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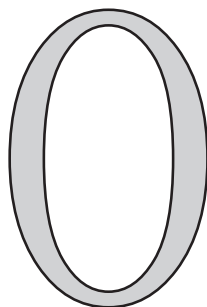
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PRESIDENT'S MESSAGE



Opening address delivered by President of the Association Judge Hadassa Ben-Itto at the commencement of the Round Table on Anti-Semitism and Holocaust Denial, held in Salonika, Greece, on June 26-28, 1998.

This conference is the first of a series of events which we plan to hold to commemorate Jewish lawyers and jurists who perished in the Holocaust, and their contribution to the law in their respective countries.

I would like to share with you a little personal story, which prompted me to initiate this project.

A few years ago, my grandson, who was then 9 years old, asked me to prepare for him a detailed list of all the members of my family who perished in the Holocaust. I prepared a list which included my grandparents, even one great grandfather, my aunts, uncles and numerous cousins. Even though I did not include the larger circle of relatives on both sides, the list was quite long. My grandson then asked me to prepare another list describing his own relationship to all the persons in the first list. He said he wanted to know who he himself had lost in the Holocaust.

Then came the last question which to me explained his process of thinking. He asked: how did you mourn them? Did you mourn all of them together, or each one separately?

The question of one little boy suddenly gave me a new perspective on my attitude to a subject which has shadowed my life since childhood. For actually none of us can truly say that he has come to terms with the enormity of the Holocaust, and all its aspects.

My grandson had heard much about the Holocaust, he had seen films, listened to conversations, and felt a need to grasp what to him was abstract. In order to understand, he had to have names, see photographs and list relationships. He had to personalize the Holocaust, in order to grasp it. He also understood, with the rare perception of a nine year old child, that each victim deserved to be mourned separately, not as part of the six million, but as a person, a man, woman or child, who lived this horror, suffered the pain and the humiliation, and slowly, day by day, hour by hour, minute by minute, lost his human face and became part of a mass awaiting extermination.

I was reminded of my grandson's need to personalize his own private concept of the Holocaust, when I visited the Holocaust Museum in Washington. Each visitor to the Museum is handed, on entrance, an "identity card" of one Holocaust victim: name, country, age, profession, photo, and, where possible, probable date of extermination.

The idea is the same. You do not really understand what happened to the six million, until you see the face of one single human being who was there. Relating to one single person reveals the horror, the inhumanity, but it does not reveal the enormity of the loss. Because not only human lives were extinguished in this tragedy. The six million did not only perish in the physical sense. With them perished a tremendous intellectual and spiritual potential which can never be regained. A whole culture was erased. The loss is not only ours, as Jews, for no country, no city, no community, which lost victims in the Holocaust, will ever be the same.

So, how do we remember them? First and foremost we remember them as human beings, fathers, mothers, sons, daughters, brothers and sisters. But we must also remember them as members of professional and intellectual communities, whose contribution to society lives on, and serves as a reminder that they were here.

Sharing memories among ourselves is not enough. To our horror we are facing one of the

ugliest and most horrible outgrowths of the Holocaust: the spreading denial of its existence. I refuse to consider it a fringe phenomenon, for this is what we said when Hitler first started advocating his theory about the Jews. 'He is a lunatic', the world said, and unfortunately the Jews agreed. We must never ever make the same mistake again. The deniers are saying that there was no Holocaust, no gas chambers; it is all a hoax, a fabrication, we made it all up. They say it openly, in books and in pamphlets, in the media, in public addresses and interviews, in so-called academic publications, and now on the Internet which they blatantly use to bring their message to individual homes, teach to children, and convey to the next generations. They say it in the face of the wealth of evidence proving one of the best recorded events in human history. They dare say it in front of survivors with numbers tattooed on their arms. What happens when there are no more survivors to testify in legal proceedings and describe their personal anguish?

In some countries, in some societies, their lies are welcome, they are used for either political or anti-Semitic purposes. In most other countries they are protected by their constitutional right to lie.

We, each and every one of us, can no longer shake our heads, shrug our shoulders in despair and then go about our daily business. We have a duty to do something. On the personal level every one must make his own individual commitment, but groups and organizations must also commit themselves to their own agenda. This project of meetings and seminars to commemorate our perished colleagues and their contribution to the law in their countries is one way of responding, as an organization of lawyers.

We shall go to one country after another, where our fellow Jews lived and worked, we shall walk in their footsteps, we shall not only remember them among ourselves, we shall talk about them in public and remind those who need reminding that they were here and that they left a legacy.

The idea of holding our first conference in Salonika came to me when we decided to initiate a new chapter of our Association in Greece. I knew that the flourishing Jewish community in this city was almost completely annihilated, and it seemed right and proper to start our project in this city. So, here we are, and we are proud indeed that so many have been able to leave their busy law offices to come here and pay tribute to our dead colleagues.

We came to physically be in what was their city, to see the houses where they lived, to walk the streets they walked, to visit the markets where they shopped, to travel to the places where they took their vacations, to pray where they used to pray. Even though we do not know all their names, we come one step closer to feeling their presence, not as a vague memory, but as people who were born here, lived here, made law here, and were taken from this place to their inevitable tragic end.

Vital as it is, raising their memory is not enough. We must also discuss ways and means to confront the denial of the Holocaust. This too, is something we owe to our dead colleagues as well as to the next generations.

Hadassa Ben-Zur

Celebrating fifty years of law in Israel, *JUSTICE* continues with conversations with leading figures from Israel's parliamentary and military legal systems.

“Israeli Democracy, and the Special Place of the Supreme Court, are Safe”

Conversation with Shevach Weiss

JUSTICE - How do you see the role of the Knesset vis-à-vis the judicial system in Israel, is it equal, subordinate or superior?

Weiss MK - I would like to start by saying that a myth exists which has strengthened since the Direct Elections Law entered into force, amending Basic Law: the Government. According to this myth, the Knesset has weakened. According to another view the Knesset was already weak. The problem is that some academics and intellectuals have fastened on this myth, illustrating the ignorance and superficiality of people who allow themselves to judge a system even though they do not completely understand the prevailing political reality. The Knesset is the strongest Parliament in the democratic world, and certainly in the democratic world of non-presidential regimes. I would also like to say something about the impact of direct elections on the power of the Knesset based on my understanding as a professor of political science. First, as we have not yet completed the process of enactment of the constitution, the Knesset is a Parliament like any parliament and it is also a constituent assembly. It fulfills these two functions concurrently. We are still enacting chapters of the constitution, each chapter called a Basic Law, in accordance with the famous Harari resolution of 1950. The 120 members of the Knesset are running the routine affairs of the nation, supervising the government and legislating, and concurrently acting as a constituent assembly

Prof. Shevach Weiss, Knesset Member (Labour), Professor of Political Science, is a former Speaker of the Knesset.

applying all their powers in the enactment of the sections of the constitution and in **refraining** from enacting sections of the constitution. The latter is an even greater power from a public and political point of view and has an immediate and



forceful impact on the relations between the Knesset and the legal system. Second, in earlier times, in the first to the ninth Knessets, when there was strict party discipline, *Mapai* was dominant, there was centralist government and a centralist political culture, the budget of the government (which is at the heart of the political process, historically and in practice) was tabled in the Knesset for first reading and emerged completely identical after the third reading. In the last two Knessets the situation is totally different. The Knesset, pressure groups, sectoral interests, the Finance Committee of the Knesset, transform it completely, contrary to the wishes of the government. This was true during Prime Minister Rabin's government and remains true today, in the era of direct elections, because of the coalitional regime, the sectoral atmosphere and the legitimacy given to sectoral needs.

Third, this is a *Knesset* operating *via* live broadcasts. This is a *Knesset* which, in its last two terms, has arisen out of primaries in the *Likud*, which have since been cancelled, and in Labour, which have not yet been cancelled, and to a certain extent in *Meretz*. The *Knesset* Members exercise a great deal of energy in exploiting the *Knesset* for self-marketing, and they succeed. This shows the might of the *Knesset*.

Who are the *Knesset* Members? - the entire political elite of the State of Israel; some in the opposition and some in government. Moreover, because of the coalitional nature of our system of government, even when there is a coalition, the coalition ministers are always in a state of friction with the Prime Minister. Accordingly, against the background of the great political power which is wielded here, there is an atmosphere, which for example is expressed by the current speaker of the *Knesset*, as is his right and as he also expressed it when in opposition, opposing the efforts of the Supreme Court of Israel, particularly in its capacity as the High Court of Justice, to dictate to the *Knesset* an interpretation of laws which does not accord with the majority views in the *Knesset*. There is a feeling of power and therefore also a feeling of affront in terms of the activities of the Supreme Court.

JUSTICE - Perhaps one should see this process as an attempt to politicize the decisions of the Supreme Court, through exercising the powers of the *Knesset*?

Weiss MK - There is a certain truth in this, and it touches upon the relations between the *Knesset*, in its role as both a parliament and a constitutive assembly and as the centre of political power in the State of Israel, and the Supreme Court as the body which from its inception has placed itself in the zone between the unwritten or non-existent constitution and the routine legislation of the Parliament, with the task of formulating constitutional norms in Israel. Even if, on occasion, the political elite does not like the decisions of the High Court, the latter is seen, through these judgments, as a "secondary legislator" of the so-far unwritten constitution on the normative level. This is a fascinating process. However, lately, two developments have taken place which have had a great impact on the relations between the *Knesset* and the Supreme Court. The first is that the Supreme Court has become much more liberal. This recalls the great debates which took place in the US during the Roosevelt era after the New Deal, when President Roosevelt found a

conservative Supreme Court, and there was great friction between them.

To elaborate on this first point, it should be noted that it was convenient for the *Mapai* regime to also have a liberal branch. *Mapai* itself was doctrinaire, dogmatic, totalitarian democratic, but we had the facade of being the only democracy in the Middle East. The collaboration was convenient, but there were also clashes. In the US, President Roosevelt was so upset with the conservatism of the Supreme Court that he once said in one of his fireside talks: "We are under a Constitution but the Constitution is what the judges say it is". The fight was tremendous, and public opinion held that he had behaved improperly towards the Supreme Court; he only won when he succeeded in appointing Justices Goldberg and Brandeis. In Israel, we had the opposite situation. The Supreme Court of Israel sailed towards liberal horizons whereas the regime was socialist and somewhat dogmatic. But they lived in peace together. There was another convenience. A large number of matters which could not be resolved by the regime were left at the door of the Supreme Court for solution; for example, matters such as State and religion, reflected in cases such as *Rufeisen* and *Shalit*.

Lately, there has been a new development which is very interesting. The new *Likud* regime, in all its variations, including Netanyahu's Government, reflects a coalition of depressed societal minorities. It is attempting to replace the societal elites with greater energy than the Begin Government. The Begin Government had turned towards the Oriental Jews but was still Ashkenazi and a little Polish. I call them "WASPs" - [V]eteran Ashkenazi Soviet Poles. Begin was still connected and wished to be connected to the Supreme Court, he treated it with respect and appreciated Justice Barak who is of Lithuanian origin, was Begin's Attorney-General and helped him with the Camp David Accords. Today, there is a real fight against the Supreme Court within the framework of this process of replacement of societal elites. If one considers the religious component of the 20 primary societal elites in the last 50 years, it is instructive that of the 45 justices who have so far served in the Supreme Court of Israel, only 6 have been Oriental Jews, and it cannot be said that there aren't excellent jurists among Oriental Jews.

Against the background of a parliamentary arena in which there is a majority of minorities, sectoral interests, and a battle waging against the liberal Supreme Court on the basis of the interpretation of the constitutional revolution of President Barak, the *Knesset* and the Supreme Court have each become a little more militant, each pulling in opposite directions.

Today, matters remain undetermined. In practice, the majority of decisions of the Supreme Court on questions of State and religion are very moderate. There is a so-called “constitutional revolution”. Justice Barak is careful; he does not want to provoke the *Knesset*, and he does not want to cut himself off from the *Knesset*. The same is true of the *Knesset*. There is a myth of intervention in the *Knesset*. When I was speaker of the *Knesset* there were 23 petitions against me. Twenty-two were dismissed *in limine*, the Court did not want to intervene, and in one, the Pinhasi immunity matter, there was a ruling that a revote had to take place. The Court is very careful and restrained. It does not wish to reach the position described by Roosevelt where the constitution is what the Court says it is. There is an atmosphere of war, which is led by *Shas*, against the background of the *De’eri case*, the *Pinhasi case* and the feeling that they are persecuted by the judicial system, because the latter incorporates elements of State and religion.

JUSTICE - But isn’t the militancy on a conceptual rather than a practical level?

Weiss MK - The militancy is ecological, but this is very important. Political ecology, political culture, atmosphere are all very important, they are part of the constitutive materials. For example, what influence does the ecology discussed above have? The religious parties have succeeded. This *Knesset* is very careful in legislating Basic Laws.

My position is that it is both possible and necessary to apply to the Supreme Court, in particular for the following reasons:

- (a) Because we still do not have a complete constitution and we have a constitutional situation; the Supreme Court is of great importance, particularly in its capacity as the High Court of Justice, and as a constitutional restraining and guiding body.
- (b) Because the coalitional nature of the regime in Israel, and this has not changed at all with the Direct Elections Law, embraces hasty legislation of a self-interested, partisan nature, directed towards fluid coalitional interests. It is important that the Supreme Court offer a guiding hand which is swift to act.
- (c) Israeli democracy faces a certain danger from extreme groups, particularly from the right. It is therefore important that there be an additional liberal, restraining democratic body.
- (d) Israeli Arabs justifiably have great confidence in the

Supreme Court, therefore it is important that it have constitutional power in the delicate relations between Jews and Arabs.

JUSTICE - So where do you see the root of the problem?

Weiss MK - The problem lies between secular and Orthodox. The latter refuse to allow progress to be made on the Basic Law: Legislation, which is intended to provide for the completion of the constitution, for procedures for amending the constitution and for the constitutional instance which will review legislation in the light of the constitution, if at all. The Orthodox do not wish to leave the latter function in the hands of the Supreme Court as a constitutional court in practice, rather, they prefer to establish a public constitutional court as is customary in most of the countries of the Continent, in order to increase the element of proportional representation in Israeli politics. They are therefore interested in delaying and succeed in delaying the process of constitutional legislation in Israel.

These are interesting processes which are not understood by everyone, even on the Labour benches of the *Knesset*. Thus, for example, when I was speaker of the *Knesset*, there was an attempt by a *Meretz* faction to advance the enactment of the constitution by means of a variety of compromises with the Orthodox parties. Unofficially, I warned against this attempt, on the grounds that creating a flexible constitution would not meet the test of reality. This became evident in the case of Basic Law: Freedom of Occupation, where additional legislation had to be enacted to prevent the importation of non-Kosher meat. It was not worth completing the constitution at a stage where the level of compromise on principles with persons wishing to preserve a more religious character of the State of Israel and who had sufficient power for that purpose, would cause the constitution to be undermined. It was better to wait for a time when we could create a document which was more definitive. This was my position and the position of Shulamit Aloni, the head of *Meretz*.

JUSTICE - What has happened in the last 50 years that has brought us to this impasse with the Orthodox parties, why have we waited 50 years for a constitution?

Weiss MK - First, we have not waited 50 years. The fifty years of the State of Israel are fifty years of the enactment of a constitution. It is very difficult to engage in a quantitative anal-

ysis because the matter is primarily one of values. Nevertheless, a cautious quantitative estimate shows that we have a constitution in Israel which embraces 90% of the issues generally covered by a constitution. Second, the *Knesset*, public opinion and the courts consider it to be the constitution. Each time the Court is required to consider these matters it gives an interpretation in accordance with the Basic Laws.

When I was speaker of the *Knesset*, Dedi Zucker, Chairman of the Law, Justice and Constitution Committee of the *Knesset*, occasionally tried to introduce a Parliamentary mechanism for self-review when legislating laws in the face of Basic Laws. I opposed this vehemently. I saw this as a limitation on the power of the Supreme Court. I wanted the intervention of the Supreme Court, because I did not see it as a hostile body. On the contrary, I regard democracy as a triangle and not a pyramid topped by the *Knesset*. We had a difficult argument although the Attorney-General and Court supported my view. I was not their agent; I was the agent of Israeli democracy. I never perceived my position as Speaker of the *Knesset* as being the representative of Parliamentary egocentricity. I never allowed *Knesset* Members to call the *Knesset* sovereign. That is pure ignorance. The public is sovereign. It governs through all its organs: through the *Knesset*, through the Prime Minister who is now directly elected, and through the Court. Accordingly, in practice, there is a constitutional situation in the State of Israel and we did not wait 50 years to enact it.

There were a few issues where no constitutional provisions were enacted in the 1950s, particularly matters of State and religion, liberties of the citizen arising therefrom and some matters related to national security, defence emergency regulations and the like. These matters remain open to this day. In other words, we have travelled almost the entire length of the road and become stuck on those matters in respect of which there was a need for the Harari decision, and it was impossible to complete the constitution in the constitutive assembly. The situation has become more grave in recent years because of the increase in numerical and political strength of the Orthodox public. In Netanyahu's Government, which is a coalition of societal minorities, the Orthodox minority leads. I would describe this as the victory of the Hasmoneans over the Hellenists, where we are the Hellenists and they perceive themselves to be the Hasmoneans.

Another interesting matter which is worth considering is: who

has decided that legislation of a constitution within a definitive period is a liberal, democratic, vital or positive phenomenon? That is not at all so. When the State of Israel was established there already existed firm legal, administrative, military and other structures. It was possible to follow the English practice of satisfying ourselves with Acts of Parliament, slowly and without hurry. We did not need to establish democracy by means of a constitution. Israeli democracy was established through the Zionist movement, the *Histadrut*, the voluntary nature of the *Yishuv*, the desire to be the most democratic people in the Middle East and because of the ability over a number of years to maintain "super-democratic" relations between totalitarian parties. We could have totalitarian parties with, for example, a Bolshevik flavour, and the rules of the game were described as democratic because we never had a majority party, because we are dependent on the Jewish people, and on America, because we are intellectuals, because it is not proper not to be democratic, and, in particular, because of the Holocaust.

Thus, we enacted a variety of laws, some of which were very enlightened. Apart from the issue of State and religion, where we adopted the Jewish tradition and Jewish law into the civilian frameworks, we have an election system which is the most democratic in the world and national proportional elections which reflect the wishes of the public, with the lowest threshold in the world. There has never been a majority party. All these are phenomena which are completely democratic. The regime is much more democratic than the political culture, and it is a fact that Oriental Jews have only reached power in government, thanks to Israeli democracy. They have not reached the ruling ranks in any other structure, whether it be academe, economics, law or elsewhere. Looking at the government, out of 17 ministers, 9 are Oriental Jews. This is an amazing achievement of Netanyahu's Government, and he is in government because of this social achievement. We [the Labour Party] have remained in the social power and political opposition. We remained in Sheinkin Street and he in the Government Plaza.

Accordingly, there was no urgency for a constitution, we did not need to introduce democracy through a constitution, or to establish the structure of the regime or the rules of the game. Today, when we have almost all the constitutional rules of the game in place, Israeli society has disintegrated because of the political societal situation: the murder of Prime Minister Rabin, the victory of fascism, the victory of nationalism, the shattering

of the democratic rules of the game, civil war by means of political terrorism. However, the democratic structure which is so strong has even succeeded in overcoming these phenomena.

The right wing was so ashamed at the activities of its agents, that it enabled Shimon Peres to quickly establish a government. It returned to the democratic structure, even though we have not completed the constitution. The myth spread by the constitutionalists that, in the absence of a completed constitution, the regime is not democratic is one of the distorted pronouncements of some members of academe, who adhere to unjustified legalism or formalism. Either a realistic or formalistic perception of the constitutional situation is possible. On a realistic level we are a constitutional country with flaws, some of which I have already mentioned.

Although the Supreme Court is in the midst of the fray against the *Knesset* and political interests, it is a body which determines the constitution and has influence which is equal to that of the *Knesset*. We are enacting the constitution together. The Court - through precedents and the creation of a certain respect - and the *Knesset* through the legislation of the chapters of the constitution and various other laws.

