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THE TORONTO CONFERENCE

The International Conference held by IAJLJ at Toronto (August 13-16, 2000) on "Pursuing Justice in the Global Village", discussed Jewish Perspectives on Democracy, Human Rights, Media and Commerce. The main themes of the panels were Crimes against Humanity from an International Perspective; Transitional Justice in Emerging Democracies; International Commercial Arbitration; Restitution of Holocaust Era Assets; Religious Pluralism & Funding Obligations of Democratic Governments; Combatting Electronic Anti-Semitism and Holocaust Denial; Public Trials and Impact of the Media; Update on Human Rights Decisions; Secular Justice and Religious Law and the Ways Jewish and Israeli Issues are Portrayed in the International Media. This issue of *JUSTICE* commences reporting on the addresses delivered during the Conference. More reports will follow in later issues.

"We Should Never Loose Sight of our Major Aim, Pursuing Justice for the Inhabitants of the Global Village"

Hadassa Ben - Yeh

Preparing my address, I gave much thought to the title we have chosen for this conference. "Pursuing Justice in the Global Village" is a very fitting, but also a very ambitious title.

We cannot mark the exact point in time when the term "global village" crept into our language, but it is here and I dare say that its implications have only begun to dawn on us. I myself come from a place where, in my childhood, electricity was a rare luxury, water was drawn from a well, the only telephone could be found in the pharmacy, and inter-city travelling was by horse-drawn buggies. This is why people of my generation have difficulty in adjusting to this new era, and we sometimes find ourselves lagging not only behind our children but also behind our grandchildren.

Yet we should not forget that this "global village", with all its astounding means of communication, with its never ending new technologies, is still no more and no less than the world we live in, and we should never loose sight of what should be our major

aim, "pursuing justice" for all its inhabitants.

Pursuing justice has always been the aim of civilized nations, we Jews were actually the first to coin the term "Justice thou shalt pursue", which is the motto on the cover of our publication, *JUSTICE*.

But what kind of justice do we pursue? How do we pursue it? And how is it different in the global village?

In my many years on the bench I learnt that there is no consensus as to the meaning of the term "justice".

PRESIDENT'S MESSAGE



Keynote address at the opening of the IAJLJ's Toronto Conference.

Litigants often exclaimed in my courtroom “I want my justice”. Indeed, we live in a world of conflicting interests, in the public, as well as in the private domain. Justice to one person, or one group, or one nation, often results in injustice to somebody else. It is therefore always a matter of balancing conflicting interests, and while we who live in democratic societies are agreed on this principle, we often disagree on how this act of balancing should be accomplished.

Although we live in a constantly changing world, most major issues which confront us today are not so different from those which confronted us before the world became a “village”, before it became “global”. Not only have the old problems not been solved, but we are even facing some new dangers, which were created by this globalization, new problems which we have not even begun to confront.

Poverty still prevails in large parts of the world, children still starve, wars still rage in various corners of the globe, acts of terrorism are still used as a means of achieving goals of various groups, even of nations; weapons of mass murder are still produced; and racism is still a prominent item on the national as well as the international agenda. And now we all see the sights on the screens in our living rooms.

This has been a brutal century. It has witnessed some of the most horrible chapters in human history. In trying to do justice, in the broad sense, we dare not ignore or overlook the lessons it has taught us, or should have taught us. As the second half of the last century unfolded, we applauded new developments: medicine has made big steps both in curing and preventing illness; countries which have been at war for centuries have laid down their weapons and opened their borders to each other; the international community has become directly involved in the promotion and protection of human rights even inside sovereign countries, and has created proper tribunals for the implementation of a growing number of conventions and covenants ratified by most countries; racism has been condemned by the international community and outlawed by laws and constitutions in emerging democracies; dictatorships have collapsed and been replaced by governments committed to the rule of law. The rights of the individual, formerly recognized only in small parts of the world, have achieved international sanction.

Yet, taking stock, one must conclude that very often positive achievements come with a price tag, and the solution to one problem immediately creates a new one. Development also has its price.

- Antibiotics appeared to cure most infectious diseases, but microbes have become immune to them.

- Society is confronted by the impossibility of financing new medical procedures and making them available to indigent not only affluent patients.

- The pill, which played such an important role in liberating women, has created an era of free sex, but the whole world now faces the growing danger of AIDS with no hope of containing this epidemic within the boundaries of one country, or even one continent.

- Open borders between countries, which were considered a blessing, have encouraged uncontrolled immigration, which is fast changing the fabric of society in many countries and creating unsolvable social, economic and legal problems.

One of the most important benefits to the individual which marks the twentieth century, is the recognition of the rights and freedoms of the individual, of which we, in democratic societies, are so proud. With the downfall of dictatorships more and more countries have enacted modern constitutions which secure freedoms hitherto unrecognized in those countries. But here too, there is a price-tag, and we are not all agreed on how to balance conflicting rights and interests.

“Pursuing justice in the global village” is a very broad subject, and we chose a number of issues under this vast umbrella, to be discussed at this Conference.

In my remarks I have chosen to address one particular issue, to which we come back again and again, and which is as important today as it was in the first part of the century.

We are all worried about the weapons of future wars, nuclear, chemical and bacteriological, and indeed it scares us to even mention them. Yet, weapons are only dangerous when placed in the hands of dangerous people. Excluding accidents, bombs do not explode without somebody pushing a button, guns do not shoot by themselves, missiles do not fly unless they are dispatched by humans.

Those humans must be motivated and indoctrinated in order to do the bidding of dangerous leaders. Dictators cannot do it all singlehanded.

The Charter of UNESCO wisely states that “wars start in the minds of men”. Therefore, poisoning the minds of men and women against other fellow humans is the first step, an important and powerful step, in each battle, in each war. Hitler knew it; Goebbels knew it; and so do their followers. The impressive Nazi propaganda machine, aimed both at the German people and

at the rest of the world, was a necessary tool. Without this brainwashing process, the Nazis could not have done what they did.

One of the most important diaries of the Nazi era has recently been published, first in German and now also in English. This is the diary of Professor Victor Klemperer, entitled *I Will Bear Witness*. A converted Jew, who was nevertheless treated as a Jew by the Nazi definition, Klemperer managed to survive in Dresden and documented the years 1933-45 of Nazi rule in a detailed diary. Reading it one realizes exactly how it was done, how a whole nation was systematically brainwashed, how devious Nazi propaganda served its purpose around the world.

It is inconceivable that propaganda materials, so successfully used by the Nazis, are still being openly used by their followers in many countries, and what is more, they are being distributed around the world by others for purely commercial reasons, with total disregard for the consequences, falsely hiding behind the cloak of "free speech".

We sign regional and international agreements concerning the production of non-conventional weapons; we send supervisors to Iraq to prevent the preparation of an arsenal of weapons which might destroy us all; yet, in spite of the lessons of the twentieth century, we ignore at our peril blatant undisguised hate propaganda which incites, directly or indirectly, to the same kind of acts, which we all pay lip service in condemning.

There was a time when we were told that these were only fringe groups, let them march and wave their flags, and paint their dirty slogans on the walls, nobody takes them seriously. We do not say that anymore. Only two weeks ago in Dusseldorf, we were reminded that they do not stop at painting swastikas, they shoot to kill, as did some militia terrorists in a Jewish community centre in Los Angeles. In recent years they also burned to death foreign immigrants, and if the German government and the German parliament are very worried, so should we all be, but not only at what happens in Germany, we should be very worried at what happens within our borders, or in our "global village" which now has no borders.

After the murder of Itzhak Rabin, we too, in Israel, shall never again say "it cannot happen here".

I submit that if we wish to pursue justice in the global village, in the broad sense, we must place this issue high on our agenda. It is by far not the only issue, but it should be recognized as one of major importance. I also submit that racists and anti-Semites, neo-Nazis and terrorists, who cynically misuse constitutional rights and freedoms, are not the only ones who deserve constitu-

tional protection. Their victims, and their potential victims, also deserve justice under the law, their rights should also be protected. Is the right to live without fear, the right not to be singled out as a potential target, the right to protect the memory of millions of victims, the right not to be slandered as a race, a group, a nation, are they all lesser rights?

We sometimes forget that the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on December 10, 1948, stated: "all are equal before the law and are entitled without any discrimination to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

I repeat: We are entitled to protection against any incitement to discrimination!

How do we implement this part of the Universal Declaration of Human Rights?

Actually, it was one of the drafters of this Declaration, the legal philosopher, Nobel Prize laureate René Cassin, who was one of the founders of our Association, in the belief that Jewish lawyers and jurists must play a role in creating a world where the atrocities of World War Two would not be repeated. This was his legacy to us, and we must never forget it.

In the spirit of the Universal Declaration, the international community created legal instruments which are now ratified by most Member States. The International Covenant on Civil and Political Rights, adopted by the General Assembly in 1966, guarantees, in Article 19, the right to freedom of expression, but immediately adds in Article 20: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".

Precedence of anti-racism over freedom of expression is carried even further by the International Convention on the Elimination of All Forms of Racial Discrimination, adopted in December, 1965. In Article 4 of this Convention, which has been ratified and acceded to by most Member States, the State Parties "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form". The State Parties also undertake "with due regard to the principles embodied in the Universal Declaration of Human Rights" to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to

such acts against any race or group of persons of another colour or ethnic origin", to "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination", and to "recognize participation in such organizations and activities as an offence punishable by law".

To ensure a right we must prescribe a remedy in law.

To seek justice, one must have access to the courts.

In a brief overview of the twentieth century, I would like to examine how courts of law dealt with this matter, which I shall call "hate speech".

As Jews we have always been discriminated against, therefore it was mostly the Jews who were compelled to seek redress in the courts. But before this new legislation, which came after World War Two, there was no ready remedy in the law, in most countries, against "hate speech" aimed at groups or minorities. So, Jewish communities, potential victims, and often real victims, of lies and libels had to use ingenious methods to bring their case before the courts. Courts in various countries dealt with this danger firmly and courageously, condemning hate speech in no uncertain terms.

When Walter Rathenau, the famous Jewish Minister of Foreign Affairs in Germany, was murdered in 1922, and one of his murderers argued in his defence that Rathenau had been "one of the elders of Zion" and his execution was justified to protect Germany from The "Jewish conspiracy", the German judge called the murder "a sacrificial death", and expressed the hope that his judgment would "serve to purify the infected air of Germany, now sinking in moral sickness and barbarism". In his outspoken judgment, he called the *Protocols of the Elders of Zion*: "a vulgar libel, which sows in confused and immature minds the urge to murder". This in 1922!

As the *Protocols of the Elders of Zion* were considered the most important and dangerous tool, used first by the Russian secret police, in the instigation of pogroms, and later around the world, many trials dealt with this forgery. It is interesting to look at two trials which took place in the same year, 1933, in separate parts of the world, in two different jurisdictions, under two completely different systems of law. These are the two famous trials concerning the *Protocols of the Elders of Zion*: one, in Bern, Switzerland, the other in a town called Grahamstone, in South Africa.

In the first trial, under the continental procedure, where a private party may institute criminal proceedings, the Jewish

community charged leaders of the local Nazi organization, "the National Front", with distributing the *Protocols of the Elders of Zion*, which are a fabrication and a plagiarism, and thus inciting the public against the Jews. For want of a relevant paragraph in the then existing law, they decided on an intriguing and some say, brilliant, legal maneuver, using a 1916 local law of the canton of Bern which prohibited the dissemination of "obscene literature". They even succeeded in convincing a judge in the city court of Bern, that this law, most probably enacted with pornography in mind, could be interpreted to condemn "political obscenity". And indeed, after a long and dramatic trial this judge, in the year 1935, decided that the *Protocols* were obscene literature, and convicted the defendants, ending his judgment with these words:

"I hope that a time will come when nobody will understand how in the year 1935 almost a dozen sane and reasonable men could for fourteen days torment their brains before a Bern court over the authenticity of these so-called protocols, these protocols which, despite the harm they have caused and may yet cause, are nothing more than ridiculous nonsense".

This last passage of the judgment has become famous around the world and is quoted to this day, in spite of the fact that the Court of Appeal did not agree with Judge Meyer's interpretation of the term "obscene literature". Yet, unhappy with their own result, the Court of Appeal in Bern, in the year 1937, aware of what was happening across the border, found a way to express its views on the subject, and also to recommend suitable legislation.

Judges have various ways of saying what they think, and in this case they did so by placing the burden of costs in both instances on the shoulders of the appellants. Ignoring the usual practice of imposing the costs of a trial on the losing party, the judges concluded their decision with these words:

"This scurrilous work contains unheard-of and unjustified attacks against the Jews and must without reservation be judged to be immoral literature. It will be for other authorities to forbid, for reasons of state, the propagation of writings of this kind".

Refusing to award damages and costs demanded by the appellants, the court said:

"Whoever disseminates libelous and insulting writings of the greatest possible coarseness, runs the risk of being summoned before the courts and must take the consequences".

In South Africa, where courts operated under the English system of law, there was no offence of group libel on the books, neither in criminal nor in civil law. But the local Nazi organization, “the Grey Shirts” made the mistake of accusing the rabbi of the major Port-Elizabeth synagogue, of composing a local version of the *Protocols of the Elders of Zion*, advocating and actually planning Jewish domination of South Africa. The Jewish community used this loophole and instigated proceedings in which the rabbi sued for damages. Through this loophole the trial quickly ignored the rabbi and dealt with the whole question of the *Protocols* and the so-called “Jewish conspiracy” to dominate the world. The rabbi won, but this was not the end. The leaders of the Nazi group were then indicted for perjury and forgery, and sentenced to stiff prison terms, one of them to 6 years with hard labour.

But the courts did not only serve as a means of obtaining verdicts.

In many cases, and again I refer to cases concerning the *Protocols*, the distributors realized that they had, or their lawyers required them, to prove the authenticity of the forged document they were distributing, and thus these trials were settled by the parties, with agreed court orders to destroy all the existing copies of the forged book, an apology to the plaintiffs and, many times, substantial costs. Such was the famous trial, actually two trials, against Henry Ford, which were settled in 1927, with the same result.

All this, before the War, before the Holocaust, before the international covenants and conventions.

We would never have dreamed that the subject matter of these trials, and similar lies against the Jewish people, would again occupy the public, as well as courts of law, in the year 2000, 60 years after the Holocaust. So, let us take a look at the second half of the century.

One of the first countries to act according to the newly adopted international instruments, was France. As early as 1972, the French enacted a law which prohibited incitement against a group of people on the grounds of their origin, or of their belonging to a particular ethnic group, race or religion. One year later, in 1973, the director of a bulletin published by the Soviet Information Bureau in Paris, was charged with an offence against this new law, for having published an article which accused the Jews of the worst kind of racist and inhuman practices, misquoting and misinterpreting ancient Jewish writings. The article described how Jewish children were taught “from the cradle” hatred of other peoples, and commanded to massacre non-Jews (*goys*), under Divine law. The Jewish conspiracy to

dominate the world was being systematically implemented, according to the writer.

The case was instigated by LICRA, the French League against Racism and Anti-Semitism, the presiding judge was Simone Rozes, who later became President of the Supreme Court of France, the Cour de Cassation, and LICRA was represented by Robert Badinter, who later became Minister of Justice of France, and finally, President of the Constitutional Court.

One of the witnesses for LICRA was Nobel Prize laureate, René Cassin.

Quoting the various witnesses, the court stated that the article in issue contained passages from the *Protocols of the Elders of Zion*, “an anti-Semitic publication compiled by the Russian tsarist police, Okhranka, towards the end of the nineteenth century”. The defendant was found guilty of the offence of public defamation and sentenced to pay a fine of 1,500 francs. The court also ordered that the full verdict be published in the next issue of the Russian bulletin, and that excerpts of the judgment be published in six French newspapers or periodicals.

A short foreword on the first page of the book, which described the trial, was signed by the famous Russian ballet dancer, Valery Panov, who had defected to the west. “It is unbelievable”, he wrote, “that outworn prejudices should still be used to degrade human beings on the ground of race, religion or nationality... one reads in these pages a confrontation between the sanity of civilization and old, malignant myths, that have cost innocent human lives”. Panov concluded his short foreword with a message of hope. “In Paris”, he wrote, “truth was vindicated and the lies that have haunted European history were exposed to the light of reason”.

On May 25, 1990, after the desecration of the Jewish cemetery in Carpantras, the French authorities banned the *Protocols of the Elders of Zion* among other drastic measures passed in the French parliament to combat the growing tide of racism, anti-Semitism and Denial of the Holocaust.

These trials are not always instigated by Jews. Sometimes they are instigated by the distributors of hate speech, who dare sue those who call them racists or anti-Semites.

This was the case in Moscow, where in 1991 the anti-Semitic organization “Pamiat” sued the editor of a Jewish newspaper for calling them anti-Semites.

This was also the recent case in London, when the famous Holocaust denier, David Irving, sued Professor Deborah Lipstadt, for calling him a denier. The judgment in both cases went against the plaintiffs. Typically, the Moscow case did not

receive much attention, the record was not made available to the public. On the other hand, the Lipstadt case was a big news item.

Coming back to the global village, we are now faced with a situation for which there is no ready solution.

There seems to be a huge cultural gap about freedom of speech between countries that have experienced Nazi terror and those which have not, like the United States, yet the majority of hate websites originate in the US, all the big Internet portals are located in the United States, but they operate in a lawless world of their own, reaching surfers everywhere, showing no respect for the laws of other countries.

Municipal laws, in every country, enacted in accordance with international norms established in the wake of World War Two, have lost their meaning, and the whole world is now subjected to the extreme First Amendment interpretation which prevails only in the United States.

