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**Remember Warsaw**

**An International Conference to Commemorate Jewish Lawyers and Jurists  
in Poland and to Mark their Contribution to Polish Law**

**Warsaw, Poland, May 9-13, 2001**

**Venue: Sheraton Hotel, Warsaw**

**Mark your calendar and register without delay**

**See program pages 43-44**

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## PRESIDENT'S MESSAGE



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ince the eruption of violence initiated by the Palestinians and labeled "*Intifada El-Aksa*", we are witnessing an unprecedented wave of anti-Semitic attacks launched against Jewish communities throughout the world, including such abhorrent manifestations as physical attacks on Jews, burning of synagogues, desecration of cemeteries and the defiling of Holocaust memorials and Jewish communal buildings.

These activities are initiated, encouraged and accompanied by a growing campaign of incitement to hatred and violence, repudiation and denial of the Holocaust, spread world-wide by an increased use of the Internet to propagate anti-Semitic and racist views.

Cynical and dangerous attempts are being made by extremists to inject blatantly false and misleading issues with respect to the Arab-Israeli conflict, as components of a pattern of deliberate distortion of the situation, by manipulatively exploiting stereotyped anti-Semitic themes and inciting racial hatred. This is part of a deliberate effort to convert a political confrontation into a religious and ethnic conflict.

The International Association of Jewish Lawyers and Jurists expresses its deep concern about this dangerous phenomenon, which threatens not only Jews but the entire international community. It endangers the very basis of co-existence between ethnic groups and minorities in every country, and undermines the relationship between citizens of different denominations and origins, which must be based on mutual respect backed by full observance of legal instruments which States, as well as the international community, have enacted, to prevent a repetition of horrors that marked the twentieth century.

The present attempt to broaden the current wave of Palestinian violence against Israel, supported by extremist Arab States, and to convert the Middle-East conflict into a world-wide religious confrontation between Judaism and Islam, is aided and abetted by ongoing incitement, based on a deliberate policy of disinformation, and the repeated use of age-old stereotypes and slogans.

One example of the relentless incitement in the Palestinian media, is a live broadcast on Palestinian television of a sermon delivered in Gaza's central mosque, at Friday prayers, by the Rector of the Islamic University in Gaza, Dr. Ahmad Abu Halabiya, in which Moslems were enjoined to kill Jews wherever they are, and describing them as criminals and terrorists. Halabiya also targeted Christians as allies of the Jews, and specifically Americans: "Wherever you are" he urged, "kill those Jews and those Americans who are like them..."

This sermon constituting an open incitement to violence and killing as a prelude to a religious war, was broadcast live on Palestinian television.

We have compiled a list of anti-Semitic events which occurred around the world, and while I shall limit myself here to some examples, it must be noted that similar events were reported on all continents. In France alone there were 140 anti-Semitic attacks!

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The list includes verbal provocations in front of synagogues during prayers, Nazi salutes before worshippers, swastika daubings, phone threats and actual physical damage by stoning and incendiary attacks against scores of synagogues and Jewish institutions, as well as physical attacks on Jews.

Here are some examples:

In the late evening of September 29 stones were thrown at the windows of the 'Kehillat Yaakov' synagogue in London.

On Saturday, September 30, an unidentified person attacked a 50-year old Hasidic Jew in New York, wounding him while shouting obscene remarks.

On October 1, outside the synagogue of Aubervilliers in Paris, an Arab driver tried to run over worshippers, who were fortunately able to escape death at the last moment.

On October 5, a statement publicly announced that Sheikh Omar Abd Al-Rahman, who is in a US prison, has issued a call for *Jihad* against Jews wherever they may be.

On the night of October 2nd, unknown persons threw three Molotov cocktails at the main entrance of the synagogue and community center in Dusseldorf.

During the night of October 2-3, stones were thrown by youths at the synagogue on Clinic Street in Brussels. Several window panes were smashed.

On the same night in Schwerin in North-East Germany, unknown persons attacked a Jewish couple and seriously injured the woman.

Again, on the same night, the Jewish cemetery in Schwaebisch Hall, Germany, was desecrated, paint and swastikas daubed on 11 gravestones.

On the night marking the unification of Germany, October 3, swastikas were drawn on the memorial to the Buchenwald concentration camp, and also on a memorial commemorating a destroyed Jewish synagogue in Halle, Germany.

On the same night, firebombs were thrown at a synagogue in the Villepine suburb of Paris, severely burning the doors. The fire which began to ignite the building was extinguished by firemen.

During the night of October 3-4, in Malmo, Sweden, unknown persons burned the purification building in the cemetery, damaged gravestones, and set the cemetery office on fire.

On October 4, the Jewish cemetery in Potsdam was desecrated, a gallows drawn over the Star of David on the entrance sign to the cemetery.

Dummy letter bombs were thrown at the homes of the heads of the Jewish Community in Germany, Mr. Spiegel and his deputy Mr. Friedman. Each envelope contained a clock with electric wires and a letter saying "This will soon happen to you, too".

On October 6, Email messages were received at the offices of the Jewish newspaper "*O Hebreu*" in San Paolo and at the website of the Jewish Museum in Rio de Janeiro, threatening that Jewish facilities would be bombed and comparing Jews to Hitler. The messages were signed in the name of the *Bin Laden* organization and *Hizballah*.

On October 6, the Arab community of Panama published an official announcement which contained derogatory expressions against Israel and the Jews. It also said "the Jews are murderers who kill everyone opposing their desire to take over the world".

On October 7, a number of attacks occurred in London: the Reform synagogue in

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Edgeware, the 'Yeshurun' synagogue in Edgeware, the 'Elstree and Borehamwood' synagogue, where the ark was smashed and children's *Torah* scrolls burnt, the Upper Berkely Street synagogue and the synagogue in Seymour Place were also attacked.

On October 8, windows were smashed in a synagogue in Leicester.

Also on the same date, October 8, windows were smashed in the Portuguese synagogue in Birmingham, and stones were thrown at an elderly couple near the Kenton United synagogue.

The Day of Atonement, "*Yom Kippur*", was marked by many anti-Semitic attacks in a number of countries. These attacks began on October 8, and continued on the night of *Kol-Nidrei* and on *Yom Kippur* (October 10). I list some examples:

A Molotov cocktail was thrown by three Muslim youths into the "Adat Israel" synagogue in the Bronx, in New-York, and on the same night stones were thrown at a synagogue in Dagestan, Russia.

Canada also had its share of anti-Semitic events:

Windows were smashed at the 'Beit Shalom' synagogue in Ottawa, and graffiti stating "Islam Forever" was scrawled over the walls.

Muslims demonstrated in Montreal with slogans "Murder the Jews".

The spokesman of the Jewish Canadian Congress stated that since October 2 over five attacks had been perpetrated against synagogues in and around Toronto.

The 'Ohev Shalom' Central Reform synagogue in Harrisburg, Pennsylvania, was set on fire. A new building attached to the synagogue caught fire, causing heavy damage.

During *Kol-Nidrei* prayers, 3 Molotov cocktails were thrown at a synagogue in Clichy S/Bois, Paris, one of them igniting. The worshippers were compelled to shorten the service and disperse.

Unknown persons broke into the synagogue on Rue Crimee in Paris and damaged furniture and *Torah* scrolls.

One of the two Bukharian synagogues active in Tashkent was set on fire and razed to the ground. Five *Torah* scrolls were burnt.

A large swastika was drawn on the main entrance to the 'Maimonides' synagogue in Brussels.

The Holocaust memorial in Brussels was also desecrated and an attempt was made to damage it.

A synagogue in the Anderlecht district in Brussels was stoned, and an orthodox Jew was attacked by a group of Arabs in the vicinity of the Clinic Street synagogue. He was severely beaten and required hospitalization.

Three skinheads broke into the synagogue in the city of Oss, Netherlands, and threatened the worshippers.

Three Molotov cocktails were thrown into a synagogue in 'Les Ulis', a suburb in south west Paris. The synagogue hall on the ground floor was entirely burnt down. The rabbi, who was on the premises, escaped to the second floor and was rescued by the firemen who extinguished the fire.

The Chief Rabbi of Paris received an anonymous call that the 'Tournelle' synagogue in Paris was about to be blown up. The caller later said the threat had been removed but the Jews should watch out.

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The synagogue in the Trappes suburb, near Versailles, was completely burned down, including five *Torah* scrolls, and the nearby cemetery was desecrated.

As mentioned, most of these attacks took place on and around *Yom Kippur*, often during prayers. The list of similar desecrations and attacks is very long, and the above were only examples.

But the attacks were not limited to synagogues and Holocaust memorials. Other Jewish institutions were also targeted: Here are some other examples:

A Jewish library on Landenellestraat Street in Antwerp was attacked on October 9.

The Jewish school 'Bet Jacob' in Mexico City, was stoned and damaged on October 10.

Jewish students were attacked in the Sorbonne University and an Israeli flag was burned on October 11

Also on October 11, an ANC demonstration was held in Cape-Town and cries were heard "Death to the Jews".

On October 12, stones were thrown at a bus driving children from the 'Tenouji' school in the Savigny S/Orge suburb of Paris, and on the same day stones were thrown at night school students who were traveling in a car in Paris, the car windows were smashed.

There were also personal attacks:

On October 12, in Paris, four young Arabs threw four bottles at a man wearing a skullcap and wounded him in the head.

The same evening unknown persons fired bullets from a passing car at an orthodox rabbi who was parking his car near his home.

On the same day in Chicago, three Palestinian youths hit two orthodox Jews with a slingshot.

In Orly, in south Paris, the doors to two Jewish private homes were set on fire.

On October 13, stones were thrown at a Jewish Community Center in Madrid. Four windows were broken.

In the 18th quarter of Paris a gang of youths set fire to a vehicle on which anti-Semitic slogans and swastikas were daubed. Later that night the same gang shattered windows in a shop belonging to a Jew in the same quarter. Stones were also thrown at a kosher restaurant.

On October 16, an orthodox Jew in his twenties was stabbed twenty times with a hunting knife by a man of Algerian origin, in a bus in Stamford Hill in North London. The victim's condition is extremely serious.

While Jewish communities and organizations have condemned this abhorrent wave of anti-Semitism, we, as lawyers and jurists, have a special duty to call for remedial and preventive measures.

We appeal to all governments, parliaments and politicians, to the deans of academic institutions, to educators generally, to the media at large, to all branches of civil society, and to all those with a conscience and sense of moral responsibility, to publicly take a clear and active stand in condemning all forms of anti-Semitism, and particularly the recent wave of anti-Semitic acts that has engulfed many parts of the world.

We urge all those who exercise this responsibility to make a positive effort to induce a culture of tolerance and to promote respect for others.

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We call upon law enforcement bodies to combat vigorously and decisively all anti-Semitic manifestations wherever they occur, to firmly enforce the law against the perpetrators of such criminal actions and to ensure their trial and punishment. We urge that measures be taken to strengthen protection of sensitive locations likely to be targeted, and ensure that action is taken against individuals and organizations responsible for offences perpetrated against Jews and Jewish communities.

We are profoundly convinced that combating anti-Semitism is an integral part of fighting all forms of racism, racial discrimination, xenophobia and related intolerance.

We therefore urge that these grave and widespread occurrences also be submitted for urgent consideration, discussion and appropriate action, at the United Nations World Conference on Racism and Racial Discrimination due to be held in South Africa in September 2001.

Hate propaganda on the Internet continues to be a matter of grave concern to countries that prohibit by law the publication of racist, xenophobic and anti-Semitic material.

In the last issue of *JUSTICE* we reported the proceedings in a French court against Yahoo Inc. In a landmark decision the court has now ruled that *Yahoo* must do what it can to block French users from visiting its auction sites that sell Nazi memorabilia. This ruling buries the old idea that the Internet cannot be regulated. The French judge held that using new technologies one can now divide the Net into geographic chunks and regulate each one separately, and in France, this must be done.

This is not about the suppression of individual freedom online. It is about respecting national sovereignty of countries and laws which reflect the choice of their citizens expressed by their duly elected legislatures.

In this issue of *JUSTICE* we are pleased to publish extracts from the English version of the French judgment. We also note with satisfaction the fact that Yahoo! Inc. has undertaken to cease hosting the *Protocols of the Elders of Zion*, as reflected in the judgment.

We are confident that if similar legal proceedings are initiated in other countries where the Net publishes hate propaganda in contravention of municipal laws, the Internet's big players will change their policy and stop distributing this dangerous material without being coerced into doing so.

*Hadassa Ben-Yahu*

# The Use of Children in Armed Conflict

Alan Baker and Har'el Ben-Ari

One of the tragic and incomprehensible phenomena accompanying the renewed spate of violence between Israel and the Palestinians has been the accentuation by both the international and the Palestinian media of the fact that a relatively large number of Palestinian children have been killed or wounded. Has any consideration been given, however, to the question how, and why these Palestinian children came to be exposed to such dangers? How and why they find themselves on the front lines, in violent confrontations? Why they are not in the safe and natural surroundings of a home, a playground or in school?

There are only two possible answers. Either, as Palestinian spokespersons would have the world believe, Israeli forces have been willfully and unabashedly targeting innocent Palestinian children, intentionally seeking them out and murdering them. Or, these children are being incited, brain washed and deliberately taken out of their homes, schools and playgrounds and sent to the areas of tension, alongside Palestinian rioters, snipers, terrorists, and press photographers - with the express purpose of placing them in the line of fire in a calculated play for world sympathy.

It is clear which of these two possibilities is the more likely. It is clear who stands to benefit from the sympathy and to suffer from the censure that the injury of these children attracts. It is clear who is seeking to deflect world attention from an inherent



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The Office of the Legal Advisor in the Foreign Ministry

unwillingness or lack of ability to take the necessary steps to make peace.

In the eyes of the Palestinian leadership, the fact that their children are being wounded or killed, sad as it may be, is secondary to the fact that the world sees them being wounded or killed. Thus the Palestinians are able to cynically manipulate their media image and that of Israel. Furthermore, while the Palestinians make sure that the wounding and killing of children is captured on film, they are equally active in ensuring that the active Palestinian involvement in committing inhumane acts is not. When foreign correspondents are caught filming footage that could show the Palestinians in a negative light, such as the slaughter of innocent Israelis by Palestinian mobs (an act condoned and even encouraged by religious leaders) or the destruction of Jewish holy sites, the photographers are harassed, beaten or otherwise intimidated, the film confiscated and cameras destroyed. This is the way that the Palestinians cultivate their media image, by martyring their children and bullying those who dare to tell the truth.

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The views expressed are the authors' and do not necessarily represent the views of the Government of Israel. The authors wish to thank Ms. Orna Gabay of the legal office for her assistance in reviewing the drafts of this article.

Yasser Arafat, Chairman of the Palestinian Authority, who is ruthlessly encouraging the tragic involvement of children in the violence, calls them “the generals of the rocks”. He would have the world believe that Israel, with its guns and helicopters, is waging a war against ten-year-olds with small stones. In truth, however, the children are not the generals of this conflict, but, rather, the smoke screen masking the gunmen, petrol-bomb throwers and lynch mobs which have exacted their pound of Israeli flesh, unseen or ignored by the television cameras and the media crews.

Whether the children are seen as the generals of this conflict or merely its cannon-fodder in the Palestinian campaign to discredit Israel, it is clear that the deliberate use of children in armed conflict is reprehensible and entirely contrary to all accepted norms of humanity and international law.

International humanitarian law, as the regulator of conduct in armed conflicts, attaches particular relevance to the protection of children<sup>1</sup> in hostilities. Furthermore, general human rights law also considers the protection of children in armed conflicts as one of its major concerns.<sup>2</sup> The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, incorporates 17 Articles,<sup>3</sup> which afford general protection to children in as much as they constitute “civilians in armed conflicts”. Thus, as a rule, and with the exception of a number of specific provisions of the Additional Protocols to the Geneva Conventions 1977,<sup>4</sup> children, in practice, are afforded protection according to humanitarian law within their general recognized status as civilians.<sup>5</sup>

Within this framework, the relevant provisions of the Fourth Geneva Convention limit the use of methods and means of warfare, distinguish between the civilian population and those participating in the hostilities and prohibit reprisals against civilians, their forcible transfer or assaults upon their dignity.

Changes in the conduct of armed conflicts, occurring since the adoption of the Geneva Conventions, have revealed several *lacunae* in relation to the protection of children. The absence of any prescribed minimum age for child participation in hostilities and the lack of specific additional protection for children caught up in an increasing number of internal armed conflicts<sup>6</sup> were of particular concern. The two Additional Protocols, aimed at diminishing such *lacunae*, provided greater protection for children against the effects of hostilities and for the first time regulated their participation in armed conflicts.<sup>7</sup> The two Protocols thus remarkably establish fifteen as the minimum age

for recruitment, both with regard to international and internal armed conflicts. This standard was subsequently reiterated in Article 38(3) of the Convention on the Rights of the Child (CRC).<sup>8</sup>

International humanitarian law acknowledges that children may participate in armed conflicts in two ways, directly, by engaging them in combat through formal recruitment, or indi-

- 1 It would be difficult to find a unified and universally accepted definition for the term “child”. Nevertheless, it seems to be generally accepted that the age of 15, so frequently used in the Fourth Geneva Convention and its Additional Protocols, provides reasonable measure to distinguish minors from adults - See J. Pictet, *Commentary on the Additional Protocols* (1987), p.p. 899-900, margin 3179. For further analysis of the definition of “children”, especially with regard to the relevant provisions of the Additional Protocols, see Matthew C.E. Happold, “Child Soldiers in International Law: The Legal Regulation of Children’s Participation in Hostilities”, *Netherlands International Law Review*, Vol. XLVII (2000), p. 27, 32.
- 2 Geraldine Van Bueren, “The International Legal Protection of Children in Armed Conflicts”, *International and Comparative Law Quarterly*, Vol. 43 (1994), p. 809, 810, 817-819. See as well M. Bothe, K.J. Partsch, W.A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the Two Protocols Additional to the Geneva Conventions of 1949* (1982), pp. 474-475.
- 3 Articles 14, 17, 23-27, 40, 50, 51, 68, 76, 81, 82, 89, 94 and 132. For a careful analysis of the reasons for the lack of express regulation of the participation of children in hostilities within the Geneva Conventions, see Happold, pp. 29-30.
- 4 Articles 77, 78 of Additional Protocol I and Article 4(3) of Additional Protocol II.
- 5 Van Bueren, p. 811, fn. 13.
- 6 See Bothe, p. 475. In this spirit, the General Assembly adopted in 1974 the Declaration on the Protection of Women and Children in Emergency and Armed Conflicts. However, as it is possible to conclude from the wording of the Preamble of this Declaration, it does not refer directly to the issue of “child combatants”, rather to the protection of children as those “belonging to the civilian population”. It should be noted that although the Declaration has not acquired great normative status, its importance has been measured in the groundwork it provided for the adoption of the specific provisions of the Additional Protocols, as mentioned above - see Van Bueren, p. 811-812.
- 7 See Happold, p. 31.
- 8 The Convention entered into force on 2 September 1990 (signed in New-York, 20 November 1989) and is the most ratified multilateral human rights treaty: 191 States are parties to it (US and Somalia are the only UN members which have not ratified it as of yet). Article 38 reads as follows:



rectly, through an infinite variety of means. Accordingly, international humanitarian law deals, in fact, with two aspects: first, whether it is appropriate that children be recruited into the armed forces; and second, whether it is at all appropriate that they be permitted to participate in armed conflicts.<sup>9</sup>

Although there seems to be some uncertainty as to the precise definition of “recruitment”, many would argue that it means both compulsory and “voluntary enrollment”,<sup>10</sup> so that the parties to the conflict would also be under a duty to refrain from enrolling children under the age of fifteen, who volunteer to the armed forces.<sup>11</sup> Furthermore, it is acknowledged that recruitment does not necessarily imply that children must directly participate in armed conflicts (regardless of the tendency of many to widely

interpret even the scope of such “direct” participation<sup>12</sup>). It is sufficient, under certain circumstances, that they merely be part of the armed forces. In relation to international armed conflicts, Additional Protocol I only provides that children under fifteen should not take “a direct part in the hostilities” (Article 77(2)<sup>13</sup>), while in relation to non-international armed conflicts, Additional Protocol II provides that children under fifteen are prohibited from any type of participation (Article 4(3)<sup>14</sup>).<sup>15</sup>

Article 38(2) of the Convention on the Rights of the Child, does not change the age of recruitment, but merely reiterates the existing norms that establish fifteen as the minimum age of recruitment and **urges** that any recruitment from amongst the 15-18 age group,<sup>16</sup> be among the more senior of that age group. This

“1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. **States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.**

3. **States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.** In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen, States Parties shall endeavor to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law **to protect the civilian population** in armed conflicts’ States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.”.

