Ahmadinejad, but from the more moderate alternative to Ahmadinejad. So if there is a change of face in the election, that doesn’t mean there has been a success.

One has to take successes where they come. Libya is an example. The U.S., with the help of many allies, did get Libya to give up its nuclear ambitions and the Libyan leader to make changes. Does that mean the leaders of Libya are changed people, that they’ve changed their hearts? I wouldn’t trust that for a moment, but they’ve changed their actions and their words. That’s an important first step forward.

So if the result of the Obama Administration is to get a change in rhetoric and a change in words, that would be a good first step, but not one that would eliminate all need for caution.

Mr. Wayne Marston: One of the things you spoke of a few moments ago was relative to nations and Saudi Arabia and their potential for purchasing nuclear weapons.

I spent six months in Saudi Arabia—although it was 30 years ago at this point in time. But even at that time, the royal family’s grip on power in that country was tenuous in most people’s minds. We have the Shia population there. And there are a lot of concerns about 9/11, and some of the folks involved in 9/11 came from there. In fact, a high number of the attackers were actually Saudis. So there is a concern that if the Saudi royals were to purchase nuclear weapons in the context of defence against Iran, those weapons could just be turned around and used inappropriately by others.

Prof. Alan Dershowitz: On a question about that, one has just to look at what’s going on in Pakistan today. For a while, Pakistan was a stable democracy and developed nuclear weapons without strong objection from the international community, in the hope that perhaps India and Pakistan would be in a stalemate. But now the future of Pakistan is anything but certain. I agree with you that in the future, if Saudi Arabia—which is, after all, a dictatorship without the support of the masses, necessarily—were to develop or purchase nuclear weapons, one could not make a reliable prediction about who would be in control of that nuclear stock 10 or 15 or 20 years from now.

The world changes very quickly. Thirty or forty years ago, nobody could have predicted that Iran would be the worst enemy of western democracies and Israel, and nobody could have predicted that perhaps the Saudi government would become an ally of Israel and western democracies in trying to make peace. Self-interest is a strange motivator.

The importance of great leadership is not to anticipate what’s predictable, but to anticipate what’s unpredictable. Your government and my government both have to come to grips with a very unpredictable world. The one thing that is entirely predictable is that if Iran does get nuclear weapons, there will be an end of nuclear proliferation restrictions. The arms race will build up and the world will be a far less safe place.

● (1340)

The Chair: Mr. Hiebert, you’re next.

Mr. Russ Hiebert (South Surrey—White Rock—Cloverdale, CPC): Thank you, Mr. Chair.

Thank you, Professor Dershowitz for your comments. I especially appreciate your remarks dealing with freedom of expression and the importance of that. I hope this committee will, at some point, have an opportunity to pursue that as well.

I have a couple of questions. In terms of a pre-emptive strike, do you think that Israel would be justified under international law in taking a pre-emptive strike if it assessed that a nuclear threat from Iran were imminent? Under what circumstances might they be justified in doing that?

Prof. Alan Dershowitz: The answer to that question is yes, if the circumstances were appropriate. The United Nations recently convened a commission, headed by the former foreign affairs minister of Australia, to give an interpretation of article 51 of the UN Charter, which gives every nation the inherent right of self-defence, in the context of nuclear attacks and nuclear terrorism. The commission unanimously came to the conclusion that the right of self-defence includes the right of pre-emptive self-defence.

They distinguished between pre-emption and prevention. Pre-emption means the ability to attack, to stop something that’s relatively imminent, or short term. They said that for that, you don’t even need the approval of the UN Security Council. They distinguished that from prevention, or the longer term. They said that prevention is also appropriate in the nuclear age. You don’t have to allow your enemies to threaten you, and you can take preventive action, but to do that, you need to go through certain steps. You need to try to get the United Nations to act. You need to try, if that doesn’t work, to get multilateral organizations—NATO and others—to act. Individual preventive action should come as a last resort.

I think that’s what Israel did in 1981 with the Osirak reactor. They sent their emissary, now the President of Israel, to France to try to persuade France to stop helping Iraq get nuclear. He failed. They went to the United Nations and that failed. There was a very brief window of opportunity before the nuclear reactor got hot, and it was during that window of opportunity that Israel acted and destroyed the nuclear reactor and set back the program at least 10 years. Tragically, there was one casualty, somebody who wasn’t supposed to be there on a late Sunday afternoon.

