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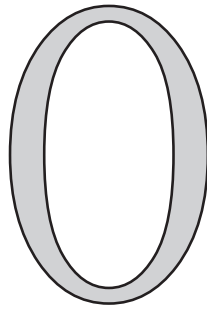
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PRESIDENT'S MESSAGE



Opening address at the Strasbourg Conference, January 20-23, 2000.

Our Association holds many international conferences, but this conference in Strasbourg is of particular significance to us.

We are hoping for an ongoing dialogue between ourselves and the Council of Europe, and we offer our participation in the important work the Council is doing, particularly in the field of human rights, a subject high on our agenda.

We are aware of the fact that the Council is sensitive to subjects which are of special concern to us; this was manifested by the fact that our Berlin Conference was held in June 1999 under the auspices of the Secretary General of the Council and he delegated his representative to speak at the conference. This was one of a series of meetings being held in various cities in Europe to commemorate Jewish lawyers and jurists who perished in the

Holocaust and mark their contribution to the legal systems of their respective countries. We have come Strasbourg to further this process of co-operation with the Council.

The International Association of Jewish Lawyers and Jurists was founded in 1969. Among its founders were Supreme Court Justices Haim Cohn from Israel, Arthur Goldberg from the United States, and Nobel Prize laureate René Cassin from France. Membership in the Association is open to both Jewish and non-Jewish lawyers and jurists, who share a common agenda.

We have a membership consisting of lawyers, judges, judicial officers and jurists in academia in more than 50 countries. We pride ourselves on arousing their awareness, recruiting their support and obtaining their voluntary participation in furtherance of our aims. Members are active both at the international level and in their respective countries, as the need arises.

I am often asked why an association like ours is needed. Is it just another gimmick to allow members the luxury of tax free travelling to international conferences? Is it a means of helping lawyers to establish business contacts around the world?

What do we actually do, I am asked, what special role do lawyers play, and why do Jewish lawyers have a special agenda?

I propose to address my remarks to these issues.

Our Association promotes human rights goals such as the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, international co-operation based on the rule of law, and the fair implementation of international covenants and conventions.

One of our main goals is addressing issues that are on the agenda of the Jewish people everywhere, and we are particularly committed to combating racism, xenophobia, anti-Semitism and denial of the Holocaust.

Why is this a task for lawyers?

The role of lawyers in our time has become important, not only in the representation of their clients but in the field of public law. Courts of law have become the arena where major national, and sometimes international, issues are decided. Governments which are vested with the power to lead nations, bow before decisions of learned judges, in courts of both domestic, regional and international jurisdiction.

The law is not everything. There are other means: there is education, media, economy, and

politics. But the law is a powerful weapon, and we, men and women of the law, are sworn to uphold the law, to find ways and means of securing public order and protecting the rights of the individual, within the rule of law. We have a prominent part to play in any democratic society, and, moreover, we are professionally and socially equipped to do so. We are particularly fit to use our influence, our professional expertise and our good standing in the community, to promote legislation, and, when necessary, to initiate litigation, to influence governments and educate the public, to fight wrongs and to encourage and assist others who do so. We are duty bound to act, using the tools of our trade.

One of the outstanding phenomena of this century is the development of an international code, a growing set of international conventions and covenants, which not only govern relations between States, but create a mode of behaviour in what traditionally belonged to the sphere of "internal affairs". Behaviour of governments towards their citizens in the field of human rights, in a very broad sense, has become the legitimate concern of the international community. Patterns of behaviour towards minorities have ceased to be the sole concern of any given society. It has become not only acceptable, but almost imperative, that we watch each other in a global sense. It has become legitimate to interfere in what happens in other countries, to criticize, to protest, and sometimes even to act, when countries fail to take proper action in protecting rights which deserve to be protected within the meaning of an international code.

The idea of having a world order and international institutions means recognizing that there are internationally accepted norms. Some things are right and others are wrong in human society everywhere, not specifically in any geographical context.

We all proclaim today that, yes, we are our brothers' keepers.

Why an association of Jewish lawyers?

Because there are particular issues on the Jewish agenda which an association like ours is equipped to address, and which we, as Jews, cannot afford to ignore.

First and foremost among these issues is anti-Semitism and denial of the Holocaust.

After the world became acquainted with the horrors of the Holocaust, we thought that it was over. For many years we treated what is called "the new wave of anti-Semitism" as something minor, a fringe phenomenon, an aberration, a sickness which does not touch the mainstream of post-war society. We know now that this is not so.

Old anti-Semitic stereotypes have come to life; Jews are again depicted in most derogatory language. Anti-Semitic graffiti, articles, slogans and acts of vandalism have surfaced in many European countries. Jews are held responsible for the miseries suffered by the population in many countries, even those in which Jews do not live anymore. There the forged *Protocols of the Elders of Zion* are quoted and the so called "International Jewish Conspiracy" is mentioned, as if it were a proven fact; as if it did not originate in a proven forgery.

It is as popular today as it has ever been to de-legitimize your opponents by blaming them for being "in the pockets of the Jews" or of Jewish interests. Popular polls in some countries reveal a frightening picture, as do the outcomes of some elections.

The banalization of anti-Semitism in public opinion is accompanied by a growing output of anti-Semitic and revisionist literature, and publications abound which serve as an apology for Nazism and anti-Semitism. And now it is all available on the Internet.

Anti-Semitism does not start in the sick minds of fringe groups. It has been rooted, and unfortunately still exists, in the fabric of most societies. It can no longer be blamed on any particular country or any particular part of the world. To some extent it is part of the social, political, economical and cultural climate in most countries of the civilized world, though it

manifests itself in various ways, differing from one society to another. The Holocaust is being openly denied. It is called a fiction, an artificial fabrication, a political plot, a Jewish hoax.

The denial of the Holocaust is not a fringe phenomenon. With years of practice, millions of dollars to spend, and an increasingly large accumulation of material, it seems that the deniers are here to stay. They are especially targeting the young with anti-Semitic hatred cloaked in the garb of reason. It is anti-Semitism masquerading as objective scholarly inquiry. It impresses the unknowing public.

While we convene here, a trial is held in the High Court of London where a well-known Holocaust denier is suing a respected Jewish professor, an expert on the Holocaust, for having dared to accuse him of denying the most documented event in history. The press reports that in his presentation to the court David Irving publicly continues to deny the existence of gas chambers and the proven extent of the extermination of Jewish victims. Thus, in an English Court of Law, in the presence of the public and of the international press, the deniers claim legitimacy for their false and perverted message. Like many instances in the past, the legal process is being abused and a court of law is used as a forum for spreading this poison.

We must realize that racism, xenophobia and anti-Semitism do not start on the streets, exactly as wars do not start on the battlefield, they start in the minds of men. Long before they make their appearance on the streets or in the beer halls, they are well hidden away in books and in newspapers, in learned academic lectures and on television interviews. They are stamped on the minds of young people in the form of routine stereotypes. This dangerous phenomenon is mostly ignored because we do not want to face up to it.

Europe is of particular interest to us from a Jewish perspective. For a thousand years Jews have played a prominent role in European history, in its culture, science, art and politics. Jewish communities have flourished here and so has Jewish learning and tradition. But Europe has also been the scene of pogroms, of ghettos, of persecution and of a holocaust.

In a way, Europe owes the Jews, if nothing else, then at least a firm commitment to be in the forefront of the fight against anti-Semitism and denial of the Holocaust. This commitment should be a major component in the fight against racism and xenophobia in general, a fight to which we, as an association, are fully committed.

The enlargement process of the European Union is due to include, within the next few years, many Eastern European countries, some of which have a long unfortunate history of anti-Semitism, including an active collaboration with the Nazis during the Second World War. More than four decades under Communist rule did not contribute in any way to dispelling xenophobic and anti-Semitic feelings, and it is essential that those countries adopt and implement a corpus of legal instruments in order to deal effectively with latent anti-Semitism. The legal and educational framework, yet to be determined, ought to be fully implemented as a prior condition to full integration of those countries in the European Union.

Non-governmental associations such as ours are playing a growing role in international affairs, particularly in the field of human rights. It is mainly in this field that we hope to cooperate with the Council of Europe and with its various important bodies.

We are grateful to the leadership of Council of Europe for hosting our conference on its premises, for the warm welcome extended to us and for honouring us with their presence.

Hadassa Ben-Yahu

THE STRASBOURG CONFERENCE

The Strasbourg Conference (January 20-23, 2000), in which the Council of Europe hosted the IAJLJ, examined the question: “*From Xenophobia to anti-Semitism and Vice-Versa: a Calamity in Europe and Elsewhere*”, as well as aspects of the European Court of Human Rights, and the relationship between justice and human rights generally. Highlights of some of the addresses follow (pages 3-26). Others will be published in the next issue of *JUSTICE*.

“We have a Common Agenda: the Fight Against Xenophobia, Anti-Semitism and Racism”

Walter Schwimmer

It is both a great honour and a real pleasure to welcome the first European meeting of the International Association of Jewish Lawyers here to the Council of Europe headquarters.

As soon as I heard of the initiative taken by our European chairman, Mr. Joseph Roubache, I was glad to open to him the gates of this House which, because of its influence in protecting human rights, is also the House of your Association.

I wish the Association every success during this two-day seminar, and also positive developments in all its activities at the European level in the months and years to come. In such areas, we will always need to join forces because there is an ever-present danger to our freedom.

Both the Council of Europe in 1949 and the International Association of Jewish Lawyers and Jurists through René Cassin’s initiative in 1970, have the same roots and the same inspiration. The Council of Europe is characterised by the protection and promotion of human rights and pluralistic democ-

Mr. Walter Schwimmer is the Secretary General of the Council of Europe. Here are translated highlights of his greetings at the opening of the conference hosted by the Council of Europe.

racies today, at a Pan-European level, but also at a global level. Because we are entering an era of border-free democracy and globalisation of our hopes and challenges, and also because we are facing global hazards.

The fact that you chose the Council of Europe for this meeting and that many colleagues from the Council of Europe agreed to take part in these discussions shows how our interests and concerns are converging.

I am referring mainly to the participation of the First Deputy



President of ECRI, Professor Voyame, and of Mr. Justice Jean-Paul Costa, a French Judge at the European Court of Human Rights, who eloquently illustrate our shared efforts. While I will not mention all the distinguished key figures the Association invited to this meeting, I wish to thank all of them on behalf of the Council of Europe for the interest they show in our work through their attendance and participation.

However, I would like to pay a very special tribute to Judge Hadassa Ben-Itto, the Association's President, to Mr. Joseph Roubache, President of the European Council of the IAJLJ, to Dr. Parienti, Director of the European Committee of the Weizmann Institute of Science, and to Mr Pierre Drai, Emeritus Chief Justice of France's Cour de Cassation and Honorary President of the Association's French Section, to whom we are paying a special tribute together with Mr. Jean Kahn, President of the European Monitoring Center against Xenophobia and Racism.

I would like to welcome Judge Myrella Cohen, President of the UK Section of the IAJLJ, Mr. Avel, representative of the French Ministry of Justice, and an old friend of the Council of Europe, Mr. Dan Meridor, Israel's former Minister of Justice, and current Chairman of the *Knesset* Committee for Foreign Affairs and Defence, whose presence is more than symbolic.

I would like to emphasise that both the IAJLJ and the Council of Europe actually have a common agenda, namely, the fight against xenophobia, anti-Semitism and racism in general. This illustrates the need for both organisations to combine every effort at the level of non-governmental and intergovernmental organisations.

No racist or xenophobic phenomenon can be tolerated, be it segregation based on poverty, immigration, or hatred for Jews or Gypsies. Today, we are witnessing a proliferation and a diversification of the various signs of discrimination and exclusion.

Unfortunately, I cannot but confirm how dangerous are those phenomena which we thought could not emerge again. I have just returned from south-east Europe after a trip to Bosnia-Herzegovina and Kosovo. Sixty years after synagogues were set alight in

Europe, churches and mosques are now being set alight for the same reasons: for motives of hatred for individuals who belong to another people, another faith. People have been killed for those simple motives and other people are still being killed for the same reasons. This stresses the importance of your work.

Both the collapse of totalitarian regimes in the continent and the Council of Europe's enlargement increase hopes, in spite of the dangers and awareness of the various phenomena you are going to review during your session at the Council of Europe. We hope and believe that the papers you are going to receive from the various segments of our organisation will not only seem interesting to you, but will also be useful in our joint fight against discrimination, racism and anti-Semitism which, in our shared history, led to the worst evils experienced by mankind, especially in the 20th century. Hopefully, the beginning of the 3rd millennium will also be the beginning of a better future, a future free of such events.

The mere fact that we are here together under the aegis of the Council of Europe, inspired by our founding fathers, in particular René Cassin, a reference in our shared history, is no coincidence. This should constitute a symbol of both hope and confidence, and a challenge for carrying on, increasing and combining our efforts in the future.



Participants at the first session of the Strasbourg Conference

“The Universalist Nature of the Jewish People’s Message”

Hans Christian Krüger

It is not only a great honour, but also a real pleasure for the Council of Europe to welcome the Association here, in the very heart of the vast Pan-European House of Human Rights.

Your presence reminds us of our *raison d’etre*, our origins and our hopes. Indeed, the very notion of the Council of Europe would never have emerged without the cataclysm of World War Two, without the lesson jointly learnt from the *Shoah* and from the racist, totalitarian wave which swept over Europe, and without René Cassin’s inspired vision.

Our historical course has reflected from the very beginning a convergence of our experiences and our wishes to jointly oppose a return to the totalitarian drift that this continent has experienced through exacerbated nationalism since the 19th century.

Your presence here is no ordinary or fortuitous event, nor is it a mere addition to so many other varied meetings: it is a reminder of our sources as well as a prompting to vigilance and memory and a prompting to create together a shared vision for the future.

I am convinced, in view of the quality of the participants from the Association, the European Court of Human Rights and our various institutions, that this seminar will meet with the success it deserves and that its work will certainly spread among both decision-makers and the public at large, through all government and non-government channels without which the protection and promotion of human rights would go unheeded.

The fact that the Jewish world provided mankind with the Tables of the Law and the Ten Commandments, and a reference

to a single code of ethics, both constraining and liberating, is not a matter of chance. Today, that impulse is still marking not only the Judeo-Christian dimension of our society, but also the lay and political world which surrounds us and is

gradually redefining itself around a converging vision of a pluralistic democracy.

Therefore, I think that the universalist calling of the Jewish people’s message is a direct inspiration to the humanist message deriving from the Enlightenment and philosophies which contributed over centuries to free man and society from their chains.

Thank you once again for choosing the Council of Europe to hold your European meeting. I wish the Association a successful outcome to its work, to which we will certainly contribute in a resolute and committed fashion - to the full extent of our means.



Mr. Hans Christian Krüger is the Deputy Secretary General of the Council of Europe. Here are translated highlights from his welcoming remarks.

“The Council of Europe was the First to Recognize the Relationship between Racism and Anti-Semitism”

Joseph Roubache

Europe of liberties, a Europe rich in diversities, conscious of its unity, a Europe of solidarity, a Europe of all the hopes, this is the Europe to which we all aspire.

Unfortunately, even taking into account the progress and advances which are beyond doubt, this is also the Europe which the past century has not been able to leave as its legacy.

Of course, today, we enjoy the privilege of having lived through and of seeing the liberation from the iron grip of Communism of central Europe and Eastern Europe. We also have the incredible advantage of living through the emergence and consolidation of a new collective conscience, of a real European citizenship.

But at what price? War, suffering, misery, these are the other images that another Europe is sending us, a Europe of violence and declared violence.