The provision confirms that the prohibition of recruitment of children under 15 is a “blanket” one, applying in times of peace and war. For a detailed discussion of the customary status of provisions governing the recruitment of children - see Happold, pp. 43-48.

9 Van Bueren, pp. 812-813.

10 Happold argues that in English, the term “recruitment” is broader than the word “conscription”, and therefore covers both voluntary enlistment and conscription into the armed forces. He further maintains that “... the object and purpose of the provision is ... to protect children from the effects of armed conflicts; it is concerned with their welfare. Given this, it becomes immaterial whether a child’s recruitment is voluntary or coerced” - see p. 37-38.

11 See, for example, Bothe, pp. 476-477; Pictet, p. 900, margin 3184-3187 and p. 902 margin 3190; Van Bueren, pp. 813-814, 816.

12 Kalshoven remarkably notes that “... ‘to take a direct part in hostilities’ must be interpreted to mean that the person in question performs warlike

acts **which by their nature or purpose are designed to strike enemy combatants or materiel**; acts, therefore, such as firing at enemy soldiers, throwing a Molotov cocktail at an enemy tank ... and so on.” [emphasis added] - F. Kalshoven, *Constraints on the Waging of War*, (Geneva, ICRC, 1987), p. 91, as cited in Happold, p. 36, fn. 31.

13 The Article reads as follows:

“1. Children shall be the **object of special respect and shall be protected against any form of indecent assault**. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years **do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.** ...”.

14 The Article reads as follows:

“3. Children shall be provided with the care and aid they require, and in particular:

...

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities. ...

(e) measures shall be taken, if necessary, ... to remove children temporarily from the area in which hostilities are taking place to a safer area within the country ...”.

15 For the sources of differences between these two provisions see Happold, p.p. 39-41.

16 Today, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict establishes the minimum recruitment age for the signatory States as 18 years of age. The Protocol, signed by 72 States and ratified by 3, is not yet in force (was opened for signature in New-York on 25 May 2000). In this regard, Happold notes that : “[P]ersons below the age of eighteen are not seen as

article does, however, place a duty to ensure that children under 15 do not participate directly in hostilities.

Today, the Rome Statute of the International Criminal Court<sup>17</sup> details the acts of “conscripting or enlisting children under the age of fifteen into the national armed forces or using them to participate actively<sup>18</sup> in hostilities”<sup>19</sup> as one of “the most serious war crimes of international concern”. Within an international armed conflict, the above act, which will accord the Court jurisdiction (once it is established), constitutes a “serious violation of the laws and customs applicable in international armed conflict”. The Statute further provides that, within an armed conflict not of an international character, the act of “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities”<sup>20</sup> would also be considered a war crime, in serious violation of the laws and customs applicable in armed conflicts.

Clearly, international law portrays a keen normative picture.<sup>21</sup> It affords substantial protection to children in armed conflicts, both in relation to assaults against them and in relation to their actual participation in the hostilities. To a large extent, this protection is primarily based on the fundamental and widely recognized endorsement of the distinction between “civilians” and “combatants”. Thus, children, recognized as a vulnerable group, are safeguarded within the general framework of protection granted to the civilian population. It is this sacred distinction that underlines, *inter alia*, the specific provisions prohibiting the participation of children less than fifteen years of age in hostilities.

The Fourth Geneva Convention affords protection pursuant to the fact that civilians refrain from taking part in the hostilities. Accordingly, it should be recalled that this basic rationale complementarily obligates the sides to a conflict to clearly distinguish between combatants and the civilian population, which does not participate in the hostilities. Providing specific and substantial protection to children, the first Additional Protocol, the provisions of which generally apply also to those who claim to struggle for national liberation,<sup>22</sup> specifically and innovatively prohibits the participation of children in armed conflicts. This Protocol imposes two related obligations: not to recruit children under fifteen into armed forces, and to take “all feasible measures” to ensure that such children do not by any other means take a direct part in the hostilities.<sup>23</sup> The rationale is self-evident:

“...the authorities ...should be conscious of the heavy responsibility they are assuming and should remember that they are dealing with **persons who are not yet sufficiently mature, or even have the necessary discernment of discrimination.**” “The purpose is to **prevent physical or moral injury to children and to ensure that they develop as normally as possible** under the conditions prevailing in armed conflict.”<sup>24</sup> [emphasis added].

having sufficient psychological maturity either to make an informed choice whether to participate in hostilities or to stand the peculiar stresses of combat”. It is this change of perception, he acknowledges, that primarily motivates the recent moves to push the minimum age of recruitment and participation in hostilities up to eighteen - see p. 28.

In this context, it is important to note that on 17 June 1999 the International Labour Conference adopted the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention 182). Article 3(a) of the Convention includes, within the definition of the term “the worst forms of child labour”, the “forced or compulsory recruitment of children for use in armed conflict”. The term “child” in the Convention applies to persons under 18.

17 UN Doc. A/CONF.183/9 (17 July 1998).

18 It is interestingly argued that: “[E]ven though the Rome Conference adopted the language of ‘using them to participate actively’ instead of ‘allowing them to take part’, there is no need of any element of force in using them, and the simple acceptance of using their ‘participation product’ should be sufficient to subsume it under this prohibition” - See M. Cottier, War Crimes - para. 2(b)(xxvi), in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 261.

19 Article 8(2)(b)(xxvi); see also Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add.2 (6 July 2000), p. 37.

20 Article 8(2)(e)(vii); see also Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add.2 (6 July 2000), p. 46.

21 In this context, Happold tentatively concludes that the provisions contained in Article 77(2) of Additional Protocol I became a norm of customary international law - see p. 46-47; Happold further acknowledges the added weight of the inclusion in the Rome Statute of Articles 8(2)(b)(xxvi) and (e)(vii) to his conclusion - see p. 48, fn. 34.

22 See Article 1(4).

23 For further analysis of the scope of these obligations see Happold, p. 35. It seems clear that the scope of the concept “feasible measures”, which incorporates a reference to existing relevant circumstances, should be interpreted in a broadening manner that correlates to the prolongation of the hostilities at hand - see Happold, p. 35.

24 Pictet, p. 901, margin 3185; Bothe, p. 476, respectively.

The same rationale clearly underlines the inclusion of the act of using such minors in armed conflicts as a serious war crime.

As demonstrated, treaty law currently in force establishes fifteen as the minimum age for the participation of children in armed conflicts. The main aim is to protect children involved in one way or another in an armed conflict, from any harmful effect, both by direct protection in the conflict itself and through the attempt to keep them away from the zone of conflict. This aim must include the prohibition of indirect use, or in fact manipulation, of children and the attempt to prevent, as far as possible, any "voluntary" participation by them, by whatever means such voluntary participation is achieved.<sup>25</sup> Bearing that in mind, any argument of "spontaneous participation", maintained over a long period of time, is to be discredited. Moreover, in this light, it is most convincingly asserted that the best interest of the child is the fundamental principle underlining our discussion. Once this guiding principle is adopted, consideration of the character or the type of conflict is no longer relevant.

Most remarkably, it is ironically noted that the standard set by treaty law, indicating fifteen as the minimum age for child participation, appears to be consistent with Islamic law, as those under fifteen are not permitted to participate in *jihad*.<sup>26</sup> Thus, the use of children in armed conflict is in direct contravention of the fundamental sources of Islamic law (*Shariah*), as an analysis of the primary sources of jurisprudence, namely provisions within the *Quran*<sup>27</sup> and the *Sunnah*<sup>28</sup> (both applicable to all sects within Islam), unequivocally leads to the conclusion that the age requirement for participation is fifteen, contingent upon the further manifestation of maturity. That is the case, regardless of any state of emergency, internal strife, or war.<sup>29</sup>

Taking into account the governing features of armed conflicts of our time, which occur, for the most part, not to say the decisive part, in the media - it is maintained that the wide, systematic and continuous use being made of children, principally for the purpose of gaining public opinion (by direct violation of the most fundamental duty to prevent their participation in the circle of violence and in blunt disregard of the requirement to prohibit, as far as possible, their access to the battlefield), indeed amounts to a calculated enrollment of children, and, in fact, their recruitment. Under the prevailing circumstances, where we can clearly identify a conscious and intentional exploitation of the "product of the participation" of children - it seems that any argument of "voluntary" or "spontaneous" participation is not only baseless in reality and cynical, but also ill-founded: such continuous use

and its exploitation/manipulation is tantamount to actual encouragement, and therefore there is no room for any consideration of either elements of "spontaneity" or "voluntarism".

Obligated to the fundamental humanitarian principles, reflecting common values deriving from established customs shared by all nations, Israel seeks to avoid injury to innocent Palestinian civilians, including children, even as it confronts widespread violence directed against it and its citizens. Moreover, with regard to child civilians, Israel's forces respect international law regulating the treatment of civilian populations (including, of course, children) during the conduct of hostilities. The time has come to ask why the Palestinians are not making efforts in order to protect their own children from harm. Indeed, how can those claiming statehood and partnership in the family of nations allow themselves to offend so brutally the principles of humanity and the dictates of public conscience which constitute very basic norms of the family of nations?!

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- 25 In this context, it is enlightening to note that according to the newspaper *AL-QUDS AL-ARABI*, a representative of the "Women's Empowerment Project" (NGO), in charge of the programme for family planning in Gaza, has reported that Palestinian women consciously give birth to a large number of children, because they foresee that some of them might die in clashes with Israeli forces. According to this newspaper article, the same representative emphasized that while some of the children might indeed wish to die for their cause, others are victims of society's pressure on them to take part in the hostilities - see *AFP* (Gaza), "Children of the Intifada Fail the Family Planning Project", *AL-QUDS AL-ARABI* (London), 8 November 2000, p. 5 (Arabic). Furthermore, *AL-HAYAT AL-JADIDA* reports that the 'FADA' party students' bureau organizes, in the Jericho district, weapon training courses for school children, boys as well as girls - see "Jericho FADA Students' Bureau Organizes Courses for Pupils", *AL-HAYAT AL-JADIDA* (London), 8 November 2000, p. 2 (Arabic).
- 26 See Van Bueren, p. 815; Maryam Elahi, "The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier", *Columbia Human Rights Law Review*, Vol. 19 (1988), p. 259. According to Elahi, the *Jihadist* is required to be male, sane, mature, economically-independent and strong. Describing the relevant provisions of the *Quran*, she acknowledges that Mohammad had categorically excused children from participating until the age of fifteen - see Elahi, pp. 273-274.
- 27 Words of God as revealed to the Prophet Mohammad - see Elahi, p. 265.
- 28 Mohammad's words, deeds, and customs - see Elahi, p. 265.
- 29 Elahi, pp. 265, 269, 274.
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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. In this issue of *JUSTICE* we continue reporting on the addresses delivered during the Conference. More reports will follow in the next issue of *JUSTICE*.

# Jewish Perspectives on Democracy and Human Rights

Rosalie Silberman Abella

I want to start with an unequivocal and proud confession: my perspective on this conference's theme - the pursuit of justice - is profoundly shaped by the fact that I am Jewish. Being Jewish and being a lawyer merges for me not into an *interest* in social justice and human rights, but a passion for them; not into a sense of entitlement, but a sense of duty.

Why should being Jewish make a difference? Because of the differences in our history. First and foremost, we experienced the Holocaust. I know that Jews are sometimes told they are too preoccupied with the Holocaust. This is a complaint I simply cannot understand. How can *anyone*, let alone any Jew, stand accused of being preoccupied with the greatest injustice civilization has

witnessed. Or of being preoccupied with trying to ensure for the rest of the world the tolerance and rights denied to 6 million victims. The pursuit of justice is the pursuit of the elimination of injustice, and the greatest injustice experienced by Jews was the Holocaust.

The Holocaust was the defining event of the *last* century, but its lessons will - and should - resonate for centuries to come. Human rights in our lifetime *cannot* be understood without appreciating its conceptual proximity to the concentration camps of Europe. It was the Holocaust's brutal offence to tolerance and human dignity that provided the moral inspiration for the creation of a just *rule* of law.

The result, just over 50 years ago, was the triangular triumph of the Universal Declaration of Human Rights, the Genocide Convention, and the Nuremberg principles. These were the responsive forms of justice which reared their heads from the Holocaust's atrocities and roared their outrage. But where



once they represented majestic idealism and miraculous regeneration, today they wistfully represent the distances not yet travelled.

It is true that we have made remarkable progress and are immeasurably ahead of where we were 50 years ago in many, many ways. But we have still not learned the most important lesson of all - to try to prevent the abuses in the first place.

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Mrs. Rosalie Silberman Abella is a Justice of the Court of Appeal for Ontario, Canada. These are highlights from her presentation at the Toronto Conference.

All over the world, in the name of religion, domestic sovereignty, national interest, economic exigency, or sheer arrogance, men, women, and children are being slaughtered, abused, imprisoned, terrorized, and exploited. With impunity.

We have no international mechanism to prevent the ongoing slaughter of children and other innocent civilians, and no overriding sense of moral responsibility that informs us and helps develop a consensus for when responsive military action is required to protect human rights. We have, in fact, no consensus on what our international moral responsibilities are, and that is why we are so desperately lacking in enforcement mechanisms, legal or otherwise.

Fifty years after the codification of the Nuremberg principles, we still have not developed an international moral culture which will not tolerate intolerance. The gap between the values the international community articulates and the values it enforces, is so wide that almost any country that wants to can push its abuses through it. No national abuser seems to worry whether there will be a "Nuremberg" trial later, because usually there is not, and in any event, by the time there is, all the damage that was sought to be done has been done. How can we teach people to value morality when there is no reward for compliance and no punishment for its violation? How can we teach people to deliver and expect justice when there are no predictable consequences in the international community for its absence? Why hasn't the Holocaust - the single most outrageous crime in civilized history - created a desperate, unquenchable thirst for enforceable international norms that make human rights abuses intolerable anytime and anywhere they occur?

But of even greater concern to me, because it feels both more immediate and more immediately soluble, is the lassitude and backlash to human rights closer to home. Aside from the occasional exuberance for rights that is reflected in a conference such as this, we seem in recent years to have allowed human rights to move from its confident primacy in the centre of the justice picture to the defensive margins of the canvas.

When I went to law school and started practising law, people who believed in human rights were in the mainstream and were called progressive; those who did not were marginalized. Today, human rights proponents are called biased radicals, opponents are called impartial realists. Something happened to the human rights parade we thought was unstoppable a generation ago, a casualty of thinning crowds and unpopular floats.

I want to offer two theories to explain why the enthusiasm for human rights appears to have become sclerotic. The first is confusion between civil liberties and human rights theories, the second is confusion from change.

The human rights story in North America, like many of our legal stories, started in England. The rampant religious, feudal and monarchical repression in seventeenth century England inspired new political philosophies like those of Hobbes, Locke, and eventually John Stuart Mill, philosophies protecting individuals from having their freedoms interfered with by governments. These were the theories of civil liberties which came to dominate the "rights" discussion for the next 300 years. They were also the theories which journeyed across the Atlantic Ocean and found themselves

firmly planted in American soil, receiving confirmation in the Declaration of Independence guaranteeing that every "man" enjoyed the right to life, liberty and the pursuit of happiness, and that government existed only to bring about the best conditions for the preservation of those rights. Thus was born the essence of social justice for Americans - the belief that every American individual had the same right as every other American individual to be free from government intervention. To be equal was to have this same right. No differences.

The individualism at the core of the political philosophy of rights articulated in the American constitution ascribing equal civil, political, and legal rights to every individual *regardless* of differences, became America's most significant international export, and the exclusive rights barometer for countries in the Western world. It was formal equality, it ignored group identities and realities, and indeed regarded collective interests as subversive of true rights. Concern for the rights of the individual monopolized the remedial endeavours of the pursuers of justice all over the world.

It was not until 1945 that we came to the realization that having chained ourselves to the pedestal of the individual, we had been ignoring rights abuses of a fundamentally different and at least equally intolerable kind, namely, the rights of individuals in different groups to retain their different identities without fear of the loss of life, liberty or the pursuit of happiness.

It was World War Two which jolted us permanently from our complacent belief that the only way to protect rights was to keep government at a distance and

protect each individual individually. What jolted us was the horrifying spectacle of *group* destruction, a spectacle so far removed from what we thought were the limits of rights violations in civilized societies, that we found our entire vocabulary and remedial arsenal inadequate. We were left with no moral alternative but to acknowledge that individuals could be denied rights not in spite of, but because of their differences, and started to formulate ways to protect the rights of the group.

