

With Revolutionary Rage and Rancor: A Preliminary Report on the 1988 Massacre of Iran's Political Prisoners

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We must establish incredible events by credible evidence.¹
— Justice Robert Jackson

INTRODUCTION

In December 2005, Human Rights Watch (“HRW”) released a fifteen-page Briefing Paper alleging that Mustafa Pour-Mohammadi, Iran’s newest Minister of Interior, played a central role in the 1988 (1367 in the Iranian calendar) massacre of political prisoners in Iran.² Without much elaboration, HRW’s publication further alleged that the executions constitute “a crime against humanity under international law.”³ This HRW statement and the creation of new human rights organizations focusing exclusively on the Iranian government’s human rights record⁴ are hopeful signs of a burgeoning interest in a thorough investigation of the 1988 prison massacre. This paper attempts to contribute to such a project by compiling key information about the mass killing and providing preliminary legal analysis. This essay also highlights some of the problems that human rights activists will face in pursuing the case.

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This Article is dedicated to the memory of Mehrdad Ashtari, who was executed at the age of 28 at Gohar-Dasht prison, presumably on August 6, 1988.

1. JUSTICE ROBERT JACKSON, REPORT TO THE PRESIDENT ON ATROCITIES AND WAR CRIMES, June 7, 1945, available at <http://www.yale.edu/lawweb/avalon/imt/jack01.htm>.

2. HUMAN RIGHTS WATCH, MINISTERS OF MURDER: IRAN’S NEW SECURITY CABINET 3 (2005), available at <http://hrw.org/backgrounder/mena/iran1205/iran1205.pdf> [hereinafter MINISTERS OF MURDER].

3. *Id.*

4. See, e.g., Arielle Levin Becker, *Thinking of Home and Human Rights*, N.Y. TIMES, Jan. 9, 2005, at 14CN (describing the establishment of the New Haven-based Iran Human Rights Documentation Center).

The gross violations of human rights in Iran since the 1979 Revolution have been documented in great detail. However, for reasons that remain largely unexplored,⁵ and are well beyond the scope of this paper, the Iranian government has been successful in keeping one of its worst atrocities a secret from the international community. During the summer of 1988, shortly after accepting a cease-fire in its eight-year war with Iraq, the Iranian government established informal commissions to re-try political prisoners across the country, ordering the immediate execution of thousands found guilty at these "trials." The secret executions were carried out with a speed and ferocity that surpassed even the reign of terror immediately following the Iranian Revolution. And yet "[t]he curtain of secrecy" surrounding these executions was so effective "that no Western journalist heard of it and no Western academic discussed it. They still have not."⁶

5. An unlikely and unsatisfying explanation is provided by Joe Stork, HRW's Middle East and North Africa Deputy Director: "At the end of the Iran-Iraq war, there was a certain interest in the part of the major powers not to stir up the pot and antagonize Iran." Veronique Mistiaen, *Memories of a Slaughter in Iran*, *TORONTO STAR*, Sept. 5, 2004, at F5. Though Stork may be right in his assessment of why "major powers" did not pursue the issue, his explanation reveals little about why human rights organizations, including his own, have been largely silent on what is arguably the single largest government-sponsored massacre of citizens in contemporary Iranian history. For example, HRW's *MINISTERS OF MURDER*, *supra* note 2, is the only HRW publication to refer to the 1988 massacre. Even there, HRW does not analyze the gruesome and systematic killing in any depth. A more plausible explanation for the reluctance of human rights organizations to pursue the story may be the general unpopularity of the political party whose members were the primary victims of the massacre. The *Sazman-e Mojahedin-e Khalq-e Iran* (the People's *Mojahedin* Organization of Iran) ("*Mojahedin*") enjoyed immense popular support in the early 1980s as Iran's most powerful opposition group. The party's popularity then declined rapidly as a result of the disastrous political decision to establish military camps in Iraq during the Iran-Iraq war, the foolhardy military actions taken against the Iranian government, the popular belief (encouraged by the Iranian government's propaganda) that the organization engaged in terrorist actions against civilians, and the cult of personality developed around the *Mojahedin's* leaders. See ERVAND ABRAHAMIAN, *THE IRANIAN MOJAHEDIN* 243–61 (1989); HUMAN RIGHTS WATCH, *NO EXIT: HUMAN RIGHTS ABUSES INSIDE THE MKO CAMPS* 5–11 (2005), available at <http://hrw.org/backgrounders/mena/iran0505/iran0505.pdf>; Human Rights Watch, *Statement on Responses to Human Rights Watch Report on Abuses by the Mujahedin-e Khalq Organization (MKO)* (Feb. 15, 2006), <http://hrw.org/mideast/pdf/iran021506.pdf>; see also Elizabeth Rubin, *The Cult of Rajavi*, *N.Y. TIMES (MAG.)*, July 13, 2003, at 26.

Meanwhile, inside Iran, the street protesters risking their lives and disappearing inside the regime's prisons consider the Mujahedeen a plague—as toxic, if not more so, than the ruling clerics. After all, the Rajavis sold out their fellow Iranians to Saddam Hussein, trading intelligence about their home country for a place to house their Marxist-Islamist Rajavi sect. While Mujahedeen press releases were pouring out last month, taking undue credit for the nightly demonstrations, many antigovernment Iranians were rejoicing over the arrest of Maryam Rajavi and wondering where Massoud was hiding and why he, too, hadn't been apprehended. This past winter in Iran, when such a popular outburst among students and others was still just a dream, if you mentioned the Mujahedeen, those who knew and remembered the group laughed at the notion of it spearheading a democracy movement. Instead, they said, the Rajavis, given the chance, would have been the Pol Pot of Iran.

6. ERVAND ABRAHAMIAN, *TORTURED CONFESSIONS: PRISONS AND PUBLIC RECANTATIONS IN MODERN IRAN* 210 (1999). Although several years have passed since the publication of Professor Abrahamian's chapter on the 1988 killings, Western journalists and academics have still not produced much writing and research on the slaughter. In producing this Article, this author estimates that he has found no more than ten or fifteen English-language news reports of the massacre and only a handful of book chapters addressing the topic.

This Article is an advocacy document intended to familiarize human rights defenders with the 1988 case and to encourage them to begin an in-depth investigation. All facts collected for this retelling of the 1988 story are available in the public domain, though their gathering has required substantial effort. The sources include memoirs of political figures, memoirs by prisoners, a handful of human rights reports, brief statements by United Nations (“U.N.”) Special Representatives, scholarly essays, and sporadic news reports of varying quality and credibility from the political groups whose members faced execution in Iranian prisons. For the purposes of this Article, no witnesses, survivors, family members, or government officials have been interviewed. Undoubtedly, any future investigation of the 1988 massacre will require locating and interviewing the (few) survivors of the massacre and the (numerous) bereaved family members, both inside and outside Iran. However, as I will discuss later, a meaningful legal investigation of the 1988 crimes cannot rest on such interviews alone.⁷ A thorough legal analysis will also require inside knowledge about Iran’s chain of command so as to answer central questions about individual responsibility within the governmental structure.

Part I of this Article attempts to present a coherent narrative of the brutality unleashed in Iran during the summer of 1988, and briefly discusses some of the possible motivations behind the executions. Although accurate reporting on a secret massacre of nearly two decades ago is difficult, the recent publication of memoirs by former political prisoners and by Grand Ayatollah Hussein Ali Montazeri has greatly facilitated the task of investigating the 1988 killing. The dissident Ayatollah Montazeri—Ayatollah Khomeini’s designated successor prior to a well-publicized forced resignation and house arrest (likely motivated by his opposition to the 1988 massacre)⁸—provides a wealth of details and documents about the massacre. Montazeri’s information is invaluable in reconstructing what occurred in Iranian prisons in 1988.

In Part II, I apply settled customary international law to show that the evidence strongly supports HRW’s categorization of the 1988 massacre as a crime against humanity. In this regard, I also discuss the relevance of the legal doctrines surrounding individual criminal responsibility and command responsibility. Finally, Part III outlines some problems human rights defenders will face in investigating the executions and explores the reasons

7. See *infra* Part III.

8. *Iranian Authorities Said to be “Jamming” Dissident Ayatollah’s Website*, BBC WORLDWIDE MONITORING, Dec. 24, 2000 (“A chapter, one of the most important of the memoir’s, addresses the underlying reasons for Montazeri’s fallout with his mentor and friend Khomeyni and the run-up to his ouster. One of the most important of the reasons was Montazeri’s staunch opposition to the execution of thousands of the opponents, particularly those who had been sentenced to death and then ordered executed by Khomeyni in the aftermath of the Mersad operation mounted against units of *Mojahedin-e Khalq* that had penetrated a few kilometers inside Iran from Iraq.”) (citing AL-SHARQ AL-AWSAT (London), Dec. 14, 2000).

why, despite these difficulties, the massacre still matters. I argue that despite the general indifference shown by most human rights organizations, an investigation ought to be pursued vigorously and immediately. A proper accounting for 1988 is important to survivors and families of victims, and is an important step in the ongoing struggle for democracy and human rights in Iran.

I. A SUMMER MASSACRE

A. *The Military and Political Context*

If you think that one day you'll be freed from prison like heroes,
you're dead wrong.⁹

— Assadollah Lajevardi, Director of Evin Prison

On July 18, 1988, one year after the U.N. Security Council issued a peace proposal for the Iran-Iraq war, Iran abruptly reversed its previously defiant position and unconditionally accepted the cease-fire in Resolution 598.¹⁰ The severe defeats of Iranian forces in the final year of fighting had led Western analysts to assert that "Iran can no longer fight without risking a collapse of its economy and, indeed, its revolution."¹¹ Most Iranians learned of the cease-fire from state radio, which broadcast the now-famous announcement by Ayatollah Khomeini comparing the acceptance of Resolution 598 to "swallowing poison."¹² The news prompted both jubilation and debate across the country, and nowhere more passionately than in prisons, where prisoners communicated across wards by tapping Morse code on prison walls.¹³ Though some remained deeply doubtful, many political prisoners celebrated the end of the destructive war and interpreted Khomeini's announcement as indicative of a forthcoming liberalization.¹⁴ Nima Parvaresh, then a prisoner in Gohar-Dasht prison, 40 kilometers outside of Tehran, recalls the speculation among his cellmates:

Among the prisoners in the ward, and even when communicating with other wards, there was much talk. Many prisoners assessed the events as a major crisis in the government and as a result of a

9. Jonoone Koshnar, *Dar Roozbayeh Ghatle Ame Zendanyane Siyasi* [*The Madness of Mass Killing, in the Days of the Massacre of Political Prisoners*], 64 RAHE TUDEH 7, 11 (1997).

10. *Iran Says It Accepts Year-Old U.N. Call for Ceasefire in War*, L.A. TIMES, July 18, 1988, at A2.

11. Youssef M. Ibrahim, *Khomeini Accepts 'Poison' of Ending the War with Iraq: Bitter Defeat for Ayatollah*, N.Y. TIMES, July 21, 1988, at A1.

12. Edward Cody, *Khomeini Says Ceasefire Decision His; Reversal of Long-Held Position "Deadlier Than Swallowing Poison,"* WASH. POST, July 21, 1988, at A1 ("Making this decision was deadlier than swallowing poison," Khomeini said at another point. 'I submit myself to God's will and drank this drink for His satisfaction.'").

13. Nima Parvaresh, *Talkh, Na Hamchon Hameyeh Talkbeeha* [*Bitter, Unlike Any Other Bitterness*], 14 CHESHMANDAZ 62, 64 (1994).

