

## 20 Years of Silence: A Legal and Political Analysis of the Demand for Accountability

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*Stockholm, Sweden.  
August 22, 2008*

Good afternoon.

Before I begin, I want to extend a heartfelt thanks to the organizers of this event who were gracious in extending an invitation to me. I am thankful that I have an opportunity to participate in such an important event on such an important yet tragic occasion. It's my first time here in your lovely city of Stockholm, and aside from just being delighted to see this city, I'm also happy to see that in Sweden there exists a strong network of human rights activists and former political prisoners, a network among local Swedish activists and activists who are part of the diaspora. I hope that, thanks to events like this, we can expand that network further to include those of us who are on the other side of the Atlantic in the US and Canada. There are obviously very large Iranian diaspora populations in those countries, and among them are individuals and groups which are very active politically. We need to build links and strengthen ties among activists.

As has been mentioned, this summer is the 20<sup>th</sup> anniversary of a massacre that stands without parallel in contemporary Iranian history. It is a grim and tragic anniversary. It is also an anniversary that has largely gone unacknowledged by Iranians and members of the international community. Aside from the occasional event like this, one generally doesn't hear of major vigils held to commemorate the event. One doesn't hear of the world's major human rights organizations releasing reports to coincide with this anniversary. One generally doesn't hear any talk about obtaining justice in this case. Sadly, one generally doesn't hear anything at all about this crime.

What we need now on the 20<sup>th</sup> anniversary of this massacre, more than ever, is to shatter this pervasive silence surrounding this massacre. To do this, I want to first recount the story of 1988. The story may be new to some in the audience, but for those of you who are former political prisoners, who bravely endured the barbaric prisons of the Iranian government, who were tortured physically and psychologically, this will be a repetition of what you already know well. I apologize for that repetition, but I think it's important to tell and re-tell this story, not just as an explanation of why we must act, not just as a way to ensure that a younger generation – my generation – understands the struggle, but also as a form of resistance against a government that has tried, since 1988, to bury the crime along with the victims; and a resistance against a tendency among the diaspora community – academics, lawyers, human rights activists, and people from other walks of life – a tendency among them to simply acquiesce in this induced historical amnesia. Telling the story is a resistance against a government that has committed a double crime against each of the political prisoners: the first crime was obviously the gruesome murder, and the second is the effort to completely erase them from the historical narrative.

After speaking about the crime, I want to devote some time to assessing the crime under international criminal law. I want to talk about the elements of the crime, and the categories of perpetrators.

Finally, I want to end by speaking about the tasks ahead, and the legal and political challenges ahead for those seeking accountability in this case. It is important that another 20 years from now, we don't gather and talk about how the 40<sup>th</sup> anniversary of the massacre is unacknowledged. Let's hope instead, that by that time, there will have been some justice. But that won't be easy, and I want to talk about why that is.

So, with that by way of an introduction, let me begin by first discussing what happened in Iran's prisoners exactly 20 years ago.

Iran's Islamic government had, immediately after the revolution, in 1980 and 81, unleashed a wave of violence and executions. But even after these executions, the prisons remained full of prisoners of every age, gender and political affiliation. Mostly, the political prisoners were from the Mojahedin or from a number of secular left-wing parties. As Amnesty International and other organizations have pointed out, the political prisoners in the 1980's had not been afforded anything even remotely resembling a fair trial. They were arrested on very vague charges, tortured, and then faced trials that lasted a minute or two. No defense offered. No appeals. No safeguards. And it's also worth pointing out, as Amnesty and others have done, these prisoners were generally in prison for very minor and non-violent "offenses" like selling books and newspapers, attending meetings, organizing solidarity groups, and things of that sort.

In late 1987 and early 1988, with the notorious Asadollah Lajevardi back at the helm of Iran's prisons, the government began a process of re-interrogating and re-categorization of prisoners. Prisoners at prisons like Gohar-Dasht and Evin were typically brought – sometime blindfolded, sometimes not -- before panels to be re-questioned. The questions they were asked varied from prison to prison, and were often based on political affiliation. They would be asked whether they accepted the legitimacy of the Islamic Republic, whether they'd be willing to publicly condemn their group, etc...