We had, in short, come to see the brutal role of discrimination, a word we had never and could never use in a concept like civil rights that permitted no differences, and invented the term "human rights" to confront it.

So we blasted away at the conceptual wall that had kept us from understanding the inhibiting role group differences played and extended the prospect of full socio-economic participation and accommodation based on - and notwithstanding - group differences. But having decided half-way through this century to endorse a commitment to diversity as integral to our understanding of rights and justice and community, why did we appear to be abandoning the commitment as the century closed?

What we appear to have done, having watched the dazzling success of so many individuals in so many of the groups we had previously excluded, is concluded that the battle with discrimination has been won and that we can, as victors, remove our human rights weapons from the social battlefield. Having seen women elected, appointed, promoted and educated in droves; having seen the winds of progress blow away segregation and apartheid; having permitted parades

to demonstrate gay and lesbian pride; having constructed hundreds of ramps for persons with disabilities; and having, in Canada at least, invited aboriginal people to participate in constitutional discussions we had started to protect *other* distinct cultures, many were no longer persuaded that the diversity theory of rights was any longer relevant, and sought to return to the simpler rights theory in which everyone was treated the same. We became nostalgic for the conformity of the civil liberties approach, and frightened by the way human rights had dramatically changed every institution in society - from the family to the legislature.

This, I think, is at the heart of the backlash and why we are marginalizing human rights, because unlike civil liberties, which re-arranges no social relationships and only protects our political ones, human rights is a direct assault on the *status quo*. It is inherently about change - in how we treat each other, not just in how government treats each of us. And so we started to yearn for the rights that are less expensive, less confusing, and less frightening. The intellectual baskets into which we place information once again took the shape of civil rights, and we ended by dismissively calling a differences-based approach - reverse discrimination, or political correctness, or an insult to the goodwill of the majority and to the talents of minorities, or a violation of the merit principle. Personal aspirations, we became convinced, would be realized by those who deserve them, and no one qualified would be turned away. Civil rights trumps human rights. Social and economic Darwinism trumps social and economic reality.

The backlash to change grew accord-

ingly, accompanied by a strident chorus of those who felt their *status quos* had been too severely violated by our rearrangements. The irony is that having dedicated the last five decades to promoting human rights and tolerance, we have come over time to do such a good job that we learned to tolerate even intolerance. Anxious to squelch the realigning generosity of opportunity, the forces of intolerance proclaimed that their patience had run out and that it was time to return to truth, as they understood it.

The truth is, there are still built-in headwinds for those who are different, who are thwarted in their conscious choices by stereotypes unconsciously assigned, and who cannot be expected to understand why the evolutionary knowledge we came to call human rights has suffered such swift Orwellian obliteration. We have forgotten the courage our outrage after the Second World War gave us to expand our understanding generosity, and have, I fear, been lulled into a false sense of complacency by the formidable human rights successes that resulted from our post-war courage.

We know from history that all rights, especially in their infancy, are fragile and need nurturing. Democratic communities need their civil liberties rigorously protected, but unless they also protect their human rights, they do a disservice to justice. Of course we need the right to vote and think and speak freely, but no less do we need the right to eat and work and aspire freely. Before we relinquish the lessons of history to those who fear its transforming vision, before we allow the civil libertarian spirit to hold us in exclusive thrall, and before we are lured into intellectual lassitude by the

successes of the lucky and the tenacious, we need to remember the rights lesson of the Second World War: the enormity of its intolerance shocked us into a new understanding of diversity; we should need no more shocks to retain that understanding.

Ignoring the contributions our diversity offers to the social texture is incomprehensible; but ignoring the lessons of history is unforgivable.

I am the child of Holocaust survivors. We came to Canada from Germany in 1950 as Jewish refugees and benefitted enormously from Canada's generosity.

Several years ago I went to Poland for the 50th anniversary of the Warsaw Ghetto uprising when my husband Irving was President of the Canadian Jewish Congress. Poland was haunting. You could almost hear the voices. Everywhere we went we knew millions

had been, had laughed, had planned, had loved, had wept. I saw the streets my parents grew up on, and walked the 800-year-old halls of the law school in Krakow from which my father graduated in 1934. I xeroxed his diploma, the pages that listed his marks, his professors, his courses - and his religion in three places. I accepted with tears the poignant comment of the archivist who said, "It was hard to be a Jewish student in those days." I persuaded the bureaucrat in the record office of my father's town to give me a copy of the sheet of paper listing the names of the Jewish families and where they had lived, a list prepared so their properties could be conveyed to the Polish residents left in the town. I spent a day with the 81-year-old non-Jewish woman whose brother had been my father's best friend and who told me about his family. I visited Treblinka

where his parents three brothers and 2-year-old son were killed.

I found out where and what I had come from. I found out who I was and why I was. It was very painful, but from the pain came a sense of strengthened resolve. I truly felt "never again." Not to me, not to my children, not to anyone.

No one with this history does not feel lucky. No one with this history can take anything for granted.

We have a gift: we are alive. We can still use our voices. We can never forget how the world looks to those who are vulnerable. And that is really all it takes to keep the fire lit under human rights - the memory of the horror when they do not exist. The memory inspires us, but it is an inspiration we should never let anyone else experience.



Deputy Prime Minister of Canada Herb Gray addresses the plenary meeting of the Toronto Conference

# The Struggle for Control: Is it Possible to Restrict and Control Access to the Internet?

Bernard M. Farber

**L**ike a walk through the *Shuk* or the *Kasbah*, today's Internet offers the very best of whatever the heart desires. Without leaving the comfort of your office or living room, and by finding the right news group, chat room or web site, today's computer-literate society can travel to Paris, tour the Louvre, climb Mount Everest, chat with Al Gore and Joseph Liberman and even download recipes from world famous chefs.

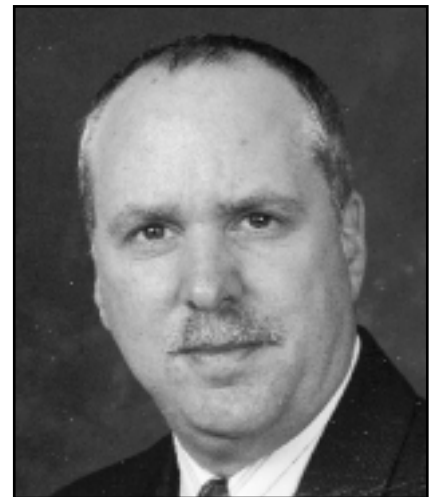
However, the dark side of the equation is bleak indeed. Sexual predators, hustlers, scam artists, child pornographers and hate mongers also populate cyberspace, thankfully on its periphery.

Some argue that the Internet is but a mirror of the world. Good and bad, intelligent and stupid, love and hate, are part of the society we live in and, therefore, one should not be surprised to find them on the super information highway or at least the gravelly side roads.

However, in the real world we have to

deal with issues of responsibility, sensitivity, and the balancing of rights. These are accomplished through various means. In free and democratic societies the best possible choice to ensure one's rights are respected is through a combination of law with individual and corporate responsibility.

For example, newspapers, radio and T.V., and other forms of inter-global communications have established various sets of guidelines which give definition to what it will print, broadcast or communicate. Here, in this province, newspapers fall under the auspices of the "Ontario Press Council". Where editors and journalists have crossed the bounds of decency, the Press Council will adjudicate and decide on appropriate sanctions if necessary. Even within certain large newspapers, codes and guidelines have been worked out. For example, The *Toronto Star* has established what has become known as "Advocacy Advertising Guidelines". These guidelines assure that specific religious minorities, visible and other vulnerable minorities are not targeted by the unscrupulous to promote hatred, contempt or religious conversion. In broadcasting, the CRTC ensures that radio and T.V. meet the standards



expected by a decent society. As a result, the likes of Ernst Zundel, James Keegstra and Malcolm Ross would never be given air time to expound on their hateful views, at least not in Canada.

Even ham radio operators must abide by an international set of guidelines in order to receive a radio operators licence. Citizen band radio operators have similar regulations.

This brings us to the Internet. Many suggest that the technology of the Internet transcends man-made law and therefore the Internet, unlike newspapers, radio and T.V., etc., cannot be so easily controlled. Other purists demand that the

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Internet be left untouched as the last domain of free expression in the communications frontier.

All of us fully understand the complexities of Internet technology - the ways in which one can hide in the Internet world and be close to invisible; the difficulties in clearly identifying those who post abhorrent messages, like garish billboards, on the super information highway. Some have even suggested that this technology makes it impossible in any way to police or control the Net. Yet, only last year, we note that a man was convicted in Toronto for downloading pornographic pictures of children on the Internet for others to view. So policing does take place and at least, in this case, was technologically viable.

Many ask why not? In Canada and many other democratic countries around the world there are laws dealing with child pornography, hate mongering, copyright, fraud, *etc.*, all serving as a means by which we choose to live. If the Internet is part of society, should it not be subject to society's laws?

In recent years there have been significant decisions by Internet servers: firstly *CompuServe's* resolution to shutdown a number of news groups dealing with sexual pornography on the Net and secondly a more recent determination by *Deutscher Telekom* to close down Ernst Zundel's web site in Germany.

On the first issue of sexual pornography, *CompuServe* announced that it had closed access worldwide to more than 200 Internet user groups, the vast majority of which dealt specifically with child pornography, as a result of a request from a Munich prosecutor who warned that *CompuServe* could be held legally accountable for distributing

illegal sexual material in Germany. This was historically the first time that a government's action led to a worldwide ban on the Internet.

In the second case that of the notorious Canadian landed immigrant and Holocaust denier Ernst Zundel, the T-online service of *Deutscher Telekom* claimed that it voluntarily blocked access to "Zundelsite", the worldwide web page operated by this anti-Semite. However, it should be noted that this action occurred shortly after a Mannheim Germany state prosecutor warned *Deutscher Telekom* that it was investigating whether or not the service was "helping to incite racial hatred" which is a crime in Germany.

*Deutscher Telekom* has more than one million customers in Germany and it has bitterly complained that it is unreasonable for the German government to hold the server responsible for anti-Semitic material appearing on one of its worldwide web pages. While many of us might argue as to the efficacy of the big hand of government censoring the Internet, I am sure that at one and the same time we understand the power of the hateful word and the possibility that such hatred can result in assault, violence and even death. One need only look at the bombing of the Alfred P. Murrah Federal building in Oklahoma City just a few years ago. We now know that the perpetrators of that horrendous crime gained most of their information including the knowledge of how to construct the bomb itself from the Internet.

The real question in this case is whether it was necessary for the heavy hand of state-sponsored censorship to be invoked or if on second sober reflection

other, less intrusive, means were available.

In this light, it is absolutely necessary to understand the concerns of vulnerable minorities. A while back, the Jewish public library of Montreal in cooperation with the Canadian Jewish Congress, Quebec Region, held a seminar dealing with the promotion of racial tolerance in the world of cyberhate. Rabbi Abraham Cooper, Associate Dean of the Simon Wiesenthal Centre, explained to the audience that well-known hatemonger Tom Metzger, leader of something called the "White Aryan Resistance (WAR)" and a resident of Fallbrook California, spent most of his 20-year career as a hate-monger distributing flyers on street corners and operating a telephone hate-line from his home. Some time ago he went online. For the first time in his career as one of America's most notorious hatemongers, Metzger and his new partner, his son John, had a way to reach a worldwide audience, specifically targeting youth. Glenda Carmen, one of our communications associates at the Canadian Jewish Congress, in a recent paper she prepared dealing with hate online noted that "since going online, the 'White Aryan Resistance' has had more exposure and a membership growing at a faster pace than Tom Metzger's previous group did in its 20-year history". It should be remembered that it was Tom Metzger's group, WAR, which was found liable, to a tune of 12 million dollars, for inciting a group of neo-Nazi skinheads to murder a young Ethiopian immigrant in Portland, Oregon.

Similarly, Ernst Zundel, has become known worldwide as the "father-figure of Holocaust denial". Young neo-Nazis and white power advocates look up to Herr

Zundel and blindly follow his hateful advice. In the past, Zundel's ability to access the young was strictly curtailed both in Canada and in many areas around the world. Even in the U.S. satellite T.V. cancelled his Holocaust denial program following complaints from viewers. With the advent of "Zundelsite" - his egotistically named website - high school students and many others need only type in the word "Nazi" or even "Holocaust" onto their web browser and pull up pages and pages of anti-Semitic Holocaust denial garbage. Zundel's dream of being able to spread his poison worldwide has become today's nightmare.

So what can be done? What should be done? The Canadian Jewish Congress has held that those who post on the Internet in this country are subject to the laws of the land. In relation to hate proliferation on the Internet, Sections 318 and 319 of the Criminal Code, our anti-hate laws, do apply. Section 13 of the Canadian Human Rights Act, which has jurisdiction over "hate and contempt transmitted telephonically" (*i.e.* through telephone wires, *i.e.* modem) can also be utilized if the section is violated and proper evidence is available. Once again the law of the land must apply to all equally. While there may be many who are uncomfortable or in fact disagree with the philosophy behind these laws, none of us, Zundel included, have the right to wilfully break the law. We are, of course, cognizant of the fact that for the most part such laws are very difficult to implement when it comes to the Internet. News posts and other messages pass through a myriad of computer servers making them extremely hard to trace. And as we all know if one really wanted to hopscotch our laws, hate messages can

be placed on BBS's and other web pages emanating from countries where anti-hate laws do not exist.

Nonetheless, despite these difficulties, it is not presently the position of the Canadian Jewish Congress that new law is required. We still believe that our present law along with corporate and consumer responsibility can go a long way in addressing computer hate and pornography.

Even in the United States, where the First Amendment protects American citizens and allows almost unfettered freedom of speech, as pointed out recently by the Simon Wiesenthal Centre in Los Angeles, the First Amendment:

"... does not obligate newspapers, television stations, and indeed Internet providers to publish materials editors and servers consider false, inflammatory hateful and unfair. Indeed, the First Amendment protects publishers and others from having to publish material they consider unsuitable for their publication."

Interestingly, the Simon Wiesenthal Centre in L.A. has recently come under attack by those who felt that this well-respected organization was promoting "censorship" of the Net. Once again, let us take a second sober look at what the Wiesenthal Centre was actually suggesting. Associate Dean of the Centre, Rabbi Abraham Cooper, in a letter sent to presidents of various Internet servers across North America, noted that when it comes to newspapers and magazines the onus of responsibility to ensure that hateful and pornographic material was not published rested with the publisher. Cooper suggested that with freedom of the press comes respon-

sibility. Therefore, writes Cooper, "most newspaper chains and broadcast networks have developed clear guidelines and codes of ethics". The Simon Wiesenthal Centre then continued to suggest that Internet providers should themselves develop "guidelines and codes of ethics" that would deal with this very topic. In fact, as far back as March 16, 1995, through an article I co-authored with the Chair of the National Community Relations Committee of the Canadian Jewish Congress, lawyer Hal Joffe from Calgary, that was published in *The Globe and Mail*, we commented on the idea of large Internet service providers considering a form of self regulation.

The Wiesenthal Centre has put forward a draft it calls the "Internet Provider's Code of Ethics". It reads as follows:

"The Internet is an unprecedented technological tool which for the first time in history has democratized communications throughout the world. It provides tens of millions of people with the tools to communicate freely and share their ideas with an audience whose size and diversity was previously unimagined. It is the embodiment of the concept of an international market place of ideas.

As such it deserves to be encouraged and protected from those who would abuse it. There are those who use this incredible power to promote violence, threaten women, denigrate minorities, promote homophobia and conspire against democracy. Internet providers have a First Amendment right and moral obligation not to provide these groups with a platform for their destructive propaganda.

Given the unprecedented potential and scope of the Internet, we consider it our civic duty to terminate service to any

individual or group which exploits our services to incite mayhem or racist violence”.

The Simon Wiesenthal Centre has asked for discussion and input, not an unreasonable request by any standard.

In April of 1984 on a cold downtown street in Metropolitan Toronto, two scruffy neo-Nazis by the name of Don Andrews and Robert Smith stood on a street corner, handing out leaflets which claimed “God has bestowed his greatest gifts only on the white people”; “if it were God’s plan to create one coffee-coloured race of humanity it would have created from Genesis”; “all those who urge a homogenous race mixed planet are in fact working against God’s will”; “violent crime is increasing in proportion to the increase of minority immigrants coming to our country” - “a high propor-

tion of violent crimes are committed by blacks”; “Canada is being swamped by coloureds who do not believe in democracy and harbour a hatred for white people”; “Zionists fabricated the Holocaust hoax and dominate financial life and resources in this country and we cannot remain in good health because this alien community’s interests are not those of the majority of citizens either culturally or economically”.

As a result, police charged these two individuals and eventually they served time in jail after being convicted under Canada’s anti-hate laws. Along with the *Keegstra case*, *Andrews & Smith* resulted in Canada’s Supreme Court upholding as constitutional Canada’s anti-hate laws.