14. NIMA PARVARESH, NABARDI NABARABAR: GOZARESHI AZ HAFT SAL ZENDAN 1361-68 [AN UNEQUAL BATTLE: A REPORT OF SEVEN YEARS IN PRISON 1982-1989] 106 (1995).

mass movement protesting against the government. They anticipated even further changes; at least a move from the government's direct fascist oppression to a more liberal policy.¹⁵

The prisoners' optimism was not unjustified, likely inspired by the relative calm that had pervaded Iranian prisons between 1984 and early 1988. Supporters of the moderate Ayatollah Montazeri had temporarily wrestled control of Iran's prisons¹⁶ away from hardliners like Assadollah Lajevardi (famous among the opposition as "The Butcher of Evin").¹⁷ The prisoners note that, until shortly before Montazeri's supporters were sidelined and the mass executions began, the atmosphere of the prisons was sufficiently calm for them to demand concessions from the authorities.¹⁸ Some even note that prisoners launched hunger strikes to protest insufficient prison meals.¹⁹

Whatever the prevalent mood in prisons immediately after Iran's acceptance of the cease-fire, the situation changed dramatically after *Arteshb-e Azadibakhsh-e Melli-e Iran* (the National Liberation Army of Iran), the military wing of the opposition *Sazman-e Mojahedin-e Khalq-e Iran* (the People's

15. *Id.*

16. Maziar Behrooz, *Reflections on Iran's Prison System During the Montazeri Years (1985–1988)*, 2 IRAN ANALYSIS Q. 11 (2005), available at <http://web.mit.edu/isg/IAQW/inter05.pdf>; REZA AFSHARI, HUMAN RIGHTS IN IRAN: THE ABUSE OF CULTURAL RELATIVISM 105 (2001). For a brief account of Montazeri's general conflict with the Iranian establishment, see BAQER MOIN, *KHOMEINI: LIFE OF THE AYATOLLAH* 277–84 (1999).

17. Lajevardi's reputation as the "Butcher of Evin" seems to have been well deserved. According to a 1989 report published in the *Guardian* newspaper:

[Lajevardi] is especially remembered for two widely used innovations in Iranian gaols.

The first, still in operation was the rape of virgin girls through forced 'marriages' to prison guards, so that an obscure religious sanction against the execution of virgins could be overcome.

The second, now apparently obsolete or used only with great care, was to test 'converted' prisoners' loyalty by using them in firing squads aiming at other inmates.

This ploy backfired when 'tested' inmates opened fire on prison officials including Ladjevardi himself, before committing suicide.

Farhad Mogaddam, *Death Comes to an Iranian Dissident: A Young Woman's Fruitless Struggle to Stay Alive Under Ayatollah Khomeini*, *GUARDIAN* (London), Jan. 13, 1989.

On the tenth anniversary of the 1988 massacre, *Mojahedin* agents assassinated Assadollah Lajevardi. *Iran: Double Standard?*, *ECONOMIST*, Aug. 29, 1998, at 45 ("On August 23rd, Assod-ollah La-je-wardi was shot dead by two men in his tailor's shop in Tehran's bazaar. The Iraq-based [*Mojahedin*] immediately, and proudly, claimed responsibility.")

18. See AFSHARI, *supra* note 16, at 108, 113; see also *Witness to Massacre: Interview with Monireh Baradaran*, *IRAN BULL.*, available at <http://www.iran-bulletin.org/witness/MONIREH1.html> (last visited Dec. 22, 2006) [hereinafter *Interview with Monireh Baradaran*].

19. *Interview with Monireh Baradaran*, *supra* note 18; see also SAZMAN-E MOJAHEDIN-E KHALQ-E IRAN, GHATLE-AME ZENDANYANE SIYASI [THE MASSACRE OF POLITICAL PRISONERS] 191 (1999) ("The 3rd and 5th wards in Evin became famous because of their launch of several successful hunger strikes in prison."). Such hunger strikes still entailed significant risks for political prisoners after the hardliners managed to regain control of the prisons. Amnesty International noted that it had received a report of "a group of 40 political prisoners executed in early 1987 for taking part in a hunger-strike to protest about conditions in Evin prison." AMNESTY INT'L, *IRAN, VIOLATIONS OF HUMAN RIGHTS 1987–1990*, 11 (1990) [hereinafter AMNESTY INT'L REPORT].

Mojahedin Organization of Iran) (“*Mojahedin*”),²⁰ launched an armed incursion into western Iran from its bases in Iraq. The *Mojahedin*—an Islamic-Marxist political organization that had initially supported the Iranian Revolution, but violently split from Ayatollah Khomeini in the early 1980’s due to intense ideological disagreements—likely interpreted Iran’s acceptance of Resolution 598 as a sign that the government was crumbling. Thus, they began “Operation Eternal Light” on July 25, 1988, shortly after the announcement of the cease-fire.²¹ Iranian military forces quickly repelled the ill-conceived and poorly executed attack, handing the *Mojahedin* a severe defeat that U.S. officials characterized as a “shellacking.”²² With the information currently available, it is difficult to establish whether the *Mojahedin* attack was, in fact, the real reason behind the decision to execute Iran’s political prisoners. What is known, however, is that immediately after learning of the incursion, the prisons entered an unusual state of emergency, soon after which the killings began.²³ Prisoners affiliated with the *Mojahedin* bore the brunt of the government’s massacre.

B. *The Mass Executions*

In the world, there are always people who can’t be dealt with in any way but through repression. We must repress those people. This atmosphere of terror must exist for such traitors and deceitful people.²⁴

— Ali Akbar Hashemi Rafsanjani, Iran’s Former President

Most examinations of the massacre begin the narrative in mid-July 1988, when “the regime suddenly, without warning, isolated the main prisons

20. “*Sazman-e Mojahedin-e Khalq-e Iran*” is the official, Persian-language name of the organization. In the English-language press, various terms and acronyms are used to denote the group. Writers sometimes refer to the organization simply as the “*Mojahedin*,” which reflects what the group is called by most Iranians. Others use the acronym “PMOI,” derived from the direct translation of the group’s name: “The People’s *Mojahedin* Organization of Iran.” Still others use MKO (*Mojahedin Khalq* Organization), or MEK (*Mojahedin-E Khalq*). The name of the group is also transliterated differently in various texts. In this Article and in the footnotes, I use the terms “*Mojahedin*” and “PMOI,” because they are the names by which the group refers to itself. However, where citing from other sources, I use acronyms found in the original.

Ervand Abrahamian notes that the term “*Mojahed*” (the singular form of “*Mojahedin*”), which literally means ‘holy warrior,’ was originally used to describe the armed companions of the Prophet Mohammad. In adopting their title, the *Mojahedin* were influenced in part by religious sentiments and images of these early crusaders. They also were influenced, and to a greater extent, by the fact that this was the label used by the Algerian revolutionaries and by some of the armed volunteers in the Iranian Revolution of 1905–1911.

ABRAHAMIAN, *supra* note 6, at 4. For an in-depth study on the *Mojahedin*, see *id.*

21. David Wood, *Anti-Khomeini Rebels Drive Deep into Iran*, THE EVENING NEWS HARRISBURG, July 27, 1988; see also National Liberation Army of Iran, Operation Eternal Light, <http://www.iran-e-azad.org/english/nla/etl.html> (last visited Jan. 26, 2007).

22. Alladin Touran, *Iran Resistance ‘Shellacking’ Untrue*, CHI. TRIB., Oct. 1, 1988, at 10.

23. REZA GHAFARI, KHATERATE YEK ZENDANI AZ ZENDANHAYE JOMHURIYEH ISLAMI [MEMOIRS OF A PRISONER IN THE PRISONS OF THE ISLAMIC REPUBLIC] 237 (1998).

24. Nasser Mohajer, *Koshtare Bozorg* [The Great Massacre], 57 ARASH 4, 7 (1996).

from the outside world.”²⁵ Amnesty International reports that “the first sign that something was happening in the prisons came in July 1988 when family visits to political prisoners were suspended.”²⁶ Closer analysis of the memoirs written by survivors reveals, however, that prison authorities had begun preparation for the massacre months before the war ended, indicating that the cease-fire and the *Mojahedin* attack simply may have been convenient pretexts to carry out pre-existing plans.

The survivors consistently note that prison officials took the unusual step in late 1987 and early 1988 of re-questioning and separating all political prisoners according to party affiliation and length of sentence. As an ominous sign of things to come, prisoners in Gohar-Dasht prison recall being summoned from their wards to face questioning.²⁷ Some wore blindfolds throughout the process, whereas others recall seeing a committee comprised of prosecutors, prison authorities, and Intelligence Ministry officials assigned to re-interrogate each individual.²⁸ Though questions varied slightly depending on political affiliation,²⁹ authorities typically asked prisoners the following questions: “Do you still believe in your political group and its ideology?”; “Do you accept the legitimacy of the Islamic Republic?”; “Do you pray?”; “Would you be willing to go to the fronts to fight against the Iraqis?”; “Would you be willing to publicly condemn your political group?”; and “If you were to be freed, would you be willing to be publicly interviewed?”³⁰ In Evin prison, the “new deputy warden, Hossein-Zadeh, briefly interviewed each prisoner about her/his views. The inquiry concerned the Islamic Republic, religion, and Marxism.”³¹

After the interrogations, *Mojahedin* prisoners, who self-identified as practicing Muslims, were separated from atheist leftist prisoners.³² Prison officials also separated prisoners based on the length of their sentences,³³ removing those deemed “trouble-makers” from general wards and placing them in solitary confinement until the massacre.³⁴ As a result of this re-

25. ABRAHAMIAN, *supra* note 6, at 209.

26. AMNESTY INT’L REPORT, *supra* note 19, at 13.

27. GHAFARI, *supra* note 23, at 229.

28. *Id.*

29. At the time, the vast majority of Iran’s political prisoners were either members of the ideologically Islamic-Marxist *Mojahedin* or members of Socialist and Communist parties. Most prominent among the latter groups were the *Tudeh* Party and the *Sazeman-e Fadayian-e Khalq-e Iran* (The People’s Fadayian Organization of Iran).

30. GHAFARI, *supra* note 23, at 234; Mohajer, *supra* note 24, at 5.

31. AFSHARI, *supra* note 16, at 108.

32. NAT’L COUNCIL OF RESISTANCE OF IRAN, FOREIGN AFFAIRS COMM., CRIME AGAINST HUMANITY: INDICT IRAN’S RULING MULLAHS FOR MASSACRE OF 30,000 POLITICAL PRISONERS 69 (2001) [hereinafter CRIME AGAINST HUMANITY] (on file with the author); see also PARVARESH, *supra* note 14, at 99–100.

33. CRIME AGAINST HUMANITY, *supra* note 32, at 69 (“In Gohar-Dasht prison, those condemned to life imprisonment were transferred to Evin and the rest were divided into two groups of under- and over-ten-year terms.”); PARVARESH, *supra* note 14, at 99–100.

34. Anonymous, *Man Shabede Ghatle Ame Zendanyane Siyasi Boodam* [I Witnessed the Massacre of Political Prisoners], 14 Cheshmandaz 67, 68 (1994); PARVARESH, *supra* note 14, at 102.

interrogation, a number of prisoners (particularly those sentenced to life imprisonment) moved from Gohar-Dasht to Evin prison.³⁵ The changes confused the prisoners, who did not understand the significance of the interrogations and the reshuffling.³⁶ In retrospect, the Iranian government may have meant to confuse the prisoners and disrupt communication networks, preventing prisoners from warning one another once the killing began. Reflecting on the preparations that necessarily must have preceded the executions, one prisoner notes:

With these new arrangements, all that we had created in our years of resistance was lost. All the communication [networks] that had formed as a result of years of experiencing torture and executions were completely destroyed. It was with these arrangements that Khomeini's regime prepared itself for the creation of a bloodbath and the massacre of political prisoners.³⁷

Although exact dates are difficult to determine, the executions in Tehran likely began on July 27, 1988, in Evin, and on July 30 in Gohar-Dasht prison.³⁸ The prisoners became completely isolated from the outside world as the prisons moved into emergency mode. Parvaresh recalls that "on July 27, 1988, the guards took all the television sets out of the wards, and cut off all the loudspeakers that aired radio news on 2:00 p.m. and 8:00 p.m. From that day on, the fresh air for all wards was cancelled."³⁹ Guards prohibited ill prisoners from visiting the prison infirmary.⁴⁰ Finally, all family visits were suspended "until further notice."⁴¹ The first prisoners to be exterminated were the *Mojahedin*, many of whom had already served several years of their sentences. During this time, officials kept left-wing prisoners isolated without any idea of the horrors unfolding around them. The leftists originally speculated that Khomeini had died or that a coup d'état or public rebellion was underway.⁴² They were slow to realize that the emergency situation was actually prompted by circumstances *inside* the prisons.