But there is also another form of violence, this one insidious, devious, which poses a risk, if we are not careful, of infecting our Western societies. I want to talk about intolerance and xenophobia which are progressing in our Western societies. One need only think about the electoral success of Jörg Haider’s party in Austria, or of Christophe Blocher’s Democratic Union in Switzerland.

Can we remain impassive faced with the increase in these dangers? It has been said that the opposite of love is not hate, but indifference. And we do not wish to be indifferent; we wish to join this necessary struggle for the respect of mankind.

That is the reason why our Association has decided to focus its action in Europe within the Council of Europe. And, today,

for the first time, we are together in this place along with delegations from most of the countries of Europe: France, Germany, England, Italy, Belgium, Switzerland, and Hungary as well as others.



That is why, today, we have chosen as the theme of our Seminar: “From xenophobia to anti-Semitism and vice-versa”.

Xenophobia, intolerance, anti-Semitism, all these words cover the same reality. The Council of Europe was, I believe, the first institution to recognize the similitude of these terms and the relationship between racism and anti-Semitism. These words cover the rejection and exclusion of the other; leading to the catastrophe of the *Shoah* and, today, justifying once again what is sadly called ethnic cleansing.

As a sub-title to our seminar, we asked the following question: “xenophobia, anti-Semitism, an inevitability in Europe and elsewhere?”

The answer is no. It would only be an inevitability if we failed to unite our forces, concentrate our resources. The resources of our Association are the law, our ability to federalize projects, energies, to initiate and conduct affairs and to serve as relays for disseminating worthy initiatives and ensuring that they succeed.

Adv. Joseph Roubache is the President of the European Council and the French Section of the IAJLJ. Here are translated highlights of his welcoming greetings.

It is in this spirit that we formed synergies with the Council of Europe and with one of its specialized organizations: ECRI, the European Commission Against Racism and Intolerance.

I would like to thank Mr. Schwimmer and Mr. Krüger, for having welcomed us with such warmth in the House of the Council of Europe, and for allowing us to, modestly, bring our contribution to the work which they have been pursuing for nearly fifty years, because the Council of Europe has this extraordinary ability to defend human rights, with its commissions, its organizations but also its secular arm, if one may so call the European Court of Human Rights.

Mr. Francis Rosenstiel, our friend of always, who contributed to the organization of this seminar, comments on the theme: "From one European Council to another, traversing a European orbit". I would also like to thank all the speakers for their contributions to our work. First, the members of ECRI: Mrs. Isil Gachet, Professor Voyame, and Mr. Michael Head; Professor Kovács who came especially from Budapest; President Jean Kahn who's talk is about xenophobia and racist events he witnessed when he was in Vienna; and our friend Alexandre Adler, a journalist and well known historian, as well as eminent Sovietologist or today, Russianologist.

Our second seminar is about the relationship between justice and human rights: can judicial institutions be turned into an instrument to serve human rights?

For a long time, realists considered that justice had nothing to do with human rights, because it was helpless when faced with violence and subversion. It is evident that, today, this "judicialization" of human rights is no longer a pipe dream.

Judge Jean-Paul Costa tells us how and why the European Court for Human Rights has become a permanent institution at the service of European citizens. Mr. Jean-Baptiste Avel refers to the workings of the International Criminal Court created in Rome last July. Finally, Mr. Dan Meridor, former Minister of Justice and today Chairman of the Foreign Affairs and Defence Committee of the *Knesset*, deals with a recurring problem: the relationship between security and human rights. He tells us of the Israeli experience with the Israeli Supreme Court.

These two sessions are presided over respectively by Daniel Lack, who has worked a great deal for human rights and who is the permanent representative of our Association at the UN, and Judge Myrella Cohen who leads a very important delegation of British lawyers. Bernard Cahen who, among other things, is the former President of the International Lawyers' Association, conducts the final session.

We are happy to welcome first members and directors of the European Council: Mr. Buquicchio, Mr. De Jonge, Mrs. Wiederkehr, Judge Thomassen, Judge Makarczyk and Mr. Ulrich Haak who permanently represents Austria at the Council of Europe. Also among us, I must salute Mr. Jean Waline who represents Mr. Reichert, President of the Regional Council of Alsace and President of the France-Israel alliance.

I wish to mention just a few of the members who honour us: Mrs. Vera Liatowitsh who is a Judge of the Swiss Supreme Court; Mrs. Myriam Ezratty, Honorary First President of the Court of Appeals of Paris; Professor David Ruzie, former Dean of the Law Faculty of Paris and who is, today, one of the members of the Commission on Reparations and Spoliation due to anti-Semitic laws during World War Two; Professor Rhomer who represents the Dean of the Law Faculty of Strasbourg; Mr. Claude Cohen, who is member of the national consultative Commission on Human Rights, and of course, all our friends present: Professor Jean-Paul Bureau, of the National League against Cancer; Mr. Oster, President of the Bar Association; Chief Rabbi of Strasbourg, René Guttman; and, finally, Robert Parienti and Claude Salis, who are respectively President and General Representative of the European Foundation for Sciences and Cultures. Finally, I would like to particularly thank Gilles Kaufman, organizer of this seminar.

When this conference is over, there will remain in my mind first of all the conviction that our strength is the result of the union of our wills and our energies and, at the same time, I will persist in believing that the foremost condition for our success remains personal engagement, this never-ending struggle that each of us carries on for himself, for the sole joy of doing what has to be done.

Right now, two pictures come to mind, removed from one another by 50 years; a photograph taken during the 1930s in Nazi Germany. There is a great celebration for the launching of a new warship. There is a huge crowd, and this huge crowd raises its arm in the Nazi salute, and this multitude of arms forms a crown around the ship. And in this photograph, there is a man, one man, who is not raising his arm; he is resisting.

And this picture joins in my mind another one, which is well known to all of you, that of the little man on Tiananmen Square in China who, alone, opposes the tanks of the Chinese army.

The answer to the question which we ask in our seminar: "Is there an inevitability?" No, there is no inevitability in oppression.

Extremism in Europe: “Only their Faces Change!”

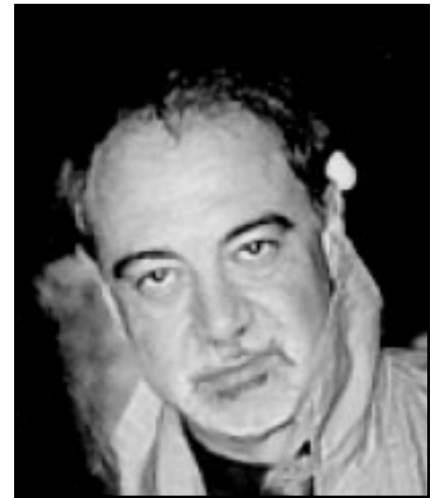
András Kovács

Last Autumn, shortly after the electoral success of Haider's Freedom Party in Austria, thousands of demonstrators took to the streets of Vienna. They gathered under a placard with the slogan “Only their faces change!”. And above the text: the pictures of Hitler, Haider and Milosevic. The message was clear to onlookers in the street as well as to those in front of the television sets, world-wide. Indeed, time and again over the past ten years, frightening news arrived from both the old democracies of Western Europe and the new democracies of the East about the electoral success and increased parliamentary presence of the parties of the far right - political formations the ideological base of which is rooted in extreme nationalism, racism, xenophobia, a loathing of democracy, and a fanatical wish for a strong State. Many people feel that Europe is being haunted once again - this time by the spectre of Fascism. The illusions created by the euphoria that accompanied the fall of the Berlin Wall seem to be dispelled. Today, ten years after the end of the Cold War, we have to raise the question: rather than the ‘end of history’ and the final victory of liberal

democracy, should we not really be talking about the ‘eternal recurrence of history’ and the deep crisis of the Western democracies? Is it not possible that current historical developments will confirm Nietzsche's ominous vision rather than Fukuyama's optimistic predictions?

Recent developments point in this direction. In elections held last year, Haider's Freedom Party in Austria and Blocher's Swiss People's Party in Switzerland each took more than a quarter of all votes cast. In France and in Italy about 15% of voters expressed their support for Le Pen or for Fini and Bossi, and there were also considerable electoral successes for the Vlaams Blok in Belgium and the DVU in Germany. And it comes as no surprise to find representatives of similar parties in the parliaments of the new democracies of Eastern Europe the Republicans in the Czech Republic, the Slovak National Party in Slovakia, the parties of Corneliu Vadim Tudor and Gheoghe Funar in Romania, Zhirinovskiy's Liberal Democrats in Russia, István Csurka's Hungarian Truth and Life Party in Hungary - all of these parties enjoyed the support of about five to ten percent of voters.

Of course, these parties differ from one another - as well as from the tradi-



tional Fascist parties. But for those who see in today's right-wing the revival of traditional Fascism - only the faces change - such differences are of minor significance. As Umberto Eco, the Italian writer wrote in his essay on “Ur-Fascism” (*The New York Review of Books*, 1995. June 22), after all there were significant differences between the traditional Fascist parties, too. Franco's Phalangism was Catholic and clerical, while German Nazism was anti-Christian and heathen. Whereas Italian Fascism showed little concern for artistic styles, Nazism attempted to construct a monolithic State art. While the ideology of Hitlerism was anti-capitalist, Mussolini attributed no great significance to such

Professor András Kovács, Central European University in Budapest, Hungary.

ideas. And finally the Fascism of Italy or of Spain treated anti-Semitism as a minor issue rather than an essential part of policy, but the hatred of the Jews is inseparable from German Nazism.

Those who see a direct continuity between the past and the present like Eco, argue that all political variants of extremism have something substantial in common. Umberto Eco - citing Ludwig Wittgenstein's game theory - argued that just as quite different games still belong to a single family group, so also there exists a kind of family resemblance between the various types of Fascism. According to Eco, a minimal definition of Fascism may be established: "...one can eliminate from a Fascist regime one or more features, and it will still be recognisable as Fascist" (*op. cit.* p.14.). Eco lists fourteen criteria which he thinks illuminate the characteristic and constant features of Fascism. Ten of these criteria are basically psychological in nature - for example: the fear of difference, which lies at the root of racism; the feeling of individual and social frustration, which characterises members of the group; the mystical notion of the wealthy and powerful enemy; the cult of the hero, *etc.* The list includes just four criteria that are both ideological and sociological-political: the cult of tradition; the rejection of modernity; societal elitism; and 'qualitative populism' - which seek to derive political legitimacy from the will of the people, who are seen as a monolithic mass, while bestowing power on the Leader.

We can agree that all these items were obvious features of all forms of traditional Fascism. But on the other hand we have to admit that the extreme right-wing movements and parties of today show a

substantially different picture. As political analysts have repeatedly stressed, (see, for example, Miklós G. Tamás: *Reformfasiszták* [Reform Fascists]. *Élet és Irodalom* [Life and Literature], 22 October 1999, Budapest) the relationship between today's extreme right-wing and tradition and modernity is quite different from that of the Fascist parties. They no longer preach the virtues of romantic utopias projected onto organic pre-capitalist societies, nor do they wish to re-establish the organic unity of the individual and the community in a revolutionary way. They do not inveigh against technical civilisation and the modern market economy, nor do they propagate corporate ideals. And they do not want to destroy the information superhighway or computerised bureaucracy. Drawing an analogy between reform Fascism and reform Communism, M.G. Tamás stated:

"Today's reform Fascism is no longer totalitarian... The Fascists of today no longer invoke the leadership principle. The storm troopers have been replaced by campaign teams... Even when they are close to power, they no longer press for the destruction of the parliamentary system. The main proponents of democratic Fascism or reform Fascism think that their goals can be reached through the simple restriction of ... the rule of law, and in a bloodless manner" (*op. cit.*). Finally, the extreme right-wing of today is no longer elitist; indeed, like populism in general, it tends to be anti-elitist.

These substantial differences between traditional Fascism and today's extreme right are not accidental at all. The conditions in which today's right-wing extremism has grown strong, as well as

the political context in which it is active, have little in common with the decades following the First World War. The Fascist movements of the 1920 and 1930s, arose against the background of a peace settlement that was full of injustices, and amid a deep economic and political crisis. In contrast, today's extreme right-wing is a product of victorious liberal capitalism and the freedom that was born among the ruins of Communism; moreover, in the western half of the continent, it has attracted the greatest numbers of supporters in countries that have served as models of prosperity for decades, such as Austria, France, and Switzerland.

It is hardly surprising, therefore, that political experts are divided over whether (or to what extent) the continuity-hypothesis is valid. On the one hand, one cannot deny the existence of certain similarities between the extreme right-wing parties of today and the Fascist parties of the inter-war period - similarities of ideology, political style, the manner of their leaders, external appearances and symbols. On the other hand, as we have seen, there are a number fundamental differences between the current situation and the era in which the various forms of European Fascism developed. Indeed, these differences are of such magnitude that academics researching the extreme right-wing find it hard to agree upon a name for the political phenomenon forming the subject of their research: Left-wing and Marxist researchers are most likely to use the term neo-Fascism, but just as common are the terms 'new extreme-right' 'radical right-wing' 'radical populism', or simply 'populism'.

A number of powerful arguments suggest that, if we really want to under-

stand the series of phenomena known by the term 'extreme right-wing', we should avoid explaining these phenomena by drawing direct and full analogies with traditional Fascism. We must accept that most of our knowledge of traditional Fascism is unsuitable for describing the developments of recent decades. We must also ask ourselves whether the xenophobia of the new-right-wing movements and parties is really the political outcome of a worldview - the Fascist one - that has changed in form and content but not in essence. Is not xenophobia more likely to be the distorted answer to a real problem of post-industrial affluent society, an answer which, although conflicting with a whole series of humanitarian values stemming from the ideals of human rights and human dignity, is not the product of the ideological rejection of such ideals? We cannot simply dismiss the theory that today's xenophobia is rooted in problems that are completely different to those which gave rise to the racism of traditional Fascism. One could argue that the struggle for scarce goods that appears in the form of the 'chauvinism of affluence', and its extremism is linked to the fact that the democratic political forces have still not found an appropriate answer, for example, to the question of immigration. Both attempt to activate xenophobic emotions but their political motives are clearly very different. For this reason, the ideological-political criteria of Eco's minimal definition may not be used to describe today's extreme right.

Consequently, if we continue to believe in the existence of a 'family resemblance' between contemporary far right and traditional Fascism, we must describe this similarity using criteria of

the Eco's definition that point to cognitive structures of a psychological nature or basis - for example, xenophobia. If we do this, we shall obviously find something in common between the two political phenomena. But what we shall find - so runs the counter-argument - is not the common denominator of the various forms of Fascism, but the basic characteristics shared by all Fascists. In effect, this means that we shall be de-politicising and individualising right-wing extremism and Fascism.

In this way, we arrive at the issue which forms the original subject of this symposium. What is the role and function of xenophobia in the contemporary movements of the extreme right? Are we not simply de-politicising a dangerous political phenomenon by using psychological terms - such as xenophobia, prejudice, and ethnic hatred - to describe it? When and how do xenophobia, racism, and anti-Semitism represent more than personal feelings, and what is it that transforms such phenomena into political factors - what turns them into 'isms'?

We know that xenophobia is not simply the expression of prejudice against a foreign group, but rather the representation of some threat felt by many members of a society. It is here that xenophobia comes into contact with anti-Semitism. Xenophobia in itself does not fill the same political role played by anti-Semitism in modern European history. But the inherent dangers are just the same, and the key to understanding these dangers is to know how exactly anti-Jewish sentiments were turned into a political ideology.