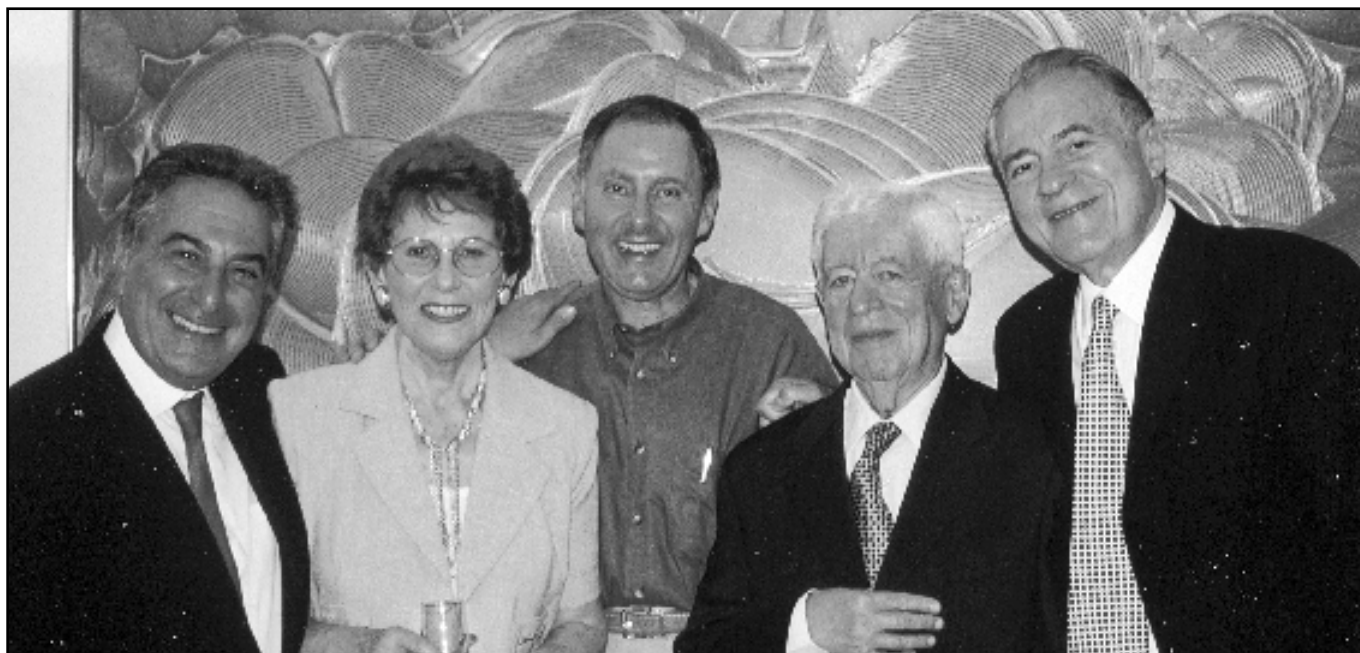
Last week, while cruising the Internet, I pulled up the following message:

“Dowse them with gasoline and burn

his fro. Hit him with a flashlight and kick him in the head. Just make sure that niggers dead. Big-lipped chicken eating melon stealing bast. I can’t wait to kill a nigger with a shotgun blast”.

“Nigger your termination is growing near with my shotgun I invoke fear. I’ll blast you in the legs then blast you in the head, I’ll laugh at you nigger till your ass is dead. I am near now you’re out of luck. I’ll cripple you nigger crush your skull. It’s so much fun to watch you tremble and fall. You are worth nothing, nigger, zero, zip. You should be on the farm under a whip. I hate all niggers the way they behave. Whites are superior beings nigger are slaves. Kill that nigger he’s worse than a fag. Blast him in the head with a 44-mag”.

No action has ever been taken against the individual who posted this message.



At the conference reception (L to R): Deputy President Joseph Roubache, France; President Hadassa Ben-Itto, Israel; Vice President Igor Ellyn, Canada; First Deputy President Itzhak Nener, Israel; Jerome Shestack, President of the American Section

# Secular Justice and Religious Law

Dow Marmur

I begin with an expression of discomfort. If the title of this session juxtaposes **secular justice** to **Jewish law**, exponents of Judaism have reason to be troubled. Jewish tradition would normally not juxtapose secular *tsedek*, justice, to Jewish *din*, law, but the other way around. Though Judaism does recognize secular and non-Jewish *tsadikim*, just persons, it regards non-Jewish jurisprudence primarily as *din*, law. It does not believe that secular justice could ever be superior to Jewish justice, because Jewish justice is rooted in the will of God and secular justice - by definition - is not. Jews are bidden to pursue justice because God is just. *Imitatio dei*, to imitate God, is what it takes to be a Jew. But Jews may have to endure different systems of law - both in the Diaspora and in Israel.

Jewish tradition does accept, of course, that Jewish and non-Jewish law differ and it addresses the question how Jews, committed to Jewish law, should act when faced with the power of secular legislation in the countries where they live. However, the title of this session implies an order of priorities which some

would describe as characteristically assimilationist, because it assumes that justice stands outside the realm of Judaism.

It takes a Christian theologian to put us right on this point. Miroslav Volf of Yale Divinity School has written that the ancient image of *Justitia*, “the angelic woman with a blindfold, sword in her right hand and scales in the left” implies that the passionate God who has made a unique covenant with the people of Israel is unjust. From the perspective of the so-called Judeo-Christian tradition such an assertion is untenable.<sup>1</sup>

It is important that a convention of Jewish jurists does not succumb to self-negation. Though I am opposed to many manifestations of Jewish law, I do so in the conviction that Jewish justice brings us much closer to what it means to be a responsible human being than does secular justice - and that this is the case even when a particular secular law may be closer to Jewish justice than a Jewish law. To the extent that I oppose Jewish laws - never Jewish law as such - I do so as a radical, an insider who - as the term “radical” suggests - tries to go to the root of things, and that root is always *tsedek*, justice.

## Dina D’malchuta

Below I shall confine myself to

remarks about conditions in the Diaspora as they affect Jewish life today. Being a liberal rabbi I shall further limit myself to the particular liberal perspective, as we encounter it in the West. The basis of what I have to say on the subject is the traditional understanding of the statement in *Deuteronomy* - “*tsedek tsedek tirdof*, justice, justice shall you pursue” (16:20) - to mean, “*tsedek tsedek tirdof*, justice **with** justice - that is, by just means - shall you pursue”.

The *locus classicus* in all such discussions is the *dictum* in the name of Samuel, the third century sage, at least four times cited in the Babylonian Talmud: “*Dina d’malchuta dina*, the law of the land is the law”.<sup>2</sup> But as Berachyahu Lifshitz of the Hebrew University has rightly pointed out, “it should not be inferred from this that Babylonian law was generally applied in Jewish courts, but rather that it was applied only in particular instances (on the details of this there is considerable scholarly debate)”.<sup>3</sup> In other words,

Rabbi Dow Marmur, Rabbi Emeritus, Holy Blossom Temple, Canada, addressed the panel on “Secular Justice and Religious Law”.

1 Miroslav Volf, *Exclusion and Embrace* (Nashville: Abingdon Press, 1996), 220f.

2 *Nedarim* 28a; *Gittin* 10a; *Bava Kamma* 113a; *Bava Batra* 54b.

3 Berachyahu Lifshitz, “The Age of the Talmud” in N.S. Hecht etc. (editors), *An*

though Samuel's words are often quoted, they should not be taken as a general principle in Jewish law that overrides other principles.

The *din* of the state does not overrule the *tsedek* of the covenant between God and Israel. The particular instances when the law of the land might be legitimate had to do with civil law, not with religious law. Thus, no secular law could be tolerated by Jewish authorities if it were to compel a Jew, for example, to abandon Sabbath observance; or ignore *Yom Kippur* by decreeing another date for the commemoration; or to force a Cohen to marry a divorcee. God's law could never be allowed to be superseded by the king's law.

Though instances of the appearances of Jews in Gentile courts are frequent throughout Jewish history - and the sources refer to it often - there is little to suggest that the Jewish authorities welcomed it. The weekly portion *Mishpatim* is named after its opening sentence: "*V'eleh hamishpatim asher tassim lifneyhem*, these are the rules that you shall set before them" (*Exodus* 21:1). Tradition understood this to mean that only **you Israel** can enforce the law to the members of the covenant of Israel. Nobody else. Thus even if a Roman court would judge in accordance with Jewish law, such judgment would be unacceptable to Jews, because the judgment was made by non-Jewish judges. As Rabbi Eleazar ben Azariah is quoted to have said: "You [Jews] may judge their cases but they [Gentiles] are not to judge your cases".<sup>4</sup>

Writing about Jewish law in Spain before 1300, Eliav Shochetman, also of the Hebrew University, states: "The prohibition on appearing before non-

Jewish tribunals, and the strong stand taken by Spanish rabbis against any attempt to subvert it, produced a situation in which appearance of Jewish litigants before a non-Jewish tribunal was an extremely rare phenomenon".<sup>5</sup> Jews did their utmost to persuade non-Jewish authorities to allow the Jewish community its own judicial system.

### The Get and Reform Judaism

This is, of course, not the case in our day and age. Jewish self-government, which made it possible for rabbis in Spain and elsewhere to prevent Jews

**Though instances of the appearances of Jews in Gentile courts are frequent throughout Jewish history - and the sources refer to it often - there is little to suggest that the Jewish authorities welcomed it.**

from going to Gentile courts, is a matter of the past. Though some individuals may in rare cases still take civil disputes to a *din torah*, a rabbinic court of arbitration, Jews of all religious persuasions use the court system of the countries in which they live.

In America, some Jews have also extended this procedure to matters of family law, notably divorce. The late Solomon B. Freehof, who in many ways tried to alert American Reform Judaism to the significance and force of Jewish law, was nevertheless unequivocal on the validity of the civil divorce. Listing

objections to the way divorce is being administered by Orthodox rabbinic courts - e.g., the inequality of husband and wife and the miserable lot of the *agunah*, the abandoned wife who cannot remarry - Freehof has written:

"For these reasons the Reform movement has turned away from the traditional laws of divorce, classifying the divorce laws with all the civil laws governing business relations which were an important part of Jewish law when all of Jewish life, religious and secular, was governed by Jewish law. These civil laws are now under the principle of *dina d'Malchusa dina*, i.e., the law of the land is the law with regard to civil law. Similarly, divorce (so argued the early Reformers) must no longer be considered a religious matter but a civil matter. Besides, it is the true function of the rabbi to solemnize marriage and not break it. Divorce should also be under the control of civil law and the rabbis have nothing to do with it".<sup>6</sup>

Though Freehof listed complications, especially when it comes to the relationship between Reform and the other religious movements in American Judaism, he was not prepared to go further than to suggest that "consideration of the religious scruples of Orthodox and Conservative congregations should impel the Reform rabbi to refuse to

*Introduction to the History and Sources of Jewish Law* (Oxford: Clarendon Press, 1996), 187f.

4 Mekhilta deRabbi Ishmael, *Mishpatim* 1.

5 Hecht, *etc. op.cit.*, 274.

6 Solomon B. Freehof, *Reform Jewish Practice and its Rabbinic Background* (New York: Union of American Hebrew Congregations, 1960), 106.

marry members of other congregations whose rabbi refuses to marry them".<sup>7</sup>

Of course, no rabbi of whatever persuasion will go **against** the law of the land in anything, even in matters of family law. Thus, as rabbis in North America (not necessarily in Europe) are licensed by the civil authorities to perform marriages, they are not likely to perform ceremonies that the state does not sanction. Hence, for example, even rabbis who advocate same-sex marriages will not issue marriage certificates to such couples as long as the law of the state does not allow it. They may try to devise alternative "ceremonies," but they usually go out of their way to stress that these are not marriages. Things may be different when the law of the land changes, but that is precisely my point: Jews do not go against the law of the land.

Similarly, rare would be the instance when a *Beth Din*, a rabbinic court, would effect a *Get*, a traditional Jewish divorce, without the parties concerned first having obtained a civil divorce. But it does not work the other way around: Other than in American Reform, no rabbi would officiate at a marriage of a woman who, though divorced civilly, has not been given a *Get* by her former husband. If she nevertheless marries and has children, such children would be regarded as *mamzerim*, bastards, in all Orthodox and perhaps also in many Conservative congregations.

This is not the place for reflections on the tensions between the various groups in Judaism other than to point out that the Reform understanding of *dina d'malchuta dina* to apply to divorce is a serious obstacle to Jewish unity today. Those rabbinic authorities which, for

whatever reason, choose not to recognize Reform conversions can always convert the persons concerned according to their criteria. But once a child has been born to a woman who had no *Get* from her previous Jewish husband, virtually no remedy is available.

A growing number of Reform rabbis are sensitive to this situation. Therefore, they recommend an Orthodox *Get*, especially in cases, where the woman is likely to have children in her second marriage. Their aim is to prevent the stigma of *mamzerut*. Even though they themselves do not accept the category of *mamzerut*, they do not want to make it difficult for children who, for whatever reason, may wish to choose Orthodoxy later in life.

Though this may be politically self-deprecating on the part of the Reform rabbi, it is a true expression of religious liberalism in that it prevents individuals - in this case, as yet unborn children - from having their choices limited by circumstances beyond their control. And in all cases, the Central Conference of American Rabbis (the Reform rabbinic body) has in its Manual a "Ritual of Release".<sup>8</sup> Though it's not a traditional *Get*, the ritual nevertheless acknowledges the role of the rabbi in matters of divorce - in addition to the determination by the civil authorities - and contrary to Freehof.

Had Orthodox rabbinic authorities been more lenient in their ways of dealing with women wishing to obtain a *Get* - seeking to solve the problem of *agunot* and generally attempting to create as much symmetry as possible between men and women - most Reform rabbis would probably wish to cooperate. Of course, the Orthodox rabbinate in Israel would have to lead on this and that is not likely at present.

But that is far beyond the scope of this article, which has aimed (1) to draw attention to the shift in our approach to secular law as a result of the changes in the status of the Jews in the Diaspora; and (2) to remind ourselves of the new problems that this shift has created in the relationship between the different streams of Judaism in the Diaspora.

<sup>7</sup> *Ibid.*, 109f.

<sup>8</sup> Rabbi's Manual (New York: Central Conference of American Rabbis, 1988), 97ff.

## From the Association

### Mayer Gabay Elected President of the UN Administrative Tribunal



The Association congratulates Mayer Gabay, Chairman of the Council of the Association, on his election as President of the UN Administrative Tribunal.

# Update on Human Rights Decisions in Israel

Yaffa Zilbershats

**T**hree important legal events which occurred at the end of 1991 and the beginning of 1992 have had a great impact on Israel's constitutional law in general, and the law of human rights in particular.

First, in 1991, Israel ratified five major human rights conventions including the two 1966 Covenants on Civil and Political Rights and on Economic Social and Cultural Rights.<sup>1</sup>

Second, in March 1992, two new Basic Laws on human rights were enacted: Basic Law: Freedom of Occupation<sup>2</sup> and Basic Law: Human Dignity and Liberty.<sup>3</sup> Third, in April 1992, the *Knesset*, (the Israeli legislature) adopted a new Basic Law: the Government<sup>4</sup> which changed the system of electing a Prime Minister and added new important provisions regarding the emergency situation in Israel.<sup>5</sup>

In this article, I will try to show how these three events influenced the court when dealing with human rights issues. However, first, I shall elaborate briefly on each event in order to explain its potential influence.

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## The Human Rights Conventions

The fact that Israel has ratified the conventions does not mean that they automatically become part of the Israeli domestic legal system. Conventions are considered part of Israeli law only if after ratification they are enacted as law by the *Knesset*.<sup>6</sup> To date, none of these conventions has been enacted as law by the *Knesset*. Only customary rules of international law automatically become part of the law of the land when they are not in conflict with explicit Israeli domestic laws.<sup>7</sup> Thus, as long as the human rights



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1 The 1966 International Covenant on Economic Social & Cultural Rights was ratified on Oct. 3, 1991, published both in Hebrew and English in *Kitvei-Amana* 1037; the 1966 International Covenant on Civil and Political Rights was ratified on Aug. 18, 1991, published in *Kitvei-Amana* 1040; the 1989 Convention on the Rights of the Child was ratified on Aug. 4, 1991 and published in *Kitvei-Amana* 1038; the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was ratified on Aug. 4, 1991 and published in *Kitvei-Amana* 1039; the 1979 Convention Against the Elimination of All Forms of Discrimination Against Women, which came into force for Israel on Nov. 2, 1991, was published in *Kitvei-Amana* 1035; Israel is also a party to the 1966 International Convention on the Elimination of All Forms

of Racial Discrimination which was ratified on Jan. 3, 1979 and published in *Kitvei-Amana* 861.

2 *Sefer-Hahukim* 1387, for an unofficial English translation see: Haifa: A.G. Publ., 1999, 3rd ed.

3 *Sefer-Hahukim* 1391, for an unofficial English translation see: *ibid*.

4 *Sefer-Hahukim* 1396, for an unofficial English translation see: *ibid*.

5 *Ibid*, Sections 49-50.

6 C.A. (Civil Appeal) 25/55, *The Custodian of Absentee Property v. Samara*, 10 P.D. 1829; C.A. 439/76, *Kupath Holim Maccabi v. State of Israel*, 31(1) P.D. 770, 777; *Kawasma v. Minister of Defence [Second Phase]* 35(1) P.D. 617, 627; *Jamait Askan v. Commander of the IDF Forces in the Judea and Samaria Region* 37(4) P.D. 785, 793.

7 M. (Motion) 41/49 *Shimshon v. Attorney General*, P.D. 143, 145-146; Cr. A. 174/54 *Stampfer v. Attorney General*, 10 P.D. 5,17;

conventions ratified by Israel are also part of customary international law, they may be considered to be part of the Israeli legal system even when not specifically enacted as law by the *Knesset*.<sup>8</sup> One should bear in mind that according to rules of interpretation developed in Israeli case law, the court has the obligation to interpret Israeli laws in a way that will implement, as far as possible, Israel's international legal obligations.<sup>9</sup>

## Two Basic Laws on Human Rights

The fact that Israel did not have any constitutional legislation on human rights until 1992, does not mean that there was no human rights protection within the Israeli legal system. Many regular laws of the *Knesset* did provide for the observance of social rights,<sup>10</sup> equality rights<sup>11</sup> and other basic human rights.<sup>12</sup> In addition, the Supreme Court, when sitting as the High Court of Justice, explicitly declared in its judgements the existence of basic human rights such as freedom of speech,<sup>13</sup> freedom of movement and the right to leave a country,<sup>14</sup> freedom of occupation,<sup>15</sup> equality,<sup>16</sup> etc.

Once the rights were recognized by the Supreme Court as basic rights, the courts implemented them when interpreting statutes to the extent that the language of these statutes allowed.<sup>17</sup> But when the statutes clearly and explicitly violated the rights, the Court did not grant relief. It was hinted in the late eighties in a few *dicta* that the Court might consider invalidating laws which violated basic human rights but actually the Court did not do so.<sup>18</sup> It was just quite recently, in 1995, that the Supreme Court in a civil appeal wrote the Israeli version of *Marbury v.*

*Madison* in which it provided explicitly that a court in Israel can annul a law if it infringes basic human rights for an improper cause and to an extent that exceeds what is necessary.<sup>19</sup>

This case, the *Mizrahi Bank case*, actually gave meaning to the new Basic Law: Human Dignity and Liberty enacted in 1992. It did not speak specifically of the other Basic Law: Freedom of Occupation, but since both laws were similar in their structure although not totally identical, one may actually learn by analogy from this case about the scope of both laws. The two main rationales that may be deduced from the *Mizrahi Bank case*, in which the Court was asked to decide upon the validity of a law seemingly infringing the right to property, are:

1. That the Basic Laws of Israel (eleven in number) make up the Constitution of Israel, a question highly debated and not decided until the *Mizrahi Bank case*.<sup>20</sup>
2. That Section 8 of Basic Law: Human Dignity and Liberty which provides that "Rights under this law must not be infringed, except by a law that complies with the ethical values of the State of Israel, which has a valid purpose, and to an extent that does not exceed what is necessary..." actually confers upon courts the authority to annul laws which violate one of the elements required by that section.<sup>21</sup> (Basic Law: Freedom of Occupation Section 4 is similar to Section 8 of Basic Law: Human Dignity and that is how one may reach the same conclusion with regard to laws violating freedom of occupation).