Israel was condemned for that by the United Nations Security Council unanimously, with the support of the United States. Nine years later, the United States essentially apologized and thanked Israel for having taken that action, because had they not taken that action, Iraq would still be in Kuwait today. Saddam Hussein would still be the dictator of Iraq today. The world benefited enormously from Israel’s pre-emptive action against Iraq.

I hope it doesn’t come to that. This will be a much harder military action. And I hope there are sanctions and others that can stop Iraq and Iran in the same way as Libya was stopped. The military option can’t be taken off the table and would be justified, if it had to be resorted to, as a matter of law.

Mr. Russ Hiebert: You and others have recommended that nations seek to prosecute Iran at the International Court of Justice. I believe Iran is a member of the genocide convention. Maybe you can clarify that for me. Why do you think no nation, as yet, has taken that step of trying to prosecute Iran at the International Court of Justice through the genocide convention?

• (1345)

Prof. Alan Dershowitz: Obviously international politics plays a major role. Iran is an oil-rich nation. It's also a major consumer. It has close connections to China, to Russia, in some respects, and even to France. The applause at the United Nations that I referred to suggests that it has widespread support among some African nations, some South American nations, and some Middle East nations. By the way, it has less among Middle East nations, I think, than among some African nations, which are further away from it. It seems to me that the further away you get from Iran, maybe the more you're willing to support and applaud it. The closer you are, the more dangerous I think many nations see it. Nations generally are not known for their willingness to confront other large, powerful nations. I think it's a tragedy that there have not been prosecutions brought.

Israel provides such an interesting excuse to the world. While Rwanda was dying, the UN was debating, repeatedly, condemnations of Israel and the UN Commission on Human Rights' condemnations of Israel, while real genocide was going on. The same thing is happening now. There is all kinds of talk that maybe Israelis should be prosecuted by the Spanish government, maybe by the Italian government, maybe by the United Nations. This investigation is.... It's so easy to change the subject. The real danger to the world today is Iran. As you say, nobody is taking seriously the international law that permits and indeed, in my view, may require the duty to prevent, in this instance.

Mr. Russ Hiebert: We had a witness about a week ago who said that the U.S. has the Foreign Sovereign Immunities Act. I'm not sure if you're familiar with that act, but it provides for four exceptions: Syria, Iran, Cuba, and Sudan. This is apparently an act that allows individual Americans to sue Iran civilly for acts of violence or what have you. Are you aware of any Americans taking advantage of this opportunity? Would this not be another way to prosecute Iran?

Prof. Alan Dershowitz: Yes, it would be a very good opportunity. In fact, there are some lawsuits being talked about, particularly by victims of Hezbollah and Hamas, which are directed by Iran. Remember, too, Iran hasn't only talked about this. Everybody in the world now knows that Iran's fingerprints are all over the terrorist attacks that took place in Argentina years ago. There's absolutely no doubt about that. There have been admissions, findings of fact. They blew up civilian and diplomatic enterprises, killing dozens and dozens of people. So in addition to talking genocide, they've been trying to carry it out in retail fashion. Victims, particularly U.S. victims, can sue in U.S. courts, and there have been some lawsuits. I would say there have been mixed results around the country, but there have been some successful lawsuits brought by my colleague Nathan Lewin, his daughter, and some other lawyers in the United States. These lawsuits have been brought by victims of terrorist acts for which Iran is responsible.

I'm not aware of any civil suits brought against Iran or Ahmadinejad for threats of genocide. That's much harder to do.

You have to show actual damage to bring a civil lawsuit, and preventive civil lawsuits are difficult. Now, they exist. For example, you can bring a lawsuit against a spouse who has threatened you and get a protective order or an injunctive order.

So there is equitable relief that could be obtained in courts of law. But this is really a new area, and a new jurisprudence is needed. As somebody who is prepared to work with other people, countries, and NGOs, I offer myself to try to help develop this new jurisprudence of prevention, which could be used to prevent genocides instead of merely responding to them after they occur.

The Chair: Mr. Rae.

Hon. Bob Rae (Toronto Centre, Lib.): Thank you, Professor.

I have two lines of questioning. The first has to do with marshalling the evidentiary case against Iran with respect to its breach of the genocide convention. What would be the steps, what would be the essential elements of the case, as it has developed historically?