JUSTICE - But isn't this constitutional concept a recent invention of Barak?

Weiss MK - Not at all. Presidents Landau, Agranat, Shamgar and others had their part. Take, for example, cases from the beginning of the State in relation to freedom of speech - *Kol Ha'am v. Minister of the Interior*, which was dramatic, or *Shmaryahu Levine v. Local Council*, *Kfar Shmaryahu* in relation to religious worship or the *Shalit case* on who is a Jew. There is a whole range of cases which expanded the liberal nature of the regime in Israel. I would say that one of the remarkable chapters in the annals of Israeli democracy is the place of the Supreme Court, particularly in its capacity as the High Court of Justice, in preserving and nurturing the liberal democratic character of Israeli society. This is the reason for my personal desire to preserve its power.

President Barak has taken on almost mythological proportions in this respect because of his character and charisma and because the Orthodox regard him as their nemesis, although in practice his decisions are restrained and he leads the Court in a very moderate way. Here and there he intervenes in political issues, but generally the Court is very careful in its judgments to

preserve the special place of the *Knesset* in the governmental structure and its ascendancy.

JUSTICE - You mentioned that the Israeli constitution covers 90% of the issues usually covered by a constitution, to what extent are the other 10% critical?

Weiss MK - A constitution is the anatomy, the physiology and the spirit of the regime. Its anatomy is made up of elections, direct elections of the Prime Minister *etc.*; its physiology we have also discussed - who has the powers, who is responsible for different structures, the doctrine of *ultra vires*; freedoms of the individual, Basic Law: Human Dignity, and the like. We have made progress with this concept, although in the area of State and religion, great weight is still given to religious tradition as it has been internalized in legal parliamentary processes. The political power of the Orthodox today guarantees its preservation, *inter alia*, by imposing a freeze on action in this area.

JUSTICE - How would you change this situation?

Weiss MK - The situation can only be changed by Parliamentary majority. There is no other way. I would like to refer you to a number of historical examples. There was the *Bar Yehuda case*, a variation on the 'who is a Jew' issue from 1958. Regulations allowed individuals to describe themselves as Jews in their ID cards based on their own perception. The *Mafdal* [National Religious Party] left the Government, but Ben Gurion led a government for over a year without the religious party; when they returned in 1959 the regulations were repealed. In 1969, during the period of Golda Meir, the *Shalit decision*, by a majority of 5:4, reintroduced the Bar Yehuda regulations. Golda Meir sent her Minister of Justice to her Minister of Interior (of the *Mafdal*), and a compromise of a constitutional character was reached, which in effect left the registration of who is a Jew by defining the term 'Jew'. The Rabin government in 1993, without the participation of *Shas* but with *Meretz*, also refrained from dramatically changing the *status quo*. Thus, when I say 'Parliamentary majority', that is only part of the story. It is a process. I believe that the Orthodox parties are currently fighting a rearguard action. It is clear to them that in practice this is a secular country. In the 1950s Ben Gurion had enough political power to close the Haifa train on *Shabbat*; people were stoned when they drove into Jerusalem; only one cinema was open in

Tel Aviv; there was no public transport. Today, everything is open. All the cinemas are open in Jerusalem; the roads are full of cars on *Shabbat*. The country is secular. Moreover, there has been a tremendous wave of secular immigration from the former Soviet Union, a million people, 30% of whom are not even Jewish. The Orthodox know that the country will ultimately be called secular, and they therefore engage in this rearguard action. The solution will come through demographic changes in another 5, 10 or 15 years.

Take another example, the Basic Law: Freedom of Occupation (which had the effect of precluding prohibitions on the importation of non-Kosher meat). The political *Knesset*, acting under Rabin's Government, with no religious parties in the coalition but out of a sense of fair play and a far-sighted perception of the future and relations with the Orthodox, enacted a law which prohibited the importation of non-Kosher meat. The Supreme Court operates in accordance with the laws of the *Knesset*. The power to legislate lies with the *Knesset*. Thus, the scope for activity on the part of the High Court of Justice is very limited and Parliament has the ability to circumscribe it even further by enacting more specific legislation, *i.e.* moving from *lex generalis* to *lex specialis*. By this I mean that the Supreme Court cannot continue to enact the constitution instead of the Parliament where a specific law of the *Knesset* already makes provision, even if, in the example at hand, the importation of meat law contradicted the Basic Law: Freedom of Occupation. As long as the constitution has not been completed and we have not yet created a fixed mechanism for providing for the superiority of the constitution over specific laws, the *lex specialis* overrides *lex generalis*, even where constitutional principles are at stake.

Ultimately, therefore, there is a lot of prattle, but in practice the Supreme Court is not so strong *vis-à-vis* the *Knesset*, and does not want to be too strong.

JUSTICE - You regard demographic change as the critical factor, but what guarantee is there that it will tend towards secularism?

Weiss MK - This is an open question. It is possible that Russian Jewry will become integrated not through Zionism but through accepting Jewish tradition, perhaps with reservations, and will live in political agreement with the *status quo*.

JUSTICE - Do you see any room for enacting legislation by-

passing the High Court, in order to counter the perception of the rise in power of the High Court and its increased interventionism?

Weiss MK - There is already a form of concealed 'by-passing' legislation. The very enactment of *lex specialis* in matters where the *lex generalis* together with case law of the High Court have given a liberal interpretation in relation to the future, limits the power of the High Court. These are actions on the part of the Parliament which are taken without the desire to provoke the Court. The *Knesset* is very careful not to enact direct 'by-passing' laws, and public opinion would not allow it to do so. So it is done otherwise.

JUSTICE - Justice Haim Cohn told us of his efforts to gather material for a constitution and Ben Gurion's ultimate rejection of such a document in order to maintain public consensus [see *JUSTICE* No.16 p. 10]. How do you regard that period?

Weiss MK - There have been at least 7-10 proposals for a constitution, ranging from before the establishment of the State, through the State Council, the Provisional Government, various legislative committees and constitutional committees, up to the proposal for direct elections. The arena has been subjected to constant activity. With regard to Ben Gurion, he had an intellectual curiosity as to this matter, he also saw himself as an aesthetic in the broader meaning of the term: he wanted to build the customs of a people - solidarity, a State - but he also had a soft spot for the Americans and regard for the British, and he wavered between the American approach, which was clearly constitutional, and the English experience, which is an unwritten constitution and Acts of Parliament. The second aspect of Ben Gurion was as a leader who had to build a coalition and ensure that the regime worked without excessive tensions, as well as the need to maintain contact with the Jewish people through the idea that some religious ideas are still stabilizing and keep us one people. The Harari formula was convenient for him and he accepted it serenely, in terms of both tempo and order of preferences, although it did pose problems. Thus, for example, he wished to change the election system. He believed that proportional representation would lead to disintegration of the country. On the other hand, if a constitution was established which embraced the election system he feared that would make it more difficult and complicated to bring about changes later on. He did

not want to create a constitution, not because he was waiting for the ingathering of all the Jewish people, but because he did not want to anchor governmental arrangements in constitutional rock, making them more difficult to change at a later stage.

JUSTICE - Do you believe that Israel requires an institution such as the Office of Independent Counsel in the US, which in effect operates outside but reflects each of the 3 branches of government?

Weiss MK - We have a mechanism which is similar in terms of results, namely, the government commission of inquiry. It is appointed by the government, but is headed by a retired or sitting Justice of the Supreme Court. The terms of reference, however, are set by the body appointing it. The Shamgar Commission into the murder of Rabin is an example of a situation where, in my opinion, the terms of reference did not define the principal issue - what was the psychological, social, and cultural background to the murder? The government wanted to make the commission apolitical and this self-restraint caused the real issues behind the murder to be missed. Moreover, after the commission draws its conclusions, the body appointing it is also the body executing its recommendations. I can say to the credit of all the governments that they have always implemented the recommendations made to them even if they were inconvenient. These commissions have great moral strength. We are a political nation, and that peaks during elections with participation of 80-90% of the electorate, even though there is a certain anti-political and anti-party atmosphere. The Supreme Court carries great moral weight, and the commissions of inquiry acquire the same moral weight and respect, being headed by a Justice of the Supreme Court. The final decisions, however, are made by political institutions, either the government or the *Knesset*.

JUSTICE - There is a claim that Israeli democracy is now in the process of collapse, and the Supreme Court is the last barrier in the face of that collapse. How do you answer this perception?

Weiss MK - There is a misunderstanding which underlies this view, and I don't reject it out of hand because it is prevalent and influences the political process. This view consists of a mixture of hysteria, exaggerated glorification of the Court, a certain convenience felt by the liberal forces in relying on a liberal

Court and a large amount of disappointment in the present regime. The right has entered into a form of civil war through its agents. The left counters this by a form of quiet civil insurrection. We [the Left] retreat to our past glories, our social status (which is higher than that of voters for Netanyahu), our free economy, privatization, bars, festivals etc. The Supreme Court is painted as the saviour of democracy. It is both a form of aristocracy (aggrandizing political, cultural, moral power) and despair. Rabin has become a historical hero. He gave the younger generation both pride and the hope of peace. That generation now no longer wants to cooperate with the government. There is a tear in the fabric of society. To draw a Biblical analogy, the Supreme Court is the hope of Israel against the government of Judah.

All these factors create the perception you mention, but it is incorrect. The democratic mechanisms are still strong and I would say stronger than the political culture and may even succeed in saving and changing the political culture.

JUSTICE - There is a perception among secular sectors that the religious parties threaten democracy, is that also your view?

Weiss MK - There is a philosophical, ideological and mental difficulty in the arrangement between an orthodox political public and a secular public. The primary difficulty lies in the fact that democracy is based on the concept of the sovereignty of the public; sovereignty which is delegated in part to elected governmental institutions. Religious philosophy is based on the sovereignty of the Almighty. The interpreters of this sovereignty are religious persons, the Rabbis. Thus, on a philosophical level conflict is built into the structure. On a practical level, the participation of the *HaPoel HaMizrachi* and later the *Mafdal* into politics connected them more closely to democratic processes. The connection to government strengthened during Begin's government, and even more so during Shamir and later Netanyahu's time, with the appointment of deputy ministers belonging to *Agudath Yisrael* and ministers belonging to *Shas*. It is true that the Orthodox use their governmental power to entrench and broaden the *status quo*, but in practice they are connecting to democratic mechanisms. This is the reason why on occasion President Barak wishes to meet and speak with them, to ensure that the Supreme Court, particularly in its capacity as the High Court of Justice, is accepted by the majority of sectors of the population and retains its moral weight. President Barak is

very much aware of this need and therefore a lot of the criticism against him is unjust.

JUSTICE - There is a process of deZionization of some political parties, is this having an impact on the Knesset?

Weiss MK - There are two non-Zionist streams operating here: post-Zionism and the non-Zionism of the Orthodox parties. There may be a government which contains groups which are post-Zionist on a number of issues; official *Meretz* does not fall within that definition although some of the views of Zionism held there are very liberal, very democratic and in some circumstances democratic-socialist. In the other stream, in practice, the Orthodox are becoming Zionist, they are connecting to the State of Israel, they are playing by the rules of the institutional game. Sadly, the anti-Arabism and increasing nationalism of some of the Orthodox has connected them more closely to Zionism and the anti-Arab aspects of Zionism. By virtue of their citizenship, their connections to the Israeli parliamentary system, and their being a ruling party, they are also connected to Israel's judicial system. They need the High Court of Justice and public opinion. They use the language of the High Court and parliament even in their most bitter arguments with the Court.

JUSTICE - How do you see future trends in Israel?

Weiss MK - Events are so dynamic here that it is difficult to make predictions. However, certain trends are clear: (a) the democratic regime in Israel will continue to exist; (b) the democratic regime is tightly connected to moderate policies. International circumstances make the Oslo process irreversible, so that even Netanyahu will have to reach a peace agreement - whether by desire, by force or by being ejected from government. The more moderate atmosphere will help the development of democratic institutions. The societal minorities are fast joining Israeli democracy - *Yisrael be Aliyah* [the Russian immigration party] already has 7 seats on the *Knesset*. If the Orthodox public goes into political opposition, the result will be a more liberal coalition; if they remain, they will be forced to accept more and more of the democratic game rules. Some they have already accepted.

In my opinion, therefore, Israeli democracy and the special place of the Court, headed by the Supreme Court of Israel, are safe.



Front view of the Knesset building in Jerusalem. (Courtesy of Zoom 77).

“Our Legal System is Much More Independent than the Legal System in the US Military Structure”

Conversation with Uri Shoham

JUSTICE - Perhaps you can start by explaining the structure and functions of the Military Advocate General's corps?

Brig. Gen. Shoham - Heading the Military Advocate General's corps is the Military Advocate General, myself, and my deputy, Colonel Joseph Telraz. The corps consists of a number of branches dealing with a wide variety of fields of law, including international law, civil law, penal law, military law, administrative law, constitutional law, corporate law, torts and more. We could arguably be called the biggest law firm in Israel. The career law officers number about 180 lawyers, and the reserve officers number another 700 lawyers who can be called to duty whenever necessary. We average about 40 reservists at any given time, providing us with about 220 lawyers throughout the country including Judea, Samaria and the Gaza Strip.

Subordinate to the Deputy Military Advocate General is the Head of Personnel and Administration Branch. He is the only non-lawyer in the corps. Professionally, next in the Military Advocate General's headquarters' structure is the Military Advocate General's School. The School is a new venture of which I am very proud. To a certain extent it emulates the Judge Advocate General's School in Charlottesville, Virginia, which is the highest military school for judges and advocates in the U.S. Army. I spent a year in a graduate course in this school and had a dream of creating the same type of school in the IDF. It took more than 10 years to establish something similar to the JAG School. Our School teaches our lawyers about military law. We hold specific professional courses for the lawyers and, more

importantly, we hold courses and give lectures to commanders in the field on a variety of legal topics, such as manifestly illegal orders, conduct unbecoming an officer, or international law and the law of war, as well as rules relating to disciplinary trials.

Last year we had about 5,000 students throughout the year in the School. This year we expect the number to exceed 6,000 officers and lawyers. It is a great success, and although it cost a lot of money to establish, in the long run it will save money by reducing the number of trials and investigations against officers and increasing their knowledge of military law, norms and ethics.

Next is the Head of the Legal Supervision Branch. This Branch deals with many issues which are not typical legal issues. For example, it deals with the operation of the Penal Review Board, petitions for pardons and mitigation of sentences imposed on soldiers and civilians tried before the Military Courts; it supervises the military disciplinary jurisdiction system and the military prisons. Each month visits are made to each of the three military prisons - Prison 4, Prison 6 and Megiddo Prison which houses Palestinian prisoners. The Branch deals with the requests



Brigadier General Uri Shoham is the Military Advocate General in the Israel Defence Forces.

and complaints of soldiers made to the Military Advocate General. Soldiers may make complaints through two channels: the Military Advocate General and the Soldier's Complaints Commissioner.

We also have the Head of the International Law Branch. Among other matters, this Branch deals with the negotiations with the Egyptians, Jordanians, Palestinians and Syrians. It provides legal counsel regarding assorted issues which arise in the Administered Territories to the General Staff, military commanders of the Territories and other officials in the military government; it also prepares and publishes orders and proclamations issued by the military commanders in the Territories and prepares position papers for government agencies in respect of legal matters pertaining to the Territories. Other important functions include administration of trials before the Military Courts as well as administrative detentions and other administrative sanctions; administration of the General Appeal Board in the Territories; dealing with petitions for pardons by residents of the Territories; preparing responses to questions posed by human rights organizations, such as the Red Cross and Amnesty, and meeting their delegates; and last but not least providing advice to the government regarding the military or security aspects of international law, including the formulation or implementation of international treaties.

JUSTICE - What proportion of the Military Advocate General's workload is performed by the International Law Branch?

Brig. Gen. Shoham - Probably a third. Another third of the work load is performed by the criminal and military law branches and the remainder is performed by the civil law branches.

JUSTICE - Can you say a few words about the civil work carried out by the corps?

Brig. Gen. Shoham - The Head of Legislation and Legal Advice Branch which is next in the headquarters structure has a very important function. Although we specialize in military, criminal and international law and are not experts on civil law, we nevertheless require a branch to deal with civil matters such as torts, contracts, deeds, *etc.* This branch is responsible for the preparation of bills, secondary legislation, proclamations,

appointments and the like. They give legal advice dealing with the preparation and interpretation of Army regulations and they prepare responses to petitions brought before the High Court of Justice concerning the Territories. More than 100 petitions are brought to the High Court of Justice per year; with the numbers climbing. About a third of the petitions are brought by soldiers or civilians in relation to such matters as conscription, and other aspects of army service such as demands to serve in a particular unit. An example of such a petition is that brought by Alice Miller who wished to enroll in the Pilot's School [for abstract, see *JUSTICE* No. 7 p. 46].

We review the Army regulations and ensure they conform with the Basic Laws and, of course, the other laws of the State. We consider all the regulations every two years to see if they need updating and check whether the balance is being maintained between the civil rights of the soldiers and the needs of the Army.

Also present in the Headquarters are the Chief Military Defence Counsel and Chief Military Prosecutor. Each is responsible for prosecution and defence in the Military Courts or Courts Martial, operating under the Military Justice Law 1955. There are military defence counsel and military prosecutors, which represent the government or the soldiers respectively in the Court Martial or Appeal Court Martial.

JUSTICE - How do you answer the criticism of having both these institutions under the single umbrella of the Military Advocate General?

Brig. Gen. Shoham - The solution to that dilemma is that I am responsible for the prosecution, through the command channels and the professional channels, but am responsible for the defence counsel solely through the command channels. The Chief Defence Counsel, who holds the rank of colonel, is responsible for the defence counsel on a professional level. I have no intention and no need to intervene in the methods of handling the defence or the tactics or strategy employed, or indeed whether to file an appeal or not or whether to petition the Supreme Court of Israel. I do not intervene in the decision who will represent the soldier or how the lawyer handles the defence. To that extent, the defence counsel are completely independent. However, these lawyers remain part of the Military Advocate General's corps, they are officers in the Army and have to behave according to the norms of the IDF and they have to

behave according to the norms and ethics of the Israeli Bar. If we abide by this arrangement, and currently there is a full understanding between myself, my Deputy and the Chief Defence Counsel, we can work together. The only alternatives would be either to remove the defence counsel from the legal corps or to remove them from the Army. The latter is an option as there is a Public Defence Attorney who is part of the Ministry of Justice but is not part of the Attorney-General's Office.

Nevertheless, in my view it is in the interest of the soldiers that the military defence be part of the Military Advocate General corps. The defence counsel are part of the family. They know in advance what is going on, where and when we initiate an investigation, our intentions in relation to any particular file, they can freely enter any Military Advocate General corps offices and speak to whomever they wish, and this gives them a significant advantage over private lawyers, which benefits the defendants. Secondly, this structure is in the legal officers own interest, because it provides them with an opportunity for promotion within the legal corps. Otherwise, these lawyers would be restricted to the same position throughout the years.

Finally, we have the Head of the Computerized Systems and Legal Data Bases Branch. We are currently engaged in a six year plan to computerize all the systems of the legal corps. We can put our data on line from the Headquarters to the field and *vice versa*. The system allows us to deal with cases rapidly and efficiently. Our system is highly advanced, we are in the process of implementing and developing it and have already spent NIS 3 million doing so.

JUSTICE - Can you also tell us about the function of the Military Advocates themselves?

Brig. Gen. Shoham - There are Military Advocates throughout the country, wherever there are Military Courts. In each jurisdiction, there is the head of that jurisdiction, these are known as the Military Advocate Northern Command, Military Advocate Southern Command and Ground Corps Command, Military Advocate General Staff Command, Military Advocate Central Command, Military Advocate Navy and Homefront Command, Military Advocate Air Force, Head of Logistics Investigations Branch and Special Military Advocate for AWOL's and Deserters. The Military Advocate, prosecutors and defence counsel review the cases and decide what to do with them, initiate criminal proceedings, disciplinary proceedings,

close the file or take other proceedings against the commanders or soldiers. In each of the seven jurisdictions there is a Military Court, although some courts deal with the cases of more than one command; for example the same Military Court deals with cases from the General Staff Command, Homefront and Navy.