It should be pointed out that the Court

prior to the *Mizrahi Bank case* gave relief with regard to human rights issues in another two ways, additional to the interpretation of laws just mentioned:

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- H.C. (High Court) 606/78 *Ayub et al v. Minister of Defence et al*, 33 (2) P.D. 113, 120, 129 (*the Beth El case*), *Kawasma, ibid*, *Askan, ibid*.
  - 8 See the *Ayub, Kawasma and Askan cases, ibid*.
  - 9 Cr. A. 336/61 *Adolf Eichman v. The Attorney General*, 19 P.D. 2033, 2041; Cr. A. 7048 *Plonim v. The Minister of Defence* (not published).
  - 10 Compulsory Education Act 1949, 3 LSI (Laws of the State of Israel) 1125; Hours of Work and Rest Law 1951, LSI 125.
  - 11 Women's Equal Rights Law 1951, 5 LSI 171; Equality of Opportunities in Labour Law 1988, 42 LSI 31.
  - 12 Secret Monitoring Law 1974, 33 LSI 141; Protecting of Privacy Law 1981, 35 LSI 136.
  - 13 H.C. (High Court) 73/53. *Kol Ha'am v. The Minister of Interior*, 7 P.D. 871; H.C. 680/88 *Schnitzer v. The Chief Military Censor*, 42 (2) P.D. 617.
  - 14 H.C. 111/53 *Kaufman v. The Minister of Interior*, 7 P.D. 534.
  - 15 H.C. 1/49 *Bejarano v. The Minister of Police* 2 P.D. 80; H.C. 75/76 *Hilron v. The Committee for the Production and Marketing of Fruit*, 30 (3) P.D. 645.
  - 16 H.C. 153/87 *Shakdiel v. The Minister of Religious Affairs*, 42 (2) P.D. 221; H.C. 104/87 *Nevo v. National Labour Court*, 44 (4) P.D. 749; H.C. 168/91 *Murcus v. The Minister of Defence*, 45 (1) P.D. 467.
  - 17 *Ibid*, note 13 and see also H.C. 953/87 *Poraz v. Shlomo Lahat*, 42 (2) P.D. 309.
  - 18 H.C. 889/86 *Cohen v. The Minister of Labour*, 41(2) P.D. 540, 543; H.C. 142, 172/89 *Laor v. The Chairman of the Knesset*, 44 (3) P.D. 529, 544.
  - 19 C.A. (Civil Appeal) 6821/93 *United Mizrahi Bank v. Migdal*, 49 (4) P.D. 221.
  - 20 *Ibid*, paragraphs 24-27, 35-36 of Judge Samgar's opinion, para. 3 of Judge Bach's opinion, para. 38-39, 50-51 of Judge Barak's opinion.



1. The Court insisted that an unavoidable infringement of a basic right must be authorized by the legislature. The government has no authority to infringe the individual's rights if the law does not permit it.<sup>22</sup> This principle found its way explicitly into the language of the above mentioned Sections 8 and 4 providing that: "Rights under this Law must not be infringed, except by law..."
2. The Court stated the principle that the government and its administrative branches have to act in a reasonable manner. One major way to fulfil the reasonableness requirements is by adhering to human rights norms.<sup>23</sup> This principle developed consistently by the judiciary for many years also found its way into the two Basic Laws on human rights in sections providing that: "Each and every governmental authority must respect the rights under this Basic Law".<sup>24</sup>

To sum up this point I would note that the Israeli Supreme Court prior to the *Mizrahi Bank case* had developed a mechanism for the protection of human rights by: 1. providing explicitly in its decisions which human rights are basic norms to be respected; 2. interpreting laws so as to implement the rights in so far as possible; 3. insisting that any infringement of the rights should have an explicit authorization from the legislature; and 4. imposing upon the administrative authorities the duty to act in a reasonable manner. The Supreme Court has now added a new mechanism, that of judicial review of statutes. The Court based its decision upon its interpretation of the newly enacted Basic Laws on human rights.

As stated in the beginning of this article, there were three recent developments in the human rights field. We have spoken about the adoption of the international conventions, the enactment of the Basic Laws on human rights and we still have to elaborate on the new law regarding the legal state of emergency in Israel.

When the State of Israel was established in 1948, the first enactment made by its provisional legislature was the Law and Administration Ordinance.<sup>25</sup> This Ordinance provided in Section 9 that the legislature could proclaim the existence of a formal state of emergency. Such proclamation enabled the government to issue emergency regulations which could contradict a law. The legislature proclaimed a state of emergency in May 1948,<sup>26</sup> and this proclamation remained in force in Israel for decades. It was only in 1992 that the new Basic Law: the Government provided that the original formal proclamation could not remain in force forever, the *Knesset* had to issue a new proclamation.

According to the new law, such new proclamation cannot exceed one year and if it is required for longer, the *Knesset* will have to issue a new proclamation which too cannot be for longer than one year.<sup>27</sup> It should be noted that, as a consequence of a recent appeal to the Supreme Court sitting as the High Court of Justice, demanding the cancellation of the formal proclamation of the state of emergency in Israel, the government undertook to shorten the next proclamation and ensure that it would not exceed six months.<sup>28</sup> The possibility that Israel will be absent a legal proclamation of a state of emergency does not seem unreal. This will have two important consequences:

1. The government will have no further authority to make regulation which contradict laws;
2. Laws the application of which is dependent upon the existence of the state of emergency will no longer be in force; for example, the Israeli law enabling preventive detention provides that it will cease to be in force once the proclamation of the state emergency is no longer in effect.<sup>29</sup>

21 *Ibid.*, para. 44-45 of Judge Shamgar's opinion, para. 9 of Judge Bach's opinion, para. 77, 83 of Judge Barak's opinion.

22 H.C. 98/54 *Lazrovich v. The Food Supervisor* 10 P.D. 40; H.C. 122/54 *Axel v. The Mayor of Natanya* 8 P.D. 1524; Cr. Case (Jerusalem) 3471/87 *The State of Israel v. Kaplan*, 1988 (2) District Courts Decisions (Pasam) 265; H.C. 355/79 *Katlan v. Prisons Authority* 34 (3) P.D. 294; H.C. 337/81 *Miterni v. The Minister of Transportation* 37 (3) P.D. 337; H.C. 789/78 *Offek v. The Minister of Interior*, 33 (3) P.D. 480.

23 H.C. 389/80 *Dapey Zahav (Yellow Pages) v. The Broadcasting Authority*, 35(1) P.D. 421.

24 Section 11 of Basic Law: Human Dignity and Liberty, *supra* note 3; Section 5 of Basic Law: Freedom of Occupation, *supra* note 2.

25 Law and Administration Ordinance 1948, 1 LSI 7.

26 Official Gazette No. 2 P. 6 of May 19, 1948 (in Hebrew).

27 Basic Law: the Government, *supra* note 4, Sections 49-50.

28 This information is based on 1999-2000 Annual Report of the Association for Civil Rights in Israel.

29 For example, Emergency Powers (Detention) Law, 33 LSI 89 provides in Section 1: "This Law shall apply in a period in which a state of emergency exists in the state by virtue of a declaration under Section 9 of the Law and Administration Ordinance 5708-1948".

## Leading Cases Dealing with Human Rights Issues

Having briefly looked at the three major developments in the human rights field in Israeli law, I now turn to the very recent Supreme Court decisions dealing with human rights issues. I will show how the above developments have influenced these human rights decisions.

I will start with two cases dealing with the rights of children. The first, the *Bakoo case*,<sup>30</sup> is about two young children who were beaten almost daily by their mother since the mother believed that this was the best way to educate them. All three judges sitting in this case decided to convict the mother of assault, but the question was whether she should also be convicted of abuse of a minor or person under her care. Two of the three judges who decided this case, Judge Beinisch who wrote the decision and President Barak who assented, believed that the mother abused her children while Judge England dissented. When giving the reasons for her decision Judge Beinisch stated that beating children as a means of education should be absolutely prohibited in our society. She based this conclusion on modern social and psychological theories of education and on the International Convention on the Rights of the Child which Israel ratified in 1991 and which explicitly prohibits any physical or mental violence against children. Judge Beinisch also mentioned that the absolute prohibition on parents using violence against children can be deduced from Basic Law: Human Dignity and Liberty since human dignity includes the dignity of every human being including the weak and the helpless. According to Judge Beinisch, parents who beat their children actually violate the children's right to dignity.

While this case may be criticized as being too general or too far reaching, one cannot ignore the influence on this decision of the recent obligations Israel took upon itself in international law and in constitutional law. Both the Convention on the Rights of the Child and Basic Law: Human Dignity and Liberty formed the pillars of this decision.

In another case, a civil appeal and not a criminal one, the Supreme Court found a father liable in tort towards his children for neglecting and ignoring them during their childhood.<sup>31</sup> The children's mother had committed suicide when they were very young, and the father, who had remarried and established a new family, rejected any contact with the children from his first marriage. The children had a very traumatic childhood and as adults could not lead normal lives. They sued their father for failing to fulfil his legal obligation to educate them and for his lack of care.

Judge England who wrote the decision for the Court was aware of the fact that he was writing a radically new decision for which he did not find any precedent either in Israel or in any other democratic legal system. He was also aware of the fact that allowing civil suits by children for the misconduct of their parents is very problematic since almost every person has criticism of the way he was brought up and this can be a slippery slope leading to interference with the privacy and autonomy of the family cell. However, he believed that this was a very extreme case where the father cruelly refused to have any contact with his needy children. In such a clear case the father owed his children damages.

In contrast to the *Bakoo case* where Judge Beinisch mentioned both the new

Basic Law and the international convention, Judge England in this case did not refer to either of these legal sources. Nonetheless, I believe that at the back of his mind these developments in the law of the human rights of children must have had an impact on his decision.

From cases of human rights within the family I will now move to cases of human rights in forming a family unit. The question whether two people of the same sex may be considered a family unit was indirectly treated by the Israeli Supreme Court in two cases. In one recent case,<sup>32</sup> two women, Israeli citizens, resided in California. One gave birth to a child there and the other adopted him and was registered in his birth certificate as an additional parent. The women returned to live in Israel. The clerk in the Israeli population registry refused to register the adoption since in his view it was impossible for a child to have two mothers. Judge Dorner (with whom Judge Beinisch agreed) thought that the clerk had no authority to refuse the registration because every adopted child has two mothers: a natural one and an adopting one. Judge Dorner also believed that by refusing to register the adopting mother the clerk made a decision that two people of the same sex cannot form a family, an issue not yet decided by the Israeli legal system and one which the clerk had no authority to

30 Cr. A. 4596/98 *Natalie Bakoo v. The State of Israel* (not yet published).

31 C. A. (Civil Appeal) 2034/98 *Amin v. Amin* (not yet published).

32 H.C. 1779/99 *Nicole Brener Kadish v. The Minister of Interior* (not yet published).

decide. On the other hand, Judge Zuabi believed that since no Israeli court had ratified the validity of the Californian adoption, the clerk had no authority to register it.

This case follows an earlier decision handed down in 1994 in which the Court said that the airline El-Al cannot avoid giving financial benefits to the partner of a worker because such partner is of the same sex.<sup>33</sup> The Court based its rationale on the Israeli Equal Opportunities in Work Law which provides that an employer cannot discriminate against his workers for certain reasons including their sexual inclination.

Although the judges who wrote the opinion for the majority in these two cases tried to stress that they were giving a narrow decision relevant only to the specific issues of these cases, one cannot ignore the fact that the two cases are a first step in the recognition by the Israeli Court of the rights of homosexuals and lesbians. Since the Court refrained from making general statements on these issues and for policy reasons preferred to write narrow decisions, one will not find in these cases general human rights declarations inferred from the Basic Laws or from the international conventions, but I assume that the ground for these decisions was prepared by the liberal atmosphere which the laws and conventions created.

The above two cases actually concern the right to equality in the context of non-discrimination for sexual preference. It is very interesting to note that Basic Law: Human Dignity does not list the right to equality among the enumerated rights. It should be mentioned that the two Basic Laws were enacted without a wide consensus having been obtained

and without either the Members of Parliament or the people in Israel being aware of the fact that a very important constitutional move was taking place. After many attempts since 1963 to enact a Basic Law on human rights the opponents (who mainly belonged to the religious parties) agreed to compromise and support a very narrow law; thus, the original draft was altered and did not include very basic rights such as freedom of speech, freedom of religion, and equality. Whether these rights are included in the existing Basic Law as part of either human dignity or liberty is debatable; the Court has not yet decided clearly on the matter since it has not been asked to invalidate laws which violate these rights. But, equality as a human right which must be respected by the administrative authorities was explicitly recognized by the Israeli courts many years ago and has recently been dealt with in a variety of important cases.

### Equality - Minorities

The Court has dealt with questions of equality between the Arab minority and the Jewish majority directing the authorities to make sure that the Arab communities in Israel receive the same amount of money as Jewish ones for maintaining their cemeteries.<sup>34</sup> In another case, the *Ka'adan case*<sup>35</sup> the Court criticized the policy of the Israeli authorities of not allocating state lands to the Arab population while allocating them to Jews. The Court granted relief to an Arab couple who wished to receive a lot in the new Jewish settlement Katzir. While this case was applauded by some as advancing equality between Arabs and Jews in Israel, others criticized it for interfering with the Zionist goal of estab-

lishing Jewish towns and settlements in Israel.

### Equality - Orthodox and Non-Orthodox Jews

Additional questions concerning equality were recently decided by the Court with regard to the relations between orthodox and non-orthodox Jewish communities in Israel.<sup>36</sup> Women belonging to a non-orthodox Jewish community wished to pray in front of the Western Wall (the *Kotel*) once a month, on the first day of the month (*Rosh-Hodesh*), wearing a *Talit* and reading aloud from the *Torah*. The ultra-orthodox Jews praying daily at the *Kotel* objected to such a prayer since it is against their tradition and they acted in a violent manner whenever the women tried to pray covered with a *Talit* in front of the *Kotel*. The women petitioned the Israeli Supreme Court sitting as the High Court of Justice and asked the Court to order the authorities to make arrangements so that they could pray as they wished every *Rosh-Hodesh* before the *Kotel*. The first petition was presented in 1989 and the Court delivered its decision in 1994. The majority judges decided in 1994 that the women had a right to pray as they wished before the *Kotel*, but Judge Shamgar,

33 H.C. 721/94 *El-Al v. Danilovich*, 48 (5) P.D. 749.

34 H. C. 1113/99 *Adallah v. The Minister of Religious Affairs* (not yet published).

35 H. C. 6698/95 *Ka'adan v. Israel's Lands Administration* (not yet published).

36 H. C. 3358/98 *Hoffman v. General Director of the Prime Minister's Office* (not yet published).

who was sensitive to the objections of the ultra-orthodox Jews, suggested that the case be referred to a committee which would decide upon the arrangements for the women's prayers. The committee came to the conclusion that the prayers should take place not exactly in front of the *Kotel* but a little further away. The committee based its decision on the probability that such prayer before the *Kotel* would lead to a violent reaction by the ultra-orthodox Jews and on Judge Elon's minority view in the 1994 case that the *Kotel* is a synagogue in which traditional praying habits should not be broken. The women were not ready to accept the committee's solution and they again petitioned the Supreme Court which very recently decided to reject the committee's conclusions and order the authorities to allow the women to pray once a month wearing a *Talit* in front of the *Kotel*.

## Human Rights and National Security Considerations

Three important recent cases have dealt with questions of human rights and national security in Israel.

In the first case, the *Rubinstein case*,<sup>37</sup> decided in December 1998, the Court decided once and for all that the general exemption from military service given by the Minister of Defence to the ultra-orthodox Jews who declared that they study *Torah* as a way of life would expire one year from the date of the decision. This exemption is as old as the State of Israel and it was created when the famous orthodox Rabbi, the Hazon-Ish, asked Ben-Gurion to exempt *Yeshiva* students from military service because there was a major need to rebuild the

*Yeshivot* which were destroyed in the Second World War in Europe. From that time on, any ultra-orthodox Jew who decided not to join the army at the age of 18, could declare that he studied *Torah* full time and thus postpone his military service; this actually meant an almost total exemption from the army. Over the years, the number of such *Yeshiva* students increased and a spate of petitions were submitted to the Supreme Court asking it to order the Minister of Defence to stop this discriminatory practice. For many years the Court did not recognize their standing<sup>38</sup> and later, when allowing standing, decided that such petitions were not justiciable.<sup>39</sup> It was only in 1987, for the first time, in the *Ressler case*<sup>40</sup> that the Court decided to deal with the issue. Its conclusion, however, was that at the time the number of *Yeshiva* students not drafted into the army did not endanger national security and the Minister's decision to exempt them from service had to be respected as it achieved a proper balance between equality and freedom of religion.

Time passed and the number of *Yeshiva* students increased. A new petition was submitted to the Court to declare the Minister's exemption practice unreasonable.<sup>41</sup> This time, the Court, correctly, in my opinion, did not want to take upon itself the responsibility of invalidating this discriminatory practice and decided to shift the task to the legislature. Basing its decision on Basic Law: Human Dignity and Liberty, the Court held that the Defence Minister's exemption practice concerns important matters and touches upon questions of human rights and thus should be dealt with by the legislature. The Court gave the legislature one year (which was extended for

an additional six months) to enact a proper law which achieves a balance between the conflicting issues arising out of drafting the ultra-orthodox population into the army.

Actually the Court applied here its classic, well known, long standing rule of protecting human rights by insisting that any infringement of the rights should be based on explicit legislature.

The second case dealing with human rights and the national security situation in Israel relates to the human right not to be tortured.

The interrogation methods of the Israeli Secret Services involved the use of physical force against the persons interrogated. This practice was developed by the Secret Services without any basis in law. The Supreme Court, in a recent decision,<sup>42</sup> analyzed these methods and reached the conclusion that they amounted to acts of torture and inhuman and degrading treatment prohibited both by the Torture Convention which Israel had ratified and by the concept of human dignity enshrined in Basic Law: Human

37 H. C. 3267/97 *Amnon Rubinstein v. The Minister of Defence* (not yet published).

38 H. C. 40/70 *Israel Bekker v. The Minister of Defence* 24 (1) P.D. 238; H. C. 197/82 *Ressler v. The Minister of Defence*, 36(4) P.D. 421.