Based on those answer, the prisoners were divided up based on their continued level of resistance, their length of sentence, their religiosity. Some of the so-called "troublemakers" were moved from the general ward into solitary confinement. Some of the prisoners were moved between Evin and Gohardasht.

This unusual re-interrogation really undermines the theory, posited by many, that the executions that occurred in the summer of 1988 were somehow the reaction of a panicked government that had been attacked militarily by an opposition group. In fact, the methodical way in which this re-organization occurred indicates that the government may have been laying the groundwork for such a massacre and was looking for some means of making the process more efficient. A number of former prisoners have pointed out this reorganization had the effect of disrupting sophisticated communication networks the prisoners had developed over the years. This may have, in fact, been part of the massacre preparation.

Mid-July of 1988 rolled around and Iran decided, after having faced severe defeats in the battlefield in the last year or two of the war, to accept the UN Resolution 598 and end the war. Khomeini drank from the so-called poisoned chalice. The war was ended. The prisoners thought they were coming home. How wrong they were.

Shortly after the ceasefire was announced, the military wing of the Mojahedin launched a very ill-conceived attack on Iran's western border and were defeated soundly. Very shortly thereafter, the massacre began. As an aside, I want to point out, as I did a moment ago, that I think the connection between the Mojahedin attack and the executions is not as close as it appears at first.

On or about July 27<sup>th</sup>, the Iranian the prisons went into lockdown. Visits were suspended. Televisions were taken from the wards and radio broadcasts stopped. Prisoners were not permitted to visit the infirmary. Basically, all communication between the prison and the outside world ceased.

Initially, the prisoners from left-wing secular parties were isolated and the massacre of the Mojahedin prisoners began. Those prisoners were taken from their cells, and in what must have been someone's idea of a perverse joke, told that they would be meeting with a commission that would grant amnesty. The prisoners were taken, often blindfolded, and told to line up. When they met the commission, it was not an amnesty commission. It was, in fact, a commission that would come to be called the "Death Commission" comprised of a representative of the judiciary, the prosecutor's office and the intelligence ministry. The figures on Tehran's commission were diverse, but some of the better-known ones include (J) Jaffar Nayyeri, (P) Morteza Eshraghi, (P) Ebrahim Raisee, (I) Mostafa Pour-mohammadi. Some have named Ismail Shooshtari and others as members of the commission.

The commission decided on whether a Mojahed prisoner would live or die often based on only one question: What political party do you belong to? To answer "mojahedin" was to seal one's own fate. The "correct" answer was Monafeqin. (For those in the audience that may not know, the term Monafeqin, meaning hypocrites, is a religiously loaded term, is derived from the Koran, and is a term by which the Iranian government refers to the Mojahedin.) If a prisoner got past this initial threshold question, he or she would then be asked about religious views, opposition to the government, and his or her willingness to publicly denounce his organization, his or her willingness to given names of resistant prisoners, and willingness to go on missions to clear landmines from the war front. Based on these answers, the Death Commission would decide, by a plurality of votes, whether the prisoner would hang. In Evin, when it was decided that a prisoner was to be executed, he'd be guided to a line on the left side of a hallway, taken to a small room to write a last will and then taken to the amphitheater to hang. The whole process, from start to finish, was a matter of minutes.

The prisoners report that there was chaos in the lead up to the death chambers, and often prison guards would take prisoners they didn't like and simply put them in the execution line. That is how matters of life and death were decided.

During this time when the Mojahedin faced a massacre, the leftist prisoners were generally kept isolated and had no idea what was happening. There were clues about the massacre, however. One prisoner recalls seeing an Afghan prison worker coming in and miming a noose around his neck, as a way to signal what was happening. The prisoner interpreted that to mean that perhaps Khomeini had died. Some heard a helicopter that would come, twice a week, and carry the members of the roving Death Commission. Some got morse code messages, tapped on prison walls, from Mojahedin prisoners about a massacre underway. But they found that too hyperbolic to believe. Some in Gohar-Dasht saw guards with facemasks entering the prison amphitheater and would see bodies being taken out of the

prison. But they often thought that these were just the bodies of Mojahedin soldiers killed in the skirmish at the border. In talking to prisoners and reading their memoirs, one is often struck by the fact that prisoner after prisoner noticed these clues, but did not immediately think that a massacre was underway. To them, it was just too unexpected that such a thing would occur.