JUSTICE - What are the major landmarks of the Military Court system?

Brig. Gen. Shoham - The first major landmark, of course, took place in 1948, when at the same time that the State of Israel was being proclaimed by Prime Minister Ben Gurion, we started providing legal services in the field. This was the time of the War of Independence, and our lawyers worked together with the brigade commanders in the field, and not only gave them legal advice but also dealt with problems of discipline and the occasional crime. They initiated military courts in the field, in what was the beginning of the Military Advocate General corps. At the same time it should be borne in mind that even prior to those times, legal services were being given to the *Haganah*, which were later transferred to the IDF.

The second landmark came in 1955 with the enactment of the Military Justice Law by the *Knesset*. This was a form of revolution, for the first time providing a "*Magna Carta*" of the legal system in the IDF. The law is all-encompassing. It provides for the establishment of the Courts Martial; the Appeal Court Martial; the appointment and powers of the Military Advocates and Military Advocate General; and the powers of the commanders. There are chapters dealing with military offences, sentences, military prisons and more. The person responsible for the enactment of the law was Aharon Hoter-Ishai who was the first Military Advocate General; some of his ideas were adopted from the British system, and the influence of that system on the Military Justice Law is clearly evident. There have been about 34 amendments to date of this Law in an effort to keep it in tune with changes in people, notions and events.

Another milestone came after the Shamgar Commission in 1977. President Shamgar had headed a special commission to review the Military Justice Law and, in particular, find ways of conferring greater independence on the Military Courts Martial and remove some elements of subordination to the Chief of Staff and Head of Personnel and other commanders. As a result of his suggestions, a very comprehensive amendment was made whereby military judges are appointed by a special appointing

commission, headed by the Minister of Defence. Other members of the committee include the Minister of Justice, the President of the Supreme Court, a Justice of the Supreme Court, the Chief of Staff, the Head of Personnel, the President of the Appeal Court Martial, a judge of the Appeal Court Martial and a representative of the Israeli Bar. The nine delegates select the military judge and the appointment is then made by the President of the State of Israel. The process is very similar to that applied in respect of civilian judges. This was the most important change to the Military Justice Law. Despite the fact that the judges wear uniforms and possess ranks and insignia, they are free to make any rulings they see fit. There is no pressure or influence over them of any sort and they are totally independent.

Another memorable landmark relates to military investigations. In 1997 there was an amendment to the Law, enabling soldiers, after a military operation, to talk freely to their commanders without any fear that their communication would serve as evidence against them in Court. This has provided an important atmosphere in which soldiers and commanders can share with their superiors all data and information concerning the military operation, without fear of incriminating themselves in Court. The amendment was not easy to pass. It was criticized throughout the country by parents, politicians and even by commanders who thought we would take advantage of the information in other ways, but finally it was passed.

JUSTICE - How effective is the military appeal system?

Brig. Gen. Shoham - Any soldier and the prosecution may appeal a decision from the District Court Martial to the Appeal Court Martial. The right of appeal is both as to verdict and sentence. This differs from the position in the United States where, except in very special circumstances, only a defendant may appeal a decision. In Israel, both the prosecution and the defence possess the same rights. There is also a right to appeal a decision from the Appeal Court Martial to the Supreme Court of Israel by way of leave given either by the Military Court itself or by the President of the Supreme Court. This implements one of the recommendations of the Shamgar Commission. In the last four years, while I have held this position, more than 20 cases have been appealed from the Appeal Court Martial to the Supreme Court. These appeals are limited to important and unique legal issues. Parties cannot appeal sentences or other matters which have already been resolved by precedent of either

the Military Court or the Supreme Court. An important example of such an appeal concerned the rules of engagement. There were many cases of firing upon Palestinians, where it was unclear what the position was under the military regulations. An old Supreme Court ruling (Cr. App.57/53 *Gold v. The Attorney General* 7 P.D. 1126), held that where a person, who was not a policeman, fired at a person he suspected of committing a crime, in that case shooting at and killing a Palestinian committing a robbery, he was entitled to act in order to stop the suspect and bring him to the police. A new ruling of the Supreme Court, following an appeal by a soldier from a decision of the Appeal Court Martial, has held that proof must now be shown that the soldier not only fired at a time when he suspected that a crime was being committed, but also that the crime was a dangerous one. This is an extremely important change. It is now for the soldier to prove that he fired because he suspected that the person before him was using a lethal weapon or endangering others. It is not sufficient for the soldier to allege that the suspect was engaged in routine crime (see Cr. App.486/88 *Ankonina v. The Chief Military Prosecutor* 44(2) P.D. 3).

JUSTICE - Have you noticed a reduction in the number of cases brought against soldiers since the end of the Intifada?

Brig. Gen. Shoham - Actually the figures are much higher than during the years of the *Intifada* (1987-1993). In 1997, for example, just over 4,000 crimes were indicted. However, of these 68% were AWOL related and the next largest figure, 14%, related to theft of IDF property. Only 3% were violence-related crimes and 4% related to illegal use of arms. In terms of offences against Palestinians, of course the figures are much lower than during the *Intifada* years. At the moment we have about 3 or 4 cases a year of homicide or negligent manslaughter.

JUSTICE - How do you see the relationship between the military and civilian court systems and the attempt by some Attorney Generals to dictate to the Military Advocate General?

Brig. Gen. Shoham - It is no secret that there have been periods of tension between some Attorney Generals, such as Michael Ben Yair, and the then Military Advocate General, due to disagreements about their respective powers. At that time the main disagreement centred around the *Sa'diel case*. Sa'diel was an officer who took part in a military operation in Southern

Lebanon. In the course of the operation, one soldier shot and killed another in the mistaken belief that he was a *Hizballah* terrorist. Due to the fact that the incident occurred during a military operation, the Military Advocate General thought that a very high level of negligence had to be proved in order to prosecute the company leader. His view was that the standard of negligence had to be higher in such a case than in the case of a mere military exercise where greater preparations could be made and the environment was very different. On the facts, the Military Advocate General decided that there were no grounds for initiating criminal proceedings against the company leader and closed the file. The family of the deceased soldier applied to the Attorney General for a review of this decision. The Attorney General agreed that there were no grounds for initiating proceedings for negligent homicide as in his view there was no legal or factual connection between the officer's behaviour and the tragic incident. Nevertheless, he thought it would be appropriate to bring proceedings against the commander on grounds of negligence without connection to the result itself. The Attorney General further thought he could instruct the Military Advocate General to bring charges against the soldier. The Military Advocate General disputed that this was either the appropriate way to proceed or indeed that the Attorney General had the power to give him instructions; he therefore made his objections known but, on the basis that the Attorney General was nevertheless his superior, he decided to follow the latter's instructions. In the event, the Military Court itself vacated the charges and held that there was no authority on the part of the Attorney General to instruct the Military Advocate General. The Attorney General in turn declared that he did not wish to review complaints brought by parents in respect of military matters, as if he had no authority to instruct the Military Advocate General, it was not appropriate for him to deal with these cases.

I believe that the ruling of the Military Court was right. A year after this incident, I became Military Advocate General, and the Attorney General also changed, with the office now being occupied by Elyakim Rubinstein. We have reached an understanding that he will review the cases and we will not reach the same level of conflict again. Thus, at the moment the authority or powers of the Attorney General are open but I and he both know that we will reach an understanding in the event that a similar situation arises. I believe that this is the best way to handle this problem, and that the legal question of the powers of the Attorney General should be left to another appropriate case.

JUSTICE - Israel has forces in Judea and Samaria and Gaza Strip and in Southern Lebanon, how has this military jurisdiction been expanded over the years to cope with extra-territorial incidents?

Brig. Gen. Shoham - The military legal system is personal rather than territorial. We have a saying that every soldier carries a copy of the Military Justice Law in his pocket, at all times and wherever he goes. This is not only a saying, it is true in practice. As a result, we must provide legal advice to commanders and soldiers all over the world not only in the Territories or Lebanon; for example, we gave legal advice to the Israeli delegation that went to Kenya following the bombing of the US Embassy. In the Territories themselves, we have a military government to which we give legal advice on a running basis, because their activities are constantly being tested by the Supreme Court of Israel. Legal advice is given on a very different scale to the troops in Lebanon. There is no military government there, it is not occupied territory, and therefore we have not established a Legal Advisor for Southern Lebanon and we are not responsible for what is done there by the South Lebanon Army.

As to the issue of expanded jurisdiction, it should be borne in mind that due to the fact that we do not consider the Territories to be occupied territories, we do not think, and this is also the formal position of the Government of the State of Israel, that we have to apply the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1948, over the Territories. At the same time, we have taken the position that the humanitarian sections of this Convention should be applied voluntarily to the Palestinian population in the Territories. Thus, when we give legal advice to our commanders in the field, we cite chapter and verse from the Convention, explaining what international law provides in respect of a particular problem, although we bear in mind that the Convention as such does not automatically apply. In this context, I would like to draw your attention to a speech I gave to graduate students in the Judge Advocate School in Charlottesville, which was published in the form of an article "The Principle of Legality in the Israeli Military Government in the Territories" [153 *Military Law Review* 245], and which considers some of the major issues relating to the military government.

JUSTICE - How has your work changed since the creation of the Palestinian Authority and the division of the Territories into Areas A, B and C?

Brig. Gen. Shoham - As is well known, Judea, Samaria and the Gaza Strip are divided into 3 areas, where in Area A the Palestinians enjoy complete civil rights and have responsibility for internal security; in Area B the Palestinians have complete authority over civil issues but Israel has overriding security responsibility for the security of Israelis and defending them against terrorism, *etc.*; in Area C, generally speaking, Israel has the same powers as it had before the Oslo Agreements, save that the Palestinians have been given certain civilian powers over Palestinians in the area. The military government remains in force in Area C, headed by the Commander of the IDF troops in the Territories and the same military orders and proclamations continue to apply there as before. Thus, from our point of view, no change has occurred in terms of powers and authority over Area C since the signing of the Oslo Agreements. Nevertheless, a relationship exists between us and the Legal Advisor to the Territories and the Palestinians. We are involved in negotiations with the Palestinians in the field to solve problems and talk about issues which concern both sides. The level of cooperation in the field is quite good. The Palestinians are generally ready to cooperate to solve problems while they are still manageable and before they become major issues.

JUSTICE - *There is a perception among the public that Israel's right of hot pursuit, which is guaranteed by the Oslo Agreements, is not being exercised, why is that?*

Brig. Gen. Shoham - Hot pursuit may lead not only to tension but also to engagements between the two sides which can escalate to killing and other serious consequences. To date, there has been no need to make use of this right; we have thought it better to apply to the Palestinian Authority to ask them to fulfill their obligations under the Oslo Agreements and not to enter Area A or Palestinian controlled cities. We take the view that it is better to handle the problems this way and not to use force to arrest people in territories controlled by them.

JUSTICE - *In your view, is there a problem with the fact it is the Military Courts which try Palestinians in the Territories but that the Palestinians turn to the civilian system in Israel, when they petition the Supreme Court in Israel?*

Brig. Gen. Shoham - No. The Palestinians in the Territories have been able to apply to the Supreme Court since 1970. The

Attorney General Meir Shamgar enabled this practice although he had no legal obligation to do so, by announcing that the representatives of the Government would not raise any objection to the power of the Supreme Court in cases coming from the Territories. Since that date, the Palestinians have been able to apply to the Supreme Court and obtain their remedies, and this practice continued even during the *Intifada* years. On the contrary, a decision made at one point during the *Intifada* not to apply to the Israeli courts was quickly revoked when the Palestinians discovered that it was not in their interest to boycott the Supreme Court of Israel as this left them without any legal recourse.

Secondly, we must distinguish between the Military Courts in the Territories and the Courts Martial in the Territories. In the Military Courts we prosecute the local inhabitants of the Territories for terrorist activities and disturbances of the peace. These Courts were established under Article 66 of the Fourth Geneva Convention which empowers "the Occupying Power [to] hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country..." These Military Courts are part of my unit although, of course, I am not involved in their rulings. The Courts Martial were established under the Military Justice Law, and there we prosecute soldiers for military offences, civilian offences or indeed *Intifada* offences. During the *Intifada* there were many cases where soldiers were prosecuted for abusing the Palestinians' rights, using their weapons unlawfully, crimes of larceny, and the like. These Courts belong to a separate unit and the President of the Appeal Court Martial is the commander of that unit. He holds the rank of Major-General.

JUSTICE - *How do you see the rulings on capital punishment which have been made but not implemented?*

Brig. Gen. Shoham - The Military Courts in the Territories are empowered to deliver a death sentence, however, such a sentence must be unanimous, and delivered by a bench on which two legally qualified judges sit. There have been cases where the Court passed such a sentence on accused involved in cruel murders, such as Hassan Salame who was responsible for the death of 45 Israelis killed by suicide bombers. The formal policy of the Government is not to instruct the prosecution to ask for the death penalty; we think that there are many reasons why it would not be useful for us to have a variety of people sentenced

to death. It would be hard to execute them and our security would be harmed much more than if these people were executed under a death penalty. Currently, therefore, prosecutors are not allowed to ask for the death penalty; they must obtain instructions from the Military Advocate General and I have to consult with the Chief of Staff, the Defence Minister and other Cabinet Ministers before I instruct my prosecutors to ask for capital punishment.

JUSTICE - Comparing the military legal system of Israel, Britain and the US, where do the distinctions lie?

Brig. Gen. Shoham - There are many points which are common to all three military legal systems. All operate an adversary system; there is involvement on the part of the commander in initiating proceedings; the judges are legally qualified and officers may sit beside them and possess the same powers in passing judgment and sentence. There are many points of similarity but the process as a whole is not identical. One important difference is that in Israel, although the commander participates in the process, his involvement is very small in comparison to the situation in the United States. An analysis of these matters is contained in an article I wrote, entitled "The Legal Powers and Authority of the Commanders in the US Army" (9 *Law and the Army* 91 (Heb.)) and I came to the conclusion that our legal system is much more independent than the legal system in the US military structure.

JUSTICE - There has been criticism of Israel's raid against the Iraqi nuclear reactor, what conclusions have you drawn about this issue?

Brig. Gen. Shoham - I set out my answer to these critics in an article "Israeli Aerial Raid upon the Iraqi Nuclear Reactor and the Right of Self- Defence" (109 *Military Law Review* 191) 1985. The article was written 4 years after the raid. I thought that the great criticism made of the operation was a display of double standards; especially when it was made by people such as Prof. Maddison and his wife who published an article which I quoted, making such statements as "The Middle East and possibly the world now lives under the potential of nuclear obliteration brought on by the actions of the Government of Israel". They thought that the operation was illegal as a matter of international law; however, the same authors said during the Cuban crisis that

the United States had properly made use of its right of self-defence according to Article 51 of the UN Charter and norms of international law. In my view, the same legal principle and standards applies to both countries, and accordingly the Israeli operation was not unlawful as a matter of international law and under Article 51 of the UN Charter.

JUSTICE - Finally, is the Military Advocate General's Unit making any preparations in advance of PLO Chairman Arafat's stated intention to declare an independent State of Palestine in May next year?

Brig. Gen. Shoham - I won't elaborate, but the brief answer to your question is yes. ■

From the Association

Swiss Section Legal Ski Week-End

The IAJLJ (Swiss Section) has pleasure in advising all members that it is planning to hold a ski week-end with some legal content provided, *inter alia*, by Prof. Amos Shapira, which will take place at the Grand Hotel du Parc, Villars-sur-Ollon, from Friday 29 to Sunday 31, January, 1999.

For further details, please contact Frederique Bensahel-Zimra, Vice-President of the Swiss Section (IAJLJ Swiss Section, Frederique Bensahel-Zimra, 47, rue du 31-December, 1207 Geneva - Switzerland, Tel. : 4122/849 60 40, Fax 4122/849 60 50, E-mail: frederique_zimra@fbt.ch).

Accommodation is limited. If you are interested, please book early as places will be allocated on a first-come first-served basis.

The Swiss Section hopes that as many members of other national sections as possible will participate in this week-end.

The International Criminal Court: Israel's Unique Dilemma

Alan Baker



In the vast panoply of international, legal and treaty-making activity taking place whether under the auspices of the various United Nations organs or independently through academic and professional institutions, in the development and codification of international law, rarely does there occur a development which can be considered as an historic milestone in international law.

On 17 July 1998, after an intense, high-powered and tension-filled five week long United Nations Diplomatic Conference, the “**Rome Statute of the International Criminal Court**” was approved by a vote of 120 States in favour, 7 against and 21 abstentions.¹ The event was dramatic, traumatic and memorable for all those who took part. The International Criminal Court (ICC) was born - an historical step forward for international law and justice and for the international community, in the fight against impunity.

The adoption of the Statute was accompanied by unprecedented general pandemonium in the conference hall by Ministers of Foreign Affairs and Justice of several States, delegates, representatives of international and non-governmental organizations, United Nations staff and the international media. The solemn plenary meeting of the Conference broke into applause, jubilation, embracing and excitement - distinctly uncharacteristic of United Nations Conferences. In the circumstances this was clearly a spontaneous outburst of tensions,

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frustrations and emotion which had been kept up, not only during the five tense weeks of the conference itself, but in many cases, for the more than fifty year period in which the idea and the concept of the Court had germinated and developed.

During the pandemonium, few paid attention to the fact that some delegations were not able to share in the jubilation, and even exhibited a sense of concern and foreboding. The delegation of Israel² was one of those delegations which could not share in the jubilation. The Statute which had been approved, as significant and important a milestone as it may be, was not a statute to which Israel was able to lend its political support.

Clearly, any attempt, within the confines of this article, to analyse in detail the 128 articles of the Statute of what is potentially to become one of the most important organs of international justice, would do ‘justice’ neither to the Statute of the ICC itself, nor to the Magazine *JUSTICE*. Hence, this article will restrict itself to a brief description of the concepts underlying the establishment of the Court and the principle elements

1 The Statute is reproduced in United Nations Document A/CONF.183/9 of 18 July 1998.

2 The Israeli Delegation was headed by Attorney-General Elyakim Rubinstein, who addressed the Plenary of the Conference, and Judge (retired) Eli Nathan who replaced Mr. Rubinstein as Head of the Delegation after his departure from Rome. The State Attorney, Ms. Edna Arbel, the Legal Adviser of the Foreign Ministry, Alan Baker and the Deputy State Attorney, Ms. Rachel Sukkar, were members of the delegation. In addition, representatives of the Military Advocate General's corps, and the Foreign Ministry Legal Division also attended portions of the Conference.

comprising its Statute and jurisdiction, and attempt to examine the problems faced by Israel during the course of the drafting and approval of the Statute.

Historical Perspective

Since the initial concept of establishing an international criminal jurisdiction, framed in the Treaty of Versailles after the First World War (in order to prosecute the German Emperor³), and the adoption of the Nuremberg⁴ and Tokyo⁵ Statutes following the Second World War, it took over fifty more years of efforts to instill into international consciousness the importance of, and the need for a permanent international criminal instance in order to exercise criminal jurisdiction *vis à vis* individuals perpetrating the most heinous and flagrant war crimes and atrocities.

While the above mentioned Nuremberg and Tokyo *ad-hoc* tribunals had been set up to deal with the serious war crimes committed during the Second World War, and the more recent Yugoslavia⁶ and Rwanda⁷ Tribunals set up in 1993 and 1994 respectively, to deal with the atrocities committed within those internal conflicts, the concept of a permanent, universal and independent judicial organ capable of exercising jurisdiction in any situation and thereby ensuring individual accountability for serious violations of international law on a global scale, never actually reached fruition.