Anti-Jewish feelings have been an almost constant feature of Christian-

dominated culture for two thousand years. However, such feelings have developed into anti-Semitism only under special circumstances. Modern explanations (See, for example, Reinhard Rürup: *Die 'Judenfrage' der bürgerlichen Gesellschaft und die Entstehung des modernen Antisemitismus. In: R. Rürup: Emanzipation und Antisemitismus. Studien zur 'Judenfrage' der bürgerlichen Gesellschaft.* Vandenhoeck & Ruprecht, Göttingen, 1975; Shulamit Volkov: "Anti-Semitism as a cultural code". In: *Leo Baeck Institute Yearbook*, XXIII, 1978.) interpret anti-Semitism as a worldview or code system performing a specific function. In the late nineteenth century, a peculiar culture was established in various European - especially Central European - countries that was characterised by a rejection of modernity, liberalism, capitalism, and socialism, as well as by a nostalgic yearning for a long-lost world, opposition to democracy, extreme nationalism, colonial and imperial zeal, and support for the ethical norms of the pre-industrial era. Thus, this culture was woven together from various very different and independent elements, which were not naturally interconnected and did not form a coherent worldview. There was, therefore, a great need for a factor that would function as their common denominator, and express their interrelated character clearly and simply to everyone. For this reason, it became important that each of the constituent elements of this culture should become linked with anti-Semitism. In this way, taking a stand on the "Jewish Question" received a symbolic value, because it served as a way of expressing one's belonging to a certain political-cultural camp. Anti-Semitism became the code of

this culture, a cultural abbreviation if you will, the acceptance or rejection of which could be used to express their support for - or antipathy towards - views, ideologies, and norms that were otherwise completely unrelated to the status and role of Jews in the society.

The transformation of diffuse anti-Semitic prejudices into a cultural code represents the novel aspect of modern anti-Semitism. Nevertheless, the fact that large groups of people accept the 'Jewish Question' as a framework for interpreting issues which - although perceived as important - are not interconnected, may only be explained by the cognitive process that binds these problems, conflicts and the 'Jewish question' together. Anti-Semitism may only function as a consensual cultural code once the cognitive process linking the symbol with the point of reference has run its course.

Today's extreme right-wing parties are roughly at the same stage (and display the same behaviour) as the anti-Semitic parties of the late nineteenth century. These parties have no coherent policy programs. They simply issue slogans, concentrating in their political campaigns upon issues for which they have no solutions but which they know are of great concern to many people. They do not highlight such problems with a view to realising their vision of a future society, but because they realise that these problems are causing insecurity, anxiety, and fear in many people. Just like the anti-Semites during the crisis of liberal capitalism in the last century, these parties attempt to offer a simple and tangible explanation for the problems affecting insecure sections of society who suffer as a result of the failings of the post-

industrial Welfare State. Nevertheless, they, too, are in need of a code that may be both easily linked to the issues they concentrate and easily understood by potential supporters. This code is xenophobia. The primary reason why the parties of the extreme right are dangerous is not because they create xenophobia but because they attempt to organise it into a conceptual system and link it to existing and serious socio-economic problems. Probably xenophobic and ethnocentric attitudes will never cease to exist in the human world. But we all know what the consequences are of their political exploitation.

The symbolic meaning that the extreme right today attempts to give to xenophobia is the same as that given by the creators of political anti-Semitism to anti-Jewish feelings in the early twentieth century. Thus, if we identify xenophobia as the factor establishing the 'family resemblance' between traditional Fascism and today's far right, we are not de-politicising, individualising and psychologizing a political phenomenon. On the contrary, we are pointing to the factor that 'introduces' frustrated, anomic, and disorientated people to the culture of the extreme right.

The history of anti-Semitism demonstrates that in the modern era the role of anti-Semitism as a political factor depended upon the stand taken by the political and cultural leaders. If the dominant intellectual discourse which sets the boundary between legitimate and non-legitimate languages places the anti-Semitic language into the non-legitimate sphere, then there is a good chance that hostility to Jews will lose its symbolic-ideological meaning, will be restricted to the level of the personal emotions of

individuals who are only able to cope with life by resorting to prejudice and scapegoating.

This is all valid for the xenophobia we experience today. Once again the role of the opinion leaders is decisive with regard to the ability of xenophobia to gain ground in the symbolic sphere and in politics. The final outcome of this struggle remains open. However, we may be quite sure that three frequently applied strategies do not result in the desired effect, that is, the political marginalization of the extreme right. The first one is the simple and repetitive recalling of the nightmare of traditional Fascism and associating it with today's extreme right-wing. This, alone, unfortunately no longer has the restraining effect upon young people that it had in the post-War decades. Secondly, we shall not reach the desired result as long as the political and public spheres are unwilling to acknowledge the real anxieties of certain sections of society - anxieties that stem from problems specifically targeted by the extreme right-wing, such as the consequences of European integration, migration, the refugee issue, and the integration of immigrants. Finally, it is quite counterproductive for the political mainstream reacting to people's anxieties to silently realise some of the far right's demands without actually voicing their xenophobic slogans, for example in the field of legislation restricting immigration, the numbers of refugees, or the rights of citizenship. Of course, in certain political or economic situations, restrictive measures may have to be taken, for example when drawing a line between economic and political refugees. But democratic governments that consider such measures to be necessary must

clearly and openly demonstrate to everyone the reasons and purpose of their actions, and how their actions are in keeping with their democratic principles and differ from the demands made by the extreme right-wing. If they fail to do so, rather than taking the wind out of the extreme right-wing's sails, they will effectively legitimise its rhetoric.

Finally, I should like to say a few words about the special problems of the region I come from. I do not believe that the causes of the national and ethnic hatred in the Eastern European countries - with all its dramatic consequences in recent years - will correspond to the causes of the 'chauvinism of affluence' of the West.

What we have experienced in Eastern Europe since 1989 is the consequence both of the collapse of the post-War system in Europe and of the enormous changes that have shaken each of the former Communist societies. In the years following the fall of the Berlin Wall, one after another the States formed by the peace treaties concluding the two World Wars disintegrated or were transformed: the two Germanys, Czechoslovakia, Yugoslavia, the Soviet Union all disappeared and new or old-new States emerged. In a situation characterised by a lack of identity - because Communist ideology considered particular identities to be uncontrollable and subversive - a whole series of nations and ethnic groups had to face the task of finding anew or reformulating their identities. The rebirth of nationalism is one of the consequences of this quest.

Moreover, the demise of Communism in itself posed difficult tasks for members of Eastern European societies. People's acquired social status was violently

shaken, the economic and social transformation affected drastically the social mobility of certain groups, the old social norms and regulations lost their validity, and the consequences of one's actions in society - which had once been so calculable - often became quite unpredictable. Large groups of people had to find their place in the new Capitalist system, while adapting to unknown rules and adopting new life-strategies. Many people were rather unsuccessful, and in some the loss of orientation provoked feelings of anomie, which were then expressed in the form of xenophobic and often anti-Semitic prejudice.

We must also recognise that the consequences of the demise of Communism have not been uniform in the former Communist countries. While in south-eastern Europe (the Balkans) the past decade has seen a number of bloody and seemingly irresolvable conflicts, in other part of the region - Poland, the Czech Republic, Slovenia, Hungary, the Baltic States, and even in Slovakia - recent developments have given rise to cautious optimism. Taking into account the profound nature of the transformation, as well as the trauma resulting from these changes, one may regard it as a favourable development that the openly Fascist groups in these countries have been pushed to the margins of the political arena, and that in the Czech Republic, Poland and Hungary the extreme right-wing - enjoying the support of five to nine percent of voters - has remained far from the centres of power, and has struggled to enter parliament.

But our optimism should be tempered by a certain amount of caution. That things have developed in this way is not because these countries have already

undergone profound historical self-examinations. We know from the German example that facing the past in order to produce enough antidote to counteract the historical poison of xenophobia, ethnic hatred, and anti-Semitism needs a great amount of time and huge conscious efforts. This task must be faced by politicians, intellectuals, schools, and the institutions of civil society. One reason, however, for a degree of moderate optimism is that most of the citizens in these States accept that the only way of defending the liberty established after the demise of Communism (and of achieving economic prosperity) is for the former Communist countries of Central and Eastern Europe to become part of the Western world as soon as possible, both institutionally and at the level of civil society. People are also quite aware that the path of nationalism, ethno-politics, racism and anti-Semitism will not take them towards the West. All this reminds us that economic arguments, foreign policy and strategic considerations are not the only ones indicating that the post-Communist countries should be integrated into the European institutions as quickly as possible. We also have to understand that the room for manoeuvre of the extreme right in the post-Communist system will diminish or increase with the speed of European integration of the new European democracies.

“The Founding Cry of the Council of Europe is: Never Again!”

Isil Gachet

The very existence of our European Commission against Racism and Intolerance, which is commonly known by its acronym ECRI, and which has, over the last 5 years, become the central point of this House of the Council of Europe, in the struggle against racism, xenophobia, anti-Semitism, and intolerance, is the start of a response to the question of the inevitability of xenophobia and racism. If ECRI has been created, it is because these phenomena exist. There is racism, xenophobia, anti-Semitism, and intolerance on our continent. But if it has been created, it is also because in Europe there exists the desire to fight these phenomena.

Thus, the response is: No, it is not an inevitability, since when something is inevitable, we shrug our shoulders and say, there is nothing we can do about it, it is like this and no other way. No, this is not an inevitability. We can fight. We wanted, at the European political level, to create the means, through certain instruments, to fight these phenomena.

Ms. Isil Gachet is head of the Secretariat of ECRI (European Commission against Racism and Intolerance). The above is a translation of her address.

Here, at the Council of Europe, there are two very important points that require highlighting: in our vision of the struggle against racism, xenophobia, anti-Semitism, and intolerance in Europe, the struggle must be firmly anchored in the domain of the protection of human rights. For us, this is not only an issue from the perspective of education or a social issue; it is an issue that is linked to the protection of international rights and the protection of human rights. The struggle against racism is an integral part of the domain of the protection of the fundamental rights of every human being.

The second important point regarding the Council of Europe, is that the struggle against racism, xenophobia, anti-Semitism, and intolerance, is a struggle that should be undertaken on a pan-European scale. These are not phenomena that are confined by borders. The struggle against racism concerns our entire continent. If we want to be effective in this struggle, we must lead a concentrated action at the widest possible European level.

It should be understood that the great effort made against racism is fairly recent. In fact, our commission has only existed for 5 years, although the Council

of Europe, in its totality, as an organization, was founded entirely to fight racism and intolerance.

The historical and political roots of this organization go back to the Second World War and the struggle against Nazism, Fascism, and totalitarianism. During the darkness of the Second World War, for those who fought for the creation of a new European order, it is always good to recall chronologically that the European construction was above all a great humanist project. It did not deal with the era of economic union, one wanted to build Europe around certain principles: the principles of pluralist democracy, the state of rights, and the protection of human rights. The first European organization, the Council of Europe was founded to be the incarnation and guardian of these principles. The founding cry of this organization is: “Never again!”

The entire Council of Europe was constructed to combat racism. Today, the fight against racism follows a political will which was demonstrated during the first summit of the Heads of State and Governments in 1993, when certain very important decisions regarding the future of our organization were made and added to the declaration of Vienna.

Following the widening scope of the Organization, we wanted to see how to reinforce its effectiveness, to see what measures to take upon the fall of the Berlin Wall, and make the convention’s protection mechanisms effective. At Vienna we decided to institute this unique and permanent court. This was followed by the protection of national minorities through the framework convention for the protection of national minorities, which has become effective.

Finally, a plan of action for the struggle against racism, xenophobia, anti-Semitism, and intolerance, was the start of an essential project at the core of the Organization.

Why did we want to adopt such a plan of action?

The declaration was made in 1993, but the negotiations and the preparation for the decision took place in 1992. At that time, there was war in ex-Yugoslavia, Croatia, and the start of the conflict in Bosnia-Herzegovina. It was the return of the monstrous concept of "ethnic cleansing". But somewhat closer to us, in certain old Member States, were the events that struck at the heart of public opinion. These were Rostock, these were Solingen, and these were the fires in the homes of immigrants, where it was discovered that, in Europe, people are still capable of burning others because they are immigrants.

All this was sealed by a European desire to put into place new thoughts and new means of action in the struggle against racism and intolerance.

The plan of action adopted at Vienna was accompanied by a declaration that did not use officialese, which condemned and rejected these phenomena, but at the same time stated that practical, very concrete action was needed against these phenomena. We needed to adopt a plan of action close to the ground and try to formulate measures that would, above all, target effectiveness.

The plan of action gave birth to ECRI, a commission composed of independent members, each named by Member States of the Council of Europe, a multi-disciplinary commission which would pursue the struggle against racism and

intolerance from the perspective of human rights protection and through a pan-European approach.

Behind the work methods of ECRI there is a participative philosophy. It is a commission where all the members named by the Member States must participate in all the commission's projects. It is not an issue of instituting a bureaucracy in Strasbourg or an administration that tells Member States what to do. It is closest to the reality of Member States that we think together about the problems and the means to solve them.

It is also a philosophy that places the 41 Member States on an equal footing. The projects of ECRI address all the Member States. This is not about differentiating or saying that there is a greater problem of racism here or there. These are phenomena that exist throughout the Member States. Today, no country can claim to be racism-free.

ECRI's activity program is three-faceted:

- * A country by country approach, an analysis of the problems in each of the Member States, a creation of specific recommendations for each Member State.
- * Projects dealing with certain general, universal themes which may be useful to all the States.
- * A strong component concerning relations with civil society, as it is evident that the impact of all actions used in the struggle against racism depend on the impact which you have on civil society as a whole. It is also through information and communication that we can make a difference.

I would like to indicate some of the main tendencies, today in Europe, with

which ECRI is confronted and by reason of which we deem it necessary to emphasize the struggle against racism. Our country by country approach allows us to cover all situations. We have an almost photographic vision of the state of affairs of European locations.

What is the nature of these phenomena today in our continent?

According to the analyses of ECRI, it is evident that the most salient feature of the state of affairs concerns the persistence of daily discrimination at different levels. Whether it is at work, with regard to access to housing, services, sometimes citizenship, the persistence of discrimination is a trait that is evident.

In some of our Member States, anti-discriminatory measures are certainly still absent. But, in fact, according to the analyses of ECRI, the problem in Europe is not the absence of texts, since many Member States possess legislation targeting discrimination. The problem is the absence of enforcement of the law: an unsatisfactory application of existing measures, a great gap between the law and practical use.

Another point is the continued hostility in Member States toward immigrants, applicants for asylum, and refugees; a hostility often expressed in the media, but also taken up by politicians in charge, a hostility reflected in restrictive legislation and measures which do not always guarantee respect for human rights.

The political parties generally encourage the adoption of restrictive measures - and I speak of democratic political parties - probably out of fear of losing the electoral support of segments

of the population that would likely be hostile to foreigners. Unfortunately, our opinion leaders are increasingly distancing themselves from the concept of society based on principles of justice and solidarity.

Another important point for ECRI in terms of the European state of affairs is ethnic violence. Ethnic violence has always existed in our continent, as has incitement to hatred and the proliferation of extremist right-wing groups.

We still report the incessant presence of racism and prejudice in public institutions. We can refer to racism in the functioning of our institutions, even at the heart of the judicial system, in the police, sometimes in the schools. The problem that our British colleagues call institutionalized racism. Institutionalized racism is a great challenge for us.

In addition to this institutionalized racism, there is a sensitive increase in Europe of complaints with regard to the attitudes and racist behaviour on the part of the police and border guards, the police and general peacekeeping agents, this is a related issue which causes concern.

A very disturbing phenomenon that absolutely must be dealt with, and ECRI has done this, is the use of new communication technologies, notably the Internet, to spread racist messages.