• (1350)

Prof. Alan Dershowitz: We're very fortunate to have had a lot of that work done for us by the Honourable Irwin Cotler and people working under his direction. They put together a brilliant petition that I had the honour of signing, together with Louise Arbour, Elie Wiesel, and dozens of other people from around the world. We all read it very carefully. That petition cites specific verses and sentences. There are videotapes and audiotapes. The case is a very powerful one.

We would also want to get the file from Argentina of the investigation that was done of the Iranian complicity in the terrorist acts down there. Perhaps we could try to create an analogy with the conspiracy or RICO laws in the United States, which go back many years. We might be able to show an overall pattern that includes support of terrorism, incitement, other genocidal activities, and actual crimes that have occurred, and present them together, as part of the evidentiary context in which the incitement to genocide occurred.

If somebody like Richard Goldstone, who has been invited to do the investigation of what went on in the Gaza, or somebody of his distinction were to be appointed to gather evidence in relation to Iran, it could serve a very important preventive function. Even a gathering of evidence and making of the case in the court of public opinion would serve a very important function.

Hon. Bob Rae: As I understand it, under the genocide convention—a lot of what you've been talking about is the criminalization of the head of state, the activities of Ahmadinejad himself—it would be possible for a government that's a party to the convention to bring a case against another state in front of the ICJ, let alone the ICC; but let's set aside the ICC for a moment.

One of the issues we have to get to is how do we get this beyond a political science discussion, if you'll pardon the expression? How do we encourage a state to actually take this issue sufficiently seriously that we move it beyond the academic discussion and take it into the realm of statecraft, into the realm of diplomacy, so that the discussions that President Obama and others are having with the Government of Iran are taking place in a context where clearly it isn't simply business as usual and there's a very profound case that the Government of Iran has to meet?

Prof. Alan Dershowitz: I agree completely with that analysis. I think you negotiate from a greater position of strength when there are sanctions hanging over the head of a government like Iran.

I think trying to bring a case in front of the International Court of Justice, under the treaty, would be interesting. Of course, the International Court of Justice, unlike the International Criminal Court, is a United Nations body. The judges are appointed very differently and are somewhat less independent. Their jurisprudence is of mixed quality, I think, in terms of independence.

But there have been some very good decisions. The decision on the use of nuclear weapons, I know, is something that Professor Cotler was interested in, and he brought cases in front of the Canadian courts.

Unfortunately, in the end, the International Court of Justice didn't render a decision—it basically was in equipoise on some of these issues—but at least it provides a precedent for being able to bring a case.

I don't think any international court would be able to sit silently after it was presented with the evidence of this incitement of genocide. At the very least, it would have to condemn it, as secretaries general of the United Nations have condemned it. But if it came from a court of law, even a court of law without enforcement power against other nations, I think it would have a big impact and move it from the political science classroom, as you correctly point out, to at least the courtroom. That would have a salutary effect.

The Chair: That completes the round.

Mr. Sweet, you'll be our cleanup hitter today.

Mr. David Sweet (Ancaster—Dundas—Flamborough—Westdale, CPC): Thank you very much.

Thank you, Professor Dershowitz.

I have a follow-up question to Mr. Rae's line of questioning. You had mentioned the mixed quality of jurisprudence on the ICJ. That begs the question on my part, would a ruling that is flawed—for lack of a better word—diminish a future case at the ICC or other international fora?

• (1355)

Prof. Alan Dershowitz: That's a very good question. It really presents the issue very starkly: whether, when you have two court systems, one of which is neutral and objective and has very professional judges and a completely professional prosecutor on it, as the International Criminal Court does, and another court, which has been—up to now, at least—tinged with politics, bringing a case in the first court could have a negative impact on the second court.

My own view, which would be subject to reconsideration, obviously, based on new evidence, would be no; in a case like this, the issue is so clear that I think the International Court of Justice would have to condemn and would have to make the findings that would be conducive to doing justice and acting preventively in this case.

This is not a close case on its facts. Therefore, I would have more confidence in the International Court of Justice than I might in a more controversial or closer case. I mean, Ahmadinejad presents an embarrassment to the world. Even at the United Nations, when he spoke there, nobody wanted him to speak there. He *had* to be allowed to speak. The UN didn't want him to speak. They tried to distance themselves from his talk. But they were unable to do so.