Following an initiative by the Prime Minister of Trinidad and Tobago, in 1989, to institute an international criminal instance to deal with international drug traffickers, and then pursuant to United Nations General Assembly resolutions adopted since 1989, the International Law Commission was directed to address the question⁸ and, in 1992 to elaborate a draft statute for an international criminal court.⁹ It took a further six years of deliberations, negotiations and drafting by that Commission, by an *Ad-Hoc* Committee of all Member States of the United Nations set up in 1994 to review the draft statute produced by the Commission,¹⁰ and by a Preparatory Committee set up in 1995 to prepare a “widely acceptable consolidated text of a convention for an international criminal court”.¹¹ This text became the basis for the Rome Conference.

The Contribution of the State of Israel and the Jewish People

Any consideration of concepts aimed at ending impunity in the context of international justice must of necessity weigh

heavily on the collective sensibilities and memory of the Jewish people as a whole, and the State of Israel in particular. In his opening speech to the Plenary session of the Rome Conference on 17 June 1998, the Attorney-General of Israel, Elyakim Rubinstein reiterated Israel’s unique interest in the successful completion of the task of drafting the statute of the court, linking that interest to the fact that the Jewish people had born the brunt of the most flagrant crime humanity has ever known - the holocaust of the Jewish people in Europe, one third of which was exterminated.

This unique interest thus exists for Jews the world over, whether actual survivors of the Holocaust, victims of Nazi persecution or families which still bear the physical, mental and social wounds caused as a result of the Holocaust. They have a unique, ingrained and personal interest in the establishment of a permanent international court to judge the purveyors of wanton genocide, death and atrocities, wherever and whoever they may be.

As such, the State of Israel, both in its general capacity as the sovereign personification of the Jewish people, as well as its being a Member State of the United Nations and a subject of international law, considered, from the outset, that it had a moral responsibility not only to accompany the development of such a court, but to actively assist in the molding of its personality and character with a view to ensuring that it would be able genuinely to function as a means to prevent impunity and ensure the blind pursuit of justice, without being in any way fettered by extraneous political trappings which might serve to neutralise the

- 3 Treaty of Versailles, June 28, 1919 - Articles 227 - 229, 112 (*British & Foreign State Papers*) at page 103.
- 4 Pursuant to the London Agreement “for the Prosecution and Punishment of the Major War Criminals of the European Axis”, August 8, 1945.
- 5 Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, as amended 26 April 1946.
- 6 United Nations Security Council Resolution 808 (1993) of 22 February 1993.
- 7 United Nations Security Council Resolution 955 (1994) of 8 November 1994.
- 8 United Nations General Assembly Resolutions 44/39 of 4 December 1989, 45/41 of 28 November 1990, 46/54 of 9 December 1991.
- 9 Resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993
- 10 Resolution 49/53 of 9 December 1994.
- 11 Resolutions 50/46 of 11 December 1995, 51/207 of 17 December 1996 and 52/ 160 of 15 December 1997.

bona fide and impartial character and nature of the Court and render it prone to politicization.

Hence, Jewish leaders and intellectuals throughout the world, as well as leading Israeli lawyers, scholars and statesmen have figured in all stages of the development of the concept of the international criminal court since the end of the Second World War and during the formative years of the State of Israel. An active Israeli delegation made its ongoing contribution during the various negotiation sessions, adding wide-ranging experience and know-how in the field of criminal prosecution and international criminal law stemming from a vibrant and universally acclaimed legal system and judiciary based both on modern criminal law as well as on *talmudic* precepts of justice, which have found their place in many civilised legal systems.

The Concept of an International Criminal Court

Individual Imputability

Prior to summarizing its basic components, it is perhaps significant at this stage to clarify the distinction between the projected **International Criminal Court** and the already existing **International Court of Justice**. The new court, once established, will constitute an independent judicial organ empowered to exercise criminal jurisdiction *ratione personae* as against individuals accused of such crimes as genocide, crimes against humanity and the most serious war crimes. It is aimed at preventing situations of criminal impunity by individuals on the international plane, a factor lacking in today's organized international juridical system. The existing International Court of Justice, itself a United Nations organ, is an international tribunal exercising jurisdiction *vis à vis* acts and responsibilities by **States**, and not by individuals.

Complementarity

The jurisdiction of the new Court to try individuals is not designed to remove such jurisdiction from national criminal jurisdictions, and the Statute stresses in its opening provision that it is intended to be **complementary** to local criminal jurisdictions.¹² Where a State has jurisdiction to try an individual it will have priority over the ICC; however, this will not prevent the Court from trying an individual where the State was unwilling or unable to deal with the matter or where the Court is convinced that national proceedings were not genuine or did not adequately reflect the seriousness of the crime.¹³

This component is considered to be one of the central, and most important elements of the Statute, intended to encourage, first and foremost, all States - whether party to the Statute or not - to fulfill their existing obligations under customary international law to investigate and prosecute individuals for the most serious international crimes. The principle of complementarity is also intended to facilitate wider participation by States in the Statute, without fear of infringement of the authority of sovereign legal institutions.

Structure and Status of the ICC

The ICC is a permanent judicial body, independent both structurally and financially from the United Nations, and will have its seat in the Hague.¹⁴ The Statute of the Court takes the form of an international treaty, which will enter into force once sixty States have ratified the treaty.¹⁵ Only upon entry into force of the Statute will the Court be able to function.

The Court will be composed of Pre-Trial, Trial and Appeals Divisions, in addition to a Prosecutor and Registry.¹⁶ Eighteen judges will be elected, and are required by the Statute *inter alia* to have established competence and experience in criminal law and procedure, international humanitarian law and human rights, as well as legal expertise on certain other specific issues.¹⁷

Jurisdiction *Ratione Personae*

The Court's jurisdiction, clearly the central component of the Statute, is exercisable *vis à vis* all **individuals** (including Heads of State or Government, Ministers, Members of Parliament, officials and commanding officers)¹⁸ who perpetrate or are responsible for any of the crimes listed in the Statute as "the most serious crimes of concern to the international community as a whole". These crimes are listed under the following categories: **genocide, crimes against humanity, war crimes and the crime of aggression**.¹⁹

12 Article 1.

13 Article 17.

14 Part 1 of the Statute, see Article 1.

15 Part 12, Article 126.

16 Article 34.

17 Article 36.

18 Articles 27 and 28.

19 Article 5. In the light of deep political controversy as to the definition of the crime of aggression in the context of individual imputability and the role of the United Nations Security Council in determining the existence

Admissibility and Exercise of Jurisdiction

The Court's jurisdiction with respect to these categories of crimes is automatic, and States are considered to have accepted its jurisdiction upon becoming party to the Statute.²⁰ However, with respect to the crimes listed under the category of "war crimes",²¹ States are given the option, for a period of seven years, to **opt out** of the Court's jurisdiction with respect to such crimes committed by its nationals or on its territory.²² The Court's jurisdiction is not retroactive, and applies only with respect to crimes committed after the entry into force of the Statute.²³

In order for the Court to acquire and exercise jurisdiction in a particular case referred to it by a State Party or by the Court's Prosecutor, either the State in the territory of which the crime occurred, or the State of nationality of the accused must be party to the Statute, or must have accepted (by declaration) the Court's jurisdiction. These preconditions are not applicable when the Security Council, acting under Chapter VII of the United Nations Charter ("Threats to the Peace, Breaches of the Peace and Acts of Aggression"), refers a situation to the Court in which case there is no limitation on the Court's jurisdiction.²⁴

It follows that, where a **State in whose territory the crime was committed** is party to the Statute, or has otherwise accepted the Court's jurisdiction, the suspect who is present in that territory may be arrested and transferred for investigation and trial by the ICC, even where his or her own State of nationality is not party to the Statute, does not accept, or agree to the jurisdiction of the Court or merely objects. This is all the more evident in the event of a Security Council referral of a case to the Court.

Deep dissatisfaction with this point of principle regarding application of the Court's jurisdiction *vis à vis* non-States parties, caused some leading States to express reservations as to their willingness to become party to the Statute (India, China, and the United States) and caused the latter two States to vote against approval of the Court's Statute.

Jurisdiction *Ratione Materiae*

Genocide

The definition of the crime of genocide²⁵ is taken directly from the 1951 *Convention on the Prevention and Punishment of the Crime of Genocide*,²⁶ referring to killing, causing serious injury or harm, inflicting conditions calculated to cause physical destruction, preventing births and transferring children, all committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

Crimes Against Humanity

This category refers to acts committed, whether in times of peace or armed conflict, as part of a "widespread or systematic attack directed against any civilian population, with knowledge of the attack", and lists such acts as murder, extermination, enslavement, deportation, imprisonment/deprivation of physical liberty, torture, rape and related sexual crimes, political, racial, religious or other forms of persecution, enforced disappearance, apartheid, and other inhuman acts intentionally causing great suffering or serious injury to body or to mental or physical health. Each of these acts are individually defined and detailed in the Statute.²⁷

While the core elements of this category were taken from the 1945 Nuremberg Charter,²⁸ as well as the Yugoslavia and Rwanda Statutes, some new elements were added, or existing ones elaborated, during the course of the negotiations of the ICC Statute, in order to reflect updated notions of crimes against humanity as experienced in recent events.

War Crimes

The detailed listing of war crimes in Article 8 of the Statute gave rise to considerable debate and controversy, whether on legal, humanitarian, religious or social grounds. Its approval was evidently secured only by the addition of the above mentioned "opt-out" clause enabling States that entertain reservations regarding one or more of the components of the complex and detailed war crimes category, to delay accepting the jurisdiction of the Court with respect to acts committed by their nationals or on their territory, for a period of up to seven years.

of aggression, the exercise by the Court of its jurisdiction in this respect is deferred by the Statute pending adoption of a definition of the crime, and determining the conditions under which the Court will exercise its jurisdiction (a process of amendment and review of the Statute which requires seven years).

20 Article 12(1).

21 Article 8.

22 Article 124.

23 Articles 11 and 24.

24 Article 12.

25 Article 6.

26 78 UNTS 277, Article 2.

27 Article 7(2).

28 Charter of the International Military Tribunal at Nuremberg, dated 8 August 1945, Article 6(c).

While no doubt or question existed with regard to the reproduction of the list of all the **grave breaches** of the 1949 Geneva Conventions, in view of the status of those Conventions in international law and the established nature of their grave breaches as serious war crimes,²⁹ similar consensus was not demonstrated regarding the sub-categories dealing with “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law” and “armed conflicts not of an international character”.³⁰

As regards the latter sub-category, most of the “non-aligned” States (in the territories of which most internal conflicts have taken place, and continue to occur) entertained objections to the Court’s exercising jurisdiction with respect to crimes perpetrated in such conflicts.

As to the sub-category of “other serious violations ...”, some States were unable to agree as to the customary international law status of several of the crimes listed, and raised questions as to the justification for their inclusion, on a par with the above mentioned grave breaches, as war crimes within the jurisdiction of the Court. In this context, Israel strongly objected to the inclusion in this heading of a “serious crime” of transferring civilian population to occupied territory (see below). Other States (led by Egypt and the non-aligned group) demanded (unsuccessfully) the inclusion as war crimes of the use of nuclear weapons and other weapons of indiscriminate effect.³¹ Several States aligned with the Catholic Church, together with the Delegation of the Holy See, expressed strong reservation regarding inclusion of a reference to “forced pregnancy” within the listing of sexual crimes.³² The war crime of enlisting children under the age of fifteen into armed forces also generated heated debate.³³ The fact that several of the war crimes listed are adapted from instruments which are not considered to represent customary international law added to the difficulties in achieving consensus on this category. This was compounded by the fact that some of the crimes listed lack substantive and even vital elements which appear in the original instruments of international humanitarian law from which they were copied. Other crimes include elements which have been added, and which do not appear in the original instruments.

The issue of the “threshold” beyond which war crimes become a matter for the jurisdiction of the Court was also a subject of intense debate. Many States were of the view that an isolated act should not justify the involvement of the Court, and that the Court should **only** have jurisdiction when such a crime is

committed “as part of a plan or policy or as part of a large-scale commission of such crimes” (similar, to a certain extent, to the threshold required for “Crimes against Humanity”). The formula adopted by the Conference was less restrictive, and refers to crimes committed **in particular**, as part of a plan, or policy or on a large scale.³⁴

Other Significant Issues

The Prosecutor

Under the Statute the Prosecutor has authority not only to pursue proceedings initiated by a complainant State or by the Security Council, but also to initiate investigations *proprio motu*, at his or her own initiative, on the basis of information received from any source.³⁵ Though this far-reaching capacity is, in theory, restrained by the Pre-Trial Chamber of the Court, which must authorise an investigation, some delegations, the United States and Israel included, expressed reservations to this power of initiative, which, in their view would prejudice the independent, impartial and professional functioning of the Prosecutor and expose the Office of the Prosecutor to endless political pressures.

Security Council Intervention

The United Nations Security Council has the capacity to bring about the deferral of an investigation or prosecution by the ICC if it so requests in a resolution adopted under Chapter VII of the United Nations Charter (dealing with threats to the peace, breaches of the peace and acts of aggression).³⁶ This capacity gave rise to controversy both by those States objecting to **any** Security Council right of deferral (chiefly the non-aligned States), and by those (including the United States and China) which considered this provision to constitute a limitation on inherent rights enjoyed by them pursuant to the United Nations Charter.

29 Article 8, paragraph 2(a) of the Statute.

30 *Ibid* subparagraphs (b), (c) and (e).

31 *Ibid* subparagraph (b)(xx).

32 *Ibid* subparagraph (b)(xxii).

33 *Ibid* subparagraph (b)(xxvi).

34 Article 8 paragraph 1.

35 Article 15.

36 Article 16.

Death Penalty

Despite the insistence of many States which, following the precepts of Islam, maintain the death penalty as part of their national penal legislation, (as well as other non-Islamic States which maintain the death penalty), the Court is not authorised to impose the death penalty, and the maximum penalty is imprisonment for thirty years or a term of life imprisonment.³⁷

Terrorism and Drug Trafficking

Several States had, during the earlier stages of the process, advocated the addition of terrorism and drug trafficking as core crimes in the projected Statute. Due to a lack of consensus, these crimes were not included in the Statute, but referred to in a resolution attached to the Final Act of the Conference,³⁸ as subjects for further elaboration with a view to their possible addition to the Statute in the future.

Issues of Concern to Israel

Throughout the negotiating process, the Israeli delegation pointed to several provisions which posed considerable difficulties for Israel. In addition to its position regarding the overly wide *proprio motu* capacities of the Prosecutor referred to above, Israel also actively advocated a State's right to withhold the disclosure to the Court of information or documents that it considers could prejudice its national security interests. This position, while supported by many States, was not reflected in the final text of the Statute as adopted, which places the responsibility for making such a determination into the hands of the Court itself, and ultimately into the hands of the Assembly of States Party to the Statute, or even the United Nations Security Council.

Israel also expressed some reservation as to the selective manner in which war crimes had been listed, in some cases lacking substantive elements that appeared in the original instruments of humanitarian law, and in others adding new elements which had not been previously part of those instruments.

A further cause for concern by Israel is the process of selecting the judges of the Court - a process based *inter alia* upon the "equitable geographical representation" formula which represents the standard mode for elections in United Nations organs, based on the United Nations regional grouping system. As Israel is the only United Nations Member State which is not accepted in any of the regional groups of the system, the election of an Israeli candidate - however competent professionally -

would be impossible as long as Israel remains outside this grouping system.

Israel's Dilemma

In spite of Israel's active and constructive participation and contribution throughout the long and drawn-out negotiating and drafting processes of the ICC Statute, as well as its inherent historical links to the subject matter, and despite hopes that the negotiation and adoption of the Statute would be untainted by elements of politicization, the Israeli Delegation nevertheless was faced with a serious political and moral dilemma towards the end of the Conference.

The proposed inclusion as a war crime of "*the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies*"³⁹ was perceived to be an attempt to abuse the Statute of the Court for political ends, directed principally against Israel. Israel expressed the legal position, both during the Conference as well as in separate appeals to participating States, that the proposed formulation, which had been transcribed from Additional Protocol I to the Geneva Conventions,⁴⁰ with various adaptations, neither represented a grave breach of the Fourth Geneva Convention, nor did it reflect customary international law. In fact, it had been cynically adapted and proposed in order to advance a political viewpoint maintained by certain States. Accordingly Israel claimed that such a provision had no place among a listing of genuinely serious war crimes in the Statute of the ICC.

As the final stages of the Conference, during which the draft Statute was finalised, enabled no possibility of voting on separate substantive provisions, Israel was faced with a "take it all or leave it" option, and was required to decide whether to approve a Statute which included a "war crime" considered by Israel as objectionable and political, or alternatively to express its view through the voting procedure.

³⁷ Articles 77 and 80.

³⁸ United Nations Document A/CONF. 183/C. 1/L. 76/Add. 14.

³⁹ Article 8(2)(b)(viii).

⁴⁰ Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, Article 85(4)(a). Neither Israel, nor the United States, France, India, Pakistan and Turkey are parties to the First Protocol.

In his statement to the Plenary of the Conference on 17 July 1998 in explanation of Israel's negative vote, Judge Eli Nathan stated as follows:

"Article 1 of the Statute clearly refers to *"the most serious crimes of concern to the international community as a whole"*; the preamble talks of *"unimaginable atrocities"*, and of *"grave crimes which deeply shock the conscience of the whole international community"*. And indeed, the core crimes listed in Article 5 were intended to meet these thresholds.

We therefore fail to comprehend why it has been considered necessary to insert into the list of the most heinous and grievous war crimes, the action of transferring population into occupied territory, as it appears in Article 8, Paragraph 2(b), sub-para.viii. Without entering here into the question of the substantive status of any particular alleged violation of the 4th Geneva Convention, which clearly Israel does not accept, can it **really** be held that such an action as that listed in Article 8 above really ranks among the most **heinous and serious** war crimes, especially as compared to the other, genuinely heinous ones listed in Article 8? Or is it not clear that this has been inserted as a means of utilising and abusing the Statute of the International Criminal Court and the International Criminal Court itself as one more political tool in the Middle East conflict?

Despite all our entreaties, during the discussions of the Prep-Com as well as here in Rome and directly to capitals, this paragraph still remains as a symbol of politicization, sullyng the entire Statute.

Needless to say, had sub-para. viii not been included my Delegation would have been able proudly to vote in favour of adopting the Statute. Now, we have no choice, - we have been obliged by all those delegations here which have supported its inclusion into the Statute, to cast our vote against the Statute **as a whole**, because we have been permitted no other means of expressing our frustration and disdain at this gratuitous politicization of the Statute and the Court. Clearly we cannot voice our approval of the Statute with such a provision forming part of it. We regret being obliged here today to vote in a way that prevents us, as victims of genocide, founding fathers of the concept and idea of the International Criminal Court, to vote in favour of its Statute.

We still maintain the hope that somewhere, good sense will prevail and the International Criminal Court which is to be established as a result of all of our hard work, will not become just one more political forum to be abused for political ends by an irresponsible group of States, at their political whim. We continue to hope that the Court will indeed serve the lofty objectives for the attainment of which it is being established."

framework of today's international community, the question arises whether it would indeed be possible to expect total non-politicization of such a process.

While one might hope, as a matter of course, that States participating in such a vital and historic exercise might be instilled with an appropriate sense of mission, devoid of political motivation, it is perhaps unrealistic, and even naive to assume that the parliamentary structure of the present-day international community, based as it is on the United Nations and its inherent, in-built regional and political groupings and polarization, could for a moment be capable of reaching the requisite level of genuine, substantive and apolitical commitment and dedication needed to override political struggles, in order to establish an entirely apolitical international criminal instance.

Perhaps such an aspiration is also, by its nature unreasonable, in view of the fact that the subject matter of any such international judicature - its sphere of substantive criminal jurisdiction - must, of necessity rely on international instruments the drafting and adoption of which were achieved through political processes, within a political framework, without, in many cases, having anticipated that such instruments would one day serve as a basis for establishing **criminal** jurisdiction *vis à vis* the individual.