The leftist prisoners slowly pieced together small and increasingly macabre clues. The prisoners heard late-night sounds of marching *Pasdars* (Revolutionary Guards), stomping their feet and chanting "Death to the [*Mojahedin*]" or "Death to infidels."⁴³ Elsewhere, *Mojahedin* prisoners tapped Morse code messages to inform the adjacent ward, made up mostly

35. *I Witnessed the Massacre of Political Prisoners*, *supra* note 34, at 67; GHAFFARI, *supra* note 23, at 235.

36. AFSHARI, *supra* note 16, at 108.

37. GHAFFARI, *supra* note 23, at 235.

38. CRIME AGAINST HUMANITY, *supra* note 32, at 71–72.

39. PARVARESH, *supra* note 14, at 109; *Jonoone Koshtar*, *supra* note 9, at 8.

40. *Jonoone Koshtar*, *supra* note 9, at 8.

41. 3 MONIREH BARADARAN (RAHA M.), HAGHIGHATE SADEH [SIMPLE TRUTHS] 386 (2000).

42. ANONYMOUS, *Roozhayeh Ghor-eh Barayeh Edam* [Days of the Execution Lottery], 65 RAHE TUDEH 14, 15 (1997).

43. BARADARAN, *supra* note 41, at 388.

of Communists, that 200 of their members had been executed that day.⁴⁴ Years of growing mistrust between prisoners of different political stripes, however, meant that many of the Communists dismissed this story as a rumor.⁴⁵ Reza Ghaffari, a former prisoner, writes:

Someone sent a message using Morse code that many of the *Mojahedin* prisoners had been hanged. I could not believe it. I thought that the authorities were spreading rumors to frighten the prisoners and to break their spirit. A message was sent from our ward that maybe the police, itself, spread the news of executions to break the will of resistant prisoners.⁴⁶

Over time, the signs of an extermination campaign became clear. A survivor remembers an Afghan prison worker who tried to warn the prisoners by miming a noose around his neck, a gesture misinterpreted to mean that Khomeini had died.⁴⁷ The prisoners in Ward 7 of Gohar-Dasht saw Davood Lashgari, one of the more powerful wardens of that prison, carrying thick rope to the prison auditorium.⁴⁸ Prisoners vividly recall witnessing guards carry dead bodies to trucks in the prison yard.⁴⁹ Yet they found the prospect of a large-scale massacre so unbelievable that the prisoners simply assumed the bodies to be those of *Mojahedin* soldiers killed during the recent border skirmish.⁵⁰ Some in Gohar-Dasht saw guards with facemasks entering the prison amphitheater; they would later learn that the morgue freezers had broken down.⁵¹ When some Communist prisoners finally asked Davood Lashgari about the masked guards entering the prison auditorium and the repulsive odor emanating from within, the warden told them: "The septic tank in the amphitheater is broken and is being repaired. Don't your comrades in the Soviet Union sometimes clean out their prisons too?"⁵² The double entendre was likely not lost on nervous prisoners slowly becoming aware of the brutality awaiting them.

The first and primary targets of the 1988 massacre were supporters of the *Mojahedin*.⁵³ According to Amnesty International, many of those *Mojahedin* prisoners "had been tried and sentenced to prison terms during the early 1980s, many for non-violent offences such as distributing newspapers and

44. *Days of the Execution Lottery*, *supra* note 42, at 15.

45. *Id.*; see also Parvaresh, *supra* note 13, at 65 ("The news spread across the ward. The majority of prisoners were skeptical because, until then, the *Mojahedin* prisoners had repeatedly spread false news about the execution of their members. We all interpreted the message as a continuation of the same false news.")

46. GHAFFARI, *supra* note 23, at 240.

47. *I Witnessed the Massacre of Political Prisoners*, *supra* note 34, at 70.

48. Mohajer, *supra* note 24, at 6.

49. *Id.*

50. PARVARESH, *supra* note 14, at 109.

51. ABRAHAMIAN, *supra* note 6, at 211.

52. *I Witnessed the Massacre of Political Prisoners*, *supra* note 34, at 70.

53. GHAFFARI, *supra* note 23, at 242.

leaflets, taking part in demonstrations or collecting funds for prisoners' families."⁵⁴ In prisons across Iran, officials removed *Mojahedin* prisoners from their cells and told them that an amnesty commission would be meeting with them individually.⁵⁵ Officials then forced the prisoners to line up blindfolded and wait, often for hours, before individually being brought before a tribunal comprised of three to twelve members.⁵⁶

The group that the prisoners faced, which came later to be known widely as the "Death Commission," was not in fact an amnesty commission. Its sole purpose was to re-try each prisoner and order the execution of those remaining steadfast in their opposition to the government. What took place before these commissions "bore little resemblance to judicial proceedings aimed at establishing the guilt or innocence of a defendant with regard to a recognized criminal offence under the law. Instead, they appear to have been formalized interrogation sessions . . ." designed to discover a prisoner's true political beliefs.⁵⁷

The sessions were very brief, and, in the case of *Mojahedin* prisoners, often ended after a single, simple question: that of the prisoner's political affiliation. All who replied "*Mojahedin*" would be immediately sentenced to death.⁵⁸ In the eyes of the Death Commission judges, the "correct" answer to this preliminary question was "*Monafeqin*" ("hypocrites"), a pejorative term the Iranian government has long assigned to the *Mojahedin* organization.⁵⁹ The undesirable answer meant that guards would immediately guide the prisoner to a line on the left side of a hallway leading to a room where the prisoner could write a last will, and subsequently take him to the amphitheater to hang.⁶⁰ The prisoners were hung six at a time, although some alternate accounts claim that, each half hour, thirty-three prisoners were hanged using cranes and forklifts.⁶¹

Prisoners providing the "correct" answer to the first question were then asked the following questions: "Are you willing to give an interview on

54. AMNESTY INT'L REPORT, *supra* note 19, at 13.

55. CRIME AGAINST HUMANITY, *supra* note 32, at 71; GHAFFARI, *supra* note 23, at 242–43.

56. Based on survivor accounts, the number of judges on these tribunals was not constant. *I Witnessed the Massacre of Political Prisoners*, *supra* note 34, at 69.

57. AMNESTY INT'L REPORT, *supra* note 19, at 16.

58. *Id.*

59. The word "*Monafeq*" is an Arabic term for "hypocrite." The term is the title of *Surah* 63 of the Koran and is, thus, theologically significant. In that *Surah*, the following verse appears: "Under the guise of their apparent faith, [the hypocrites] repel the people from the path of Allah. Evil indeed is what they do." THE KORAN 63:2. In using the term, Iran's Islamic government implies that the *Mojahedin's* Islamic ideology is inauthentic and is used for evil ends. Interestingly, the use of the word "*Monafeqin*" and its loaded religious subtext did not originate with Iran's theocratic government. The secular government of the Shah initially used the Arabic term. ABRAHAMIAN, *supra* note 6, at 143–44 ("The [monarchist] regime, claiming that the *Mojahedin* were unbelievers masquerading as Muslims, used the Koranic term *Monafeqin* (hypocrites) to describe them—a label that the Islamic Republic was later to use in its own effort to discredit the *Mojahedin*.").

60. PARVARESH, *supra* note 14, at 119.

61. Compare ABRAHAMIAN, *supra* note 6, at 211, with CRIME AGAINST HUMANITY, *supra* note 32, at 23.

television to condemn and expose the {M}onafeqin?"; "Are you willing to fight with the forces of the Islamic Republic against the {M}onafeqin?"; "Are you willing to put a noose around the neck of an active member of the {M}onafeqin?"; and "Are you willing to clear the minefields for the army of the Islamic Republic?"⁶² An unsatisfactory answer to any of these questions meant a death sentence for the prisoner. Since the purpose of the questions was to test the prisoners' inner beliefs, some judges demanded that prisoners prove their loyalty to the government by becoming prison informants. In a particularly moving passage, Reza Ghaffari recounts the story of what his friend Habib, a member of the *Mojahedin*, suffered during his last moments:

When [Habib] appeared before the Death Commission, they asked him about his [affiliations]. He said 'Monafeqin.' They asked him if he was willing to participate in a televised interview and to condemn the *Mojahedin*, and he said that he is willing to do so. [The judge] asked again if he was willing to sign a petition against the *Mojahedin's* leadership. He said that he's willing. The [judge's] last question to Habib was whether he is willing to reveal information to the prison authorities about five resistant prisoners, and to cooperate with [them] by providing intelligence. But Habib stood firm and was unwilling to give in to such disgrace. He went to the gallows.⁶³

Given how quickly events transpired, very few *Mojahedin* prisoners actually survived the 1988 killings. Information about the early days of the massacre is consequently vague at best.

A slightly clearer picture is available for the experience of leftist prisoners brought before the Death Commission. By the time the Iranian government turned its attention to secular leftists in late August, the prisoners had realized the seriousness of the situation and had begun devising tactical answers to satisfy the judges. Compared to the *Mojahedin*, then, a greater proportion of left-wing prisoners survived. While each prisoner affiliated with the *Mojahedin* was tried as a *Mohareb* ("he who declares war on God"), authorities instead considered a leftist a *Mortad* ("apostate").⁶⁴ Determining whether a prisoner was a *Mortad*—a charge itself subdivided into *mortad-e fetri* ("innate apostate") and *mortad-e melli* ("national apostate"), the former category punishable by death—required unique questioning.⁶⁵ As Abrahamian describes it, the hearings were "an inquisition in the full sense of the term—an investigation into religious beliefs rather than into political and organizational affiliations. Conspicuously absent from them were

62. AMNESTY INT'L REPORT, *supra* note 19, at 16 (emphasis omitted).

63. GHAFFARI, *supra* note 23, at 245.

64. ABRAHAMIAN, *supra* note 6, at 210.

65. *Id.* at 213.

the issues that had concerned the preceding tribunals—issues such as ‘subversion,’ ‘treason,’ ‘espionage,’ ‘terrorism,’ and ‘imperialist links.’”⁶⁶ Judges first questioned prisoners about their political affiliation and then asked: “Are you a Muslim?”; “Do you pray?”; “Do you believe in heaven and hell?”; and “Do you read the Koran?”⁶⁷ After a few minutes of questioning, guards forced those prisoners who had given “incorrect” answers or publicly declared themselves atheists into a line on the left side of the hallway leading to the execution hall, just as they had with the *Mojahedin* a few weeks earlier.

In Evin, the prisoners wore blindfolds during their trial. In Gohar-Dasht, however, the prisoners could see their inquisitors.⁶⁸ The Gohar-Dasht survivors brought before the Death Commission consistently identify the same figures as sitting members of the tribunal: Tehran prosecutor Morteza Eshraghi, Revolutionary Court Judge Jaafar Nayyeri, Deputy Tehran Prosecutor Ebrahim Raisee, Deputy Minister of Intelligence Mustafa Pour-Mohammadi, and the aforementioned warden Davood Lashgari.⁶⁹ Others have mentioned Ismail Shoushtari, the head of the state prison organization in 1988 and later the Justice Minister, in connection with the Death Commission.⁷⁰ The Death Commission in Evin prison was likely comprised of the same officials, though Seyyed Hossein Mortazavi, warden of Evin, probably replaced Lashgari.

