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# PRESIDENT'S MESSAGE



A

anti-Semitism has always been nourished by lies and libels against the Jews. Until the Holy See officially vindicated Jews of that crime, we were persecuted as Christ killers; we were accused of causing epidemics and plagues by poisoning wells, and engaging in the ritual murder of Christian children, in the famous (or one should say infamous) blood libels.

For centuries, in many countries, the persecution and murder of Jews was provoked by those who cynically used such lies to incite their followers to acts of violence.

It is a proven historical fact that these false allegations often acted as weapons, more deadly than bullets and bombs, often distributed on a world-wide basis.

After the Holocaust, we hoped that the world had finally learned its lesson, and that it would never again permit the use of Hitler's tactics of poisoning the minds of people against the Jews, setting them up once more as possible targets and victims.

Two recent highly publicized events proved how wrong we were.

One event was the trial of David Irving against *Penguin Books* and Professor Deborah Lipstadt, in an English court.

The second ongoing event is the sale of the *Protocols of the Elders of Zion* on the Internet by *Amazon* and by *Barnes and Noble*.

There is no bigger lie than the denial of the Holocaust, probably the most documented historical event of the twentieth century. We all admire the judgment of the English court, and we congratulate Deborah Lipstadt, *Penguin Books*, and their legal representatives, who, in a way, represented all of us in that courtroom. Yet we cannot ignore the fact that in the face of all the available, irrefutable, historical and personal evidence, a court of law was forced to provide a public forum for a Holocaust denier, who, like many before him, used legitimate court proceedings, as well as the international press, to spread his poisonous lies in the ears of the public. One will never know how many television viewers, who had previously never heard of David Irving, were impressed by his lies, rather than by the court's 350 page judgment.

Yet one thing is certain. The deniers will continue to spread their lies, which will become much more dangerous in the future, when live witnesses will not be here to testify and repudiate them. It is therefore our duty to denounce the deniers and expose them for what they are. We are told that the vast amount of material presented at the trial, including all the documents that Irving was compelled to disclose, has now become part of the public record and may be of great help in future studies of the motives and methods of Holocaust deniers everywhere.

We are publishing the essence of the judgment in this issue, and we are proud to display Deborah Lipstadt's portrait on our cover.

The *Protocols of the Elders of Zion* have been published and disseminated for an entire century in almost every language known to man. Time and again, over the decades, this false document has been challenged and refuted by honest journalists, learned historians, politicians and diplomats, religious leaders and former police agents, and most of all by courageous, responsible and unimpeachable judges in democratic

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countries. It has also been disproved by the horrible history of the twentieth century, which has just drawn to its close.

To objective impartial minds, there can be no doubt whatsoever that this is a fabrication, largely plagiarized from an old French book that had nothing to do with Jews. Any fair-minded person who takes the trouble to inform himself, would also realize that both the forgers and the distributors of this lie had one purpose in mind: to discredit the Jews and incite the public against them. Unfortunately, history proves that they often succeeded.

Many believe that lies and libels which set up a group of people as scapegoats and hate targets, potential victims of murder and extermination, should not be protected as “free speech”. This view is supported by a number of international covenants and conventions, ratified and adopted by most Member States of the United Nations.

Yet, even those who believe in almost unlimited free speech, as practiced in the United States, must concede that publishers still have a choice of what to publish. They are free to refuse publication of a dangerous forgery, without compromising their commitment to the American Constitution. Contrary to what *Amazon* says (“we are booksellers, not book censors”), they are not invited to act as censors, because every informed person who takes the trouble to read published court judgments, knows that this is not a “controversial book”, it is a blatant and dangerous lie. For many years the *Protocols* were distributed privately or sold in fringe bookstores. Now, through the Internet, they are not only available, but they are actually promoted and brought to the attention of readers who had never previously heard of them, even in countries which officially ban this book. Who knows how many readers whose curiosity causes them to buy the book, will even notice, let alone read, the disclaimer which *Amazon* is forced to publish? How many will be impressed by the fact that *Amazon* “does not endorse the book or its publishers”.

Those of us who are aware of the history of the *Protocols* and the damage this document has done in the past, must protest its renewed distribution.

*Amazon* claims it will publish any book, whatever its content. We suggest that a forged document does not belong in that category. Does any printed matter become a legitimate “book” merely because it is bound between two book covers?

Our forthcoming international conference in Toronto will provide a forum for discussing these and other issues on our agenda.

We urge our members to attend this conference and participate in its deliberations.

*Hadassa Ben-Zur*

# Welcome to the Toronto Conference

**INTERNATIONAL CONFERENCE OF THE ASSOCIATION  
TORONTO, CANADA, AUGUST 13 -16, 2000**

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- **Combatting Electronic Anti-Semitism and Holocaust Denial**
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- **Update on Human Rights Decisions**
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- **Secular Justice and Religious Law**
- **How Jewish and Israel Issues are Portrayed in the International Media**

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# Denial of the Holocaust: The Trial of David Irving v. Professor Deborah Lipstadt and Penguin Books

Jonathan Goldberg

**A**s is well known, the English libel laws provide strong protection for the reputations of individuals, whether they be public or private figures. Some would say too strong. Certainly there is no equivalent in England to the First Amendment to the United States Constitution, whereby the right to free speech is generally taken to prevent legal action by public figures to defend their reputations against even the most outrageously false accusations. In English law, by contrast, a plaintiff may bring an action for damages for defamation by reason of any words published about him which are calculated to injure his reputation by exposing him to “hatred, ridicule or contempt.” Moreover, the law presumes that such defamatory words are false. The defendant must prove that they are true (known as the plea of “justification”) if he can. If he cannot, the defendant loses and must pay damages and legal costs for his injury to the plaintiff’s reputation. Often, such damages are enormous.

Weighted as the English law thus is in favour of the plaintiff, it may come as a surprise to the international observer that the English press and media are as free and vigorous as they undoubtedly are. It is perhaps less surprising that high profile and sensational libel actions flourish in the English courts as nowhere else, and that from time to time impudent and even fraudulent libel actions are brought by plaintiffs who gamble on salvaging their public reputations by denying the truth of things published about them which were in fact true all along, in the hope that the defendants will be unable to satisfy the burden of proof which is upon them. Undoubtedly, such tactics do some-

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times succeed for unscrupulous plaintiffs, but they are high risk, and there has equally been a long and spectacular list of English libel trials which have proved a graveyard for famous reputations where hypocritical plaintiffs have been exposed by brave defendants who stood their ground and risked the enormous costs of losing such an action, in order to prove that those accusations which they had published were true all along.

A few famous examples will suffice to illustrate this point. The great Victorian playwright Oscar Wilde ruined himself and ended up in prison when he sued Lord Queensberry who had pinned a note to the notice board of his London Club that Wilde was “a sodomite” (as he indeed was, and moreover with Queensberry’s own son!). More recently, the Conservative Cabinet Minister Jonathan Aitken sued the *Guardian Newspaper* which had published the accusation that a Saudi arms dealer had paid his hotel bill during a luxurious stay at The Ritz Hotel in Paris. The newspaper stood its ground, Aitken perjured himself at trial and even enlisted the support of his wife and daughter to this end, before being exposed. He too ended up ruined and in prison.



Yet there still seems to be no shortage of such bogus libel plaintiffs who will take a gamble and the latest such case which was decided in the High Court in London in April 2000, is as extraordinary as any which has ever gone before. It is a case moreover which has the greatest possible interest for Jews, and indeed all who are affected by, or interested in, Hitler, Churchill, the rise of Nazism and the Second World War.

It fell to Mr. Justice Charles Gray, a relatively young and recently appointed judge of the Queen's Bench Division of the English High Court, with an impeccably patrician English background, to rule on momentous historical questions concerning the Holocaust against the Jews. After hearing many weeks of contested historical evidence, he found that Professor Deborah Lipstadt and her publishers *Penguin Books* were justified in having branded the famous historian David Irving an anti-Semite, a racist, a Holocaust denier, an apologist for Hitler and most damningly, a deliberate perverter and distorter of historical evidence.

Normally, such libel actions are the rare exception in English civil law whereby a jury of twelve ordinary citizens still decide the issues of fact. Exceptionally, however, where the issues involved necessitate a prolonged and difficult examination of documentary material, a judge sitting alone will decide. Such was the case here. It must be said straightaway that Mr. Justice Gray's judgment runs to 334 pages of closely argued text. In the opinion of the present writer it is an intellectual *tour de force*. It can be accessed on the Internet on [www.fpp.co.uk](http://www.fpp.co.uk) (although the joke is that this is Irving's own website on which he has posted the full judgment). It will be appreciated that the most which can be done within the present limits of space is to note the salient features of this judgment, using its own language mainly as follows.

The plaintiff, David Irving, is the author of over 30 books on modern German history and the Second World War. Amongst the better known titles are "*The Destruction of Dresden*", "*Hitler's War*", "*Goebbels - Mastermind of the Third Reich*", and "*Goering - A Biography*". As the judge found, many of his works have been published by houses of the highest standing and have attracted favourable reviews. Now aged 62, his industry and the diligence of his historical research are beyond doubt. The son of a British naval officer who abandoned his wife and children after the war, Irving grew up fatherless and came to have a fascination with all things German and particularly the life of Hitler. Interestingly, he describes his resentment towards

a Jewish professor ("a known Communist") who failed him in a maths exam at Imperial College, London, in a manner strangely reminiscent of Hitler's own experience at college as an art student. Over many years Irving has become increasingly identified with right wing groups, to which he lectures all over the world, although he described himself to the judge as a politically "*laissez-faire conservative*." The thrust of his books and lectures has been to minimise the scope and extent of the Holocaust, to claim that Hitler bears little or no responsibility for it because it was done by subordinates such as Goebbels and Himmler behind his back, and that Allied attacks on the German civilian population (such as the firebombing of Dresden ordered by Churchill and Air Marshal Arthur "Bomber" Harris in February 1945) were anyway just as bad. He claims that the extent of the Holocaust has been deliberately exaggerated by the so-called eye witnesses and victims, often in order to obtain fraudulent reparations, and in part as an invention of British wartime propaganda. And he claims vocally that there is an international Jewish - inspired conspiracy to denigrate him and to put pressure on publishers to suppress the publication of his works all over the English speaking world.

Professor Deborah Lipstadt is also a historian of the Holocaust. She teaches at Emory University in Atlanta. She writes about the Holocaust from a somewhat different point of view. Her recent book "*Denying the Holocaust*" gave rise to the present libel action. In it she examined the origins and growth of the phenomenon of "Holocaust Denial." She argued that "the Deniers" represent a clear and present danger that the lessons which future generations ought to learn from these terrible events will be obfuscated.

Irving claimed that this very book was now one of the principal instruments whereby he was boycotted, hounded and persecuted by an orchestrated campaign in the UK and elsewhere. In total he selected some 5 main pages from the book which were claimed to libel him. According to Irving "She vandalised my legitimacy as an historian". In them she had accused him of misstating, misquoting, falsifying statistics and falsely attributing conclusions to known and otherwise reliable sources in his effort to legitimise Hitler.

He was in addition, she said, a Holocaust Denier, a right wing extremist, a man obsessed with Hitler to the point of deliberately manipulating and falsifying history in order to place him in a more favourable light, a discredited historian, a racist and an anti-Semite. In one specific accusation she also claimed that he

had breached an agreement with the Russians allowing him to inspect certain glass microfiches of the diaries of Goebbels in an archive in Moscow, by illicitly removing them abroad and copying them, before returning them to Moscow, thereby exposing these precious artefacts to a risk of damage.

Irving claimed to the judge that for him, his reputation as a truth-seeking historian was more important than anything else. The judge had no hesitation in accepting that the book did accuse Irving of deliberate perversion of historical evidence, and therefore was a fundamental attack on his integrity as a serious historian. Indeed, no worse attack could easily be imagined against a professional historian than this.

The judge noted that this had not been a trial where it had been possible or appropriate to observe the strict rules of evidence, and moreover that Irving had been greatly hampered in making his case by the unexpected decision of the defendants, in full knowledge of the allegations which Irving was making about the conduct of Professor Lipstadt, not to call her to give evidence and be cross-examined by him. Irving had represented himself, and cross-examined the many expert witnesses called by the defence at length, and testified on oath himself. The judge noted his great competence in defending himself. In contrast Professor Lipstadt and *Penguin Books* had the advantage of a large and distinguished team of legal representatives. It is nonetheless a well known feature of the English system, with its traditional regard for fair play, that a judge will always “bend over backwards” to give an unrepresented litigant a fair trial, as here.

Irving asked that his damages should be aggravated on the basis that the defendants were part of a sinister international campaign to discredit him. He accused Professor Lipstadt of acting in league with the Anti-Defamation League, the Board of Deputies of British Jews, and other such organisations. He even called a Professor Kevin MacDonald, a Professor of Psychology, who testified as to the machinations of “traditional enemies of free speech” (*i.e.* the Jews). He claimed a deliberate attempt by Professor Lipstadt to ruin him. Whilst eventually rejecting all these claims, the learned judge found that Irving’s subjective suspicions and indignation were at least genuine. There was, however, no objective evidence to establish the conspiracy which he alleged.

The main body of evidence called by the defendants was provided by academic historians. These included Professor Richard Evans, Professor of Modern History at Cambridge,

Professor Robert van Pelt, a Professor of Architecture from the University of Waterloo in Canada, who is an acknowledged authority on Auschwitz, Professor Christopher Browning, Professor of History at the Pacific Lutheran University in Tacoma, Dr Peter Longerich of the University of London and Professor Hajo Funke, Professor of Political Science at the Free University of Berlin. Irving called only two historians on his behalf, namely, Professor Donald Watt of the London School of Economics, a diplomatic historian, and Sir John Keegan, Defence Editor of the *Daily Telegraph* newspaper, himself a distinguished military historian. It is to be noted, however, that these two witnesses would not attend voluntarily and each came under the compulsion of a witness summons from Irving. Their evidence was directed primarily to establishing Irving’s *prima facie* credentials as a serious historian. By contrast, Professor Evans of Cambridge did not resile from his view that Irving “did not deserve to be called a historian at all.”

Certainly his views were unorthodox. In his book “*Hitler’s War*”, for example, he described the Führer as “A friend of the Arts, benefactor of the impoverished, defender of the innocent, persecutor of the delinquent”, and he claimed that “Hitler was one of the best friends the Jews ever had in the Third Reich.”

Over the many weeks of this trial, the evidence ranged far and wide on events of major historical importance. Intricate and detailed comparisons were made between what Irving had written in his various books, and the historical source material concerning these same events. As the judge was at pains to point out both at the outset and conclusion of his long judgment, he did not regard it as being any part of his function as the trial judge to make findings of fact as to what actually did and what did not occur during the Nazi regime in Germany. What he had to do rather was to evaluate the criticisms of Irving as a historian, in the light of all the available historical evidence. “But it is not for me to form, still less to express, a judgment about what happened. That is a task for historians. It is important that those reading this judgment should bear well in mind the distinction between my judicial role in resolving the issues arising between these parties and the role of the historian seeking to provide an accurate narrative of past events.” In other words, the judge had to decide whether Irving’s disputed writings fell within the area of legitimate historical opinion, or were rather a deliberate attempt to distort the evidence for ideological reasons, which no *bona fide* historian would countenance. Certain it is that this long judgment reviews and recites an enormous wealth of fasci-

nating historical data. But the purpose was not for the judge to decide what actually happened, but rather whether any *bona fide* historian in Irving's position could reasonably have interpreted the evidence as he did.

Having conducted this painstaking and thorough review of the historical evidence presented to him by both sides, Mr. Justice Gray reached the following conclusions. He accepted that Irving had much to commend him as a military historian. He had researched and unearthed many original documents which without his efforts might never have come to light. Moreover, he wrote in a clear and vivid style. There were 19 specific instances in which the defendants had contended that Irving had in one way or another distorted historical evidence. The judge concluded that these criticisms were well founded. He was satisfied that in these instances Irving had significantly misrepresented what the historical evidence (objectively examined) revealed. Whilst naturally paying great respect to the standing of the expert witness historians who had testified against Irving, the judge nonetheless stressed that he must arrive at his own independent assessment of the evidence surrounding these 19 instances. Since, however, many of the documents which he would need to analyse for this purpose had been selected by Irving himself as allegedly best demonstrating that Hitler was a friend of the Jews, this fact itself must assist him in his analysis.

It is regrettably impossible within the scope of this short article to catalogue all the judge's findings on the 19 instances. It must suffice to choose a brief selection only for present purposes. The judgment itself repays careful study of course.

Thus, in the context of describing how Goebbels turned anti-Semitic when he realised the dominant position occupied by the Jews in Berlin in the 1930s, Irving had written that "Goebbels was unfortunately not always wrong to highlight every malfeasance of the criminal *demi-monde* and identify it as Jewish. In 1930 no fewer than 31,000 cases of fraud, mainly insurance swindles, would be committed by Jews." He had cited in the supporting footnotes various sources including Interpol statistics for 1932 and one Kurt Daluge, writing in 1935. However, the truth was that Interpol did not even exist at the time, and Daluge had been an enthusiastic Nazi. Irving had not been justified a historian in quoting without reservation such suspect claims, the judge held.