When the authorities finished with the Mojahedin in late August, they turned to the leftists. Some of the leftist prisoners had caught on to what was happening and were more prepared than the Mojahedin prisoners had been. Some of them gave strategic answers to questions about their political beliefs and their religious beliefs to ensure that they survived. By and large, they faced the same type of questioning as the Mojahedin prisoners had faced and the same type of brutality, though the questioning they faced had a lot of theological elements. There was really an effort to decipher whether the prisoner was a mortad (apostate) or a mohareb (waging war on God.) One scholar has referred to it as an inquisition in the classic sense of the word, and it really was.

Probably the only group of prisoners to collectively escape death were leftist female prisoners. The Mojahedin women were mostly found to be mohareb and hanged. The female leftists, however, were found not to have sufficient agency, as women, to be deemed as apostates. So, as one commentator has pointed out, the Iranian government's misogyny, in fact, ended up saving a lot of women in this case. Of course, the female prisoners were subject to horrific floggings and so on afterwards, and a number simply committed suicide because they couldn't bear it, but they were not generally killed in that wave of executions.

After about three months of this brutality, the families, who had for months been desperate for information, were notified and told to come and collect their loved ones' belongings. They weren't told about the date of execution, or method, or burial spot, and they had to agree not to hold funerals or erect public memorials to their loved ones. When a representative of the UN appeared in Iran to investigate allegations of human rights abuses, even very small monuments built to those prisoners by their families, a few stones, some flowers, etc... were torn down.

Immediately after the massacre, the government launched what can only be described as a fairly well-orchestrated denial campaign, in which its representatives spoke to the international press and to human right organizations and international agencies and simply denied the massacre ever occurred. People like Rafsanjani and Khamenei simply said that a few people had been killed, but that they were Mojahedin combatants who were involved in the military attack on Iran. Abdullah Nouri, who would later become the darling of the reform camp and a close associate of President Khatami, and who was the interior minister in the 1980's, spoke to the UN and said 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." "But" he went on to say, "Islamic law and the Government of the Islamic Republic respect human dignity and have organized the institutions of the Islamic Republic of Iran on the basis of that essential principle."

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As I mentioned at the outset, I want to just talk a little bit about this massacre in the framework of international criminal law. Without delving too deeply into technical discussions, I want to point out that the 1988 massacre is almost a textbook definition of crimes against humanity.

The concept of crimes against humanity is now a firmly established concept in customary international law, and has a rich jurisprudence that begins roughly at the start of the 20<sup>th</sup> century, continues in earnest during the Nuremburg and associated trials. The richest jurisprudence has been developed by the ICTY and ICTR, and the new Rome Statute of the International Criminal Court draws from it and adds to it.

Just a word about the elements of crimes against humanity and why I referred to 1988 as a textbook case.

A crime against humanity needs to be part of a widespread or systematic attack against civilians. This element is intended to distinguish a crime against humanity from a random attack not part of a plan or policy. Widespread has meant an attack that is a “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.” A systematic attack on the other hand, is a qualitative term, pointing to the organized nature of the act of violence and the improbability of its random occurrence. This requires a “pattern or methodical plan.”

The 1988 killings were almost certainly widespread. They were geographically dispersed across the country and the number of victims is in the thousands, though the exact magnitude is open to debate. And they were systematic. I will get to that shortly when I discuss the preconceived policy.

I also want to point out that that the attacks were against civilians. The Iranian government has exerted a great deal of effort trying to link the victims of that massacre to the Mojahedin’s military action in 1988. That position is both factually and legally indefensible. Factually because the prisoners who had been in prison for many years had nothing to do with the attacks. They were far from the battlefield, were in no position to take part in spying or terrorist activities, and in the case of the prisoners not affiliated with the Mojahedin, did not even belong to a political party involved in battle. The assertion is also legally incorrect because the customary international law is increasingly that any person who has laid down his arms is considered a civilian for purposes of the definition of crimes against humanity. So, even assuming that some of the prisoners executed that summer were captured on the battlefield, they could not summarily be executed.

The other important element of a crime against humanity is that it be part of a preconceived policy. There is some debate about the exact contours of this element. But, in the 1988 case, it is crystal clear.