This, to my mind, is one of the major issues on the world agenda, and most definitely on the agenda of organizations such as ours, in the years to come.

Groups and organizations in many countries, including one group in this country, protest the distribution by *Amazon* and by *Barnes and Noble*, through the net, of inciting materials, such as the *Protocols of the Elders of Zion*, *Mein Kampf*, and the *Turner Diaries*, to no avail. Some countries have decided that protests are not enough.

Germany and France have been in the forefront of firm anti-racist legislation. Both these countries have witnessed the Nazi atrocities, though from different perspectives. They both understand the implications and they both say "not anymore, not here".

In these countries Holocaust victims are not tortured in long cross examinations in which the gas chambers are questioned. The law says that the Holocaust took place and its denial is a criminal offence. These countries maintain that their laws should be respected and what is forbidden offline, must be forbidden online.

The German parliament is currently considering outlawing the neo-Nazi party.

On July 27, Germany's Justice Minister urged self regulation by web companies to beat racism and xenophobia, and called for global rules against hate speech on the Internet, arguing that this is a new threat to society. "Given the global character of the Internet" she said, "our goal must be to achieve a global value consensus and to agree an international minimum level of regulation".

Let us remember that these are two democratic countries,

which respect constitutional rights and freedoms, but do not wish again to expose their citizens to what in the past caused so much human misery.

This is today the heart of the problem: does freedom of speech, as interpreted by one country, entail freedom of access in other countries, which find themselves forced into a tricky balancing act between Internet freedom and what they conceive as minimal standards necessary for protection from the evils threatening their society.

Currently, France is again at the forefront of this controversy, and Judge Jean-Jacques Gomez, in a Paris court, is struggling with this most difficult decision, which may well turn out to be a landmark decision, a major precedent, worldwide.

We are all familiar with *Yahoo*. It allows French users to access sites selling Nazi memorabilia, through its search engine, in contravention of French law banning the sale of material which could incite to racism and xenophobia. Among the items being auctioned in an ongoing sale one may find hundreds of Nazi and Ku Klux Klan items, like a copy of an SS Dachau cuff-band for \$15, or an SS Hitler-jugend helmet for \$250, and other Nazi artifacts, like films, uniforms, flags, swastika bearing signs, and literature which, how surprising, includes the *Protocols of the Elders of Zion*, *Mein Kampf* and materials denying the Holocaust. The sale and even possession of all these articles is prohibited by French law, but is now available to French citizens at the click of the mouse.

LICRA, the French League Against Racism and Anti-Semitism sued *Yahoo*, first the local and then also the international company, asking the court to force them, by injunction, to comply with French law and prevent French web-surfers from accessing these controversial sites. LICRA was joined in its claim by the Association of Jewish Students.

On May 22, the judge gave *Yahoo* 2 months to either adopt his suggestions for blocking the site, or come up with other workable suggestions of their own. He explained that a French citizen who links into *Yahoo.com* in the present situation, commits a criminal offense.

The issue then became a technical one: *Yahoo* argues that it is technically impossible to block access to any one country, or to identify French surfers, the judge consequently deferred his ruling, and decided to appoint three independent experts to advise him on the technical possibilities.

This issue is not going away, it will not disappear. On the threshold of the new century we cannot avoid confronting it. I promise that it will continue to be a permanent item on our agenda. ■



JUSTICE wishes its readership a Prosperous and Happy New Year



Top: Opening Session of the Toronto Conference. L to R: Adv. I. Nener, First Deputy President of the Association; Judge Hadassa Ben-Itto, President of the Association; Adv. Igor Ellyn Q.C., Vice-President of the Association and Chairman of the Toronto Conference Organizing Committee; Hon. Roy R. McMurtry, Chief Justice of Ontario; Hon. Herb Gray, Deputy Prime Minister of Canada

Bottom: Participants at the Opening Session of the Toronto Conference



Canadian Leaders Greet the Conference



Hon. Herb Gray
Deputy Prime Minister of Canada

Pursuing justice in the global village involves Jewish perspectives on democracy, human rights, media and commerce. What are the specifically Jewish perspectives that the conference organizers may have had in mind? Should it make a difference if these issues are looked at by legal practitioners who are Jewish?

One answer is that all of these matters are linked with the concept of the rule of law and the concept of the rule of law has been with the Jewish people from our very beginning. After all, in the words of the *Torah*, the Lord said to Moses, "I will give thee tables of stone and the law and the commandments which I have written", and the Almighty was by doing so establishing the rule of law, making a contract with the Jewish people.

But this rule of law was not and is not intended only for them. Our sages repeatedly have made clear that our faith provides a guide to living meaningful and

worthwhile lives. Our *Torah* says "justice justice shall thou pursue". Applying the rule of law, interpreting rules for society and taking part in a rules-based society whether on the national or wider level, are matters that I believe we instinctively should feel comfortable with on the basis of our history and our traditions.

Justice, especially social justice, has been a keystone of our heritage, of our contribution to mankind. I am talking about the message of our *Torah*, especially the words of our prophets. For example, the prophet might proclaim: what does the Lord required of thee - only to do justice and to allow mercy and walk humbly with thy God.

I believe it is meaningful to be a Jewish lawyer or a Jewish judge, because of our link with the concept of the rule of law as the necessary foundation of a peaceful free and open society. I say to you as you participate in this conference: *Yesheh Koach!* May you be strengthened in your work for the rights and dignity of all. ■

Hon. Roy R. McMurtry
Chief Justice of Ontario, Canada

I can't tell you how pleased I am to have been asked to bring greetings to you on behalf of all the judiciary of Ontario. Jewish lawyers and jurists have, of course, made and continue to make a crucial contribution to the administration of justice in Canada and to law reform. My Jewish colleagues have provided distinguish leadership in relation to our most important social justice issues over many decades.

Here I might be rather personal. I would like to say that my friendship with my



Jewish colleagues has been a very special, very rich dimension in my own life; the support, advice and encouragement of my Jewish friends and colleagues have served me well as a lawyer, Attorney General, Ambassador and Chief Justice. But when I look back on my own political life in Canada, the nicest compliment that was ever paid was when I was first introduced to a Jewish gathering as a Christian Zionist.

As the Attorney General for Ontario, I was pleased to have had the opportunity of appointing the first female Jewish judge in Ontario and perhaps in Canada. She is now a member of the Court of Appeal, and is not only a very dear friend but one of the kindest, most outstanding judges.

The Court of Appeal for Ontario was comprised of 21 judges until two recent retirements. There were 9 Jewish members on our Court, and I think this dramatically illustrates the extent and the importance of the Jewish contribution to the administration of justice. ■



Hon. James Flaherty **Attorney General of Ontario**

I want to welcome all of you to this great city Toronto and the beautiful Province of Ontario.

We are honoured to be the site of the first meeting of this Association, the first conference in North America; the theme of this event, "Pursuing justice in the global village", could not be more timely. It reminds us that our traditional commitment to justice remains as valid and compelling as ever in this age of world trade and electronic communication.

The creation of a justice system for resolving conflicts peacefully and for basing the use of force on a rule of law is truly one of the most significant achievements of civilization and, as has often been said, the most sacred of the duties of government is to do equal and impartial justice to all citizens. But as times have changed, and they do change, new threats to justice and new opportunities for advancing the cause of justice emerge.

One of today's challenges is combatting the promotion of hatred.

Chief Justice McMurtry, when he was Attorney General, was responsible for

some major strides forward in discouraging this kind of behaviour in Ontario and in Canada. Our criminal code deals with hate crime in two ways. First, it is a criminal offence to promote hatred; secondly, in any crime motivated by hate, the courts are required to treat the motive as an aggravating factor in sentencing.

The Province of Ontario and my government vigorously prosecute both hate propaganda and bias motivated offences. We have established in my Ministry a team of 15 specially trained crown prosecutors for this purpose.

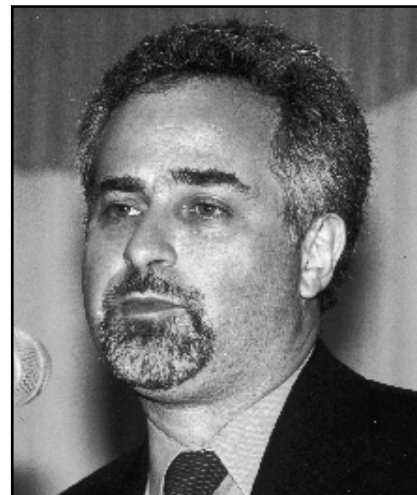
Under the criminal code, the Attorney General's consent is required to prosecute if there are reasonable grounds to believe the offence of promoting hatred has been committed. In the past four years, this consent has been given in four cases.

Let me state unequivocally that there is no room in Ontario for people who willfully promote hatred against others and I will not hesitate to authorize prosecution if this is warranted. I believe and I think the people of Ontario support all of us in this belief, that justice and hatred cannot coexist.

To this and other current challenges this conference will bring the special perspective of lawyers who are also members of the Jewish community. The historic experience of the Jewish people has strengthened the community's resolve to eliminate all forms of discrimination and hatred and violence. No one better understands justice than someone who has suffered injustice. ■

Morris Rosenberg **Deputy Minister of Justice of Canada**

The Department of Justice is Canada's largest multi-disciplinary legal practice group. The 1600 lawyers of the federal Department of Justice provide legal service



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Judging by the program for this conference, we share many common interests with the International Association of Jewish Lawyers and Jurists. For example, with regard to crimes against humanity from an international perspective, parliament has passed a new Crimes against Humanity Act to implement in Canada the Statute of the International Criminal Court and has replaced the current war crimes provision of the criminal code.

It is counsel of the Department of Justice who bring forward cases to revoke

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Recent Developments in Legislation and Case Law in Israel

Yossi Beilin

In this address I wish to refer to some of the developments in legislation and in case law in Israel in the last year, which I believe created important progress in the legal arena.

I will begin with some of the rulings of the Supreme Court. One very important ruling of the High Court of Justice was the prohibition on using physical methods of interrogation.

This is one of the most controversial issues in Israel and has been so for a long while. There were those who said that without some use of physical methods, or at least the threat of use, it would be impossible to get to the truth, to save people, and when there is a need, such methods must be used. There were others who said that even if this entails some difficulties, the use of physical methods should be prohibited and that in the modern world one can find information in many ways other than physical interrogation. It was not the *Knesset* which took the decision, nor the government, rather it was the Court. Some suggested that this ruling be changed and a law enacted which might enable us to use



physical methods. However, together with good friends such as M.K. Professor Amnon Rubinstein and M.K. Dan Meridor, we were able to prevent any idea of enacting such a law. We would have been the only country in the world to enact a law officially enabling the use of physical methods in interrogation. The General Security Service agreed to give up this idea and I am proud of the Service which is able to find other methods of obtaining the needed information.

Another important decision concerned the prohibition on parents hitting their children. This created a real uproar in Israel and there were those, especially in the religious parties, who thought that

refraining from chastising their children reflects lack of care for their welfare. However, some things which may have been right thousands of years ago are not necessarily right today. Again, an attempt is underway to change the law and permit parents to hit their children. I hope that corporal punishment like this will not become a part of our statute books and that again, the ruling of the Supreme Court will become a norm, although, as one can imagine, it will be one quite difficult to enforce.

There is a ruling which permits Arabs to live in a communal settlement which was established by the Jewish Agency. This too was a big big issue in Israel and although there were those who said that it was the end of the Jewish State and the Zionist dream, many others believe that this is the fulfillment of the Zionist dream. By this I mean that the Jewish State should not be the entity which prevents non-Jews from living with Jews in their own country, although in reality the Arab who tried to live in this settlement does not reside there. This ruling is now a precedent and discrimination will not be possible in the future unless the community entails a very special structure; for example, if ultra-religious Jews would like to live together, with a *mikve* and a synagogue, secular people will be prevented from living with them.

Dr. Yossi Beilin is the Minister of Justice of Israel. The following are highlights from his keynote address at the Toronto Conference.

However, a racist attitude which says Jews 'yes', Arabs 'no', cannot be condoned and I am very proud of the Court which took this decision.

Another very controversial and interesting decision recognized an adoption of a child by two mothers. Here again, there was a big uproar concerning the question whether such an adoption, which had been earlier recognized in the United States, could be accepted in Israel.

There was the decision to permit women belonging to the Reform Movement to pray at the Wailing Wall contrary to the decision of the Ministry of Religious Affairs. This too is now a precedent and these women will pray if they wish. It would be very strange for the Jewish State to prevent Jews from praying wherever they wanted, and especially at the Wailing Wall.

One may say that the Supreme Court is leading the creation of liberal norms in Israel before the government and before the *Knesset*. But, one should also take into consideration that the government too initiated some very important laws in the last year, and I see this as a comprehensive effort to change the face of Israel. This is a political, if you will, ideological tendency to change a map which, in my view and in the view of others, was too conservative, was not compatible with the 21st century and did not follow some of the very important developments which have taken place in other countries, including Canada, which is a model for Israel in many areas.

One of the important laws is the Administrative Courts Law under which many authorities have been transferred from the High Court of Justice to the District Court. This may help the Supreme Court to deal with issues which

are more constitutional as they will have more time to deal with the most important issues on their agenda.

In August this year we nominated, for the first time, a commissioner for the disabled. This is based on a law which passed in the *Knesset* two years ago. Disabled people will be able to turn to the commissioner, demand access to public places and also to private places. It is an extremely expensive law and a very important one. It was difficult to enact because of the financial aspect, not because of the moral issue. Everybody agreed that it is very important that people have access. I am very glad that we were able to convince the Treasury and that we found the financial resources to implement this law, not only enact it.

One law which is at a very advanced stage of the legislative process is the abolition of the State of Emergency Law. Israel is still in a state of emergency and has been so since May 19th, 1948, when the road between Jerusalem and Tel Aviv was severed. Since then the road has been opened, there is no sense of emergency, although we have not had one day without an emergency in our lives.

There are bizarre decisions and bizarre laws everywhere and if one digs in the archives one may find, I believe in every country, some laws which people forgot to abolish and which are not being used. This is not the case here, because the state of emergency has been a basis for enacting orders and laws in the last 52 years.

There is an unbearable ease in enacting orders on this basis. Thus, if a Minister comes to his or her Ministry and wants to enact a law, he calls the legal advisor, and says, for example: "I want all houses to be painted white". The bill will be sent

for 21 days to all the Ministries, their reactions obtained and then the Ministerial Committee on Legislation will have to be convinced. If a majority exists, the bill is brought to the *Knesset* for a first, second and third reading. This can take 2, 3 or 4 years. However, a Minister who asks if this is the only way, will be told by his legal advisor that there is another way too. The Minister can just issue an order, sign it on the basis of the state of emergency, and all the houses will be painted white.

Even if this is an exaggerated way of describing the situation, because today it is much more difficult to make use of this route, when I asked to see all the Orders which are based on the state of emergency, I could not believe my eyes. For example, the control of theatre prices is based on the state of emergency, as is the price of eggs. Another really far sighted order provides that the ticket price for car races will be controlled under the state of emergency. Why is this so far sighted? Because we do not have car races in Israel.

About a year ago I gathered all the legal advisors of all the Ministries to speak to them about the abolition of the state of emergency. This was seen as an impossible mission; for example, the Ministry of Agriculture is actually based on the state of emergency, and if it were to be removed there would be no agriculture in Israel. This became my project. I received the support of the government because they understood that it was my "craze". This is a big project involving hundreds of orders and laws. I believe that in 2 or 3 months we are going to substitute the needed laws, erase the unneeded laws and then bring the matter to the *Knesset* and put an end to the state

of emergency. This will be one of the most important laws in the coming year.

Another law concerns the equal representation of Arabs in the civil service. It passed the first reading with a big majority. The percentage of Arabs in the civil service is about one quarter of their percentage of the population; it is less than 5% and they are almost 20%. This was not a simple matter, it was criticized, but I believe that this is really one of those laws which shows our attitude to a minority, and there are few issues which are more Jewish than something like this.

As I have already mentioned, we are also enacting a law reforming our court system. The revolutionary change is that the first instance will deal with most issues and the District Courts will become an Appeal Court. In this we are following models recently adopted in many other countries. This is a very important project, a long one and an expensive one.

Another project concerns the codification of the rights of children. I hope that at the conclusion of this project, we will be one of the first countries in the world which will have such a codification. Judge Saviyona Rotlevi is leading this project; we received some money from international funds as we are employing dozens of people in different areas in order to actually prepare the book of the rights of children. In the world to which most of us were born, we did not even think about the need to have rights for children, today this is becoming one of the most interesting issues on our agenda.

I also hope that by March 2001 we will take a decision on creating a new function in Israel, namely, a High Commissioner for Human Rights. A

special committee is studying the different functions of such a commissioner in the world, including in Canada, Australia, New Zealand and Denmark. We want to learn from the lessons of others and then enact a law which will create such a function, and will set up a big commission which will deal with different kinds of human rights including the right of people with disabilities.

By all this I do not believe that we have solved the main issues on our agenda and this is the place where I can share some of my concerns and worries. These are more important for me than the positive developments of which I personally am proud.

One important point is that we do not yet have a constitution.

We do have Basic Laws, some of which have constitutional importance, but we still do not have a constitution. Its absence is felt because, among other things, we also have judicial review. The resulting tension is evident. It ensues because the Supreme Court has taken upon itself the responsibility for judicial review, primarily based on two Basic Laws enacted in 1992, on human rights and on freedom of occupation. The Court has enlarged its jurisdiction and reviews decisions of the *Knesset*. In the *Knesset* itself, especially among the right wing and the religious parties, there is harsh criticism of the authority which the Supreme Court has taken upon itself. This, I believe, should be taken into account as one of the main problems facing us in our legal system.