In his same book on Goebbels, Irving had dealt extensively with the events of *Kristallnacht* which marked a vital stage in

the evolution of the Nazis' attitude towards the Jews. It was the first occasion on which there was a mass organised destruction of Jewish property and wholesale violence directed at Jews across the whole of Germany. It began on November 9, 1938. Irving claimed that Hitler bore no responsibility for this pogrom, and indeed that he had reacted against it angrily when he had belatedly heard of it, and had intervened to call a halt to the violence. Irving had attempted to cast sole blame for this pogrom on Goebbels. The judge found that this picture seriously misrepresented the available contemporary and documentary evidence. Any objective historian would have dismissed the notion that Hitler was kept in ignorance about *Kristallnacht*. Irving had deliberately misquoted entries in Goebbels' diary and had suppressed other vital contemporary telegrams and messages in order to lend credence to this theory. Moreover, he had accepted, wholly uncritically, anecdotes told him by adjutants of Hitler many years after the event. He had not treated their accounts with any proper professional scepticism and had ignored those contemporary documents which contradicted them. In summary, the judge held "To write, as Irving did, that Hitler was totally unaware of what Goebbels had done, is in my view to pervert the evidence."

Concerning the expulsion of Jews from Berlin in 1941, Irving had written that Hitler had summoned Himmler to his headquarters and obliged him to telephone Heydrich ordering that these same Jews were not to be liquidated. However, here again, he had grafted sheer speculation on to the misreading and mistranslation of an entry in Himmler's diary in order to jump to this wrong conclusion.

It was a central theme of Irving's writings that Hitler had been the Jews' friend, who had not known or approved of their extermination. The judge found that Irving had seriously misrepresented Hitler's views on the Jewish question. He had done so in some instances by misinterpreting and mistranslating contemporary documents and in other instances by simply omitting inconvenient documents or parts of them. He had chosen to ignore the fact that the Nazis often resorted to euphemism and camouflage when discussing secretly the radical solutions to the Jewish question, and had brushed aside Hitler's many pre-war speeches and writings warning of the sinister fate which awaited the Jews. He had placed impossible weight on a questionable document called "*The Schlegelberger Note*" to reach his conclusion, and had again misused entries in Goebbels' diary. At one point he had quoted Ribbentrop's belief that "Hitler did not



order the destruction of the Jews.” Yet he had omitted to quote the words of Ribbentrop which immediately followed, namely, “that Hitler at least knew about it.” Once again the judge concluded that judged objectively, Irving had treated the historical evidence in a manner which fell far short of the standard to be expected of a conscientious historian. He had misrepresented and distorted the evidence available to him.

Irving had claimed that Hitler lost interest in anti-Semitism after 1933. No dispassionate historian could have reached these conclusions. He had claimed that the shooting of Jews in Eastern Europe was local and arbitrary and unauthorised by Hitler. He had claimed that Hitler did not know or approve of the extermination of Jews at Belzec, Sobibor and Treblinka (known as “the Reinhard Camps”) and that few Jews had been killed there in any event. Originally, Irving did not even accept that these camps were Nazi killing centres at all. He had changed his stance in the course of the trial, to say that if they were, the blame lay with Heydrich and Himmler alone. The judge found substantial reasons for concluding that Hitler was indeed aware of the gassing in the Reinhard Camps and also that he was consulted and had approved the extermination. He found it unreal to suppose that Himmler would not have obtained the authority of Hitler for the gassing programme and irrefutable that Hitler had indeed known and approved of the organised programme of shooting Jews wholesale in the East.

Irving had made much in his writings of the British fire bombing of Dresden which he claimed to be “a true Holocaust.” He had alleged a death toll of over 250,000 people, contrary to the generally accepted figure of around 25,000. Yet he relied for this purpose on a document known as TB47 which was a patent forgery. He had continued to write about the higher death toll figure even at a time when he already knew it to be a forgery. The judge concluded that the estimates for the deaths which Irving continued to put about in the 1990s lacked any evidential basis and were such as no responsible historian could have made.

Auschwitz was a main topic at the trial. Irving had claimed in numerous speeches and writings that no gas chambers were operated there, and that consequently no Jew had lost his or her life in a gas chamber at Auschwitz. He changed his stance in the course of the trial to accept that there was just one “gas cellar” at Auschwitz, but used solely to fumigate clothing. The case for the defendants was that almost 1 million Jews were put to death in the gas chambers there. The learned judge said “I have to

confess that in common I suspect with most other people, I had supposed that the evidence of mass extermination of Jews in the gas chambers at Auschwitz was compelling. I have, however, set aside this preconception when assessing the evidence adduced by the parties in these proceedings.” He went on to examine the available historical evidence in depth. He found an overwhelming convergence of evidence which must convince any ordinary dispassionate mind that at least hundreds of thousands of Jews were systematically gassed to death at Auschwitz mainly by the use of Zyklon B. This evidence included contemporary documents, drawings, photographs, plans and correspondence and eye witness testimony. There was no reason to suggest “cross-pollination” between the witnesses. The judge rejected other suggested motives put forward by Irving as to why eye witnesses might have given false accounts, including greed and resentment by survivors anxious for reparations.

One of Irving’s main reasons for doubting what happened at Auschwitz, was a remarkable document called “*The Leuchter Report*”. Leuchter is an American so-called consultant who was retained by several prisons there to give advice about judicial execution procedures, including those by means of the gas chamber. He has no formal professional qualifications. He was a defence witness in 1988 in Toronto at the trial of Ernst Zundel, a publisher who was prosecuted for infringing a Canadian law (since repealed) which made it a criminal offence to disseminate false information. Zundel had published a pamphlet entitled “*Did 6 million really die?*” which questioned the Holocaust. Irving too had appeared as a witness for Zundel’s defence. There he had learned of the *Leuchter Report*. Fred Leuchter had visited Auschwitz in 1988 to inspect the site and to conduct certain quasi-scientific tests. He had given his “best engineering opinion” that none of the facilities there were utilised for the execution of human beings and that in any event the crematoria could not have supported the enormous workload of corpses attributed to them. He relied especially on the low concentration of cyanide remaining in the fabric of the buildings.

This had caused Irving to make such statements in speeches as “It is clear to me that no serious historian can now believe that Auschwitz, Treblinka, Majdanek were “*Todesfabriken*”. All the expert and scientific evidence is to the contrary.” And “The Holocaust of Germans in Dresden (by the Royal Air Force) really happened. That of the Jews in the gas chambers of Auschwitz is an invention. I am ashamed to be an Englishman”. And “More people died on the back seat of Senator Edward

Kennedy's motor car at Chappaquiddick than died in the gas chambers at Auschwitz." And "Eli Wiesel is a liar... so are the other eye witnesses in Auschwitz who claim they saw gassings going on because there were no gas chambers in Auschwitz as the forensic tests show." And "I don't see any reason to be tasteful about Auschwitz. It's baloney, it's a legend. Once we admit the fact that it was a brutal slave labour camp and large numbers of people did die, as large numbers of innocent people died elsewhere in the war, why believe the rest of the baloney... I am going to form an association of Auschwitz survivors, survivors of the Holocaust and other liars, or the A-S-S-H-O-L-S" And "Far more than half of the inmates of Aushwitz died of natural causes... Perhaps 30,000 people at most were murdered at Auschwitz. That's bad enough of course. None of us wants to approve of that in any way. That's about as many as we English killed in one night in Hamburg, burnt alive." And "It has become a very profitable lie, a lie in fact on which the financial existence of the state of Israel depends." And "I will say to her, Mrs. Altman, 'a survivor' you have suffered undoubtedly and I am sure that life in a Nazi concentration camp, where you say you were, we have no reasons to disbelieve you, was probably not very nice... and life in Dresden probably wasn't very nice... but tell me one thing Mrs. Altman, how much money have you made out of that tattoo since 1945: How much money have you coined for that bit of ink on your arm... half a million dollars, three quarters of a million for you alone?" And "Poor Mr. Wiesel. I mean it's terribly bad luck to be called Weasel, but that's no excuse." The judge quoted dozens of similar statements by Irving which the defendants had placed before him in evidence. These included the claim that British intelligence had deliberately invented the gas chambers lie after 1942 in discussions at the Psychological Warfare Executive in London.

At the trial Irving was finally forced to concede in cross-examination that the *Leuchter Report* was fundamentally flawed. It is unnecessary here to go into all the scientific details, but most significantly Leuchter had assumed wrongly that a greater concentration of cyanide was required to kill human beings than was required to kill lice in the fumigation of clothing process. In fact, however, the concentration of cyanide required to kill humans was 22 times less than for lice. The judge concluded "I do not consider that an objective historian would have regarded the *Leuchter Report* as a sufficient reason for dismissing, or even doubting, the convergence of evidence on which the defendants rely for the presence of homicidal gas chambers at Auschwitz... I

do not accept that an objective historian would be persuaded that the gas chambers served only the purposes of fumigation.... It is my conclusion that no objective fair minded historian would have serious cause to doubt that there were gas chambers at Auschwitz and that they were operated on a substantial scale to kill hundreds of thousands of Jews." It followed that the defendants were justified in describing Irving as a Holocaust denier.

The judge next turned to consider whether the defendants had been justified in describing Irving as an anti-Semite and a racist. He found clear evidence that he was both. He had made many hostile, and offensive references to Jews, for example, "that they deserved to be disliked". And "They brought the Holocaust on themselves". And "Jewish financiers are crooked." And "Jews generate anti-Semitism by their greed and mendacity." And "They scurry and hide furtively, unable to stand the light of day." And "Simon Wiesenthal has a hideous, leering evil face", and many other such statements. Irving had claimed that he was not an anti-Semite, but merely someone seeking to explain to Jews for their own benefit and elucidation why anti-Semitism flourished in the world, without himself adopting it. The judge agreed with Irving's point that Jews are just as open to criticism as anyone else, but found that Irving had repeatedly crossed the divide between legitimate criticism and vilification of the Jewish race and people. "The inference which in my judgment is clearly to be drawn from what Irving has said and written is that he is anti-Semitic."

The judge also concluded that the defendants' allegation that Irving is a racist was justified. Amongst a wealth of similar statements by Irving, he cited the nursery poem which he had written for his own baby daughter. "*I am a baby Aryan, not Jewish or sectarian, I have no plans to marry, an Ape or Rastafarian.*" And he had spoken of his feelings of humiliation at the experience of having his passport checked at Heathrow by an immigration official of Pakistani descent, and seeing black men play cricket for England. There was moreover a wealth of evidence of his associations with right wing extremist groups in different countries, including notably Germany and the United States. He had been filmed at a rally in Halle in 1991 at which Nazi uniforms and slogans were paraded. He had made a speech at this gathering. He had a long standing association in particular with the Institute of Historical Review in America which he himself admitted included "cracked Anti-Semites". He was also associated with the National Alliance, a neo-Nazi and anti-Semitic organisation. He had associated to a significant extent

with over 15 named individuals who were themselves right wing extremists and Holocaust deniers. The judge had no doubt that Irving was fully aware of their political views and shared many of their political beliefs.

Virtually the only issue on which the judge found in favour of Irving was his removal of the glass plates from the Moscow archives. There had been no risk of damage to them and they had been properly returned. Whilst the defendants were not justified in having made this one allegation against Irving, it was minimal and did not sound in damages in the context of the far graver catalogue of allegations which the judge had found to be proven true, and thus justified.

In the final sections of his long judgment, Mr. Justice Gray turned to consider his assessment of Irving as a historian, and his motivation. The defendants had accused Irving of deliberately falsifying and distorting historical evidence. The judge recognised this to be the gravest possible imputation reflecting on his integrity as a historian. Because of the seriousness of the charge, the judge had adopted a commensurately higher standard of proof in his favour when assessing it. Historians, he said, were human. They made mistakes like anyone else, misread and misconstrued documents at times, and sometimes overlooked material evidence. However, he held that in numerous instances Irving had misstated historical evidence and adopted positions which ran directly counter to the weight of the evidence. He had given credence to unreliable evidence and had disregarded credible evidence. In the vast majority of these instances, the effect of what he had written had been to portray Hitler in a favourable light and to divert blame from Hitler onto his subordinates. The judge noted that, by contrast, he had seen no single instance where Irving had misinterpreted evidence in a manner detrimental to Hitler. The judge concluded that Irving had deliberately slanted the evidence, that it was not mere inadvertence on his part, and that he showed a willingness to manipulate the evidence so as to make it conform with his own preconceptions. "He has deliberately skewed the evidence to bring it into line with his political beliefs... he did so because it does not conform to his ideological agenda." He had adopted double standards when treating eye witnesses. For example, taking a sceptical approach towards the evidence of the survivors of the death camps and of camp officials who confirmed the genocide there, but adopting uncritically witnesses such as Hitler's own adjutants who did not. On important issues he had shifted his ground in a significant way in the course of the trial.

"The picture of Irving which emerges from the evidence of his extra-curricular activities reveals him to be a right wing pro-Nazi polemicist.

In my view the defendants have established that Irving has a political agenda. It is one which disposes him... to manipulate the historical record in order to make it conform with his political beliefs... find myself unable to accept Irving's contention that his falsification of the historical record is the product of innocent error or misinterpretation or incompetence on his part... it appears to me that the correct and inevitable inference must be that... the falsification of the historical record was deliberate and that Irving was motivated by a desire to present events in a manner consistent with his own ideological beliefs even if that involved distortion and manipulation of historical evidence".

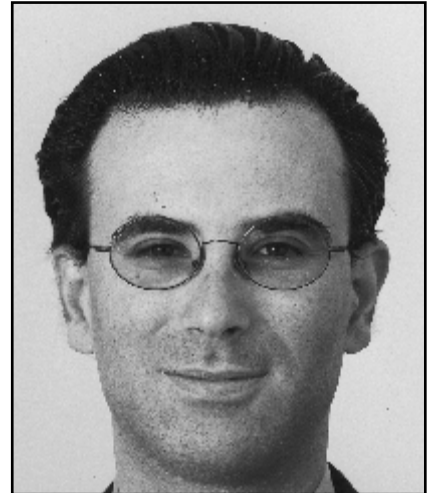
### The Sequel

This landmark judgment was given the widest prominence in the British press and television media. Both Professor Lipstadt and Irving were interviewed separately and at length following it. Irving was wholly unrepentant, and announced his determination to appeal. He has not yet (happily) accused the judge of bias, but has limited himself to stating that he (Irving) must have failed to make himself properly understood, because the judgment was so riddled with errors. A delighted Deborah Lipstadt proclaimed the judgment as a significant victory for free speech, because Irving had chosen to bring his action against her and her publishers. They had not taken the battle to him. He had sought to silence them, and he had lost. Irving claims he will now go bankrupt because he cannot afford to pay the defendants' costs, and must even sell his apartment in Mayfair.

The readers of this article will require no further gloss on the issues raised by this extraordinary trial from the present author, who contents himself with this final reflection. It is deeply depressing that in the year 2000, a man of Irving's undoubted intellect can so prostitute himself intellectually, that he can find a willing worldwide audience perhaps running to many millions in all, and that there continue to be many who will believe what he has written despite all the evidence to the contrary, and will claim (as some voices already have) that this important judgment is just the latest effort by a sinister international conspiracy to silence the voice of historical truth. Will it never end?

# Notorious Swiss Holocaust Denier Imprisoned

Philippe A. Grumbach



**A**t the beginning of last April, the Penal Court of Lausanne found the Holocaust-denier Amaudruz guilty of racial discrimination and sentenced him to one year's imprisonment.

Three Associations filed charges as "*parties civiles*". This is an institution of Swiss and French law whereby certain parties are authorized to act as civil plaintiffs in the course of criminal proceedings. These Associations were the Federation of Swiss Jewish Communities, the International League Against Racism and Anti-Semitism as well as the Association "*Les Fils et Filles des Déportés Juifs de France*" (the Association represents sons and daughters of deportees from France). Mr. Serge Klarsfeld, the President of the latter organization, was personally present at the trial.

A survivor of the concentration camps also brought charges as a "*partie civile*" in his representative capacity as a victim of Nazi persecution.

From the first hearing, Amaudruz requested the Court to refuse to recognize the right of the "*parties civiles*" to appear as parties to the proceedings. The Lausanne Court dismissed Amaudruz' request. The Court held that to reject the right of these Associations to appear in these proceedings was tantamount to preventing any effective action being taken in the future when there would no longer be any survivors left alive to bear personal testimony against Holocaust-deniers and revisionists who asserted that the genocide of the Second World War

had never taken place. These grounds for rejecting Amaudruz' request raised by counsel for the Associations concerned, is of great importance, particularly since the Swiss Supreme Court has not yet ruled on this question. The Court also based itself upon international law, namely, the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December, 1965, which Switzerland has ratified and which has consequently entered into effect as positive law binding on all Swiss courts.

A few days before the proceedings began, Amaudruz again deliberately violated the applicable Swiss law by writing an article entitled "*Long Live Revisionism*". In summary, he wrote: "The figure of six million is an impossibility. I do not believe in the gas chambers, in the absence of proof. My trial is a political trial. The judgment is purely opportunistic. I prefer to follow my conscience rather than an immoral law of a criminal nature. I maintain my point of view. Long live revisionism".

At the request of the Public Prosecutor, the indictment made explicit reference to this article. During the course of the trial, Amaudruz visibly took pride in being regarded as a racist.