Not only were the killings cruel and unwarranted, but they were also arbitrary. A prisoner’s chance of survival depended first on his or her prison assignment. In Evin, where “there was no way for prisoners to communicate with each other,” prisoners faced a greater chance of execution because they had no opportunity “to prepare answers to questions put to them by the ‘Death Commission’ as prisoners in [Gohar-Dasht] had done.”⁷¹ The survivors also describe the trials and executions as scenes of chaos. Mistakes regularly occurred; prison guards—sometimes in error and sometimes deliberately—sent prisoners found to be “innocent” to the execution line.⁷² According to Amnesty International, “[s]ome prisoners who had been sentenced to death by the commission were spared because prison guards sent prisoners whom they disliked to be executed in their place.”⁷³ Tragically, there are currently no verifiable descriptions of the execution hall—no prisoner who entered it lived to tell about it.

The only political prisoners to collectively escape the mass executions were women affiliated with secular left parties, though even they suffered

66. *Id.* at 212.

67. *Id.*

68. *Id.* at 211.

69. *Id.* at 210; GHAFFARI, *supra* note 23, at 248.

70. CRIME AGAINST HUMANITY, *supra* note 32, at 57.

71. AMNESTY INT’L REPORT, *supra* note 19, at 17.

72. *Days of the Execution Lottery*, *supra* note 42, at 65.

73. AMNESTY INT’L REPORT, *supra* note 19, at 17.

some casualties. "Whereas Mojahedin women were promptly hanged as 'armed enemies of God,'" leftist women were not deemed sufficiently autonomous agents to be killed as apostates.⁷⁴ Professor Reza Afshari accurately observes that "[t]his one misogynist rule saved some lives!"⁷⁵ But the government's misogyny did not save all women. The U.N. Special Representative to Iran has reported on allegations from families of female *Mojahedin* prisoners who claim to have "received from administrative officials a certificate of marriage of their imprisoned daughters. These certificates concerned female prisoners who had allegedly been raped before execution."⁷⁶

While the *Mojahedin* women faced death and possibly rape, leftist female prisoners received brutal floggings if they refused to pray.⁷⁷ Suicides were common among the female prisoners who could no longer cope with the psychological trauma of prison life.⁷⁸ Baradaran, a leftist prisoner, notes that the physical torment and psychological pressure of this period prompted some of her friends to kill themselves by drinking toxic cleaning fluids.⁷⁹

This brutality, which lasted for nearly three months, was carried out in complete secrecy. Officials did not provide any information to the families of prisoners until after the "emergency" had ended. Prior to receiving news of the executions, family members tried to ascertain the fate of their imprisoned relatives by bringing clothes, medicine, or money to the prison in the hope that they could obtain a signed receipt from their loved ones, indicating that they were still alive.⁸⁰ When rumors began to circulate about possible executions, "distraught family members searched the cemeteries for signs of the newly dug graves which might contain their relatives' bodies."⁸¹ An Amnesty International newsletter reported on "a woman who dug up the corpse of an executed man with her bare hands as she searched for her husband's body in *Jadeh Khavaran* cemetery in Tehran in August."⁸² She is quoted as saying:

Groups of bodies, some clothed, some in shrouds, had been buried in unmarked shallow graves in the section of the cemetery reserved for executed leftist political prisoners . . . [T]he stench

74. ABRAHAMIAN, *supra* note 6, at 214; Mohajer, *supra* note 24, at 6.

75. AFSAHRI, *supra* note 16, at 112.

76. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Hum. Rts. on the Situation of Hum. Rts. in the Islamic Republic of Iran, *Situation of Human Rights in the Islamic Republic of Iran*, ¶ 27, U.N. Doc. A/44/620 (Nov. 2, 1989) (prepared by Reynaldo Galindo Pohl) [hereinafter *Situation of Human Rights in Iran*].

77. BARADARAN, *supra* note 41, at 391.

78. *Id.* at 398.

79. *Id.*

80. THE MASSACRE OF POLITICAL PRISONERS, *supra* note 19, at 192; AMNESTY INT'L REPORT, *supra* note 19, at 13; Mohajer, *supra* note 24, at 7.

81. AMNESTY INT'L REPORT, *supra* note 19, at 13.

82. *Mass Executions of Political Prisoners*, AMNESTY INT'L NEWSL., Feb. 1989.

of the corpses was appalling but I started digging with my hands because it was important for me and my two little children that I locate my husband's grave.⁸³

In Tehran, Iranian authorities usually transported the bodies to a special graveyard known commonly as *Lanat-Abad* ("The Place of the Damned"). A report prepared by the *Mojahedin* organization lists twenty-one mass graves across the country containing bodies of those executed in 1988.⁸⁴

Iranian authorities eventually contacted the families of prisoners by letter or telephone. Many families simply received instructions to visit the Islamic Revolutionary Committee office to receive news of their prisoner. Once there, "they were informed of the execution and required to sign undertakings that they would not hold a funeral or any other mourning ceremony."⁸⁵ Authorities typically did not tell relatives either the burial place of their loved one or how their relative was executed. Even if a family knew where the body of their relative was buried, they "were told that they should not hold any funeral ceremony."⁸⁶ Despite the orders, families sometimes defied the authorities and erected small monuments to their executed relatives. According to reports received by Amnesty International, such monuments erected in Beheshte Zahra, Tehran's main cemetery, often made up of little more than a few stones and some flowers, "were removed by the authorities prior to the visit to Tehran by the UN Special Representative on Iran in January 1990. This was apparently an attempt to remove visible evidence of the mass killings from the site of a possible inspection by the Special Representative."⁸⁷ In addition, when a U.N. human rights investigator visited Iran in 1990, the government prevented the families of the 1988 victims from reaching his office.⁸⁸

Almost immediately after the massacre, the government launched a well-organized international misinformation campaign, downplaying the extent of the killing and attempting to link all political prisoners to the *Mojahedin's* military incursion. According to Amnesty International, Ali Akbar Rafsanjani (then-Parliament Speaker) denied the widespread executions, telling French television that "the number of political prisoners executed in the past few months was less than 1,000."⁸⁹ Then-President Khamenei also acknowledged that some people had been killed, but claimed that the state only executed "those who have links from inside prison with the hypocrites [*Monafeqin*] who mounted an armed attack inside the territory of the Islamic Republic."⁹⁰ Iran's Ambassador to the

83. *Id.*

84. CRIME AGAINST HUMANITY, *supra* note 32, at 81.

85. AMNESTY INT'L REPORT, *supra* note 19, at 14.

86. *Id.*

87. *Id.* at 15.

88. *Opposition Rallies in Public*, IRAN TIMES, Feb. 2, 1990, at 1.

89. AMNESTY INT'L REPORT, *supra* note 19, at 12.

90. *Id.*

U.N., Ja'afar Mahallati, criticized Amnesty International for siding with "terrorist groups opposed to the Iranian government."⁹¹ He claimed that the victims had "direct organisational contacts with the army which invaded the sovereignty and territorial integrity of Iran, and which, through a treacherous espionage network, realised the enemy's aggressive intentions."⁹² In a statement verging on outright denial, Iran's then-Interior Minister told the U.N. Special Representative that "a campaign had been organized abroad alleging that invaders captured on the battlefield had been executed en masse, together with imprisoned members of the same group."⁹³ He went on to claim that "Islamic law and the Government of the Islamic Republic of Iran respect human dignity and have organized the institutions of the Islamic Republic of Iran on the basis of that essential principle."⁹⁴ Regrettably, when Abdullah Nouri re-emerged as a leading reformist politician nearly a decade later, few journalists celebrating his commitment to democracy and free speech questioned him as to why he had denied the massacre of thousands of political prisoners when he was the Minister of Interior.⁹⁵

As summer gave way to fall and winter, the initially swift and ferocious killing slowed and eventually "ended just before the tenth anniversary of the Islamic revolution in February 1989."⁹⁶ To mark the anniversary celebrations, "several hundred repentant political prisoners were included in amnesties."⁹⁷ The Iranian government and the state-controlled media made much of this prisoner release. According to Abrahmaian, Iran's "television networks featured a large Friday prayer meeting in downtown Tehran involving former royalists, Mojahedins, and well-known leftists from diverse Marxist groups."⁹⁸ Iran's diplomats, too, ensured that the international community, particularly U.N. Special Representative Reynaldo Galindo Pohl, knew of the amnesty. Although the report submitted to the U.N. General Assembly noted that "armed opposition groups dispute[] the exist-

91. U.N. ECOSOC, Rep. of the Econ. & Soc. Council, Annex, *Letter Dated 28 February 1989 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General*, 2, U.N. Doc. A/44/153 (Feb. 28, 1989) (prepared by Mohammad Ja'afar Mahallati) [hereinafter *Letter to the Secretary-General*].

92. *Id.* at 5.

93. U.N. ECOSOC, Comm. on Hum. Rts. on the Situation of Hum. Rts. in the Islamic Republic of Iran, *Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Commission on Human Rights, Mr. Reynaldo Galindo Pohl, Pursuant to Commission Resolution 1989/66*, ¶ 119, U.N. Doc. E/CN.4/1990/24 (Feb. 12, 1990) (prepared by Reynaldo Galindo Pohl).

94. *Id.* ¶ 120.

95. *Ballot-box Justice for Jailed Cleric*, GUARDIAN (London), Feb. 22, 2000, at 14; Susan Sachs, *Iran Reformers' Gains Reflected in Homages to Outspoken Cleric*, N.Y. TIMES, Feb. 21, 2000, at A1 ("In November, Mr. Nouri, 51, a close ally of the president, was sentenced to prison after he enraged the religious hierarchy by questioning its near-absolute power over how Iranians conduct their private lives. The trial mesmerized the public and became a metaphor for the struggle between the reactionary clergy and the impatient young reformers.")

96. APSHARI, *supra* note 16, at 116.

97. AMNESTY INT'L REPORT, *supra* note 19, at 18.

98. ABRAHAMIAN, *supra* note 6, at 221.

tence of the amnesty," the Special Representative ultimately applauded Iran's government for "a step in the right direction towards the disappearance of political arrests."⁹⁹ Special Representative Pohl, however, failed to report that the prisoners "who were released had to sign statements denouncing their earlier political activities. They were further obliged to pledge large sums of money, or in some cases, the deeds of the family house, against their future good conduct and non-involvement in opposition politics."¹⁰⁰

C. A Senseless Massacre?

At first glance, the utter senselessness of the 1988 massacre is puzzling. Why did the Iranian government decide to attack the political prisoners? And why in 1988, with the war over, the *Mojahedin* soundly defeated, and the prisoners wholly demoralized after years of imprisonment and torture? Although multiple theories exist, no survivor or observer has been able to provide a completely satisfactory explanation.

The most sensible theories are those put forth by Professors Abrahamian and Afshari, both of whom locate the impetus for the executions in the government's own inner workings. Abrahamian writes that after the cease-fire, Khomeini realized that "he had lost the most valuable glue holding together his disparate followers He also realized that his ailing health would soon remove him from the scene and thus leave his followers without a paramount leader."¹⁰¹ Along with the Salman Rushdie fatwa, which, in Abrahamian's view, erected a "formidable—if not insurmountable—obstacle in the way" of relations with the West, Khomeini pursued the execution of prisoners to "test the true mettle of his followers . . . [weeding] out the half-hearted from the true believers, the wishy-washy from the real revolutionaries."¹⁰² Afshari also considers the regime's internal dynamics, citing the effort to target the more liberal Ayatollah Montazeri, under whose command the prisons had become less repressive.¹⁰³

When considered in the context of Iran in the late 1980s, it seems plausible that the executions may simply have been part of the regime's inner power struggles. With Khomeini's death expected, various factions contended bitterly for control of the future of the Islamic Republic. The main faction seeking power was affiliated with then-Parliament Speaker Hashemi Rafsanjani, and its success depended, in large part, on forcing rivals such as Ayatollah Montazeri out of power. Mehdi Hashemi, an ally and relative of Montazeri, had already been tortured and executed in 1987 for revealing

99. *Situation of Human Rights in Iran*, *supra* note 76, ¶¶ 107–08.