Be that as it may, the architects of the concept of the International Criminal Court, since the inception of the very idea, nevertheless entertained the hopes that it would be special, that the Court would be devoid of any political constraints and that justice would indeed be blind. Here, in this melee of hopes, concepts, emotions and dreams lies the unique dilemma in which the State of Israel finds itself. Is the International Criminal Court which came out of the Rome Conference indeed the realisation of the dream? Can Israel live with it as it is and become party to the Statute, or will this Court become merely one more political organ playing the familiar "UN tunes".

The Government of Israel, in reviewing the Statute and determining its position in light of its various interests and concerns, will have to try to face up to this dilemma.

Time will tell.

The United Nations Context

Faced with the realities of treaty-making in the context and

International Conference Commemorating the Jewish Community of Salonika

On June 26-28, 1998, the Association held an international conference to commemorate the Jewish community of Salonika which was almost totally wiped out in the Holocaust and to mark the contribution of Jewish lawyers, jurists and prominent intellectuals to Greek law.

In this issue of *JUSTICE*, we report on the Round Table held on "Anti-Semitism and Holocaust Denial towards the 21st Century", commencing with extracts from the opening remarks of the Chairperson, Adv. Itzhak Nener, First Deputy President of the Association, Israel, followed by the lectures given by Mr. Per Ahlmark, former Deputy Prime Minister of Sweden, and Dr. George Margaritis, Professor of History and Archaeology, University of Crete, Greece. *JUSTICE* will carry more presentations in the near future. Adv. Itzhak Nener, First Deputy President of the Association introduced the members of the Round Table Panel on Anti-Semitism and Holocaust Denial and initiated the discussion with a quotation from an eyewitness account of the transportation of Salonika's Jews and a warning about the dangers of Holocaust denial.

Itzhak Nener

Most of the Jews from Salonika were transported to Auschwitz and gassed there. A few transports were sent to Treblinka and to other extermination camps. A Holocaust survivor, Shmuel Wilenberg witnessed such a transport and described it thus:

"During those days of March 1943, a train's whistle signaled the arrival of a new transport. This time, a most strange crowd issued forth from the cars. The new arrivals, with tanned faces and jet black, curly hair, spoke among themselves in an unrecognizable language. The baggage they took with them from the cars was tagged 'Salonika'. Among the arrivals were intellectuals, people of high station, a

Adv. Itzhak Nener is First Deputy President of the Association.

few professors and university lecturers. While they had come all this way in freight cars, the strangest thing was that the cars had not been locked and sealed. Everyone was well-dressed and carried lots of baggage. Amazed, we eyed marvelous oriental carpets. We couldn't take our eyes off the enormous reserves of food, the Salonika Jews took along a reserve of clothing.

They all disembarked from the freight cars in perfect order. Attractive, well-dressed women, children as pretty as dolls, gentlemen, tidying up their lapels. Three German-speaking Greeks appointed as translators moved about with armbands embellished with the Greek colours. Not a single one of the new arrivals had grasped where he was and what his fate was to be. The truth only penetrated when they were being led naked, supposedly to the baths, and suddenly the first blows began to fall.

When we looked at a man like that, we didn't want to believe that only twenty minutes later he would end his life in the gas chamber.



A small quantity of gas was introduced into the chambers, and the process went on all night. They suffered for a long time until they breathed their last. They also suffered terribly before entering the chambers. The hangmen were jealous of the victims' fine appearance and maltreated them much more."

Today, fifty-five years after 6 million Jews perished in the Holocaust, there are

some who deny that the Holocaust ever occurred; there are some who deny that there were ever gas chambers, and there are also quite a few, in many countries, who have never heard about the Holocaust.

On the eve of a new century, is there a chance that we are approaching a new era, free of anti-Semitism, hatred and racial prejudice? Is there any chance that the three lies which have done special harm to the Jewish people: ritual murders, the *Protocols of the Elders of Zion* and that the Holocaust never took place - will die? Are there any grounds for the fear that the Holocaust in this or another form, will occur again? Have the people and States learned their lesson that hatred has no borders and suppress in time the recurrence of neo-Nazism and anti-Semitism?

There are some very disturbing signs.

Under the cover of democracy, freedom of speech and freedom of organization, the anti-Semites are again growing in strength.

The period between 1991 and 1996 was marked by a rise in expressions of anti-Semitism, resulting mainly from the collapse of the Communist block in Europe and the reunification of Germany.

In the last few months there has been another wave of anti-Semitism in some countries, because Jewish survivors asked for restitution of their property and assets robbed during the World War. Militant anti-Semitism has become a growing threat to Jews and anti-Semitism from Islamic sources has increased. A few months ago, the representative of the PLO on the Human Rights Commission

in Geneva, supported by representatives of some other States, accused Israel of having caused 300 Arab children to become infected with AIDS. As no Arab children suffered from AIDS this lie did not last, although in the few months that it was spread it caused great hatred and anti-Semitic feeling.

While in recent years, anti-Semitism in various countries has taken a less violent form, neo-Nazi and anti-Semitic parties and organizations have spread, or, where already in existence - have increased their strength and impact on the political life of their respective countries, including countries where no Jews live.

What are the most effective means of combatting anti-Semitism? There are those who say that no means are effective as anti-Semitism is chronic and cannot be remedied. The war is lost. I hope this view is not accepted but that all possible ways are used to fight this disease and diminish its disastrous consequences.

Eli Wiesel, the Nobel Prize Winner and well-known writer, made the following pessimistic comment a short time ago:

“Anti-Semitism will remain. I think that in the year 2000 or sometime thereafter, there will be a change of awareness with regard to the Holocaust. There will be a day when good friends of ours will come and say: listen, you, we are with you. But it is enough. It is the year 2000 - the century is over, the millenium is over. Once a year we will come and cry with you on the *Yom Hashoa*.”

I hope that Eli Wiesel is mistaken. The memory of the Holocaust must remain not only as a tribute to the 6 million - a third of our nation, men, women and

children who were burned, murdered, gassed, but also as a reminder - a danger sign of which people should be aware, the danger of anti-Semitism and its implications.

It is of special importance that the Vatican has changed its basic attitude and recognized the terrible injustice done to Jews over many centuries. While the Vatican's recent statement on the Holocaust falls short of recognizing the Church's direct link to the persecution and murder of Jews, it is an important tool for combatting anti-Semitism.

There are Holocaust Museums, books, special teaching programmes in some countries; yet it seems that all this is not enough. The anti-Semites, neo-Nazis groups and especially the Holocaust deniers have unlimited funds at their disposal; they have succeeded in activating a number of intellectuals, not only in Europe but also in the USA and other countries. They have no museums, but they do have so-called historical institutes, they have published many books, periodicals and even some pseudo-scientific studies.

Another way of fighting anti-Semitism and the denial of the Holocaust, which is part of anti-Semitic propaganda, is by legislation prohibiting expressions of anti-Semitic, xenophobia and denial of the Holocaust. There are few countries which have passed such legislation, those which have include Belgium, France, Germany, Austria, Switzerland and Spain. However, even in those countries which have adopted some legislation, a problem exists of leniency in the application of the law against offenders and, in some cases, inability or reluctance of the authorities to persecute.

continued on p. 44

Sweden: From Indifference to Protecting Memory

Per Ahlmark

Let me confess how foolish I was when first told about the denial of the Holocaust. It happened more than twenty years ago when I first met Elie Wiesel in New York City. Elie was warning me of the growing danger from those who pretend that the Holocaust never occurred. This is just the beginning, he said, this theme will become a centerpiece of a new Nazi movement.

My reaction was incredibly naive. Could this really be dangerous? I asked. It is like denying that Japan attacked America at Pearl Harbour or claiming that the Battle of Britain never took place. This is a joke!

No, it was not a joke at all. On the contrary, it has become the nucleus of neo-Nazi agitation. Wiesel was right when, in the 1970s, he saw what was coming.

In the 1980s, this became even more evident. Anti-Semitic agitation has renewed its evil message in at least two ways:

Per Ahlmark served as Deputy Prime Minister and Minister of Labour in Sweden between 1976-78. Between 1970-1998 he was the Deputy President of the Swedish-Israeli Friendship League and in 1983 he founded the Swedish Committee Against Anti-Semitism. He has written extensively about politics, literature, international conflicts, Israel and anti-Semitism.

First, anti-Zionism has become very similar to anti-Semitism. Old stereotypes directed against the Jews have returned, now often directed against the Jewish State. This is especially obvious when it comes to phrases and images about the so-called “Jewish power” and the “Jewish urge to dominate the world”. Anti-Zionists often also exploit words which have been connected to Jewish suffering and are now using them against Israelis and Jews. Thus, the War in Lebanon in 1982 was a “Holocaust”; West Beirut was the “new Warsaw ghetto”; the struggle against the PLO - “genocide”; Israel aims at the “extermination” of the Palestinians, while the Star of David has been reshaped into the Swastika.

The purpose of these expressions is to make the Israelis look like the Nazis, or, in the blunt language of anti-Semites - the Israelis are the new Nazis. This is both a trivialization of Nazi-Germany and a demonization of Israel. It was once the nucleus of Soviet anti-Semitism and has since spread to some Western countries as well as to the Arab world.

Second, there is the allegation that the Holocaust is a Jewish invention. There were no gas chambers, deniers of the Holocaust say; the Nazis never tried to exterminate the Jewish people.

From one perspective, the two themes



read together, are illogical. First, the terrible Israelis behave like the terrible Nazis; secondly, the Nazis were not so terrible at all.

But logic has never protected us from anti-Semitic demagoguery, and on another level these two propaganda lines are not incompatible. The comparison between the Israelis and the Nazis is intended to indicate that Nazi-Germany was a sort of “normal” regime. The deniers also pretend that the Nazis did not commit the crimes of which they are accused, and consequently again that the Third Reich was more or less normal.

Of course we understand that those who lie about the crimes of the Nazis are those most likely to repeat them. They

deny the Holocaust for the reason that they themselves are inclined to complete what Hitler did not have time to carry out.

The perversion here is obvious. The deniers claim: these Jews were never killed. But they are evidently not alive. Thus, six million European Jews were never here on our planet - the ultimate annihilation.

I founded the Swedish Committee Against Anti-Semitism fifteen years ago. The denial of the Holocaust immediately became our most important field of study and resistance. What struck us then was how seldom well-known personalities made statements in order to warn and defend the world against the deniers.

In 1990, Elie Wiesel took the initiative to a big international conference in Oslo, under the title *The Anatomy of Hate*. I drafted a resolution condemning the denial of the Holocaust, which read in part:

“By lying about the Holocaust, the Jew-haters try to destroy memory. The purpose is to clear Nazism from its criminal stigma and rehabilitate anti-Semitism.

By accusing the Jews of having invented the Holocaust in order to make non-Jews feel guilty, they transform the crime into an allegation against the victims. First the anti-Semites take Jewish lives; a few decades later they take their deaths from them too.”

Among those who signed were President Havel; Nobel Laureates Nadine Gordimer and Elie Wiesel; Shlomo Avineri, Conor Cruise O’Brien, Harlem Desir, Günter Grass, György Konrad and Adam Michnik; the present Prime Minister of Norway Kjell Magne

Bondevik; the present head of the WHO Gro Harlem Bruntland; the present Foreign Minister of Poland Bronislaw Geremek, the former French Minister of Culture Jack Lang; and Ida Nudel, Abe Rosenthal, the late Eli Kedouri and others. But some people refused to sign, and I will never forget the reaction of the US economist, Professor John Kenneth Galbraith, who loudly condemned our efforts and declared that “We make fools of ourselves by protesting against this nonsense.”

Today, this incident would be unthinkable. Even among shallow diplomats, politicians and journalists it has now become fairly well-known that world wide Nazi groups regard Faurisson and Irving, Zündel and Leuchter, as their teachers and idols.

We are facing several risks here. The Holocaust is now being transformed from Memory to History. If we fail here, anti-Semitism might again explode in some of our countries. Of course, education about hatred of Jews is not enough, but without efficient teaching we are all in danger.

A decade ago, a radio station called Radio Islam appeared in Stockholm. It had nothing to do with Islamic studies. Professor Yehuda Bauer, then at the Hebrew University, analyzed transcripts of broadcasts and concluded that these were the worst anti-Semitic broadcasts in Europe since World War II. Jewish power is “like a cancer and AIDS” against which we cannot defend ourselves, said Radio Islam. “I welcome, I welcome a new Hitler” proclaimed the editor, Ahmed Rami.

However, the major theme of this radio station was the denial of the

Holocaust. The Final Solution was a “hoax” which the Jews want us to believe, said Radio Islam. Rami repeatedly returned to the “gas chamber legend”, the purpose of which, he claimed, was to raise money and attract sympathy for the Jewish people and the Zionist state.

During the first of several trials against Radio Islam, our committee received very little support. Only a few newspapers and politicians were with us. Most remained silent. A number of writers and journalists even defended the broadcasts by saying that they were about “Palestine” or “theology”. Thus, most people in Sweden at the end of the 1980s did not recognize basic Nazi propaganda when they met it.

After Radio Islam was convicted of more than 20 counts of defamation of the Jewish people, public opinion slowly changed. The station was closed; the editor sentenced to six months in prison. Nevertheless, we still did not get support from the head of government. On the contrary, both a Socialist Prime Minister (Ingvar Carlsson) and later a Conservative Prime Minister (Carl Bildt) were indifferent. They were asked to make statements and refused. But we needed the moral and economic backing of the Cabinet itself. We got it only a decade later.

In 1997, a new Prime Minister, Göran Persson, opened his morning paper and read an opinion poll on Swedish grammar and secondary school students and their ignorance about the Holocaust. He was taken aback, brought the newspaper to the Cabinet table and started work on an educational campaign. The scope of it and the ambition are unique.

With the full cooperation of all the

ministries, the government will set up a national centre for scholarly research and education about the Holocaust at the Upsala University. A number of other projects regarding Nazism and racism will be conducted at other universities. All Swedish citizens, young and old, are being offered a new book on the Holocaust.

This book, written by Stéphane Bruchfeld and Dr. Paul Levine, "*Tell ye your children...*" is knowledgeable, balanced and well-written. The title is borrowed from an appeal in the Bible:

"Tell ye your children of it, and let your children tell their children, and their children another generation"
(*Book of Joel, 1:3*).

The Prime Minister, in a letter, offered the book to all households, free of charge. He estimated that about 20-40,000 would respond and that about 100,000 copies altogether would be enough. To date 900,000 books have been printed in the Swedish language and distributed; the numbers are rising and form a significant proportion of our population of less than 9 million people. In Britain, for example, this would be equivalent to 5 million books, or in the US to 20 million copies. The book may be ordered at post offices, in book shops, on the Internet, through ads in the newspapers, magazines, over the phone and by fax.

A first edition has also just been published in English. Before the year is over, the book will also be distributed to immigrants in Sweden who order it. Accordingly, it is now being printed in a number of our major immigrant languages, among them Arabic, Bosnian, Croatian, Serbian, Finnish, Persian,

Spanish and Turkish. This will probably be one of the few scholarly accurate books on the Holocaust in Arabic. It has been suggested in our Parliament that part of our aid to the Palestinian Authority in Gaza should be a large number of "*Tell ye your children...*" in Arabic for Palestinians, in order to allow them to better understand what the Jewish people have gone through in our century.

We have an additional idea for our neighbours in the Baltic States. Some of us have experienced how difficult it is to obtain truthful education about the Holocaust in those three countries. In Latvia, for example, some people in power have admitted that a large number of Latvians collaborated with the Germans in the murder of more than 95% of Latvian Jewry. They have promised to write new history text books telling the truth but have not done so.

Accordingly, we are now considering translating our book into the Estonian, Latvian and Lithuanian languages and then printing many thousands of copies as part of our educational assistance to these States. Young people there have the right to know of the genocide also committed on their own soil and with the consent of some of their own people.

Other projects include establishing a Holocaust Memorial Museum in Stockholm at the beginning of the next decade. Various kinds of materials will be distributed in Swedish school teacher-parent meetings, and discussions will be held on compassion, tolerance, xenophobia and human rights. Schools will be given access to films on anti-Semitism and videos will be made available to teenagers on the destruction of European Jewry.

Teachers all over the country will be given the opportunity to attend seminars on hatred of Jews, White Power music and neo-Nazi organizations. Members of Parliament and heads of public administrations will visit concentration camps in Poland and Germany. Information packages will be made available when teachers and their students go to the death camps. The government has given experts the task of opening a web site on anti-Semitism, aiming at young people and teachers.

Commemoration meetings regarding the Holocaust have been held not only in Parliament but also in most of our municipalities. Inauguration of a monument honouring the victims of the Holocaust is planned for September 1998 in Stockholm. Exhibitions will travel between several museums around the country.

The government has given state grants to the Swedish Committee Against Anti-Semitism in order to organize highly qualified study tours for influential opinion-makers, visiting extermination camps in Poland and *Yad Vashem* in Israel. Economic support is also being granted to those survivors of the Holocaust who are willing to give testimony at schools and other public institutions.

The Prime Minister has asked Professor Yehuda Bauer to serve as chief advisor for the whole project; a position which he has accepted.

In June this year, representatives from the United Kingdom and the United States were invited to Stockholm to discuss how we could intensify and coordinate educational projects regarding the Holocaust towards the 21st Century. The British, Swedish and US governments

have established a task force for international cooperation, again with Professor Bauer as independent advisor. This group will meet in September to work out an action oriented report to be presented to a conference to be held in Washington on November 9, 1998, exactly 60 years after *Kristallnacht*.

In June this year, Under Secretary of State Stuart Eizenstat issued his latest report on behalf of the US State Department. It is a thorough investigation of *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany during World War II*. Its analysis of how neutral countries helped Nazi Germany during the war contains a detailed, accurate and very, very dark description of Swedish foreign policy at the time. But it also recognizes what has been done in the last year - "Certainly no country has recently made a more significant investment in encouraging its people to learn the lessons of history than Sweden."

Finally, the time may now be ripe for a new effort in Europe. Most Central and East European countries wish to become members of the European Union. Some are almost desperate to join as soon as possible. Among these are countries which have been plagued for centuries by anti-Semitic prejudice.

The EU principles for enlargement have already been adopted. The first principle of the Copenhagen Declaration states: Membership requires that the candidate country "has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities".

"Respect for and protection of minorities"! I have urged the Swedish government to interpret these words extensively. A candidate country should have both an efficient legislation against defamation of minorities and an efficient education about anti-Semitism and the Holocaust.

Together with the IAJLJ we could now start trying to convince politicians and diplomats, who will negotiate for the 15 EU - members, that these conditions should be presented explicitly to the candidate countries in East Europe.

For the last 15 years I have made speeches in many countries on anti-Semitism, complaining also about the ignorance and indifference in my own country. But today I am a little proud of Sweden for trying to protect history and fight the deniers.

The reason why this is crucial is clear. Anti-Semitism always starts with the Jews but never stops with the Jews. When anti-Semites attack the Jews, or try to destroy memory, they attack all of us. Let us therefore together fight this old-new anti-Semitism with all our energy and strength.

Below: Visit by Conference participants to the synagogue in Veria near Salonika.



Anti-Semitism in Greece

George Margaritis

The question I wish to develop in today's discussion regards Greek anti-Semitism. In particular, it concerns policies, movements, and ideologies with an anti-Semitic tendency which have appeared within Greek territory from the 1821 revolution up to the present. The question is difficult and there are no obvious answers, principally, because it does not require answers. Official and unofficial declarations have specifically stressed that such an issue has never existed in Greece, and consequently the question and any discussion of it is unnecessary. This could be simply a "diplomatic" opinion which, even though contradicting numerous historic events, has its own function - it discourages the manifestation of such events; nevertheless, it complicates the situation, as it presents self-evident facts as radical and subversive.