Amaudruz, born in 1920, studied political science at the University of Lausanne where he obtained a doctorate in 1942. Presently, he is retired and ostensibly lives on his pension. As from 1946, he took part in establishing a publication called "*Le Courier du Continent*". In 1951, he also took part in the creation of the "New European Order" movement in Zurich. Its basic doctrine called for the creation of a European racial policy. For many years, Amaudruz was considered as a neo-Nazi. An

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August 1946 report of the Swiss Federal Justice Department made reference to his pro-Nazi sentiments. Throughout his trial, Amaudruz denied that he was an anti-Semite. It was, however, extensively shown by Amaudruz' writings that he was a central figure of extreme right wing anti-Semitism.

Amaudruz admitted that he was a member of the Association called "Truth and Justice" created in January 1999 the purpose of which was to re-establish the historical truth of freedom of expression! The Court read out several passages of Amaudruz' works, the contents of which are of the most pronounced anti-Semitic and racist character. The denial of the existence of the gas chambers is a central feature of most of his writings.

The main concern of the Court and of the Associations and civil plaintiffs was to avoid making the history of the Second World War the central issue of the trial. In fact, in accordance with decided precedents of the Swiss Supreme Court, the existence of the gas chambers is a recognized fact of record. Several witnesses testified to the terrible suffering to which they and their relatives were exposed in the death camps.

Amaudruz was found guilty of racial discrimination and of violating Art. 261 *bis*, Sections 1, 2 and 4 of the Swiss Penal Code. It should be recalled that this provision was endorsed by Swiss voters in the course of a referendum which was held on 25 September, 1994.

Art. 261 *bis* entered into effect on 1 January, 1995. It specifies under Swiss law the requirements of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December, 1965, which took effect in Switzerland on 29 December, 1994. Amaudruz, like all Holocaust-deniers, rejects the validity of this law. It should be emphasized that this provision protects public order and punishes any violation, whether collective or individual, offending against the racial identity and the human dignity of the group affected. It should also not be forgotten that Art. 261 *bis* Section 4 is particularly aimed at negationist propaganda described in German as "*Auschwitzlüge*", which is defined as a denial of the existence of the gas chambers, minimizing the number of Jews killed in the Holocaust and asserting that Jews derived an economic advantage from this period of their history.

Negationism is a form of racial discrimination which causes offence to the community to which the victims of genocide belong. It is very important to emphasize in this specific context of the respect for the right to freedom of expression, that the violation of Art. 261 *bis* Section 4 of the Penal Code does not

prohibit serious and objective scientific research but seeks only to prevent the publication of statements the purpose of which is to minimize the importance of crimes against humanity or which aims at negating their barbarous and monstrous nature. Establishing the element of deliberate racist motivation plays a crucial role in the enforcement of this provision.

All the articles and writings of Amaudruz as well as all the publications seized in his home clearly established that they were racial propaganda. They all consist essentially of denying the genocidal acts committed during the course of the Second World War. Amaudruz' published articles in "*Le Courier du Continent*" all contain extracts which purport to negate the existence of the gas chambers, cast doubt on the extent of *Shoah* and in effect deny its existence and make reference to blackmail for which the figure of six million victims was allegedly used.

The Lausanne Court found that these extracts constituted a serious affront to the dignity of Jews in general. The Court also recognized that these extracts amounted to an offence against the sacrosanct memory of the victims as well as a defamatory attack against the history of the Jewish community.

To summarize, the judges concluded that all Amaudruz' written works, the material which he disseminated and the contacts which he entertained with racist movements of the extreme right, pointed to his profoundly anti-Semitic motivations. The Court left no doubt in its findings as to the extent and seriousness of Amaudruz' guilt. Having regard to the attitude which he displayed in Court, the judges refused to recognize any mitigating circumstances and sentenced him to a prison sentence which he would be required to serve.

The importance of Amaudruz' trial and conviction and the keen interest with which it has been followed, has been widely acknowledged in both the Swiss national and international press. A man of advanced years, Amaudruz nonetheless represents a threat to society, as do all Holocaust-deniers.

Treating such a dangerous phenomenon as commonplace would imply giving revisionists and Holocaust-deniers a certain degree of credibility. The danger of a revival of Nazism undoubtedly exists and contemporary evidence of this abounds.

Amaudruz filed an appeal against this judgment. Its purpose is purely dilatory and there is little doubt that his conviction and sentence will be reaffirmed all the way to the Supreme Court.

There can be no doubt that the fight must be continued against all Holocaust-deniers and racists for the simple reason that those who forget the past, are condemned to relive it. ■

## THE STRASBOURG CONFERENCE

The Strasbourg Conference (January 20-23, 2000), in which the Council of Europe hosted the IAJLJ, deliberated on the relationship between xenophobia and anti-Semitism in Europe and elsewhere. This issue of *JUSTICE* continues with our extensive reports of addresses given during the Conference.

# “Who Made You a Judge? Why Do You Judge Me?”

Pierre Draï

**J**udging means caring to listen, trying to understand and being willing to decide.

*In short, it means loving and respecting one's fellow man.*

French judges, whose conscientiousness and moral integrity are praised abroad, are not fundamentally questioned in France, although it is good custom there for writers, sculptors and painters, on stage or on screen, to address the police and judges in caustic criticism or ferocious irony.

Judges and barristers who provide defence and advice, whose mission it is to pass judgments, to settle disputes and to establish that “judiciary peace” without which a constitutional State remains an empty, flimsy concept - are

those for whom - according to von Ihering's proud statement made a hundred years ago - “law is not pure theory but a lively force, for the reality and practical strength of the rules of private law reveal themselves in and through the defence of concrete rights.”

In these difficult times related to a half-century of a history that has been cruel to France - there are judges in France who climb and often struggle up the steep and difficult path leading to the truth amidst media demonstrations and revolts, in a hubbub of indignant sarcasm and vengeful cries.

One must know and be deeply convinced that nobody is indifferent to justice and judges. And the columnists and editors who, through words or drawings, through picture or sound, endeavour to put “judges on the scales”, to blame them now for their submissiveness, now for their arbitrariness, now for



being distant from living and suffering men, now for being excessively and unconditionally “integrated” in a political, social or economic “fabric” which turns them into “activists” or “partisans”, will never get tired of the “strange power of seduction” Franz Kafka assigned to the thing called the Institution of Law.

Distant judge, finicky judge, asthenic judge, sheriff-judge, expeditious judge - all these terms can be said indefinitely in

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a tone of vengeful controversy or doleful litany.

Unless we see our judge only in God, in the symbol of monotheists' supreme will, the secret of judges' hardships and crises is that man, in his greatness or pettiness, finds it hard or even impossible to accept that one of his fellow men may decide, judge and impose.

And he proclaims it when his argument has been rejected in court, by "climbing" up to the Supreme Court - France's 'Cour de Cassation' - (and even beyond if possible). And when his claims have been admitted, he then considers that justice has been done to his "good right".

Whether a transient or a lasting phenomenon, the "judge's crisis" is attached to our condition as imperfect and demanding men.

### **Who made you a judge?**

### **Why do you judge me?**

Asking a judge those two questions means prompting him to search, in a state of surprise and anxiety for the source of his legitimacy and the limits to his power.

To decide on the life, honour or fortune of one's fellow man would require proceeding from a Supreme Being, unquestionable in his perfect omniscience.

Socrates, hearing that he had been sentenced to death, caused his judges to be utterly perplexed: "It is time that we part, O my judges! You, to live your life further, I to join death. Which of us got the happiest lot? Nobody knows, except God".

### **Yes, judges are needed!**

"*Shoftim ve shotrim titten leha*" ["Judges and officers shalt thou make thee", Deut. 16:18].

In our countries, which are designated by protest and noise as real democracies as opposed to the orderly silence of totalitarian regimes, always talking about justice and human rights means maintaining the sometimes flickering flame of which the judge has to take care and which he has to rekindle when "evil winds" are blowing.

Yes - never before have judges been so much in the foreground.

Europe can only be constructed through Law and by the good workers of the Law, the judges. A free law, independent and impartial judges - an ever open, huge worksite of a never completed building!

With fundamental rights always under threat or jeopardy, either openly or insidiously, and also new rights emerging as decades go by because it is Man's destiny to continuously want more freedom and more respect, it will always be necessary to turn to judges as "practitioners of the ideal".

To his king who threatened him and tried to despoil him, the Potsdam miller shouted in plain language "Yes, there are still judges - in Berlin!"

Yes, there are judges! Let us publicize it in that vast space of the Europe of Human Rights.

While criticisms about the training of judges, their inaccessibility, their approaches, and the length and cost of the end product - the sentence - are flying from all sides, all those who, knowingly or not, aspire to more law and to whom a judge must serve as an economic and social regulation organ go to judges in huge crowds.

There is a growing need for law, and "law consumers" are increasingly demanding.

For, as they are emerging from a strictly State-controlled and regulated economy and forced to open their eyes and ears wide on new fields covered by law, our lawyers - and not only our judges - must be aware of the phenomenon of "pan-legalism" which our modern societies are exploring in convergence or the benefits of which, with their naturally attendant perils and adaptive efforts, they are making out.

Of course, quoting Mr. Laurent Cohen-Tanugi, in his remarkable essay "*Le Métamorphose de la Démocratie*": "*Tomorrow's society and States will require multiple services from their judges, and perpetuating a political tradition that assigns to jurisdiction and jurisprudence the role of narrow interpreter is a poor preparation to promoting that mission*".

First of all, legislators increasingly have confidence in judges.

Judges are increasingly called to go beyond what university professors call "legal standards".

Judges, through the various "legal standards", should be able to move more freely than in the past.

They are no longer those "judges with tied hands", shut away in their ivory towers and fully deaf to the cries and whispers of a society that is eager for opening up.

Again, legislators themselves are helping judges go beyond those "legal standards", not for the purpose of negating law, but when law is inadequate to settle a dispute, when it has shortcomings or when it is silent: judges must nevertheless make a decision, since Article 4 of our Civil Code makes it an absolute requirement, otherwise there is a denial of justice. The 'Cour de

Cassation' itself invites judges, just as does the Council of State, to use those general principles of law which form the general and fundamental basis of our civilisation, because their value is universal and because, therefore, they are at the top of the kelsenian hierarchy of standards.

The following principles should be noted:

- legal safety,
- legitimate confidence,
- equivalence or proportionality of services,
- non-discrimination between men and women,
- equality before judges of those to be tried,
- the presumption of innocence,
- the fundamental principle of any liberal democracy, according to which all that is not prohibited is allowed.

These principles have been the outline of a democratic public order, for it must be remembered that the European Commission and Court have always asserted that that the Convention has a subsidiary character versus internal law, and that it assigns, in the first place, to each State the task of implementing the Convention, giving States some "room for assessment" to allow for the variety of local systems.

Learned authors may analyze decisions made by the European Court of Human Rights: they would fail to note that one year after its ratification by France, the Court of Criminal Appeal at the 'Cour de Cassation' had already acknowledged its *Raspino* decision (3 June, 1975) that the Convention's provisions were directly

applicable in France and that they could be referred to before French courts since Article 55 of our constitution so requires.

However, when France decided on 2 October, 1981, to recognize the right to individual appeal to the European Commission and the European Court of Human Rights, it came a full circle: French law was confronted with the Convention's international law before a court of law with a supranational character.

Our judges have tackled this new project in a very relaxed frame of mind and, day after day, they establish, in particular within the Court of Criminal Appeal at the 'Cour de Cassation', a model of European criminal trial involving the "right to a fair trial", with fundamental guarantees granted to those prosecuted.

I will conclude with a text which

serves as my profession of faith, without the least literary claim - the text of the '*Letter to My Fellow Judges*' which I sent to each of them when I left office on 1 July, 1996. This is the text of a written reflection, not on a judge's rights, but on the duties towards those who, in confidence, go to him and give him the order to accomplish an almost sacred mission, according to the precepts of the Torah:

*"Tsedek - Tsedek Tirdof"*

"Justice, it is justice that thou will strive for".

This is the formula heading the front cover of our beloved Association's review.

We must never stop repeating it.

*"Tsedek - Tsedek Tirdof"*

"Justice, it is justice that thou will strive for".

## 'Letter to My Fellow Judges'

This first day of July 1996 sees the end of a judge's career.

I was a judge for over four decades uninterruptedly and, while climbing the successive rungs of the ladder of courts of law, I learned to know and love more and more that "occupation" (is it really an occupation?) which requires enthusiasm, modesty, patience and pride from those who take it up.

I learned that judging means caring to listen, trying to understand and being willing to decide.

I learned that judging does not mean judging "as usual", in the monotonous and mechanical routine of a stream of cases that must be managed and, one day, are disposed of.

I learned that in the act of judging we should always leave room for doubt and never leave room for "rumour", "prejudice" or "suspicion".

I learned that we should always be considerate to a person who suffers, in his or her freedom, his or her reputation, his or her family and emotional life.

I learned that when appearing before an independent, free judge, a man or a woman should not feel humiliated prior to judgment.

I learned that a judge should only worry about the confidence and respect he must receive.

Such confidence and respect are our sole title of legitimacy.

I wish that the law of this country will always get the "dignified" and "loyal" judges it deserves.

**Pierre Drai**



# “The Real Test is Whether One is Able to Maintain a High Level of Human Rights When One is in Conflict”

Dan Meridor

**J**ews have always been prominent in the fight for human rights all over the world. But let me submit that there is not much need for bravery to fight for human rights when one is the minority because one is protecting one's own interests. The real test for adherence to human rights is when one is the majority, and has the power. The question then is whether one is able and ready to do what one wanted others to do when one was the minority. We in Israel, not only as a democratic State but also as a Jewish State, have been put to the test - to see whether, when we have the power, the army and the police, when we fight our wars, we are able to maintain that same level of moral behaviour in relation to human rights, as we wanted others to uphold when we were the subject of maltreatment.

Unfortunately, when Israel was established it was decided not to have a constitution, perhaps bearing in mind the English example. The fact is that the *Knesset*, which I thought would deal first and foremost with human rights, did very

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little in that respect. Over the years we have enacted chapters of the constitution which we called Basic Laws (*Grundgesetze*, to use the German term) that will ultimately comprise a full constitution. By 1992, we enacted nine Basic Laws dealing with the institutions of the State - none of them dealing with human rights. How is it then that Israel was and is a democracy if the *Knesset* did not do anything about it?

No one can doubt that the role of setting the standard of human rights, was assumed by the Supreme Court of Israel. When the politicians shamefully did very little, the Court stepped in and did a lot.

I would add that it is easy to maintain a level of human rights when you teach it at Harvard University in Boston or even Oxford in England in times of peace, when there are no enemies and there is no tension of a national character between your nation and other nations. But, again, the real test is whether one is able to maintain a high level of human rights when one is in conflict, when there are national interests on the table and when - because one is upholding a high level of human rights of the individual - one has to make decisions which may sometimes hurt the interests of the general public.



I do not know of any other State or nation that, in the initial phases of building up the nation, did so, alongside wars and terror, with that high regard for human rights. One may think of Britain during the Second World War when persons holding German passports were detained because they were German, not because they had done anything wrong. We have not done anything like that to the Arabs among us. One may think of the Japanese in America during the Second World War when America was at war. One may think of another human right - the right to freedom of expression - the First Amendment, in American terms - and how well it was kept when

the American army fought in Grenada, or the British press in the Falklands. They said that freedom of press could not be allowed when there was war.

We have not done that. We are trying to maintain a high level of human rights, including freedom of expression and the freedoms and liberties of the individual while fighting wars. Since the early days - the late 1940s and early 1950s - the Supreme Court of Israel has been the body to set the standard and keep it against a very authoritarian regime in the times of emergency and war that Israel has experienced.

Let me go through a series of cases that will illustrate this point. In the first years, when Israel was led by David Ben Gurion, who, for security reasons, wanted to close down a newspaper that had published something against the Government, the Court - in 1953, less than 5 years after independence - said to him, "No, Sir, You won't close down the paper! It will be kept open." This, the *Kol Ha'am case*, has been the cornerstone of freedom of expression in Israel for almost 50 years.

Over the years, while wars were being fought, there was conflict between the needs of the army or the behaviour of soldiers and commanders and individual rights. Again, it was the Court in Israel that raised the flag and set a standard. One may remember the awful case of Kfar Kasim in 1956 during the Sinai campaign, when a curfew was imposed and soldiers, seeing civilians violating the curfew, shot them down. The Court in a historic decision set the rules concerning the manifestly unlawful order that should not be obeyed: "When a black flag is waved above your head, don't obey the order! Even if it is given by authorities that have the right to give orders."

In recent years, when the *Intifada* was part of our lives, soldiers were put into difficult situations that were very difficult to handle, and the question rose several times - I remember it very well as a Minister of Justice in those days - what do you do when soldiers exceed the limits we have set for them? There were several cases where soldiers and commanders, including a brigadier-general, were brought to trial because of what was perceived to be an intolerable infringement of human rights in times of war.

The decision which was made then by the legal system was very unpopular. The majority, as is natural in times of war, would go with the soldiers. But we - the legal system, the courts - had the courage to try those people and set standards for the army. We said, "Don't do those things! Yes, it makes war more difficult, it makes your life as soldiers more difficult, but when you don't see an immediate danger in which you have to use power the way you do, then don't do it! It's true that if you use certain means you may extract evidence, information, but don't exceed a certain limit. In the end, we are all human beings."

The Court in Israel also acted in this way in the years following the *Intifada*, from the end of 1987, until 3 or 4 years ago.