We can still observe the increase of religious intolerance. Another important point for ECRI and on which projects will soon be initiated, is the struggle against prejudice directed against Muslim communities. There is a certain type of Islamophobia which is in the process of development and which must be monitored.

Finally, a vulnerable group which has

continually, throughout history and still today, been the target of sometimes violent demonstrations of racism, is the Gypsies in Europe. The Gypsies are confronted with lasting racism.

A final word on anti-Semitism, since anti-Semitism persists in our Member States: it is demonstrated sometimes through acts of violence directed against members of Jewish communities, but also through the serious problem of the diffusion of anti-Semitic material and the propagation of anti-Semitic ideas.

The picture is disturbing, but as we have said from the start, it is not an inevitability. I just wanted to show the points that were highlighted by our analyses because, when we want to fight something, we must analyze, and the more we analyze, the more we discover other problems.

Against these problems, concrete solutions exist. But, in my opinion, the most important sign is political willpower to recognize that the problem exists, notably at the European level, because

once the existence of the problem is recognized, part of the solution has been accomplished. This willpower is here at the political level, whether at the level of the Council of Europe or the European Union.

In conclusion, not only within our fight against racism, but also in other sectors of the defence of human rights, we, in this House, know that working at the international and European level is important. But we fight racism better at a local and national level, since often through actions close to the problem we can be most effective. Directives to be enforced should not come only from the European level, they must also come from local and national levels. If, at those levels, measures are not adopted by citizens, local authorities, and concerned governments, it will be very unlikely that they will be implemented.

I believe that this political willpower at the European level must also be reflected in national politics so that the action combatting racism may prove fruitful. ■

Association Applauds the Stand of the Paris Bar Association

The Association wishes to express its appreciation to the President of the Paris Bar Association, Francis Teitgen, for sending his Special Representative Madame Elisabeth Moiron-Braud (right) to our Conference in Strasbourg. The Association also applauds his decision to absent himself from the Conference of Bar Association Presidents held in Vienna, in protest at the entry of Haider's Free Party to the governing coalition in Austria.



Does xenophobia lead to anti-Semitism and *vice versa*? Is this interdependence inevitable? Or is the existence of these two phenomena, or perhaps of one or another of the phenomena, independent of each other, inevitable?

I would like to consider some of the events through which Switzerland has lived and continues to live, and try, from them, to draw one or two conclusions.

Beginning in 1995, the behaviour of Switzerland and the Swiss during the Second World War has become the subject of virulent attacks. So much so that the Parliament and government have decided to shed more light on this tragic period and have given an independent international commission (of which I have been a part), this responsibility and this task.

After a first report on the gold trade that was published in May 1998, the commission has just published a voluminous report on the policy regarding refugees. An interesting report, it states, *inter alia*, that the Swiss accepted, in round numbers, during the War, 51,000 civilian refugees, of whom 21,000 were Jews. But it mentions that Switzerland closed its borders for rather long periods beginning in 1938 and during the summer of 1942. It thus forbade access to its territory to more than 24,000 people, of whom a great part were Jews who tried desperately to escape Hitler's henchmen, while the authorities of the country knew, beginning in the summer

Professor Joseph Voyame is the First Deputy President of ECRI. The above is a translation of his address.

“Anti-Semitism and Xenophobia are Born in the Same Heads”

Joseph Voyame

of 1942, of the fate which awaited those people who could not find asylum from the Nazi campaign.

This rigorous policy has been explained on diverse grounds. It has been said that since Switzerland is completely surrounded by Germany and Italy, it depended on these countries to guarantee its supplies. The country could not accept tens of thousands of additional mouths to feed. As they said: the boat was full. In addition, attentive to Hitler's moods, the authorities were careful to irritate him as little as possible.

However, in the motives that appear in more than a few documents of the period, what is said? You can also read that it was necessary to prevent the Jewification of the country, a sort of official anti-Semitism that was hardly ever expressed publicly. But indeed, this anti-Semitism was much more diffuse amongst the populace, which generally paid no attention, until 1945, either to the Nazi crimes in all their seriousness or to the tragic scenes which were going on at the borders.

Today, this anti-Semitism, especially in official circles, has vanished. One can mention a recent resurgence of popular anti-Semitism, but it is an anti-Semitism of reaction; it is an anti-Semitism with which the population reacted and reacted justly against sometimes excessive

attacks, it must be said, of which Switzerland has been the object in recent years. It is a type of anti-Semitism which is not racist, but political, revived only by the events that one may hope are transient and which will, without a doubt, disappear with them.

But if anti-Semitism hardly appears formidable today in Switzerland, it has been replaced, as in many other European countries, by an intolerance and xenophobia, which generally refuses to utter its name.

Intolerance that targets, for example, Muslims. Xenophobia which is directed, notably and especially, against applicants for asylum, against refugees, no matter what their origin. A very widespread phenomenon, it is stunning, for example, to observe that if measures which are restrictive with regard to asylum seekers, are proposed, they are regularly accepted in popular referendums, which are numerous in Switzerland, and often accepted by great majorities. By the same token, when it is proposed to accord political rights to foreigners, these measures are generally refused.

It is this widespread demonstration of strong xenophobia that is particularly disturbing. We hear the same arguments that were heard during the Second World War: “Asylum seekers” it is true that they are numerous, up to 50,000 per year

- it is said, "will, if they are welcomed too openly, corrupt the identity of the country or even ruin it".

Thus, even though the conditions are completely different, since, of course, there can never be the same conditions, one can hear some similarities between the arguments against the admission of the Jews during the War and the arguments against admission of today's asylum seekers. There is a point where certain people even ask the question: "Just as we bitterly regret the conduct of our authorities during the war 60 years ago, will our descendants regret the conduct which we demonstrate currently?"

What is the relationship between the anti-Semitism of those days and the xenophobia of today?

One can envision a cause and effect relationship between the two phenomena, either being, according to circumstances, the cause or the effect. I must say, however, that I do not see things this way.

The fact is, most simply and most banally, that these phenomena are born and develop in the same heads: amongst those who overcautiously want to preserve their world the way it is, who want jealously to preserve their well-being and even their prosperity, who selfishly refuse to risk the smallest bit of their possessions to come to the aid of other human beings whose belongings, corporal or moral integrity, or even whose lives are threatened. I am not speaking of the envious, since these exist as well, nor am I speaking of the violent people who are always happy to persecute those weaker than themselves.

Is that inevitable, a phenomenon inherent in human nature and against which it is fruitless to struggle?

If we are here together, then we have been persuaded to the contrary.

We are sometimes witnesses to so much devotion, so much courage, so much generosity, and so many heroic acts that we cannot believe that human beings will always, deep down, be animals.

But, of course, this conviction is not enough. We must also fight for it, fight to be able to share it, fight to prevent anti-Semites and xenophobes from spreading their ideas, from seducing spirits, from persecuting other human beings with impunity simply because they are different from themselves.

This struggle is led by admirable, non-governmental organizations, by national bodies and by the committees of the United Nations, and since we are today in the House of the Council of Europe, I must also mention ECRI once more.

I would not like to end without also referring to the European Monitoring Center against Racism and Xenophobia, an organization which goes far beyond the scope of its name as it is more than just a monitoring center, it also has the mission of combating the phenomena which it has been asked to observe. I also wish to pay homage to its founder and current President, Jean Kahn.



The Council of Europe hosts the Association at its headquarters in Strasbourg

“It is Absolutely Necessary for Political Leaders to Feel Free to Oppose Most Extreme Forms of Populism”

Michael Head

I am a non-jurist. I am just an administrator. But this, it seems to me, also gives me the advantage of a perspective on the practical problems with which ECRI is confronted in certain countries where this committee has worked.

During the first two years of ECRI's projects, it was possible to maintain that the demonstrations of anti-Semitism as such tended to be absorbed by the general xenophobic tendencies. It is the act of targeting certain scapegoats, certain minorities as objects of blame for the socio-economic difficulties with which we have been faced in the 1990's, notably in Central and Eastern Europe.

To a certain degree, this remains true. If one looks at Europe today, one must say that there are still problems such as those amongst the Gypsies in Slovakia or the Albanians in Greece, the North Africans in France, the Russians in certain Baltic States, *etc.* Thus, one can list the manifestations of anti-Semitism in the global context.

Mr. Michael Head is the Second Vice-President of ECRI.

However, and this is very important, we have also noticed very disturbing signs in the last few years of a resurgence of anti-Semitism. Maybe not in terms of numbers of violent incidents or disruptions, since we can maintain that these incidents are relatively marginal and originate in extreme right-wing parties, but the existence of these parties and the fact that these parties play a perhaps more active role today than previously, constitutes an extremely disturbing factor and also something that ECRI must take into consideration.

By way of illustrating problems that we have found, I would like to refer to two very different cases: the case of Russia and the case of Poland.

It is fair to say that ECRI's report of Russia, which has been published, enters into greater detail than a great number of others regarding the problems of anti-Semitism in that country for the simple reason that there are perhaps more of these types of problems than in other countries.

ECRI has stated, in fact, that Russia has one of the largest Jewish populations in the world. The committee has also noticed a reemergence of Russia's Jewish communities since the start of the 1990's, but the committee has also



noticed that there are signs of discriminatory practice against Jews.

Anti-Semitic feelings were tolerated for centuries, under Tsarist and Communist rule. Today, unfortunately, it constitutes the basis of extreme nationalist rhetoric. The advent of elections in Russia may also be disturbing in this regard. Somewhat ironically, the very desirable liberalization of opinions in Russia has opened the way to more widespread publication of anti-Semitic newspapers, tracts, and works. There have also been a substantially greater number of incidents of vandalism in Jewish cemeteries, bombs in synagogues, *etc.* The Russian authorities, on certain occasions, have condemned certain incidents, however, there are very few

proceedings against authors belonging to extremist groups. Those that have been the object of investigations have always been pursued at the federal or local level.

Consequently, ECRI claims that it is a problem that absolutely must be considered by Russian federal authorities. ECRI does not think that this will only stir up judicial problems. Constitutional provisions, for example, in Russia, constitute a good basis and a justification for action. What that country needs is implementation and enforcement of the law at all levels. This is a common theme which we have found in a great number of countries and which can only be answered with very clear political willpower.

The real problem is knowing how, in a given country, the necessary degree of political willpower may be mustered to be able to correct the prevailing culture.

The case of Poland is completely different. For very painful historical reasons, the Jewish population in Poland has been greatly reduced. But we are confronted with the extraordinary phenomenon of anti-Semitic sentiment in the absence of Jews. This remains a very sensitive problem in Poland. Today, there are still demonstrations of anti-Semitism in political life; anti-Semitic sentiments are expressed in public. And although there may be less violence, the extreme rhetoric, in our experience, remains.

Thus, once again, we are confronted with a situation where it is absolutely necessary for political leaders to prove their goodwill. The problem is knowing how to stimulate this political willpower and how to guarantee an improvement or change mentalities during our lifetimes.

These are two very different cases

which present distinct problems, but which allow us to draw certain general conclusions.

At the heart of ECRI, we will look into these countries in the near future. ECRI must visit Russia to prepare one of its country by country reports. Poland was the object of one such visit. We hope to be able to prepare a published report in the second half of the year 2000, for one and for the other.

Several common themes emerge from our research and investigations in the different countries. At this stage, I think that it would be more interesting to speak in a more general sense:

One of the most important themes is the link between incidents of racist demonstrations, notably anti-Semitism, and the relative absence in a given country of sufficient and adequate political and judicial systems.

ECRI has noted the importance of municipal administrative levels and their capacity to influence national politics. In certain countries, it is very clear that the aspirations of governments and the aspirations of national constitutions, have been hindered by local administrations that have adopted a totally distinct approach to given politics.

Likewise, the absence in certain countries of a strong judicial body, completely independent from the executive and legislative bodies, and capable of offering channels of effective recourse, also impacts on the capacity of individual minorities to obtain some protection against deliberate harassment. In certain countries, there are also certain absences or defects in civil or administrative rights.

Yet I am not referring to declarations in constitutions. Sometimes, in constitu-

tions, there are great declarations proclaiming equality of men. It is precisely the opposite case when you examine certain specific laws or the absence of certain laws; the absence, for example, of measures combating the incitement of racial or religious hatred, the absence notably of any legislation that obliges public prosecutors to pay particular attention to racially motivated incidents. Only by making these observations does one see that, in a great number of countries, the legislation has not been sufficiently developed.

A very important question is knowing how to encourage the creation of such institutions and promote the development of adequate legislation.

We have also found a lack of experience in certain countries in facing the obligations and needs of different international judicial instruments, such as the European Convention of Human Rights, and the UN Convention for the Elimination of all Forms of Discrimination.

Something to which I attach much importance is that we have observed the lack of development of institutions which specialize in these human rights questions, which are completely independent *vis-à-vis* governments, and which can play a role in promoting the defence of human rights and play a role in assuring that individuals obtain means for recourse. These are institutions that range, for example, from different types of arbitrators to independent commissions such as the Commission for Racial Equality in the United Kingdom. This concerns all types of institutions. But they all share a common ground: they exist to encourage governments, sometimes to shame them, and also to complete the work effected by non-

governmental organizations in these countries, in other words to constitute the developmental base of a civil society. Perhaps not at all surprising, this constitutes another characteristic of the transitory democracies of the countries of Central and Eastern Europe. These characteristics are very often found there.

But this does not mean that this does not affect other countries and that the other countries, for example, Western countries, have nothing to learn.

ECRI has stressed the identification of gaps and defects. It is certainly true that my own country, the United Kingdom, also has gaps, defects in the system that should absolutely be corrected. But in terms of judicial gaps, weakness of civil society, and the absence of a body at the intermediary level of administration, perhaps we pay particular attention to the countries of Central and Eastern Europe.

In terms of solutions at the political level, the role played by the Council of

Europe, notably in the context of the Convention on Human Rights, takes on particular importance. Of course, to become a member of the Council of Europe, an applicant must sign and ratify the Convention. The Parliamentary Assembly of the Council of Europe is particularly important. It plays a role as the institution that ensures respect for the conventions.

There is discussion taking place today regarding the Convention on Discrimination, and this would also influence the legislation of the independent States.

There is also the question with regard to the influence of the expansion of the European Union and the consequences for the other States. But it is rather in terms of the improvement of infrastructures that ECRI has the ability to provide a valuable contribution, not only because of its detailed recommendations, its codes of conduct or the code of ethics that it has developed, but also because of

its encouragement of the emergence of Human Rights institutions, notably in the context of the pact of stability and where there would be good reason for carrying out exchanges of experiences and good practices between the States to reinforce the institutions which already exist, and create them where they do not.

All this is absolutely necessary for us to be able to create a culture where the political leaders would feel freer to oppose the most extreme forms of populism, which are, unfortunately, now integrated in the political rhetoric of certain countries.

It is precisely due to this need for political willpower that the leaders of certain countries can be influenced by the projects of such organizations as ours. It is at this level that ECRI will be able to provide a contribution.



Panelists discussing xenophobia, racism and anti-Semitism at the Strasbourg Conference, Council of Europe headquarters

“Do not Forget that You Were a Stranger in Egypt”

Jean Kahn

I read the theme of the discussion as: “anti-Semitic xenophobia and the reverse”.