In establishing that the 1988 murders were part of a preconceived policy, one needs to refer to the memoirs of Ayatollah Montazeri who has written with incredible clarity on the topic. He has indicated that the orders came from the very top, Khomeini himself and that many in the upper echelons of the government, like Mousavi Ardebili and Ahmad Khoemini were involved.

His writing corroborates much of what has been stated by former prisoners about the nature of the questioning and the arbitrary decision-making on whether a prisoner would live or die.

Who, then, is responsible for these crimes against humanity? I posit that we have 4 categories of culprits to think about when analyzing the 1988 executions.

The first group, obviously, is the executioners. The murderer who performs the unlawful act obviously bears criminal responsibility for it. Next in the hierarchy are those who directly ordered or prompted the executions, ranking immediately above the actual executioners. This category includes the judges on the Death Commission and the prison wardens who instigated the killings. Thanks to Montazeri, some of these figures are fairly well known to us: Nayyeri, Eshraghi, Pourmohammadi, Ebrahim Raisee and others.

At the top of the criminal hierarchy are those who participated in the planning of the crime. Montazeri is purposely vague on who these people are. He says that “some people” came to Khomeini and obtained a letter for executing the political prisoners. He never reveals who these people were. One needs to look to Khomeini’s inner circle at that time to figure out who they were.

There is a fourth group who bears criminal responsibility for these crimes, and they may sometimes slip one’s mind. These are government officials who didn’t order the killings or conceive of the policy, but bear criminal responsibility under the doctrine of superior responsibility. These are individuals who (i) had effective command, control or authority over the perpetrators, (ii) who knew or had information that would allow them to conclude that crimes were being committed, and (iii) failed to take action.

This allows us to look up the chain of command, at people who may not have directly sat on the Death Commission, but who must surely have known of its existence and its gruesome activities. So, we look to see who headed up the intelligence ministry at that time and we find Mohammad Rayshahri. Or we find Mousavi Ardebili as the chief justice of Iran’s courts, or Ismail Shooshtari as head of Iran’s prisons, or Mousavi-Kheiniha (later the “reformist” publisher of *Salam*) as Iran’s Prosecutor General, and Khamenei as Iran’s president.

In the Iranian context, this “superior responsibility” doctrine is not without its problems. In Iran’s chaotic power structure, it is not always clear who has effective control over whom. As I mentioned, mere knowledge of a crime is not enough. There has to be effective command, control or authority.

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Having addressed what happened and what it all means under international law, I also want to address briefly what it is we should be doing and what political and legal challenges lie ahead.

When thinking about the political challenges involved in the pursuit of accountability in the 1988 case, and when thinking about why no one has seriously taken up an investigation of the case, there is an uncomfortable truth to which many in the human rights community will not admit. But it’s the giant elephant in the room, so it doesn’t make sense not to address it. I think a primary political problem in addressing the issue is that the majority of victims of the massacre belonged to a political group that is now looked upon unfavorably by a lot of human rights organizations and by a great many opinion makers.

I don’t want to delve into a discussion of the arguments for or against the Mojahedin, their ideology, tactics, leadership, etc... But, looking strategically at the project of obtaining justice, one will immediately recognize that the victims are not viewed in the most sympathetic light. Those who want to keep this story buried will always point to the fact that

the Mojahedin have been designated by a number of countries as a terrorist group, though we are beginning to see some change in that. They will point to the fact that the group had bases in Iraq for a number of years. They will point to the fact that human rights groups have severely criticized the organization's own human rights practices and its "cult" behavior. As I said, I don't want to get into the merits of those arguments. But we all know that they have salience. We all know that the unpopularity of the victims has something to do with the fact that the world has been silent for too long.

A second political or, better yet, strategic problem, is that so many of the facts of this case are shrouded in complete mystery. It's so difficult to provide a complete narrative of the crimes of that summer when one does not even know how many people were killed and who, exactly, ordered their killing. The story of 1988 is an incredible story. But it's an incredible story with significant gaps in it.