There was a decision to be made. We have the Territories: Judea, Samaria, Gaza, the Golan. Our army is there. There are Israeli soldiers in Lebanon. Sometimes in the operation of the army one infringes rights or hurts Lebanese people or Arabs in Judea and Samaria. Should we give them access to the Supreme Court? The Americans did not. One may recall the cases where Germans who were held prisoners by the

American army in Germany appealed to the court in the United States and were told, "It is not for you. It is for Americans."

Only six or seven years ago a case was tried in the United States Supreme Court concerning drug trafficking. Under the American-Mexican agreement, America apprehended a suspect in Mexico and took evidence. He was brought to trial in America where he claimed that there had been no warrant for the search and that he was protected by the American Constitution. The case went to the Supreme Court. The question asked was whether the American Constitution - in terms of human rights - applies to non-Americans. Surprisingly, a majority of 5:4 said "No. The people of the United States are us. It doesn't protect the Mexicans." The majority was led by Justice Rhenquist and opposed by Judge Brennan. "Why should we give our enemies access to our Supreme Court?" said the Americans in those two cases.

We decided differently. Supreme Court President Shamgar decided so when he was still the Attorney-General. We gave them access to the Supreme Court against our army when acts were done that they thought infringed basic human rights. The Court intervened: some people say too little, some people say too much; there is criticism from both sides. But I think that the intervention of the Court in times of war regarding enemy civilians is extraordinary. I don't know of other countries which have done the same.

Another question has now arisen regarding the Lebanese. A very difficult case is now before the Supreme Court concerning prisoners of war who are alive and still held by enemies [see

below at p. 38]. In our operations in Lebanon, we took some people from Lebanon, to trade for our soldiers. Some have been in our prisons for several years. There were appeals to the Supreme Court and the Supreme Court has to make a decision whether it is legitimate for a State to hold people as "hostages". It is a very difficult case. I would guess that the Supreme Court is going to say, "No. Release them". I am not sure. I don't have any inside information. But just three weeks ago the head of the *Hizbullah* said, "All right. Release some and we'll try to find evidence." Should we release them now and lose the trade or not? It is a very large question put now to the Supreme Court.

The question rises sometimes whether defence and security issues are justiciable. Let me tell you about an English case this time. During the Gulf War in 1991 the Iraqis called by radio upon certain terrorist organizations to terrorize the West. One morning the Home Office knocked on the door of a Mr. Shablak who was living at the time in Oxford and said, "Sir, you are going to be deported from England." He had been living in England for 15 years by that time but he was not an English subject. He had a wife who was English and his children had been born in England. He appealed to the court and in a decision by the then Master of the Rolls, Mr. Donaldson, it was held that defence issues are not justiciable and he could be deported.

The Israeli Court went a long way - I think further than many courts in the world - in holding that there is nothing that is in principle non-justiciable. The Court may not interfere, but everything that the authority does, it does by virtue of the law that gives it the authority so to

do. If it uses the law wrongly or exceeds its authority it is justiciable and the Court will demand an explanation and see if the deed is based on legal grounds or not.

Finally, something else should be mentioned that happened during that same Gulf War. One may remember the SCUD missiles which fell in Tel Aviv and other places, the fear of chemical warheads, and how all wore gas masks. There was a petition by Arabs from Judea and Samaria saying, "Why don't you give us masks? We too may be victims of the SCUD if it falls on our heads." The answer of the defence establishment at the time was, "Yes, you may be victims but the likelihood that it will fall on your heads is very small because they aren't shooting at you. They're shooting at us." In a debatable decision, the Court decided that the Government should buy more masks and not discriminate when distributing them. Everybody was entitled to receive masks in time of war when SCUD missiles were falling.

I think these are examples of intervention in times of war against the Government in very serious circumstances.

We broadened the entrance to the Court. The theory of *locus standi* given only to persons who have been hurt personally or damaged personally, has changed so that if the case brought before the Court is of great constitutional importance - the petitioner may apply even if he has not been personally damaged and even if the matter is a defence or security issue - contending that the authority had no grounds for doing what it did.

Years ago, the President of the United States granted amnesty to some security service people who were accused of

killing a terrorist during his captivity. After a long debate - the Court unanimously decided that it had a right to rescind the pardon given by the President. Two against one they decided not to do it in that particular case. The petitioner was not hurt because somebody received an amnesty, but the pardon may have been given otherwise than on correct legal grounds. There was no authority to give it and the Court was ready to intervene.

A unique case is the matter of interrogation by the security services - a case well publicized recently. That we fight a war, that there are terrorist organizations fighting against us who have no regard for human rights, and that the Supreme Court intervened, is known. When interrogating people there are methods which are totally illegitimate under the Convention against Degrading and Inhuman Treatment and Torture, but it is also a matter of basic humanity that one does not use them. Nonetheless, in times of war, in many armies, this rule is not kept meticulously. Over the years, there was one Prime Minister, Menachem Begin, who, when he became Prime Minister in 1977 - called into his office the head of the security service and said to him, "I won't permit you to use any violence in interrogations. Use the smart heads of the interrogators."

They agreed, but the truth is that, unfortunately, they did not follow the instructions of the Prime Minister meticulously. Over the years, more and more cases were reported directly to the Government or to Amnesty International or to the Red Cross concerning totally illegal treatment by the investigators of the security service. It was not because they were sadists but because they had a

problem on their hands. The man in front of them might have known where someone had hidden weapons or explosives. He was part of that organization. If he did not give the information someone could get killed, and he was not going to tell if just asked politely. So what was to be done? "Do we or don't we?" There was great pressure from the Government to get results and from the legal system which said that a certain limit was not to be exceeded. It has not been a war of a week, but an ongoing war of years.

I understand the pressure that the security service people were under but over the years the legal system and some people in the political system fought and changed and corrected the situation in a radical way.

The first case was when the former Supreme Court President Moshe Landau headed a Commission that found that there were systematic cases of breaches of basic human rights during interrogations. Later, there was the case of Halici Ali who was killed during an investigation. We held an investigation within the Ministry of Justice and found again that torture had been used.

For the first time in Israeli legal history people from the security services were brought to trial, convicted of causing the death of a prisoner and sent to prison. This sent shock waves through the security services. They changed somewhat but it wasn't good enough. Until recently - some four months ago - the Supreme Court, in a unanimous decision of 11 judges, decided that those methods were totally illegal, illegitimate, and should not be carried out any more. That very same day, the head of the security services stopped these ways of interrogation.

Let me explain the problem. Under our

law and under English law, one of the excuses for committing a crime is duress or necessity. Necessity may occur where one knows that if one does not perform the action someone will die, and one needs immediately - "immediately" is important here - to do a certain thing which is in violation of the law, as otherwise greater damage will occur. This is legitimate. The question arose whether if I have good grounds for thinking that a person may know of someone who may use weapons or has explosives, I can use force, power? The decision rightfully was: no. Not because there are no cases where the danger is immediate and the action is necessary but because when left to such wide interpretation and construction, people have used the opening in an excessive manner in many, many cases.

So the Court said that if *ex post factum*, we find that the man being interrogated has the knowledge and that if one does not act now people may lose their lives - a bomb is ticking somewhere in a supermarket and if the information is not received a hundred people will be killed - the Court would not indict the interrogator, and of course would not convict him. But the Court will not say in advance that the interrogator may act in this way, because such a rule saying that torture or inhumane treatment may be used during interrogation is not legitimate.

That is what the Supreme Court decided. Immediately there was a row, and the security service and many politicians said, "Let's legislate. There is a legitimate way of using force." The Prime Minister set up a committee which has not come to a unanimous conclusion. Just recently, after many witnesses appeared before them with differing

views, it decided to refrain from acting for the time being. I believe and hope that because of the Court's attitude the interrogation in the security services will be such that they will use methods other than those they have used so far.

In conclusion, when there is this tension between real security needs, on one hand, and human rights on the other, a decision is very difficult because one is talking about human lives, about the basic survival of a country. Because we are in the long process of a war for the survival of Israel, we know, and the intuition is perhaps even intellectual, that if we allow too high or too low a standard, in the long run it will kill us, not only our enemies. We would not be able to look in the mirror and be proud of ourselves. But in this test and under very difficult circumstances, we have acted over the years in the way we preach to others to act, and in the long run it serves our cause and not the opposite.

The Israeli legal system has taken up this task more than the democratically elected representatives. I believe and hope that the day is not far off when we shall conclude the legislation of constitutional human rights which we started in 1992 with Basic Law: Human Dignity and Freedom. We need to broaden the number of rights protected there and give the Supreme Court the right of judicial review over *Knesset* legislation - a majority legislation - especially in cases of human rights. In the long run parliamentarians will take the right road. So far, the Courts have done so and in a way that makes all Israelis proud of where we are now.

# From One Council of Europe to Another: a Pan-European Trajectory

Francis Rosenstiel

**T**he concept of a European trajectory is not the easiest to define scientifically. But who speaks of exact science when discussing political science?

Visionaries, maybe, mythomaniacs, without a doubt.

Basically, what is the Council of Europe?

The history of the Council of Europe is a history of diverse, divergent constraints, through which runs a thread reflecting the link between Jewishness and Europeanness.

These two concepts, in respect of Europe in general and the Council of Europe in particular, seem to me inseparable, for better or for worse. These are our roots which plunge into uncertain, sometimes incompatible foundations.

In June 1944, in a little township of l'Allier, in Bourbonnais, a singular meeting lasting more than 4 hours between Gestapo and militia opened up my eyes at the age of 7. There is a strange formula - that age 7 is the age of reason, with respect to me, that meeting was at once a coincidence between the

age of reason and the age of unreasonableness. A kind of symbiosis, a type of closeness between reason and unreasonableness which was created there in an instance, in a place which knew nothing of Europe, which knew nothing of the Jewish people, and even less of the great stakes at hand a few kilometers away at the Parc Hotel, at the seat of the Vichy Gestapo, the Portugal Hotel, or at the "small casino" where the militia, so zealous, went on its rampage.

For me, it was, in a way, a first European meeting, one which had gone poorly. It was, in a way, a failed European meeting, perhaps demonic. But devilishness can also bring about benefits, and this devilishness determined my inner chemistry and certainly my future European itinerary, which may not have existed, or made sense, without that meeting.

Strasbourg in 1947 was a strange place. Brought up in the shadow of the cathedral which reveals a certain indifference and a haughtiness which carries a certain sense of derision; this cathedral resounded with the steps of the Führer who removed his cap and carried it under his arm. Deference? Doubt? We don't know. The statues do not speak.



Subsequently, in 1957, I pursued this rather chaotic logic: as a federalist, European militant, then as a Zionist; this did not seem to me, in my real-life logic, to be incompatible; it was in any event unavoidable.

With the same "micro-logic", in 1965, I entered the Council of Europe.

In 1966, I discovered Israel, through a Jewish prism, but also through a European prism.

I remember one of my first missions as a young official of the Council of Europe, when, in the wake of the Six Day War, I accompanied the Adjoint Secretary General of the Council to the Vatican to have a meeting with the

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eminent Cardinal Agostino Casaroli, an inspired personality. We held an interesting discussion. Our Secretary General asked him: "But, Your Eminence, since the uniting or the occupation of Jerusalem by Israeli authorities, what is the impact of this event on you?"

Cardinal Casaroli, with wisdom, with honesty and undoubtedly with faith, responded: "You know, Mister Secretary General, the Church is accustomed to dealing with *de facto* authorities." There was almost a pleonasm in the mouth of the churchman used to the subtleties of transcendence.

With what other Institution above the Church, can the Vatican institution deal if not with a *de facto* authority, since the only *de jure* authority, even if it displeases us, is located in a sort of perpetual and global elsewhere?

This explains everything. The deferential visit of the Führer to the cathedral at Strasbourg, the spontaneous arrival of General de Gaulle in the same cathedral, the passage of Israeli leaders between the statue of the church and that of the synagogue with the broken spear.

After this short Vatican anecdote which left me with a certain sense of political reality, within the history of the Council of Europe, I see certain crucial moments:

Cassin's creation in 1949 and the creation of the Council of Europe on the heels of the *Shoah*. The Council of Europe would make no sense without this common history.

Why? Because the Council of Europe is a totally artificial creation. It is not the result of collective reason and the

wisdom of nations. It is a wisdom produced after the exhaustion of all other bloody solutions. It is a type of positive and constructive balance. It is not the arrival of collective and spontaneous wisdom.

The European Convention on Human Rights, the Court, the statute itself which excluded all totalitarian regimes, carries a constraint which implies that becoming a member of the Council of Europe is not the same thing as acquiring a type of one way ticket. It is a round-trip package deal. It is a sort of moderately ejectable seat since one can hesitate sometimes, but one never falters - and when one hesitates it is with the certainty that diplomats will save the essential.

During the years 1952-1954, the Council of Europe met with interesting developments - the first community breakaways. This was the adventure of supranationality, by a group of politicians who were looking for something else between the Nation State and the Federal State. Then a head group was established which successively tried the Ceca, Euratom, the EEC, judicial and political audacity at the same time.

Then came the great trauma due to the failure of the European Community Defence project, a failure which raised the spectre of German rearmament. I remember the posters, the soldiers, the SS, the soldiers of the *Wehrmacht*, with boots, helmets, legs apart, and sentences like: "Is this what you want?"

But behind these shocking images, behind this spectre of German rearmament, there was the fact that the project of the ECD treaty anticipated that, in a

given and very short amount of time, the European Community of Defence would be equipped with a decisive political and parliamentary structure for political interaction.

Why? The success of the ECD would have granted us more than a little time today, since the spectre of German rearmament was totally a product of fantasy, given that the German army, as a result of the failure to adopt the ECD, was much more independent and less integrated with the other structures which would have fallen into the scope of an ECD.

Then, the Community continued to develop, beyond the scope of the Council of Europe, in the panorama of international organizations, the fundamental, innovative originality was the coexistence of two statutory organs, one traditional, a body of sovereignties, inasmuch as sovereignty still existed, and also the Committee of Ministers, one State, one voice, and a parliamentary dimension: the consultative assembly.

Here was the innovation: the statute of an international organization was juxtaposed with a classic intergovernmental executive body at the heart of an international organization and a democratic parliamentary organ.

The ambition of those who had conceived - at the Congress of the Hague - the concept of the Council of Europe would go even further, since they wanted, through the Council of Europe, to establish a real political community with a parliamentary and constituent assembly, elected by universal suffrage from the start.

But that project, as is known, was shelved, until the European Parliament saw the light and, during a second phase, this European Parliament would be elected by universal suffrage.

But here, as well, there was a deviation, a sort of positive perversity of European progress. This European Parliament was, above all, an advance force. It was a European Parliament which came before a political reality which is still in the process of being formed. In addition, the Commission, a bureaucracy, was given an anticipatory political role, whereas with a traditional bureaucracy, the administration serves the political authority and, as a rule, does not promote it.

The two roads thus separated in the 1950s.

At that time, the Council of Europe entered a sort of sublime desert crossing, destined for the concelebration of the theology of the human rights, in the shadow of the icons.

In 1989 came what I call a positive implosion, the fall of the Berlin Wall. Was it true that a political institution, a bureaucracy was witnessing something that it had always wished for? The memory of the pan-European dimension of the Council of Europe had never been forgotten, it had simply been put on hold.

The integrated memory of the Council of Europe was to be rediscovered in 1989 with the appearance of Gorbachev at the platform of the Council of Europe.

It was not to the European Parliament in Brussels, where the real business was conducted, that Gorbachev went, but to the epicenter of human rights. There he

came to hold a dialogue and there he came to declare, with extreme candor, the availability of his country, and by force of circumstance, the availability of a part of that continent.

The Council of Europe pondered this and said to itself that something needed to be done to respond to this expectation.

What could be done?

These countries were not mature, not "perfect" democracies. And yet, something had to be done. Something with respect to "*Real politik*". We did not turn to status, this was too complicated. We needed to preserve the image of the sanctity of human rights and pluralist democracy, adapting to the needs of the moment.

The Council of Europe thus hurled itself into a period where imagination abounded, and a store of accessories proliferated; where there was a propensity to multiply the components at the disposal of the Institution.

A category was invented to welcome these countries. This category was that of special guests.

How can one define - scientifically - a concept like that of special guest? Is this a guest who does not seem like a guest? Is the guest special to the point of appearing normal? Is it the inverse of that?

For all those candidate States which had not yet acquired the maturity of democratic credibility we would offer a custom-made Parliamentary Assembly seat, to allow them to participate in debates, without integration into the holiest of the holy parts of the Organization, the executive, the Committee of Ministers.

In a way, this would transform this House into an immense European Fitness Center, a center not for relaxation, but for democratic workouts, with unique hostesses, it is true, somewhat muscled hostesses, where the principles always have muscles if they want to be effective.

The Fitness Center would gradually welcome all the States, until the countries could become full members.

So, questions were asked. The Institution had witnessed metaphysical anguish. There had been a real surrealist debate in the Parliamentary Assembly with a written report, on the limits of Europe: where did Europe stop?

The conclusions of the debate were: we did not say that we should stop with Judeo-Christian reality, we had already included Turkey, a short time before, thus we decided that this Council of Europe should stop with the Caucasus. A certain number of Caucasian States are, moreover, already members of the Council of Europe. It was clearly stated that the central Asian countries (Turkmenistan, Tadjikistan, Kazakhstan) could not join the Organization.