Does this mean that xenophobia is related to anti-Semitism? I say yes, because, for centuries, we have been victims of persecution. It is because we were different. We were specific. We wanted to live according to our customs. We were considered as if we were foreigners, as if we had come from another place. We did not eat the same way. We had other religious traditions, *etc.*

I’ll say it: xenophobia leads to anti-Semitism. I am convinced of this. But remembering that, in several places in the *Torah* it reads “do not forget that you were a stranger in Egypt,” we must uphold a vigilant watch regarding all the attacks against victims who come from elsewhere, not only because xenophobia may be transformed into anti-Semitism, but also because we have a task which is dictated by our texts, our values, which is to be a light amongst nations as far as this is concerned and to pay attention whenever any sort of injustice occurs.

Mr. Jean Kahn is the President of the European Monitoring Center against Xenophobia and Racism in Vienna.



It is sometimes said: we are the night watchmen. Perhaps because we have long experience of persecution, we should react every time an injustice is committed. This is why a drama lived by certain immigrants in France or elsewhere does not leave us indifferent. We react each time.

Every time I am able to obtain documentation for someone called “undocumented” in France, I am happy because I value serving the cause which is ours, responding to the goal which is ours.

I am not going to wax philosophical; I am here as the President of the Monitoring Center located in Vienna. Vienna is a stroke of luck, perhaps a

happy stroke of luck, since Austria was the only country of the European Union that did not have a European institution. Vienna was chosen even though there were other candidate cities. It is an institution created by the European Union, and I shall very briefly explain its history.

In 1994, in Germany, an immigrant’s home would be set on fire every night, and one deplored the loss of human lives, people burned alive, in a country which had invented the persecution of Jews in 1942 at Wannsee.

I recall that I went to visit Chancellor Kohl on 3 May 1994, since Germany was to take on the presidency of the European Union; I said to him: “Don’t you think that you should take advantage of your presidency to institute within the European Union a body to survey ethics in Europe, so that the European Union is not only the Europe of merchants, the Europe of currency, the Europe of finances, not only the Europe of defence or politics if worst comes to worst”.

The next day, I went to see President François Mitterand and I spoke to him using the same language.

And as before every European summit, there is a French-German summit, it was decided at that French-German summit to create a consulting commission on racism and xenophobia in Brussels, of

which I was designated President. It lasted 3 years. Moreover, it advocated the creation of the Observatory of the European Union to denounce racist attacks of all sorts (anti-Semitic, xenophobic) in the 15 States of the European Union.

This Observatory comprises 15 members: one representative from each of the 15 States, who are not men of politics, but independent personalities. There, as well, I was elected President.

We have already accomplished a certain number of things. For example, we managed to see to it that, at the summit in Amsterdam, which goes back one and one-half years, Article 13 would be inserted to ban all forms of discrimination in the European Union.

We have also achieved, thanks to our Dutch colleague, a code of good conduct for the political parties in Europe. 70 political parties have already signed this charter which commits signatories not to use racist or xenophobic arguments in their electoral campaigns. I believe that this is a satisfying step forward.

We also obtained a common action in 1996. It is, in European jargon, something that allows the pursuit, in the territory of our State, of someone who has committed a racist or xenophobic act. Here, we especially targeted the manufacture of racist materials that have been manufactured in certain States of the European Union and which circulate freely, given that there are no more borders. Video games designed for children, who, by pressing on a button, may send 10,000 Gypsies to a concentration camp and, by pressing on another button, 20,000 Jews. We have tried to prevent the continued practice of such commerce.

There is still much to be done. There is

much discrimination. There is much discrimination that continues to be observed at the workplace. Know that, for example, here, in Alsace - you often read in the press employment notices which require knowledge of the Alsatian dialect. This is, of course, meant to eliminate those who come from sub-Saharan Africa or elsewhere.

There are still many disturbing areas in Europe and, in particular, in Austria where our Observatory is located. From time to time, where we have installed our offices, we have even had protests right in front of our windows by an association that is called Karl Luega. Karl Luega was a mayor during the Nazi era who was a great anti-Semite. He has collected a following. There is, today, another association that comes to threaten us or our employees and civil servants. Indeed, in Austria, we have recently observed the massive election of Mr. Haider and his group so that it has become the second most important party in Austria, and we shudder at the idea that, accomplishing an alliance with the Christian Democratic party, it could ascend to power.

What is the action that we have taken? A political action. We have addressed all responsible European Christian Democrats or at least conservatives to exert pressure on the head of the Austrian Christian Democratic party so that it does not ally itself with Haider.

In this way, I have personally convinced President Chirac, as well as ex-Chancellor Kohl to intervene, and also Ms. Nicole Fontaine who is President of the European Parliament and also a Christian Democrat. I do not know if this pressure will suffice, but the fact remains that all must be attempted to prevent these people from ascending to power.

Indeed, following this result of Mr. Haider in Austria, we have observed a considerable resurgence in outbreaks of anti-Semitic acts in Austria.

Lastly, I was greatly disturbed by the election in Switzerland of Mr. Blocher, whose party, I believe, has become one of the most powerful of the Swiss Confederation.

When I was questioned at Brussels, following a press conference where we presented the annual Observatory report, someone brought up Switzerland, and I dared to say that, for me, Haider equals Blocher. This caused much emotion. And I, myself, created a term, which apparently, has not been well accepted in Switzerland. I said: "Switzerland is a victim of Alpine racism." I was interviewed in the newspaper *Le Temps de Genève* where I was criticized. The young journalist who interviewed me said to me: "Don't forget that in Austria it is called racism; in Switzerland, it is called nationalism". I reacted as you would expect.

The same thing happened to me during a colloquium which took place near Vienna, on the banks of the Danube, in a magnificent region, where there were a certain number of State Ministers from Western and Eastern Europe. Speaking of the Czech Republic, I stated that, in certain cities, while we now celebrate the 10th anniversary of the fall of the Berlin Wall, walls are being built to separate the native Czechs from the Gypsies. The Czech Minister, who was there, stood up, saying: "This is not racism, it's a social measure". I told him: "You're making your case worse".

This is the struggle we face and which we will continue to face.

I was very disturbed when I received a

telephone call from a Swiss Senator, who told me: "Imagine that an extreme right-wing Senator has just introduced a call to boycott Jewish stores in Switzerland."

I asked him the question: "What can I do?" He told me: "Eventually, you could come with one of the members of your Observatory to hold a conference in the Senate meeting places themselves."

But, three days later, I was called and told: "No, don't come. The Swiss people would say that foreigners want to teach them how to live." Thus, we did not go there.

Now look at today's Switzerland!

I would like to remind us that, in effect, Switzerland did save people. But Switzerland hurled out: "The boat is full".

There was a customs agent who was courageous, who personally saved Jews by letting them into Swiss territory because he knew that if they did not enter, they would be thrown into the arms of Nazi forces and taken directly to Drancy and then to Auschwitz. A Swiss court at the time convicted this man. 55 years passed before he was pardoned, posthumously.

In 1936, before World War Two, many German Jews sought refuge in Switzerland. The Swiss, having seen the arrival of numerous German Jews, asked the Nazi authorities to add a Jewish stamp to the passports of Jews. The Germans, during Hitler's regime, agreed on condition that the Swiss would do the same with their Jewish nationals. The Swiss declared this impossible. But, finally, the Nazis did it nevertheless. Thus, the Jewish stamp is of Swiss origin.

In certain eastern countries, such as Romania and Hungary, there has been a

rebirth of Nazism. There, as well, we must fight the negation of the *Shoah*, assassinating for a second time the 6 million Jews who are dead. Romania and Hungary are two of the States best poised to soon enter the European Union, which, may grow soon from 15 to 25.

It is the role of the Observatory to make suggestions or remarks to the leaders of the States of the European Union, and I believe that it will be necessary to speak to them of this issue, at that time. As long as negativist anti-Semitism and racism reigns in these countries, it will be necessary to tell them to wait a bit longer to enter.

One of the latest things that we have accomplished is a letter to the Heads of State and governments of the 15 of the European Union saying to them: "Would you be so kind as to make use of the wishes that you send on television, on the radio, in the newspapers, for the New Year, the New Century, to say that this new year, this new century, must be a century for tolerance, for solidarity, and for creating an ethical Europe."

From the President of the Republic, Jacques Chirac, I received a letter saying: "Message received. You will hear me. I will keep your observations in mind." I was very happy to hear that seven other European States also saw their Heads of State make the same remarks during their messages of good wishes. Here, as well, there was perhaps a pious wish, but one that had to be expressed.

J. Shestack Elected as President of the American Section

The American Section has elected Mr. Jerome J. Shestack of Philadelphia, PA, as its new President. Mr. Shestack is the former President of the American Bar Association. The IAJLJ wishes him every success in his new position, (see p. 27).



Meir Gabay Re-elected

The Association congratulates Meir Gabay, Chairman of the Council of the Association, on being re-elected by the United Nations General Assembly to the position of Judge and First Vice President of the UN Administrative Tribunal. The Administrative Tribunal serves the United Nations itself as well as a number of other international organizations around the world.



Polish Branch Inaugurated

On February 1, 2000, in an historic event near the edge of the once large Warsaw ghetto, destroyed on April 19, 1943, and at a site only a few hundred meters away from Mila 18 bunker, and from the infamous Umschlag platz, our Association held the first meeting of the new Polish Section. Thirty-five people were in attendance as Israel's Ambassador, the acting US Ambassador and the President of the Poland National Bar Association addressed what is thought to be the first Jewish law association in Poland since before the Holocaust. The establishment of the Section was made possible by the efforts of Michael H. Traison of the international law firm Miller, Canfield, Paddock & Stone, Detroit, USA.



Justice **Pierre Drai** (top), former Premier President de la Cour de Cassation of France, and Mr. **Jean Kahn** (center), President of the European Monitoring Center against Xenophobia and Racism, were honoured at the Strasbourg Conference by IAJLJ's President Hadassa Ben-Itto and French Section President Joseph Roubache, for their life-long dedication to justice and peace. Renowned singer **Enrico Macias** (bottom) was honoured by the Council of Europe and its Secretary-General Walter Schwimmer for his dedicated efforts to promote better understanding among people of all religions and the welfare of children in need.

Translated reply of French President Jacques Chirac to a letter sent by Mr. Roubache, President of the French Section of the Association, regarding the menace posed by Haider's rise to power in Austria.

Presidency of the Republic

Paris, 7 March, 2000

Monsieur Joseph Roubache
President of the French Section, IAJLJ

Dear Mr. President,

The President of the Republic has received your letter of the 4th of February, in which you informed him of your concern due to the current political situation in Austria.

Mr. Jacques Chirac has asked me to thank you for the appreciation that you have shown for the positions that he has defended since the formation of the new government in Austria.

The President of the Republic believes that the entry into the government of one of the Member States of the European Union of a party having a xenophobic and extremist ideology, constitutes a serious event that cannot be underestimated.

It is in this spirit that he has proposed that the 15 partners of Austria in the Union take measures to express their condemnation.

By so doing, they signaled to Austria that Europe is first and foremost a community of values, which is built around principles of humanism, tolerance and respect for human dignity.

This condemnation does not intend to isolate Austria as such, or the Austrian people. It does not constitute interference, but reminds Austria that there exists a moral contract to which Austria adhered when it entered the Union, and which it is obliged to respect. For that reason, France rigorously applies the decisions taken by the 15 Member States and continues to maintain great vigilance.

Dear Chairman, please accept my distinguished sentiments.

Jacques Lapouge

Judaism and Fundamental Human Rights

Jerome J. Shestack

Just about a hundred years ago, a group of wise men gathered together to predict what the 20th century would be like.

They predicted a Century of Peace. How muddy was their crystal ball!

We suffered the two greatest wars in history and the scourge of Fascism and Communism. From a Jewish perspective during the 20th century, we shared in all the world's evils, to which were added our own suffering, pogroms, persistent persecution, and above all - seared in our

souls is the unspeakable horror of the Holocaust, the tragedy for which there is no metaphor, no redemption.

How vast were our rivers of blood and how endless our days of darkness. And yet, everlastingly hopeful, we took heart in decrees of emancipation; we danced on waves of immigration, and we sang at the birth of Israel.

Now, as we begin a new century, at its very advent, tyrannies still flourish, wars continue, the resolve of many of Israel's enemies to destroy it remains, and new repressions arise daily to test our faith in a just world. The still waters promised by the psalmist remain troubled and turbulent.

Yet, my theme is not a gloomy one; rather, the heartwarming theme is the international human rights movement - and in



particular, the Jewish relationship to human rights.

Strikingly, international human rights law did not exist in 1900. It did not really come about until after World War Two, when the enormous tragedy of the Holocaust led a shamed and horrified world to say "Never Again". As the new United Nations came into being, those words propelled the nations of the world to adopt the Universal Declaration of Human Rights. The Declaration became the foundation for a series of human rights treaties which now, at long last, form the substantive international law of

human rights.

Despite the Universal Declaration, for some 25 years after its birth, authoritarian and totalitarian regimes around the world continued to abuse their citizens.

Yet remarkably - perhaps even miraculously - in the last 30 years the yearnings, aspirations, and expectations of the peoples of the world for their human rights began to be realized. In Portugal, Spain, Argentina, Brazil, Chile, and Uruguay, in the Philippines and in Uganda, and in Chile dictators fell. Virtually all of Latin America progressed toward democracy. As the Berlin Wall crumbled, so did Communism give way to emerging democracies throughout Eastern Europe. Hope began to succeed despair.

The human rights revolution is far from over. In China, Miramar, Indonesia, Cambodia, the Mid-East, much of Africa, and too many other areas, human rights are still unfulfilled. Vivid in all of our minds are the horrible massacres in the Balkans.

Mr. Jerome J. Shestack is the newly-elected President of the American Section of the Association. He is the former President of the American Bar Association, and has been cited by the National Law Journal as one of the "100 most influential lawyers in the US".

Yet today, as the planes over Belgrad demonstrated, we do not tolerate the massive violations of human rights and genocide with the neglect and apathy that prevailed in the past. There is much to agonize our spirits; yet, much to uplift it. Human rights law is part of the law of nations and despite periodic regression, it is an article of faith among human rights believers that the realization of human rights is part of the moral inevitability of our times.

For Jews, there has never been doubt about Human Rights. Human Rights have always been part of our moral faith, even as we were victims and as realization of human rights seemed far beyond reach. For Jews, our commitment to human rights did not await the advent of this century, but is found in the warp and woof of our religion and in its most sacred traditions.

The words "Human Rights" do not appear in the Bible. But there is no doubt that human rights values permeate both the Bible and Rabbinic learning.

One might fancy that perhaps the very first human rights inquiry occurred when Adam ate the forbidden fruit in the Garden of Eden. God asked Adam what he had done. Surely, God knew the answer to his question. Yet, Adam was provided with elementary due process - that is, the accused was given the dignity of a hearing and the opportunity to defend.

Whether you regard this early beginning as firm or tenuous, authentic or apocryphal, as Judaism developed in Biblical precept and Rabbinic learning, human rights principles were the very essence of Jewish tradition and philosophy.

Let me identify four principles which are part of the fundamental values of Judaism and which are central to human rights.

The first fundamental principle, which provides the moral foundation of human rights is the inviolability of the individual, which is the very moral foundation of human rights.

In Judaism, the integrity of the person was sacred. The *Talmud* viewed the destruction of any soul as equal in tragedy and sinfulness to the destruction of the world.

A poignant anecdote illustrating this concept is found in the commentary in the Passover *Hagadah* about the drowning of the Egyptian hosts in the Sea of Reeds. When the drowning took place, the angels in Heaven began to sing praises to the Lord. But the Lord rebuked them saying, "My children are drowned, and you would sing!"

A modern parallel occurred when Israeli forces captured the Sinai during the Six Days War. A cable was drafted to be sent to the Prime Minister with the news of the victory. The cable

concluded with the word "Hallelujah". General Itzhak Rabin took out that word, saying: "Many people have been killed here today. We should not say "Hallelujah".