39 H. C. 448/81 *Ressler v. The Minister of Defence* 36 (1) P.D. 81; Second Phase 2/82 *Ressler v. The Minister of Defence*, 36(1) P.D. 708.

40 H. C. 910/86 *Ressler v. The Minister of Defence*, 22 P.D. 441.

41 *Supra* note 37.

42 H. C. 5100/94 *The Public Committee Against Torture v. The Government of Israel* (not yet published).

Dignity and Liberty. The Court ordered the Secret Services to refrain from using any such methods, but added that if the state wishes to allow the use of any physical force in interrogations, the same must be explicitly provided by law.

The third case dealing with national security and human rights was also greatly influenced by international law.<sup>43</sup> The Supreme Court sitting as a High Court of Justice came to the conclusion that holding Lebanese detainees in preventive detention solely for use during negotiations for the release of Israeli prisoners of war and soldiers missing in action actually meant that the

detainees were being held as hostages, and this was prohibited by international law norms binding upon Israel.<sup>44</sup>

All laws in Israel should be interpreted so as to give effect to international law norms unless absolutely prevented by the language of the law. The Israeli law which enables preventive detention is the Emergency Powers (Detention) Law 1979. The Court came to the conclusion that in order to give effect to international law, this law should be narrowly interpreted so as to provide that only persons who are likely to endanger the security of Israel may be held in preventive detention. People such as the

Lebanese detainees who were being held in detention solely for use in negotiations, were hostages and current Israeli

43 Second Phase Cr. 7048/ 97 *Plonim v. The Minister of Defence* (not yet published).

44 This case was actually a further hearing. In the first hearing President Barak and Judge Kedmy decided that holding people in preventive detention so as to be used in negotiations for the return of our prisoners of war was legitimate. Only Judge Dorner dissented. Her dissent became the basis for the majority opinion in the further hearing decided by nine judges. Seven judges including President Barak, who admitted that he had changed his mind, adhered to



Parcel-gilt silver Hanukah lamp, Warsaw, M. Nowakowski, 1825-1856



Silver Hanukah lamp, Germany, circa 1920-1930

law does not permit holding them in preventive detention.

When the family of Ron Arad, an airforce navigator missing in action, petitioned the High Court of Justice against the decision to release the Lebanese detainees, the Court clarified that the present law does not allow holding such people in preventive detention, but if the *Knesset* legislated a new law, the outcome might be different.<sup>45</sup>

## Concluding Remarks

The cases surveyed here indicate that the Israeli Supreme Court has recently followed a very intensive agenda on human rights issues. The rights of the child, equality rights, freedom of religion, the right not to be tortured and the right not to be held in custody as a hostage have been implemented by the Court.

Many of the matters dealt with by the Court touch upon highly controversial issues within Israeli society. The drafting of the ultra-orthodox to the IDF, the rights of non-orthodox Jewish women to pray according to their rules near the *Kotel*, the question whether the Secret Services may use force in their interrogations and whether Arabs should receive land within Jewish settlements are all issues upon which views in Israeli society are divided.

When the Court granted relief in these cases it was not asked to invalidate a law of the *Knesset*. All the petitions to the Supreme Court sitting as the High Court of Justice in these cases, were directed against acts of the administrative branch of the government. The Court based its decisions in many of these cases on the new international obligations which Israel has taken upon itself in the field of

human rights. The Court also spoke in almost every case about the administrative branch's duty to protect human rights enshrined in the new Basic Laws of 1992. The fact that the administration cannot claim national security considerations and thus obtain automatic approval from the Court is consistent with the approach of reevaluating the legal consequences of the state of emergency in Israel. However, the main constitutional change that took place in 1992, as indicated by the Court in the *Mizrahi Bank case* in 1995, that of judicial review of statutes, was not the issue in these important human rights decisions.

This relief has been little used by the Court up to the present.<sup>46</sup> This may be coincidental but it may also be a policy followed by the Court in order to let the public and the legislature adjust to the new relief of judicial review of statutes which was quite controversial when declared by the Court in the *Mizrahi Bank case*.

Since the cases presented here touch upon controversial issues one must expect legislation reacting to their outcome. It should be noted that in some instances, such as the last three cases dealing with human rights and national security (the drafting of ultra-orthodox to the IDF, the use of force in Secret Service interrogations and the holding of enemy guerrilla soldiers in preventive detention), the Court expected legislation and even requested legislative regulation of the matter.

Today, the *Knesset* is in the midst of a process of reacting to some of the cases discussed here and legislating on the issues of drafting the ultra-orthodox to the IDF, taking into custody guerrilla soldiers, using force in Secret Services interrogations and allowing light corporal

punishment of children for educational purpose. The *Knesset* may also initiate legislation on other topics such as the Arab minority's freedom to choose a residence or the rights of the Jewish non-orthodox movements in Israel.

One should expect that the validity of these new laws will be attacked in Court. In such a situation, the Court will have a very heavy burden. On one hand, it's commitment to the protection of human rights will probably lead to decisions to invalidate some of the laws. On the other hand, the Court will have to be very sensitive to the reaction of the *Knesset* which may end up restricting the Court's authority to review laws if the Court acts too broadly while reviewing these controversial laws of the *Knesset*.

At the beginning of the new millenium and the second jubilee of the State of Israel and second decade to the enactment of the Israeli Basic Laws on human rights, we still do not know how the Court will handle human rights petitions when requested to review statutes. I hope we can all meet in ten years or even earlier to satisfy our curiosity.

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Dorner's opinion in the first hearing while two Judges, Kedmi and Heshin dissented.

45 H. C. 2967/00 *Batia Arad v. The Knesset* (not yet published).

46 The Court has invalidated one section in the 1995 Investment Counseling and Portfolio Management Law which imposed too heavy a burden on senior investment counselors, see H.C. 1715/97 *The Chamber of Investment Counselors v. The Minister of Finance* (not yet published) and also one section in the Military Justice Law 1955 which allowed soldiers to be held in detention for 96 hours before being brought before a judge (the Court suggested a maximum of 48 hours), see: H. C. 6055/95 *Saggi Zemah v. The Minister of Defence* (not yet published). ■



# YAHOO to Block Access of French Surfers to Nazi Memorabilia Sites

Interim Court Order No. RG : 00/05308

The League against Racism and Anti-Semitism (Licra), and the French Union of Jewish Students v. The Company YAHOO! Inc.; the Company YAHOO France

Before Jean-Jacques GOMEZ, First Deputy Justice Presiding in the County Court of Paris

Given on 20th November 2000

(Translated extracts)

## Judgement

We, the Presiding Justice,

Considering our order of 22nd May 2000, to which reference shall expressly be made and wherein we ordered :

1. YAHOO Inc.: to take all necessary measures to dissuade and make impossible any access via *yahoo.com* to the auction service for Nazi merchandise as well as to any other site or service that may be construed as an apology for Nazism or contesting the reality of Nazi crimes
2. YAHOO France: to issue to all Internet surfers, even before use is made of the link enabling them to proceed with searches on *yahoo.com*, a warning informing them of the risks involved in continuing to view such sites;
3. continuance of the proceeding in order to enable YAHOO Inc. to submit for deliberation by all interested parties the measures that it proposes to take to put an end to the trouble and damage suffered and to prevent any further trouble;

Considering our order of 11th August 2000, to which reference shall be made insofar as it sets out the facts of the case as well as the arguments and claims of the parties.

Considering the submissions made by LICRA, UEJF and MRAP and reiterated at the hearing of 6th November 2000 in pursuit of their case as already set forth in our previous order;

## On the demands placed on YAHOO Inc.

*Whereas* in the opinion of the company YAHOO Inc. :

- this court is not competent to make a ruling in this dispute;
- there are no technical means capable of satisfying the terms of the order of 22nd May 2000;
- on the assumption that such means existed, their implementation would entail unduly high costs for the company, might even place the company in jeopardy and would to a degree compromise the existence of the Internet, being a space of liberty and scarcely receptive to attempts to control and restrict access;

*Whereas* in support of its incompetence plea, reiterated for the third time, the company YAHOO points out that:

- its services are directed essentially at surfers located in the territory of the United States of America;
- its servers are installed in the same territory;
- a coercive measure instituted against it could have no application in the United States given that it would be in contravention of the First Amendment of the United States Constitution which guarantees freedom of opinion and expression to every citizen;

*Whereas* it is true that the "Yahoo Auctions" site is in general directed principally at surfers based in the United States having regard notably to the items posted for sale, the methods of payment envisaged, the terms of delivery, the language and the currency used, the same cannot be said to apply to the auctioning of objects representing symbols of Nazi ideology which may be of interest to any person wishing to participate in such activities, including French people;

*Whereas*, furthermore, and as already ruled, the simple act of displaying such objects in France constitutes a violation of Article R645-1 of the Penal Code and therefore a threat to internal public order;

*Whereas*, in addition, this display clearly causes damage in France to the plaintiff associations who are justified in demanding the cessation and reparation thereof;

Whereas YAHOO is aware that it is addressing French parties because upon making a connection to its auctions site from a terminal located in France it responds by transmitting advertising banners written in the French language;

Whereas a sufficient basis is thus established in this case for a connecting link with France, which renders our jurisdiction perfectly competent to rule in this matter;

Whereas any possible difficulties in executing our decision in the territory of the United States, as argued by YAHOO Inc., cannot by themselves justify a plea of incompetence;

Whereas this plea will therefore be rejected;

Whereas, on the argument developed by YAHOO and based on the impossibility of implementing technical measures capable of satisfying the terms of the order of 22nd May 2000, it is necessary to cite in the first instance the findings of the panel of consultants:

## Opinion of the Consultants

### The context

An order was made on 22nd May 2000 against the companies YAHOO! France and YAHOO! Inc. by the County Court of Paris in the following terms:

*We order the company YAHOO! Inc. to take all measures to dissuade and make impossible any access via Yahoo.com to the auction service for Nazi objects and to any other site or service that may be construed as constituting an apology for Nazism or contesting the reality of Nazi crimes;*

*We order the company YAHOO FRANCE to warn any surfer visiting Yahoo.fr, even before use is made of the link enabling him or her to proceed with searches on Yahoo.com, that if the result of any search, initiated either through a tree structure or by means of keywords, causes the surfer to point to sites, pages or forums of which the title and/or content constitutes a violation*



Silver Hanukah lamp, Continental, 20th Century



Silver Hanukah lamp, Frankfurt, 18th Century



*of French law, as applies to the viewing of sites making an apology for Nazism and/or exhibiting uniforms, insignia or emblems resembling those worn or displayed by the Nazis, or offering for sale objects or works whose sale is strictly prohibited in France, the surfer must desist from viewing the site concerned subject to imposition of the penalties provided in French legislation or the bringing of legal action against him. "*

The company YAHOO! France declared that it had complied with this decision. The company YAHOO! Inc. pointed out that there was no technical solution which would enable it to comply fully with the terms of the court order.

A panel of experts was then designated to enlighten the Court on the various technical solutions that could be implemented by YAHOO! Inc. in order to comply with the order of 22nd May.

### Internet

The Internet is a combination of several hundred million computer networks and associated sites which are interconnected throughout the world. The routers are computers dedicated to the interconnection of these networks. The number of computers using the Internet at any one time is estimated at one hundred million, and three times more if one includes portable computers, office computers, organisers, mobile telephones, etc...

A set of procedures was defined in the period between 1973 and 1980 under the control of the US defence research laboratories (DARPA). These procedures, referred to as TCP/IP, are the core of several hundred protocols used by the Internet.

In the late 80's, CERN developed the World Wide Web (WWW) which uses a set of complementary procedures - the HTTP protocols and HTML language - to set up this global information-sharing system.

The most common applications include electronic mail (email), forums (newsgroups), dialogue services (chat), auction services, online telephony, video and audio, together with many other services.

It is a common misconception that all Internet services are provided *via* the World Wide Web. In reality, the Web is only one facet of the Internet.

The Internet, which started out as an experimental project used and developed by computer researchers, has become a global business enterprise within the space of ten years. Internet service providers (ISPs) have established and operate networks open to the general public. Private networks in universities,

companies, and even home computers are now interconnected by internet services providers to form a truly global network. Some service providers specialised in providing access to users of the public switched telephone network. Other specialised in providing access to users of cable television, digital users (ISDN), users of ADSL services, local loop, etc... These providers are generally referred to as Internet Access Providers. They also offer various portal services, email, information services, etc...

Each unit connected to the Internet has to have an IP address. Initially, certain organizations obtained sets of addresses from MANA. These sets were divided into sub-sets for allocation to their customers. These addresses could be fixed for permanently connected units or temporarily for dial-up users connecting *via* the switched telephone network or for mobile units (portable computers). These addresses are composed of 32 bits in a two-part structure: the network part and the individual part. The boundaries between these two parts are variable depending on the class of the addresses. WAP telephones do not each have an IP address. The WAP protocol uses a gateway to convert the WAP address into an IP address and *vice versa*.

IP addresses are represented by four series of bytes converted into decimal numbers in the range 0 to 255.

This representation is not very convenient to use and a system was devised to associate a name with an address. These names, each of which corresponds to an address, are referred to as domain names. Conversion of domain names into their numerical IP addresses is performed by an array of databases distributed across the Internet (DNS). These DNS servers operate on the basis of a tree structure and are specialised according to the nature of the services offered (.COM, .ORG, .EDU, .GOV, etc...) and according to country (.FR, .UK, .SF, etc...).

However, it is necessary to understand that there is no hard and fast correspondence between the country appearing in the domain name and the numerical IP address. For example, *www.yahoo.fr* does not correspond to an IP address of a French network.

Therefore, the domain name extension cannot be used to determine to which network a numerical IP address belongs.

However, the IP address allocation originally made by MANA, and subsequently by ICANN, to Internet Service Providers (ISPs) follows a tree structure, for example, from the main network, to the sub-network, to the access provider, and finally to the local user.

It is possible to work backwards from a given IP address to the access provider, to the sub-network, to the main network.

This being so, certain organizations and certain providers maintain databases which are used to determine the identity of a network, sub-network, router or site from its IP address.

The DNS system gives access providers, sites, *etc...* the ability to associate their reference address with their geographical location in the form of latitude and longitude coordinates. This is not an obligatory requirement.

The ability to use information about the geographical location of IP address holders is extremely useful, however, not only for the purposes of targeted advertising but also in order to ensure harmonious development of the Web.

Several providers have technology and databases capable of identifying the geographical location of fixed addresses or even of dynamically allocated addresses. A number of these made submissions to the panel of experts to the effect that they had at their disposal the technical means to enable YAHOO! to fulfil the obligations placed upon it by the Court.

### **The problem**

In order to satisfy the terms of the court order requiring it to prevent access to auction services for Nazi objects, YAHOO! has to :

- 1) know the geographical origin and nationality of surfers wishing to access its auctions site
- 2) prevent French surfers or surfers connecting from French territory from perusing the description of Nazi objects posted for auction, and even more importantly to prevent them from bidding.

## **On geographical origin and nationality**

### **General case**

In order for a website to be viewed by members of the public, it is necessary for a user workstation (PC or other) to be linked to a destination site.

This operation involves the participation of various categories of intermediaries: the access provider, routers, one or more destination sites.

It may be useful to recall at this point that the user's workstation, access provider, routers and destination sites are all identified on the network by an address which conforms to the Internet Protocol (IP) standard.

Whereas the IP addresses of the sites operated by the access

providers, routers and destination sites are fixed, in the sense that there is a permanent reciprocal link between the IP address and its holder, this does not apply to the address allocated to the user's workstation. This address is allocated dynamically, on a non-permanent basis, by the access provider at the time of connection.

However, access providers are only able to assign the IP addresses which have been allocated to them by the Internet authorities. These addresses follow a tree structure as mentioned above. A surfer's PC receives an IP address allocated to an access provider who belongs to a sub-network which belongs to a network.

The panel of experts consulted the AFA, the French association of access and internet service providers, to find out the proportion of internet connections made by access providers who do not assign IP addresses capable of being identified as French.

The answer was 20.57% at 30th September 2000.

The panel also asked the AFA to what extent were its members representative of access providers operating in French territory.

The answer, according to a Mediametrie survey carried out in March 2000, was that "87% of surfers connecting from their home use access providers who are AFA members".

It may be added that, given the level of telephone charges involved, French surfers for the most part use the services of access providers present in their country.

It may therefore be estimated that 70% of the IP addresses assigned to French surfers can be matched with certainty to a service provider located in France, and can be filtered.

Further, it is this fact that enables YAHOO Inc. to display French advertising banners in French on its auctions site...

### **The exceptions**

There are numerous exceptions.

A large number of these, in the order of 20%, stem from the multinational character of the access provider or from the fact that they use the services of an international ISP or a private communications network.

The case of AOL is significant in this regard. AOL uses the services of the UUNET network. The dynamic IP addresses assigned by AOL appear as being located in Virginia where UUNET has its headquarters.

In this situation, the workstations of users residing in French

territory appear on the Web as if they are not located in French territory.

The same applies to a number of private networks operated by large corporations (intranets) in which the real addresses are encapsulated and transported in a manner such that the address seen by Internet sites is that appearing at the tunnel exit.

Other exceptions stem from the desire on the part of certain users to hide their real address on the net. Thus, so-called anonymizer sites have been developed whose purpose is to replace the user's real IP address by another address. It is not possible in this case to know the geographical location of the access provider's customer because the user's address can no longer be identified. The only location which can be known is that of the anonymizer site, but this is of no value in this case.

#### **Examination of solutions proposed by specialised providers**

All of the proposed solutions are based on using geographical information about sites which have one or more permanent addresses. These approaches rely partly on information obtained from DNS servers and partly on information provided by the access providers themselves.

##### **Infosplit**

The consultants found that Infosplit was incapable of identifying the geographical location of users of AOL France whose server is sited in the United States, for the reasons stated earlier.

##### **NetGeo**

This system, which is based on principles similar to those of Infosplit, is also unable to determine the location of surfers using a network in which the access provider assigns dynamic IP addresses that do not match the user's actual geographical location.

##### **Cyber Locator**

This approach relies on the use of geographical data obtained from a satellite positioning system (GPS).

This solution is wholly unsuited to the case in question given the limited number of surfers with a GPS peripheral connected to their terminal.