At that time we entered a period where the Organization somehow left the theological world and made, either a return or a real entry, into politics; that is to say it reinstitutionalized the taste, sense, and willpower of political risk and the management of political risk, really turning democracy into what it should be, not a pious image, but the daily management of our certainties and our fragilities.

At that time, the Organization entered into a period not of doubt, but of deep readaptation of mentalities, obviously confirmed by the arrival of our colleagues from Russia and other Eastern countries. When Russia became a member of the Council of Europe, a number of people said: "Not only is Russia not mature, not perfect, not this, not that, but won't it also completely unbalance, turn upside down the life of the organization, its image, its credibility? Won't the nature of the Council of Europe change?"

I have always denied that this would be the case, and I have always affirmed that the entry of Russia would basically constitute the crowning of the Institution's political normalization. In effect, I think that the fact that a certain horizontal banalization has been implemented at the political level, is a good thing. Realism imposes certain fluidities.

To date, there have not been any major

impulses or jolts on the diplomatic or the daily plane.

Finally, I will refer briefly, in impressionist fashion, to the moments when the overlapping of the Jewish dimension and the European dimension were particularly sensitive, namely, after 1949, after the Cassin effect.

In 1954, the Parliamentary Assembly of the Council of Europe granted the Israeli *Knesset*, the status of observer which allowed it to send 4 MKs to every session, two from the opposition and two from the majority.

The presence, amongst us, of :

- Abba Eban, in 1967,
- Golda Meir in 1973,
- Menahem Begin
- Dayan and Boutros-Ghali who together held a dialogue.

The great questions which have interested us from a Jewish perspective were mainly the lengthy struggle for the

defence of the Jews of the USSR, and also the Jews of Arab countries; the long debates about the Middle East and peace; and the colloquiums with Shimon Peres, the Palestinians, the Arabs, the League of Arab States.

There is thus a type of linear quality, at least at the level of parallels, between the common European topics of interest and Jewish topics of interest in the widest sense of the concept.

The most recent initiative was when the Secretary General, Mr. Walter Schwimmer, considered together with the European Jewish Congress and the American Jewish Committee new types of anti-Semitism, in the light of the European Conference and the Worldwide Conference on Racism.

The Council of Europe and the Jewish reality, this is the history of a long, shared march, often side-to-side.



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



# “Anti-Semitism and Xenophobia Today Appear to be Dissociated”

Alexander Adler

**I**n Jewish thought which is a deeply judicial form of thought, four functions may be distinguished which are at once complementary, yet permanently opposed. These are the king, *melekh* the executive power; the priest, *cohen*, the religious power; *shofet*, the judge; and *nabi*, the prophetic power which to a small degree sums up the others, surpasses them and permanently incites them.

I believe that the Council of Europe, has been placed under this invocation of prophecy.

The Council of Europe is a pure institution. First of all, it wanted to include all of Europe and does this progressively in a manner that has been almost unexpected. This Europe is the Europe of Human Rights, the Europe of Justice, the Europe of Fundamental Rights, even beyond judicial ones, the Europe of Equity.

This is precisely that prophetic invocation: Yes, Jews were slaves in Egypt and should not, even when it compromises their interests, tolerate slavery anywhere. They must remember this condition.

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They must look at the lot of the foreigner. As in the 19th century, xenophobia and anti-Semitism should be questioned, combatted in the way that the institutions born of the Council of Europe, like ECRI, try to accomplish it.

One must try to accomplish this, of course, with a spirit involving a strong, distinctive judicial flavour.

The problems of xenophobia in the West, the problems of rejection of non-natives in the East, constitute related problems, culturally similar, with certain shared historical roots, but today, with very different sociologies and, doubtless, dynamics.

Between the Austrians, citizens of Vienna, or the Swiss, or the Bavarians - who are essentially preoccupied with not sharing their prosperity, dearly acquired through this century, with newly arrived people - and the Hungarians, Romanians, Croats and Slovaks - who have been confronted with total subversion of their world and often great poverty or failures in the implementation of free market institutions and democracy - there are meeting points. But these are fleeting encounters, as between the German extreme right wing of the West, which tried in vain to recruit the East to gamble on similar phenomena, without there being a true meeting.

I think that the outbreak of fever which we have witnessed in Switzerland is not lasting, that the permanent and incessant calling into question of Swiss banks, has ended by pushing one section of the population to the limit. I will go further, I do not think that today's anti-Semitism is very strongly connected to xenophobia.

Of course, both carry the same dangers, but both today do not represent the same intensity. In short, we have powerful xenophobia throughout the European community, which has developed due to reasons of which I will briefly speak. We have anti-Semitism that is, for the time being, residual. We know, as with tropical diseases, that certain residual elements can be violently stirred up again. We have seen a few examples of this. But this is not the case today.

I have observed, for example, that the growing number of arrivals of urbanized Russian Jews, with a great degree of education and culture, in German cities and notably in Berlin, has not given way to xenophobia and that this Russian Jewish population, often very eager to learn German and bearing no great grudge about German history, and having a certain capacity for assimilation, gets along well. At the same time, the arrival of the *Volgadeutches*, the Volga Germans, who have forgotten almost all their German and who keep much of their local Russian culture, coming directly from the central *kolkhozes* of Kazakhstan, today confronts more substantial rejection from the German population.

Indeed, those rejected today in modern Europe are, first of all and most importantly, the poor, foreigners, those who are different, and also, of course, fanatics. If

the Turkish community in Germany would not have been identified with Milli Gurush, would not have multiplied, and would not have the Mannheim mosque which is a place for proclaiming the *Protocols of the Elders of Zion*, a violent Islamic ideology, and if all the Turks would have looked like M. Osdemir, the Green Deputy at the *Bundestag*, the rejection of one part of the Turkish population by the Germans would have been less strong. If the phenomena of reislamization, which we have witnessed in France, had not taken place, and if the North African community would have had the same will to assimilate as they had 20 years ago, undoubtedly the task would have been easier.

But, of course, these rejections today do not deal with the Jewish population. The Jewish working class has almost entirely vanished in Europe. Today, the Jews are largely middle class, yet rising and socially climbing throughout Europe. The Jewish population has found, because they are few in number and because they have been greatly integrated into the national tapestry, in France and England, that their lifestyle cannot be compared with that of the past. There are forms of subtle discrimination, which affect the elite much more. For example, the more or less strongly anti-Israeli positions which are held by governments, notably the French and British, provide a subtle hindrance to the rise of Jewish high functionaries or politicians, who are often resented for their excessive sympathy for Israel.

Facing these things, anti-Semitism and xenophobia today appear to be dissociated elements, which will certainly continue to be dissociated. The most serious anti-Semitic expressions, which I

could record in the last 10 years, came from a country that knows practically no anti-Semitism. This was Italy, where Ms. Pivetti, the President of the National Assembly held negativist views. In Italy, a minister, Mastella, warned the American Jewish community against continuing to make the lira drop. One should not worry excessively. But for evident reasons, there have been no incidents in the daily lives of Jews in Italy.

Despite everything, there is certainly substantial potential for more serious anti-Semitic phenomena. Western Europe, today, is confronted with a choice of civilization, much like Japan, of great importance.

In short, what does it concern? Social security and the future of our retirees. It is impossible, with today's outlook and with the current demography of Europe, including European Jews, to comfortably compensate for the entire population reaching the age of retirement in the near future, without immigration. Thus, immigration will not only not diminish as it has done in the last 20 years, but it will be stimulated, as it always has been, by phenomena of strong economic growth which also seem to be coming back.

Is Europe ready to accept this renewed immigration boom? Everything leads us to believe that it is not, and the residual pre-war extreme right-wing waits for that time to return with their whole package. Of course, Mr. Blocher is not Mr. Haider and Mr. Blocher and Mr. Haider, not Mr. Steuber. But one feels that among them all there is a will, at any given moment, to start from scratch.

The question is this: today's xenophobia is a relatively limited phenomenon, although we have witnessed alarming forms of it with Le Pen. It is a

phenomenon that will naturally take place during the transformation of societies. In prosperous societies, it is the cunning of reason, occurring simply because these societies want to remain prosperous. This is true in the United States, with massive Latin American immigration. This is true in Japan, with the objects being Korea and China. As long as Japanese firms recruit Japanese-Brazilians who dance the samba in Tokyo, other immigrants should also be recruited.

In Europe, this immigration will also take place. Will it be Turkish and North African immigration as in the 1950s and 1960s? Or more likely, Russian, Polish, and Balkan immigration? I favour the second solution. Do not think this will shelter us from xenophobia.

Russian anti-Semitism, in contrast, is strong, organized, expressed openly, and unabashed.

I was recently on an elevator in Moscow; I was going up to the 4th floor of a hospital with a pleasant, retired, blonde lady. She looked me up and down and said to me, between the first and second floors: "To what national minority do you belong?" I said to her: "I am Jewish." She exploded, saying: "I knew it. I hate you, I hate you, I hate you."

We reached the fourth floor, the door opened, she stepped aside politely, and we got off as if nothing had been said in the elevator.

Today, Russian anti-Semitism is that elevator. That is to say that, given conditions of temperature and pressure, some type of phobia is expressed very strongly. At the same time, speaking with the irresponsibility of someone who does not live in Russia, the phenomenon is not very serious.

When one looks at the situation of

permanent discrimination, as steadfast as in the communist regime, notably during the Brezhnev years, which oppressed millions of open Jews and, even more, the potential Jews who had one or more Jewish parents and who tried to hide that fact, where one had to declare one's nationality to borrow a library book, rent a hotel room, or ask any question, and then one looks at the situation today - one notices that it has changed radically, and even more encouraging, we see generations changing.

Anti-Semitism concerns that lady and all people over age 40. Under age 40, I am struck by the degree to which anti-Semitism is in decline.

What is the data?

First, there is no rejection of Jewish politicians, politicians who had completely vanished from the scene of the communist Soviet Union. When, for example, the Prime Minister passed away, Serge Kirienko succeeded him and said: "I took the name of my mother, but my father is Jewish". On television, he did not plunge in the surveys. He managed to devalue the ruble without having his popularity plunge.

The rejection of those of Jewish origin is not evident. If one looks at the popularity of Primakov, a true and great friend of Saddam Hussein, everyone found out that he was called Guirjouplad as a young man, and that his Judaism was an open secret. This did not stop his progression, and one notices that the supposed strong anti-Semitic sentiment in Russia is not so strong after all.

In Odessa, only 12% of the population is Jewish. The mayor, Gourvitz, is Jewish.

Numerous Jewish deputies have been elected in areas where there is only a small minority of Jews, by a sound

majority of people, despite the campaigns of the extreme right party; it is no longer obsessive.

The *Duma* has approximately 10% Jewish deputies.

Of course, when one looks at the banking situation, there is a certain catastrophic perspective in comparison to the traditional Jewish approach. One might think that a pogrom would be announced. One cannot have 10 of the 12 large banks of the country in the hands of more or less honest Jewish businessmen and think that this would not lead to a catastrophe.

The catastrophe has not happened.

You can well imagine that under the classic analysis of Russian anti-Semitism, under the traditional Russian expansionist philosophy which allowed the worst acts of stupidity to occur day after day, there would be no remorse in attacking Jews, chasing them from society, marginalizing them. The sentiment that I observe, however, is to the contrary. Thus, for example, the administrator of Chechnya today, Kochmann, is a Jew. Today, among the Ministers, one sees a considerable number of Jews, more than have been seen since the 1920s.

I put this phenomenon into perspective. One can argue that in Weimar Germany, the same thing happened, and it all came to a bad end. Yes. But Russia is not in a Weimar phase, and the country demonstrates this day after day. Russia is in the process of proving its public freedoms and open society for the first time in its history. We must give it the chance to continue with this experience. This experience has not been completed. It is evident that there is an extremely narrow link between the future of Russian

democracy, the future of anti-Semitism, and the future of xenophobia. Since, if there is a region of the world where anti-Semitism can take off like a rocket and reach the European borders very quickly, it is, naturally, tormented Eastern Europe and its Russian heart.

Will this be the case? It's open betting season.

My feeling is that, far from reaching that situation, we are instead witnessing an upturn.

The subject of our round table was: "From xenophobia to anti-Semitism and the reverse." Yes, this equation may still be read in two ways, but not always in such a direct manner.

In conclusion, I would simply like to present the question in very similar terms: And what if the return of anti-Semitism which we have effectively seen in Europe, in the last 40 years, does not open the way to the return of xenophobia, which is absolutely necessary for European societies to preserve this great degree of cohesion and prosperity which has today become the distinctive sign and maybe the cement of their unity? ■

## Web Site

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# The European Court of Human Rights: A Permanent Institution Serving the European Citizen

Jean-Paul Costa

**S**ince November 1, 1998, the European Court of Human Rights has been a permanent institution. The judges who make up the Court live in Strasbourg and practice on a full-time basis.

The Court serves the European citizen in the sense that it safeguards respect for the rights and liberties guaranteed by the European Convention of Human Rights signed in Rome almost half a century ago, on 4 November, 1950.

Beyond European citizens, any person, regardless of his nationality, who claims that a Member State has committed a violation of his rights and freedoms, may file a personal petition against that State before our Court. It is the task of the European Court of Human Rights to decide if there has been a violation or not.

It is also possible to file inter-State petitions, whereby a State or several States file against another State. Of course, these petitions are a lot less frequent than personal petitions, but they are often very important. At this time, we

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have an inter-State case pending between Cyprus and Turkey.

The European Court of Human Rights constitutes the most important international jurisdiction in terms of the number of potential petitioners, since its powers span 41 countries. The borders of European Human Rights are not exactly geographical borders, since the powers of the Court span from Iceland to Vladivostok, from the Atlantic to the Pacific, and from the North Pole to Cyprus. The jurisdiction has, both in theory and in practice, between 7 and 800 million inhabitants within its boundaries.

My talk is divided into three parts:

- \* The rights and liberties which are protected by the European Convention of Human Rights.
- \* The role played by the Court.
- \* Prospects for future development.

## Protected Rights and Liberties

These have to be placed in the context of 1950. The European Convention of Human Rights and Liberties was the first judicial mechanism developed in the framework of the Council of Europe, which, at that time, had only existed for a year and a half.

From the beginning, the Convention

made reference to the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly on 10 December, 1948.

The Universal Declaration, of which René Cassin was one of the principal authors, had and still has considerable effect, but legally, it does not have restricting value. Its value is more moral than legal.

It is remarkable that Europe, at a time when it was reduced to Western Europe due to the refusal of the Soviet Union and the eastern countries to adhere to the European Council, quickly transformed the text that constituted the Universal Declaration by adopting a multilateral treaty that connected Member States. The latter, therefore, has a *jus cogens* value, which may be directly invoked by those to be tried in these countries, and which recaptures the rights solemnly set out in the Universal Declaration.

Nevertheless, the Convention did not recapture all of them. Out of concern for realism and effectiveness, the European Convention limited itself to rights and liberties of a political nature, which, if not necessarily considered to be more fundamental, were at least considered easier to protect, and more easily brought

to justice than social and economic rights.

Briefly, these include: the right to life, the prohibition of torture and treatment deemed inhumane and degrading, the prohibition of slavery, the right to a fair trial, respect for private and family life, the legality of sentencing, religious freedom and the freedom of expression, the freedom to convene and to form associations, the right to marry, the right to effective appeal, the principle of non-discrimination, notably in terms of sex, race, religion, colour, language and ideals.

This catalogue of essentially political rights and liberties, was subsequently enriched. First, it was enriched because protocols were added to the European Convention of Human Rights, having the same judicial value and expressing other liberties, such as the right to own property, the right to education, the right to free elections, the prohibition of the act of expelling nationals and the act of collectively expelling foreigners, the abolition of the death sentence, the right not to be judged or punished twice for the same crime and equality between spouses.

Furthermore, by a constructive and progressive interpretation of the Convention, the European Court of Human Rights itself brought about new rights, the seeds of which were to be found in the Convention, but which were not stated *expressis verbis*. I think though, the right to a satisfactory environment relates to the principle of respect for private and family life, or the positive obligations with which States are charged, for example to guarantee respect for this private and family life.

On the other hand, the second section

of the Universal Declaration of 1948, relating to economic, social and cultural rights, was added later. This second section does not figure in the European Convention and its protocols. Of course, there were some exceptions, for example the freedom to form a union being part of the freedom to form associations, the right to own property, which is as economic as it is political, or the right to education, being as social as it is political.

On the European level, we had to wait until 1961 and the adoption of the

**“The European Court of Human Rights will and has already begun to deal with much more important petitions than it did in the past. For example, in the year 1999 alone, our Court dealt with 177 well-founded petitions and issued approximately 3,500 decisions of inadmissibility.”**

European Social Charter to see very important economic and social rights implemented in our continent: the right to work, the right to fair remuneration, the right to strike, the right to have children, family law.

It should still be noted that, although revised in 1996, the European Social Charter, unlike the Convention, is not subject to European jurisdictional protection. It is a Committee of Independent Experts, now called the European Social Rights Committee, but without the same powers as a jurisdiction, that sees that

States respect their commitments to the Charter.

In my opinion, there is no doubt that some day it will be necessary to assure the justness on a European level of at least some of these social and economic rights. Resolutions already exist in the European Council Parliamentary Assembly in this respect. The Assembly even recommends an extension of the powers of the European Court of Human Rights in this direction.