100. AMNESTY INT'L REPORT, *supra* note 19, at 18.

101. ABRAHAMIAN, *supra* note 6, at 218.

102. *Id.* at 219.

103. AFSHARI, *supra* note 16, at 113.

Rafsanjani's role in the Iran-Contra scandal.¹⁰⁴ The execution of political prisoners, whose rights Montazeri and his supporters had attempted to defend for a number of years, may have been yet another maneuver in this ongoing struggle against Montazeri's faction.¹⁰⁵ If decreasing Montazeri's power within the government was the goal of the prison massacre, then the strategy proved immensely successful. As a result of Ayatollah Montazeri's conscientious objection to the killings, Khomeini effectively sidelined him and thus allowed Rafsanjani's faction to emerge victorious.

II. A CRIME AGAINST HUMANITY

It is naïve to show mercy to those who wage war on God . . . I hope that with your revolutionary rage and rancor toward the enemies of Islam, you can satisfy the Almighty.¹⁰⁶

— Ayatollah Khomeini, in a letter ordering
the execution of political prisoners

In this part, I argue that the massacre described in Part I meets the customary international law definition of a crime against humanity and must be examined as such by human rights investigators and possible future prosecutors. I further argue that the executioners, the authorities who directly ordered the executions, and the living figures who formulated the original extermination policy each can be held individually criminally responsible. Others indirectly linked to the executions can be held liable under the superior responsibility doctrine. The argument that I shall present in this Part is neither very innovative nor particularly complex. In fact, my goal is merely to apply well-recognized international criminal law doctrine to the facts I have outlined above. What is surprising—and what, hopefully, makes this project worthwhile—is that this simple analysis has never been articulated by any human rights organization. As mentioned in the introduction, HRW recently asserted that Iran's new Minister of Interior is implicated in a crime against humanity. However, this bold allegation was supported by only about five lines of legal discussion.¹⁰⁷ My task

104. Lee Stokes, *Iranian Elections Crucial to Rival Factions*, UNITED PRESS INT'L, May 28, 1989.

105. For a discussion of the power struggles in 1989, see Youssef M. Ibrahim, *Son of Khomeini Gains in Authority*, N.Y. TIMES, Mar. 22, 1989, at A1.

106. MATNE KAMELE KHATERATE AYATOLLAH HOSSAIN ALI MONTAZERI [THE COMPLETE TEXT OF THE MEMOIRS OF AYATOLLAH HOSSAIN ALI MONTAZERI] 520 (2001) [hereinafter MONTAZERI MEMOIRS].

107. MINISTERS OF MURDER, *supra* note 2, at 13. HRW's entire analysis is as follows:

Crimes against humanity were first classified in the charter of the Nuremberg Tribunal and constitute crimes "which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied . . . endangered the international community or shocked the conscience of mankind." Recently, crimes against humanity have been incorporated into several international treaties and the statutes of international criminal tribunals, including the Rome Statute of the International Criminal Court.

Id. (internal citations omitted).

here is to present the legal analysis that international human rights groups have neglected to provide.

The concept of crimes against humanity has a strong foundation in customary international law, emerging initially in the Martens Clause of the Hague Convention.¹⁰⁸ After the Second World War, the Charter of the International Military Tribunal for Nuremberg,¹⁰⁹ the Tokyo Charter,¹¹⁰ and Control Council Law No. 10, Art. II(1)(c)¹¹¹ all offered codifications of crimes against humanity. Following a number of high-profile domestic cases that occurred in the post-war era,¹¹² the statutes of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")¹¹³ and the International Criminal Tribunal for Rwanda ("ICTR")¹¹⁴ also outlawed crimes against humanity. The two tribunals have since produced a rich jurisprudence on the topic. The ICTY's decision in *Prosecutor v. Tadic* notes that "since the [London] Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned."¹¹⁵ The Rome Statute of the International Criminal Court ("ICC")¹¹⁶ further includes crimes against humanity in its list of core crimes. Below, I consider each element of the definition of crimes against humanity under customary international law and argue that the 1988 massacre of Iranian

108. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 23 (1992).

109. See Antonio Cassese, *Crimes against Humanity*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 353, 353 (2002) (quoting the definition of crimes against humanity from Article 6(c) of the Nuremberg Charter) ("namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of [the] domestic laws of the country where perpetrated.").

110. See GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 217 n.9 (2005) (quoting the definition of crimes against humanity from Article 5(c) of the Tokyo Charter) ("namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.").

111. See *id.* at 217 n.11 ("Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.").

112. Such domestic trials included those of Adolph Eichmann in Israel, Klaus Barbie in France, and Imre Finta in Canada. ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME* 249 (2005); see also *R. v. Finta* [1994] 1 S.C.R. 701 (Can.).

113. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute].

114. Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

115. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment, ¶ 623 (May 7, 1997).

116. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

political prisoners meets the definition. I then discuss the individual criminal responsibility of different groups of perpetrators.

A. *Widespread or Systematic Attack on Civilians*

When prosecutors brought the first cases before the ICTY, it was not immediately obvious that the “widespread” or “systematic” criteria constituted part of the definition of crimes against humanity under customary international law. The terms, after all, do not appear in Article 5 of the ICTY statute, nor do they appear in the Nuremberg Charter.¹¹⁷ In its *Tadic* decision, the ICTY clarified the issue, holding that “it is now well established that the requirement that the acts be directed against a civilian ‘population’ can be fulfilled if the acts occur on either a widespread basis or in a systematic manner.”¹¹⁸

The International Law Commission’s (“ILC”) 1996 Draft Code of Crimes Against the Peace and Security of Mankind (“ILC Draft Code”) also supports this reading of customary international law.¹¹⁹ According to the ILC, “[t]he thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy.”¹²⁰ The ICTR Statute and the Rome Statute both include the “widespread” and “systematic” elements.

The next questions are what “widespread” and “systematic” mean under customary international law, and how the elements are related to the 1998 massacre. Although it “can also be derived from [the crime’s] extension over a broad geographic area,”¹²¹ legal authorities generally consider “widespread” to be a quantitative term referring to the number of victims. According to the ILC Draft Code, to be widespread, an act must be “directed against a multiplicity of victims.”¹²² In *Prosecutor v. Jean-Paul Akayesu*, the ICTR defined “widespread” to mean a “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”¹²³ The ICTY has defined the term similarly.¹²⁴ “Systematic,” however, is a qualitative term, pointing to “the [organized] nature of the acts of violence and the improbability of their

117. See Cassese, *supra* note 109 and accompanying text.

118. *Tadic*, Case No. IT-94-1-T, Judgment, ¶ 646.

119. Int’l Law Comm’n [ILC], Draft Code of Crimes Against the Peace and Security of Mankind, art. 18, cmt. 3, in *Report of the International Law Commission on the Work of Its Forty-Eight Session, May 6–July 26, 1996*, at 94, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996) [hereinafter ILC Draft Code].

120. *Id.*

121. WERLE, *supra* note 110, at 225.

122. ILC Draft Code, *supra* note 119, art. 18, cmt. 4.

123. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 580 (Sep. 2, 1998).

124. See, e.g., *Prosecutor v. Kunarac*, Case No. ICTY-IT-96-23-T, Judgment, ¶ 428 (Feb. 22, 2001).

random occurrence."¹²⁵ The *Tadic* court found a systematic attack where "a pattern or methodical plan is evident."¹²⁶

To understand this particular element of crimes against humanity, it is also important to have a working definition of the term "civilian." In *Prosecutor v. Blaskic*, the ICTY addressed the issue in some depth, holding that whether or not a person is a civilian is determined as of "the moment the crimes were committed," thus encompassing "former combatants—regardless of whether they wore uniform[s] or not—who were no longer taking part in hostilities when the crimes were perpetrated . . ."¹²⁷ This common-sense definition of "civilian" is important here because the Iranian government has exerted much effort to link the executed prisoners to the *Mojahedin* military operations in July 1988.

The facts outlined in Part I indicate that the 1988 executions were both "widespread" and "systematic." Though the exact number of victims is an enduring mystery, conservative yet credible estimates range from 2800 to 5000 executions.¹²⁸ The killing was also geographically dispersed, occurring in prisons across Iran. The main massacres took place in Evin and Gohar-Dasht, the prisons that held a majority of Iran's political prisoners. But Amnesty International and the U.N. both find credible accounts of "similar events in many different prisons in all parts of Iran: in Rasht, Sanandaj, Mashhad, Isfahan, and elsewhere."¹²⁹ The fact that the killings occurred throughout Iran, claiming thousands of victims, meets the *Akayesu* requirement that the crime be a "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."¹³⁰

In the section below, I shall deal more closely with the requirement of systematization and point to evidence that the killings were part of a highly coordinated plan conceived at the very highest level of the Iranian government. For now, I shall only point to the seemingly deliberate strategy among high-ranking Iranian officials to downplay the massacre by portraying the victims as non-civilians. In statements published by the U.N. and Amnesty International, respectively, then-Chief Justice Mousavi Ardebili and then-President Khamenei claimed the authorities had executed "those who have links from inside prison with the [*Mojahedin*] . . . who mounted an armed attack inside the territory of the Islamic Republic."¹³¹ The gov-

125. *Prosecutor v. Kunarac*, Case No. ICTY-IT-96-23/1-A, Judgment, ¶ 94 (June 12, 2002).

126. *Tadic*, Case No. IT-94-1-T, Judgment, ¶ 648.

127. *Prosecutor v. Blaskic*, Case No. ICTY-IT-95-14-T, Judgment, ¶ 214, (Mar. 3, 2000).

128. For a discussion of the various estimates of the number of victims, see *infra* Part III.

129. AMNESTY INT'L REPORT, *supra* note 19, at 15; U.N. ECOSOC, Comm. on Hum. Rts. on the Situation of Hum. Rts. in the Islamic Republic of Iran, *Interim Report on the Situation of Human Rights in the Islamic Republic of Iran*, ¶ 48, U.N. Doc. A/43/705 (Oct. 13, 1988) (prepared by Reynaldo Galindo Pohl) [hereinafter *Interim Report on Iran*].

130. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 580.

131. AMNESTY INT'L REPORT, *supra* note 19, at 12; see also *Interim Report on Iran*, *supra* note 129, ¶ 49 ("The Iranian Chief Justice was reported as declaring on 5 August 1988 that . . . 'It was lucky that

ernment's position was both factually and legally indefensible, and Amnesty International unequivocally refuted the statement:

The political executions took place in many prisons in all parts of Iran, often far from where the armed incursion took place. Most of the executions were of political prisoners, including an unknown number of prisoners of conscience, who had already served a number of years in prison. They could have played no part in the armed incursion, and they were in no position to take part in spying or terrorist activities.¹³²

The government's position is even more absurd in light of the execution of leftist political prisoners who supported neither the *Mojahedin* organization nor the military attack against Iranian troops.

B. *A Preconceived Policy*

It is unclear whether customary international law requires a crime against humanity be in furtherance of a preconceived policy. The ILC Draft Code commentary includes this element in the definition,¹³³ as does the Rome Statute.¹³⁴ Although some scholars accept this view,¹³⁵ the ad-hoc tribunals have not uniformly adopted the preconception requirement. While *Tadic* adopts the ILC/ICC model,¹³⁶ the *Kunarac* court instead held that the existence of an overall government policy has mere evidentiary value.¹³⁷ Regardless of the doctrinal gulf, such an element, if required, is met in the 1988 case.

many of those who fought with the National Liberation Army were killed, this saved having to prepare files to have them executed.'").

132. AMNESTY INT'L REPORT, *supra* note 19, at 13.

133. ILC Draft Code, *supra* note 119, art. 18, cmt. 5.

134. Rome Statute, *supra* note 116, art. 7(2)(a).

135. See, e.g., BASSIOUNI, *supra* note 108, at 249:

The rationale for this requisite of 'state action or policy' is that 'crimes against humanity,' like other international crimes such as genocide and apartheid, cannot be committed without it because of the nature and scale of the crime. Thus, this element is not due to any exigency pertaining to each of the specific crimes (e.g. murder) contained within the meaning of this criminal category, but because the commission of such specific crimes against a large number of persons (i.e. 'extermination,' 'persecution') cannot take place without pre-existing 'state action or policy' requiring reliance on the power of the State in order to be carried out.