##### **Declaration of nationality made by the surfer**

Given that, in light of the aforementioned exceptions, no filtering method is capable of identifying all French surfers or

surfers connecting from French territory, the panel of consultants looked at the feasibility of requiring the surfer to make a sworn declaration of nationality.

This declaration could be made when a first connection is made to a disputed site, in this case the Yahoo auctions site, by a surfer whose IP address falls within the exceptions regime described above. A message (cookie) downloaded to the surfer's workstation would then dispense with the need for the surfer to make a fresh declaration at each subsequent connection.

#### **Use of nationality information by YAHOO Inc.**

This is the second aspect of the problem. How to proceed once the nationality or location of the user workstation is known ?

The measures to be taken depend on the particular case in point. They cannot be generalised to all sites and services on the Internet.

In this case, the site in question is *pages.auctions.yahoo.com*. This site is hosted by GeoCities IP...

This site is an auction site for miscellaneous items and is not dedicated to Nazi objects. A characteristic feature of this type of site is to enable the surfer to easily find the item he or she is looking for.

It appears that in order to satisfy the terms of the court order of 22nd May 2000, YAHOO must not allow surfers of French nationality or calling from French territory to access these items.

If, as the result of a search initiated by a request entered by a French surfer, one or more Nazi objects described as Nazi by their owner are picked up by the search engine, these items must be hidden from the surfer and excluded from the search result.

Clearly, however, it is not possible for YAHOO to exclude *a priori* items which have not been described by their owner as being of Nazi origin or belonging to the Nazi era, or the characteristics of which have not been brought to the attention of YAHOO. Checks carried out by the panel of consultants confirmed that numerous Nazi objects were presented as such by their owner.

A more radical solution is also possible. This would simply require the search engine not to execute requests, transmitted in the URL, including the word "Nazi" and originating from surfers identified or declared as French.

#### **The Demands Placed on YAHOO Inc.**

*"Describe the information carried on the Internet enabling the geographical origin of calls to be determined."*

The Internet Protocol (IP) attaches the sender's IP address and the recipient's IP address to each datapacket transmitted. The recipient is thus able to determine the sender's IP address. There are three classes of IP address (A, B and C).

The first part of this address is used to identify the network and subnetwork to which the sender's access provider belongs. These networks may be national or multinational.

According to the French association of access providers (AFA), it may be estimated that 80% of the addresses assigned dynamically by the members of that association are identified as French. On the other hand, 20% are not so identified.

Of the information carried on the Internet, only senders' IP addresses can be used to determine the geographical origin of calls. 80% of the addresses assigned dynamically by AFA member access providers can be identified as being French.

It should be noted, however, that the geographical origin referred to is that of the access provider's site called by the surfer. There is nothing to prevent a user from placing a call from France, by telephone, to an access provider with a foreign telephone number. In this case, there is every chance that the dynamically assigned IP address will be identified as being foreign. It is equally feasible for a foreigner to call an access provider located in France and thus be assigned a French IP address. However, it may be estimated in practice that over 70% of the IP addresses of surfers residing in French territory can be identified as being French.

The consultants stress that there is no evidence to suggest that the same will apply in the future. Encapsulation is becoming more widespread, service and access providers are becoming more international, and surfers are increasingly intent on protecting their rights to privacy.

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*"Say whether other information, originating notably from telephone or cable operators, could be used either by access providers or destination site hosting services to determine the origin of calls and, if so, to describe this information."*

This refers to information carried by telecommunications and cable operators, but which is not transmitted over the Internet. In this situation, the destination sites cannot know this information.

French telecommunications operators routinely transmit the caller's telephone number to the called party's handset. This information is not used in real time by the access provider. It is

held temporarily in a file to facilitate searches at a later time. It is thus possible to know, *a posteriori*, after analysing the connection history, which caller number was assigned at a given time to a particular IP address, and *vice versa*.

Cable operators are also able, on request but *a posteriori*, to match an IP address assigned at a particular time to their customer's local site.

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*"Describe the filtering procedures that can be implemented by the company YAHOO to prevent surfers operating from French territory from accessing sites which may be deemed illegal by the French judicial authorities. On the assumption that no technical solution can guarantee 100% filtering, provide all technical and factual information to facilitate an assessment of the effectiveness of filtering capable of being achieved by each of the filtering procedures described by the consultants. More generally, provide all technical and factual information to enable the Court to assure itself that the restrictions on access ordered against YAHOO Inc. can be met."*

The consultants consider that, in order for a technical solution to be effective, it must be properly suited to the case in question. The YAHOO! companies operate numerous services on the Internet, ranging from personal pages (GeoCities) to astrology (Yahoo astrology) and finance, *etc...* The majority of these sites do not appear to be concerned in the present dispute.

The decisions of the court and the demands made are precisely directed against the auctions site. No grievance against any other Yahoo! sites or services is formulated with sufficient precision to enable the consultants to propose suitable and effective technical solutions.

In these circumstances, the consultants will therefore confine their answers to the matter of the auctions site (Yahoo auctions). They will also rule out an examination of other technical measures that could be imposed on third parties not party to the proceeding. Neither the matter of proxy servers nor the matter of browser settings at the surfer's computer fall within the remit as stipulated by the Court.

### Replies of the Consultants Laurie and Wallon

These consultants report that in the current state of development of the Internet:

- 1) The figures supplied by the AFA, combined with their personal experience, enable the consultants to estimate that some 70% of the IP addresses of French users or users residing in French territory are capable of being correctly identified by specialised providers such as InfoSplit, GeoNet or others, using specialised databases.
- 2) Yahoo! displays advertising banners targeted at surfers considered by that company to be French, and that it therefore has the technical means to identify them.
- 3) Around 30% of the IP addresses assigned to French users cannot be identified correctly by the aforementioned methods.
- 4) Numerous sites, most often relating to the area of national defence (cryptography), only allow access to certain pages on the site or allow software to be downloaded after requesting surfers to declare their identity.
- 5) The use of cookies is a common practice which avoids the necessity for surfers to re-enter information every time they visit a site. Individuals wishing to delete cookies or prevent them from being stored on their computer are perfectly well aware that it will take longer to access the sites which issued the cookies.
- 6) Nazi objects are generally described as such by the vendors by including the word "Nazi" in the description of the item, which in their eyes constitutes a selling point.

In these circumstances, the consultants consider that in addition to the geographical identification already practised by Yahoo to target its advertising, it would also be desirable to ask surfers whose IP address is ambiguous to make a declaration of nationality.

This declaration, given on honour, would only be required of surfers whose IP address cannot be identified as belonging to a French ISP (e.g. multinational ISPs like AOL, address transmitted from an anonymizer site, or encapsulation of an address assigned by an intranet server).

At the discretion of Yahoo, this declaration could be made on the home page of the auctions site, or only in the context of a search for Nazi objects if the word "Nazi" is included in the user's request, immediately before the search engine processes the request.

In these circumstances, the consultants consider that it cannot be reasonably claimed that this would have a negative impact on the performance and response time of the server hosting the Yahoo! auctions service.

The combination of two procedures, namely geographical identification of the IP address and declaration of nationality, would be likely to achieve a filtering success rate approaching 90%.

### Reply of the Consultant Vinton Cerf

It has been proposed that users identify where they are at the request of the web server, such as the one(s) serving *yahoo.fr* or *yahoo.com*. There are several potential problems with this approach. For one thing, users can choose to lie about their locations. For another, every user of the website would have to be asked to identify his or her geographic location since the web server would have no way to determine *a priori* whether the user is French or is using the Internet from a French location. Some users consider such questions to be an invasion of privacy...

other complaint about the idea of asking users for their location is that this might have to be done repeatedly by each web site that the user accesses. Yahoo cannot force every web site to make this request. When a user first contacts the server(s) at *yahoo.fr* or *yahoo.com*, one might imagine that the question of geographic location might be asked and then a piece of data called a cookie might be stored on the user's computer disk. Repeated visits to Yahoo sites might then refer to this cookie for user location information. The problem with this idea is that cookies are considered by many to be an invasion of privacy. Also, as a result, many users configure browsers to reject storage of cookies on their disk drives or they clear them away after each session on the Internet - thus forcing the query about geographical location each time the user encounters a Yahoo-controlled web site. Again, Yahoo would have no way to force a web site net under its control to either ask the location question or to request a copy of the cookie containing the location. Indeed, it would open up a vulnerability for each user if arbitrary web sites were told how to retrieve the cookie placed there by the Yahoo sites.

For these and many other reasons, it does not appear to be very feasible to rely on discovering the geographic location of users for purposes of imposing filtering of the kind described in the Court Order.

### Judgment

Whereas it emerges from the said submissions that it is possible to determine the physical location of a surfer from the IP address;

*Whereas* YAHOO Inc. has sought to completely overturn these submissions on the basis of the contents of a separate note written by one of the consultants, Mr. Vinton CERF;

*Whereas*, however, at the hearing of submissions devoted *inter alia* to a presentation of the consultants' findings, Mr. Vinton CERF acknowledged the feasibility of identifying geographical location under the terms and conditions of the report and in the proportions mentioned in the report...;

*Whereas*, furthermore, his separate note dated 5th November 2000 and submitted in evidence by YAHOO Inc. does not contradict the findings of the report; whereas the note confines itself to stating **on one hand** that it would be "incorrect or at any rate liable to be mistaken" to affirm that it is possible to determine with a high degree of reliability the physical location of an IP address, the phrase "high degree of reliability" evidently meaning a degree of reliability well above that stated in the report at some 70% and that, **on the other hand**, which the panel of consultants accepted in its entirety, that the reply given on this point could only relate to the auctions site for Nazi objects and that it could not be extrapolated against other YAHOO-controlled sites and services;

*Whereas* it should be borne in mind that YAHOO Inc. already carries out geographical identification of French surfers or surfers operating out of French territory and visiting its auctions site, insofar as it routinely displays advertising banners in the French language targeted at these surfers, in respect of whom it therefore has means of identification; whereas YAHOO Inc. cannot properly maintain that this practice amounts to "crude technology" of limited reliability, unless it were felt that YAHOO Inc. had decided to spend money with no hope of a return or that it was deliberately misleading its advertisers about the quality of the services which it had undertaken to offer them, which does not appear to be so in this case;

*Whereas* in addition to the geographical identification as shown above to be already practised by YAHOO Inc., **the consultants' report suggests that a request be made** to surfers whose IP address is ambiguous (access through an anonymizer site - or allocation of IP addresses by AOL COMPUSERVE which do not take account of the subscriber's country of origin) to provide a **declaration of nationality**, which in effect amounts to a declaration of the surfer's geographical origin, which YAHOO could ask for when the home page is reached, or when a search is initiated for Nazi objects if the word "Nazi" appears in the user's search string, immediately before the request is processed by the search engine;

*Whereas* the consultants, who contest the arguments adduced by YAHOO Inc. as to the negative impact on such controls on the performance and response time of the server hosting the auctions site, estimate that a combination of two procedures, namely geographical identification and declaration of nationality, would enable a filtering success rate approaching 90% to be achieved;

*Whereas* in regard to optimisation of the filtering process by the use of associated keywords, the consultants gave the opinion... that it would undoubtedly be necessary in order to optimise the filtering to select about ten words associated with the search operators for document searches or character string searches "AND", "OR", "EXCEPT";

*Whereas*, in addition to the measures suggested by the consultants, it is necessary to include checks by YAHOO on the place of delivery of items purchased by auction;

*Whereas*, in effect, the act of visiting the auctions site for Nazi objects is not exclusively for the purpose of viewing; that this purpose is often to purchase items; that in these circumstances even if YAHOO had been unable to identify with certainty the surfer's geographical origin, in this case France, it would know the place of delivery, and would be in a position to prevent the delivery from taking place if the delivery address was located in France;

*Whereas*, furthermore, YAHOO Inc. could obtain additional nationality information from the language version of the surfer's browser;

*Whereas*, however, it maintains that this information would require it to modify the management software of its sites and to substantially increase associated hardware resources;

*Whereas* it adds that filtering of all information at Web server level would only be feasible if it were possible to ensure that the prohibition would only apply to French surfers, otherwise surfers throughout the world would be denied access to information published on its sites, which cannot be envisaged;

*Whereas*, however, it has been shown above that it does have effective filtering methods available to it;

*Whereas*, furthermore, it fails to show by means of a convincing case study that the technical modifications required to control access to auction services for Nazi objects would effectively entail a substantial increase in associated hardware resources;

*Whereas*, in any event, the company YAHOO Inc. has offered to cooperate with the plaintiffs; whereas it thus requests that note

be taken of its willingness to put in place a monitoring system with the assistance of the plaintiffs, for whom it expresses the greatest respect for the cause to which they are committed, so that when an offending site is brought to its notice by the plaintiffs and subject to its being manifestly directed essentially at French users, it can take action to cease hosting the site;

*Whereas*, to demonstrate its good faith, it states that it has ceased hosting the “*Protocole des Sages de Sion*”, considering that a sufficient connecting link exists between this document and France by reason of the language of the work;

*Whereas*, with a modicum of will on its part, the company YAHOO Inc. could be persuaded of the usefulness of extending this connecting link to photographs and descriptions representing symbols of Nazism;

*Whereas*, according to the information given in the consultants’ report at the initiative of the plaintiffs and which has not been seriously challenged, the company YAHOO is currently refusing to accept through its auctions service the sale of human organs, drugs, works or objects connected with paedophilia, cigarettes or live animals, all such sales being automatically and justifiably excluded with the benefit of the First Amendment of the American Constitution guaranteeing freedom of opinion and expression;

*Whereas* it would most certainly cost the company very little to extend its ban to symbols of Nazism, and such an initiative would also have the merit of satisfying an ethical and moral imperative shared by all democratic societies;

*Whereas* the combination of these technical measures at its disposal and the initiatives which it is able to take in the name of simple public morality therefore afford it the opportunity of satisfying the injunctions contained in the order of 22nd May 2000 in respect of the filtering of access to the auctions service for Nazi objects and to the service relating to the work *Mein Kampf* which was included in the wording of the aforementioned order by the phrase “and any other site or service constituting an apology for Nazism”;

*Whereas* it is nonetheless granted a period of three months in which to comply with this order;

*Whereas* upon expiry of this period it shall be liable to a penalty of 100,000 Francs per day of delay until such time as it has complied in full;

### On the demand placed on YAHOO France

*Whereas* the consultants’ report states and suggests:

*“Verify whether YAHOO France has effectively satisfied the terms of our injunction contained in the order of 22nd May 2000.”*

The order of 22nd May 2000 stipulates in this regard :

*We order the company YAHOO FRANCE to warn any surfer visiting Yahoo.fr, even before use is made of the link enabling him or her to proceed with searches on Yahoo.com, that if the result of any search, initiated either through a tree structure or by means of keywords, causes the surfer to point to sites, pages or forums of which the title and/or content constitutes a violation of French law, as applies to the viewing of sites making an apology for Nazism and/or exhibiting uniforms, insignia or emblems resembling those worn or displayed by the Nazis, or offering for sale objects or works whose sale is strictly prohibited in France, the surfer must desist from viewing the site concerned subject to imposition of the penalties provided in French legislation or the bringing of legal action against him”.*

In order to satisfy the terms of this order, YAHOO! France has:

- 1) modified and amplified its terms of use accessible by clicking on the link “Find out about Yahoo!” (“*tout savoir sur Yahoo!*”) appearing at the bottom of each page on the site. The following paragraph has been added: “*Finally, if in the context of a search conducted on www.yahoo.fr from a tree structure or keywords, the result of the search is to point to sites, pages or forums whose title and/or content contravenes French law, considering notably that Yahoo! France has no control over the Content of these sites and external sources (including Content referenced on other Yahoo! Sites and Services worldwide), you must desist from viewing the site concerned or you may be subject to the penalties provided in French law or legal action may be brought against you*”.
- 2) put in place a warning when a search by tree structure (categories) is requested, worded as follows: “*Warning: if you continue this search on Yahoo! US, you could be invited to view revisionist sites of which the content contravenes French law and the viewing of which could lead to prosecution.*”

It was found that the Yahoo! terms of use were not systematically displayed when first logging on to this site, and further that the link “Find out about Yahoo!” did not necessarily convey the impression that it pointed to the general terms of use of the service.

However, the warning was systematically displayed in the context of a search by category (e.g. holocaust).

It is technically possible for Yahoo! France to arrange the obligatory display of its terms of use apart from the first connection of a user to its site.

Yahoo! could also, instead of or in addition to the preceding measure, arrange for the warning referred to in 2) to be systematically displayed whenever the link to *Yahoo.com* is displayed.

However, on this latter point, Yahoo! contended that this went beyond the terms of the court order. Under these circumstances, it is for the court to interpret its ruling. Contrary to the argument made by Yahoo!, the phrase “*warn any surfer visiting Yahoo.fr, even before use is made of the link ...*” can mean that the warning must be displayed every time the link is displayed.

Whereas Yahoo France maintains that it has fully complied with the terms of our order of 22nd May 2000 by modifying the link referred to by the plaintiffs, by installing the warning mentioned in the order on several links, by advising surfers of the terms of use of the service which are accessible to users when they log on to *Yahoo.fr* and which can be viewed on all *Yahoo.fr* pages with effect from 3rd November 2000, and by amending the general terms of use of the service to include a message exceeding the requirements of the court order of 22nd May 2000 and worded in the terms of the new Article 6.2;

Whereas the initiatives undertaken by Yahoo! France are technically capable of satisfying in large measure the terms of our order of 22nd May 2000, with the proviso however that the warning is given every time the link is displayed “even before use is made of the link”.