Implicit in Judaism's emphasis on the value of the individual is the concept that the eminent dignity of human personality does not depend upon mathematical majorities. The will of many souls does not give them the right to violate the dignity of any one soul. It is striking that the concept that recognition of the value of individual human worth and dignity is the essential goal toward which democratic thinking must strive.

The second concept in Jewish tradition is that of the equality of human beings.

Ben Azzai, a *Talmudic* sage, asked, "what is the most important verse in the Bible?". And the answer was, the verse from the Book of Genesis that says, "Man was created in the Divine image". That verse establishes for Jews the fundamental relationship between one person and another. All were created in the image of God. Therefore, all are entitled to equal treatment.

Surely, one of the sources of moral failure even among democratic governments has been their failure to extend equality to all persons, no matter their colour, race or creed. Such a failure indicates an ethical confusion which never existed in the Jewish religion.

It is telling that the *Torah* and the *Talmud* do not refer to a "good Jew", but to a "good man". In the Book of Proverbs, there is no mention of Israel, but Man is mentioned 13 times and Wisdom and Understanding and Knowledge are mentioned many more times.

The prophet Micah succinctly expressed the universalist view when he said, "Have we not all one father? Hath not one God created us?"

These are not merely enchanting homilies. They represent the very well springs of our Jewish tradition.

The third concept is that of reverence for the Rule of Law.

No nation in history, I am sure, has equaled the Jewish people in their reverence for the law. Wherever the Jews went, the law went with them. What other people in history has continued to preserve its law even though it lost its political independence, was dispersed across the face of the earth, and was persecuted constantly for belief in its laws?

English history boasts of the confrontation between Lord Coke and James I, when Coke declared that the King must be under God and the Law. This was a startling new concept in that age. But the Rabbis had taught this long before. The *Talmud* tells

us that no one can be above the Law - whether he wear the crown of *Torah*, or the priestly crown, or the royal crown. Indeed, even God himself was considered bound by the Law.

The concept of the Law's supremacy, is beautifully illustrated in a *Talmudic* allegory of the oven of Atendi. A dispute arose among the *Talmudic* sages [the *Tannaim*; circa 220 A.D.] on a rather dry legal question regarding the ritual purity of a particular oven. Rabbi Eliezer was of the opinion that the oven was pure, whereas the other sages held that the oven was unclean.

Having exhausted his legal arguments, Rabbi Eliezer sought other ways to convince the majority and he said to them:

"If the Law agrees with me, let this carab tree prove it". Therefore, the tree was torn a 100 cubits out of its place. But the Rabbis retorted: "No proof can be brought from a carab tree".

Again, Rabbi Eliezer said, "If the Law agrees with me, let the stream of water prove it". Whereupon the stream of water flowed backwards. But the Rabbis rejoined: "No proof can be brought from a stream of water".

Finally, Rabbi Eliezer said: "If the Law agrees with me, let it be proved from Heaven!"

And a Heavenly Voice cried out, "Why do ye dispute with Rabbi Eliezer, seeing that in all matters the Law (*Halachah*) agrees with him".

But Rabbi Joshua arose and exclaimed, "The Law is not in Heaven - since the Law had already been given at Mt. Sinai we pay no attention to a Heavenly Voice, because Thou hast long since written in the Law, one must follow the majority."

And the *Talmud* goes on to say that Rabbi Natan, met Elijah and asked him what the Holy One, did when he heard that response. And Elijah replied: He laughed with joy saying, "My sons have defeated me, my sons have defeated me".

What a remarkable allegory to express the supremacy of the Rule of Law even over the Law giver himself.

Our Jewish tradition recognized that there can be no freedom in the absence of a rule of law which governs all and which restricts ruler and citizen alike. "When Law came into the world", the *Talmud* says, "freedom came into the world". Yet, until that lesson has been learned there can be no basis for either domestic or world order.

The fourth major contribution of our tradition is the passion for justice. What are human rights, but a recital of what is just. But we know that these rights are never realized without passionate advocates to secure them.

For Jews, that passion for justice is an axiom of our tradition.

"Justice, justice, shalt thou pursue", the Bible tells us, and that pursuit has been a driving force in Judaism ever since.

As Professor Edmond Cahn has observed, what is the Bible "but a living library of social and individual justice, a set of ordinances to teach man how to pursue justice, a set of court reports to record when justice prevailed and when it lapsed and succumbed? Where in the literature of any people can one match the savage anger of the Jewish prophets in the face of injustice their noble hatred of oppression, their divine compassion for the oppressed?"

In Judaism, an injustice is to be condemned, no matter who commits it.

Abraham confronted even God and insisted that it was unjust to destroy the righteous individuals of Sodom and Gomorrah along with the wicked.

Abraham was brave in challenging God - who is All Merciful. But the prophets were braver still - since they challenged kings whose mercy was less likely. When King David unjustly violated the rights of one of his citizens by sending him off to war because David coveted the man's wife, the prophet Nathan accused him saying, "Thou art the man".

And when King Ahab unjustly seized the vineyards of Naboth, the prophet Elijah confronted the King, not just with quiet diplomacy but by speaking out openly against injustice.

Isaiah, even on the Day of Atonement, called out against "ye that grind down the faces of the poor". So too, did Jeremiah, Ezekiel, Amos, and Micah castigate injustice wrought by the powerful.

Indeed, where in the literature of any people can one match the ominous warnings of the Jewish prophets in the face of injustice and oppression, their calls for human equality, and their constant compassion for the oppressed?

It is heartwarming to say that these values of which I speak are not just the values of an ancient history. Indeed, we can boast that the basic values of our Jewish ideology have become part of the humanism of our Western world.

Jewish groups and individuals formed the vanguard of European liberalism. The emancipation of the Jews of Western Europe was related not only to their own interests but to the creation of a social order in which all citizens, including linguistic and ethnic minorities, would have equal rights. Indeed, the Zionist movement itself was a pioneering effort to assert human rights and self-determination for an oppressed minority.

It is no accident that in the fight for human rights in the

modern era, the descendants of the prophets have continued to play a prominent role. And not only in their own causes.

Surely, the dramatic gains in civil rights and civil liberties during the past 50 years have benefitted greatly from Jewish organizations and Jewish advocates, who brought the test cases, and fought them to victory and to acceptance. We all recall the many Jewish young men and women who went to our Southern States in the 1960s to fight for civil rights - some of them died there.

To be sure, the record is not unblemished. There have been times when Jews have served parochial interests in conflict with universal human rights values, or when local concerns removed us from the fray. Fortunately, these diversions have not been frequent and never lasting.

On balance, as we review this century's saga, it is a fair statement that in every significant movement of human rights, civil rights and civil liberties around the world, Jewish names are prominent. The passion for justice which moved our forefathers remains a proud inheritance for their children.

Jewish lawyers have been notably significant in human rights - in fighting religious intolerance, in efforts on behalf of Soviet Jews, in leadership in NGOs, in defending Sakarov, Timmerman, Mandela, Sharansky, and other dissidents. Behind the Universal Declaration stood a Jewish lawyer, René Cassin. Behind the Genocide Convention stood Rudolph Lemkin. Behind the International Bill of Rights stood Herschal Lauterpacht.

And in current times, Justice Aaron Barak, Justice Tom Buergethal, Judge Rosie Abella and Louis Sohn, Theodore Meron, Louis Henkin, Yoram Dinstein, and Irwin Cotler are all

magnificent in their advocacy, their teaching, and their devotion to human rights. And there are others.

Finally, what does this all mean for each of us as individuals today? Jewish tradition has always sought to instill a sense of awesome individual responsibility for each person to contribute to the sum of good and evil in the world. The *Mishna* put it succinctly and lyrically - because everyone was created with the stamp of the first human and in the Divine image, everyone must say, "For my sake was the world created". Jewish tradition and experience do not allow us to remain uninvolved in the pain and distress of our generation and in the pursuit for justice and human dignity. Moses himself was heralded by our Rabbis as one who searched out the cause of "those he knew not", and his example resonates throughout Rabbinic teaching.

Let us make no mistake about it. From the viewpoint of the Jewish tradition, a life that is not involved in some aspect and manner with the problems of alleviating suffering and pursuing justice and human dignity is lacking the most important ingredient of the good life.

In the Ethics of the Fathers, there is an axiom, "Know from whence you came". As we move forward into the 21st century. I take heart in the belief that we - particularly Jewish lawyers - will remember from whence we came in our Jewish tradition.

The Bible, in speaking of Jacob and Benjamin, tells us that the soul of Jacob was "bound up" in the soul of his young son. So, too, throughout history, the souls of Jews and the quest for justice and human rights have been bound together. That fact is a tribute to our Faith. That fact is the source of our most splendid hours.



Members of the Association and other guests attending the Strasbourg conference

The Validity of a Contractual Obligation for Payment

Amihai Radzyner

The purpose of this brief essay is to clarify the approach which exists in Jewish Law that denies the validity of an obligation to pay for a certain deed where the doer would in any event have been committed to an existing legal obligation. In other words, if Side A undertakes contractually to pay in exchange for Side B's commitment to uphold the law or refrain from breaching it, then Side A can renounce his commitment. For example, Reuven who promises Shimon a reward if he drives in compliance with road traffic laws can then breach his promise if he claims that Shimon was in fact committed to acting according to these laws, regardless of what was promised him.

The approach which will be presented hereinafter is the one accepted by the majority of the arbiters (*poskim*), although not by all of them. The essay will ignore other solutions which could have been suggested in order to cancel the validity of the contract in some of the cases presented, such as: the claim of exploitation, mistake and misrepresentation. As will be seen, according to the main approach which exists in Jewish Law, the obligation which is the subject of our discussion is invalid *ab initio*, and other contractual claims are unnecessary.

The Validity of an Additional Obligation

First, one must ask if there is any validity to the obligation under which a person obligates himself to perform an act which he must perform in any case. Several years ago, the Appellate Rabbinical High Court dealt with a question of this sort.¹ The issue was the validity of an agreement under which a father undertakes to support his children, an obligation which exists anyway, by force of regulation set by our Scholars ("*Takanat Chachamim*"). The majority ruling² was that a contractual obli-

gation does not apply to something which is legally binding, thus, the fathers' additional obligation is meaningless.

Therefore, in the event that he is not obligated according to regulation to support his children, the additional obligation is not binding either.

According to the dissenting opinion, it is possible to apply an additional contractual obligation where a regulatory obligation already exists.

Accordingly, we may say that there is, at least, a problem with the validity of the 'additional obligation'. If it is not valid, there is no contract at all and, of course, one can not demand the promised payment for such an obligation.



The Talmud and the Arbiters (*Poskim*)

The source with which the discussion should begin, which binds together all the answers and verdicts that will be presented, is a *Baraita* which appears in the Babylonian *Talmud*³ and which states that in the case of an escaped convict whose life will be endangered if he is caught, and who must, in the process of the escape, cross a river using an existing ferry, then, even if the escapee promises the ferry owner a higher payment than is customary to get him across, he will be obliged to pay only the accepted fee, and can mislead the ferry owner with his promise of higher payment.

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This was enforced as religious law both by the *Rambam* (Maimonides)⁴ and in *Shulhan Aruch*.⁵ It seems that the explanation for this ruling is that as the ferry owner is obligated to save lives, the escapee is not obliged to pay the entire sum which he undertook to pay, but only the regular fee for the ferry ride. This explanation is accepted by most of the commentators,⁶ even if not by all of them.

The issue in *Tractate Yevamot* which the *Baraita* discussed above presents, deals with a woman whose husband passed away. The husband's brother is unwilling to release her, but she is unwilling to marry the brother. The solution proposed is that she misleads the brother and promises to pay him 200 coins, and, once he has released her, she will tell him that she has misled him, and refuse to pay the promised sum. This was adopted as the law in *Shulhan Aruch*.⁷

The comments made by *Hameiri* on this subject are relevant.⁸ He determines that from this subject the following general principle arises, and that this principle holds true in property law ("*Dine Mamonot*") as well: If a person is legally obligated to perform an act for another person's benefit, such as assisting in loading and unloading his animal or returning a lost article, and he demands payment in return for the deed, then even if the beneficiary has promised to pay the helper, he (the beneficiary) is not obliged to do so. According to the same principle, if the helper deserves a low wage, for example, to compensate for the time devoted to searching for the lost object, and the owner of the object guaranteed a higher wage, he is obliged to pay only the lower wage.

Responsa Literature

We discovered several cases which discuss the subject at hand in this literature:

1. **Saving an assimilating Jew** - A similar case to that of the ferry in the *Talmud* is brought in the *Responsa* of the *Maharshdam*.⁹ The story is about Shimon who has become assimilated, and Reuven, his relative, who attempts to convince him to return to Judaism. Shimon agrees to return to sit among Jews and to observe the Jewish commandments if Reuven will agree to loan him a certain sum of money at comfortable interest rates. Reuven accepts the offer and even gives a written commitment, in addition to the sum of money, and Shimon indeed leaves the non-Jews in whose midst he resides and moves to the intended place. Shimon then demands the money which he was promised by Reuven;
2. **The father's commitment to teach Torah to his son** - The previous answer which we discussed is upheld in this answer. The subject answer was given by the *Maharam* of Rothenburg¹⁰ and it introduces a new concept in that it does not involve a doctor or different kind of savior, but rather relates to a case in which a person promised to pay his son-in-law in exchange for him teaching *Torah* to his son (who is in fact the grandson of the person who made the promise). Based on the *Talmud* topic discussed above, the *Maharam* determines that this commitment is invalid as a person is commanded to teach his son *Torah* in any case.

Apart from the novelty of the very subject, there is an additional great novelty in the *Maharam's* decision: even if the person who made the commitment does not himself claim that he is exempt from payment, the court or arbiter will make that claim on his behalf, and say that he is exempt from paying in any case where he committed himself to pay in exchange for a deed, performance of which was any case obligatory. It seems that by this, the arbiter expresses an opinion which dissents from the very idea that someone will undertake to perform a commandment in exchange for additional payment.
3. **Payment to a match-maker** - The *Maharam* of Rothenburg extends this line of thinking to an additional issue, which seems like a 'lesser' obligation compared to the preceding obligations, namely, payment to a match-maker.¹¹ It may be assumed that the *Maharam* felt that this involved a commandment, and thus he dissented from other arbiters regarding the case where a person undertook to pay a match-maker a large sum of money, and held that even someone who undertakes to pay a large sum to a match-maker is only

obliged to pay his labour fees. This was also the decision of the *Rema* in his additions to the *Shulhan Aruch*.¹²

4. **Return of a lost item** - The *Hameiri's* thoughts on property laws in general, and on the issue of return of a lost item in particular, were mentioned above. A similar opinion is expressed by the *Ramah*,¹³ who, from the ruling relating to the escaped convict, concludes that just as one may mislead a person who saves him and not pay the promised sum, due to a pre-existing obligation on the part of the savior, so too in the case of a person who promises another a sum of money in exchange for saving his property or finding a lost item, there is only an obligation to pay the "unemployment fee", namely, the damage which was caused as a result of the time invested in fulfilling a commandment.
5. **Payment to a doctor** - The *Radbaz*¹⁴ brings the example of a man who undertakes to pay extremely high fees to a doctor because he is the only one who can help, and after being cured, refuses to pay all the promised fees. The *Radbaz* holds that this person is not obliged to pay what is promised, but only the customary doctor fees, as the doctor is obliged to heal. The *Radbaz* discusses the *Ramban's*¹⁵ (Nahmanides) theory according to which such an undertaking is valid and explains that the *Ramban's* theory is relevant only in the situation whereby there are a few doctors who can help, all of whom are commanded to do so, thus the actual process of choosing a particular doctor obligates the promisor to pay the entire promised sum, for the doctor will claim that the commandment applies to others as well. But in the case where only one doctor can help, only he is commanded to do so, and thus there is no obligation to pay the promised fee. The *Radbaz* himself agrees with the *Ramban's* dissenters, who are of the opinion that even if there are other experts present, a person does not have to pay the doctor anything more than the customary fee. The *Radbaz* adds that if this person has already mistakenly paid the higher fee to the doctor, thinking that he was legally bound to do so, this qualifies as a 'mistaken gift' and the money that was paid may be recovered from the doctor.

