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Cover: An important silver etrog container for Succot (Vienna, maker ATR, 1760) inscribed in Hebrew with Biblical verse for the taking of the etrog "*You should take for yourselves the beautiful fruit of the tree*", and with a quotation from *Psalms* 36.12 (Courtesy of Sotheby's).

Views of individuals and organizations published in JUSTICE are their own, and inclusion in this publication does not necessarily imply endorsement by the Association.

JUSTICE is published by:

**The International Association
of Jewish Lawyers and Jurists**

10 Daniel Frish St., Tel Aviv 64731, Israel.

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© Copyright (2001) by IAJLJ

ISSN 0793-176X

Printed by Shmuel Press Ltd.

27 Shoken Street, Tel Aviv,

Tel: 972-3-682-2056.

JUSTICE (ISSN 0793-176X) is published 4 times a year for \$50 per year by The International Association of Jewish Lawyers and Jurists. Royal Mail International, c/o Yellowstone International, 87 Burlews Court, Hackensack, NJ 07601. Periodicals Postage Paid at South Hackensack. POSTMASTER: Send address corrections to JUSTICE Royal Mail International, C/O Yellowstone International, 2375 Pratt Boulevard, Elk Grove Village, IL 60007-5937.

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PRESIDENT'S MESSAGE



Making preparations for this issue of *JUSTICE*, I planned to write about the perverted picture of the situation in Israel presented to the world, about the terror waged against Israelis, about the plight of the Palestinians - worsening because their leaders have chosen a path of violence instead of peaceful negotiations to solve the prevailing conflict in the Middle East - and about the Jerusalem Conference that we will convene on December 12-14, 2001, under the title *Standing By Israel In Time Of Emergency* (see enclosed program).

But then the preparations for the anti-racism conference in Durban put us on alert. We published a last-minute appeal to the High Commissioner for Human Rights, Mary Robinson, in an effort to prevent the events that subsequently actually ensued.

We had had great hopes that the two events scheduled for Durban - the NGO Forum and the Intergovernmental World Conference - would pave the way for increased unity and cooperation around the world in the fight against racism. Nonetheless, on the eve of the Conference we suspected what would happen. Consequently, we acted in a way that we believed would save the Conference itself from turning into a racist mob scene, hijacked by politically motivated extremists who were ready to sacrifice the real fight against racism in order to promote hatred and violence, pervert history, spread lies, and single out Israel and the Jewish people as the enemies of mankind. Unfortunately, our last-minute appeal was unable to turn the tide and our worst fears materialized in Durban.

In describing the NGO Forum, Advocate David Matas from Winnipeg, Manitoba, Canada, who was the rapporteur for the Commission on Anti-Semitism at the Forum, wrote in his final report:

"The Durban NGO Forum told us what civil society becomes when it ceases to be civil. It is an unruly mob, a kangaroo court, a bunch of bullies and cowards, a collection of tricksters and suckers".

It behooves us to take notice and to wonder why a well-known speaker and brilliant writer such as Matas would resort to such unprecedented strong language. The final document that was adopted at the NGO Forum was so repulsive in its language that even the High Commissioner Mary Robinson publicly rejected it.

Our Association was represented in Durban by Advocate Daniel Lack, who is our Permanent Representative to the UN bodies in Geneva, and Professor Anne Bayefski of Toronto, a well-known expert on human rights, currently acting as a guest professor at Columbia University in New York. We take this opportunity to commend both of them for their brilliant work, as well as for their courageous behaviour in the face of violent mobs, which not only hurled outrageous abuse at them but also on occasion actually used physical violence.

The Jewish NGOs walked out of the Forum when we all realized that it had forfeited its legitimacy by turning into a racist and biased gathering. We also walked out of the Intergovernmental Conference together with the delegations of Israel and the United States.

We regret that other delegations did not follow suit, although a large group of delegations achieved a last minute success when they managed to overcome the tireless efforts of Arab and

Islamic delegations and their supporters, to include in the final document of the Conference the same racist and abusive language that had been adopted by the NGO Forum. Although the Arab and Moslem delegations failed to attain their goal, this was not a victory in any sense. The final document, which refers to the Middle East conflict in the context of an anti-racism conference and uses agreed coded language to circumvent objectionable issues in an effort to save that conference, is unacceptable to us.

The Durban Conference was a non-event from the human rights standpoint and only succeeded in demonstrating the racist hatred that was generated there.

We shall have to study in depth the events that unfolded in Durban and to draw our conclusions.