So I think the International Court of Justice would, as they say, do the right thing in a case of this kind.

Mr. David Sweet: I was shocked to hear your observation that at the Durban event so many representatives of countries were clapping vociferously in support. It was very disturbing. Obviously they didn't want to distance themselves.

The other concern I have is on the evidence we hear about the human rights transgressions of Iran; frankly, the international assassinations of Iran; and of course, the development of nuclear weapons. We've had genocide in human history, but I believe this is the first time we are faced with a dictator of this magnitude, or at least the representative of the dictating council of this magnitude, that could possibly have a storehouse of nuclear weapons. Up until now genocide has been attempted by conventional means, or at least conventional weapons. Of course, there were the atrocious acts of Nazi Germany with ovens. But now the risk is that this person will be backed with nuclear weapons.

Prof. Alan Dershowitz: I agree, and I think it's actually worse than that. This is the first time we've had the following combination of three factors, maybe four. One is a genocidal nation bent on inciting genocide. Two, they're soon to be armed with nuclear weapons. Three, there's a culture of suicide that has an unwillingness to be deterred. At least with Nazi Germany, the Stalinists, the Soviet Union, and Saddam in Iraq, they didn't want to die. Their leaders wanted to live. They weren't promised paradise if they killed so many people.

When you have a combination of incitement to genocide, the capability of inflicting it through nuclear weapons, and a lack of concern with losing 15 million people—all of whom would immediately go to paradise and be treated as martyrs, at least that's what they believe—that triple combination.... Plus it's coming from religious leaders with whom you have no right to disagree. That four-way combination is unprecedented in human history and presents the greatest threat of genocide ever presented on this planet, in my view.

Mr. David Sweet: I fully concur. Thank you.

Time is always an enemy here in committee. I'm going to have to choose my last question.

I'll go back to something that was already said to take the process from the academic to the pragmatic. Moving into statecraft diplomacy and ultimately justice, I would say.... Because certainly that's needed right now with the threats that have happened. We've heard witnesses talk about strategies to curtail this threat with economic sanctions, the ICJ, the ICC, or a watch list for travel. Are there any other strategies?

Our ultimate goal is going to be recommendations on how to stop these human rights transgressions as well as the nuclear threat of Iran. Are there any other initiatives that you could give us that we could consider in our report to end the insanity of this Iranian regime?

• (1400)

Prof. Alan Dershowitz: That really is the \$64,000 question. What can be done to really end this insanity?

I hate to say there is no one single elegant solution or magic bullet. I think a wide combination of facts, such as was done with regard to Libya, is probably going to be helpful. Number one is isolating the country; number two is having very significant economic sanctions. And with Libya what was required was a demonstration by the United States that military action would be taken. Remember that President Clinton did authorize the bombing, a very narrow bombing of just one small area, but it sent the message to Gadhafi as clearly as possible that he was not safe. Now, the difference is that Gadhafi wanted to live and he doesn't have a martyr complex, and he saw how close his own children came to being killed by the bombs. So it does require a combination of carrot and stick.

The other issue is whether the United States and Canada and other freedom-loving countries can have any impact on the people of Iran, many of whom are wonderful and freedom-loving people. Iran, let's remember, had the most open and freest—though not particularly open and free—Muslim nation in the Middle East for a long period of time, with women's rights being recognized. There is a secular culture in that country as well, a culture preferring life to death. And if we can do anything to promote that culture from within and expect that maybe some democratic considerations would prevail....

I'm afraid that won't work alone. It's an extraordinarily complicated problem, because even military action might have negative results. It might strengthen the regime. So there is no single solution.

I just think silence is not an option and inaction is not an option. I know the committee will come up with brilliant and innovative and creative and positive suggestions, all of which should be tried. I think the multi-faceted approach is what is required here, and not reliance on one single magic bullet, which is not available to us.

The Chair: Professor Dershowitz, we really appreciate your taking the time to be with us. We've had a real adventure following you and getting you to come before the committee, but I can tell you there was considerable enthusiasm to having you testify. I see that our enthusiasm for you was justified by the testimony you gave us today. I thank you very much.

Prof. Alan Dershowitz: Thank you very much. I appreciate it.

The Chair: With that, committee, we are adjourned.

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