These sources may be summarized by Rabbi Israel Yaakov Algazi¹⁶ statement when summarizing the main theme that stems from some of the above sources: "anyone who gives an undertaking to his friend so that his friend will perform an act which he is legally obligated to perform, is exempt from performing

whatever he undertook because that friend would have had to uphold that commandment in any case."

The Ruling of the Rabbinical Court

A similar question was brought before the Rabbinical Court in Tel Aviv,¹⁷ and some of the sources surveyed above were used in the verdict. The case involved a situation where Reuven made an agreement with Shimon, according to which Reuven would pay Shimon in exchange for Shimon obtaining one witness, out of a list of 34 potential witnesses, for the purpose of a law suit that he was involved in. Shimon did in fact arrange to bring that witness, but the testimony did not aid Reuven in his suit, and accordingly he refused to pay Shimon the sum agreed upon. Shimon, of course, claimed that he had kept his side of the bargain, and that it was not his concern whether the witness was or was not helpful, and that he was therefore entitled to the promised payment. Reuven raised a series of claims, of which the relevant one to our discussion was:

"According to the law, the duty to testify applies to everyone, and when a person fulfills his duty he cannot expect to be paid for it."

And as the judge Rabbi Ben Shimon understood it and 'translated' it to the language of Jewish Law:

"There is room for discussion, as he is familiar with the witness and as it is in his power to help his friend by influencing the witness to testify, thus he is obligated by the laws of 'return of the lost item' to attempt to help, therefore there may be truth in the defendant's representative's claim that no payment is due when obligations are fulfilled, and even if he only helped on condition, he can refuse to pay".

Rabbi Ben Shimon held that the undertaking to pay had to be honoured and that the sum had to be paid in full, based on the explanation given by the *Radbaz* to the *Ramban's* instructions discussed above, and that where there was no commandment that had to be executed by a certain person, but rather several people were capable of carrying it out, then the obligation to pay any sum was valid. Accordingly, in the case at hand, even if there was a commandment to help in the search, this was not a commandment which was placed on a single person only, for there were surely many more people among the 34 who could testify on the defendant's behalf. Thus, because Reuven under-

took to pay for locating the witness, he had to honour that commitment.

It follows that the obligation to pay in exchange for locating a witness, which may be obligatory in any case, is only obligatory because there are other persons capable of finding a witness who may help. But where only one person is capable of helping, the helper's demand for payment may be rejected, even though it was explicitly promised to him.

Conclusion

We reviewed an important approach in Jewish Law, that was first expressed by the scholars from the era of the *Talmud* and which influences contemporary judgments. This approach denies the validity of an obligation to pay for an action which would have had to be performed in any case. The *Ramban's* theory limited this denial of validity to an obligation which is placed on a particular person.

It may be that the assumption which is at the root of this approach is that it is not possible to speak of a system of double obligations: a person who is obligated according to the State law or to religious law, *i.e.* as a result of his commitment to a sovereign, which in the case of Jewish Law is God, to perform a certain act, cannot create an additional obligation towards another person by virtue of a contract. The obligation towards God is total and does not need strengthening using other means (and it is definitely wrong to demand payment for it). In any case the additional obligation is void.

Additionally, one may detect in this approach an expression of disgust for the very idea that someone would ask to be paid for something which he is obligated to do.

1. File No. 46, the arbiters Rabbi A. Shapira, Rabbi S. Ben Shimon and Rabbi S. Dichovsky. The verdict, including expansion on the arbiters' arguments, was published in the periodical *Tehumin* 16 (5756), 71-101. The issue appears as two separate articles in the collection, one by Rabbi Shapira (dissenting opinion) and the other by Rabbi Dichovsky (majority ruling).
2. This opinion was based on the method of Rabbi Menachem Zamba (Poland, 20th Century) in his *Responsa Zera Avraham*, sign 14.
3. *Yebamot* 106:a; *Bava Kamma* 116:a.
4. *Mishneh-Torah, Hilchot Gzela v' Avedah* 12:7.
5. *Hoshen-Mishpat* 264:7.
6. So say *Radbaz* (R. David Ibn Zimra, Egypt and Eretz-Israel, 16th century) in his *Responsa*, vol. 3 sign 986 (556).
7. *Even-HaEzer* 169:50.

8. R. Menachem Hameiri (Provance, 13th century) in his commentary *Beit-HaBehira* to this paragraph in *Yebamot*.
9. *Hoshen-Mishpat* sign 128. R. Shmuel di Modina, Thessalonica 16th century.
10. R. Meir Ben Baruch of Rothenburg, Germany 13th century. The response is brought by his student R. Mordechai Ben Hillel, in his composition *Mordechai to Sanhedrin* sign 704.
11. *Mordechai to Bava-Kamma* sign 172; *Responsa* of Maharam (Prague edition) sign 498.
12. *Hoshen-Mishpat* 264:7. Rema: R. Moshe Iserlish, Poland 16th century.
13. R. Meir Halevy Abulafia, Spain 13th century. His opinion was brought in *Shitah-Mekubetset I to Bava-Kamma* 116a. See also: *Sema (Sefer Meirat Einaim)* in *Shulhan-Arukh Hoshen-Mishpat* 265:7.
14. *Supra* note 7.
15. R. Moshe Ben Nahman, Spain and Eretz-Israel 13th century. In his composition *Torat-HaAdam*, Jerusalem 1964 44-45.
16. Eretz-Israel, 18th century. In his composition *Sheerith-Yaakov*, Jerusalem 1989 68 (the homily to *Parashat Tazria*).
17. File No. 2896/37, *Piskei-Din Rabbaniim* vol. 13 pp. 206.

Judge Thomas Buergenthal Elected to the International Court of Justice

The Association congratulates Judge Thomas Buergenthal on his election to the International Court of Justice. Before his election Judge Buergenthal was the Lobingier Professor of International and Comparative Law at the George Washington University Law School, D.C., USA. Since 1999, he has also served as Vice Chairman of the Claims Resolution Tribunal for Dormant Accounts in Switzerland.

Judge Buergenthal's earlier judicial experience includes service as President of the Inter-American Court of Human Rights as well as President of the Administrative Tribunal of the Inter-American Development Bank. He was a member of the United Nations Truth Commission for El Salvador and of the United Nations Human Rights Committee.

Judge Buergenthal was born in Czechoslovakia. He came to the U.S. in 1951, after surviving the Ghetto in Kielce as well as the concentration camps of Auschwitz and Sachsenhausen.

Parental Corporal Punishment Prohibited

In the Supreme Court sitting as a Court of Criminal Appeal
Criminal Appeal 4596/98

Natalie Bako v. State of Israel

Before President Aharon Barak and Justices Dorit Beinisch
and Yitzhak England

Judgment given 25.1.2000

Precis

The Appellant, the mother of a minor boy aged 11 and a minor girl of 13, was convicted by the District Court of assaulting her children, an offence contrary to Section 379 of the Penal Law - 1977 and abusing them. She was acquitted of assaulting a minor contrary to Section 368b(a) of the same law. The Appellant was sentenced to 12 months imprisonment suspended for three years and 18 months supervision. The charges related to routine slapping of the children on their faces and buttocks, hitting the girl with a section of a vacuum cleaner and breaking a tooth of the boy. The Appellant appealed against both conviction and sentence, arguing that even if the factual elements of the offences had been proved, her acts did not constitute the said offences as the corporal punishment of her children was intended to teach them to obey and did not breach any legal norm. The District Court had held that hitting the children in such a manner did not meet the test of reasonableness and was impermissible legally and morally.

The Supreme Court dismissed the appeal against conviction, deferring the issue of the sentence until receipt of additional reports. Justice Beinisch delivered the leading judgment holding that corporal punishment by a parent, even if performed in good faith for educational and disciplinary purposes, is prohibited and constitutes abuse of a minor.

Judgment

After reciting and adopting the factual and credibility findings of the District Court, Justice Beinisch proceeded to consider the need for real as opposed to merely technical corroboration of a child's evidence under Section 11 of the Child Protection Law. She held that even though the evidence given by each child to

the youth investigator required corroboration, each child could corroborate the other.

Considering the offence of physical, mental or sexual abuse of a minor under Section 368C of the Penal Law, Justice Beinisch noted that the Law did not define the term "abuse". The *Even-Shoshan Dictionary* definition: "hard and cruel treatment; inhuman treatment", did not necessarily express the legal definition; the latter had to be determined in accordance with the purpose of the Law and through the exercise of judicial discretion. With regard to the purpose of the Law, Section 368C was included within the chapter of the Law dealing with minors and helpless persons. It reflected a social trend which was specifically developing in the period prior to the enactment of the amendment in 1989, namely, increasing social awareness of the gravity and extent of the phenomenon of injury to minors and helpless persons and the desire of the Israeli legislator to deal more rigorously with persons committing such injuries.

In the case at hand the dominant component of the violence committed by the Appellant against her children, was physical. Justice Beinisch noted that the distinction between the offence of physical abuse and the offence of assault is not a simple one. As a rule, abuse, including physical abuse, relates to cases where, by reason of their character and nature, one's conscience and emotions refuse to allow them to be regarded as cases of assault only. The fact that abuse consists of conduct entailing cruelty, imposition of fear and humiliation - attaches the stigma of immorality to it, which is not necessarily associated with every offence entailing the use of force.

Similarly, the definition of the term "physical abuse" is difficult, as the concept of abuse has a negative normative significance, which encompasses a wide range of possible activities. Justice Beinisch also did not purport to provide an exhaustive definition of the term, confining herself to presenting the elements of the offence.

Abuse is a behavioural offence not a result-oriented offence. Accordingly, the prosecution does not have to prove actual damage to the victim in order to prove the commission of the offence. The abuse may be committed by a positive act or by an omission - such as starvation or neglect. Generally, however, it

must involve the exercise of force or physical means against the person of the victim either directly or indirectly, and be performed in such manner and extent as to be likely to cause damage or physical-bodily or emotional-mental suffering, or both.

As in many cases the victim is in an inferior position and dependent upon the person abusing him, it is difficult to give much weight to the position of the victim when evaluating the nature of the conduct and extent of its harmfulness. The victim may not feel that he has been humiliated or treated cruelly; thus the determinative perspective is that of the observer, *i.e.*, the objective perspective.

Justice Beinish set out a number of additional characteristics of abuse, such as that it may be the outcome of a chain of actions over a period of time, where the cumulative effect can give rise to the acts being regarded as abuse. Additionally, abuse is usually, although not necessarily, intended to impose authority, cause fear, punish or extort.

The mental element required for an offence under Section 368C, being a behavioral offence, is “criminal thought”, and accordingly it is not necessary to prove an intent to achieve a harmful result, provided however that there is awareness of the nature of the conduct (act or omission) and of the existence of the relevant circumstances required for the commission of the offence.

Under Section 378A, the offence is aggravated where the person committing the abuse is “responsible” for the minor or helpless person.

In the instant case the acts of the Appellant met all the criteria set out above.

Parental Corporal Punishment

Counsel for the Appellant argued that the slaps administered by the Appellant did not amount to a criminal offence as they were intended as disciplinary and educational measures for the good of the children.

Justice Beinish noted that this argument raised the question of the legitimacy of parental corporal punishment. Justice Beinish agreed with the District Court that as the body establishing judicial norms and values, the Court had to denounce violence by parents against their children, even when that violence was cloaked in an “educational philosophy”.

Justice Beinish proceeded to review the approach taken by other legal systems to the issue of parental punishment, noting

that approaches varied depending on values, and social, educational and moral perceptions.

One approach adopted by the common law in England, afforded protection to a parent against criminal liability, if the punishment was “reasonable”. This approach emphasized the rights and powers of the parent. According to this approach the right of the parent to raise his children is expressed, *inter alia*, by his power to decide their manner of education, and, in acting for the welfare of the children, he may take disciplinary measures, including through the use of force. The Court will not intervene in that parental discretion so long as the use of force against the child is not excessive in terms of achieving the educational objective.

Thus, as early as 1860, it was held in England that a parent would not be criminally liable if he subjected his child to “reasonable and moderate” corporal punishment - *R. v. Hopley* 175 E.R. 1204 (1860).

Over the years, English case law held that the “reasonableness” of the punishment would be tested on the basis of the circumstances of each case, and with reference to the age of the child, his physical condition, level of understanding and emotional maturity, as well as the duration of the punishment and specific reason for it in the case under consideration. This right was even protected in legislation, namely, the Children and Young Persons Act 1933, as amended by the Children Act 1989:

Section 7(1):

“Nothing in this section shall be construed as affecting the right of any parent, teacher or other person having the lawful control or charge of a child or young person, to administer punishment to him.”

Similarly, the American Model Penal Code also protects the right of a parent to punish for educational and disciplinary purposes:

“The use of force upon or toward the person of another is justifiable if:

- (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and: (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create substantial risk of causing death, serious

bodily injury, disfigurement, extreme pain or mental distress or gross degradation". (Part 1, Article 3, Section 3.08).

Justice Beinish reviewed the various tests applied in the United States for the "reasonableness" of the punishment which the parent is entitled to impose.

Similarly, in Canada, Section 43 of the Criminal Code, entitled "Correction of child by force", states:

"Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances". (R.S.C., 1985, c. C - 46, s. 43 (1985)).

In Canada, the object of education or discipline is not regarded as having been met if the force is used to instill fear in the child (*R. v. Komick* [1995] O.J. 2939, para. 51), or the force is exercised without thought, out of anger or loss of control (*R. v. D.W.* [1995] A.J. 905, para. 13 and *R. v. D.H.* [1998] O.J. 3347, para. 31). The test of reasonableness has also been given a restrictive interpretation (*R. v. Dupperon* [1984] 16 C.C.C. (3d) 453).

Justice Beinish noted the judicial criticism that has been voiced in Canada in relation to Section 43 and in particular in relation to the lack of clarity of the definition of "reasonable" force, and the fact that different judges have different views about what is reasonable - leading to the absence of uniformity in the application of the section.

Thus for example, in *R. v. J.O.W* [1996] O.J. 4061, it was stated:

"I consequently hope that the law makers will see to establish clearer rules, so that parents will know with some degree of certainty when they are permitted to physically discipline their children; or alternatively, if Parliament determines that corporal punishment is no longer tolerable in our society, to then repeal Section 43 of the Code.

The current state of uncertainty is inadequate to protect children, while simultaneously, potentially placing otherwise law abiding parents at risk of obtaining a criminal record".

A different approach rejects the right of a parent to corporal punishment against his child. This approach emphasizes the child's right to dignity, to the integrity of his person and his mental health. On this view, corporal punishment, as an educational measure, not only does not achieve its purpose but it

causes physical and mental harm to the child, which may also affect him as he matures. This latter approach may be seen in the legislation of a number of countries such as Sweden, Finland, Denmark, Norway and Austria.

In the instant case, the Appellant had argued that the punishment was part of her educational measures. Justice Beinish noted that reasonable corporal punishment could not provide a defence to the offence of abuse. Abuse involved an element of immorality and therefore there could never be a legal justification or a justification anchored in an accepted social norm for abuse. Accordingly, if the acts of the Appellant fell within the definition of abuse she could not assert justification in the form of severe corporal punishment for educational purposes.