Yet, such a prospect implies very important changes in the resources available to our Court, and I do not think that we can get there quickly, particularly because certain States remain reluctant where this protection of social and economic rights is concerned.

Protocol No. 12, which has just been developed, will be ratified and will be of great importance. Paradoxically, the principle of non-discrimination - in the European Convention of Human Rights - is only currently applicable to the rights and liberties which the Convention itself guarantees. At present, a general equality or non-discrimination principle does not exist, even related to other rights and freedoms. It is the objective of Protocol No. 12 to enlarge, as it were, the fundamental range of non-discrimination.

### **The Specific Role of the European Court of Human Rights**

This has been an important innovation which has inspired the American continent, and will soon inspire the African continent to develop a regional international jurisdiction able to protect the rights and freedoms of those residing in the jurisdiction of the Member States. In

the field of Human Rights, the Strasbourg Court is truly a supra national institution that has its own sovereignty comparable to that of the States.

In a first phase which came to a close on 31 October, 1998, the Convention allowed for three control bodies: the European Commission of Human Rights; the Committee of Ministers which also played a quasi-judicial role; and the Court itself.

It is hardly surprising that, in this first phase, the Court possessed relatively reduced powers, at least in comparison to the number of cases that were submitted, even if these were clearly important cases that led to the most solemn decisions.

Between 1960 and 1998, the Court tried 837 cases, an average of just over 20 a year, which is a relatively limited number. This does not mean that the Court did not try very important cases, in fields as diverse as the freedom of expression, freedom of religion, the prohibition on torture, extradition, the right to own property, not to mention the abundant and demanding case law on the regulations of a fair trial.

In this regard, purely procedural rights often came into conflict with substantive rights. It is true that, at first glance, procedural rights can seem less fundamental than substantive rights, such as the right to life or the right not to be tortured, but, in reality, the Court insisted on the notion of the indivisibility of Human Rights that René Cassin held dear. The Court insisted on the fact that, without a fair trial, without an impartial independent judicial system that recognizes the rights of the defence, the presumption of innocence and other elements of this nature, other Human

Rights would be threatened with losing their national jurisdictional protection.

The second phase in the functioning of the Strasbourg Court is much more recent. This phase started on 1 November, 1998, with the coming into effect of Protocol No. 11.

This change may be explained by saying that the Court and the former Commission formula have disappeared and have been replaced by a single and permanent Court. At the same time, the role of the Committee of Ministers decreased in this field. The European Council Committee of Ministers still has the important task of seeing to the execution of Court cases, notably by those Member States that are reluctant or inflexible, but the Committee of Ministers no longer has a jurisdictional or quasi-judicial role. The Commission has completely disappeared. The single, permanent Court acts as a substitute for the former functions of the other two bodies.

Thus, for example, the Court has now taken on the very important task performed by the Commission in the past, of filtering petitions and separating those which are inadmissible or without foundation. Similarly, the Court has organized its work system to deal with examining both the admissibility of petitions, and if necessary, the grounds for a case.

In our jurisdiction there are Committees of 3 Judges that have the power to unanimously dismiss inadmissible petitions. There are also the Chambers of 7 Judges. For the most difficult and important cases, there is also a Grand Chamber of 17 Judges which rules on the grounds of the case and not solely on its admissibility.

At the same time, the Secretariat of the former European Commission of Human Rights and the Clerk's Office of the former Court have been merged to create a single Clerk's Office to help the Judges, and this assistance is particularly important and valuable.

The European Court of Human Rights will and has already begun to deal with much more important petitions than it did in the past. For example, in the year 1999 alone, our Court dealt with 177 well-founded petitions and issued approximately 3,500 decisions of inadmissibility. But these numbers are still only the figures at take off, and when the Court reaches its cruising speed, it will make an even greater number of decisions. This is a necessity, considering the influx of petitions to Strasbourg.

Apart from all this, the Court is confronted with two apparently opposing tasks that it must reconcile.

The first task consists of scrupulously seeing that Human Rights are respected, and notably those which are the most respectable, the most intangible, the least degradable. Therefore, it has to ensure that a high standard of quality is maintained both in its rulings and in the protection of Human Rights throughout the whole of the vastness of Western and Eastern Europe that has resulted from the geopolitical changes seen since the fall of the Berlin Wall.

At the same time, the Court must face up to a mass of often repetitive contentiousness, sometimes, it must be admitted, without great interest. However, at present, the Court continues to consider that the equality of those to be tried means that it must deal with all petitions that are presented to it.

This double requirement of produc-

tivity and quality had not escaped the authors of Protocol No. 11, but the slowness with which this protocol was developed meant that when it finally came into force, the geographical and geopolitical changes that I have mentioned were already taking place. The authors of the protocol had not, regretfully, anticipated the growth in the number of Member States, the corresponding growth of the number of petitions, or the possibility of supplying sufficient human, material and technological resources to our Court, to respond to this ever-growing demand.

### Prospects for the Development of the European Court of Human Rights

We are at the beginning of the year 2000, and it is tempting to offer a small prediction at the beginning of this new millennium.

The European Court of Human Rights, implicitly, yet necessarily, operates, and

has since the beginning, on the notion of the subsidiary principle, a neighbour of the complementary principle.

Strasbourg is only a last resort. It is first and foremost up to the national systems to impose respect for conventional obligations upon Member States. Moreover, it is in the name of this principle that the well-known international rule of public international law exists, which requires the exhaustion of all internal resources in order for a petition to the Court to be classified as admissible.

Ideally, the jurisdictions of Member States should dismiss those laws and rulings which seem, by analogy with verdicts previously rendered by the European Court of Human Rights, to be incompatible with the Convention. Even more preventatively, the executives and national Parliaments should wash their hands of these texts, for example in the case of codifications and texts that abrogate laws and regulations which are incompatible with the Convention. That

is starting to happen. Yet, still too often, States prefer to wait to be condemned by the European Court of Human Rights. They prefer to make their reforms in hot water instead of cold.

As there is no mechanism for dealing with prejudicial matters before our Court, unlike the case of the Court of Luxembourg, the European Communities Court of Justice, the States, when in doubt, prefer all the more to keep their judicial norms intact, delaying future European rulings.

This first matter, which is obviously worrying because it means that the subsidiary principle is not as effective as it should be, entails a second aspect. Almost half of the 41 Member States are new democracies which, up to a few years ago, did not greatly respect Human Rights, as guaranteed by the Convention. In general, it is even harder for these countries to internalize the Convention and the jurisprudence of the Court in order to adopt the reforms that adapt their laws to European standards.



Participants to the Strasbourg Conference listening to addresses

Nevertheless, the Court cannot render justice at two or more speeds, it must have the same requirements for everyone.

The European Council, through its co-operation programmes, has played and continues to play an important role in helping these countries adopt legislation, notably where penal justice is concerned, in accordance with State law, and with respect to Human Rights. The very recent institution, within the framework of the European Council, of the European Commissioner for Human Rights should work in the same way, since the Commissioner is not charged with ruling on individual claims, but does have the task of helping the States to give greater guarantees of Human Rights collectively, notably through training and information campaigns. This very recent institution sheds light on an interesting perspective, of a complementary nature to the functions of the international jurisdiction that is our Court.

A second complex matter is that of the future of Europe. At the present time, there are surely two Europes, the Europe of 15, and the Europe of 41, each one having its own judicial system and its own jurisdictional system: the European Court of Human Rights in Strasbourg, and the European Communities Court of Justice and its Tribunal de Premiere Instance in Luxembourg.

One has to wonder about the evolution of these two Europes that probably have the long-term fate of being confused with one another. But, in the meantime, there are questions, for example, in terms of a charter of fundamental rights project of the European Union and of the Europe of 15, and the attempts to draw the two systems closer together.

A third matter that arises at the dawn of this millennium obviously touches on the exceptional increase in the number of petitions submitted to the European Court of Human Rights: 1,000 per year in 1988, 2,000 in 1993, 6,000 in 1998, and more than 8,000 in 1999. If we extrapolate this curve, we can expect an annual influx of 20,000 petitions in the next three or four years.

Is it possible, is it even reasonable to expect 40 judges, even with the help of excellent lawyers, who are, however, already insufficient in number, to render 20,000 verdicts a year, and even more if we want to catch up on the delay which the new system inherited from its predecessor?

Personally, I do not believe so.

Of course, we can hope to anticipate the contentious European and reduce the number of applications if the subsidiary principle becomes more effective. But we must not be Utopian, if progress is made, it will necessarily be slow and progressive.

How are we to cope with the number of decisions that our Court can reasonably make?

Do we need to create a Cour de Premiere Instance such as that in Luxembourg?

Is that not just recreating the European Commission of Human Rights under a different guise, that which the authors of Protocol No. 11 wished to suppress in order to achieve large-scale savings? Is that not a paradox?

Do we need to create a Court like the United States Supreme Court which filed 10,000 admissions last year and decided to accept and to rule on only 95 of those admissions, less than 1%, dismissing all the others with the word "denied?"

It is a possibility, but this solution has existed in the United States since 1787, whereas, the Strasbourg Court, has, for 40 years, traditionally dealt with every petition, regardless of its judicial nature or importance.

There is currently no solution to this third matter. Yet we really have to settle this, if only because the Court cannot allow itself to dismiss national jurisdictions when they exceed the reasonable time limit set out by the law under Article 6 of the Convention, and then in its turn, work with unreasonable judgment delays.

Like all other international jurisdictions, the European Court of Human Rights constitutes remarkable progress in the fields of law and justice, in a fundamental area for humankind, where law and justice could be crushed by the use of force.

Not only can, and indeed must the Court sentence States to repair violations of Human Rights that they may have perpetrated or engage them not to commit any, but its very existence obliges these States, at the risk of finding themselves banned from the International Community and the European Community, to think twice before violating the rights and liberties of people subject to their jurisdiction.

Of course, there are limits to the action the Court can take. In a world that is far from perfect, the Court is less efficient at times of war or civil war and when violations of Human Rights occur on a massive scale. Yet, even in these situations, its role is not worthless, nor even negligible. It is therefore necessary, and I say this with the utmost objectivity, to uphold and reinforce its resources.



# The International Penal Court

Jean Baptiste Avel

The establishment of a competent international penal system to recognize the most serious crimes certainly constitutes one of the most striking achievements of the end of the 20th century, as far as international law is concerned. This is mainly because it indicates the consent of States to go further towards an international judicial order.

In this respect, the appearance of an International Penal Court is evidence that human rights constitute not only moral principles or even the expression of a natural law, devoid of any connection with the reality of human behaviour, but also a collection of constraining legal rules which have their place in the judicial organization of human society.

The International Penal Court addresses certain crimes, the most severe ones, namely, those that threaten all of humanity.

It is because the whole of humanity is concerned with these crimes that it appears particularly legitimate for the international community to judge them.

Certainly, crimes other than those recognized by the Statutory Court should be defined, pursued, and repressed by States acting together. This is because of the exceptional severity and cross-border nature of these offences. I am referring to terrorism, drug trafficking, or organised crime.

The European Union is particularly committed to this idea; the recent Amsterdam Treaty targeted these three categories of crime as being those requiring the harmonization of penal law in Europe.

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We are now faced with the situation - defined in the preamble to the Statutory Court as the threat to the common patrimony of all its populations: "throughout this century, millions of men, women and children have fallen victim to atrocities which defy imagination, which deeply strike the human conscience, that these crimes threaten the peace, the security and the well-being of the world."

This is the reason why, in this time, the creation of an International Penal Court is a particularly striking event.

Creating international penal justice is not a new idea.

It was at the end of the First World War that provisions were first made for the creation of a jurisdiction which had specific powers to judge a statesman. At that time, the issue in question was the indictment of ex-Emperor Guillaume II of Germany for breaching international morals and the high authority of treaties. This was to be provided for by the Treaty of Versailles in 1919. In fact, the tribunal never materialized because of the refusal to deliver the ex-Emperor to the Allied Forces.

But the idea remained, and would be the center of many doctrinal discussions after the First World War.

The French Government proposed the creation of a Penal Court to judge offences provided for in certain international conventions. Yet again, this jurisdiction would not be created due to

the absence of ratification of this agreement.

It was the Second World War that would make room for the establishment of two international jurisdictions: the International Military Tribunal of Nuremberg and the International Military Tribunal for the Far East, the Tokyo Tribunal, established by an Allied Forces supreme command declaration.

These two tribunals were capable of dealing with crimes against peace, war crimes and crimes against humanity.

But no international jurisdiction had yet been created.

What developed was the notion of international crime, as was awareness of the necessity to protect individuals against the most serious crimes. It was events in the former Yugoslavia that caused the recent rebirth of the idea of an international penal jurisdiction.

In 1993, the United Nations Security Council adopted Resolution 827, by which it decided to establish a Penal Tribunal able to prosecute those responsible for serious violations of international humanitarian law, committed in ex-Yugoslavia after January 1, 1991.

On November 8, 1994, the Security Council adopted Resolution 955, creating the International Penal Tribunal charged with judging those responsible for acts of genocide, and other severe violations of international humanitarian law committed in Rwanda, or by a Rwandan

citizen on the territory of neighbouring States, between January 1 and December 31, 1994.

It was actually the establishment of these two *ad hoc* jurisdictions, which would restart the idea of creating a permanent International Penal Court.

Worthy of consideration are the negotiations that brought about the creation of the International Penal Court. These negotiations were developed between July 1994 and July 1998.

In July 1994, the session of the International Law Commission of the UN, composed of independent experts, engaged in a project for drafting a statute for an International Penal Court. A draft of 60 articles served as a basis for the negotiations to which the United Nations would commit itself.

A Preparatory Committee convened 6 times between March 1996 and March 1998 in order to draft a contract agreement with a view to the diplomatic conference that would be organized in Rome.

The agreement supporting the statute of the Court was adopted on July 17, 1998. 120 States voted in favour and 7 States voted against: the United States, Israel, India, Bahrain, Qatar, China and Vietnam. 21 countries abstained.

Throughout these negotiations, the position of various parties changed; finally, today, the statute of the International Penal Court seems to be a work of compromise.

Until 1995, France was held up as an example and viewed as an inspirational force. France was at the root of the creation of two *ad hoc* tribunals, and quickly expressed its favour for the institution of a permanent jurisdiction having powers limited to the most serious crimes: genocide, crimes against humanity, crimes of aggression, war crimes, and serious violations of the Geneva Convention of August 12, 1949.

The French position has changed since 1996. France proposed that the Court should not exercise its powers in three cases, in relation to which State organizations had already reached agreement concerning the jurisdiction of:

- The land where the crimes were committed.
- The land of which the suspected persons are nationals.
- The land of which the victims are nationals.

**“The existence of a Preliminary Chamber allows for the consideration of contradictions facing the State Prosecutor, and also allows the system to be more efficient, increasing the legitimacy of evidence, notably in cases where all matters cannot be presented at the hearing, such as technical expert evidence.”**

Other more restrictive measures were also proposed, such as the facility for States to evoke the rules of internal law and the principle of the non-extradition of nationals.

The reasons put forward to defend the powers by consent are of two types:

- \* Constitutional - for France, the 1958 constitution concerning measures related to the penal responsibility of the President of the Republic and members of government, opposed the Court having obligatory, automatic powers.
- \* On the other hand, the fear shared by

non-signatory States of seeing complaints founded on military interventions multiply within the scope of international action, within the scope of United Nations mandates or within the scope of a bilateral agreement.

The proposal filed by France in August 1996 also consisted of several positive judicial propositions, detailed arrangements for the definitions of crimes, general principles of penal law, incurred sufferings, *etc.*

France advocated the adoption of mixed procedural rules in order to maintain a balance between Common Law and written law. France notably proposed giving judges of the Court more power in the preliminary phase of proceedings and suggested the idea of a Chamber of Instruction that would later become the Preliminary Chamber that we currently find in the statute of the Penal Court.

Positions were set to change in favour of discussions and different intervening arbitrary bodies.

Finally, automatic powers to act in cases of genocide and crimes against humanity were accepted. It was also accepted that the State Prosecutor could take over the Court himself subject to the control of the Chamber of Instruction.

Further, it was accepted that States would not be able to oppose the Court with restrictive measures taken from their internal law.

Finally, a compromise was reached on the matter of the repression of war crimes.

The international convention supporting the creation of an International Penal Court was adopted on July 17, 1998 by the United Nations Diplomatic Plenipotentiary Conference, which met in Rome.

A text of compromise, as noted above, the statute of the Court was approved by

120 of 147 States. Sixty ratifications are needed for it to take effect.

Thus, it is necessary to wait until all these countries have ratified in order for the Court to really exist. The first five countries have ratified, and have done so quickly, but it must be remembered that 60 are needed for it to proceed effectively.

What are the most prominent features of this statute? Initially, those that concern the powers of the Court.

As already stated, not all serious crimes are within the jurisdiction of the International Penal Court. Jurisdiction is limited to genocide, crimes against humanity, war crimes, and crimes of aggression. This is stated in Article 5 of the International Penal Court statute.

These different crimes are very precisely defined in the subsequent articles of the statute, with the exception of crimes of aggression, which are subject to a particular measure: *“Once a measure has been adopted, the Court will exercise its powers in respect to crimes of aggression, conforming to Articles 121 and 123, that will define these crimes and set the conditions for the Court to exercise its powers in this respect. This measure will be compatible with the relevant measures of the United Nations Charter.”*

The Court regards these four defined crimes as not being subject to prescription, as stated in Article 29 of the statute.