In this issue of *JUSTICE* we present three documents to our readers:

- Our last-minute appeal issued on July 18, 2001, distributed to governments and organizations around the world and delivered to the office of Mary Robinson;
- Prof. Anne Bayefsky's address at the Commission on Anti-Semitism in Durban;
- Adv. Daniel Lack's final report.

These documents tell it all.

Then, when we were actually ready to go to print, we witnessed on our screens the horrendous terrorist attack against the United States. Words fail to describe this event and all its repercussions.

We express our condolences to the American people and to the victims and their families; our best wishes for recovery to all those who were injured, and our appreciation for the American leadership which is facing this unprecedented and horrible event in its history with dignity, with compassion, and with firm resolve to never let this happen again, anywhere in the world.

The barbaric terrorist attacks on New York and Washington were not caused by the events at the Durban Conference which had closed only three days earlier. Yet, we cannot fail to realize that these attacks were motivated by the same hatred, the same racist incitement, the same verbal violence, that raged in the conference halls and in the streets of Durban.

We hope the world is finally realizing that there is only one definition of terror, whatever its reasons or aims, whatever its means and disguises. No kind of terror, or incitement to terror, should be tolerated or condoned, if there is to be any hope for us to create the civil society in which groups and individuals can co-exist, resolving their conflicts by peaceful negotiations without resort to the type of violence we are now witnessing.

The human race is confronted with a choice: we can eliminate this evil from amongst us or ignore it at our peril, thereby endangering all civilizations, all the inhabitants of our globe.

We express our best wishes for the New Year to all our members and our readers. May this year be the harbinger of peace for all mankind.

We urge our members to express their solidarity with Israel by attending the Jerusalem Conference in December.

Hadassa Ben-Yitvo

The Durban World Conference

**“Failure to provide moral leadership
will result in a grave regression of
international human standards”**

**A last minute appeal to the international community by the
International Association of Jewish Lawyers and Jurists on
the eve of the of the Durban World Conference Against Racism**

Hadassa Ben-Itto

This is a last minute appeal to the High Commissioner for Human Rights and to all States, intergovernmental bodies, non-governmental organisations and other actors involved in the final preparations for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which is about to convene in Durban, South Africa on 1 September 2001.

The third, and last Preparatory Committee Session, scheduled to take place in Geneva on the 29th of July, is intended to finalise the Draft Declaration and Draft Program of Action to be discussed and adopted at the World Conference. The High Commissioner, Mrs. Mary Robinson, will serve as Secretary General of the Conference, and our Association, which represents lawyers and jurists throughout the world, would have expected her office to play a decisive role in providing the moral leadership to present to this important international forum the basis of a Draft Declaration and Draft Program of Action that would achieve a consensus for a

meaningful world-wide campaign to combat racial discrimination in all its forms and manifestations, based on the Convention on the Elimination of all Forms of Racial Discrimination. Instead, there are valid grounds to believe that the Preparatory Committee will enable an existing text to be submitted to the World Conference in Durban as the basis for the Draft Declaration and Program of Action. This is a deeply divisive and essentially political document that includes scurrilous and racially inspired passages which are the antithesis of the Conference fundamentals.

We are convinced that even as a draft, the presentation of this reprehensible and racially discriminatory document at the World Conference will inevitably provoke confrontation leading to retrogressive and harmful consequences for the cause of human rights as a result of the adoption of a Declaration and Program of Action that will seriously discredit the role and office of the High Commissioner for Human Rights.

Our Association has therefore decided, at this late hour, to express not only its apprehension and concern, but its sense of outrage, that such a document could be presented for consideration at the World Conference against Racism.

It was the founder of our Association, the Nobel Peace Prize

Judge Hadassa Ben-Itto, President of the IAJLJ, made this statement to the High Commissioner for Human Rights on behalf of the IAJLJ on July 18, 2001.

laureate Rene Cassin and Eleanor Roosevelt, who were the architects of the Universal Declaration of Human Rights, in the wake of the Second World War and of the Holocaust. As members of this association of men and women of the law, we feel duty bound to speak out at this eleventh hour in an effort to prevent the submission of a text that will compromise the forthcoming Conference and disappoint all people of conscience and human rights defenders everywhere, who are hoping for a meaningful contribution to the campaign against racism. Such a profoundly negative outcome would embarrass the host country of the Conference which has every right to be in the forefront of this struggle to defeat racism in all its guises.