On the other hand, in historiography, these subjects are so rarely examined, that whoever wishes to develop them further, will never rise above the rank of an amateur. Amateurs who, moreover, navigate in deep waters. This is because it is extremely difficult, when considering the subject of anti-Semitism, which recently reached the absolute horror of the Holocaust, to define causes and

dimensions, to specify exactly the measure in such a manner as not to lose perspective, not to cancel pogroms and "final solutions" in a theory of general and absolute anti-Semitism. In other words, to maintain a hierarchy, totally and partially, like in respect of Greek anti-Semitism, even though we might feel that in the end, in its small measure, it still forms a part of the tragic whole.

In the first decades of the State's existence, the Jewish presence was limited. Massacres and deportation of the Jewish population from the areas of insurrection had limited the Jewish communities to towns which were given to the Greek government under treaties at the end of the revolution (Halkida mainly). Owing to this peculiarity, a reflection of anti-Semitism, more than an actual anti-Semitic movement, appeared in the young Greek State. The anti-Jewish attitude was aggravated by situations and conflicts which took place outside the country's borders, especially in areas where colonial Hellenism competed with Jewish communities in the open game of economic penetration and prevalence. Rumania, South Russia, the Ottoman towns, and mainly Alexandria, were the schools of Greek anti-Semitism. At the same time, the press attentively observed the relative developments on Greek territory and repeated - in the manner of journalism - practice and theory.

This situation changed in 1864 with the incorporation of the Eptanese and in 1881 with the incorporation of Thessaly



and Arta, areas with significant Jewish communities. Greek society, for the first time had to confront a powerful Jewish presence. Reactions were not identical but differed from one area to another, and from decade to decade. The preservation of Moslem populations in Thessaly, for example, and local social flexibility, imposed policies of partnership which reduced conflict. In contrast, on the Ionian islands, the situation was aggravated by the departure of the British authorities. The equal-handed policy of the latter, could hardly be continued by the Greek authorities who were under great pressure from Christians to restrict Jewish rights.

The anti-Semitic explosion commenced in Kerkira, in April 1891. It should be noted that this was the beginning of a decade of particularly intense anti-Semitic activity. The prevailing context

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in Europe was generally favourable for the outburst of riots even though those in Greece preceded several corresponding manifestations in the West. The consequences of the anti-Jewish demonstrations in the 1880s in Egypt, already in turmoil because of the Machtintistites, and the active role of the Greek population there, must have further influenced developments.

The obviously hostile attitude of a wide social range of the Christian population, and of the Greek government and authorities is also a point of interest. The latter were not only particularly slow and hesitant in revealing the obvious plot which started the riots (namely, the discovery of the body of a ritually molested and massacred Jewish girl) but the measures they applied to arrest the riots were worse for the Jewish communities than the riots themselves. The long isolation of the Jewish quarters by the army resulted in hunger and misery, and was also the cause of a predatory black market with the isolated population as victims. The government only became troubled by events when they reached the point of a diplomatic incident, namely, when the warships of the Great Powers arrived in the port of Kerkira to undertake the protection of the Jewish community.

In the 19th century, Greek anti-Semitism had archaic characteristics. The prevailing accusation against Jews was the kidnapping and ritual sacrifice of Christian children, and the consequent fears were wide-spread at every level of society. With the arrival of the 20th century, the features of anti-Semitism were gradually transformed. In the areas claimed by Greece, particularly Macedonia, the presence of the Jewish population was significant, and resulted

in an approach being applied to them which was part of the Great Idea. During the Macedonian War of Independence, the anti-Jewish tendencies of groups and chieftains were checked by the central government which saw no reason to widen the enemy front. However, after 1913, the Jewish presence in Salonika progressively appeared as an obstacle to the national homogeneity of the area.

It is difficult to speak of concentrated anti-Semitism during this period, rather there was a tendency towards antagonism and mistrust of the Jews on the part of the local population and an anti-Jewish policy on the part of the authorities. The re-planning of the Jewish quarters of Salonika, following the 1917 fire, exemplified this policy, which, however, hesitated to go beyond certain limits in such turbulent and threatening times. In the social context, the anti-Jewish attitude strengthened, having been formed mainly after the exchange of populations and the arrival of a great number of refugees into the town. Under the new conditions, the Jewish community appeared to be an anomaly, an island of difference in a rapidly more religiously and racially homogeneous area, while at the same time becoming the target of a great portion of the general discontent felt by the refugee groups.

Anti-Semitism in Salonika became a movement in the beginning of the 1930's. As in 1891, Europe as a whole was on the threshold of seeing a revival of the phenomenon. But once more the Greek manifestation seems to have preceded corresponding European events. Particular coincidences are of course significant. The first symptoms of international and also Greek economic crisis made their appearance, while following the Greek-Turkish treaties of

1930, the refugees lost every hope of returning to the east or of significant indemnities. Thus, at the end of June 1931, there were extensive anti-Semitic riots in Salonika, this time not on the pretext that Christian children had been kidnapped and sacrificed, but that there was a conspiracy against Greek Macedonia.

The social basis of the riots was also significant, with a major portion of the responsibility attributable to the refugees. Numerous nationalist organizations led by the *Tria Epsilon* (National Union of Greece) guided and supplied the theory behind the riots, while once more, just like in Kerkira forty years before, the reaction of the government was, to say the least, ambiguous. The government reacted only when the matter exceeded national limits, namely, when the country was accused of being a source of anti-Semitic activity. It should be recalled that these events occurred in 1931 and practically no one could suspect the proportions anti-Semitism would reach in the near future. Disturbances in relation to the still nationally sensitive capital of Macedonia, caused apprehension in the government and led to the application of strict measures. Naturally, this did not hinder the transformation of the consequent trials into parodies of justice, nor the periodical incitements of *Tria Epsilon* by subsequent governments until Metaxas.

The manifestation of anti-Semitic feelings in Greece under the occupation, and the attitude to the Nazi "Final Solution" in our country, closed a chapter. Naturally, the crudeness and extension of the Jewish Holocaust went beyond the intentions, the capacities and the ideology of the Greek population and leaders, the occupation governments and

the members of the public administration. There was no significant anti-Jewish movement in occupied Greece, notwithstanding the revival of *Tria Epsilon* and small organizations of a Nazi nature. On the other hand, there was no extensive movement in support of the Jewish population of the country which was under threat of extinction, even though the future which awaited the Jews was widely known (in the deportations of 1944: Giannena, Kerkira, Rhodes, *etc.*)

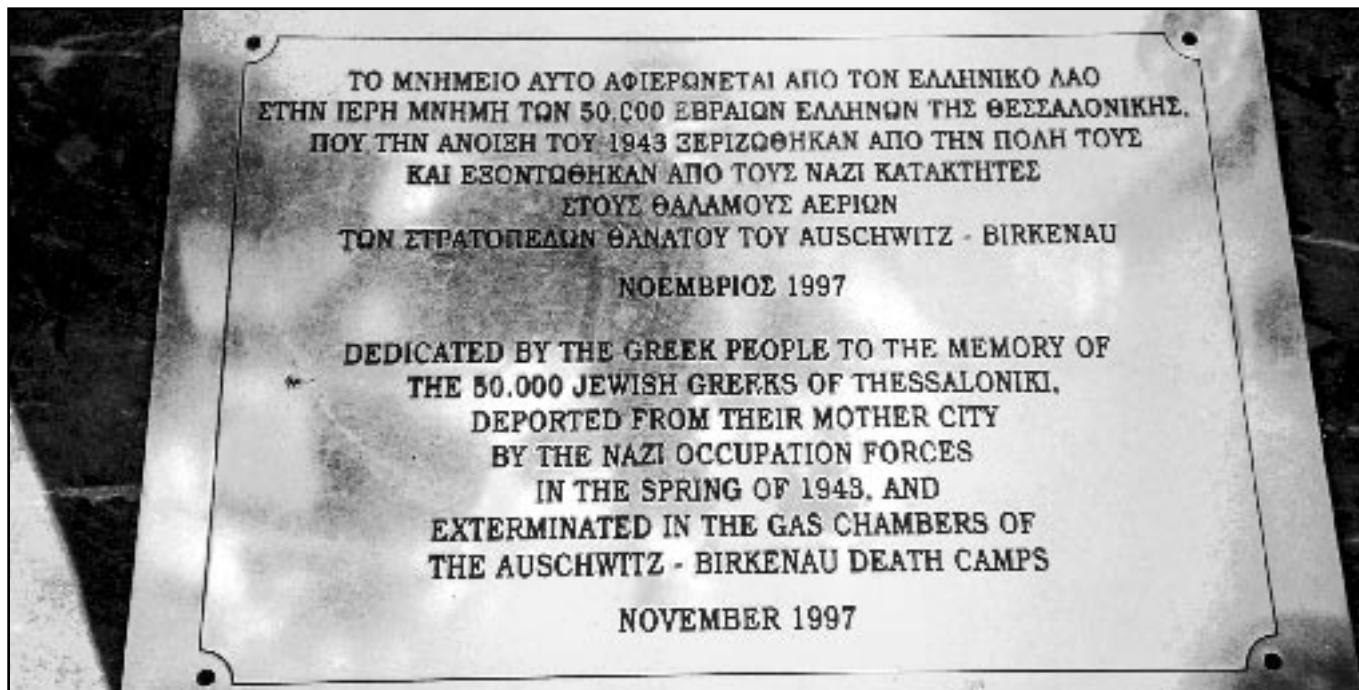
There were some protests, some letters, and a few public manifestations of disapproval on the part of the occupation government, occupation authorities, leading personalities and the church. However, in no case did the reaction to Nazi measures proceed further. For example, there was no resignation of government, public or church officials motivated by the deportation and extinc-

tion of Greek citizens of Jewish faith. Furthermore, the silence of the Resistance on the same issue is at least surprising. Even though the Resistance groups rarely denied their support to Jews in hiding, the whole issue was never considered worthy of being included significantly in the list of Nazi atrocities in Greece. This silence was not only directed towards the occupation period. The reaction of Greece to the Holocaust was as anaemic as in other European countries, and that was the reason why the catastrophe reached the same proportions in Greece.

More may be said about the embarrassment of the Greek State towards surviving Jews, in the years immediately after the war: about their mobilization in the civil war; the many ambiguities on the issue of their property; about society's desire to rapidly close the

subject and the questions, in those places where the history of Jewish communities ended violently; about the dismissal of memory, still occurring today, which resulted in the construction of monuments to the Holocaust becoming a political issue.

The rest is a question of terminology. In independent Greece, the method of dealing with Jewish communities by society and the State, is mainly negative, effectively corresponding to the general phenomenon currently defined as anti-Semitism. Certainly the proportions of the phenomenon in this case are subject to historical singularities and coincidences. Certainly also, there were exceptions in Greece as in all other places, reflected by a resistance against general tendencies, and periods of peaceful and creative coexistence.



Memorial located in the centre of Salonika

Another article in a series specially written for *JUSTICE* dealing with the manner in which Switzerland is handling the repercussions of World War II.

The Swiss banks and the Independent Committee of Eminent Persons (ICEP)

David Wyss

To resolve the problem of dormant accounts from the Second World War, the Swiss banks have developed unique, global procedures to locate the rightful beneficiaries and to process claims to the accounts. The banks have spared neither money nor effort in this regard. They continue to work in large teams, with great care and as expeditiously as possible.

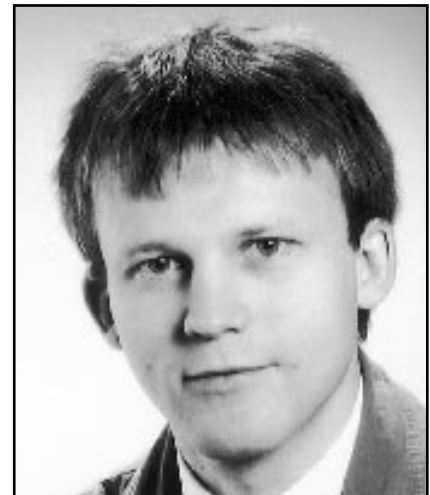
On 2 May 1996, a memorandum of understanding was concluded between the World Jewish Restitution Organisation, the World Jewish Congress and the Jewish Agency on the one hand, and the Swiss Bankers Association on the other. The memorandum provided for the formation of a commission on which the aforementioned organisations were to be equally represented, with the members to elect the Chair. The Independent Committee of Eminent Persons (ICEP) was created as a result and is presided over by Paul A. Volcker, former Chairman of the Federal Reserve Board.¹

ICEP's top priority is the examination of the methodology and results of the banks' search for dormant accounts of Holocaust victims. In this respect, ICEP may enlist the services of international audit companies to which the Swiss banks must grant comprehensive access to their records.²

Extraordinary Audits of Swiss Banks

In accordance with Swiss law, the examination of the banks may only be performed by audit companies which are recog-

nised under banking law³ and bound by banking confidentiality.⁴ At the beginning of 1997, the Federal Banking Commission (FBC) therefore decided to define the examination process as extraordinary audits of the individual



banks within the scope of Art. 23bis Para. 2 of the Banking Law and Art. 49, Para. 2 of the Implementing Ordinance.⁵ This removed any residual doubt on either side as to the legality of

- 1 The ICEP members are Dr. Rubén Beraja, Avraham Burg, Ronald S. Lauder, Zvi Barak (alternate member) and Israel B. Singer (alternate member) as well as Prof. Curt Gasteyger, Prof. Klaus Jacobi, Dr. Peider Mengiardi, Hans J. Bär (alternate member) and Prof. René Rhinow (alternate member).
- 2 See memorandum of understanding, sections 3 and 4.
- 3 Art. 47 of the Federal Law relating to Banks and Savings Banks (Banking Law) of 8 November 1934, SR 952.
- 4 Art. 20 of the Banking Law.
- 5 Implementing Ordinance to the Federal Law on Banks and Savings Banks (Implementing Ordinance) of 17 May 1972, SR 952.02.

Adv. David Wyss is a former legal advisor to the Swiss Bankers Association.

the examination process. At the same time, the executive bodies and employees of the audit companies and any persons mandated by them are bound by the legal obligation to safeguard bank (client) secrecy under threat of punishment in accordance with Art. 47 of the Swiss Banking Law. These persons are therefore prohibited from revealing the identity of individual bank clients or information leading to the disclosure of such, to third parties, such as ICEP. In the light of the decision to treat ICEP examinations of individual banks as extraordinary bank audits, reports must be submitted to both the ICEP and the FBC. On completion of the pilot audits, the main audits could commence. Proceedings were delayed by discussions with the audit companies, in which concerns were expressed over legal liability under US law. An initial eight banks will be subject to comprehensive audits using the methods and processes developed during the pilot phase. Four internationally renowned audit companies are currently working on this very costly and time-consuming project. Finally, a report will be prepared for the Volcker Commission on the basis of which the ICEP will decide how to proceed.

Publication of Lists

On 25 June 1997, the FBC requested, on the basis of Art. 23bis of the Banking Law, that those banks governed by the provisions of Banking Law as of 23 July 1997 report all client assets "which can be proven to have existed prior to 9 May 1945 and have remained dormant ever since", to the central contact office (the international auditing company, ATAG Ernst & Young) appointed by the Swiss Bankers Association.⁶

On the basis of these reports, the Swiss Banks published the names of holders of dormant accounts in a unique, global campaign. More than 150 Jewish organisations have been asked to actively assist in the search for beneficiaries.

- On 23 July 1997, details of all dormant accounts held by non-Swiss nationals that had been located were made public in newspapers and on the Internet. 1,872 names were published relating to 1,756 separate accounts with a total current value in excess of CHF 60 million (approx. USD 24 million).
- On 29 October 1997, the banks published a second list detailing dormant savings books and savings accounts of non-Swiss nationals as well as dormant accounts located after 23 July 1997. This list was made available to all interested parties. Moreover, it was published on 13 and 14

November 1997 in three international newspapers. This list detailed 3,687 positions with a total value of CHF 6 million (approx. USD 4.2 million).

- A further list of the accounts of Swiss nationals also published on 29 October 1997 contained over 10,000 positions with a total current value of nearly 11.7 million francs (approx. USD 8.19 million).

Neither reporting to ATAG Ernst & Young nor the subsequent publication of names of bank clients infringed on bank client confidentiality as set out in Art. 47 of the Banking Law. On the one hand, the federal decree of 13 December 1996 governing the historical and legal investigation into the fate of assets which came into Switzerland as a result of National Socialist rule provides for the suspension of client confidentiality for the purpose of this historical investigation.⁷ On the other hand, the publication of names of holders of dormant accounts cannot infringe upon bank client confidentiality as only by publishing such lists can the rightful beneficiaries be made aware of the existence of these assets and permitted to exercise their rights.⁸ For these reasons, the private rights of bank clients have not been infringed under the Law on Data Protection⁹ or the Civil Code.¹⁰

Arbitration Procedure

ATAG Ernst & Young has established five contact offices - in Basle, Budapest, New York, Sydney and Tel Aviv. Interested parties can contact the above contact offices using a toll free

6 FBC circular of 25 June 1997, 'Reporting and publication of dormant accounts from the period prior to or during the Second World War'.

7 Art. 5 of the federal decree of 13 December 1996, AS 1996, p. 3487 ff.

8 See also the article by Urs Zulauf, 'Bankgeheimnis und Publikation nachrichtenloser Vermögenswerte: Wurde durch die Publikation der Inhaber von seit 1945 nachrichtenlosen Konti das Schweizerische Bankgeheimnis verletzt?', in Peter Nobel (Publisher), *Aktuelle Rechtsprobleme des Finanz- und Börsenplatzes Schweiz*, Band Nr. 6, Verlag Stämpfli, Berne 1997.

9 Swiss Federal Law on Data Protection of 19 June 1992, SR 235.1. See also Urs Zulauf, *Bankgeheimnis und Publikation nachrichtenloser Vermögenswerte: Wurde durch die Publikation der Inhaber von seit 1945 nachrichtenlosen Konti das Schweizerische Bankgeheimnis verletzt?*, p. 9 ff. and 23 ff.

10 Art. 28 of the Swiss Civil Code of 10 December 1907, SR 210.

telephone number. Up to the present, 125,000 individuals have filed claims, 7,500 of which are directly related to one of the published names.

Claims in respect of publicised dormant assets deposited at Swiss banks by non-Swiss customers are assessed quickly thanks to a simple arbitration procedure developed by the banks involving less rigorous standards of proof.¹¹

An independent foundation headed by Paul A. Volcker has overall responsibility for the arbitration procedure. The other foundation trustees are Professor René Rhinow and Israel Singer. The trustees supervise the arbitration procedure for claimants from outside Switzerland, while Professor Hans Riemer presides over the actual Court of Arbitration. A "Fee Panel" attached to the court establishes uniform criteria for the payment of fees and interest. This panel is headed by the respected American economist Henry Kaufmann.

The following features characterise the arbitration procedure. It is free for all claimants - the costs are borne by the Swiss banks. The Court of Arbitration is non-partisan and autonomous. It uses a 'fast-track' procedure that allows it to reach a decision on all claims for dormant assets within a year of the claims being filed. When assessing the claims it applies a less rigorous standard of proof¹² and takes into account all available information. If a claim seems plausible in the circumstances, the Court of Arbitration will accept it. Subject to the criteria laid down by the Fee Panel, the court is authorised to award the claimant additional interest and to reimburse any fees that may have been charged to the account.

Claims are collected by ATAG Ernst & Young, which checks to ensure they are complete. The documentation is forwarded to the relevant bank, which then says whether it accepts the claim or not. Arbitration agreements are then sent to the claimants for signature, who thus agrees to the application of the arbitration procedure.¹³ If the bank accepts, the Court of Arbitration comes to a decision using a fast-track procedure. If the bank rejects the claim, the court instigates the standard procedure, which involves a full investigation. As soon as the Court of Arbitration makes a ruling, the banks immediately comply with it.

Outlook

The banks still have a great deal of work to do, and intensive searches of their archives are continuing apace. These may lead to the discovery of yet more dormant assets, though we believe that most have already been found. ICEP also continues its

endeavours. Along with the Bergier Commission it is helping to shed as much light as possible on events before, during and after the Second World War.