Elements of crimes are also included which will be developed by the Preparatory Commission, to serve as interpretative guides for the Judges of the Court.

Unlike the *ad hoc* jurisdictions just mentioned, the Court will only take account of events occurring after its statute takes effect. This is stated in Article 11.

The Court is endowed with obligatory

powers. But in the matter of war crimes, once a State adheres to the Convention, that State has the option to reject the powers of the Court for events occurring on its territory or by its citizens, during a period of 7 years from the time the statute takes effect in its own right.

This is the compromise reached in Article 124 of the statute, concerning war crimes.

This is, therefore, a transitional measure that should be re-examined at the time of the revision conference.

*“Except when seized by the Security Council, the Court will only deal with crimes committed on the territory of a participating State, whether or not committed by the nationals of a participating State,”* as indicated in Article 12, paragraph 2.

*“The Court may be seized by a participating State, by the Security Council of the United Nations, or by the State Prosecutor when authorised to do so by the Preliminary Chamber.”*

It should be noted that the Security Council, apart from its seizure powers, reserves the right to prevent or suspend Court proceedings for a renewable period of 12 months.

Dealing with the matter of the complementary principle, which is a sort of subsidiary principle, it should be noted that this principle is stated clearly in the statute of the Court. It means that the Court can only legitimately exercise its powers in the case of grave inadequacies or bad intent manifested by national authorities.

This means many things. First of all, it means that the institution of an International Penal Court does not have the function of taking away a State’s ability to judge these crimes.

It also means that the institution of an International Penal Court is a State’s

admission of failure to judge these crimes.

But it is an important principle, which, in effect, does not mean the removal of the jurisdiction of the Member States’ courts.

## Procedure

The statute contains a compromise with regard to procedure as well.

The International Penal Jurisdiction acts as the voice of compromise between different continental legal cultures and Anglo-Saxon legal systems.

The State Prosecutor is responsible for inquiries and legal proceedings. Nevertheless, the Preliminary Chamber, generally composed of three Judges, has the responsibility of assuring judicial control in the preliminary phase of proceedings.

At the same time, the existence of a Preliminary Chamber allows for the consideration of contradictions facing the State Prosecutor, and also allows the system to be more efficient, increasing the legitimacy of evidence, notably in cases where all matters cannot be presented at the hearing, such as technical expert evidence. The Preliminary Chamber will have the power to determine charges in the course of a contradictory hearing.

Finally, the Preliminary Chamber has the power to decide on measures which infringe on personal freedom.

Still on the topic of procedure, the statute has great respect for defence rights and the principle of the presumption of innocence. The right to an attorney is maintained, as well as the right to an interpreter. The right not to be detained beyond a reasonable period of time, the right to be informed of pending charges, the right not to testify against oneself.

The exercise of the law of appeal is

open-ended. A revision procedure is expected and persons unlawfully detained will have the right to compensation under quite restrictive conditions. It is important to emphasize this, because for the first time an international jurisdiction has been involved in this manner with the fate of victims. Accordingly, a right to compensation is predicted.

Thus, a Member State's obligation to co-operate with the International Penal Court is clearly established. It allows for no exception concerning transfer applications for any specific person. This again, is an extremely important principle which should be highlighted.

For other requests for co-operation, apart from requests for the transfer of individuals, there is scope for refusal to co-operate, but this must be based on the requirements of national security. This is stated in Article 93, paragraph 3 of the statute of the Court.

Finally, the serving of prison sentences imposed by the Court will be carried out either in the host State, or the Member State, if the latter has expressed its wish to receive the prisoner. However, it should also be noted that "*States may not free a convicted person before the date set by the Court, except in the case where notification is given to the Court 45 days in advance of the possible sentence reduction measures which will be in effect in the country and which should be applied.*"

This delay of 45 days gives the Court the opportunity, if it opposes the suggested measures, to recover the accused, and in certain cases, to take steps to ensure that the sentence is not reduced.

### Prospects of the Court Statute

Finally, reference should be made to

the prospects of the International Penal Court statute.

It is important to say that this is a work of compromise, and the reference to war crimes is evidence of this. It protects human rights and respects the rights of victims. Above all, it reflects the Member States' different legal cultures.

Now, it has to be ratified to take effect.

As far as France is concerned, constitutional reform has been necessary so that it can ratify the agreement.

The Constitutional Council has been taken over, clearly, with a question of national sovereignty at stake, it issued a notice, according to which a certain number of measures were declared constitutional, but three ideas of constitutionality were raised.

The first idea is the penal responsibility of public authorities, as stated in Article 27 of the statute. The ineffectiveness of prescription and amnesty in the face of the International Penal Court, which is also a principle of the statute, is within the scope of the complementary nature of the mechanism, and is a result of Article 17 of the statute, and the State Prosecutor's powers to investigate on Member State territory in the absence of State authorities.

The National Assembly and the Senate voted on a constitutional bill that was adopted by Congress on June 28, 1999.

The new constitutional law added a measure to the 1958 Constitution that states: "The Republic can recognize the jurisdiction of the International Penal Court under the conditions outlined in the Rome Treaty signed on July 18, 1958."

Finally, on an international scale, negotiations will continue within the framework of the Preparatory Commission set up by the final proceedings of the Rome Conference. The nego-

tiations will take place in New York. They notably concern the development of proof and procedure regulations. Sessions are scheduled for July, August, November and December 2000.

To conclude: What overall judgment can we make concerning these measures?

The institution of an International Penal Court does not have to exclude international co-operation, the natural condition of the exercising of international law, of which the traditional function is to distribute powers between States and to permit the articulation of its powers.

Furthermore, criticisms of the statute throughout the course of negotiations could have been made, have been made, are being made, and solved.

The very existence of the Court represents the State's failure to maintain the peace, just as to a certain extent, and even with consent, it constitutes an attack on sovereignty.

It could be said that the International Penal Court is not a universal Court. It is not obligatory in all States.

Therefore, by its permanent nature, the Court is general, without a doubt more so than the *ad hoc* jurisdictions, and it contributes more to the apprehension, pursuit, and repression of the crimes with which it is designed to deal.

The institution of International Penal Justice represents progress for common justice, even though, after all we have been through at the close of the 20th century, we could have hoped that it would not be necessary to create a new organization.

To end, one can say that it would be a good thing never to need to use the International Penal Court, but the fact that it exists is real progress.

# Anti-Semitism as a Form of Contemporary Racism

Daniel Lack

Sadly, there is, without a doubt, quite an uncomfortable feeling of *deja vue* when we speak of a subject of this nature, and when we consider everything that has happened since the Second

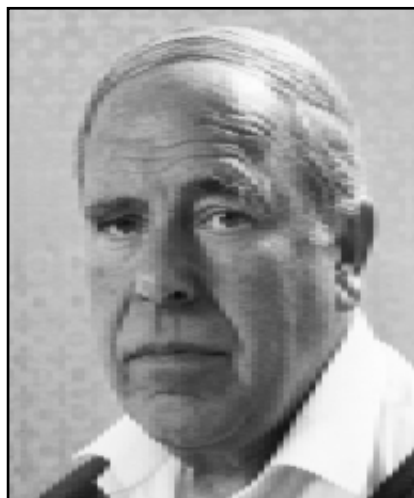
World War.

We hear the sad echoes, notably, one year ago when a well known personality from a Russian political party issued a public appeal for "Death to Jews" during the electoral campaign of 1998. This behaviour was brought to the attention of the *Duma* which actually refused to react. However, and we would expect nothing less from the Parliamentary Assembly and this Association, a proposal was put forth and one-fifth of its members protested against this exercise, in what we can describe as an exercise of parliamentary democracy. In fact, it placed the subject in its context.

I would like to point out that although the organizations of the United Nations and the Council of Europe are very similar, the backdrop and the context are very different.

Europe as it was at the beginning of the Council of Europe and the Europe of today are also different. However, parliamentary democracy and the pre-eminence of law are the common principles that the 41 Member States must respect.

The United Nations constitutes a much more disparate ensemble. Its 188 members have different types of governments, and the universal values regarding human rights have



always been contested by a certain number of countries and qualified as a patrimony or Judo-Christian heritage that has been imposed on them at a certain time. They therefore deem that this should be balanced against a cultural relativism. In other words, they feel that human rights should be interpreted in the light of religious principles and cultural influences, and the particular situation of each country or region.

Of course, that is something to which the conference that took place in Vienna tried to respond. Nonetheless, there are still a large number of countries that believe in this theory.

Thus, if we consider xenophobia and anti-Semitism, the most detestable form of racism, we notice there is a difference in the way this subject is treated by the Council of Europe and the United Nations.

Anti-Semitism instills a fear in Europe that

is less recognized by the organs of the United Nations.

In 1993, in Vienna, the Conference on Human Rights rejected all explicit reference to anti-Semitism in its declaration and in its plan of action, preferring the safer way of deploring the contemporary forms of xenophobia and racism. It was only in 1994, with Resolution 99-64 being adopted by the United Nations Commission on Human Rights, that, for the first time since the Second World War, it was thought opportune to recognize anti-Semitism as a form of contemporary racism that should be regarded as an evil which had to be dealt with.

Actually, it took two weeks of lobbying during the 50th session of the Commission to overcome the opposition of certain members who spoke up at the Conference in Vienna. Finally, we accepted a kind of definition that included anti-Semitism amongst the contemporary forms of xenophobia and racism.

Plan 4 of this Resolution states:

"In accordance with his mandate, have the Special Reporter examine the incidents pertaining to contemporary forms of racism, racial discrimination, all forms of discrimination toward blacks, Arabs, Muslims, xenophobia, negrophobia, anti-Semitism and intolerance."

So, even if this mollified reference to anti-Semitism was made, at each session since, attempts have been made to eliminate and limit all reports on anti-Semitic activities.

When we compare this with the Council of Europe's 1993 declaration in Vienna, which was developed in the same year and in the same place, we notice that it rightly, and not for the first time, condemned in strong terms, all forms of racism, xenophobia, anti-Semitism and intolerance, and all forms of racial discrimination.

The European Commission against Racism and Intolerance (ECRI) resulted from this meeting. Another outcome was the Convention for the Protection of National Minorities adopted by this organization in 1994.

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Adv. Daniel Lack is the IAJLJ's representative at the UN bodies in Geneva.

# Lebanese “Bargaining Counters” Released From Administrative Detention

Cr. F.H. 7048/97

Before President A. Barak, Deputy President S. Levin and Justices T. Or, E. Maza, M. Cheshin, I. Kedmi, I. Zamir, D. Dorner, J. Türkel.

Judgment delivered 12.4.2000

## Precis

May a person - who does not himself pose a danger to the security of the State - be held in administrative detention, when the purpose of the detention is to make use of the detainee as a “bargaining counter” in negotiations for the return of, or information about, Israeli soldiers captured or missing in action? This was the question raised in the Further Hearing before the Supreme Court of Israel. By a majority of six to three, the Supreme Court held that the Minister of Defence did not have power to detain such persons; that this amounted to a violation of their human dignity and freedom, and that the petitioners would accordingly be returned to Lebanon.

## President Barak - Judgment

### The Facts

The petitioners were Lebanese citizens who had been brought to Israel between 1986-1987 by the Israeli security forces. They were tried for affiliation to hostile organizations and involvement in actions against the IDF (Israel Defence Forces) and SLA (South Lebanese Army). They were convicted and sentenced to various terms of imprisonment. All the petitioners completed their sentences. Nonetheless, they were not released. Initially they were detained by virtue of deportation orders issued against them, and from 1991 they were placed in administrative detention by virtue of orders issued by the Minister of Defence under Section 2 of the Emergency Powers (Detention) Law - 1979 (“the Detention Law”). These orders were extended from time to time. The petitioners appealed against one such extension decision, the appeal was heard by the Supreme Court, and formed the basis of the present Further Hearing.

There was no dispute between the parties that the petitioners themselves did not pose a danger to the security of the State. There was also no dispute that the reason for their detention was to assist in the release of captured and missing Israeli soldiers, in particular, the navigator Ron Arad, whose plane had been brought down in Lebanon on 16.10.86. The dispute revolved around the questions: **first**, was the Minister of Defence empowered to issue an order for administrative detention where the only reason for such an order was the release of Israeli captured and missing soldiers - without any specific risk being posed by the petitioners themselves, and **second** - was the discretion of the Minister of Defence in the instant case exercised properly?

Initially, the Supreme Court was divided on this opinion, the majority (President Barak and Kedmi J.) answered both questions in the affirmative, Dorner J. in the minority dissented, *inter alia*, on the ground that the object of administrative detention was to prevent danger to national security or public safety posed by the detainee himself and further that the Minister of Defence had not succeeded in showing a near certainty or even reasonable possibility that the release of the petitioners would damage the prospects of obtaining the release of Israeli soldiers.

The petitioners applied for a Further Hearing. The Court agreed and during the course of the hearings heard testimony from the Arad family as well as from the Intelligence Branch of the IDF. The Court also received a statement from the State Attorney’s Office declaring that the Israeli government had decided upon a 15 month period in which it would determine whether it was possible to reach political settlements in the region and that the issue of captured and imprisoned soldiers was an integral part of the negotiations. The view of the Minister of Defence was that releasing the petitioners would leave Israel without bargaining counters in this area of negotiations. The Attorney General expressed certain reservations and favoured gradual release of the detainees in return for progress in negotiations, within the context of a moral - humane legal perspective. The Court also received a letter from the petitioners, asserting *inter alia* that their human rights had been infringed,

contrary to international treaties and fundamental principles of law. They had been jailed in Israel for 13-14 years; those tried had completed their prison sentences. Most had been under the age of 20 when arrested, none had any connection to the missing soldiers of Sultan Yakub and some had been detained even before Ron Arad was captured. They were simple men having no status or influence in Lebanon and no information about any of Israel's missing soldiers.

### Petitioners' Contentions

The petitioners contended that the Detention Law could not be interpreted as containing a power to order the administrative detention of a person only by reason of his being a "bargaining counter". The fundamental principles of an individual's dignity and freedom, as reflected in Basic Law: Human Dignity and Freedom, removed the foundation for the administrative detention of the petitioners. Such detention was not only contrary to the purpose of the law and the intention of the legislature, but also to international law. The return of the missing soldiers was indeed an important interest, but it was not part of "national security", within the meaning of the Detention Law. According to the petitioners the Detention Law only related to situations where a danger was posed by the detainee. Administrative detention was an individual act which was based on the personal responsibility of a person for his own deeds. In the alternative, the petitioners contended that there was no factual and evidential basis for their administrative detention and that less damaging alternatives existed for achieving the purpose for which they were detained.

### Respondents' Contentions

The petitioners contended that the Minister of Defence could indeed detain a person solely for the purpose of holding him as a bargaining counter. Preserving the safety of IDF soldiers and returning them home fell within the term "State security", and the law was drafted in a broad rather than restrictive manner. Further, the principle of personal responsibility was important, however, the power to detain conferred by the law was an exception to this principle. The respondents also contended that, in the circumstances, the administrative detention fell within the Basic Law: Human Dignity and Freedom as being "for a proper purpose and not exceeding what is necessary". Accordingly, the Basic Law did not change the interpretation of the Detention Law in this context. As a matter of international law, there was no customary prohibition on taking hostages, and the prohibition in treaty law did not apply in this case.

### The Normative Framework

President Barak held that the arrest of the petitioners was carried out by virtue of the Emergency Powers (Detention) Law - 1979. This law only applied where a state of emergency had been declared. The power of detention was conferred on the Minister of Defence, it was subject to judicial review, and a person detained had to be brought before the President of the District Court within 48 hours. Even if confirmed, the substance and validity of the detention order had to be reviewed at least once every three months.

Section 2 of the Law stated as follows:

- (a) Where the Minister of Defence has reasonable cause to believe that reasons of State security or public security require that a particular person be detained, he may, by order under his hand, direct that such person be detained for a period not exceeding six months, stated in the order.
- (b) Where immediately before the expiration of an order under subsection (a) (hereinafter referred to as "the original detention order") the Minister of Defence has reasonable cause to believe that reasons of State security or public security still require the detention of the detainee, he may from time to time by order under his hand, direct the extension of the validity of the original detention order for a period not exceeding six months; and the extension order shall in all respects be treated like the original detention order.

Justice Barak held that the expression "State security" was wide enough to embrace situations where the danger to State security did not ensue from the detainee himself, but from the activities of others, who were likely to be influenced by the detention of that person. The judge further held that the subjective purpose of the Detention Law consisted of the purposes designated by the legislature itself, and could be learned from the language and history of the Law. In this case, the picture was not conclusive, and it could not be said that the legislature intended to restrict the application of the law to persons who themselves posed a danger to State security. The matter was not discussed by the drafters of the legislation. With regard to the objective purpose of the Law, namely, the basic values of our system which the legislation was designed to achieve and which expressed the values of the State of Israel as a Jewish and democratic State, the purpose was twofold: on one hand, preservation of the security of the State, on the other hand, maintenance of the dignity and freedom of every man. These purposes ensued from various circles embracing the Law.