(emphasis omitted). *But cf.* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 93 (2003) ("Clearly, this requirement goes beyond what is required under international customary law and unduly restricts the notion under discussion.").

136. *Tadic*, Case No. IT-94-1-T, Judgment, ¶¶ 653–55.

137. *Kunarac*, Case No. ICTY-IT-96-23/1-A, Judgment, ¶ 98:

There was nothing in the [ICTY] Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it

It has long been suspected that the highest levels of Iran's government conceived the plan to execute Iran's political prisoners. For example, near the time of the massacre, Iranian parliamentarians had explicitly articulated the government's willingness to execute opposition figures. On the floor of Iran's parliament, representative Sadeq Khalkhali (having previously enjoyed an illustrious career as Iran's most brutal "hanging judge")¹³⁸ stated: "[The *Mojahedin*] hold their heads high in the world and want to bring us into question But we take revenge on you. We put you in jail and we kill you. This is a divine command. We exact retribution on you."¹³⁹ Another parliamentarian, Haeri-Zadeh, was just as unequivocal: "When it comes to counter-revolutionaries, we are prepared to execute them. We also use the whip, prison, exile, and other kinds of punishments."¹⁴⁰ However, it was not until 2000 that the publication of Grand Ayatollah Hussein Ali Montazeri's memoirs put to rest the rumors and speculations on this matter. The memoirs confirmed that Ayatollah Khomeini explicitly ordered the execution of all political prisoners who remained opposed to the Iranian government.

Montazeri, a theologian trained in the seminaries of Qom and imprisoned for many years by the Shah's secret police, was seen as a "reluctant politician" and a principled moderate in the Iranian government.¹⁴¹ In 1988, Ayatollah Montazeri "held no office except the title of deputy leader and had, therefore, only moral influence as the most senior revolutionary clergyman after Khomeini."¹⁴² Through his position as Khomeini's chosen successor, however, Montazeri was sufficiently well placed in the government hierarchy to have intimate knowledge of the prison massacre. His memoirs include startling revelations and strong confirmations of the accounts provided by survivors.

Montazeri claimed that after the *Mojahedin* attack on Iran

some people decided to, once and for all, get rid of the *Mojahedin* and so they obtained a letter from the Imam [Khomeini] stating that all prisoners, from any time, affiliated with the *Monafeqin* must be executed if a majority of a three-person panel, comprised of a prosecutor, a religious judge, and a representative of the Ministry of Intelligence, decides that he holds firmly to his beliefs.¹⁴³

was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters.

138. Haleh Afshar, *Obituary: Ayatollah Sadeq Khalkhali*, *GUARDIAN* (London), Dec. 1, 2003.

139. *Opposition Rallies in Public*, *supra* note 88, at 2.

140. *Id.*

141. *MOIN*, *supra* note 16, at 277.

142. *Id.*

143. *MONTAZERI MEMOIRS*, *supra* note 106, at 345.

A copy of this letter, which was sent to all judges in Iran in 1988, is included as an appendix to Montazeri's memoirs.

Khomeini's letter is astonishing in its clarity. In the brief note, which is undated but was obviously written subsequent to the *Mojahedin* attack, Iran's late Supreme Leader ordered the following: "Since the traitorous *Monafeqin* do not believe in Islam and all their words stem from deception and hypocrisy . . . and as they are waging war on God . . . those who are in prisons throughout the country and remain steadfast in their support for the *Monafeqin* must be condemned to death as *Moharebs* [those who declare war on God]."¹⁴⁴ The decision to execute any prisoner, Khomeini clarified, must be made by a plurality of judges and, in Tehran, must be carried out by Hojjat ol-Islam Nayyeri (a religious judge), prosecutor Morteza Eshraghi, and a representative from the Ministry of Intelligence.¹⁴⁵ Khomeini concluded his letter by expressing his hope that the execution order will be carried out with "revolutionary rage and rancor against the enemies of Islam."¹⁴⁶

When he learned of this letter, Ayatollah Montazeri contacted then-Chief Justice Mousavi Ardebili to ask: "Had your judges not already condemned these prisoners to five or ten years in prison?"¹⁴⁷ Montazeri chastised the Chief Justice for his failure to ask Khomeini why the government should execute "a person who, for example, has been in jail for some time on a five-year sentence and who knew nothing of the *Monafeqin* [military] operations."¹⁴⁸

Under pressure from Montazeri, Khomeini's son, Ahmad, sent a letter to his father which, by posing three questions, sought to clarify the decree. The first question concerned whether "the order applies only to those who have been in prison, have been tried and condemned to death, and yet refuse to change their stance and their verdict has not yet been carried out," or if it applied more generally even to those "who have not yet been tried."¹⁴⁹ Secondly, the letter asked whether prisoners "who have received limited jail sentences, and who have already served part of their terms" should also be condemned to death.¹⁵⁰ Finally, as a procedural matter, Ahmad asked Khomeini whether officials in provincial towns could act autonomously on the order.¹⁵¹ In a terse reply with fatal implications for thousands of prisoners, Khomeini wrote: "In all of the above cases, the verdict for whomever, that at any time, is found to remain steadfast in his *Nefaq* ["hypocrisy"], is

144. *Id.* at 520, app. 152.

145. *Id.*

146. *Id.*

147. *Id.* at 345.

148. *Id.*

149. *Id.* at 520, app. 152.

150. *Id.*

151. *Id.*

execution. Destroy the enemies of Islam quickly. In regard to the cases, use whichever procedure that provides for swifter verdicts.”¹⁵²

There are no further statements from Khomeini on the topic of the executions. But Montazeri's own writing on the massacre and his two subsequent letters to Khomeini, both of which remained unanswered, are quite revealing. On July 31, 1988, Montazeri wrote the first such letter to Iran's Supreme Leader, in which he voiced his concerns both about the plan's lack of due process safeguards and about the effect that such a massacre would have on the Islamic Republic's international reputation. Montazeri reminded Khomeini that the executions displayed utter disregard for all judicial standards and killed many innocent prisoners by mistake.¹⁵³ “If you insist that your decree be carried out,” he implored Khomeini, “at least order that decisions of the judge, prosecutor, and the intelligence official be based on unanimity and not a mere plurality. And please spare women, particularly those with children.”¹⁵⁴ The objections raised in Montazeri's July letter, particularly his warning about the mistaken executions, corroborate the survivors' statements about the arbitrary manner in which the Death Commission pronounced its life or death decisions.

Montazeri's memoirs also reveal a great deal about the type of questioning that prisoners faced when before the Death Commission and illustrate that the odds were heavily against the survival of defendants. Prompted by a visit from a judge sitting in the southwestern province of Khuzestan, who informed Montazeri that “over there [in Khuzestan], they are killing them quickly,”¹⁵⁵ the Deputy Leader wrote Khomeini a second time on August 2, 1988, to describe the “trials” to which prisoners were subjected.¹⁵⁶ Montazeri wrote:

Three days ago, a religious judge from one of the provinces, who is a trustworthy man, came to see me in Qom and was in great distress because of the way Your Eminence's decree is being implemented. He said: The intelligence chief or the prosecutor (I forget which) was trying to ascertain if a prisoner was still holding fast to his beliefs. He asked the prisoner if he was prepared to condemn the *Monafeqin*, he said “Yes.” He asked him: “Are you willing to go to the fronts to fight in the war with Iraq?” He said, “Yes.” They asked, “Are you willing to walk over landmines?” [The prisoner] said, “Do you mean all the people are willing to walk over landmines? Also, you must not have

152. *Id.* The use of the term *Nefaq* (“hypocrisy”) by Khomeini is quite deliberate. It is the Arabic root of the word *Monafeq* (plural: *Monafeqin*), the government's pejorative name for the *Mojahedin*. See *supra* note 59 and accompanying text.

153. *Id.* at 520, app. 153.

154. *Id.*

155. *Id.* at 346.

156. *Id.* at 521, app. 154.

such high expectations from someone who has just changed his views." They said, "It is obvious that you are still holding on to your political beliefs," and they dealt with him in the same way they dealt with those who had held onto their previous political positions.¹⁵⁷

Montazeri's subsequent memoranda sent to Mr. Nayyeri, Mr. Eshraghi, Mr. Raisee, Mustafa Pour-Mohammadi, Mohammad Rayshahri (then-Minister of Intelligence), and Ahmad Khomeini, all proved ineffective in halting or delaying the executions.¹⁵⁸ Consistent with the prisoners' accounts, Ayatollah Montazeri wrote that the order for the execution of atheist prisoners (who did not support the *Mojahedin*) was obtained from Khomeini at a later date.¹⁵⁹ Hence, the executions of the atheists were carried out after the *Mojahedin* prisoners had already been tried. No copy of this second order has been published. Overall, Montazeri estimates¹⁶⁰ that approximately 2800 to 3800 prisoners affiliated with the *Mojahedin* were executed in the summer of 1988.¹⁶¹ These figures do not appear to include the leftist prisoners (Montazeri claimed there were 500 such prisoners at the time).¹⁶² When compared with other sources, Montazeri's estimate appears to be low, but not grossly inaccurate.¹⁶³

Montazeri's memoirs and documentation, the statements by other officials, and the general circumstances surrounding the massacre leave little doubt that the killing of political prisoners in Iran was a calculated and systematic action closely connected to a state policy. The executions had in common both their gross savagery and the fact that each comprised part of a deliberate governmental policy. The 1988 massacre thus seems to satisfy at least the requirement that the underlying crime be committed in a systematic pattern. Even if the more stringent requirement of official state policy were required, however, the killing of Iran's prisoners still qualifies as a crime against humanity.

C. *The Underlying Crimes: Murder, Extermination, and Persecution*

When used in common parlance, it is often forgotten that the phrase "crimes against humanity" is "a label for an entire category of specific crimes" enumerated in international documents.¹⁶⁴ In the 1988 cases, the

157. *Id.* at 521, app. 154.

158. *Id.* at 347, 521, app. 155.

159. *Id.* at 347.

160. Montazeri, however, stressed that he was unsure of exact numbers. *Id.* at 345 ("After some time, they suspended prisoners' visits and, based on claims by those who carried out the letter's order, 2,800 or 3,800—I do not recall exactly—men and women were executed across the country; even individuals who prayed, fasted . . .").

161. *Id.* at 345, 347.

162. *Id.* at 347.

163. *Id.* For a discussion on the number of victims, see *infra* Part III.

164. BASSIOUNI, *supra* note 108, at 245.

crimes of murder, extermination, and persecution are most relevant. Since the executions amounted to unlawful intentional killing, they constitute murder. However, I shall say little on the charge of murder since it is a "crime that is clearly understood and well defined in the national law of every state."¹⁶⁵

Extermination differs from murder in that it is "by its very nature directed against a group of individuals" and involves an "element of mass destruction."¹⁶⁶ The ICTY's decision in *Prosecutor v. Mitar Vasiljevic* further clarifies this crime, holding that criminal liability for extermination "only attaches to those individuals responsible for a large number of deaths."¹⁶⁷ In *Prosecutor v. Radislav Krstic*, the ICTY held in turn that discrimination is not a necessary element of extermination.¹⁶⁸ That the 1988 killing of political prisoners constituted extermination is apparent from the facts outlined above and from the official letters published in Montazeri's memoirs. The massacre was, without doubt, directed at a group, and involved the requisite element of mass destruction. Although the ICTY held that a finding of extermination does not require discriminatory intent, the Iranian government demonstrated such intent by targeting its victims on the basis of political belief. It should be noted, however, that under *Vasiljevic*, only the senior Iranian officials who ordered the killings can be charged with the crime of extermination. Because extermination requires that an actor be responsible for many deaths, the ICTY holds that ordinary executioners typically cannot be convicted of such a crime.¹⁶⁹

The crimes of persecution committed in 1988 are closely connected to the crimes of murder and extermination discussed above. Since the Nuremberg Charter, persecution has been included in all codifications of the criminal acts giving rise to crimes against humanity. Cherif Bassiouni notes, however, that locating a freestanding act of persecution is difficult because persecution is not "an international crime *per se* unless it is the basis for the commission of other crimes."¹⁷⁰ Thus, to make a persecution claim, it appears necessary to demonstrate that a person's independent fundamental rights were violated on unacceptable discriminatory grounds. The commen-

165. ILC Draft Code, *supra* note 119, art. 18, cmt. 7.

166. *Id.* art. 18, cmt. 8.