For the future, it is important that a general law is passed on dormant assets covering certain key provisions as follows. This law should be extended to protect personal and ownership rights pertaining to long-term dormant assets. The concept of dormancy should be clearly defined, with due regard to experiences in Switzerland and other countries. The legislation must leave the sectors concerned scope to observe their particular ethical standards. Customers' instructions remain binding, even in the case of dormant assets. It would, however, be desirable for asset managers and customers to take measures to prevent dormancy from occurring in the first place. The institution managing the assets could look for the beneficial owner once dormancy threatened, though it would at all times have to exercise appropriate discretion. Laws should also be introduced to regulate the obligation to keep files.¹⁴

- 11 See the "Schiedsgericht für nachrichtenlose Vermögenswerte in der Schweiz" (Court of Arbitration for Dormant Assets in Switzerland) brochure, SBA, Basle 1998.
- 12 Art. 22 of the Arbitration Procedure.
- 13 The possibility also exists of having the claim judged by a Swiss court of law, but this would take longer and is not free-of-charge.
- 14 See the "Bankiertag 1997" brochure, SBA, Basle 1997.

Editor's note: President of the Association, Judge Haddasa Ben-Itto, has been

Books Just Received

"Tell Ye Your Children ...".

A book about the Holocaust in Europe 1933-1945.

Stéphane Bruchfeld and Paul A. Levine.

Regeringskansliet, Levande Historia, Stockholm, (1998).

Incitement to Racism - Behaviour not Results

Criminal Appeal 2831/95

Rabbi Ido Elba v. State of Israel

Before: President Aharon Barak, Justices Eliahu Matza, Gabriel Bach, Eliezer Goldberg, Dalia Dorner, Zvi Tal, Yaacov Tirkel

Judgment delivered on 24.9.96, reported in 50(5) P.D. 221.

Precis

The Appellant, a rabbi in a *Kolel* (religious study centre) near the Cave of the Patriarchs in Hebron, was convicted by the District Court of Jerusalem (Judge A. Prokazia) of incitement to racism contrary to Section 144b(a) of the Penal Law, and encouragement of violence within the meaning of Section 4(a) of the Prevention of Terrorism Ordinance, as well as a number of other offences including firearm offences, and sentenced to 4 years imprisonment, two of them suspended. The conviction centered around the publication of an article *Examination of Halachot relating to the Killing of Gentiles*, which was published and disseminated by the Appellant in 1994.

The Appellant appealed against his conviction and in the alternative, against his sentence to the Supreme Court. The main contention on appeal was that the article was a scholarly one which did not amount to incitement to racism. The Supreme Court rejected this contention and upheld the conviction. Justices Tal and Tirkel dissenting in relation to two of the convictions.

Following are extracts from the lengthy leading judgment of Justice Matza, which also refers to President Barak's judgment and reservations.

Justice Matza:

Facts

In April 1994, the Appellant distributed a 19 page article entitled *Examination of Halachot relating to the Killing of Gentiles*, among his students in the college in Hebron. The subtitle stated that the article was written after the *Halachot* (principles of Jewish law) were examined with one of the great *Poskim*

(deciders of law) of the generation, to justify the conclusions. A further subtitle stated that the article did not purport to decide a principle of law but only to raise the matter for discussion among scholars. The focus of the article was on the existence of authority in Jewish law for killing gentiles. The Appellant chose to exercise his right of silence in the District Court, but after examining the evidence, the District Court judge concluded that these facts had been proved, and that publication of such an article amounted to incitement to racism. The brunt of the appeal related to whether or not such an article indeed amounted to incitement to racism; what was a publication which met the preconditions of the offence and could a publication which was not racist, but was published with the intention to incite to racism, satisfy these preconditions. Other questions related to the mental element needed to commit the offence, and the relationship between the legal prohibition on incitement to racism and the basic right to freedom of expression.

Legislative Background

The initiative to legislate express criminal prohibitions on various expressions of racism arose out of the growth of Kahanism in Israeli society. The need to protect the image and values of Israel as a Jewish and democratic State, led the legislature to adopt these special penal measures. The State of Israel was established in the shadow of the Holocaust and, with its establishment, etched in its memory, were the terrible lessons of hatred and racism which have followed the Jewish people since their exile from their land and almost caused their annihilation.

The Declaration of Independence of the State of Israel, which was constitutionally anchored in the Basic Law: Human Dignity and Liberty, reflected the general national consensus on the basis of which Israel was established. The State was established as a home for the Jewish people but at the same time it would maintain a democratic regime based on recognition of the full equality of rights of all its citizens, Jews and non-Jews. In its first 30 years, phenomena of incitement to racism in Israeli society, were exceptional and marginal. To the extent that they

existed, they could be treated as offences of sedition and publication of seditious material as well as criminal defamation. More specific prohibitions were not thought necessary.

However, in the late 1970s, with the appearance of the *Kach* movement, which proselytized for a Jewish State based on the *Halacha*, “free” of non-Jews, a political movement stepped on the public stage which espoused ideals which were blatantly racist. With the election of Meir Kahane to the 11th *Knesset*, the need for legislation became apparent, and in fact in 1985 amendments were made to Basic Law: the *Knesset*, which prevented the participation of racist lists. This measure was not inconsequential. Legislation which prevents a political list from participating in elections to the *Knesset* not only impairs the passive right to choose of the candidates on that list, but also the active right to choose of each elector supporting that list, and these two rights are recognized as basic rights derived from the right to freedom of expression. The same holds true of legislation which criminalizes the expression of a view because it is out of the ordinary, extreme and injurious. Use of such legislation should only be made with great caution and only in circumstances where a need arises to protect the existence of the State and its basic values. If this boundary is not preserved, such legislation may endanger its very purpose.

Publication of Racist Material

Section 144b of the Penal Law - 1977, provides as follows:

- “(a) A person who published material with the purpose of incitement to racism - is liable to imprisonment for five years;
- (b) For the purpose of this section, it is immaterial whether the publication led to racism or not or whether it contained truth or not”.

Section 144a defines ‘racism’ thus:

“‘Racism’ - persecution, humiliation, denigration, expressions of hatred, threats or violence, or promoting feelings of ill will and resentment towards a community or sections of the population, solely due to colour or to belonging to a particular race or national-ethnic origin”.

The law defines the term “publication”, and provides for two exceptions to the prohibition on publishing racist material. Thus Section 144c permits the publication of a ‘correct record’ of an

act as provided in Section 144b, as well as publication of a quotation from religious writings or prayer books or the observance of a religious rite, provided that these acts are not committed with an intent to incite racism.

In contrast, Section 4(a) of the Prevention of Terrorism Ordinance, 1948, which defines the offence of supporting a terrorist organization, provides that:

“A person who -
 (a) publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence; or...
 shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding one thousand pounds or to both such penalties.”

From the legislative history of the Penal Law it appears that the persecution, humiliation or ridicule of a person merely because of his affiliation to a particular religion, is not ‘racism’, within the meaning of the law; however, the definition is wide enough to include cases of discrimination by Jews against Arabs and *vice versa*; while both peoples are affiliated to the same race, their national-ethnic origin is different. In determining the extent of the term ‘racism’ we must not adhere to technical, scientific or pseudo-scientific definitions relating to the various origins of human kind. Racism is all hatred of what is foreign by reason of it being foreign, against the background of racial or national-ethnic difference. The law aims to eradicate this hatred from our society, and the term ‘racism’ must be given the meaning which conforms with the purpose of the law. The law is not only intended to protect minorities but to protect all person and all groups. Thus, incitement to anti-Semitism will also be an offence of incitement to racism, even though Jews form a majority in Israel and are not subject to anti-Semitism in the same way as they have been in the diaspora.

Section 144b(b) expands the scope of the prohibition compared to the pre-existing law. The section refers to a behavioural offence, *i.e.*, the offence contains no consequential element and moreover does not require proof of the probability of a certain result. Moreover, the final clause of the section makes it clear that it is immaterial whether the publication of incitement to racism “is true or not”. The defence of justification is also not available to a defendant charged with seditious publications (Section 137 of the Penal Law) however, it may be available to a defendant accused of defamation (including defa-

mation of a section of the population) contrary to the Defamation Law. Naturally, charging a person with defamation gives rise to the fear that in utilizing his right to defend himself on the grounds of justification, the accused will use the Court as a platform for disseminating his racist ideas. Thus, Section 144b (b) is intended to negate the defence of truth of the publication where the defendant is charged with publishing an incitement to racism.

A review of the provisions of the anti-racist sections reveals that in establishing the criminal prohibitions on expressions inciting to racism, the legislature adopted restrictive standards. Even though Israel has adhered to the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, which requires Member States to prohibit all forms of racism whether oral or acts, through penal legislation, Israel has confined itself to more limited legislation. Thus, the legislature has refrained from providing that racism *per se*, or recognized and routine expressions of it (such as racial discrimination) are crimes *per se*. The legislature satisfied itself with imposing a criminal prohibition on the publication of incitement to racism and possession of a racist publication. In 1994, the Law was further amended to prohibit a racist act and provided for a more serious penalty where a range of offences are committed for racist motives. The legislature intended to stay within the boundaries of what is necessary. This approach is also reflected in the definition of the elements of the offence of incitement to racism. Thus, loyal to the restrictive approach, the legislature focused the criminal offence not on the contents of the publication but on the purpose of the person publishing the incitement to racism. The result is an offence consisting of a broad factual element together with a criminal intention of the highest level: "special intention".

"With the intention of inciting to racism"

Section 144b(a) prohibits publication of a matter "with the purpose of inciting to racism." The question which arises is what is the nature of the required *mens rea*? I accept the view that the Section requires a criminal thought which is in the nature of a "purpose" and a criminal thought in the nature of "recklessness" is not enough. The Section is confined to circumstances where the publication is made with the purpose of incitement, or in other words, where the publisher has the desire to incite.

The knowledge required for this offence is to the nature of the act, the existence of circumstances and the possibility of

bringing about the results of the act. "The nature of the act" is the publication; the "circumstances" include the contents of the publication, the public likely to receive it and be influenced by it, and the public against which the publication is directed. However, the possibility of bringing about the results of the act does not refer to a possible foreseeable injury to the group against which the publication incites, but only to the possibility that the public which shall receive the publication will be incited, as a result thereof, to racism. The offence is a behavioural one. Looking back, the question whether the publication which incites to racism caused racism or not, is not important. Looking forwards, the existence of awareness of the possibility of injury to a group against which the publication incites, should not be required. The societal value which is being protected is the prevention of incitement *per se*. This value is impaired even if the person receiving the publication does not injure others for racist motives, or even remains uninfluenced by the publication. Thus, it is enough that the publisher is aware of the contents of the publication and the existence of the possibility, even if the possibility is a distant one, that the recipient of the publication will be incited to racism. In addition the mental state of the publisher must be "purposeful", *i.e.*, he must wish to incite to racism.

The question arises whether "intent" in Section 144b(a) of the Penal Law may also include the situation where the publisher does not "wish" to incite to racism, but foresees, as a real and almost certain possibility, that the publication will lead to incitement to racism. The application of the "foreseeability rule", on purposive offences, has been determined by Section 20(b) of the Penal Law, which provides that in relation to purpose, foreseeing the occurrence of the result, as an almost certain possibility, is like intending to cause that result. The application of this rule to offences of publications of incitements to racism seems to me to be desirable. First, this is because of the particular difficulty of proving the mental element of this offence. In behavioural offences, which do not require proof of a particular result, the need to prove that the defendant acted with the purpose of achieving a particular result makes the task of the prosecution even more difficult. Enforcement of the prohibition against incitement to racism is also problematic because of the heavy burden on the prosecution to prove the nature of the purpose of the publisher. Second, because of the lesser weight which can be given (if at all) to opposing interests. The public has a clear interest that the prohibition against incitement to racism be

enforced with reasonable efficiency. This criminal prohibition is not contrary to freedom of expression and there is no real fear that the prosecution will take advantage of the easing of its burden to bring unjustified charges of incitement to racism. This is further ensured by the fact that any indictment of this sort requires the consent of the Attorney-General.

The Factual Element

The factual element of Section 144b(a) is satisfied by the publication of material. "Publication" here is a tool for expressing words or concepts, without distinguishing between a tool which is a real item (e.g. an article) or one which is not (e.g. something which is heard). The "material" need not be authored by the publisher.

The parties disputed the nature of the "material". The State contended that all material, irrespective of its content, is included in the definition. The Appellant argued that the Section only conceived of material of a racist nature. Justice Matza tended to the view of the State. The purpose of the Section is to prevent publications the purpose of which is incitement to racism. The focus of the offence is not the act of publication, and not even the content of the published "material", but the wrongful purpose of the publisher. Had the legislature wished to provide that the material itself be racist in nature, it would have retained this wording which was in fact proposed at the time the draft law was being debated. This analysis has two advantages. First, it releases the Court from the need to deal strictly with the contents of the publication. This does not mean that the contents of the publication are immaterial. On the contrary, where the contents incite to racism, either expressly or impliedly, the Court will give this the appropriate weight in examining whether the publication was made with the purpose of inciting to racism. Further, this interpretation means that a publisher will not escape liability merely because he manages to camouflage the incitement to racism with ambiguous or obscure language. Secondly, determining the racist nature of the contents might require the Court to take a value position on non-legal questions, including questions of religion, religious faith and worship. Taking such a position within the framework of criminal proceedings would be unduly onerous on the Court. The interpretation proffered by the State obviates this process. This position is strengthened by Section 144c(b) which provides that publication of a quotation from religious writings, prayer books, *etc.* shall not be deemed to be an offence under the Section, provided that they were not done with the purpose of inciting to racism.

Justice Matza rejected the Appellant's contention that the criminal prohibition on incitement to racism restricts freedom of expression and that this restriction is only justified where there is a near certainty of a breach of public order. Justice Matza held that no one has the right to express an idea the purpose of which is to incite to racism; *obiter* he was ready to hold that a racist expression is not one of the injurious, obnoxious or offensive expressions which a free society must put up with, despite its revulsion. Racist expressions are exceptions; they fall outside the boundaries of the democratic view and the gates of freedom of speech are closed to them. Justice Matza agreed with Prof. Kretzmer statement:

"Racism is not a political philosophy adopted by some and rejected by others; it is a phenomenon castigated by people of divergent political and general philosophies. It has become the one ideology outlawed by international law".

(David Kretzmer, "Freedom of Speech and Racism", 8 *Cardozo L. Rev.* 455 (1987) at p. 458).

Justice Matza also rejected the view that the test of "near certainty of a breach of the public order" is relevant to the issue of the criminal prohibition on incitement to racism. He held that this test is a "causal test" which refers to the boundaries of various basic rights as required by essential public interests such as national security and preservation of public order, it is irrelevant to the boundaries of offences of a purely behavioural character, which are committed independent of their result.

From the General to the Particular

Justice Matza accepted that the Appellant had not only distributed the article in respect of which he was charged but had also authored it. While not essential to the issue of publication, this had the effect of strengthening the findings in relation to the Appellant's motives. The Appellant contended that the article was a scholarly one analyzing principles of Jewish law in relation to the killing of gentiles and did not advocate any action. The bulk of the article was taken from Jewish sources, and although the timing was not coincidental (*i.e.* shortly after the killings in the Cave of the Patriarchs in Hebron) that was the way of scholars, namely to study issues relating to current affairs of importance. Justice Matza rejected these arguments. He held that the mental element of the crime had been proved beyond reasonable doubt. The purpose of the Appellant to incite to racism could be learned from the contents of the article. A

conclusion which was strengthened by the fact that the Appellant had written the article himself and also by the fact that the Appellant had refused to testify as to his intention in court. The scholarly nature of the article was only a camouflage for the Appellant's purpose to incite to racism and call to action.

In considering whether the publication of an article is made with the purpose of inciting to racism, the Court may look at the circumstances of time and place in which the publication is made. The fact that the article under discussion was published in the *Kolel* in Hebron, shortly after the massacre there, could only raise questions. To rebut those questions and argue that the article was a legitimate teaching tool, required the Appellant to take the witness stand and explain his true motives.

Supplement in view of President Barak's Judgment

President Barak agreed with Justice Matza's finding upholding the Appellant's conviction but disagreed with his reasoning in relation to four points: (a) the interpretation of the term "publisher of material" whose existence is required in order to satisfy the circumstantial-factual element of the offence; (b) whether the factual element of the offence also includes a probable risk which must be proved under a standard of "near certainty" or other standard of probability; (c) classification of the mental element - "with the purpose of incitement to racism"; and (d) applicability of the "foreseeability rule" of offences the commission of which is intended to achieve a particular purpose but whose definition does not include the element of result.

A. **"Publisher of material"** - President Barak was of the opinion that imposing liability on an innocent statement accompanied by a purpose of inciting to racism, brings us dangerously close to condemning people solely for their thoughts (*nullum crimen sine actu*). Justice Barak also thought that this raised a fear of unjustified impairment of freedom of speech. Justice Matza did not agree with these fears and reiterated his belief that the focus of the offence is not the act of publication or its contents, but the wrongful motive of the publisher.

B. **"Near certainty"** - President Barak preferred to leave open the issue whether fulfillment of the factual element of the offence is conditional on the existence of a near certainty that the material published will indeed, in practice, cause incitement to racism. President Barak thought a decision on this question was not needed for the appeal at hand, as the racist

publication in the instant case created a probability to a very high standard of certainty that the risk would be materialized. Justice Matza was not certain that such a high probability that the publication would lead to incitement to racism had indeed been proved or that the additional convictions of the Appellant supported that conclusion. The other offences had been committed by the Appellant, whereas incitement, by its nature, is designed to cause others to act. Further, the definition of the offence of publication of an incitement to racism makes no mention whatsoever of the application of a test of near certainty, or any other test of probability. This omission is not fortuitous. The purpose of the section is to prevent the wrongful behaviour, and commission of the offence does not require any result to have occurred. Forcing the prosecution to prove that the publication will indeed lead to incitement to racism, at the level required in a criminal trial, would be excessively onerous and would have the effect of unduly limiting the application of the Section to cases where there were actual incidents of racism.

C. **"With the purpose of incitement to racism"** - President Barak disputed Justice Matza's approach to the interpretation of the term "purpose". According to President Barak, relying on the provisions of Section 20(a) of the Penal Law, the mental element of purpose is only required in the case of 'result' offences and therefore Justice Matza's substantive interpretation of the mental element was not consistent with his conclusion that the offence is a behavioural one (a position with which President Barak agreed). According to President Barak, the commission of a behavioural offence only required the existence of awareness of the nature of the act and its circumstances.

Justice Matza noted that the source of the dispute lay in the wording of Section 20(a) and the fact that the Section omitted any definition of the mental element required in behavioural offences, whose definition included the element of 'purpose' in the sense of a desire to bring about a particular result, although causing that result was not an element of the offence

Following a lengthy analysis of various provisions of the Penal Law, Justice Matza distinguished between offences of 'intention' and offences of 'purpose', where the term 'intention' is confined to offences which require a result, which too is an element of the offence, and the term 'purpose' is

confined to offences where the mental element is a desire for the occurrence of a certain result defined in the offence, but where the result is not an element of the offence. The offence of publication of incitement to racism is the latter type of offence; however, in terms of the nature of the required mental element, *i.e.* the desire to achieve a result, there is no distinction between the two types of offences (intention to achieve a result and purpose for behaviour).

- D. **“Foreseeability Rule”** - President Barak disputed Justice Matza’s conclusion that the foreseeability rule applied to the offence of incitement to racism, and his conclusion again stemmed from the distinction between offences of ‘intention’ and offences of ‘purpose’, but that in any event its application had to be considered in respect of every particular offence separately. In view of the fact that a decision was not required in the instant case in respect of the offence of incitement to racism - President Barak left open the issue of its application here.

Justice Matza agreed that the matter was not required to be determined in the instant case but reiterated his view that since in respect of the content of the required mental element he drew no distinction between the mental element of ‘purpose’ in behavioural offences and the mental element of ‘purpose’ in result offences, the rule of foreseeability could also be applied to ‘purpose’ behavioural offences. Justice Matza preferred this approach to President Barak’s approach that the rule in respect of such offences should be left for development by case law.