Another matter which I see as a major problem is the matrimonial religious laws. This is a problem which has existed for 53 years, since June 1947 and the famous letter of the *status quo* which was

written by Ben Gurion before he became Prime Minister and which became the most important law in Israel. This letter is stronger than many, many other laws. I do not believe that what we have to do in Israel is to separate between religion and state, for example, I do not exclude the possibility that the state will finance religious services, the problem is the imposition of the religious laws.

There are many of us who, even if we had a choice, would prefer a wedding ceremony handled by a Rabbi, orthodox, conservative or reform. But there are those who would not, and the question is whether in the 21st century we can enable a system which imposes marriage and divorce on people who do not want to conduct them through any religious process. I do not think so. I do not think that in a liberal, modern country we can have matrimonial laws which are religious laws.

In my view, this would also be better for religion, because once it is not imposed, it may be appreciated much more.

There are things which religious people can accept, even if with difficulty. One example, in my view, is very telling.

A year ago the Rabbinical Religious Court in Haifa decided to disqualify a baby, who was 2 years old, from marrying. This happened during a divorce case in which the mother-in-law shouted that the baby did not belong to the husband. The mother admitted that the baby was a bastard even though the judges tried to prevent her from doing so. Perhaps she said it because she was angry, but in this she decided the destiny of her child. The religious judges had no choice, and held that this child is not qualified for marriage. Religious people

will certainly have their explanations, but I, as a secular person, could never accept such a verdict which is worse than prison and worse than many other things.

It is acceptable for the child to be disqualified from marrying those who hold this set of beliefs. But a situation cannot be created whereby she cannot marry at all. Thus, if she will eventually wish to engage in a civil marriage, she will not be able to do so as there is no civil marriage in Israel. She will have to go abroad or give up her marriage. For me, as the Minister of Justice, this is one of the tragic problems that have to be faced, because I know how difficult it will be to solve. It is too big a revolution to undertake immediately but I do believe that we must try.

Another problem is administrative detentions in Israel. It is a stain on our book of laws. It is horrible that we keep people in prison without proving anything against them and without them knowing why they are there. Administrative detentions are based on an old British Order which was amended and improved by us in the late 1970's. Now the detainees must be brought before a judge, and the judge has to decide their destiny - if it be three months or half a year or some other period. Nevertheless, detention is something that a democratic liberal country like Israel should never have and, had there been no such British mandatory laws, I believe that we would have never had it. This, therefore, is one of the things to which we have to put an end. Today, there are about a dozen prisoners; four years ago there were hundreds. Having left Lebanon, we have also got rid of the awful El-Hiam prison for which we were indirectly responsible.

There is another question that we have to deal with in our legal system, namely, the whole issue of Jewish pluralism. Like many other areas, this is also being dealt with by the Supreme Court rather than by the *Knesset*.

This is the treasure that we have. Without the Supreme Court which holds the torch in all these liberal issues, the situation would be much more difficult because the *Knesset* is always much more conservative. Labor, Likud and the religious parties are more conservative in a way than the Supreme Court. Of course, as I praise the Court there are others who say, how come? Who gave the Court the power? Who nominated it? Whereas the *Knesset* was elected by the people.

Among the matters under consideration is the issue of conversion, which has been indirectly solved in the Ne'eman Committee. The first students of the Ne'eman Committee have already become Jews, which is good news.

But there is something which goes beyond the question of equality among denominations. This is the question of the secular Jews, namely, whether pluralism refers only to religious denominations, or also to secular Jews; this question has not been solved.

Another problem concerns equality in serving in the army. Arabs and the ultra-orthodox do not serve in the army. This creates frustrations and people question why they should bear the entire burden while others do not serve. Even if we will enact the Tal Committee law, which I personally am not against, it will perpetuate inequality in Israeli society and that is the reason it is so highly criticized by many.

I hope that by 2010, we will have

concluded several projects which are very important.

One is a constitution for Israel. It is not a panacea, it will not solve all our problems, but we need a constitution, even if not a very lengthy one. I think that the Bill of Rights of Canada could be a wonderful model.

I think that the issue of civil marriage has to be solved, and has to be solved not in confrontation, not in hatred, not in civil war between religious and secular people, but by consent. Religious people have to understand that the number of people marrying in Israel is no greater than it was 30 years ago, even though we have doubled the population. This shows something. Those who appreciate family values should decide whether they want to ignore this reality or whether they prefer that people live together under some kind of an agreement which is accepted by society.

For religious people this is a very difficult decision. I do not envy them. They may well say that I am right philosophically but they cannot accept it, because it is against their rules. Nonetheless, I do not think that religious marriage laws can be imposed on the secular majority in Israel, or, if they are not the majority, they form a significant group of people.

I think that we must abolish administrative detentions. I do not think they save Israel, and the sooner the better.

I think that we must join, as swiftly as possible, international criminal law frameworks. It is inconceivable that a country like Israel does not sign the Rome Treaty. We do not have to follow the model of other countries, even if they are big and important. My feeling is that if we do not sign, we incriminate ourselves. I think that we are better than

many countries in the world in terms of human rights, democracy, and the rule of law; why, therefore, should we not sign this agreement? In Israel this issue is currently being debated. I hope that as a result of some changes in the Cabinet it will now be possible to sign this agreement.

Speaking about conversion and pluralism, I believe that we have to achieve recognition for secular conversion. The time has come. For many years, the big question was whether or not we would recognize reform conversions. This question is over because we recognize all the reform conversions which are performed abroad, and even inside Israel we are on the verge of allowing such conversions. Today, the question is whether the only gate to Judaism is a religious one. Since I believe that most of the Jews in the world are non-religious, I think that they have the right to decide for themselves who may become a member of their club. They should have their own tests, their own examinations, their own decisions which may be tougher or softer than the reform, conservative or even religious, orthodox conversions. For me, the notion that an agnostic non Jew who wants to become an agnostic Jew like myself, has to go through a rabbi, is philosophically insulting.

Why should we go through this process? In the United States there are 5.7 million Jews, and 8 million people who live in Jewish households. One knows these people, the spouses, sons, daughters, and others who see themselves as almost Jews, the people who identify with Jewish affairs and who are sad when something bad happens to us as a people, who are happy when we win.

And one asks oneself: why should these people not become part of us if they do not want to convert in a religious way because they are not religious people?

It is much more logical for a religious Christian to become a religious Jew than for an agnostic Christian to become a religious Jew, and the rabbis know that in many cases the conversion is a kind of white lie. In many cases the converts say 'yes' to the rabbi and 'no' to the synagogue. Everybody knows it. Why should we live such a lie in Israel and in the Jewish world?

We have to find those who believe that it is possible in the 21st century to enable people who want to be Jews to become Jews even if they do not believe in God, and think about ways and means, the kind of test they should pass, to allow them to become members of our very interesting club.

On the issue of equal service in the army, I believe that we have to allow exemption from conscription on grounds of conscientious objection, including for religious reasons. This may take time. Further, the Minister of Defence must have measures available to him when there are insufficient numbers for enlistment, but I do not believe that they will be used - the majority of our youth will serve in the army and continue to serve in the army because they know what stigma attaches if they do not. In Israeli society a person who refuses to serve in the army for conscientious reasons is still considered an outsider.

Ultra-religious people could be recruited and not serve, similarly someone who is religious, or non-religious, might refuse to serve in the army on grounds of pacifism. This is equality. Any other solution would be

artificial, problematic and hurtful because people would not accept it. I must admit, however, that most of these wishes could be fulfilled much better in a time of peace.

With regard to the state of emergency, administrative detentions and the like, which I would wish to abolish, I believe that we should do so even before comprehensive peace but I am aware of the fact that only when we have peace will it be easy.

One of the main reasons why people like me have been involved so much and for so many years with the peace process is not only because I believe in equality and in human rights, although I do believe that the Palestinians have their rights, but because I believe that peace is a tool for a much better society in Israel. In a normal society, we will be able to dedicate our knowledge, our efforts, our good will to many other things. I believe that the Jewish state should be a model for human rights in the world.

There are many things to do in the world. There is great distress in the third world. If we could have some kind of peace corps - Jews from Israel and from the rest of the world working together in the third world and in other places, to help people in distress - nothing would be more Jewish. But we cannot do it now because we are immediately faced with our own problems - refugees, boundaries, settlements, our own issues on the agenda. Once we have peace, I am sure that we will be able to deal with other things and dealing with human rights in the world may be the next target on our agenda.

As to the peace process - it is true that the recent summit in Camp David did not succeed, and gaps still exist, but these

gaps are bridgeable. Both Palestinians and Israelis understand that it is almost now or never.

In politics and in policy it is never never. But if it is not now, we will have to wait a very very long while. In the coming weeks we will have to work very intensively in order to find solutions which will be win win solutions. If we win and the Palestinians loose, we loose. If they win and we loose, they loose. The solutions must be creative enough in order to bridge these gaps so that nobody will feel that they have actually lost the case. This can happen, and in my view we are on the verge of achieving it, but we need courage and we need help, we need Israeli help and Jewish help and American help and international help.

I believe that the world would like to see the end of the Palestinian-Israeli conflict after so many years and that it understands that the Middle East will look very different to the way it has looked until now.

It is now August 2000 and I keep remembering a visit which we paid to the United States two years ago, in August 1998.

We were four: Ehud Barak led our Labor delegation; Efraim Sneh, now the Deputy Defence Minister; Professor Shlomo Ben-Ami, now the acting Foreign Minister and the Minister of Internal Security, and myself.

We met in Washington with Secretary of State Madeleine Albright and Sandy Berger, Head of the National Security Council, and others and then we wanted to check whether King Hussein, who was then in Mayo clinic in Minnesota, was ready to meet with us. He was then undergoing cancer treatment and it was very difficult for him to meet with us but

at a certain point in our visit, we received a phone call from his chef de bureau, and we were invited to meet with him.

We took a plane and flew to Minnesota. It was a rainy August day and we went up to his floor in the hospital. After five minutes he entered the room, a small bald person, very, very thin, shining eyes, he came over, kissed us and hugged us. He knew at least Ehud Barak and myself from years of secret meetings, and we talked about everything. He was very optimistic about the future and he died after three months.

He said that he would come back to Jordan and rule his country and he would be involved with peace. It was before the Wye Plantation summit.

King Hussein was very interested in the prospects of making peace while former Prime Minister Netanyahu was in

power and we were also quite carefully optimistic about these prospects. At a certain point he stopped the discussion, looked at us and asked whether it would be possible to return to the 3rd of November. At first, we did not understand what he wanted from us, but of course in the second minute we understood that he was asking whether it would be possible to return to the days before the assassination of the late Yitzhak Rabin.

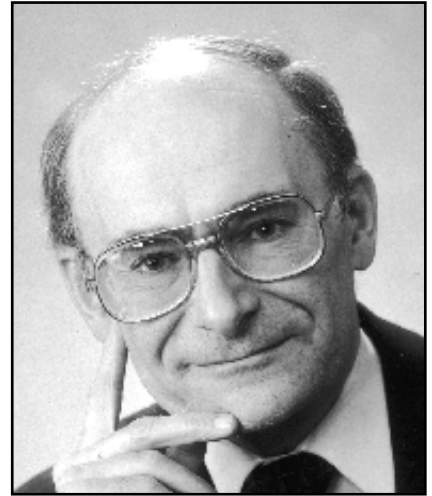
We thought instinctively-yes. Then he went back to his room and we went down to the cars, to the rainy night, and I asked Ehud Barak what he thought, was it possible? Hadn't we deceived him by saying that it was possible? He did not say yes. He was pondering on it. But I can say that today, for me, it is the 3rd of November.



At the Toronto Conference L to R: Adv. Igor Ellyn Q.C.; Dr. Yossi Beilin, Justice Minister of Israel; Judge Hadassa Ben-Itto and Mr. Meyer Romem, Israel's Consul-General in Toronto

Immunity in Transitional Democracies¹

David Matas



For decades, a country is a horror chamber of atrocities. The government is a leading violator of human rights. Then there is democracy. The repressive regime ends.

What is to be done about the crimes that have been committed, the murders, the torture, the crimes against humanity? Albie Sachs of South Africa, speaking about the old apartheid regime, has said: "if the price of peace in South Africa is that those involved in these terrible murders go unpunished, it is worth it".²

Now, I do not quarrel with the conclusion. But I think that before we jump too readily to it, we must make an assessment of exactly the price that is being paid. If democrats are going to pay a price for peace, we should know what the price is.

There is a duty at international law to prosecute torturers, mass murderers, criminals against humanity, grave violators of humanitarian law, and perpetrators of apartheid. The Torture Convention commits signatories to prosecute torturers wherever they are found.³

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The U.N. principles on extra legal executions states that governments shall bring to justice persons who participate in extra legal arbitrary and summary executions, in any territory.⁴ The U.N. principles on war crimes and crimes against humanity state that persons who have committed war crimes and crimes against humanity, wherever they are committed, shall be subject to arrest, trial, and, if found guilty, to punishment.⁵

So, the first price that has to be paid is violation of international standards. If the government of a country were not to prosecute torturers, murderers, criminals against humanity as the price for peace, it would be violating international human rights law, not in the same way as its predecessor did when it perpetrated atrocities, but in another way.

Indeed, it is generally recognized that the duty to prosecute crimes against humanity is a peremptory norm of international law, or *jus cogens*. According to the Vienna Convention on the Law of Treaties peremptory norms of international law take precedence over treaty obligations.⁶ By refusing to prosecute, the new democracy would not just be violating a rule of international law. It would be violating a rule of international law of the most basic and fundamental character.

The second point I would make is this:

the duty to prosecute is not just a duty on the government of the country where the crimes are perpetrated. It is a duty on all states. If a foreign torturer is found in Canada, then Canada has a duty to prosecute that torturer, whether the government of the country where the crime was committed prosecutes him or not, whether the government of the country where the crime was committed grants him an amnesty or not. Canada has recognized that duty and legislated the offence of torture in its Criminal Code.⁷ The law gives Canadian courts universal jurisdiction. A foreign torturer, who committed his crime abroad against

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1. See David Matas, *No More: The Battle against Human Rights Violations*, 1994 Dundurn Press, Chapter 10.
 2. *Globe and Mail*, March 3, 1990.
 3. Article 7.
 4. Paragraph 18; E.C.O.S.O.C. Resolution 1989/65.
 5. U.N.G.A. Resolution 3074 (XXVIII); December 3, 1973, paragraph 1.
 6. Article 53.
 7. Section 7 (3.7).

a foreign victim will be prosecuted in Canada, provided only that he is physically present there.

The same is true of criminals against humanity. The duty to prosecute criminals against humanity is a universal duty, incumbent on all states. Canada, again, to take an example of my own country, has a duty to prosecute criminals against humanity found in Canada. It has acted on that duty by providing for prosecution of any criminal against humanity found in Canada, no matter what the nationality of the victim, no matter what the nationality of the accused, no matter what the location of the crime, no matter whether the crime was committed before or after the passing of the law.⁸

This universal duty creates a second price associated with a foreign amnesty. It is the price of making the country a haven for its own international criminals. Outside the country of amnesty these criminals can and should be prosecuted. Within the country of amnesty they will not be.

Local amnesties for international crimes have no status at international law. The criminals remain subject to prosecution outside the country of amnesty, whether they can be prosecuted inside the country of amnesty or not. An amnesty has the effect of keeping criminals against humanity and torturers bottled up within the country of amnesty. Only in the country of amnesty would they be safe from prosecution.

We must also look at the issue from a purely practical level, from the point of view of the perpetrators, and from the point of view of the victims. Albie Sachs, who lost an arm to a car bomb in 1988, said he would have no problem if he met

on the street the people who placed the bomb and tried to kill him.

The sentiments of Sachs are noble ones. If he wishes, personally, to forgive the crime done to him, if he wishes to show mercy to those who have done him wrong, I applaud him for it. I, myself, like to think I am prepared to forgive quite a lot that is done to me.

But I have no authority to forgive what is done to others. For those who have been murdered, the person who can forgive is gone. It would be impudent of me to forgive the murder of another. It is not my place to forgive. The United States organization Human Rights Watch has put it this way. "It is not the prerogative of the many to forgive the commission of crimes against the few".⁹

On the contrary, forgiving a murder victimizes the dead person twice over. First his life is desecrated. Then his death is desecrated. By denying the dead justice, we make their deaths meaningless. We impose a posthumous cruelty on them. The memory of the victims should be hallowed. By saying we shall do nothing about their deaths we instead degrade the memory of their victimization.

There is a converse effect on the perpetrator. Doing nothing about a grave and flagrant crime emboldens and justifies the perpetrator. Doing nothing about torture, extra legal killings, crimes against humanity makes their occurrence more likely.

Perpetrators of crimes in transitional democracies remain members of the police force, the army, the security service. They remain in positions where they can in the future commit other atrocities. Past amnesties create expectations of future amnesties. The message an

amnesty or immunity law gives is that these crimes are acceptable, that the perpetrator runs no risk by committing them, that no matter what the law says, an amnesty will rescue the perpetrators.

After decades of violations, torture and extra legal killings became institutionalized as police and defence force practices. The ending of a repressive regime, by the force of circumstances, ends the use of torture and death squads to support the regime. But it does not inevitably follow that the use of torture and the death squads by the authorities will disappear.