Counsel for the Appellant also asserted that she had not committed any criminal offence at all, including assault, relying on the decision of the Supreme Court in *Cr. App. 7/53 Dalal Rassi v. Attorney General* 7 P.D. 790, where Justice S.Z. Cheshin held that:

"In the case before us there is no serious dispute between counsel for the parties that a father and educator are entitled to punish minors under their authority, even by means of corporal punishment... parents are entitled to impose corporal punishment on their children in order to educate them in the correct behaviour and teach them discipline."

This decision referred to English common law, existing at the time by virtue of Clause 46 of His Majesty's Order in Council 1922, and was relied on by lower instances over the years.

A similar approach, also having its source in English law, was adopted by the Civil Wrongs Ordinance, Section 24(7) of which provides that it shall be a defence to any action brought in respect of the torts of assault and wrongful imprisonment that:

"The defendant was the parent, guardian or schoolmaster of the plaintiff or a person whose relationship to the plaintiff was similar to that of his parent, guardian or schoolmaster, and administered to the plaintiff only such chastisement as was reasonably necessary for the purpose of correction".

Justice Beinish questioned whether the approach underlying Section 24(7) and the *Rassi case* reflected the contemporary position of Israeli criminal law.

First, she noted that the defence set out in Section 24(7) of the Civil Wrongs Ordinance did not discharge a parent from liability imposed by the Penal Law. Secondly, she pointed out that the

legitimacy of corporal punishment is greatly influenced by social perceptions which are subject to change in accordance with social and cultural developments. Thus, for example, the Supreme Court has recently held that use of force for educational purposes itself sabotages the achievement of those purposes, in so far as one is educating for a tolerant and violence-free society. In this context, the severity of the punishment is immaterial. Accordingly, teachers or educators could not legitimately exercise corporal punishment (*per* Justice Dorner in Cr./App. 5224/97 *State of Israel v. Sdeh Or*, as yet unpublished).

In the view of Justice Beinish, these sentiments were equally applicable to parents, notwithstanding the difference in status and rights of the latter towards their children.

Justice Beinish agreed that the right of parents to raise and educate their children is a natural right recognized by Israeli law, and also anchored in statute: Section 15 of the Capacity and Guardianship Law 1962, whereas Section 323 of the Penal Law imposes criminal liability for failure to fulfil parental duties towards a minor.

Justice Beinish noted that parental discretion, which best reflects decisions intended for the welfare of their children, does not mean that parents are completely autonomous in making decisions regarding their children. The decisions are always subject to the needs of the children, their benefit and rights. The right entails a general duty on the part of the parents to act for the benefit of the child.

Additionally, the law imposes a duty on the authorities of the State to intervene in the family unit and protect the child where the need arises, including against his parents. The approach underlying the law is that the child is not the property of his parents and they may not do with him as they will. The State's duty to intervene originates from its duty to protect those unable to protect themselves.

Justice Beinish referred to psychological and educational studies showing the harm occasioned by parental punishment. The Court could not close its eyes to these social developments and the lessons learned from the various scientific studies which have completely altered the approach to education and the use of physical force. The Court would take into consideration contemporary legal attitudes towards the child and his rights, particularly following the enactment of Basic Law: Human Dignity and Freedom, and the ratification by Israel of the Children's Rights Convention on 4.8.91, entering into force on 2.11.91. The Convention expressly prohibits the use of physical

or mental violence against children, and requires States to take measures to prevent such violence

Justice Beinish held that today, a child is an autonomous person, with interests and independent rights. Society has the duty to protect him and his rights. Moreover, in the light of all the above, it must be held that corporal punishment of children, humiliating them or harming their dignity as an educational measure on the part of their parents, is completely unacceptable and is a remnant of a social-educational approach which has become obsolete. The child is not the property of his parents, he must not act as a punching bag which they can hit at will, even if the parent believes in good faith that he is exercising his right and duty to educate his child. The child is dependent on his parents, needs their love, protection and caress. Imposing punishments which cause pain and humiliation does not contribute to the personality and education of the child, but breaches his rights as a person. It injures his body, feelings, dignity and proper development. It distances us from our aspiration to have a violence-free society, and accordingly such measures are prohibited in our society today.

Justice Beinish pointed out that some might argue that this ruling is one with which the public cannot comply, as there are many parents who use force which is not excessive against their children - such as a light slap on the buttocks - in order to educate and discipline them. Are these parents offenders? The proper answer to this is that in the legal, social and educational situation to which we are subject, no compromise may be made which may endanger the health and safety of minors. Account must also be taken of the fact that we are living in a society where violence is spreading, permitting "light" violence is likely to deteriorate to very serious violence. The mental and physical health of a minor may not be endangered in any way, and the proper standard must be clear and unequivocal. The message is that corporal punishment is not permitted.

At the same time it must be recalled that a parent has available to him all the defences set out in the Penal Law, which sets out qualifications to criminal liability in appropriate circumstances - these will encompass those cases of use of force to protect the person of a minor or of others. These qualifications reflect an appropriate distinction between the use of force by parents for "educational purposes" which is unacceptable and also prohibited, and a reasonable use of force intended to prevent harm to the child himself or to another, or enable light contact, even if aggressive, with the body of the child for the purpose of preserving order.

Finally, a number of filters exist within the criminal law so that trivial cases will not fall within it. For example, the prosecution has discretion not to bring charges where there is no public interest in doing so. Moreover, in general, an act which a person with an ordinary temperament would not complain of does not provide the basis for criminal liability. Thus, not every routine contact between one person and another will attract criminal liability, even if *prima facie* it falls within the formal elements of the offence of assault. The relations between a parent-child involve constant physical contact, and therefore routine physical contact between parent and child will not constitute the basis for a criminal offence.

In view of all the above, Justice Beinisch upheld the conviction of the District Court; the appeal against sentence to be reconsidered after receipt of new reports by the parole services.

President Barak agreed.

Justice England agreed that the Appellant had been properly convicted of assault under Section 379 of the Penal Law, although he expressed doubt whether the Appellant's actions fell within the definition of "abuse", noting that according to the

principle of legality, the factual components of an offence have to be defined as clearly as possible, so that the person subject to a sanction will know precisely what is permitted and what is prohibited, and if a provision is vague or ambiguous it must be interpreted strictly, applying the "rule of lenity". Justice England disagreed with the approach of Justice Beinisch that the tools which enable a distinction to be drawn between a simple assault and abuse are the conscience and feelings of the outside observer. In his view, the definition had to be given in advance and in as clear and exhaustive a manner as possible, and could be likened, in terms of severity, to causing grievous bodily harm. In the instant case he thought the Appellant's acts fell at the most within the framework of assault, of which the Appellant had been acquitted. He thought it would be a mistake to attribute to a defendant in a routine manner, acts of abuse, as this would cheapen the term, particularly if it was associated with relatively light punishment as in the instant case.

Abstract prepared by Dr. Rahel Rimón, Adv.

In Memoriam: Morris B. Abram

The IAJLJ is deeply saddened by the sudden passing of Morris Berthold Abram on 16 March in his 82nd year.

A prominent leader of the American Jewish Community, ardent civil rights advocate, partner over many years and subsequently counsel of the New York law firm Paul, Weiss, Rifkind, Wharton & Garrison, Morris Abram served successively, in various posts and different capacities under five U.S. Presidents.

Morris Abram contributed to Congresses of the IAJLJ he attended in Israel of which he was a committed member, both at the time he was U.S. Ambassador to the United Nations in Geneva and subsequently when he became Chairman of United Nations Watch, a position he held at the time of his demise. Together with IAJLJ he shared great concern at the discriminatory and hostile treatment meted out to Israel which he did not hesitate to denounce vigorously, a state of affairs which the UN Secretary-General Kofi Anan acknowledged as requiring speedy remedy.

Morris Abram's dedication to the cause of Jewish and general human rights was forged early in his career when he joined the staff of prosecutors of the International Military Tribunal at Nuremberg and was confronted with the horror of the *Shoah*. Later in the course of his repeated successes in the civil rights struggle, he played a key role in the historic 1963 U.S. Supreme Court decision of "one voter, one vote". Subsequently, he was appointed U.S. representative to the UN Commission on Human Rights in Geneva by President Lyndon Johnson, prior to becoming the U.S. Ambassador to the UN there, a post to which he was nominated by President Bush in 1989.

Morris Abram played a striking role as a key figure in the life of the American Jewish Community. National President of the American Jewish Committee from 1963 to 1968, he served as President of Brandeis University till 1970 and was Chairman of the National Conference on Soviet Jewry from 1983 to 1988. He was Chairman of the Conference of Presidents of Major Jewish Organisations from 1986 to 1989.

Morris Abram's commitment to the cause of civil



liberties and human rights throughout his career, knew no bounds. A devoted and exemplary servant of his country, outstanding leader of his community, Morris Abram was a proud Jew, stalwart supporter of Israel and unrelenting in his fight against racism, anti-Semitism, prejudice and discrimination in all its forms.

He is survived by his wife and five children.

The IAJLJ mourns his passing and sends its heartfelt condolences to his entire family.

On Top of the Agenda: Austria and Iran

The Presidency of the IAJLJ meeting on 20th March 2000, decided as follows:

Jörg Haider

The Presidency of the IAJLJ expresses its deep concern at the governing coalition in Austria being joined by a party headed by a person such as Jörg Haider, who symbolizes views from which Europe as a whole has been endeavouring to sever itself since the end of the Second World War.

It is especially for countries such as Austria to be most alert to stamp out every seed of hatred and discrimination against foreigners and minorities.

In the aftermath of the Nazis' accession to power in 1933, the world can no longer permit a party the objectives and positions of which are illegitimate and dangerous, to hide behind the claim that it has come to power in a legitimate manner through democratic process.

The claim that we are intervening in the internal affairs of Austria is inappropriate in today's world, where free countries are uniting to preserve human rights everywhere, with the full support of the international community.

In many countries in Europe the first signs may be seen of the rise of extremist parties proclaiming dangerous messages. The Austrian example is likely to strengthen them and grant them legitimacy, and therefore condemnation of events in Austria must be loud and unequivocal.

We applaud the countries and organizations which have already taken steps in order to voice their protest against the current coalition in Austria, and we call upon lawyers and legal organizations to join us in broadcasting this message of condemnation to the government of Austria and the world, and take such measures in this connection as they see fit.

We call upon all the branches and representatives of the IAJLJ to publicize this decision of the IAJLJ and take the appropriate measures in their respective countries in the spirit of this decision of the Presidency.

The Jews of Iran

With the approach of the trial of the 13 Jews arrested in Iran for no cause, the Presidency of the IAJLJ calls upon the government of Iran to release those arrested without delay, and retract its decision to try them in a process which, according to press accounts, does not guarantee a fair hearing or even minimal preservation of rights available in all advanced countries.

We protest against the refusal of the government of Iran to enable the defendants to choose their own legal counsel, and the lack of response to the offer of a well-known defence lawyer, Alan Der-showitz, a reputed protector of human rights, to represent the defendants.

Our Association requested that it be allowed to send an independent observer to Iran, in order to supervise the manner in which the trial is conducted and the truth of the Iranian declaration that it will

hold a fair trial. Mr. Georges Flecheux, the former President of the Paris Bar, who now acts as President of the Institute of Human Rights division of the Paris Bar, has volunteered to fulfil this function and he is ready to depart for Iran at short notice.

Our aforesaid request was transmitted by Mrs. Mary Robinson, the Commissioner for Human Rights in the UN, and was even made public during the visit of the President of Iran to Paris, however, to date, the Iranian government has withheld its consent.

We call upon all the branches and representatives of the Association to immediately contact the Iranian Embassies in their respective countries and demand that Mr. Flecheux be permitted to travel to Iran and be present during the trial.

Similarly, we call upon lawyers and lawyers' associations to support our request and make the government of Iran aware of the same whether directly or through the Iranian Embassies.

If Iran wishes to prove to the world that it is acting in accordance with the rules accepted by the family of nations, and if it does not release the 13 Jewish defendants immediately, it must at least guarantee that a fair trial is held, which is open to external observers, grant full rights of defence to the defendants and ensure the independence of the judges.

The French Section Mobilizes Support for Iranian Jews

In protest at the Iranian authorities' decision to pursue the trial of most of the 13 Jews arrested over nine months ago, despite the trumped up nature of the charges of espionage, the French Section of the IAJLJ, at the initiative of its President Mr. Joseph Roubache and in conformity with the decision of the IAJLJ's Presidency of 20 March last, contacted Mr. Francis Teitgen, the President of the Paris Bar Association with a view to alerting the French authorities to intervene.

The latter recently advised Mr. Roubache that he had indeed just learned of the decision to actually put 10 of the 13 persons originally arrested on trial before the Revolutionary Court, on the grounds of spying for Israel, together with a demand for the death sentence. Further, he had been informed that the accused had not been permitted to receive visitors, appoint their own lawyers or take any other steps whatever to arrange for their own defence in these proceedings.

Mr. Teitgen advised Mr. Roubache that the Paris Bar had made known its demand that independent observers be allowed to be present at the trial and provided him with copies of letters he had addressed simultaneously to the President of the Republic, Jacques Chirac, and to the Prime Minister, Lionel Jospin, as well as to the Iranian President Khatami and to the Iranian Ambassador in France, Ali Reza Moairyeri.

Mr. Teitgen also informed Mr. Roubache that a demonstration would be organised on 13 April on the steps of the Palais de Justice by members of the Paris

Bar wearing their robes to protest the conditions under which the trial would be opened.

Furthermore, steps would be taken in the meantime to continue efforts in which Mr. Roubache was asked to participate, to ensure the presence of an independent observer at the trial.

The letters to President Chirac and to Prime Minister Jospin requested the French Government to intervene with the Iranian authorities to put an end to the intolerable threats to the basic human rights of the accused persons and to approach the highest Iranian authorities, and in particular the Iranian President Hatami, to protest the holding of the trial. These letters also noted that having regard to the denial of the elementary rights of the accused to conduct their own defence, the trial should in any event be postponed so that an observer mission could be sent to interview the ten accused persons and investigate the conditions under which their defence would proceed.

In the event that the dates of 13 and 14 April be retained as the dates of the trial, the Paris Bar requested that independent French and European Union observers be allowed to attend. The letters pointed out that the refusal of the Iranian authorities to accede to these requests would constitute a rejection of the universally binding character of human rights by the Iranian authorities at the highest level. They asked that the French Ambassador in Teheran be requested to take the necessary steps to make these representations.

The letter to the Iranian President repeated the alarming information about

the denial of elementary defence rights to the accused, the threat of a death sentence being issued and the fact that only one or two days have been fixed for the trial. It asked the Iranian President personally to take matters in hand and ensure that these rights be respected, in view of the statements made by him calling for liberalisation in Iran.

The letter addressed by Mr. Teitgen to the Iranian Ambassador in Paris, also referred to the denial of basic defence rights to the accused and their imminent arraignment before the Revolutionary Court of Shiraz on 13 April.

It requested all relevant information about the trial including the place, date, name of the President of the Court and the names of the lawyers representing the accused. The Ambassador was also advised of the request made of the Iranian Government that a member of the Paris Bar be authorized to represent it at the hearings.

Web Site

The Association is pleased to announce the launch of its Internet site:

www.intjewishlawyers.org

The site will provide information about the Association, a list of its international events and all published issues of *JUSTICE*, as well as Special Issues and Public Trials. On-line registration and subscriptions to *JUSTICE* will be available.