Encouragement to Violence

The Appellant was also convicted of the offence of encouragement of violence contrary to Section 4(a) of the Prevention of Terrorism Ordinance (see above).

Justice Matza was of the opinion that the definition of this offence does not require a potential result. In other words, the creation of a risk of an act of violence is not a condition for the commission of the offence. The offence, under Section 4(a) is committed by the “publication, in writing or orally, of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence”. The word “calculated” refers only to “acts of violence”; and everything following that calculation, *i.e.*, to cause death or injury to a person - is intended to describe the nature of the violence. Thus, publication of praise, sympathy or

encouragement for acts of violence on their own (or threats of such acts of violence on their own) is not an offence under this Section. In order for the offence to be committed it is necessary that the acts of violence (or threats of such acts of violence), which the publisher praises, sympathises with or encourages, are of the serious kind, *i.e.*, be of the nature calculated to cause the death or injury of a person. It is not necessary that they could have brought about the death or injury, but merely that they are of the type calculated to bring about one of these results.

This interpretation is required by the language of the Section; by comparing the language of this Section to the wording of other sections in the Ordinance and by looking at the purpose of the Ordinance, namely, the prevention of terrorism. The offence under Section 4(a) is not confined to terrorist organizations, rather the offence is committed if the praise, sympathy or encouragement relate to the type of activities which characterize terrorist organizations, although the organizations themselves need not be identified as terrorist.

The Section does not require a risk of the occurrence of an act of violence and it does restrict freedom of speech, but this is not unknown to the Israeli legislature in cases where it is necessary to safeguard national security or public order. In publishing this article, the Appellant committed the offence of supporting a terrorist organization contrary to Section 4(a) of the Ordinance.

Additional Offences

Justice Matza also considered the conviction of the Appellant on a number of other firearm offences, holding that a license to hold a firearm did not include the right to hold a silencer, which although an accessory to a firearm, was also a firearm within the definition of the Penal Law. Further, where the accused took measures, which to his knowledge could objectively bring about the completion of the offence, a mistake in relation to the real possibility of completing the offence by the measures adopted, did not discharge him from liability for the criminal attempt. With regard to an additional offence of obstruction of justice, Justice Matza held that within certain limitations, police investigators may and may even be required to make use of ruses; but such measures must be reasonable. Reasonableness here is limited in two ways: the ruse may not impair the right of the suspect not to implicate himself in a crime, and secondly, investigative measures should not be used which impair the doing of justice. The scope of these limitations must be established after giving consideration to the concrete circumstances of the case at hand.

Sentence

Justice Matza noted that the sentence of 4 years imprisonment, two of them suspended, on a person such as the Appellant, who is a Rabbi and teacher with a stainless past, married and the father of three children, is very difficult. Nevertheless, he did not see grounds for holding that the punishment was excessive. The Appellant had committed a number of crimes, the most serious of which was publication of incitement to racism. In so doing the Appellant had violated basic principles: equality of man and his right to defend his life, person and dignity. Incitement to racism impairs the character of the State, as a Jewish and democratic State and the State of Israel, as a developed nation based on Jewish and general moral values, cannot and is not entitled, for the sake of its peace and future, to take a forgiving attitude to the ugly phenomenon of incitement to racism. Thus, in sentencing considerations relating to incitement to racism, great weight must be given to the needs of deterring both the individual accused and potential offenders.

In the light of all the above Justice Matza upheld all the convictions and the sentence.

President Barak agreed that the convictions and sentence be

upheld with the reservations referred to above. **Justices Bach, Goldberg, and Dorner** also agreed with the result achieved by **Justice Matza**, each providing his own analysis of Section 144b(a) of the Penal Code, 1997 - publication of incitement to racism.

Justice Tal dissenting in relation to the conviction on the first offence, held that Section 144b required that the item being published contain an objective element of racism or incitement to racism, that in this case had not been proved and that the Appellant's article did not give leave to kill non-Jews but was clearly a scholarly article based on quotations from religious writings. Further, the prosecution had not succeeded in showing the mental element of the crime and the conviction was a breach of the author's right to freedom of academic expression. **Justice Tirkel** also dissented in relation to this conviction and to the conviction relating to the encouragement of an act of violence.

Abstract prepared by Dr. Rahel Rimon, Adv.

continued from p. 27

Another problem we are currently facing, is the racist and anti-Semitic propaganda spread through the computer and electronic networks by various hate groups, including deniers of the Holocaust. The Internet, in particular, is used by them to disseminate lies. One such person is Garaudy, a French convert to Islam and hater of Jews, who has also visited Greece in a mission to persuade his listeners that the Holocaust is a lie and that the Greek Jews were not wiped out.

To date no legal method has been found to prevent hate propaganda on the Internet. Until such a way is found, the Internet must also be used as a means of countering the messages of hate. Unfortunately, in some countries, freedom of speech and organization are regarded as overriding the necessity to fight against racism, anti-Semitism, xenophobia and hate. These countries have forgotten what misuse of unrestricted freedom of speech and organization brought to Germany: Nazism and Hitler, and disaster to many States and peoples.

Association to honour the memory of Markus Pardes

The late Markus Pardes, Deputy President of our Association and President of the Belgian Section of our Association, was an eminent jurist, indefatigable activist on behalf of Jewish causes, influential pillar of the Jewish community in Belgium and a man deeply rooted in Judaism and the State of Israel. Among his many activities he was President and founder of the Coordination Committee of Belgian Jewish Organizations (CCOJB), initiator of the Committee Against the Presence of Auschwitz Carmel and co-signatory of the Geneva Accords; he was a committed advocate for the Jewish Prisoners of Zion in the USSR; member of the Israeli Central Consistory of Belgium, representative of Belgium in the Jewish Worldwide Congress and Legal Advisor to the Israeli Embassy in Belgium.

The Association would like to honour and perpetuate his memory by planting groves in the name of Markus Pardes in the Belgium Park, located amid the forests in the Jerusalem hills. We invite you to join the list of friends participating in the dedication of the groves by mailing your donation by cheque for purchase of trees to the KKL (Keren Kayemet LeYisrael), with the designation "Markus Pardes Groves", to KKL, European Department, POB 283, 91002, Jerusalem, Israel. Please write your name and return address for receipt purposes.

IAJLJ Expresses concern to major Jewish organizations about proposed agreement to preserve Auschwitz

The American Section of the Association has written to leading Jewish organizations and the U.S. Holocaust Memorial Council to express its concern over a proposed agreement - the **“Declaration Concerning Principles for Implementation of Program Oswiecimski”** - that was drafted by Polish officials and the U.S. Holocaust Memorial Council in an effort to preserve the concentration camp at Aushwitz and Birkenau. The Declaration was intended, in part, to establish guidelines for the development of a “Master Urban Plan” for Aushwitz-Birkenau.

On June 30, 1998, the IAJLJ sent a memorandum prepared for the Association by the Washington law firm of Wilmer, Cutler and Pickering, to the prospective signatories of the Declaration: the U.S. Holocaust Memorial Council, *Yad Vashem*, the World Jewish Congress, the Anti-Defamation League, the American Gathering of Jewish Holocaust Survivors and the American Jewish Committee. The memorandum outlined several concerns that the IAJLJ has with the current version of the Declaration and proposed specific revisions to address those concerns.

The memorandum noted that the Declaration of Principles in its current form (1) does not necessarily ensure the

removal of existing religious symbols from Aushwitz-Birkenau; (2) does not account for the impact of new Polish municipal planning laws that will govern future urban growth around the site; (3) does not include in the “Committee of Experts”, proposed in the Declaration to oversee the development of the Master Plan, any Jewish appointees or any appointees designated by authorities other than the Polish government; and (4) permits the implementation of current plans for a visitor centre, which would include a fast food restaurant and parking lot to be built by the same Polish developer who attempted to construct a shopping mall at Aushwitz-Birkenau two years ago. The IAJLJ attached to its memorandum a “redlined” version of the Declaration containing proposed revisions intended to ameliorate these concerns.

In the memorandum, the IAJLJ applauded the preservation efforts made to date by the Jewish organizations, but requested that the organizations give serious consideration to the issues raised in the memorandum and incorporate the suggested revisions into the Declaration. The memorandum raised the following issues:

Municipal Zoning: Polish law requires all municipalities, including the two local municipalities that govern

Aushwitz-Birkenau, to submit separate municipal development plans to the national government by August 31, 1998. Even though they will govern camp areas, these plans are being drafted without input from Jewish sources. The current version of the Declaration does not address this Polish legislation or the August 31 deadline. In the memorandum, the IAJLJ suggested that language be added to the Declaration that would specifically exempt the area of Aushwitz-Birkenau, and an additional 200 metre protective zone around the camps, from the August 31 deadline.

Religious Symbols: Although negotiations with Polish authorities led to the removal of some crosses and Stars of David from Birkenau in December 1997, two 26-foot high crosses and two churches remain. The IAJLJ’s memorandum noted that the proposed Declaration does not guarantee the removal of these structures, but rather states that “henceforth, there should be no introduction of post-World War II elements on the site... including the introduction of religious symbols.” The IAJLJ proposed that the Declaration be revised to make the crosses and churches a subject to be resolved in the Master Plan.

Committee of Experts: While the Declaration calls for the appointment of a Committee of Experts to develop a

Master Plan, it does not require any of the committee members to be Jewish or come from countries other than Poland. The current composition of the committee lacks any representation from Israeli institutions, such as *Yad Vashem*, or from American institutions such as the Holocaust Museum. The IAJLJ proposed that the Declaration include language to ensure that the Committee will include representatives from Poland, Israel and North America.

Visitor Centre - The visitor centre that is already under construction across the street from Auschwitz 1 contravenes both the guidelines stated in the Declaration and Master Plan and the 1972 UNESCO protection zones surrounding the camp. Although the Master Plan guidelines call for the physical linkage of Auschwitz 1 and Birkenau to help tourists receive an accurate view of history, the visitor centre next to Auschwitz will focus the attention of tourists on the relatively smaller Auschwitz 1 (whose victims were primarily non-Jews) and away from Birkenau, the site where approximately 960,000 Jews perished. The IAJLJ noted in contrast that a Visitor Reception Centre envisioned by historians Robert Jan van Pelt and Deborah Dwork would be located mid-way between Auschwitz 1 and Birkenau on land outside the UNESCO protection zone. The IAJLJ proposed to revise the Declaration so that it explicitly requires Auschwitz 1 and Birkenau to be linked by a Visitor Reception Centre between the two sites.

After a Polish developer began construction of a shopping mall across from the main entrance to Auschwitz 1, two years ago, the IAJLJ and Wilmer, Cutler & Pickering provided members of

Congress, the U.S. Holocaust Memorial Museum and Jewish organizations with legal analysis regarding the 1972 UNESCO agreement that protects Auschwitz-Birkenau as a world heritage site. It contributed to efforts that stopped the construction from going forward.



South African Chapter honours Jaap van Proosdij

The South African Chapter of our Association celebrated the honour given to Mr. Jaap van Proosdij, a Righteous Gentile, in a gathering held in September this year. In February, Mr. van Proosdij had been awarded the highest Certificate of Honour from the *Yad Vashem* Holocaust Memorial by Israel's Ambassador to South Africa. The 'Righteous Among the Nations' award was presented to Mr. van Proosdij for saving many Jews during the Second World War. As a young lawyer in Holland, Mr. van Proosdij became deeply committed to "proving" Jews to be non-Jewish or sufficiently gentile (e.g. through marriage to a non-Jew) to satisfy the German authorities and thereby save them from deportation and certain death. Mr. van Proosdij emigrated to Pretoria in 1951 where he became a successful attorney and is highly regarded by the Jewish community.



U.K. Branch delegation visits Holocaust Centre

The U.K. Branch of the Association is gratified to report an inspiring visit to a private memorial museum set up by a non-Jewish English family, the Smiths,

in Laxton Nottinghamshire. Devout Christians, the Smiths established the Holocaust Memorial Centre, which is the only one of its kind in Britain, following a visit to *Yad Vashem* in Israel and as a small act of private atonement for Christianity's treatment of the Jews.

The Centre and memorial gardens are visited by many non-Jewish Church and school groups as well as other organizations.

In a moving ceremony, Lord Justice Millet, recently elevated to the House of Lords, planted a tree in memory of those lawyers and jurists who perished in the Holocaust and the members of the delegation recited *Kadish*.

The U.K. Branch has also celebrated Israel's 50th Anniversary at a garden party held in conjunction with the British Israel Law Association. The event was held in the home of Mr. Aubrey Rose O.B.E. and the guest of honour was Israel's Ambassador to Britain.

Judge Maxwell Cohen, O.C., Q.C. 1910-1998

The Association deeply regrets to announce the passing of one of its distinguished members, Judge Maxwell Cohen, O.C., Q.C.. Highly esteemed, he was a Canadian scholar and practitioner of international, constitutional, air and space, and human rights law, educator, public servant, diplomat and judge. Among his many positions, Judge Maxwell served as Dean of the Faculty of Law at McGill University and Judge *Ad Hoc* of the International Court of Justice.

The 11th International Congress of Jewish Lawyers and Jurists

December 28 - 31, 1998 at the Hyatt Hotel, Jerusalem

(The Congress will be followed by an optional Post-Congress Tour to the Dead Sea, December 31, 1998 - January 3, 1999)

Celebrating The 50th Anniversary of Israel “Judaism, Humanism, Democracy and Political Culture Towards the 21st Century”

Programme

Monday, December 28, 1998

09:00-14:00 Registration at the Hyatt Hotel, Jerusalem.
15:00 Meeting of the International Presidency.
18:00 Dinner (for those who purchased basic hotel package).
19:00 Welcome Reception.
20:00 Opening Session.
Presiding: Judge **Hadassa Ben-Itto**,
President of the Association.
Greetings: Mr. **Ezer Weizman**,
President of Israel.
Justice **Aharon Barak**,
President, Supreme Court of Israel.
Mr. **Tzahi Hanegbi**,
Minister of Justice.
Mr. **Ehud Olmert**,
Mayor of Jerusalem.
Mr. **Dror Hoter-Ishai**,
President of the Israel Bar.
Keynote Address: Judge **Hadassa Ben-Itto**
“Israel: Fifty Years of
Independence”
Musical programme

Tuesday, December 29, 1998

09:00-13:00 Public Trial: “Boundaries of Political Speech”
Opening Remarks: Mr. **Itzhak Nener**, Advocate,
First Deputy President of the
Association.

Presiding: Justice **Gabriel Bach**, formerly of the
Supreme Court of Israel.
Lord Caplan, Senior Appeal Judge,
Court of Session, Supreme Court of
Scotland.
Judge **Isi Foighel**, Denmark, Judge of
the European Court of Human Rights
in Strasbourg.
Justice **Vera Rottenberg Liatowitsch**,
Supreme Court of Switzerland.
Judge **David G. Trager**, U.S. District
Court, Eastern District of New York,
USA.
Pleders: Professor **Alan Dershowitz**, Law
School, Harvard University, U.S.A.
Dr. **Ilana Dayan**, Faculty of Law, Tel
Aviv University, Israel.
Mr. **Alain Jakubowicz**, Advocate,
Lyon, France.
Mr. **Jonathan Goldberg**, Q.C.,
Advocate, London, England.

Academic Advisor for the preparation of the Trial
and the script: Dr. **Yaffa Zilbershats**, Faculty of
Law, Bar-Ilan University, Israel.

10:45-11:00 Coffee Break.

13:30 Light Lunch.

16:00-17:00 Public Trial: Final Session.

20:00 Dinner: Guest Speaker: Mr. **Elyakim Rubinstein**, Attorney General of
Israel.

Wednesday, December 30, 1998

09:00-13:00 Panels:

- 09:00-10:45 (1) **Pluralism, Religion And State**
 Chairperson and Moderator: Justice **Meir Shamgar**, former President of the Supreme Court of Israel.
 Rabbi **Shear-Yashuv Cohen**, Chief Rabbi of Haifa.
 Rabbi **David Rosen**, Director, Anti-Defamation League, Jerusalem.
 Professor **Alan Dershowitz**, Harvard University, U.S.A.
 Professor **Anne Bayefsky**, York University, Ontario, Canada.

10:45-11:00 Coffee Break.

- 11:00-13:00 (2) **Prosecuting Public Figures**
 Chairperson and Moderator: Judge **David G. Trager**, U.S. District Court, Eastern District of New York, U.S.A.
 Adv. **Edna Arbel**, State Attorney of Israel.
 Mr. **Floyd Abrams**, Advocate, New York, U.S.A.
 Mr. **Jonathan Goldberg**, Q.C. Advocate, London, England.

13:00 Light Lunch.

14:30-18:30 Panels:

- 14:30-16:45 (1) **States' Responsibility Today for Their Conduct During the Holocaust**
 Chairperson and Moderator: Mr. **Neal Sher**, Advocate, President, American Section of the Association.
 Dr. **Israel Singer**, Secretary General of the World Jewish Congress, New York, U.S.A. (to be confirmed).
 Rabbi **Michael Malchior**, Chief Rabbi of Norway.
 Mr. **Alain Jakubowicz**, Advocate, Lyon, France
 Professor **Irwin Cotler**, Faculty of Law, McGill University, Montreal, Canada.
 Dr. **Avi Beker**, Director of International Affairs, World Jewish Congress, Israel.
- 16:45-18:30 (2) **Privatization - a Comparative View - Israel and Other Countries**
 Chairperson and Moderator: Judge **Meir Gabay**, Vice President, U.N. Administrative

Tribunal, Chairman of the International Council of the Association.

Mr. **David Kochav**, Economic & Financial Consultant, Israel.

Mr. **Ira Lieberman**, Manager, Private Sector, Development Department, World Bank.

Mr. **Richard Lister**, Advocate, Berwin Leighton, London, England.

Rapporteur: Mr. **Harold Ullman**, Advocate, Deloitte & Touche, New Jersey, U.S.A.

20:30

Gala Dinner.

Moderator: Mr. **Joseph Roubache**, Advocate, President of the French Section.

Entertainment - Dance Music.

Thursday, December 31, 1998

09:00-12:00 **General Meeting:**

Chairman: Mr. **Itzhak Nener**, Advocate, First Deputy President of the Association.

Report of Sections.

Activities and Future Plans of the Association.

Election of Officers of the Association.

Registration Fees:

Delegate US \$ 380, Accompanying Person US \$ 200

Includes: Welcome Reception; Gala dinner; 2 coffee breaks; simultaneous translation English/French/English; 2 light lunches. Dinner with guest speaker; For accompanying persons: 2 half-day tours of Jerusalem.

Accommodation

I. Basic Congress Package

3 nights/3 days, Hyatt Hotel, Jerusalem, December 28-31, 1998, \$ 262 per person sharing a double room; single room \$ 397.

Includes: 3 nights accommodation on bed & breakfast basis at Hyatt Hotel Jerusalem; arrival transfer to Jerusalem sharing a car; Welcome buffet dinner in Jerusalem; taxes and service charge.

Additional nights at Hyatt Hotel, Jerusalem: (bed & breakfast basis) double room \$120, single room \$105

II. Basic Congress Package Plus

Dead Sea Extension 6 nights/6 days, Jerusalem & Dead Sea December 28, 1998 - 3 January, 1999; \$ 556 per person sharing a double room; single room \$ 826.

Includes: 3 nights accommodation at Hyatt Hotel, Jerusalem on bed & breakfast basis; 3 nights accommodation at Hyatt Hotel Dead Sea on half board basis, (breakfast & dinner daily). Welcome buffet dinner in Jerusalem; arrival airport to Jerusalem transfer, sharing a car; transfer from Jerusalem to Dead Sea and return to Jerusalem and/or Tel Aviv; daily entrance to the Hyatt Dead Sea Spa; taxes and service charge; additional nights at Hyatt Hotel Dead Sea (breakfast & dinner daily) double room \$ 172, single room \$ 131; share a car transfer from Dead Sea to Ben Gurion airport: 1 person \$ 41 per person, 2 persons and up \$ 36 per person.