167. *Prosecutor v. Mitar Vasiljevic*, Case No. IT-98-32-T, Judgment, ¶ 227 (Nov. 29, 2002).

168. *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, Judgment, ¶ 499 (Aug. 2, 2001).

169. *Vasiljevic*, Case No. IT-98-32-T, Judgment, ¶ 222:

[I]n none of the reviewed cases were minor figures charged with "extermination" as a crime against humanity. Those who were charged with that criminal offence did in fact exercise authority or power over many other individuals or did otherwise have the capacity to be instrumental in the killing of a large number of individuals. Those, such as executioners, who were not in such position but who had participated in the killing of one or a number of individuals were generally charged with murder or related offences whilst the charge of "extermination" seems to have been limited to individuals who, by reason of either their position or authority, could decide upon the fate or had control over a large number of individuals.

170. BASSIOUNI, *supra* note 108, at 318.

tary of the ILC Draft Code supports this reading of customary international law, noting that the common characteristic of the crime of persecution is “the denial of the human rights and fundamental freedoms to which every individual is entitled, without distinction as recognized in the Charter of the United Nations . . . and the International Covenant on Civil and Political Rights”¹⁷¹ *Tadic*, a leading ICTY case on the topic, holds that “it is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although the discrimination must be on one of the listed grounds to constitute persecution”¹⁷²

The 1988 massacre was a vivid case of such political persecution. The letter from Khomeini to the judiciary is explicit in its demand that the Islamic Republic’s political opponents be rapidly eliminated. The questions asked by the Death Commission also provide clear proof that the killings were motivated by political animus. Though interrogators often couched questions in the language of theology, the true motivation behind them was to separate those prisoners who remained in opposition to the government from those whose resistant will had been completely broken. Authorities spared the latter while sending the former to their deaths. The extrajudicial killing of political prisoners was also a blatant violation of the most fundamental human right to life. The politically motivated massacre was also in clear contravention of Articles 2, 6(1)-(2), 14, 15, and 26 of the International Covenant on Civil and Political Rights.¹⁷³

D. *Individual Criminal Responsibility*

A thorough investigation of the 1988 crimes must focus closely on the individual perpetrators, particularly those who currently hold positions of power. In accordance with customary international law, the 1988 perpetrators should be classified and investigated as three distinct but interrelated groups: the executioners, the officials who gave the execution orders, and the high-ranking figures who conceived of and implemented the policy. A fourth category of individuals could include officials with the requisite level of knowledge about the killings and effective control over complicit subordinates.

As to the first category of perpetrators, the ILC Draft Code captures the non-controversial international custom that “an individual who performs an unlawful act or omission is criminally responsible for this conduct”¹⁷⁴ In the 1988 case, it is the prison executioners who bear this form of direct criminal responsibility.

171. ILC Draft Code, *supra* note 119, art. 18, cmt. 11.

172. *Tadic*, Case No. IT-94-1-T, Judgment, ¶ 697.

173. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

174. ILC Draft Code, *supra* note 119, art. 2, cmt. 7.

Next in the hierarchy of criminal responsibility are those who directly ordered or prompted the executions, ranking immediately above the individuals who physically carried out the executions. The ILC Draft Code “provides that an individual who orders the commission of a crime incurs responsibility for that crime.”¹⁷⁵ In fact, according to the ILC, the “superior who orders the commission of the crime is in some respects more culpable than the subordinate who merely carries out the order and thereby commits a crime that he would not have committed on his own initiative.”¹⁷⁶ This appears to be an accurate statement of customary law, as reflected in the ICTY and ICTR statutes and the Rome Statute.

In the 1988 massacre, the judges on the Death Commissions in Tehran and elsewhere should bear primary criminal responsibility as instigators. The prison wardens who ordered the guards under their control to carry out the hangings are also responsible for the crimes even if they did not actually pronounce the death sentences. Thanks to Montazeri, some of the figures in this category are well-known. In his memoirs, Montazeri has pointed to Jaafar Nayyeri, Morteza Eshraghi, Ebrahim Raisee, and Mostafa Pour-Mohammadi as the sitting judges in Evin and Gohar-Dasht.¹⁷⁷ In their publications, the *Mojahedin* also allege that Esmail Shoostari, the head of Iran’s prisons in 1988, and Ali Mobasher, who later became the head of Tehran’s Revolutionary Courts, acted as Death Commission judges.¹⁷⁸

Because Montazeri has provided some active leads, pursuing this category of perpetrators may be worthwhile for human rights investigators. Unlike the low-level executioners who are probably too great in number and too difficult to locate, those who ordered the killings are far better known. In fact, many, like Pour-Mohammadi, have been rewarded with high-ranking government positions. Shoostari, for example, became Iran’s Minister of Justice in 1989, a position he maintained during the Khatami era. Ebrahim Raisee was also promoted within the government, becoming the director of Iran’s State Inspectorate Organization.¹⁷⁹ Documenting the identity and role of each of these figures will be more difficult in Iran’s more remote provinces where there were fewer prisoners and likely fewer living witnesses.

At the top of the criminal hierarchy are those who participate in the planning of the grave human rights violation. Provisions that criminalize such actions are “intended to ensure that high-level government officials or military commanders who formulate a criminal plan or policy, as individuals or as co-conspirators, are held accountable for the major role that they

175. *Id.* art. 2, cmt. 8.

176. *Id.*

177. MONTAZERI MEMOIRS, *supra* note 106, at 520, 521, app. 152, app. 155.

178. CRIME AGAINST HUMANITY, *supra* note 32, at 56–57.

179. *Khorramabad: Unrest Shows Political Divisions*, IRAN REPORT, Sept. 4, 2000, (Radio Free Europe/Radio Liberty, Washington D.C.) available at <http://www.globalsecurity.org/wmd/library/news/iran/2000/34-040900.html>.

play which is often a decisive factor in the commission of the crimes”¹⁸⁰ The appeals court in *Tadic* affirms the expansive radius of responsibility, holding:

Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question.¹⁸¹

The individual criminal responsibility of those who conceive of and disseminate plans for the violation of human rights has been repeatedly codified, starting with the Nuremberg Charter and continuing to the Rome Statute.¹⁸²

Unfortunately, Montazeri’s memoirs are unhelpful in identifying the planners of the 1988 massacre. In a key passage cited earlier, Montazeri recalls that “some people decided to, once and for all, get rid of the *Mojabedin* and so they obtained a letter from the Imam [Khomeini].”¹⁸³ To avoid controversy, Montazeri is purposely vague on the identity of the “people” who sought the letter. Though the information currently available is insufficient to determine with certainty the identity of the members of this inner circle, it is possible to make some educated guesses. By virtue of his immense power in the Iranian governmental structure, Khomeini’s son, Ahmad, was almost certainly among the masterminds of the massacre. In addition, if this Article’s power-struggle theory on the cause of the massacre is accurate, it is equally likely that Hashemi Rafsanjani was among those who sought to obtain the execution order from Khomeini. Rafsanjani was long a member of Khomeini’s inner circle and was often considered one of the Supreme Leader’s closest advisers and confidantes. Baqer Moin’s leading biography of Khomeini describes an exceptionally close relationship between the two clerics, stating:

It was Hashemi Rafsanjani, not Montazeri, or President Khamene’i, or Prime Minister Musavi, upon whom, after the death of Beheshti, Khomeini had come to rely most for political advice [H]is access to Khomeini, based on his long-standing friendship with Khomeini’s son and facilitated by the fact that, at Khomeini’s request, he and his family had moved to a mansion

180. ILC Draft Code, *supra* note 119, art. 2, cmt. 14.

181. *Tadic*, Case No. IT-94-1-A, Judgment, ¶ 191.

182. See Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Rome Statute, *supra* note 116, art. 25(3).

183. MONTAZERI MEMOIRS, *supra* note 106, at 345.

in Jamaran [the building complex where Khomeini and his family lived] was exceptional.¹⁸⁴

It is also likely that Ayatollah Mousavi Ardebili was among the planners. After all, Montazeri's initial reaction to hearing about the executions was to contact the Chief Justice and ask him to explain why the judges under his control were slaughtering prisoners who had already been sentenced.¹⁸⁵ Although Montazeri has provided these clues, more information will be needed to identify fully this group of perpetrators.

The final perpetrators whose role must be investigated are those government officials who did not order the killings or conceive of the policy, but who bear responsibility for the 1988 crimes under the doctrine of "superior responsibility" now codified in Article 28(b) of the Rome Statute. According to Antonio Cassese's analysis, three conditions must be present for the doctrine of superior responsibility to be applicable: (i) The superior must exercise effective command, control, or authority over the perpetrators; (ii) the superior must know, or have information which would allow him to conclude at the time that crimes were being committed or had been committed; and (iii) the superior must have failed to take the action necessary to prevent or repress the crimes.¹⁸⁶

The doctrine has clear relevance to the 1988 case. A number of government figures who played no direct role in the massacre held positions in which they likely acquired knowledge of the impending crime. It was earlier stated that Ayatollah Mousavi Ardebili may have been one of the handful of leaders who plotted the mass execution. Even if that theory is inaccurate, the Chief Justice is certainly implicated in the crime by the doctrine of superior responsibility. He disseminated Khomeini's letter among the judiciary and his direct representative, Jaafar Nayyeri, sat as a judge on the infamous Death Commission.¹⁸⁷ Similarly, it has been alleged that Esmail Shooshtari was a member of the Death Commission.¹⁸⁸ Even if the allegation is untrue, Shooshtari's role as the head of Iran's prisons in 1988 still renders him criminally responsible. Shooshtari may find it difficult to argue that, in his role as head of the prisons, he lacked the necessary knowledge about the mass crimes his subordinates were committing across the country. Under the superior responsibility doctrine, Mousavi Khomeiniha, a cleric who in an extraordinary about-face¹⁸⁹ reappeared on

184. MOIN, *supra* note 16, at 263.

185. MONTAZERI MEMOIRS, *supra* note 106, at 345.

186. CASSESE, *supra* note 135, at 208-09.

187. See MONTAZERI MEMOIRS, *supra* note 106, at 345, 520, app. 152.

188. CRIME AGAINST HUMANITY, *supra* note 32, at 56-57.

189. See *The Meaning of Freedom*, ECONOMIST, July 31, 1999:

The press feud is at the heart of Iran's reformist-conservative war within the establishment. Consider the actors in the Salam case. Mr. Mousavi-Khomeiniha, who conducted his defence without a lawyer, is one of the architects of the 1979 revolution: he was spiritual adviser to the students who seized the American embassy for 444 days, and later a feared prosecutor-

Iran's political scene as a reformist publisher (of the *Salam* newspaper), would also be implicated in the 1988 crimes for his role as Iran's Prosecutor General, since Morteza Eshraghi and Ebrahim Raisee, the aforementioned prosecutors and Death Commission judges, likely worked under Khomeini's direct control. Similar logic also implicates Mohammadi Rayshahri, the Minister of Intelligence, in the crimes because Rayshahri's ministry was represented on the Death Commission by Mustafa Pour-Mohammadi, making it highly likely that the minister was aware of the widespread killings.