On the contrary, the experience has been, where an amnesty or law of immunity has accompanied a transition to democracy, that torture and arbitrary executions remain. They are no longer used for political repression. They are, nonetheless, used, to fight common crime.

Amnesty International, for instance, in August, 1990 conducted a campaign against torture and extrajudicial executions in urban Brazil. Amnesty believed that the use of torture by the police in urban Brazil was endemic. Amnesty stated that the police had taken "the law into their own hands torturing and killing ordinary criminal suspects and prisoners". An Amnesty report added "Brazilian police frequently act as if they are beyond the law, torturing with impunity and increasingly resorting to extrajudicial executions".¹⁰

The Amnesty Report noted there were

8. Section 7 (3.71), to be replaced by Bill C-19.

9. *Human Rights Watch* No. 4, December 1989.

10. AMR 19/05/90.

no prosecutions for widespread abuses, such as torture and disappearances which occurred during the two decades of military rule from which Brazil emerged in 1985. In 1979 an amnesty law was passed that benefitted those accused of political crimes and members of the security forces implicated in human rights abuses. The report concluded that the lack of thorough investigation and prosecution for serious abuses in Brazil effectively condoned such actions.

An amnesty amounts to a fit of collective amnesia. At the time violations are occurring, many fight valiantly to bring the violations to the courts, through civil actions, and pressure for prosecutions, in the face of official obstruction, intimidation and murder of witnesses. An amnesty means a capitulation in this struggle for law and justice.

The old undemocratic regime used violence to attack political rivals. Political rivalry continues under the new democratic dispensation. Democracy has to protect itself against those who will try to discredit it and achieve their own ends through violence. An amnesty that accepts past violence bodes ill for the protection of the new democracy.

The best way justice systems have devised for preventing abuses is investigation, arrest, trial, conviction and punishment. Surely the worst way of preventing atrocities is blanket absolution, forgiveness, forgetfulness no matter how serious or flagrant the abuse.

If we step outside the frame of reference of perpetrator and victim, and look at society as a whole, the effect of an amnesty is equally harmful. Doing nothing in the face of flagrant international crimes is a violation of the principles of justice and the rule of law.

By bringing the perpetrators to justice, we assert the values that the perpetrators denied to their victims. The murder, the torture, the crimes that have occurred were wrong because they were unjust. Prosecution of criminals cannot bring the murdered victims back to life or heal the wounds that were inflicted. But it brings justice back to life, and heals the wounds to the justice system.

Albie Sachs reminds us that the objective of punishment is not to satisfy a desire for vengeance. That, of course, is quite so. But it does not follow that we can abandon punishment because we do not believe in vengeance.

The difference between vengeance and justice is the difference between the tyranny of individual emotions and the rule of law. Vengeance is emotional. Justice is the rule of law. Justice should be tempered with mercy. It should not be hardened with vengeance. However, if we abandon punishment through an amnesty we abandon an important part of our justice system, that like crimes be treated in like manner. A murder tomorrow will be punished. A murder yesterday will not be punished.

The quality of justice tomorrow depends upon the quality of justice today. Justice today is the foundation for justice tomorrow. When we amnesty past crimes we knock the foundations out from under future justice. We perpetrate injustice.

The symbol of justice is a blindfolded woman holding scales. Justice is blind to whether crimes were committed yesterday or today. It is also blind to whether crimes were committed by those in government or those in opposition.

There is an assumption behind the notion of trading off peace for justice.

The assumption is that the atrocities are all on the side of the old regime. The justice that is being abandoned is being given up by the opponents of the old regime.

That assumption may not be true. There are often allegations of abuses perpetrated by those involved in armed struggle against the old regime. Whether or not the opposition can or should forgive the old government for government perpetrated atrocities, the opposition has no moral claim to forgive itself for any atrocities it, itself, may have committed.

A blanket amnesty covers all. It covers the opposition as well as the old regime. It prevents the ill founded charge from being dissipated. It prevents the well founded charge from being substantiated.

The pursuit of justice uncovers all. Wild and unsubstantiated accusations against the opposition can be dispelled. As for the well founded charges, it cannot be said that the opposition used the peace process to cover up its own crimes.

An amnesty born out of political expedience does not put an end to the desire for justice. After World War Two, the Allies stopped prosecuting Nazi war criminals in mid stream. Kurt Waldheim and many others were awaiting prosecution when the trials were halted abruptly for political reasons.¹¹

The political reasoning at that time was that it was important to have West Germany as an ally in the then devel-

11. See David Matas, *Justice Delayed: Nazi War Criminals in Canada* with Susan Charendoff (1987: Summerhill Press).

oping Cold War with the Soviet Union. The British, who led the charge to abandon prosecutions in 1948, linked, I believe falsely, the necessity of bringing West Germany on side in the Cold War and the ending of the prosecutions.

Prosecutions did end in 1948, as the British had proposed, but only to start up again, in one country after another, years later. The desire for justice would not be stilled. Prosecutions began again throughout continental Europe, including West Germany.

The United States set up an office of special investigation in 1979 to deal specifically with Nazi war criminal cases. Canada, in 1987 and Australia, in 1988, both passed legislation to allow for prosecutions of Nazi war criminals found in their territories. Even the United Kingdom Parliament has finally passed such legislation.

This push for justice for the crimes of the Holocaust came, in many instances, from people who were not even born during World War Two, from people who had no connection with the victims of the crime. Decades later the logic of the political compromise that led to the abandonment of prosecutions, if it ever existed, was forgotten. The cry for justice, on the other hand, became ever louder.

Every transitional regime runs the risk of living through this same dynamic. If there is an amnesty, for political reasons, of the worst crimes, there may well be, twenty, thirty, even forty years later, persistent efforts to bring the criminals to justice. The desire for justice will not be stilled by political compromise. It will resurface in every transitional regime, as it has resurfaced worldwide in relation to the crimes of the Nazi Holocaust.

As I wrote at the beginning, I agree with Albie Sachs that if the price of peace is that atrocities go unpunished, it is worth the price. The point I would make though is that the price to be paid is a steep one. By not punishing these atrocities, we would be giving up quite a lot. It is a price that should not be paid in a spendthrift, extravagant manner.

It is, first of all, not at all clear that the price of abandonment of prosecutions indeed has to be paid for peace. There should be no automatic assumption that such a price has to be paid.

Second, if the price for peace is an amnesty, then there should be only so much of an amnesty as is needed to pay the price of peace. It may be that the parties would accept the notion of prosecution of those involved in torture and crimes against humanity, but not common crimes. It may be that the parties would accept the prosecution of crimes against the person, but not the prosecution of crimes against property. If the price for peace is abandonment of the pursuit of justice, generosity in paying more of a price than is asked is misplaced. The price that is required should be paid, and no more.

As well, the choice each country faces is not a choice between prosecuting for past atrocities and doing nothing. There are other remedies available besides the criminal courts. Reparations or compensation can be paid to the surviving victims, their heirs, or the collective institutions that represent the communities from which they came. A work of investigation, of history, of reconstruction of events can be done.

If forgiveness for past violations is appropriate, and I have doubts that it is, it should not be blanket forgiveness in

advance without knowing who committed the abuses and in what circumstances, without knowing whether the disappeared are alive or dead, without knowing where the dead are buried, and how they died. It should be forgiveness only after the truth is known, only after what is being forgiven is publicly disclosed.

Peace may not be attainable with prosecutions, but may coexist with reparations, with investigation and public disclosure of past abuses. It would be irresponsible profligacy not to pursue these remedies, if the abandonment of the pursuit is not a required price for peace.

There is a fear that a prosecution, after a peaceful transition, launched against the main architects of repression would be viewed as political vindictiveness rather than the pursuit of justice. Any intention to prosecute that the new regime manifests will, it is feared, make the transition more difficult to accept.

Prosecution of human rights violators may well complicate transition to democracy and transition to democracy is the main goal. However, it is important not to make a virtue of necessity. Conceptually, virtue and necessity are distinct. From the point of view of principle, we must extricate one from the other. The necessary is not always virtuous. What is right and wrong must not be decided on the basis of what is politically practical. Once we remove political factors from our consideration, there is little or nothing to be said for inaction on gross and flagrant international crimes.

Amnesty agreements are agreements negotiated under duress. Like any agreement negotiated under duress, they are

neither legally nor morally binding. It is understandable that they exist, but they end whenever and wherever the duress ends. That is why they have no reach beyond the borders of the states where they are agreed. That is why they unravel over time, as the power dissipates of those who extort the amnesty agreements.

Politics is the art of the possible. A peace with immunity may be the most that is politically possible. Human rights is the art of the ideal. Human rights standards do not shift with political possibilities. It is no defence to killing that the end of killing is not politically possible. It is equally no defence to immunity from killing that the end of immunity is not politically possible.

The notion of trading off peace and justice is very much a political one. It may well be that politics requires such trade offs. We, all of us, have to recognize that in our daily lives it is difficult or impossible to realize our ideals.

However, that does not weaken or invalidate the ideals that we have. Governments may have to trade off peace against justice. But, human rights activists do not. Human rights activists can continue to assert the ideal, which is peace and justice, peace with justice, whether the ideal can be realized or not.

The price that has to be paid for peace is not a price that human rights activists have to pay. Human rights organizations must not lose sight of the ideals worth pursuing, no matter what the limits of political reality are. Selling off justice for peace may, in any country where there is a peaceful transition from tyranny to democracy, be a political reality. But it will, I humbly suggest, never be right.



Top: Justice Rosalie Abella, Ontario Court of Appeal, with Herb Gray, Deputy P.M. of Canada
Bottom: Participants at the Panel discussion on Crimes Against Humanity in international Perspective



European Perspectives on Anti-Semitism on the Internet

Jon Silverman

The aim of this address is to present a European perspective on anti-Semitism on the Internet and Holocaust Denial. I shall concentrate mainly on the Net but will also consider the lessons of the David Irving-Deborah Lipstadt libel trial in London which I covered. What connects them both, of course, is the question of how the law is being used to curb race hate. My focus will be on Great Britain - which is clearly the jurisdiction I know best - but will also be casting an eye over one or two developments on the continent of Europe.

France

I shall start with France, where, earlier this summer, there were two significant court rulings about hate on the Internet - and the interesting thing is that they both lead in different directions. The first ruling involved the service provider, *Yahoo*, which had posted Nazi memorabilia on its auction site.

The case was brought by the League



Against Racism and Anti-Semitism on the basis that the auction contravened a French law banning anything that "incites racial hatred". *Yahoo France* had argued that it had filtered out the 1,000 or so objects for sale from its French site (to show how tasteless this trade is - one of the objects was a \$50 replica of a canister of Zyklon B gas, another was a postcard of a Nazi concentration camp). Incidentally, the site also carried links to other sites promoting Holocaust Denial and the activities of neo-Nazi groups.

Yahoo's lawyer said the question at law was this: can a French judge adjudicate on the content of an American site, run by an American company and subject to American law, just because French

users have access to it? The Paris judge, Jean-Jacques Gomez answered in the affirmative. He fined *Yahoo* \$3,000 for "offending the collective memory of France" and gave the provider two months to block access to the US auction site. Later, he told *Newsweek* magazine: "For too long, we've acted as if the Internet has been a place where nothing is forbidden. Not everything is permitted. Not everything is legal". A fairly clear statement then.

But now consider another judgment - given, ironically, just two days later - a few miles away in the Parisian suburb of Nanterre. This case was triggered by a neo-Nazi website carried by a French Internet service provider called *Multi-mania*. This time, the judge declined to order the company to tighten its controls. The court said that service providers "had no legal obligation to investigate the identity of their clients".

That coincides with the view of the US Supreme Court which ruled in May that an ISP bore no responsibility for the material it carried.

So, if the law remains unclear, what about the question of what is technically possible? Well, here again, there does not appear to be one consistent view. The lawyer who represented the French League Against Racism and Anti-Semitism argued that in almost all cases, a service provider can tell where a viewer is coming from and can take action to block access to particular pages.

But the European Internet Service Providers Association, which is based in Brussels, says that is not so. Its spokesman says a determined viewer can easily get round such a block by going to what's known as an "anonymizer" web site that hides a viewer's origins. So,

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suggesting that an online company can prevent someone in one country from viewing a website emanating from another is near impossible.

Certainly in Europe, this argument about what is technically feasible goes hand in hand with the question of what kind of regulation is legally and ethically justified.

Germany

In continental Europe, the best example of really vigorous action over the Internet, some would call it draconian, is from Germany - where, of course, Holocaust denial and Nazi symbolism, such as the swastika, are against the law. The government has consistently put pressure on Internet service providers to censor neo-Nazi and pornographic material. In 1997, the state authorities in Bavaria successfully prosecuted one of the biggest ISP's, *CompuServe*, for failing to block offensive websites. In fact, it was not just websites, because the prosecutors said that *CompuServe* subscribers were also given access to computer games which carried forbidden images of Hitler as well as swastikas.

This was the first time that a western government had prosecuted a commercial service provider for material produced by someone else. The conviction was actually overturned by a higher court in Munich last year but the whole issue has been something of a running sore. It is no accident that it should have happened in Germany, because throughout the post-War period, there has been a tradition of using censorship, mostly against neo-Nazi groups.

In 1996, for example, the T-online service of Deutsche Telekom voluntarily

blocked access to the website of Ernst Zundel, the notorious Holocaust denier, based, of course, in Toronto. This action followed a warning by the state prosecutor in Mannheim that he was investigating whether the site "was helping to promote racial hatred".

The company said it was the first time it had censored material at the insistence of a government official. It complained that holding it responsible for anti-Semitic material was unreasonable. This, of course, goes to the very heart of one of the debates which have been raging over the last few years. Should regulation be at the point of delivery or the point of origin? I would add another question, with Germany very much in mind: has regulation done any good?

Certainly, the blocking of hate sites - and use of the law against Holocaust Denial - has had very little beneficial impact on public attitudes towards race and anti-Semitism. Violence against foreigners and support for neo-Nazi views is still a serious problem in Germany. Thus, for example, there was an appalling bomb attack at Dusseldorf railway station in August. All nine casualties were immigrants from eastern Europe - six of them were Jews. It is assumed to be a racist bombing and indeed, the Germany security services have recently been warning that the far-right was developing terrorist structures.

One can either take the Daniel Goldhagen view that Germans are intrinsically anti-Semitic or, as I would prefer, recognize that social factors such as the tension between the former east and west Germany; the pressures caused by an influx of asylum seekers and acres of media attention on compensation for Holocaust survivors..... all these things

are likely to impact on anti-Semitism. Tinkering with what is available on the Internet is never going to offer much more than a very small sticking plaster for the wound.

Incidentally, if one is looking for a model of regulation which is even more authoritarian than Germany, then what about Singapore or China? In Singapore, all Internet users have to channel their requests through proxy servers which block access to certain sites. Individuals can be prosecuted for so-called "defamatory" comments about the government - *i.e.* criticism of the government. In China, if one wants to go on the Internet, one has to register with the police. There one gets issued with a licence, rather like a car driver has to in the West. I hope that nobody is suggesting that in a democratic society - whatever the abuses of freedom of speech - we should go down that route.

RIP Bill

In the UK too, the government is showing disturbing signs of authoritarianism regarding the Internet. A piece of legislation is currently before parliament called the Regulation of Investigatory Powers Bill, (it will be noted that the initials are RIP - which is what most of its opponents hope will happen to it before too long!).

The bill is intended to be a tool for the police and other agencies to tackle organised crime, because more and more crime, particularly fraud, is being committed *via* the Internet. Under the bill, every UK service provider will have to install a little black box which will filter all the traffic passing through it and will be linked to an M15 monitoring station. If the spooks decide that one of

the emails is suspicious, then they can obtain an interception warrant which will allow them to investigate further. Truly a case of Big Browser is watching you.

Policing hate sites

I want to refer shortly to the action being taken in the UK to police hate sites. In theory anyway, Britain is not such fertile territory for the hate-mongers as the United States for example, since we do not have a written constitution with a First Amendment which guarantees freedom of speech. In fact, I estimate that there are no fewer than four pieces of British legislation under which prosecutions against hate on the Net might be brought.

There is the Computer Misuse Act, 1995. That would cover situations where racists break into e-mail accounts and fire off hate messages in someone else's name. Now, this certainly happened in 1994 at Middlesex University in London when the email account of the university's Jewish Society was hijacked to transmit racist messages. But I do not know of any example since the legislation reached the statute book so it remains untested.

The Telecommunications Act, 1984, makes it an offence to send "by means of a public telecommunications system a message that is grossly offensive or of an indecent, obscene or menacing character". While there is no case law on this, legal opinion is that the medium by which the message is transmitted is immaterial and that it could be used against hate on the Internet. Indeed, the last Conservative Home Secretary, Michael Howard, confirmed as much to the Jewish Board of Deputies. However, I have to report that there has never been

a single prosecution under this act against far-right anti-Semitic or Holocaust denial material on the Net.

Another Act which is relevant is the 1988 Malicious Communications Act. This has the same category of offences as the Telecommunications Act. But like that, it has never been used in connection with the Internet.

Then there is the Public Order Act 1986 which has been used against the distribution of far-right pamphlets and marches. Part Three of the Act covers written and visual material where the intention is to stir up racial hatred. Interestingly, Jewish lawyers in Britain are recommending that, in the wake of the David Irving libel trial, this act could be used against Holocaust Denial rather than bringing forward specific anti-denial legislation, which at one time the Labour government of Tony Blair seemed to be favouring. Well, whether it will be used against the deniers remains to be seen. What is not in doubt is that so far, it has never been used against hate on the Internet.