A third political problem to point to is that the world's attention, at the moment, is not focused on the human rights issue in Iran. Rather, all attention is almost exclusively on the nuclear issue, Iran's sponsorship of insurgent in Iraq, Iran's connections to Hezbollah, etc... It is hard to get the world to care about a crime that happened virtually in secret that no one has really talked about for 20 years. There is a corollary problem here, and that is that it often seems like the *wrong* people are paying attention to human rights issues. There seems to be a real fear in the human rights community – some warranted and some, frankly, representative of a certain moral cowardice in my humble opinion – to engage with human rights issues in Iran for fear that neo-cons would latch on that discussion and use it as a pre-text for war. I know, from personal experience and discussions, that a number of human rights groups and high-profile academics are reluctant to engage with the issue lest they feed into the so-called imperial project of the US government.

On the legal front, there is also no shortage of problems. You know, the last few weeks have been exciting for those of us who care about international human rights and international legal mechanisms to address them. The chief prosecutor of the International Criminal Court has sought to indict Sudan's Omar al-Bashir. Radovan Karadzic has been caught and handed over to the ICTY at the Hague. But in the Iran case, it is not immediately obvious what institution can really be called upon to try anyone guilty of these crimes. The Iranian courts are obviously not part of the solution. They are, in fact, very much part of the problem. They are complicit in much of the repression of the Iranian government against Iranian citizens.

The ICC lacks the jurisdiction to try this case. It lacks both temporal and territorial jurisdiction to investigate the issue. There is no special UN-mandated court such as the ICTY or ICTR to try these cases. And national courts are often very reluctant to use notions of universal jurisdiction to try people for crimes that do not have any link to any other country.

And even if there was a court, we don't yet have adequate evidence. We still don't know how many were killed. We don't know who orchestrated their killing. We don't know who has effective command in the Iranian power structure to establish a theory of superior responsibility.

All of this talk of obstacles may lead activists and lawyers and former prisoners and people interested in justice to despair. But I don't think that is called for. If anything, all the problems I listed should propel us to act. And when I say we need to act, I mean that we must do more than simply come together every year to *commemorate* the events. Don't get

me wrong. Commemorations are important. Observing moment of silence is important. Laying flowers and singing songs are important. But they are only a beginning.

What we need now, more than ever, is for a group to come together to actually spearhead a demand for accountability.

To combat the problem I alluded to earlier about the unpopularity of victims, such a group needs to ensure that its campaign for justice is non-political and independent of any partisan leanings. This must not be a campaign to support this or that party. It must be a movement that stays above partisan frays; it must be a movement that argues that demanding justice and accountability is important to all Iranians, not just those with ties to particular parties.

Such a group needs to publicize what happened in 1988 and let people in the world, particularly policy makers, know about it. Such a group needs to also shift focus onto the massacre by linking it to what we see in Iran today. We have a government that is utterly unresponsive to its people and their demands, that continues to repress, torture and kill its own people, that acts irresponsibly on the international stage. It does all these things because there is an entrenched culture of impunity. It does these things because people who carry out horrible acts, as they did in 1988, walk free and, in fact, get promoted. It does those things because it has, so far, been accountable to no one. So, it's important that we draw the link between the culture of impunity in Iran and the Iranian government's current appalling behavior at home and abroad.

And such a group needs to begin the tough task of gathering evidence. There are already human rights documentation centers that do this kind of work, both here in Europe and at various centers in North America. Unfortunately, the groups don't communicate effectively and, as a result, don't proceed efficiently. A group focusing on 1988 needs to partner with them and gather the evidence before it has been lost. It needs to gather testimony before memories have faded and people have died.

And such a group needs to create alliances with other communities who have also been in similar situations. I always mention the Chileans and the Argentinians as examples; Communities that saw their military leaders wreak havoc on the country. But the human rights activists continued to work tirelessly, bravely and creatively and have had some notable successes.

I sometimes despair about our prospects for success. But then I see Radovan Karadzic in the defendant's box. I see Charles Taylor being tried. I remember Slobodan Milosovic being tried. I remember that Augusto Pinochet's last days were spent in fear of prosecution. I remember that each of these people was thought invincible, but was eventually brought to justice. And when I remember that, I am encouraged again.

A campaign for accountability in the 1988 case requires a serious and sustained effort. It needs people from all walks of life. As I said at the outset, 20 years from now, I hope that we can say that we struggled and eventually won victories in the cause of justice and accountability. I hope that we do not gather to lament our failure to act.