A problem with the superior responsibility doctrine as it relates to the 1988 case is that knowledge of the crimes and "effective control" over subordinates may be difficult to prove given Iran's chaotic power structure, in which political institutions often exist in parallel and the powers and responsibilities of officials are not clearly delineated.¹⁹⁰ For example, while it can be assumed that Shooshtrari knew about the massacre in his role as head of Iran's prisons, it cannot readily be inferred that he exercised effective command, control, or authority over the executioners in his prisons. The authority to instigate the killings, or to stop them, may have rested elsewhere. Human rights researchers must explore in greater depth such questions about individual criminal liability.

III. THE ROAD AHEAD: THE DIFFICULTIES IN INVESTIGATING 1988 AND WHY IT STILL MATTERS

It is one thing to ferret out criminals and murderers from their hiding places, and it is another thing to find them prominent and flourishing in the public realm¹⁹¹

— Hannah Arendt, *Eichmann in Jerusalem*

The 1988 massacre was widespread. The victims were numerous. The available facts, however, are few. Human rights groups who wish to investigate the matter ought first to recognize that the task will be an immense challenge that will undoubtedly draw the ire of the Iranian government and certain segments of the Iranian community. Below, I point to some of the obstacles that investigators will likely face. I also argue that, despite the

general. All eight members of the jury also hold impeccable revolutionary credentials. One of them is the head of the Islamic Propagation Organisation, charged with everything from assigning clerics to mosques to determining the sermons delivered at Friday prayers in central Tehran.

190. See *Iran's Choice: Pragmatist or Hardliner?*, *ECONOMIST*, June 20, 2005 ("During his two terms in office, the outgoing, moderately reformist president, Muhammad Khatami, has repeatedly had his liberalising laws approved by Iran's elected parliament only to see them overruled by the country's other, more powerful parallel government, an unelected theocracy topped by the Supreme Leader, Ayatollah Ali Khamenei.")

191. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 17 (1963).

costs, an immediate investigation and documentation effort must be launched.

Although statutes of limitation are inapplicable to the 1988 case as an abstract legal matter,¹⁹² the two decades that have passed since the commission of the mass crimes may, in effect, prevent a proper investigation. Statutes of limitation exist to ensure that a case is brought before “evidence has been lost, memories have faded, and witnesses have disappeared.”¹⁹³ Sadly, in the 1988 case this process has already begun. First, the Iranian government has tried to eliminate physical evidence of the crime. For example, the authorities have threatened to destroy Khavaran cemetery in Tehran, home to the mass graves of Iran’s political dissidents. Families of executed prisoners recently told HRW that “makeshift gravestones, put in place by the families, have been destroyed. They said that the government is preparing for a major overhaul of [Khavaran] to destroy any evidence of burials.”¹⁹⁴ Radio Farda, a U.S.-based Persian-language radio service, reported in November 2005 that unidentified figures had attacked and destroyed several mass graves.¹⁹⁵ Secondly, the survivors’ and families’ memories have probably become less reliable over time, as have the memories of perpetrators whose testimony could be instrumental in the investigation. With the high rate of emigration among Iranians, it is also possible that many survivors, victims’ families, and perpetrators have settled across the world, making them harder to locate. Many perpetrators connected to the case may have died over the years, as have Khomeini and his son, the two most senior figures linked to the killings. Finally, if the experience of writing this Article is any indication, gathering the obscure news sources on the massacre is becoming increasingly difficult.

Human rights investigators will also be confronted with two crucial, yet virtually unanswerable, structural questions about the 1988 massacre. The first concerns the exact scale of the crime. No one is entirely sure how many were killed that summer, and estimates vary widely. The *Mojabedin* have publicly stated that the figure could be as high as 30,000, though that number is highly questionable.¹⁹⁶ The organization has, however, compiled a list of 3208 of its supporters killed across the country in 1988.¹⁹⁷ In their

192. See CASSESE, *supra* note 135, at 319 (“[S]pecific customary rules render statutes of limitation inapplicable with regard to some crimes: genocide, crimes against humanity, torture.”); see also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity art. I(b), Nov. 26, 1968, 754 U.N.T.S. 73; Rome Statute, *supra* note 116, art. 29 (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”).

193. Order of R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 349 (1944).

194. MINISTERS OF MURDER, *supra* note 2, at 7.

195. Radio Broadcast, Afrade Nashenas Ghabrhaye Edamyane Siyasiye Daeye 60 ra dar Goorestane Khavaran Takhreeb Kardand [Unidentified Individuals Destroyed the Kharvaran Cemetery Graves of the Political Prisoners Executed in the 1980s] (Nov. 19, 2005) (transcript on file with author).

196. See CRIME AGAINST HUMANITY, *supra* note 32.

197. See THE MASSACRE OF POLITICAL PRISONERS, *supra* note 19.

interviews and memoirs, survivors provide estimates ranging from 5000 to 10,000 victims.¹⁹⁸ The most credible source as to the number is likely to be Ayatollah Montazeri, who believes that somewhere between 2800 and 3800 prisoners were killed that summer.¹⁹⁹ The accurate calculation and recording of the number of victims will be a serious challenge for investigators.

The second seemingly insurmountable structural challenge to such an investigation stems from the lack of information about the inner workings of the Iranian government. As I mentioned above, it is unclear exactly who conceived of the extermination policy and who gave the execution orders. Applying the doctrine of superior responsibility is also difficult in the 1988 case given Iran's unique governmental structure. The many parallel political institutions and diffuse power bases mean that a figure in a position of governmental authority in Iran may have neither knowledge of, nor effective control over, the actions of subordinates. There may be no solution to this problem except finding credible government insiders willing to provide information in exchange for possible guarantees of future amnesty. Without testimony as to how the extermination plan was conceived and how widely the plan was known, and without documentation of the role of judges and guards in various prisons, arguments made by human rights activists about the individual criminal responsibility of government officials could be dismissed as politically motivated speculation.

In addition to potential gaps in the 1988 narrative, human rights investigators will also encounter three distinct political obstacles. The first and largest is the Iranian government. Tehran will be unwilling to cooperate and will, in fact, channel vast resources to prevent and undermine any such investigation. As was the government's tactic vis-à-vis Amnesty International immediately following the massacre,²⁰⁰ Iranian officials will argue that any investigation into the 1988 execution lacks "context" unless it is accompanied by a concomitant investigation into the activities of the *Mojahedin*. The second political obstacle concerns the *Mojahedin* and their standing among the Iranian community. The group's popularity among the public has been significantly diminished over the past three decades, a situation not helped by their presence on the terror lists of a number of Western countries or their increasing links with U.S. foreign policy hawks.²⁰¹ Because of the unpopularity of the organization to which the majority of the 1988 victims belonged, it is possible that an investigation into the massacre will be met with public indifference. More worrisome is the risk

198. AFSHARI, *supra* note 16, at 112–13; *see also* Internet Broadcast, Mosahebeh Television International with Babak Yazdeh Dar Morede Koshtare Tabestane 67 [International Television's Interview with Babak Yazdeh Regarding the 1988 Summer Massacre], available at <http://khavaran.com/Ghatleam.htm> (last visited Apr. 28, 2006).

199. *See* MONTAZERI MEMOIRS, *supra* note 106, at 347.

200. *See Letter to Secretary-General*, *supra* note 91.

201. *See* Connie Bruck, *Exiles: How Iran's Expatriates Are Gaming the Nuclear Threat*, NEW YORKER, Mar. 6, 2006, at 48.

that scholars and experts may refuse to cooperate with such an investigation for fear of being portrayed as *Mojabedin* sympathizers, or lest their words be used to justify military action against Iran. The final political obstacle to a 1988 investigation involves "reformist" opposition forces who may find the matter inconvenient. A report on 1988 will certainly point to several leading government figures and is even likely to implicate some reformist politicians. Those with a vested interest in the success of Iran's official reformist camp may not wish to revisit a debate about a massacre that claimed the lives of counter-revolutionaries, particularly if such a debate would bring to light the dark pasts of some of their leading members.

Given these costs, why should human rights investigators devote their limited resources to this long-forgotten massacre? The answer is, in fact, quite simple. They should do so for the sake of ending Iran's culture of impunity, for the sake of bereaved families, and for the sake of ensuring Iran's democratic future. In short, they should do so in every interest of justice. The 1988 massacre is the Islamic Republic's most brazen and widespread violation of human rights. What transpired in Iranian prisons in the summer of that year was an act of brutality unparalleled in contemporary Iranian history. And yet so little has been written on the topic that many Iranians still know nothing about the atrocity. The 1988 case still matters because it is the Islamic Republic's single largest crime and, paradoxically, the one for which it has least been held to account. The longer the case remains dormant, and the longer human rights groups vacillate on the question of whether the issue is "worth" investigating, the more likely it will be that the Iranian government will succeed in an act of mass murder without incurring any political cost. The knowledge that the government already committed a mass atrocity has led to other serious governmental abuses since 1988 and will likely bring still others in the near future. After all, "nothing emboldens a criminal so much as the knowledge [that] he can get away with a crime."²⁰²

HRW once described the 1998 arrest of Augusto Pinochet as a "wake-up call to tyrants everywhere."²⁰³ It is in this same spirit of causing alarm to tyrants and international criminals that the 1988 case ought to be pursued. In Iran's political culture, utter impunity has been as widespread as government-ordered crimes. Many of those implicated in the 1988 massacre have enjoyed promotions. Others have seemingly changed their political allegiances and have reappeared on the scene as moderates and democrats. To borrow Arendt's words, criminals responsible for the 1988 executions are still "prominent and flourishing in the public realm."²⁰⁴ Investigating and

202. Okechukwu Oko, *Confronting Transgressions Of Prior Military Regimes: Towards A More Pragmatic Approach*, 11 CARDOZO J. INT'L & COMP. L. 89, 114 (2003) (quoting David Matas).

203. HUMAN RIGHTS WATCH, *THE PINOCHET PRECEDENT: HOW VICTIMS CAN PURSUE HUMAN RIGHTS CRIMINALS ABROAD* (Mar. 2000), <http://www.hrw.org/campaigns/chile98/brochfnl.htm>.

204. ARENDT, *supra* note 191, at 17.

publicizing the facts of the massacre would begin to reverse this culture of impunity. A meticulously researched human rights report that effectively highlights the crimes of the perpetrators would be a wake-up call to Iran's government, reminding them that the massacre of 1988 has not been forgotten. Such a report would also send a message to Iran's government officials that the international community still has a strong interest in obtaining justice. It may also remind them that their futures could resemble that of Augusto Pinochet.

Failure to pursue the case also detrimentally affects the prison survivors and the victims' families. Although the massacre took place almost two decades ago, the families are not at peace. According to HRW, relatives of victims "have repeatedly written to the government officials asking for the number of executed prisoners and their place of burials."²⁰⁵ Realizing the futility of seeking answers at home, they have taken their case to the international arena and have written "to the United Nations High Commissioner for Human Rights . . . and the then-chairman of the Working Group on Arbitrary Detentions . . . seeking their help in determining the truth behind the mass executions."²⁰⁶ The families have never been heard by any official institution or tribunal. No one has answered their questions nor acknowledged their narratives. With every delay in investigation comes the increased risk that valuable evidence will be lost forever. And with that comes the more troubling risk that the families will never have the answers they seek.

Finally, pursuing the 1988 case is central to building Iran's democratic future. Only after the truth about the atrocities in Iran's prisons is documented and publicized can the country begin down a path of national reconciliation. Such an investigation would show support for the fledgling and threatened civil society in Iran which has consistently sought government accountability. Investigation of the crimes will also underscore to future Iranian leaders the importance of a "commitment to the dignity of human life and respect for fundamental human rights—principles celebrated and cherished by the democratic process."²⁰⁷ The effect of such a report and, hopefully, the future prosecutions of wrongdoers will signal a shift away from rule by violence and terror, and toward the rule of law.

205. *MINISTERS OF MURDER*, *supra* note 2, at 7.

206. *Id.*

207. *Oko*, *supra* note 202, at 114.