### **On the other demands placed on YAHOO! France**

Whereas there is no matter for summary consideration in respect of the demands of LICRA, UEJF and MRAP seeking to require YAHOO FRANCE, subject to the imposition of financial penalties, to eliminate all links connecting the site *Yahoo.fr* to sites belonging directly or indirectly to YAHOO Inc. until such time as YAHOO Inc. has fulfilled its obligations, having regard to the existence of a serious objection to the demands on the part of YAHOO FRANCE, which objections are exclusive of our competence;

### **On These Grounds**

Ruling in public hearing, with the possibility of appeal, by order following full discussion by all parties,

We reject the plea of incompetence reiterated by YAHOO Inc.;

We order YAHOO Inc. to comply within 3 months from notification of the present order with the injunctions contained in our order of 22nd May 2000 subject to a penalty of 100,000 Francs per day of delay effective from the first day following expiry of the 3 month period;

We instruct at the advanced cost of YAHOO Inc.:

Mr. WALLON to undertake an assignment to prepare a consultancy report on the conditions of fulfilment of the terms of the aforementioned order;

We fix in the sum of 10,000 Francs the provision in respect of consultancy costs to be deposited by the Company YAHOO Inc. directly to the consultant within one month following the present order;

We state that failing deposit of the provision within this mandatory period, the matter shall be referred to us for summary ruling;

We take due note of the decision by YAHOO Inc. to cease hosting the “*Protocole des Sages de Sion*”;

We find that YAHOO FRANCE has complied in large measure with the spirit and letter of the order of 22nd May 2000 containing an injunction against it;

We order it, however, to display a warning to surfers even before they have made use of the link to *Yahoo.com*, to be brought into effect within 2 months following notification of the present order;

We order YAHOO Inc. to pay to each of the plaintiffs the sum of 10,000 Francs pursuant to Article 700 of the New Code of Civil Procedure;

We state that there is no basis for application of the aforementioned provisions against YAHOO FRANCE;

We reserve the possible liquidation of the penalty;

We state that there is no basis for the imposition of other measures or to make summary rulings in respect of the other demands made against YAHOO FRANCE;

We award costs to the charge of YAHOO Inc., with the exception of those arising from the petition brought against YAHOO FRANCE which shall provisionally remain to the charge of each of the parties.



# “The PA Should Step Back from the Brink”

*Statement made by Daniel Lack, the Representative of the International Association of Jewish Lawyers and Jurists and the World Jewish Congress at the Fifth Special Session of the United Nations Commission on Human Rights, Convened on 17 October 2000*

**Mr. Chairman,**

The statement made at approximately 1 p.m. today by President Clinton at Sharm-El-Shekh, in the presence of Chairman Arafat and Prime Minister Barak announcing an agreement reached between the two leaders to order an immediate cease-fire, the appointment of a fact-finding body lead by the U.S.A. and with UN involvement, coupled with the readiness of both leaders to return to the peace negotiations, is a positive and encouraging development.

In the hope that this glimmer of light will be nurtured so as to become an enduring flame by full implementation of these undertakings on both sides, all delegations at this special session, should consider it a duty to do nothing to interfere with the renewal of the dialogue leading to a fair and just peace for both sides.

I venture to express the hope that this might be one of the last occasions on which a representative of the two organisations who have mandated me, will have to redress the balance of truth which has been trampled upon this morning by several delegations in an outrageous manner.

The motives invoked by the members of the Arab League represented by Algeria in seeking the convening of this special session, do not stand up to examination. They totally misrepresent the facts. The temerity of the Algerian Ambassador in making these allegations and in making the inflammatory speech we heard this morning, is literally stupefying. He would be better advised to apply his energies and those of his government in exposing and remedying the grave and sustained sequence of genocidal mass killings that are decimating the population of his country and in obtaining the support of the international community in dealing with its root causes. Eighteen more Algerians were slaughtered only this last weekend, according to agency reports.

The Arab League would also be better advised in counselling Mr. Arafat and his colleagues to cease incitement to hatred and violence, leading to the destruction of the Tomb of Joseph in

Nablus and subsequently of the 6th century Synagogue in Jericho with which they have been entrusted since 1993 .

These terrible acts took place, Mr. Chairman, notwithstanding solemn promises of Mr. Arafat and his colleagues of the Palestine Authority to safeguard this ancient Jewish synagogue in Jericho and after the recent withdrawal of an Israeli army contingent, as a gesture to reduce tension and bring about a return to relative calm to this area, so as to protect the Nablus Tomb of Joseph.

Mr. Chairman, the relevant facts have been turned upside down. Yes Mr. Chairman, there have been the tragic deaths of over 90 Palestinians including children and adolescents in two weeks of unceasing riots with stone throwing and sustained exchanges of fire with Palestinian police and other unidentified gunmen concealed amongst the civilian stone throwers. In addition, there has been similar rioting causing the death of several Israeli Arabs and a smaller number of Israeli Jews in violence inside Israel. Further there are some 100 injured Israeli policemen and soldiers, apart from a number of civilians and children still in hospital.

One policeman was also shot at point blank range and killed while seated in a car by his Palestinian colleague with whom he was on joint patrol.

In a further incident in Jerusalem, ten Israeli policemen narrowly escaped being burned to death after being trapped in their police station that was deliberately set ablaze adjacent to the Western Wall by a mob that blocked the doors. Several policemen had to be hospitalised.

Amongst these violent acts there stands out the unprecedented hideous slaying and dismembering of Israeli reservists, torn apart by a frenzied mob after they strayed into Ramallah and were taken into custody by the Palestinian police from whom they were snatched by their lynchers. It was this appalling atrocity which brought a swift, proportionate and measured response in a military action of a symbolic nature by Israeli army helicopters, of which advance ample warning was given to save lives and reduce casualties to a minimum.

This sequence of events as has been clearly established, was triggered by the notorious incident on the Temple Mount in Jerusalem after the crowds flowing from the Omar and El Aksa Mosques where they had been harangued into a state of frenzied hysteria by incendiary speeches during the Friday prayers,

attacked the police escorting the leader of the opposition, Mr. Sharon, who was visiting the area, notwithstanding the fact that this visit had been previously reported and cleared with the relevant joint Palestinian - Israeli security committees.

Despite these incontrovertible facts, it is alleged that this was the incident, claimed to be a provocation, in the course of which the stone throwers showered rocks on worshipers at the Western Wall praying at Judaism's most sacred site on the eve of the Jewish New Year from which the worshipers had to be hurriedly evacuated, which produced the escalating violent sequences that have endured for over nineteen days.

The loss of life and injuries to several hundred more rioters caught up in this violent confrontation to which it has given rise between Israeli police and soldiers, has created tension between Jews and Arabs on a scale reminiscent of the worst strife in recent years.

The sustained violence has led to over ninety anti-Semitic incidents over the same two week period, featuring arson attacks and bomb threats against synagogues and other Jewish religious and cultural institutions, notably in France, Germany and the USA.

None of these incidents in their scale, or degree of intensity, remotely bears any comparison with the situations in Burundi and Rwanda, Bosnia-Herzegovina, Kosovo and East Timor which have previously been felt to justify convening special session of the Commission. We nonetheless consider that this situation is alarming and deserves the attention of this Commission but for reasons which are the antithesis of those that the Arab League would have us believe.

The greatest concern, which should be reflected in immediate and firm action by this Commission, is the growing alliance between the Palestinian Authority and its related *Fatah* groups with the *Hamas* and *Hizballah* terrorist gangs. The *Hamas* so-called Charter is a cruder and more action-oriented version of *Mein Kampf*, calling explicitly for the destruction of the State of Israel and the murder of all Jews. The release of the *Hamas* prisoners by the Palestinian Authority constitutes invites these artisans of death to resume their terrorist bombing campaign in Israel's population centres, for the consequences of which the Palestinian leadership will be held directly responsible.

*Hizballah* needs no introduction to the members of this Commission as the terrorist organisation responsible for the kidnapping of distinguished church dignitaries, journalists and university teachers and the cold blooded murder of nine Jewish hostages in Lebanon held captive by them.

If any further elucidation of this group's genocidal program is

needed, page 11 of the *International Herald Tribune* of 16 October should be consulted, where its leader Nasrullah in his widely broadcast message to Palestinians, is quoted as exhorting all Palestinians and Arabs generally, to stab all Israelis to death, if they do not have have bullets.

An orchestrated campaign is being conducted to declare a *jihad* against Israel and Jews worldwide and is a flagrant violation of Article III (c) of the Genocide Convention, making direct and public incitement to commit genocide a punishable crime.

No less serious is the tragic death of over twenty children and adolescents at the forefront of the unrelenting attacks over the past two weeks against Israeli police and army units by stone throwers, shielding militia including members of the Palestinian Police firing automatic arms. Israeli security personnel receive strictest orders not to direct fire at civilians except in the most extreme circumstances of risk to their own lives and those of others for whose protection they are responsible. Involving, and more frequently, expressly inciting children and adolescent minors to take part in these dangerous confrontations, is a deliberate flouting of basic humanitarian law in general and Article 38 of the Convention on the Rights of the Child in particular and should be unreservedly condemned by this Commission as such.

The gravest implications for the future are to be found in the appeals of the *Hamas*, *Hizballah* and other extremist groups responsible for fomenting the riots in Israel and avowedly anti-Semitic attacks abroad on Jewish communities and their institutions to which reference has already been made. Such open advocacy of national, racial, and religious hatred, clearly constitutes incitement to hostility and violence in flagrant violation of Article 20 of the Covenant on Civil and Political Rights and calls for the Commission's unequivocal condemnation.

These are the true issues which this session of the Commission has a compelling duty to address and which fully justify convening this fifth special session, in the absence of which it will have failed to carry out its most essential function.

Should the Palestinian Authority again choose to cry havoc and let slip the dogs of war, it will have sown the wind and will reap a whirlwind.

We urge the Palestinian Authority however, to step back from the brink and call for an immediate and effective cessation of violence by all Palestinians. Following a pause for the restoration of calm and the return of sanity, it must recognise that the only path to securing its legitimate aspirations is to return to the negotiating table and secure a peaceful and prosperous future for its own and all peoples of the region together with its Israeli counterparts.

# Remember Warsaw

An International Conference to Commemorate Jewish Lawyers and Jurists  
in Poland and to Mark their Contribution to Polish Law

Co-sponsored by the Polish National Council of Legal Advisers

**Warsaw, Poland, May 9-13, 2001**

**Venue: Sheraton Hotel, Warsaw**

**Post - Conference Tour: May 13-15, 2001**

## Tentative Program

### Wednesday, May 9, 2001

15:00-17:00 *Registration at Sheraton Hotel*

#### Evening:

18:00 Welcome Reception  
hosted by the Polish National Council of Legal Advisers  
19:00 Opening Session  
Venue: The Warsaw Bar Association

1. Aryanization of Free Professions in the Late Thirties
2. Jewish Lawyers during the Anti-Semitic Wave in 1968

15:30-16:00 Coffee Break

16:00-17:30 **Jews and Jewish Issues in Today's Poland**

1. Poland Today
2. Jewish Assets in Poland - Legal Aspects
3. The Legal Struggle for the Preservation of Holocaust Sites

Evening Free

### Thursday, May 10, 2001

7:30-9:00 Registration for late arrivals

*Sessions At Sheraton Hotel*

9:00-10:30 **Jews and the Polish Parliament**

1. Jews and the Polish Constitution of March 1921
2. Profile of Jewish Parliamentarians and their Contribution to the Polish Legal System

10:30-11:00 Coffee Break

11:00-12:30 **Jewish Lawyers and Jurists in Poland (1918-1939)**

1. Famous Jewish Lawyers in Poland - Jewish Lawyers in famous Jewish Trials
2. Jews in the Legal Academia - Professors and Students

12:30-14:00 Light Lunch at Sheraton Hotel

14:00-15:30 **Discrimination against Jewish Lawyers and Jurists in Poland**

### Friday, May 11, 2001

Guided Tour: Morning: **Jewish Warsaw**

Lunch Break

Afternoon: **Treblinka**

18:00 Return to Hotel

20:00 Optional: Shabbat service at Nozyk Synagogue

21:00 Shabbat Dinner at Victoria Intercontinental Hotel

### Saturday, May 12, 2001

09:30 Optional: Shabbat service at Nozyk Synagogue

12:00 **Walking Tour of the Old City of Warsaw**

Meeting Point: at the entrance to the Old City of Warsaw

Afternoon Free

Evening:

21:00 Dinner at Victoria Intercontinental Hotel

## Sunday, May 13, 2001

9:00 -12:00 **The Years of the German Occupation**

1. Jewish Resistance
  2. Polish Jewish Relations during the German Occupation
  3. Personal Recollections
- Closing Remarks

12:15 Light Lunch at Sheraton Hotel

Simultaneous translation will be provided in Polish/English/French

**Detailed program and names of speakers to be announced**

## Post Conference Tour

### Sunday, May 13, 2001

14:00 Transfer of luggage to Krakow  
 15:35 Travel by train to Krakow  
 19:00 Arrival at Forum Hotel, Krakow  
 20:00 Guided walking tour of the Old City of Krakow and dinner at a restaurant

### Monday, May 14, 2001

Morning: AUSCHWITZ - BIRKENAU  
 Afternoon: Lunch and guided tour of **Karzimierz** (Old Jewish town). Time permitting visit also Jewish sites around Krakow  
 Evening Free

### Tuesday, May 15, 2001

9:55 Train to Warsaw  
 13:00 Arrival in Warsaw and transfer to Old City for lunch (not included in package). After lunch continue to airport or for those staying on in Warsaw transfer to hotels.

## Price for Land Packages:

### Package No. 1

4 nights package based on Sheraton Hotel, Warsaw  
 Per person sharing a double room \$697  
 Single room supplement \$300

### Package No. 2

4 nights package based on Forum Hotel, Warsaw  
 Per person sharing a double room \$492  
 Single room supplement \$120

### Package No. 3

6 nights package based on Sheraton Hotel, Warsaw (4 nights) and Forum Hotel, Krakow (2 nights)  
 Per person sharing a double room \$877  
 Single room supplement \$380

### Package No. 4

6 nights package based on Forum Hotel, Warsaw (4 nights) and Forum Hotel, Krakow (2 nights)  
 Per person sharing a double room \$676  
 Single room supplement \$199

### All packages include:

Accommodation in hotels mentioned including breakfast  
 2 coffee breaks at Sheraton Hotel, Warsaw  
 2 Light buffet lunches at Sheraton Hotel, Warsaw  
 2 Dinners at Victoria Intercontinental Hotel, Warsaw

Transportation on arrival and departure from airport (for groups of 15 persons minimum)

For participants staying at the Forum Hotel: Transfer to venue of the conference, Sheraton Hotel, Warsaw

Transfer to and from Opening Session at the Warsaw Bar Association

Full day tour of Warsaw and Treblinka (by bus)

Guided walking tour of the Old City of Warsaw (Saturday)

Entrance fees to places visited as per itinerary

English and French speaking guides

Porterage

Post-conference Tour Packages (Package No. 3 and No. 4) also include:

Transfer from and to train station in Warsaw and Krakow

Guided tours of Krakow and Karzimierz

Tour to Auschwitz-Birkenau

Train ticket Warsaw-Krakow-Warsaw

Dinner in the Old City of Krakow

Lunch at Karzimierz

## In Memoriam

### Judge Cecil Stanley Margo Honorary Deputy President of IAJLJ

On 19 November 2000 the Honourable Cecil Stanley Margo died. He had been a judge of the Transvaal Provincial Division of the then Supreme Court of South Africa from 1971 to 1985, when he reached the statutory age of retirement, and thereafter in an acting capacity to the end of 1991. For twenty years he had gallantly fought a cruel illness, which he described with his typical honesty in his engrossing autobiography, *Final Postponement* (1998). Now the struggle has ended.

Cecil Margo was a committed Jew, and a keen and proud Zionist who had for several years been on the Executive Council of the South African Zionist Federation and was Honorary Deputy President of the International Association of Jewish Lawyers and Jurists and a director of the South African chapter of the Association.

During World War Two Cecil Margo served with great gallantry in the South African Air Force, and on secondment to the Royal Air Force, in the Middle East, North Africa and Europe. In 1943 Major Margo was awarded the Distinguished Flying Cross, the recommendation stressing his outstanding ability, determination, judgment and courage in leading 24 Squadron of the South African Air Force. In 1944 Lieutenant-Colonel Margo was made a Companion of the Distinguished Service Order, the citation saying "he has been the exemplification of courage and the model of leadership". As a bomber pilot, Cecil Margo completed 150 raids by day and night. To him fell the honour of leading 1000 aircraft in the "Victory Fly-past" in Italy on 29 May 1945.

After the war, Cecil returned to his practice at the Johannesburg Bar, which he had commenced in 1937 after he had qualified BA LLB at the University of the Witwatersrand. But in May 1948 he immediately accepted a request by David Ben-Gurion, Prime Minister of Israel, to help organise the Israeli Air Force. His recommendations were carried out. In September Cecil returned to South Africa, but from

June 1949 to the end of that year, again at considerable personal cost, Cecil went back to Israel as adviser to the Air Force.

At the Bar, Cecil's intellectual gifts, his forensic ability, his eloquence, his incredible stamina, and his immense charm of manner led to rapid success. In May 1959 he was appointed a Queen's Counsel. He was an acting judge on several occasions from February 1967, but declined a permanent appointment until April 1971, mainly because of the *gaudium ceraminis* - the joy of battle in the courts.

Early in 1967 began the first of the many



commissions of inquiry into aeroplane disasters over which Cecil presided. Among the most famous of them was that into the crash of the aircraft in South Africa on 19 October 1986 that led to the death of President Samora Machel of Mozambique. Cecil's unmatched knowledge of aviation proved of great benefit in these inquiries.

During his period on the Bench and for several years thereafter Cecil was chairman of a number of important other commissions of inquiry in South Africa, notably those into company law, civil aviation and the tax structure. Each of the reports of these

commissions, in which Cecil's elegance of English style is manifest, produced significant reforms.

On the Bench, Mr Justice Margo proved a conscientious and sagacious judge, before whom counsel regarded it as a pleasure to appear, and whose innate compassion found expression wherever possible. Many of his judgments made valuable contributions to the exposition and development of the law.

Cecil's dedication to the welfare of mankind led to his service on numerous legal and charitable bodies. Of special significance was his service as a South African trustee of the Cheshire Foundation, established by Group Captain Leonard Cheshire VC OM in many countries for the chronically sick and disabled.

Among the numerous honours bestowed on Cecil were the Order for Meritorious Service (Gold); the LLD *honoris causa* of his *Alma Mater*; appointment as Honorary Colonel of 24 Squadron and 60 Squadron of the South African Air Force; the Paul Tissandier Award of the Federation Aeronautique Internationale, Paris for exceptional services to aviation; Honourary Fellowship of the Hebrew University of Jerusalem; and the fellowship and the award of the gold medal of several leading learned and professional societies.

Tall and of imposing presence, Cecil was a gregarious, most hospital and helpful person, generous in deed and in praise, with a marked sense of honour. Until near the end he indulged himself in his love of attending cricket matches.

Cecil Margo is survived by his wife Marjorie, his sons Andrew, Roderick and Matthew, and three grandchildren.

If anyone was a man for all seasons, Cecil Margo was he. I take humble pride in having been, like so many others in so many lands, a friend of his. As I think of Cecil, I call to mind Bertrand Russell's moving words about Joseph Conrad: "His intense and passionate nobility shines in my memory like a star seen from the bottom of a well."

Prof. Ellison Kahn S.C.  
South Africa

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