I think there is a fairly clear reason why the prosecuting authorities in Britain have been reluctant to bring criminal charges under any of the available legislation. Again it goes to the heart of public attitudes and discourse about the Internet. For so long, it has been trumpeted a) as the greatest step forward in global communication since the telephone; and b) as a liberating influence in terms of free speech and exchange of ideas. Understandably then, prosecutors feel that the average member of a jury is unlikely to be impressed by an argument which says: "here is something which goes beyond the bounds that are legally acceptable and you should vote for censoring it".

Having said that, civil action in the UK tells a different story. There have been two cases to my knowledge where libel damages have been paid out over material appearing on the Net. Both were out-of-court settlements so they did not go before a jury. In one, *Demon Internet* paid a university lecturer because he was the subject of allegedly libellous bulletin-board postings. Within days of that settlement, British ISP's closed down two websites - a gay site called Outcast and an anti-censorship site.

It is very interesting that Outcast - the gay group - is going to the European Court of Human Rights over the issue. Those who follow UK legal policy will know that from this autumn, the European Convention of Human Rights becomes incorporated in our domestic law. In other words, complainants will have a domestic remedy for cases which until now, have had to be taken to Strasbourg. This could potentially have a big influence on this area because freedom of expression is one of the articles of the convention. So, five years down the line, we may find ourselves much closer to the US First Amendment situation than we ever thought likely.

Attitude of police agencies

What about the response of police agencies towards hate on the Net? Until the mid-1990's, even in America - as far as I can tell - there was little or no monitoring of race hate bulletin boards. That changed with the Oklahoma City bombing. The need for vigilance was reinforced by the bombing of the Atlanta Olympic Games.

In Britain, Scotland Yard and M15 have had a very patchy record in terms of surveillance of the far-right in general

and again there was no monitoring of the Internet until a traumatic terrorist event challenged their complacency. In our case, it was the London bombing campaign in 1999 carried out by David Copeland who in many ways is almost an identikit fascist psychopath - a Hitler worshipper; a loner; and someone deeply troubled about his own sexuality.

His targets were the black community in south London, the Asians in the East End, and then a gay pub in Soho, where three people were killed and others horribly maimed. When the police arrested him and searched his flat, they found notes in which he said his next bomb would be aimed at Jews.

Interestingly, Copeland learned how to make bombs from the Internet. It was a US-based site and when I spoke to one of the Scotland Yard team which investigated the attacks, he admitted that the fact that it was an American-originated site - as with the racism peddled by the Ku Klux Klan or many White Supremacy groups - meant that the police in the UK treated it as outside the jurisdiction. He estimated that up to 60% of the far-right Holocaust Denial material available on the Internet emanated from the United States.

However, he also conceded that, even if it was considered justifiable to get a particularly pernicious website shut down, the police would not regard it as a sensible use of their time and resources to do so. They would much rather throw their effort into investigating a crime - like the Copeland bombings or the race murder of the black teenager, Stephen Lawrence. My view is that monitoring and intervening in far-right websites may well help cut down the number of racist outrages and can be justified on that count alone.

The UK is, of course, a member of the European Union and there is an EU policing organisation called Europol which has its headquarters in the Netherlands. Europol has competency for organised crime which crosses national frontiers. Drug smuggling; money laundering; trafficking in human beings - all of these crimes come within its competency. But not, regrettably, racism. Given that there are known links between neo-Nazi groups in a number of European countries and that racist attacks are growing - particularly in Germany and Scandinavia - this looks more and more to me like a serious omission which needs to be rectified urgently.

Internet filters

Let us look for a moment at some of the positive moves to try to block racism on the Net. Web filters, of course, have been offered as one way forward. I know the Anti-Defamation League has developed its own which it has been actively promoting.

In Britain, a body called the Internet Watch Foundation has been leading the way in developing what is known as "self-rating and filtering systems" - principally for dealing with pornography on the Net. In other words, evaluating sites according to their harmful content and then fitting a mechanism which will block access. Put simply, such systems allow a hidden label describing content in pre-defined codes to be included in an Internet site.

Users then have the option of filtering out content which is outside specified limits - limits which the user has set him or herself. This approach is rather more sophisticated than a simple blocking mechanism. It has two great advantages.

One, it puts control of what is acceptable in the hands of the user rather than an external agency - or even worse, government. Two, any adult can see and publish anything he likes - thus allowing free speech on the Net and free choice to consumers.

The flaw is obvious. It is absolutely fine for preventing children accessing harmful sites either by mistake or in experimentation. But an adult who wants to be exposed to racist or anti-Semitic material will still find it. And in any case, the purveyors of such material are hardly likely to subscribe to a labelling system which rates their content.

So I have to say that although this answers the problem of Big Brother censoring a medium which should be about free speech, it will do little or nothing to stop the hate-mongers getting on the Net and getting an audience for their views.

The Irving trial

Finally, I would like to look at some of the issues raised by the David Irving - Deborah Lipstadt trial, which was the most significant courtroom examination of Holocaust Denial since the Ernst Zundel trial in the 1980's. But there was one big difference between the two trials which a lot of people tend to forget. Zundel was the defendant, whereas Irving launched the action against Lipstadt. She was the defendant. So quite rightly, she gets very irritated when people say: "Isn't it better to ignore the deniers rather than confront them in court". In this case, she had little choice.

Before the trial began in January, it was commonly said that, in one sense, David Irving could not lose. What he wanted was the publicity, a platform

which he was otherwise being refused by publishers who would not handle his books. Having spoken to Irving, himself, I am fairly sure that that was his motive. That, and an absolutely brazen belief in his own abilities to persuade a judge that his view of history was correct. One thing Irving is not short of is self-confidence.

But self-confidence is not common sense and in that department, Irving is notably deficient. He made a crucial mistake early on in pre-trial hearings, when he agreed to *Penguin's* application for the case to be heard without a jury. I am not suggesting that, with a jury, he would have won but certainly, his oratory and the passion with which he presented his case in court was utterly wasted on a single judge and might have scored a few points with some members of a jury.

The second miscalculation he made was in the area of disclosure. He knew that his published books would be pored over in court. He knew that TV footage of his public appearances over the years would be looked at. But he did not realise that his private diaries and privately-recorded videos of some of his speeches would also have to be handed over. Some of this material was extraordinarily damning. The Aryan ditty which he sang to his baby daughter - and which was reported around the world - came from one of his diaries and portrayed him as a dyed-in-the-wool racist who even wanted to inculcate a tiny child with his views.

In his desire for publicity, Irving, I think, also badly under-estimated the damage he would do to his cause by being seen to have got things wrong. I am not talking here about the judgment - perhaps the most crushing judgment

which has ever been delivered in an English court. I am leaving that aside because Irving himself rejects it. I am talking about the concessions he was forced to make as the evidence unfolded in court.

For example, he said that the gassing of Jews in trucks on the Eastern front was done only on what he called "an experimental basis". But faced with overwhelming evidence that 97,000 Jews had been gassed in trucks, he admitted that he had got it wrong. And he knew how big a blow that, and other mistakes were. If

I will end with this thought: it is curious but probably true that some people (perverted by hatred without doubt) will find it easier to deny the Holocaust than to deny the verdict given in court by Mr Justice Gray on April 11, 2000.

you look at how the deniers work, they spend a lot of time pointing out the inconsistencies and downright mistakes in the Holocaust story - particularly in the accounts of survivors. To the deniers, the fact that originally, 4 million people were said to have been killed at Auschwitz and that that was scaled down to about 1.2 million is a highly significant error. For them, it is another doubt cast over the Holocaust, *per se*.

So, when Irving was caught out making an error, deniers everywhere shuddered. The notorious French denier,

Robert Faurisson who Irving admires greatly rang him during the trial, after the gas truck concession, and berated him for having brought the case and said he was doing great damage to the Denial movement. Something I am sure we are all delighted to hear.

What are the consequences of this trial? On the day of the judgment, one very well-respected Jewish historian said to me: "In the short-term, it is a devastating defeat for Irving. In the long term, I am not so sure. Perhaps he will get his victory in cyberspace".

It is certainly true that Irving's obnoxious website is still flourishing and he claims it is getting as many hits as ever. He also said that in the 24 hours after the judgment, he got 322 supportive emails from around the world.

Another worrying fact is that in the many newspaper and magazine articles written after the trial, one or two reputable commentators suggested that the world needs a David Irving just to keep academic study up to the mark. That he should not be dismissed out of hand.

To my mind, none of that mitigates what was an absolutely devastating judgment. It was a judgment which left him not a shred of credibility as a serious historian in the eyes of right-thinking people. If only a few of those who might be tempted to support the Denial movement are put off by thinking about the judgment, that would represent a lasting victory. I will end with this thought: it is curious but probably true that some people (perverted by hatred without doubt) will find it easier to deny the Holocaust than to deny the verdict given in court by Mr Justice Gray on April 11, 2000.

Update on Restitution of Holocaust Era Swiss Bank Accounts

Natasha C. Lisman

The focus of my report is the Claims Resolution Tribunal for Dormant Accounts in Switzerland ("CRT") - an international arbitral tribunal charged with the resolution of claims to Holocaust era assets deposited in Swiss bank and investment accounts. Last year, I had the privilege of working as Senior Counsel to the CRT during a seven-month sabbatical from my civil litigation and arbitration practice with a Boston law firm. The opportunity to contribute to this facet of the pursuit of justice in the global village (or should we say "global *shtetl*"?) has been morally and emotionally moving and professionally challenging for all the participants - an international panel of renowned arbitrators, assisted by a legal secretariat managed by a committed and hospitable Swiss law firm and consisting of a small army of able and dedicated lawyers, paralegals, and administrative personnel from all over the world. For me, because

of my family history, serving the CRT had a particularly poignant meaning.

My father is the only member of a large Ukrainian-Jewish family to survive the Holocaust, and he survived only because he was male and old enough to be drafted into the Red Army when the Nazis invaded the Soviet Union. I was lucky - born just late enough and far enough from the Second World War to be out of the Holocaust harm's way, and, thanks to my parents' indomitable spirit and a series of special circumstances, brought to the United States early enough in my life to enjoy the full benefit of its safety, freedom and opportunities. Thus it feels particularly fitting that one of those opportunities was to contribute the professional training and experience I have had the good fortune to acquire to an effort to achieve a measure of justice, even if limited and belated, in honour of the victims of the horror which consumed my own grandparents and aunts and uncles.

This report is based on my own experience at the CRT, as well as close following of its progress since I returned home. Needless to say, except where otherwise attributed, the observations and views I will share are strictly my own and should not be ascribed to the CRT or any other person or organization.

The history of the CRT divides into



two phases, one of which is almost completed and the other is soon to begin.

Phase 1: Resolution of Claims to SBA-Published Accounts

The CRT came into being through a process parallel and related to several consolidated class action lawsuits brought against a number of Swiss banks and the Swiss Bankers Association ("SBA").¹ In essence, the plaintiffs

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¹ As consolidated, titled *In re Holocaust Victim Assets Litigation*, United States District Court for the Eastern District of New York, 96 Civ. 4849 (ERK). The Presiding judge is Chief Judge Edward R. Korman.

alleged in these lawsuits that they were victims of Nazi persecution, including genocide, looting of assets, and slave labour, and that Swiss banks and other institutions had aided the Nazi crimes against humanity through funding and deriving profits from these crimes and further compounded their role by concealing and withholding assets deposited with the banks by victims of the Holocaust.²

Concurrently with the commencement of these lawsuits, the SBA, the World Jewish Restitution Organization and the World Jewish Congress entered into a Memorandum of Understanding establishing the so-called Volcker Committee³ to determine, through a massive independent audit of Swiss banks, the existence of World War Two era accounts that could belong to victims of Nazi persecution. In the meantime, in 1997, the SBA published, in two lists, 5,570 accounts that had been opened by non-Swiss nationals and residents prior to the end of World War Two and have been dormant ever since (hereafter, "SBA-published accounts"). Persons who believed that they were entitled to those accounts were invited to submit claims. The Volcker Committee and the Swiss Federal Banking Commission then established the CRT to resolve all claims to the SBA-published accounts, as well as the Independent Claims Resolution Foundation ("ICRF") to promulgate rules of procedure for the CRT's claim resolution process and guidelines for the adjustment of awards to reflect interest and bank fees and charges, and to appoint CRT's international panel of sixteen arbitrators and its Secretariat.⁴

A total of 8,000 persons, mainly from the United States, Germany, France,

Israel, and Argentina, but also from innumerable other countries, submitted claims and supporting documentation in English, German, French, Spanish, Hebrew and many other languages. Although no claims were submitted to more than half of the 5,570 SBA-published accounts, some of the claimants made claims to more than one account and many accounts were claimed by multiple claimants. As a result, the CRT was presented with a total of 9,470 claims.⁵

To resolve these claims, the CRT and its Secretariat⁶ assembled an impressively competent, dedicated, and hardworking international and multilingual legal and administrative staff. Starting in early 1998 with nothing but space, furniture, and computer equipment, the Secretariat created a highly effective mass claim management system, utilizing the latest in legal computer technology. Nonetheless, due to the large number of claims and the complexities created by a set of rules of procedure devised prior to, and thus without the benefit of, any quantitative or qualitative assessment of the group of claims to be resolved, each stage of the claims resolution process turned out to be much more cumbersome and slow than had been envisioned and it proved to be difficult for the CRT to live up to all of the expectations placed upon it. Although it has fully met the expectation of fairness and independence, promptness in the disposition of claims has been far less attainable.

Because the current claims resolution process is about to become of solely historical interest and has been described and analyzed in detail elsewhere,⁷ a summary description will suffice here

simply to provide a concrete sense of the challenges faced by the CRT and its Secretariat.

- 2 See summary of the allegations in Judge Korman's Memorandum and Order, filed on July 26, 2000 and corrected on August 2, 2000, available on the Internet at www.swissbankclaims.com.
- 3 Formally named the Independent Committee of Eminent Persons ("ICEP") and chaired by Paul A. Volcker.
- 4 Information about CRT and its arbitrators, as well as ICRF's Rules of Procedure, can be found at the Volcker Committee website at www.icep-iaep.org and CRT's website at www.crt.ch.
- 5 See "Statistics" on CRT's website at www.crt.ch.
- 6 ICRF appointed a Swiss law firm, then called Schellenberg & Haissly, now Schellenberg Wittmer Bros, to serve as the Secretariat to CRT. Responding to the unanticipated complexity and size of this undertaking with extraordinary commitment and resourcefulness, the firm found it necessary to reinforce its own human resources with outside lawyers, paralegals, translators, information technology specialists and administrators, who came from all parts of the world. Because many were able to come only for discrete periods of time, the resulting turnover demanded constant ongoing training. Thus, one of CRT's contributions to the international arbitration system is sending off into the world several generations of veterans with expertise in mass claims arbitration.
- 7 E.G., the highly informative and thoughtful article by Shai Wade (a British solicitor who served as a member of the CRT Secretariat from October 1998 to March 1999), "Mass Claims Arbitration: The Experience of the Claims Resolution Tribunal for Dormant Accounts in Switzerland", 14 No. 11 *Mealy's Int'l Arb. Rep.* 22 (Nov. 1999). In addition, CRT will soon begin posting on its website, a representative sample of orders and decisions illustrative of the claims resolution process for the SBA-published accounts.

The SBA-published lists disclosed, for each account, only the name and last known domicile of the original account holder and, in some cases, the holder of a power of attorney, but not the name of the bank or the value of the account. The first required step in the claim resolution process was to determine whether the withheld information should be disclosed to a claimant. This decision was initially made by the bank, but if the bank either failed to make it within the prescribed time or declined to disclose, the claim was transferred to CRT for the Initial Screening by a Sole Arbitrator. Arbitrators were required to deny disclosure - and thus, effectively, dismiss the claim - if the claimant did not submit any information on his or her entitlement, or it was apparent from the claimant's and bank information that the claimant was not entitled to the account. Because many claimants were unsophisticated and few were represented by counsel, claims frequently lacked material information and, to assure the fairness of the initial screening, arbitrators and staff lawyers frequently found it necessary to seek additional information from claimants.

A claimant denied disclosure had the right to make a resubmission, effectively an appeal, to a panel of three arbitrators, who could either affirm the denial or order disclosure. A claimant granted disclosure, be it by the bank, Sole Arbitrator or upon resubmission, would be invited to enter into a Claims Resolution Agreement with the bank and the claim would proceed to arbitration. Depending on various factors, including the apparent complexity of the determination entitlement and the amount in the account, claims would be decided in either Fast Track by a Sole Arbitrator, or

in the Ordinary Procedure by a Sole Arbitrator or a Claims Panel of three. In addition, claims could be arbitrated singly, or, if two or more were found to be related because they involved the same claimant or several claimants claiming the same account, they could be joined.

Although, under the Rules' relaxed standard of proof, claimants are required to demonstrate only that their entitlement to the claimed account is plausible, rather than probable, one element of plausibility is absence of a reasonable basis to believe that other persons may have an identical or better claim to the same account. Consequently, to assure reliable resolution of this element, it has been necessary to assign multiple unjoined claims to the same account to the same sole arbitrator or panel. Indeed, the Rules provide that even third persons, such as other potential heirs of the account holder, who had not submitted any claim should be invited to join a proceeding if their participation was found appropriate, and such invitations were frequently issued.

In all proceedings, determination of entitlement would typically be preceded by one or more procedural orders requesting or inviting the submission of information, documents, or statements of position by either or both the bank and the claimant(s), causing the exchange of information and documents among the parties, and requesting or inviting the parties' comments on each other's information, documents or statements of position. Some cases, on either a party's or the arbitrators' initiative, have been resolved by settlement and entry of agreed upon award.