Justice Barak held that preservation of State security was an

interest which every country sought to achieve. In this framework, democratic countries aspiring to freedom recognized the “institution” of administrative detention. The need for this tool, ensued, *inter alia*, from the difficulty in finding an answer in criminal law to certain threats to State security. Preservation and protection of human dignity and freedom were basic constitutional rights in Israel, and they were at the basis of Israel’s social order, they were the basis for all the other basic rights. Preservation and protection of human dignity and freedom also applied to all persons whom the State sought to detain through administrative detention.

There was a sharp clash between these two objective purposes. Every detention infringed on freedom. The individual was detained without a trial, by virtue of an order issued by the executive authority (the Minister of Defence). The detention could extend over a long period of time, as here, which had not been predetermined. Often, the detainee did not know - for reasons of State security - the factual basis for the decision to detain him. His right to defend himself against the detention was limited. Nonetheless, there was no choice but to draw a balance between freedom and dignity and State security. Human rights could not turn into a tool for negating State and public security.

This balance assumed that in a democratic State aspiring to freedom and security - it was possible to enable the administrative detention of a person who himself posed a danger to State security, but this possibility could not be extended to detain a person who did not pose such a danger and was only used as a “bargaining counter”. The grounds for this position were twofold: first that administrative detention severely infringed the freedom and dignity of a person who posed a danger to the State. At the same time, it could be countenanced. It was in the nature of the least possible evil. In contrast, infringement of the freedom and dignity of a person who did not pose such a danger, was extremely severe, to the extent that the person interpreting the law could not assume that the law was intended to achieve this severe infringement. The move from the detention of the first type of person to the second type of person was not a “quantitative” but a “qualitative” move. The State, by means of the executive authority, was detaining a person who had not committed any offence, who did not pose any danger, and whose only “sin” was to be a “bargaining counter”. The infringement of freedom was so profound and substantive that it could not be countenanced in a State aspiring to freedom and dignity, even if reasons of State security led to such a measure.

Justice Barak further held that the infringement was so severe that only an express provision in the Detention Law stating that the Law was to apply to persons who themselves posed no danger to State security - a provision the constitutionality of which would have to be considered in the light of the standards of the Basic Law: Human Dignity and Freedom - could lead the person interpreting the Law to conclude that the Law was intended to enable administrative detentions of this type.

Secondly, holding persons as “hostages” - and this expression included holding persons as “bargaining counters” - was prohibited by international law (Section 1 of the International Convention on Hostage Taking, 1979; Section 34 of the Fourth Geneva Convention, 1949). Justice Barak was willing to assume, without holding the same, that there was no such prohibition in customary international law, and also that the treaty prohibitions did not fetter the State of Israel in terms of its domestic law, in the absence of application within the domestic law. Nonetheless, there was a presumption that the purpose of the law was, *inter alia*, to realize the provisions of international law and not to contravene them. There was a “presumption of conformity” between public international law and local law. The application of this presumption, in the circumstances at hand, strengthened the policy apparent from reviewing the objective purpose of the Law.

In these circumstances, the Court had to find the overall purpose of the Detention Law which was based on the two purposes (subjective and objective) - while giving preference to the subjective purpose if it clashed with the objective purpose. The conclusion reached was that the purpose of the Detention Law was to apply to the detention of a person who himself posed a danger to State security, not more than this, and also not to a person who was in the nature of a bargaining counter.

Justice Barak added three notes: **first**, this conclusion was contrary to the conclusion reached in the judgment which formed the basis of the petition. He accepted that he had been wrong previously but understood the approach of his fellow judges who continued to hold that the Detention Law applied to detainees who were only in the nature of “bargaining counters”. **Secondly**, he was aware that this judgment did not make it easy for the State in its fight with its enemies. Holding persons who did not themselves pose a danger, as “bargaining counters”, could be an efficient tool for advancing the security of the State, but not every efficient tool was also legal. **Thirdly**, he was aware of the enormous suffering and tragedy of the families of



those soldiers captured and missing. Nonetheless, however important the goal of returning the captured and missing - it was not capable of making lawful every means designed to achieve it. In the prevailing statutory situation, a wrong could not be rectified by another wrong.

Finally, President Barak noted that even if he had held that the Minister of Defence had the power to issue an order of detention in respect of a person who did not himself pose a danger, he would have held that the Minister's discretion in the instant case and at this stage had been exercised unlawfully. Administrative detention could not be prolonged indefinitely. The longer the period of detention, the weightier the considerations required to justify additional periods of detention. Over time, the tool of detention became so onerous as to cease to be proportional. The "breaking point", following which the detention was no longer proportional, could not be passed. The "breaking point" changed with the circumstances. All depended on the importance of the purpose which the administrative detention was designed to achieve; the likelihood of achieving this purpose by the administrative detention; the existence of alternative measures to achieve that purpose which might lead to a lesser infringement of individual freedom; and the severity of the infringement of freedom of the individual against the background of the proper purpose intended to be achieved.

All the factors pointed to the continued detention of the petitioners not being proportional. Today, there was no near certainty or even reasonable possibility that the continued detention of the petitioners would lead to the release of the captured and missing soldiers. The Court had only been presented with assessments and evaluations in this regard, with the likelihood of this outcome lessening with the years. Accordingly, in the absence of a legal manner of holding the petitioners in administrative detention, the Court would uphold the petition, and declare that the respondents were not entitled to hold the petitioners in detention by virtue of the Detention Law. In the absence of other grounds for detaining them, the petitioners would be released from detention and arrangements made for their immediate return to Lebanon.

#### **Justices Or, Maza and Zamir agreed with Justice Barak.**

**Justice Cheshin dissenting** opened by stating that battles were being waged in the north of Israel - battles on land and battles in the air. These were not armchair battles, nor a battle of words.

Rather these were battles where soldiers were killed and injured, young and old. Those killed in these battles were like those killed in a war - war within the definition of international law. On occasion, soldiers from one camp fell into the hands of the other camp, and at the end of the war or battle, or even by agreement while that war or battle was being waged - the parties exchanged prisoners.

Justice Cheshin expressed his agreement, in principle, with the position of the State that when the *Hizbullah* released the captured navigator Ron Arad, or provided information about his fate, the petitioners would be returned home. The right to hold soldiers of the enemy until the release of Israel's soldiers, was obvious in his view.

Referring to the Detention Law, Justice Cheshin noted that the power of the Minister of Defence to issue a detention order depended on the existence of two cumulative conditions: the existence of a state of affairs which fell within the definition of the term "public or State security" and the existence of reasonable grounds for believing that holding a person in detention was required by that state of affairs. In his view, there was no doubt that the purpose of returning the captured and missing soldiers fell squarely within the term "State security". Justice Cheshin emphasized the fact that all Jews were responsible for each other and the precept prohibiting leaving a fallen soldier in enemy territory. With regard to the second condition, there too, there could be no doubt that holding the *Hizbullah* soldiers was necessary in order to eventually secure the release of, or at the least, information about, Ron Arad. Arad had fallen in an act of war and the petitioners - enemy soldiers - had fallen in Israel's hands in an act of war. One balanced the other.

Justice Cheshin rejected the argument that no danger would be posed by the petitioners if they were released. These petitioners had knowingly tied their fate to the war between Israel and the *Hizbullah*, and in this way their case differed from that of the demolition of the homes of terrorists, a matter which had frequently been considered by the Supreme Court. It was a supreme principle that a person should only bear responsibility for his own actions. On that ground, in the past, Justice Cheshin had taken the minority view that a military commander did not have the power to demolish a house in which the family members of the terrorist lived, even if the terrorist himself also lived there. Here the case was different, the petitioners, as enemy soldiers - unlike the family members of terrorists - had knowingly and deliberately linked themselves to the war.

Justice Cheshin posed the question - if the State released the petitioners from detention - how could Israel fight its enemies? They could hold Israeli soldiers but Israel could not hold theirs? The fact that, historically, the Law had not contemplated this situation was irrelevant, the law had to adapt to changing circumstances and the Court would help it do so, interpreting it in the context of real life. Moreover, the language of the Law embraced this interpretation, and its purpose was the purpose put forward here. Further, holding prisoners, in principle, did not infringe human rights.

The petitioners had enlisted into the ranks of the enemy, and describing them as “hostages” or “bargaining counters”, was a distortion of language and the truth. Justice Cheshin deplored this usage. A man was a man and a bargaining counter, a man was not and could never be a bargaining counter. Similarly, this was not a question of bargaining. If Ron Arad were returned, the petitioners would be released. Neither were the petitioners “hostages” - they were being held for a legitimate and proper purpose of State security.

With regard to the question of proportionality, Justice Cheshin noted that since the petitioners had been detained - years before - no contact had been made with the *Hizbullah* in regard to Ron Arad, and accordingly he had initially thought that the detention had exceeded the level of proportionality, however, during the hearings it had become clear that there had been a shift in the *Hizbullah* position, and some indirect contact had been resumed. In such circumstances, it would be right to hold the petitioners for an additional, not overly long, period of time.

Justice Cheshin noted that in the past, at least five justices had held expressly that the petitioners, and others like them, were being detained lawfully. Now of the nine justices, a majority of six to three was holding to the contrary. Justice Cheshin questioned whether it was appropriate to change direction in this way in such a short period of time. He pointed out that he had stated his understanding of the law and had not been convinced by the criticism directed at the original judgment of the Supreme Court, which formed the basis for this Further Hearing. He also pointed out that the outcome of the current decision would be that the State would no longer be able to seize *Hizbullah* soldiers as it had seized the petitioners. This conclusion was unacceptable to him. Finally, he noted that he was not ignoring the human rights and dignity of the petitioners, but Ron Arad was also entitled to human rights and dignity, and Israel owed a huge debt to Ron Arad.

**Deputy President S. Levin agreed with President Barak** adding that it would be naive and even dangerous to deprive the State of the proper tools for bringing about the release of its soldiers. However, the law had not given the State such a tool - another source of jurisdiction or primary legislation was needed for this purpose. The State had not enacted appropriate legislation for this purpose, and the Court had not been referred to another source founding the power to detain the petitioners.

**Justice Kedmi also dissenting** held that the detention of the petitioners was within the power conferred by Section 2(a) of the Detention Law and that the redemption of missing and captured soldiers was a matter of “State security”. He also emphasized that redemption of prisoners was one of the basic values of the Jewish people and the knowledge that the people and the State stood behind each soldier and that no effort would be spared to bring home captured soldiers stood at the basis of the strength of Israel’s security forces. As redemption of prisoners was one of the components of State security - obstructing the implementation of this value - was tantamount to a violation of State security.

After describing the normative framework of the power of detention, Justice Kedmi held that the language and purpose of Section 2(a) of the Detention Law was not limited to persons who themselves posed a danger to State security. The purpose of the Law was to create an emergency measure for the defence of State security in circumstances where there would be no benefit in applying less severe measures; thus, placing a person in administrative detention was a last measure to protect the State against a danger with which the detention had the power to contend. Administrative detention was by nature “preventative” detention, characterized by the fact that it was designed to “prevent” a danger and not “punish” someone in respect of it. However, the fact that it was preventative did not require that the only standard for its implementation be a “personal danger” posed by the detainee.

The “preventative” nature did not preclude use being made of it as a means of exerting pressure on those wishing to harm security - by preventing the redemption of prisoners - to change their minds. This principle, however, was subject to the principle ensuing from Basic Law: Human Dignity and Freedom that every person’s right to freedom would invalidate his detention except where there was a “connection” between his behaviour and actions and the purpose of his detention. The “connection”

had to have been intentional and the result of the free choice of the detainee in relation to the grounds of his detention and the purpose thereof. One example was the existence of an organizational link between the detainee and the activities of others - where that activity infringed State security. The detention of the detainee - against the background of that link to others - was the final protective measure against it.

In the case at hand, the petitioners had "connected" themselves to the grounds for their detention, in that they had joined a terrorist organization in whose hands Ron Arad had fallen, and as such had a sufficient connection to justify holding them in administrative detention, for the purpose of creating pressure on the leadership of the organization to reveal the fate of Arad.

Justice Kedmi also considered the meaning of the terms "hostage" and "bargaining counter" and concluded that the petitioners did not fall within these terms. They were not being threatened with any harm, they were not being used as a "weapon" in the struggle against the *Hizbullah* to prevent the latter from taking any particular action, and they were not being used as part of a bargaining process with the *Hizbullah*. Rather, their detention was only aimed at causing the *Hizbullah* to break its silence regarding Arad.

With regard to the infringement of the freedom of the petitioners, an infringement which was incompatible with the humanist principles of cultured societies - where a terrorist organization acted in such a cruel and inhumane manner - a balance had to be drawn between humanitarian fundamental principles in the struggle against Israel's enemies and the interest in the redemption of prisoners, which stood at the top of Israel's priorities. The balance justified and validated the detention of the soldiers belonging to the terrorist organization. Their detention was intended to reveal the whereabouts of Israel's captive soldiers and this was the least - and in fact all - that could be done, without causing harm which exceeded what was proportional in terms of Israel's obligations to humane principles of freedom and liberty.

Finally, Justice Kedmi was willing to accept that even in relation to the restricted purpose of the detention, the detention had limits and proportionality, and that at a certain point in time, when it became clear that the detention of the petitioners was not effective, the basis for its justification would be removed. After ten years of detention, there was a question mark against its efficiency, and in such a case extending the detention necessitated

the bringing of evidence pointing to the existence of a true, real and concrete possibility that continued detention was necessary to bring about a change in the position of the *Hizbullah*. In the absence of such evidence there would be no choice but to release the detainees, on the ground that the detention had been proved to lack any benefit.

Here there was evidence of a change of position on the part of the leadership of the *Hizbullah* and accordingly, had Justice Kedmi's opinion been accepted, the petition would have been denied and a new date for a hearing set for reports on developments in negotiations.

**Justice Türkel also dissenting**, noted that originally he had thought that the Minister of Defence was not entitled to make an order of detention in these circumstances, but in the Further Hearing he had changed his mind, and believed, like the minority, that there was such jurisdiction. Additionally, like Justices Cheshin and Kedmi, he believed that the redemption of prisoners was one of the basic values of the Jewish people. Preservation of the human dignity and freedom of every person and protection of these basic constitutional rights, was of supreme importance, but in the instant case could not stand against preservation of State security, within the narrow meaning of the term - as interpreted by the majority. The balance between the dignity and freedom of the petitioners and the freedom and dignity of Israel's soldiers was not conducted in a legal laboratory but within the melting pot of values, some nationalistic, as well as human feelings of compassion. Justice Türkel held that, sadly and painfully, he was forced to admit that the freedom and dignity of Israel's soldiers were more important to him than those of the enemy. Accordingly, a broad interpretation had to be given to the term "grounds of State security".

With regard to the issue of proportionality, Justice Türkel too agreed that weight had to be given to the professional opinion of senior security officials, that there was a chance of movement on the negotiation front and that accordingly the petition should be denied for the time being.

**Justice Dorner agreeing with President Barak** and the majority, emphasized her view that the petitioners were being held as "bargaining counters", and noted that citizens held in detention in such capacity were "hostages" within the meaning of Article 1 of the International Convention relating to Hostages, 1979, and that this was completely prohibited:

### Article 1

“Any person who seizes or detains and threatens... to continue to detain another person (hereinafter referred to as the ‘hostage’) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages (‘hostage-taking’) within the meaning of this Convention.”

Israel had signed this Convention on 19.11.80, and had added the following note:

“It is the understanding of Israel that the Convention implements the principle that hostage taking is prohibited in all circumstances and that any person committing such an act shall be either prosecuted or extradited pursuant to Article B of this Convention or the relevant provisions of the Geneva Conventions of 1949 or their additional Protocols, without any exception whatsoever.”

Justice Dorner also emphasized the prohibition on taking hostages in the Fourth Geneva Convention regarding the Protection of Civilians in Time of War and noted that there was a school of thought which held that this had already become a principle of customary international law. According to Israel’s legal system, principles of customary international law were adopted directly into domestic law, and whether the prohibition on hostage taking was a matter of treaty or customary international law, Israeli law did not allow it.

She further noted that in the instant case, the State was not purporting to hold the petitioners as prisoners of war, but rather by virtue of the Detention Law. In her view, there was no reasonable way of interpreting the Detention Law as incorporating the power to hold hostages. This was not the intention of the legislature. The purpose of the Detention Law was only to enable the detention of persons endangering State security or public safety, where this purpose could not be achieved through the criminal law. Holding the petitioners in order to promote the release of Ron Arad and other captured and missing soldiers - was undoubtedly proper - but it could not itself vest a power of detention. Accordingly, Justice Dorner also held that the petitioners had to be released immediately.

*Abstract by Dr. Rahel Rimon, Adv.*

## Lord Harry Woolf Appointed Lord Chief Justice of England and Wales



The Presidency of the Association congratulates the Honorary President of its U.K. Section, the Right Honourable The Lord Harry Woolf, on his recently announced appointment to be Lord Chief Justice of England and Wales. Born in 1933, Harry Woolf has had a meteoric career as Judge of the High Court, Court of Appeal, House of Lords, and more recently Master of the Rolls, effectively the head of civil justice in the U.K. His appointment as Lord Chief Justice places him as the senior judge in the U.K. and effectively leader and spokesperson of the entire judiciary in that country, with decisive influence in the development of the common law. A man of the widest outlook and vision, he is a committed Jew who enjoys the highest respect and popularity in the wider general community also. He has been prominent in the work of the IAJLJ both in London and Jerusalem, where he has appeared as a judge of our triennial public trial. The Association hopes he may honour us in a similar capacity in the future.