In cases proceeding to full adjudica-

tion, arbitrators are required to determine the applicable law, typically involving the choice of inheritance law to resolve the entitlement of multiple claimants to the same account. Given the shifting of European borders, the scattering of families around the globe, the separation of claimants from the original account holders by as many as three generations, and the difficulty of finding old inheritance statutes, the determination of applicable law often presented very difficult problems.

The rule requiring that arbitrators determine the language of each proceeding by taking into consideration the languages spoken by the parties, combined with the fact that claimants submitted claims and documents in innumerable languages, sometimes several in the same case, caused CRT to expend considerable time and resources to have orders, correspondence, parties' submissions, and awards translated before they could be sent to claimants and claim forms and supporting documents translated before they could be considered by arbitrators and staff.

Against this background, the CRT's record of productivity is very impressive. As of July, 2000, it has issued 5,895 Initial Screening decisions, 858 Initial Screening Resubmission decisions, 2,229 Procedural Orders, 1,878 consent/partial awards and 225 final decisions in Fast Track arbitrations, and 621 partial awards and 608 final decisions in Ordinary Procedure.⁸ As of this writing, the CRT has completed all Initial Screening and Initial Screening Resubmission decisions, virtually all Fast

⁸ See "Statistics" on www.crt.ch.

Track arbitrations, and approximately 75% of the Ordinary Track proceedings. However, because ICRF did not promulgate its Rules on Interest, Charges, and Fees for Arbitral Decisions of the Claims Resolution Tribunal until May of 2000,⁹ and their implementation is in progress, all CRT awards in favour of claimants have had to be partial, pending the determination of what, if any, additional amounts may be awarded in accordance with the ICRF Rules. Because these Rules limit interest, charges, and fees awards to accounts of "victims of Nazi persecution" (using, verbatim, the definition of the term "Victims or Targets of Nazi Persecution" in the Settlement Agreement), applying them requires careful scrutiny of all partial awards that had already been rendered.

Phase 2: Resolution of Claims to Accounts Identified by the Volcker Committee Audit

While the CRT has been carrying out its task with respect to claims to the SBA-published accounts, the parties to the class actions engaged in negotiations, which culminated in the execution of a Settlement Agreement, effective as of January 26, 1999 and subsequently amended in certain respects.¹⁰ The presiding judge, Korman, C.J., has now completed the requisite judicial evaluation of the procedural and substantive fairness of the Settlement Agreement, as amended, and on July 26, 2000 granted it final approval.¹¹

With the final approval of the Settlement Agreement, the tracks on which the CRT and the class actions had been proceeding have intersected. The Settlement Agreement not only contains

a number of provisions relating to the CRT's present phase, the resolution of claims to SBA-published accounts, but, by incorporating the CRT into the implementation of its provisions, extends its life and launches its second phase.

The Settlement Agreement creates a \$1.25 billion Settlement Fund, payable by the defendants in four installments by the end of 2001, for distribution to five settlement classes. One of these classes, designated as the Deposited Assets Class,¹² consists of members who (1) are Victims or Targets of Nazi Persecution or heirs of such victims, and (2) have asserted or may seek to assert claims relating to assets deposited with a Swiss banking or other institution prior to May 9, 1945. "Victims or Targets of Nazi Persecution" is defined to comprise members of the five groups recognized by the United Nations to have been the targets of systematic Nazi persecution: Jews, homosexuals, Jehovah's Witnesses, the disabled, and Romani.

Thus, the Deposited Assets Class includes some, but not all, of the claimants to the SBA-published accounts, and the Settlement Agreement provides that banks' payments of assets from those accounts to all claimants who are members of the Deposited Asset Class "shall be deemed to included in, and part of, the Settlement Amount", Section 4.2. Consequently, Section 5.1 provides that:

All amounts (including, without limitation, interest and fees) that Settling Defendants and Other Swiss Banks have paid since October 3, 1996 or may pay in the future to Deposited Asset claimants as a result of determinations made by ... the Claims Resolution Tribunal shall reduce the Settlement Amount and may be cred-

ited in full against ... any subsequent installment... Payments ... made after ... the final installment shall be refunded to Settling Defendants... to the extent the balance remaining in the Settlement Fund is sufficient to pay the refund.

The CRT estimates that approximately 15% of the awards it has made to SBA-published accounts involve accounts opened by persons or organizations that fall within the definition of Victims or Targets of Nazi Persecution. Because these accounts tend to be small, of the total of 38 million Swiss Francs awarded by CRT as of mid-2000,¹³ only a small proportion is likely to be credited against the \$1.25 billion Settlement Amount. However, because the Rules on Interest, Charges, and Fees permit adjustments only to the awards to accounts of victims of Nazi persecution, all such payments will be credited against the Settlement Amount.

⁹ Available at www.icep-iaep.org.

¹⁰ The original Settlement Agreement is available at www.swissbankclaims.com.

¹¹ Judge Korman's Memorandum and Order, While, as of the date of the Memorandum and Order, there remained uncertainty as to whether the amendments would be incorporated into Judge Korman's final judgment, that uncertainty has reportedly been resolved by the defendants' agreement to meet Judge Korman's condition for the incorporation. *Reuters*, August 4, 2000.

¹² The other classes are Victims or Targets of Nazi Persecution with claims related to (1) looted assets, (2) slave labour for entities that deposited revenues in Switzerland, (3) slave labour for entities owned, controlled or operated by Swiss businesses, and (4) the denial of entry to, or deportation from, Switzerland.

¹³ "Statistics", www.crt.ch.

The most significant consequence of the Settlement Agreement for CRT concerns the results of the massive independent audit of Swiss banks conducted under the supervision of the Volcker Committee. In a report released in December 1999, followed by revised findings made in February 2000, the Volcker Committee announced that it had identified, and recommended the publication of, over 26,000 accounts that appear to have a "probable" connection to a Holocaust victim, as well as some 20,000 to 24,000 accounts with a "possible" connection to a Holocaust victim. The defendant banks have agreed to publish the 26,000 "probable" accounts as expeditiously as possible, and to create a centralized electronic database relating to all of the "probable" and "possible" accounts - Judge Korman's Memorandum and Order at p. 28.

The implementation of the Settlement Agreement will include a claim process, which, for the Deposited Assets Class, will require, among other things, "a mechanism to address claims related to the [45,000 to 50,000] 'probable' or 'possible' accounts" identified by the Volcker Committee audit... The instrumentality for administration of the claims process contemplated by the Settlement Agreement is the Claims Resolution Tribunal..." - Judge Korman's Memorandum and Order at p. 24. Thus, the Settlement Agreement, as construed and approved by Judge Korman, has extended the life of CRT and expanded its mission.

In the new phase, however, the CRT will not be bound by the original ICRF Rules. As Judge Korman ruled:

"[m]odifications in procedures and personnel will be required and the Claims Resolution Tribunal will operate under guidelines and criteria established with my approval, in consultation with the Volcker Committee". Memorandum and Order at pp. 24-25.

In preparation for this phase, CRT arbitrators and Secretariat have made a careful assessment of CRT's experience with the ICRF Rules of Procedure and based on the lessons learned, have designed and proposed an alternative claim resolution procedure. It is to be hoped, and is likely, that CRT's views and recommendations will carry substantial weight in Judge Korman's and the Volcker Committee's formulation of the guidelines and criteria for the second phase of CRT's operation. In any event, the procedure that will govern the CRT's second phase will probably be free of many of the unnecessarily cumbersome features of the current procedure,¹⁴ which should yield just as fair but more streamlined claim resolution process.

However, in reflecting on the CRT's first phase in order to plan improvements for the second, it is important to maintain the perspective offered by Judge

Korman, who borrowed the words of a Holocaust survivor to explain his conclusion that the Settlement Agreement is fair:

"I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure did their very best, and I think they deserve our cooperation."

The organizations and individuals who created the CRT's current procedure, writing as they did on a *tabula rasa*, unquestionably did their very best, and for this they deserve our commendation.

¹⁴ Such as, for example, the duplicative initial screening by both the banks and CRT, excessive reservation of even the simplest decisions to arbitrators and excessive use of panels rather than sole arbitrators, and, most significantly, the choice of law requirement mandating the determination of applicable national inheritance law. If the CRT is permitted to devise a set of inheritance principles applicable to all claims, it will in effect commence the process of creating international common law of inheritance. ■



Panel discussion at the Toronto Conference

Alternate Dispute Resolution in International Commercial Arbitration: The Forum of Choice?

Mayer Gabay



“ADR” is in fashion. From small claims to complicated international disputes, businessmen, lawyers and jurists are engaged in discussion of Alternate Dispute Resolution mechanisms. This dialogue has gone far beyond the theoretical stage. Many jurisdictions now include in one form or another formal mechanisms for promoting dispute resolution mechanisms outside of the court and traditional arbitration methods.

Perhaps the most respected international forum for arbitration, the International Court of Arbitration of the International Chamber of Commerce is expanding its ADR services and has recently proposed new rules for conciliation which include early neutral evaluation and mini-trials. This is one

more recent development of a well established trend.

In December of 1980 the UN General Assembly adopted a resolution explicitly “recognizing the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations” and recommending “the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation”.

In this context I would also mention the WIPO Arbitration and Mediation Center established in 1994 to offer dispute resolution services appropriate for technology, entertainment and other conflicts having to do with issues of intellectual property.

In many national jurisdictions, enabling regulations have been passed; a variety of private and statutory organizations have been established and are operating within national frameworks. I will review some of the legal develop-

ments in Israel that are part of this worldwide trend.

However my own first encounters in dealing with ADR involved not disputes between commercial entities but rather disputes between nations. In this realm the use of ADR is both more complicated and more urgent.

When the parties to an international contract or treaty are themselves states, each with the prerogatives and obligations of sovereignty, the resolution of disputes by any third party is a difficult concept to accept. However, the failure to resolve disputes through legal channels carries with it a dangerous potential.

In this context we may cite the case of Taba, a small coastal piece of land on the Red Sea, south of Eilat. Taba’s position on the border of Israel and Egypt was not resolved in the peace treaty between the two states. However, the peace agreement did provide for a process of mediation and, in the event of mediation failing to resolve the dispute, arbitration. The process was a drawn out one, and while efforts at mediation were not successful the parties took advantage of

Judge Mayer Gabay is the First Vice President, United Nations Administrative Tribunal, and former Director General, Israel Ministry of Justice. He serves as Chairman of the Council of the Association. He addressed the panel on “International Commercial Arbitration”.

the arbitration provisions of the treaty and the dispute was resolved. Whether we may agree or disagree with the outcome, it was important that the resolution came about through peaceful and legal means.

Not surprisingly, international trade agreements are one area where dispute resolution procedures have been given much attention. I was involved in the drafting of the US-Israel Free Trade Area Agreement which was signed in April 1985. This agreement was the first Free Trade Area Agreement entered into by the United States and is significant not only in and of itself but also as a precedent for other Free Trade Area Agreements.

Articles 17 and 18 deal with the establishment of a Joint Committee to supervise the proper implementation of the agreement and provide for procedures of notice and consultation. The central provision dealing with dispute resolution is Article 19.

The procedures set out in Article 19 are not mandatory but may be invoked at the request of a Party when it considers that the other Party has failed to carry out its obligations under the Agreement.

Article 19 first calls for consultation to arrive at a mutually agreeable resolution to the dispute, and only when this fails may a Party refer the matter to a Joint Committee. If the Joint Committee fails to resolve the dispute within a set period, the matter may then be referred to a conciliation panel. The report of the panel is non-binding but Article 19 does stipulate that after a report has been presented the affected Party shall be entitled to take any appropriate measure.

In fact, except for one case, no dispute arising under the Israel-US Free Trade

Agreement reached such an impasse between the two countries that it had to be referred to a conciliation panel. When a case was finally referred to the conciliation panel, (the case of Computerized Machine Tools with Taiwanese components) that mechanism proved instrumental in resolving the dispute for the enterprise concerned.

Our experience with the Free Trade Area Agreements, that Israel now also has with Canada and Mexico indicates that ADR procedures can be useful in some cases in resolving treaty disputes.

The number of litigants resolving their claims with ADR is clearly growing. However is this an entirely positive development? Is ADR a useful avenue for resolving disputes in all cases? Or, is ADR a product with exaggerated advertising claims? Lately, we have become obsessed with obtaining the latest, newest, most improved version of everything. Often, however, we are deceived by assertions that are wildly exaggerated.

Are the tried and true methods of dealing with legal conflict really so inadequate? Should we be tempted to discard our experienced legal institutions for procedures that appear to discount the strict application of the law in favour of informal consensus building?

New and non-traditional methods have a certain appeal, but one must be cautious in assessing their true value. ADR procedures often entrust the conflict not to a judge but to an expert at negotiation, and we, as jurists, should be particularly sensitive to the letter of the law.

After all, courts are the specialists and final arbiter in stating what the law is. Why, for example, should the law of contracts prevail in one forum and be

ignored in another. As jurists we must take it upon ourselves to ensure that the principle of the rule of law is not overlooked in our rush to remove dispute resolution from the courtroom.

On the other hand, jurists are required to be sensitive to the dangers of the strict application of the letter of the law. Legal history is filled with cases where the strict application of the law is a means of injustice.

Jewish law early on developed the idea of the application of "less than" the letter of the law in order to bring about an equitable resolution to a dispute. The *Talmud* refers to the principle literally: "inside the line of the law", which is often juxtaposed against the idea: "let the law subdue the mountain" which in Latin is known as *fiat justitia et pereat mundus* (let justice be done and the world be destroyed).

There is a dispute in the *Talmud* as to which point of view is preferable. The argument is sometimes referred to as an argument between "truth" and "compromise". The result of the *Talmudic* dispute is, interestingly enough, in favour of compromise.

The sages in the *Talmud* even go so far as to say that "Jerusalem was destroyed because the Law of the *Torah* was applied", which is interpreted to mean that conflict and ill-will increased in Jerusalem because the judges did not temper the application of the law and preferred stringent judgment.

Israel's Supreme Court has often based its rulings on the importance of leniency and compromise. The Court has supported the judiciary's efforts at every level to push litigants towards compromise. The Supreme Court has consistently rejected petitions by litigants to

force the recusal of judges on the grounds that the judge has offered his or her view of a case at a preliminary stage of the trial as part of an effort to force the parties into a compromise. In the case of Civil Appeal 287/88 *Manof Single Finance and Investment Company Ltd. v. Razak Salima*, Supreme Court Justice Menahem Elon rejected a petition to force the recusal of a judge, relying among other sources on Maimonides who wrote:

“At the outset of any proceeding the parties must be asked: Do you want to resolve your dispute by law or by compromise? If they want to compromise then the court must make a compromise between the parties. Any court that always promotes compromise is of high quality, as it is written ‘execute the judgment of truth and peace in your gates’. (Zecharia 8:16) And what judgment brings peace? As it is said: the compromise. As it was with David, as it is written: ‘And David executed judgment and justice to all his people’. (Samuel II, 8:15) - And what judgment carries justice with it? As it is said: That is compromise and conciliation”.

(See Civil Appeal 61/84 *Biyazi v. Levy* p. 477 for the full reference to Maimonides).

In the case of *Biyazi v. Levy*, the Court was asked to invalidate an agreement between two parties who had resolved to settle a dispute based solely on the results of a polygraph or lie-detector test. The Court rejected this petition even though it recognized that the inaccurate results of the lie detector would be conclusive. Justice Elon in his ruling stated that:

“The aim of court proceedings in a civil case is to resolve and end the dispute, and uncovering the truth is

only one means to achieve this resolution” (p. 477).

It is no surprise, therefore, that the Israeli legal system is embracing the development of alternate dispute resolution mechanisms.

In 1992 the Courts Law was amended to allow courts to more actively promote the resolution of disputes through conciliation and arbitration.

Section 79 now deals explicitly with conciliation and arbitration. This section sets out the alternate dispute resolution mechanisms available to the courts. First, the courts may, with the agreement of the parties, rule on a matter before them “by way of conciliation”. Alternatively, the courts may, with the agreement of the parties, transfer the file, wholly or partly, to arbitration. Finally, if the parties so agree the courts may refer the matter to conciliation. The section of the law on conciliation is perhaps the most significant development in this area and is worth a full translation:-

79C (A) In this section “conciliation” is defined as any procedure whereby a conciliator meets with the parties in order to bring them to an agreement to settle the dispute, where that conciliator has no authority to adjudicate the conflict.

(B) A court dealing with a civil matter may, with the approval of the parties, transfer the matter to conciliation, and subsections 79B (A) and (B) will apply *mutatis mutandis*.

(C) In a conciliation proceeding the conciliator may meet with the parties, individually or collectively, and with anyone connected to the matter; and the conciliator may meet with a party, if he so agrees, without an attorney.

- (D) Submissions within the framework of a conciliation will not serve as evidence in a civil trial.
- (E) When a matter is referred to conciliation by the court, the court proceedings will be stayed for a period to be determined by the court, and that court may extend this period upon agreement by the parties.
- (F) If the parties do not reach a settlement by the end of the period mentioned in subsection (E) then court proceedings will be renewed; however the court may, at the request of the conciliator or a party, renew proceedings before the end of said period.
- (G) If the parties reach a settlement, they will notify the court and the court may give the settlement the force of a court ruling.

The courts have promoted the use of conciliation procedures at a very early stage of the proceedings. Israeli courts, including the Supreme Court acting as a Court of Civil Appeals, now routinely proposes conciliation. The Magistrates Courts routinely send notices to both parties, informing them that the dispute is appropriate for conciliation and referring the file to a mediator or a center specializing in mediation and conciliation.

In the light of the above, I would like to try and summarize by saying that the word “alternate” is perhaps something of a misnomer. Attempts at conciliation and mediation are not foreign or new to our legal world view. By temperament and learning we value the resolution of conflict both inside and outside the courtroom through a handshake. This is not the only form of justice; but justice by judgment alone has never been our ideal.

In Re Holocaust Victim Assets Litigation

96 Civ. 4849 (ERK) (MDG) (Consolidated with 99 Civ. 5161 and 97 Civ. 461)

CORRECTED MEMORANDUM & ORDER

(Selected extracts)

Korman, Chief Judge.

I address here the legal issue of the fairness of the \$1.25 billion settlement of the Holocaust Victim Assets Litigation against two leading Swiss banks. The words of Ernest Lobet, a survivor of the Holocaust, provide the best summary of the conclusion that I reach after the analysis to follow:

"I have no quarrel with the settlement. I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure tried their very best, and I think they deserve our cooperation and that they be supported and the settlement be approved."

Background and Procedural History

I. Nature of the Lawsuit and Proposed Settlement

Beginning in late 1996 and early 1997, plaintiffs filed a series of class action lawsuits against defendants. The original class action complaints were amended and refiled in July 1997 as four separate actions, consolidated under Master Docket No. 96 Civ. 4849: *Sonabend, et al. v. Union Bank of Switzerland, et al.*; *Trilling-Grotch, et al. v. Union Bank of Switzerland, et al.*; *Weisshaus, et al. v. Union Bank of Switzerland, et al.*; and *World Council of Orthodox Jewish Communities, Inc., et al. v. Union Bank of Switzerland, et al.*

Plaintiffs alleged that, before and during World War II, they were subjected to persecution by the Nazi regime, including genocide, wholesale and systematic looting of personal and business property and slave labor. Plaintiffs alleged that, in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions and entities, including the named defendants, collaborated with

and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide. Plaintiffs also alleged that defendants breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves unjustly; were negligent; violated customary international law, Swiss banking law and the Swiss commercial code of obligations; engaged in fraud and conspiracy; and concealed relevant facts from the named plaintiffs and the plaintiff class members in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory and punitive damages, and declaratory and other appropriate relief.

In May 1997, defendants filed motions to dismiss the litigation, or, in the alternative, for a stay. The motions, supported by expert affidavits, argued that the actions should be dismissed because plaintiffs failed to state claims under Swiss and international law, failed to join indispensable parties, lacked personal and subject matter jurisdiction, and lacked standing. Defendants also argued that I should abstain from adjudicating plaintiffs' claims in favor of ongoing non-judicial initiatives to redress all of plaintiffs' claims, and argued that Switzerland, not the United States, was the proper forum for plaintiffs to pursue the relief to which they believed they were entitled... While the motions to dismiss were pending, the parties engaged in discussions resulting in a Settlement Agreement, which made it unnecessary for me to decide the motions.

The settlement discussions were facilitated, initially, by former United States Under Secretary of State, now Deputy Secretary of Treasury, Stuart Eizenstat. Subsequently, I became intimately involved in the settlement discussions that led to an agreement in principle in August 1998. The key terms of the proposed Settlement Agreement are as follows:

1. Settlement Fund: Defendants have agreed to pay \$1.25 billion, in four installments, over the course of three years. Pursuant to the terms of the Settlement Agreement, defendants paid the first and second installments into an escrow fund on November 23, 1998 and 1999, respectively. As originally set forth in the Settlement Agreement, the two remaining payments were to be made on November 23, 2000 and 2001, respectively. However, the parties have agreed to amend the Settlement Agreement to provide for acceleration

of certain payments... in order to generate additional interest payments payable to the settlement fund. The additional interest payments are designed to partially defray the cost of the claims process for the Deposited Assets Class.

2. **Defenses Waived:** As part of the settlement, defendants have foregone potentially dispositive legal and factual defenses, including the following: (i) whether this dispute is justiciable, (ii) whether plaintiffs' claims are barred under applicable foreign law, (iii) whether plaintiffs have standing to assert various claims and (iv) whether the claims are time-barred under applicable statutes of limitation and repose, or by the doctrine of prescription.
3. **Revival of Claims:** The settlement protects class members whose claims may otherwise have been deemed expired under applicable statutes of limitation and repose.
4. **Distribution:** The settlement does not preordain a plan for distribution of the settlement fund. Instead, the settlement sets forth a fair and open mechanism for the development of criteria pursuant to which distribution and allocation determinations will be made.
5. **Settled Claims:** In exchange for the settlement amount paid by the settling defendants, settling plaintiffs and settlement class members have agreed irrevocably and unconditionally to release, acquit and forever discharge certain releasees from any and all claims relating to the Holocaust, World War II and its prelude and aftermath, victims or targets of Nazi persecution, transactions with or actions of or in connection with the Nazi regime, treatment by the Swiss Confederation or other releasees of refugees fleeing persecution, or any related cause or thing whatever. Certain limited exceptions are detailed in the Settlement Agreement.
6. **Class Beneficiaries:** The parties agreed that the settlement should benefit generally persons recognized as targets of systematic Nazi oppression on the basis of race, religion or personal status. Accordingly, at the initiative of plaintiffs' Executive Committee, the settlement was explicitly designed to benefit Jews, homosexuals, Jehovah's Witnesses, the disabled and Romani.

Because the defendant banks sought to settle not only the causes of action alleged against them, but were seeking to resolve legal claims against Swiss governmental and business entities, the releases described in Para. 5 above included entities that were not named as defendants in this case. Also for this

reason, at least one of the five settlement classes described below, the Refugee Class, includes victims of Nazi persecution who did not suffer any injury as a direct or indirect result of conduct of the defendant banks or of any Swiss banks.

II. The Settlement Evaluation Process

A. Preliminary Approval and Class Certification

In an order dated March 30, 1999, I preliminarily approved the proposed settlement and certified five settlement classes, as follows:

1. **Deposited Assets Class:** victims or targets of Nazi persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from deposited assets or any effort to recover deposited assets.
2. **Looted Assets Class:** victims or targets of Nazi persecution ... who ... assert claims against any releasee ... relating to or arising in any way from looted assets or cloaked assets or any effort to recover looted assets or cloaked assets.
3. **Slave Labor Class I:** victims or targets of Nazi persecution... who actually or allegedly performed slave labor for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, releasees, and who ... assert ... claims against any releasee ... relating to or arising in any way from the deposit of such revenues or proceeds or cloaked assets or any effort to obtain redress in connection with the revenues or proceeds from slave labor or cloaked assets.
4. **Slave Labor Class II:** individuals ... who actually or allegedly performed slave labor at any facility or work site, wherever located, actually or allegedly owned, controlled or operated by any corporation or other business concern headquartered, organized or based in Switzerland or any affiliate thereof, and who ... assert ... claims against any releasee other than settling defendants, the Swiss National Bank, and other Swiss banks ... relating to or arising in any way from such slave labor or cloaked assets or any effort to obtain redress in connection with slave labor or cloaked assets.
5. **Refugee Class:** victims ... who sought entry into Switzerland in whole or in part to avoid Nazi persecution and who actually or allegedly either were denied entry into Switzerland

or, after gaining entry, were deported, detained, abused or otherwise mistreated, and who ... assert ... claims against any releasee ... relating to or arising in any way from such actual or alleged denial of entry, deportation, detention, abuse or other mistreatment.

B. Dissemination of Notice

My grant of preliminary approval and class certification allowed for implementation of the second step in the settlement evaluation process - *i.e.*, dissemination of notice of the proposed settlement and class certification to the settlement classes.

Each of the court-appointed notice administrators oversaw distinct aspects of the notice plan, and their various reports filed with the court detail the exhaustive efforts undertaken to give all settlement class members an opportunity to learn of their rights, evaluate the basic terms of the proposed settlement and comment, either by submitting correspondence, e-mailing the notice administrators or returning an Initial Questionnaire.

C. Fairness Hearings

The third and final step in the class action settlement evaluation process was a final approval hearing, also known as a "fairness hearing", pursuant to Fed. R. Civ. P. 23(e).

D. Subsequent Amendments to the Settlement Agreement

After preliminary approval, the parties amended the Settlement Agreement and escrow agreement to provide that settling defendants would pay the second installment of the settlement amount into the escrow fund, to permit the escrow agents to authorize disbursements of up to \$20 million in the aggregate for payment of certain costs incurred in implementing the settlement, and to permit the escrow agents to authorize additional disbursements from the escrow fund for settlement implementation costs, subject to court approval.

Discussion

"The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate". *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982). This determination involves consideration of both the process by which the settlement was reached and the substantive terms of the settlement itself. I have considered both the procedural fairness of the settlement process, and the overall adequacy and reasonableness of the substantive terms of the proposed

settlement, and find that each of these components weighs in favor of final approval.

I. Procedural Fairness

I turn first to the procedural component of the fairness determination. This consideration focuses on the "negotiating process by which the settlement was reached". *Weinberger*, 698 F.2d at 73.

In a class action, the principal impediment to assuring an untainted settlement process is the financial interest of counsel, who may be improperly influenced to accept certain settlement terms, or to accept a settlement at all. As plaintiffs' lead counsel observes, however, such a "divided loyalty" structural concern is absent from this case. Key members of the plaintiffs' Executive Committee who negotiated this settlement are providing their services on a *pro bono* basis, at most requesting that, in lieu of attorneys' fees, payments be made to law schools to endow Holocaust Remembrance Chairs in honor of class members who did not survive, and to foster international human rights law designed to prevent similar human tragedies in the future.

Moreover, based upon my extensive personal involvement in the process, I know that the compromise was reached as the result of lengthy, well-informed and arm's-length negotiations by competent and dedicated counsel who provided loyal and effective legal representation to all parties.

II. Substantive Fairness

I now turn to the substantive component of the fairness determination. This consideration generally is evaluated by reference to the list of specific factors identified in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), namely:

"(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation."

As of May 8, 2000, some 550,000 Initial Questionnaires had been received from class members worldwide. Approximately 32,000 letters had been received, only approximately 243 of

which commented upon or objected to the settlement, and approximately 448 of which contained comments on the plan of allocation or the claims process. Approximately 401 opt-out requests had been received.

The above figures help demonstrate that the response of the classes has been overwhelmingly positive. In addition there is virtually unanimous worldwide support for the settlement from Jewish and Holocaust survivors' organizations.

The United States, which participated actively in settlement discussions over a period of many months, through Deputy Treasury Secretary Eizenstat, has expressed its "unqualified support for the parties' class action settlement" and endorsed it "as fair, reasonable and adequate and unquestionably in the public interest".

The US Department of Justice prediction that the present settlement would serve as a catalyst for a negotiated agreement of the claims of slave and forced laborers has proven accurate. On March 23, 2000, a final agreement was reached concerning the allocation of an even more substantial settlement fund - approximately \$5 billion - in a related litigation on behalf of victims of Nazi slave and forced labor policies, some of whom are also members of the slave labor classes here.

I note that the adequacy and reasonableness of the settlement must be measured against the practical alternative to the settlement in the real world.

In accepting both the \$1.25 billion settlement figure and the defendant banks' demand for broad releases as a fair and reasonable settlement of this class action, plaintiffs' counsel balanced the powerful legal and moral claims of the members of the plaintiff classes against (i) the defendant banks' vigorous defense of this action, including the prospect of extensive appellate delays before any judgment could be enforced; (ii) the intransigence of the government of Switzerland and the Swiss National Bank in refusing to contribute to the settlement fund, and in interposing obstacles to the effective prosecution of plaintiffs' legal claims; (iii) the litigation uncertainties surrounding plaintiffs' claims against the defendant banks, especially the difficulty in gaining access to the Swiss banking records needed to establish plaintiffs' claims; (iv) the need for speedy distribution of funds to aged victims, many of whom are in great distress; and (v) the substantial legal and factual uncertainties that would have complicated effective pursuit of legal claims against the Swiss National Bank, the Swiss government and the remaining non-party releasees. They came to the conclusion that while, in a

perfectly just world, plaintiffs should have received a far greater sum, in the real world, a recovery of \$1.25 billion in return for broad releases was the best that dedicated and competent counsel could achieve under the circumstances of this case. I agree.

III. Objections and Comments

I have considered all of the objections and comments expressed by settlement class members and others at the fairness hearings and through independent submissions to the court. These objections and comments do not warrant denial of the motion for final approval.

A. Deferring Notice of the Proposed Plan of Allocation and Distribution Until After Final Approval of the Settlement Agreement

The Settlement Agreement provides for the appointment of a Special Master, who, as a neutral third party, is to consider all suggestions regarding allocation and distribution directly from the class, without relying upon intermediating representatives, such as settlement class counsel or settlement class representatives. The Special Master will then take that direct input and present a draft plan. That plan will be publicized, and class members will have an opportunity to communicate directly with me regarding it, again, without any intermediaries to dilute the class members' direct influence. Their comments will be addressed and/or incorporated in a final plan. I have appointed Judah Gribetz, Esq., as Special Master in this case.

Mr. Gribetz is an extraordinarily able lawyer with a long record of distinguished public service. He has served as Counsel to the Governor of the State of New York and as Deputy Mayor of the City of New York. He has contributed his time and energy to charitable and community organizations too numerous to recite. Most importantly, he has a deep understanding of all issues related to the Holocaust. He is a member of the Board of the Museum of Jewish Heritage Living Memorial to the Holocaust, which is located in New York. He is also the author of *The Timetables of Jewish History* (1993).

At the fairness hearings, however, several persons criticized the decision to hold any fairness hearing prior to receiving notice of the specific amounts they were likely to recover. I agree that, ordinarily, it is preferable to provide specific information to class members concerning their likely recovery. However, the special circumstances of this litigation, involving five worldwide settlement classes arising out of events that transpired approx-

imately 60 years ago, make it virtually impossible to provide specific information to individuals about their precise recovery prior to the completion of the elaborate claims processes contemplated by the Settlement Agreement.

B. The Volcker Report

These suits were filed two years after the World Jewish Restitution Organization had initiated discussions regarding certain restitution issues. Such negotiations led to, among other things, the creation of the Independent Committee of Eminent Persons (the "ICEP"). The ICEP, chaired by Paul A. Volcker was established in May 1996 by the Swiss Bankers Association, the World Jewish Congress and other Jewish organizations to conduct an audit of the settling defendants and other Swiss banks to identify accounts from the World War II era that could possibly belong to victims of Nazi persecution. The Volcker Committee conducted what is likely the most extensive audit in history, employing five of the largest accounting firms in the world at a cost of hundreds of millions of dollars to defendants. At the conclusion of its investigation, the Volcker Committee prepared a formal 100-plus page report, which it released on December 6, 1999 (the "Volcker Report"), setting forth its findings in detail, which included the revelation that approximately 54,000 Swiss bank accounts appear to have a "probable" or "possible" connection to a Holocaust victim.

The parties reached an informal agreement to settle this case for \$1.25 billion in August 1998, with knowledge that the Volcker Committee's investigation was ongoing and not likely to be completed for some time.

Several persons, however, voiced concern at the fairness hearings that the adequacy of the \$1.25 billion settlement should be re-evaluated in light of the Volcker Report's identification of the approximately 54,000 Swiss bank accounts that are "probably" or "possibly" connected to Holocaust victims. While understandable, these objections do not justify upsetting the settlement.

The findings of the Volcker Report confirmed, rather than undermined, an important element of class counsel's expectations concerning plaintiffs' potential recovery in this case, and which class counsel had in mind when agreeing upon the settlement amount. Moreover, the Volcker Report's identification of approximately 54,000 accounts with a "probable" or "possible" relation to Holocaust victims would not necessarily have been sufficient to establish a particular account holder's claim in the

event this case had proceeded to trial. In order to prevail on most types of civil claims in an American forum, a plaintiff must demonstrate, at the very least, an entitlement to relief by a preponderance of the evidence.

The absence of evidence necessary to meet "the precision of proof . . . normally applicable in judicial proceedings" is due to the destruction of records of the Swiss banks, and there may have been an arguable legal basis for drawing an adverse inference against the banks had the case been litigated. Nevertheless, the practical and legal problems resulting from the destruction of evidence and the passage of time counsel against litigating these claims. Indeed, a claims resolution process applying rules for recovery less rigorous than a legal proceeding could result in the payment of more claims than would otherwise be possible.

The significance of the report of the Volcker Committee, which included three members appointed by the Swiss Bankers Association, is that it provided legal and moral legitimacy to the claims asserted here on behalf of the members of the Deposited Assets Class. The findings suggest that the value of deposited assets held by the Swiss banks could exceed the \$1.25 billion settlement amount. Indeed, it is only the successful campaign that the Swiss banks waged to prevent disclosure before records were destroyed, that gave rise to the legal and practical impediments to the successful litigation of this case by the vast majority of individuals to whom money is justly due.

C. Administration of the Deposited Assets Class

In order to continue the work of the Volcker Committee, it will be necessary to establish a deposited assets claims process designed to (i) notify potential claimants of the existence of the 54,000 accounts referred to in the Volcker Report; (ii) determine whether the original owners of such accounts are or were targets or victims of Nazi persecution, as defined in the Settlement Agreement; (iii) ascertain their heirs, if necessary; (iv) determine the amounts attributable to each account; (v) explore the circumstances surrounding the closing of certain of the accounts; and (vi) distribute the appropriate amounts to the current owners. Moreover, aside from providing a mechanism to address claims related to the 54,000 "probable" or "possible" accounts, a fair claims process must provide a mechanism to enable any person with a potential claim to have names matched against the database of 4.1 million accounts for which records exist.

The instrumentality for the administration of the claims process contemplated by the Settlement Agreement is the Claims

Resolution Tribunal established by the Swiss Bankers Association, the Swiss Federal Banking Commission and the Volcker Committee to arbitrate claims arising from the 1997 publication of 5,570 foreign accounts in Swiss Banks. The Claims Resolution Tribunal will operate under guidelines and criteria established with my approval, in consultation with the Volcker Committee.

The failure of the SFBC to implement fully the recommendations of the Volcker Committee raised serious questions over whether it would be possible to administer a fair claims process in connection with the Deposited Assets Class. This is because access would be denied to information necessary (i) to provide notice to all potential claimants of the existence of bank accounts with a “probable” or “possible” connection to Holocaust victims, (ii) to permit victims of Nazi persecution to have names matched against the database of 4.1 million accounts for which records exist and (iii) to permit a deposited assets claims resolution process to operate fairly, efficiently and in accordance with procedural due process of law.

Professor Neuborne advises me that the defendant banks, acting pursuant to the SFBC’s authorization, have agreed to cooperate in assembling information concerning their portion of the 26,000 “probable” accounts in order to permit expeditious publication of identifying information associated with those accounts after approval of a final plan of allocation and distribution. The defendant banks also have agreed to cooperate in achieving an earlier publication date.

I am also informed that the defendant banks, acting pursuant to SFBC authorization, have agreed to create a centralized electronic database relating to their share of the 54,000 accounts referred to in the Volcker Report. They have also agreed to permit the Claims Resolution Tribunal to have convenient access to the centralized database and to the Volcker Committee’s auditors’ paper files in connection with such accounts.

Nevertheless, the failure of the SFBC to mandate compliance with the recommendations of the Volcker Committee, coupled with the unwillingness of the private or cantonal banks that are non-party releasees to voluntarily cooperate in permitting publication of information relating to some or all of their accounts that may be included within the 54,000 accounts referred to in the Volcker Report, have created substantial impediments to administration.

The unwillingness of the SFBC to mandate compliance with the recommendations of the Volcker Committee is inexplicable,

and the failure of the private and cantonal banks to voluntarily comply is inconsistent with the spirit of the Settlement Agreement, which recites that “Settling Plaintiffs and Settling Defendants commit to support and urge the conclusion of the mandates of the Volcker Committee”. It also amounts to nothing less than a replay of the conduct that created the problems addressed in this case. While its auditors “reported no evidence of systematic destruction of records of victim accounts, organized discrimination against the accounts of victims of Nazi persecution, or concerted efforts to divert the funds of victims of Nazi persecution to improper purposes”, the Volcker Committee nonetheless

“confirmed evidence of questionable and deceitful actions by some individual banks in the handling of accounts of victims, including withholding of information from Holocaust victims or their heirs about their accounts, inappropriate closing of accounts, failure to keep adequate records, many cases of insensitivity to the efforts of victims or heirs of victims to claim dormant or closed accounts, and a general lack of diligence - even active resistance - in response to earlier private and official inquiries about dormant accounts.”

More significantly, the Volcker Committee unanimously found that

“[t]he Swiss commitment to bank secrecy and a concern about maintaining the integrity of that secrecy - ironically in part a response to foreign exchange controls in Germany and their use to persecute Jews there - were undoubtedly factors in the decision not to publish the names of the dormant account holders after World War II... Banks were also concerned that too liberal a regime for processing claims to dormant accounts would result in payments to the wrong parties and double liability for the banks.”

It is disturbing, to say the least, that, having participated in creating the problem that the Volcker Committee was attempting to address, the Swiss private and cantonal banks do not feel a moral obligation to the victims of Nazi persecution. Nevertheless, if they seek the benefit of releases under the Settlement Agreement, these banks cannot legally continue to conceal from the class information needed to take advantage of the benefits conferred by the Settlement Agreement.

In sum, my hope is that the Swiss Confederation, if not the SFBC, will take the steps necessary to compel the cantonal and private banks to comply with the Volcker Committee’s recom-

mentations to the same extent as the defendant banks have agreed to comply. Nevertheless, their failure to do so does not justify disapproving the settlement with the defendant banks. They have pledged “their good faith cooperation with the implementation of the settlement”. This is a pledge that reflects their legal obligation. It is one to which I intend to hold them.

D. Looted Art

At the fairness hearings, several objectors observed that the broad scope of the releases initially contemplated in connection with the Looted Assets Class might pose an obstacle to the recovery of artworks and other items of specific property looted by the Nazis and currently in the possession of a Swiss releasee. Under the Settlement Agreement, the definition of “Releasees” includes governmental entities and business concerns; the definition does not cover private foundations, private museums or individual collectors. This means that the Settlement Agreement does not impose any obstacle to the recovery of looted art from a significant group of potential collectors.

While the Settlement Agreement does preclude the recovery of looted art from Swiss businesses and governmental agencies, the legal and practical obstacles to the recovery of art from this group are already substantial, if not insurmountable. Swiss law permits a purchaser in good faith to acquire valid title to stolen art. Swiss law also presumes that a purchaser acts in good faith, and a plaintiff seeking to reclaim stolen property has the burden of establishing that a purchaser did not act in good faith. Indeed, Switzerland has been described as “a country to which buyers of stolen art flock in order to claim Swiss law’s protection of buyers”.

Under these circumstances, the releases granted under the Settlement Agreement added little to the protection already enjoyed by the releasees under Swiss law. In any event, the defendant banks have agreed to modify the original Settlement Agreement to assure that persons may seek judicial assistance in recovering looted artwork, rare books and other items of cultural provenance from releasees without any serious impediment created by the Settlement Agreement. Accordingly, while the amended releases contemplated by the amended Settlement Agreement would continue to bar damages actions, they would not bar actions in the nature of replevin designed to recover specific items of artwork, as long as the actions are brought in the country where the artwork is located, or from which it was looted.

Critics also appear troubled by provisions limiting litigation

designed to recover specific works of art to the country where the art is located, or from where it was seized. The amended art releases would, however, permit litigation to recover art that is temporarily in the United States or on loan, or for exhibition. Second, critics have expressed concern over a requirement that individuals take “reasonable steps” to secure the return of artwork before commencing litigation. This is not an unusual requirement.

E. Insurance Releases

The original Settlement Agreement provides for releases to a number of unidentified non-party Swiss insurance companies, defined broadly to include any insurance company where at least 25 percent of the outstanding stock is owned by a Swiss company. Several Swiss insurance companies against which litigation was pending in the federal courts were explicitly excluded from these releases.

I received several well-taken objections to the inclusion of insurers as “Releasees” under the Settlement Agreement. The objections related to the effectiveness of notice as to claims against released Swiss insurers and the appropriateness of releasing such insurers in the absence of a mechanism to pay valid Holocaust-related insurance claims as part of the distribution of the settlement fund.

In response to these objections, the parties and major Swiss insurers released under the Settlement Agreement have agreed on a mechanism to evaluate and pay Holocaust-related insurance claims. The mechanism specifically designates up to \$100 million (including up to an additional \$50 million provided by the insurers themselves) for the resolution of unpaid insurance claims. The mechanism provides for prompt and fair consideration of all insurance claims, appropriate multipliers for such claims, full cooperation of the participating insurers in providing relevant documentary material to potential claimants (subject to monitoring by the Swiss insurance supervisor) and assurance of payment from the settling defendants. The amendment also contains a provision that acknowledges my power to order participating insurers to disclose the holders of policies, with the consequence of an insurer’s failure to comply being the exclusion of such insurer from all provisions of the Settlement Agreement.

F. Administration of the Refugee Class

The Special Master has expressed concerns over the ability to administer the Refugee Class in a fair and efficient manner in the

absence of information concerning the identities of persons expelled from, or denied entry into Switzerland during the relevant period.

In December 1999, the Independent Commission of Experts - an independent group of internationally recognized historians chaired by Jean Francois Bergier that was established by the Swiss Confederation in 1996 to examine Switzerland's relationship with Nazi Germany released a report indicating that approximately 14,500 applications to gain entry into Switzerland were rejected by the Federal Foreign Police and that more than 24,000 refugees were turned back at the border or expelled during the war years. On March 31, 2000, the Swiss Federal Council authorized the Swiss Federal Archives ("SFA") to release to the Special Master a list of persons denied entry into, or expelled from, Switzerland during the relevant period. I acknowledge the good faith cooperation of the SFA in compiling this list. Unfortunately, however, SFA officials have informed the Special Master that it "will be possible to collect a small part of the names only", and that, "[a]t the moment, this list contains about 2,500" names. This is woefully inadequate.

If it proves impossible to assemble the information needed because Swiss entities (including cantonal entities) refuse to provide information that they have in their possession that is needed for the fair administration of the Refugee Class, I will consider an application for modification of the enforceability of releases with respect to those entities.

G. Administration of Slave Labor Class I

The Special Master has expressed concern over the ability to administer Slave Labor Class I in the absence of information identifying those German companies within the purview of this class definition. The information is necessary to determine whether a presumption is warranted in connection with the administration of Slave Labor Class I that virtually all German companies that employed slave labor also "deposited" or "transacted" the revenues or proceeds of this labor in Switzerland. Such a presumption would simplify the administration of Slave Labor Class I by making it unnecessary for each claimant to prove a link between the German company for which slave labor was performed and a Swiss bank. I am informed that the SFA appears to have made available the necessary information.

H. Administration of Slave Labor Class II

The membership of Slave Labor Class II, unlike the other classes, is not limited to victims of Nazi persecution who were

Jewish, Romani, Jehovah's Witnesses, homosexual, or physically or mentally disabled. When this class was included in the Settlement Agreement, the defendant banks represented that Slave Labor Class II consists of an extremely small number of persons who may have performed slave labor directly for an extremely small number of Swiss companies during World War II. Since then, they have backed off of this representation.

Research by the SFA has failed to develop information concerning the identities of potential Slave Labor Class II claimants. Nor has the Special Master been able to develop significant information as to the identities of Swiss companies or their affiliates that may have utilized slave labor during the relevant period. I am informed that the SFA appears to be cooperating in assembling certain information as to Swiss companies that may have utilized slave labor. Nevertheless, that information is incomplete and there is little prospect that a complete list can be obtained in sufficient time to make the necessary use of it.

Under these circumstances, those Swiss entities that seek releases from Slave Labor Class II are directed to identify themselves to the Special Master within 30 days of the date of this memorandum and order. The failure of Swiss entities seeking releases from Slave Labor Class II claims to identify themselves will result in the denial of a release and permit those who have claims against those entities to pursue such claims independently of this lawsuit.

I. The Defendant Banks' Threat to Repudiate the Amendments to the Settlement Agreement

The defendant banks have advised me that, if I required business entities that utilized slave labor to identify themselves as a condition to obtaining releases, they would repudiate the amendments to the Settlement Agreement that have been negotiated tediously over the last few months with my informal approval.

The reason for the defendant banks' unhappiness with the conditions placed upon the Slave Labor Class II releases is that

"[o]ne of the fundamental premises for our 'all Switzerland' settlement was that, in exchange for a payment of \$1.25 billion, all Swiss companies would be released from slave labor claims".

Moreover, they claim that

"[i]t is not practical for the defendant banks to make public requests to all Swiss companies to investigate whether any of

their subsidiaries used slave labor during World War II in order to respond to such a condition, nor would this be in harmony with the spirit or the terms of the settlement agreement.”

I note that the \$1.25 billion payment that defendants Union Bank of Switzerland and Credit Suisse made in exchange for releases for “all Switzerland” is money that could reasonably be said to have belonged to depositors who were victims of the Holocaust. Indeed, as I have already noted, the Volcker Committee’s estimates indicate that the total value of these accounts could exceed \$1.25 billion. The only reason for settling the case for less was the practical problem created by the wholesale destruction of records and, to a degree, the passage of time. Indeed, there was once a time when the Swiss promised that, if account holders could not be identified, this money would be paid to a charitable foundation for Holocaust survivors.

In any event, I do not propose to deny releases to which Swiss companies who utilized slave laborers are entitled. I am simply requiring them to identify themselves and provide information (if they possess it) that is critical to the fair and efficient administration of Slave Labor Class II.

Counsel for the defendant banks acknowledged that the Bergier Commission will publish a report concerning the utilization of slave laborers by the Swiss “that will be a significant additional informational resource”. Under these circumstances, it seems reasonable to conclude that the small number of Swiss companies who the defendant banks suggested utilized slave laborers have good reason to know who they are. Nor is it my intention that any company be certain that it or its affiliates employed slave labor. The fact that they believe that it was likely or probable will suffice.

J. Other Objections Concerning Notice

A handful of other objectors challenged portions of the overall notice plan, governing the form, content and dissemination of notice to class members. I have considered those objections and determined that those objections are without merit.

K. Attorneys’ Fees

Objections regarding attorneys’ fees are premature. Although fee applications have been filed (and do not appear to exceed one percent of the total recovery if the applications are granted in their entirety), I have not yet made any decision regarding those applications.

IV. Maintenance of Certification of Settlement Classes

I have already made numerous findings in support of certification of the five settlement classes defined above. No actual, non-speculative conflicts among class members exist. The settlement itself does not purport to allocate the fund to specific classes, subclasses, or claimants.

Conclusion

The Settlement Agreement is granted final approval. The defendant banks are directed to advise me within seven business days of the date of this order whether they intend to adhere to the amendments to the Settlement Agreement. If they do, I will enter a final judgment to reflect that the Settlement Agreement, as amended by Amendment 2 and the memorandum to file is granted final approval. If they do not, I will enter a final judgment on the Settlement Agreement.

Judge Korman signed the Final Order and Judgment on August 9, 2000. No claims process or Plan of Allocation has yet been established. The court appointed Special Master, Judah Gribetz, has proposed a draft Plan of Allocation, which is open to comment until November 6, 2000. The full judgment, draft Plan and other documents are available at www.swissbankclaims.com.

Extracts prepared by Dr. Rahel Rimon, Adv.

Web Site

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

www.intjewishlawyers.org

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

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Canadian citizenship and deport persons alleged to have committed war crimes or crimes against humanity during the Second World War or in more modern conflicts.

With regard to the issue of free trade in the global village increasing global interdependence has resulted a proliferation of multilateral original and bilateral trade agreements, including a Canada-Israel Free Trade Agreement. Again, our counsel are on the forefront of international trade law and are intimately involved in negotiating, advising and litigating these new trade arrangements.

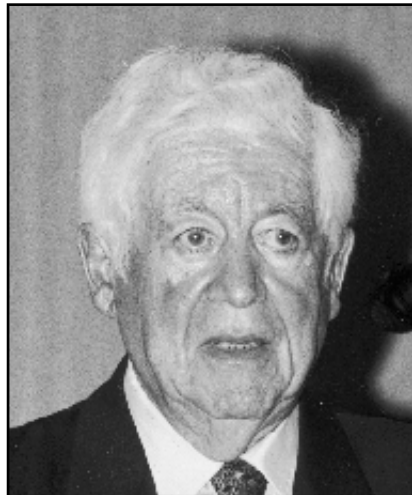
"Pursuing justice in the global village" is a reality we increasingly face every day in our work.

With globalization and new communications technology, the world really is becoming a much smaller place. In law that means that we are dealing with what might be called the internationalization of legal issues. Matters that we formerly addressed in an entirely domestic context now have important international aspects. Thus, for example, we are having to deal with trans-border computer crime, international electronic commerce and child custody. Things occurring beyond our borders affect domestic well-being and our policy development must account for this new reality.

I understand that the motto of the IAJLJ is the biblical injunction "*Zedek zedek tirdof*" - Justice justice thou shalt pursue. Let me assure you that in all that we do, we at the Department of Justice wholeheartedly share in this pursuit.

From the Association

Adv. Nener Honoured



The Association congratulates Adv. Itzhak Nener, First Deputy President of the Association, on being awarded the honour *Yakir Yerushalayim* - ("Worthy of Jerusalem").

Zurich Banquet November 2000

The Swiss Chapter invites members to a banquet to be held on Sunday, November 26, 2000 in the Petit Palais of the famous Baur au Lac Hotel in the heart of Zurich. Mr. Philip Hook, senior director of the international auction house Sotheby's will be the main speaker of the evening. Eminent guests are expected from all over the world. For further details, please contact Robert Rom in Zurich (++ 41-1-221-29-20, Fx 221-29-40) or Elie Elkaim in Lausanne (++ 41-21-343-20-40, Fx 312-20-11).

In Memoriam Michael Benjamin 1932-2000

The Association regrets to announce the untimely death of Dr. Michael Benjamin following heart surgery on 7, August 2000. Born in 1932 in Berlin, son of the Mauthausen concentration camp victim Dr. Georg Benjamin and later Minister of Justice of the GDR, Hilde Benjamin, Michael Benjamin survived the Third Reich but the experience continued to haunt him his entire life.

He studied jurisprudence in Berlin and Leningrad, and worked in the fields of jurisprudence and administrative law. He was a staff member and later professor at the Law and Science Academy in Potsdam-Babelsberg and in Moscow until 1990. He wrote over 200 scientific publications and approximately 80 journalistic works, on criminal, state and administrative law, administration and politics. Speaker of the Party Council and member of the Federal Board of the PDS, Professor Benjamin was also a devoted member of our Association. He attended our conferences and made a significant contribution to the success of the Berlin conference. He will always be remembered and appreciated.