The choice of Teheran as the venue for one of the regional conferences preceding Durban, has resulted in the adoption of a statement, intended to be reflected in the Declaration and Program of Action, containing fundamental flaws which vitiate the entire text. It is no accident that the outrageous language produced on this occasion emanates from a conference hosted in a country notorious for its breaches of fundamental human rights and for its systematic violations of the rule of law. The text produced at this regional conference in Teheran is shameful both for the language it contains and because of the racially discriminatory conditions under which it was held, including the banning of all Jewish UN accredited non-governmental organisations from attending as was their right. Teheran is also the capital of a country which openly calls for the destruction of Israel, another UN Member State, and promotes and actively aids and abets terrorist attacks against Israel in flagrant violation of all UN Charter principles.

The international community must ask itself how is it possible that anti-Semitism, one of the most persistent forms of racial discrimination, which has claimed in the past, and still claims, Jewish victims in many countries, is not fully recognised at such a conference as a major form of racial discrimination. Bracketing every reference to anti-Semitism, as does the present text at the request of countries which not only preach but also practise this form of racism, should not be tolerated.

It is inconceivable and disgraceful that this World Conference Against Racism should be permitted to serve as a forum to discuss whether the Holocaust should be spelled with a capital "H" or with a small "h", and whether it deserves to stand by itself, as the most heinous crime committed against a people in recorded history, or whether the Holocaust should be marginalised, trivialised and relativised by simply adding an "s" whenever there is reference to this unprecedented tragedy, so that there is no reference to

"the Holocaust" but instead to "holocausts"! The resort to the discreditable tactic of usurping and deliberately abusing the established terminology for identifying great disasters which caused dreadful and untold human suffering on a massive scale, and using them as code names for other forms of human predicaments, with the sole aim of achieving political ends, should be barred at the outset and should not be allowed recognition in any official document, even as a draft and even if it is bracketed! The Holocaust is a well-defined term, as is Apartheid, or ethnic cleansing. They should all be distinctively singled out in history as a warning to future generations. However, abusing these well-defined terms for manipulative purposes as a transparently rhetorical and cynical device for achieving political ends, is tantamount to denying their unique character and their specificity.

The Israeli-Palestinian conflict is a dispute between two peoples over a piece of land that has been recognised by the United Nations to serve as a homeland and State for the Jewish people. The attempt to compromise and hijack the Durban World Conference by falsely and abusively depicting the role of Israel in the Middle East conflict as an example of racial discrimination should be condemned and decisively rejected. Unlike the Vienna, Beijing, Cairo and Copenhagen World Conferences, no rule has been introduced here barring the disruption and distortion of the proceedings by the introduction of specific issues such as the Middle East conflict. Cynically presenting the Arab-Israel dispute in false and distorted terms is liable to provoke incitement to racial hatred and violence and negate fundamental human rights principles which the Durban Conference is expected to reaffirm.

Not only does the intrusion of this extraneous political conflict into the agenda of the Conference represent a serious abuse and distortion of its purpose, it also constitutes an egregiously false presentation of this problem, manifestly motivated and inspired by blatantly racist sentiment and behaviour. This should not only be of grave concern to Israel but also to the Conference organisers. The inclusion of this unrelated agenda item is manifestly motivated and inspired by blatantly racist sentiment and behaviour. While Israel, the only true democracy in the region, is cynically presented as the sole villain in this conflict, falsely accused of every violation of human rights, including, amongst other allegations, implementation of racist policies, enacting racist laws and practising ethnic cleansing, it would appear on the other hand that there is no adversary or opponent in this conflict. No mention is made of the deliberate resort to terrorism, to the repeated use

of suicide bombers, with the avowed intention of indiscriminately killing innocent men, women and children in bus stations and shopping centres; no mention of incitement to destroy Israel and the calls for the extermination of all Jews not only by terrorist groups but also by religious leaders in mosques, repeated on public television radio broadcasts and in print; no mention of inculcating racial and religious hatred of all Jews from infancy and continuing in school text books in elementary schools, including conditioning children for their role as future suicide bombers assured of ascending to paradise; no mention of youth camps where 8, 9 and 10-year-old children are trained for warfare including firing weapons with live ammunition. None of this is mentioned in this one-sided, mendacious and racially tainted propaganda documentation presented to a Conference that purports to discuss how to confront racism and racial discrimination.

Last but not least is the outrageously false and transparent attempt to renew the equation of Zionism with racism. This scurrilous UN General Assembly Resolution No. 3379 adopted on November 10, 1975 has been described by the UN Secretary-General himself as the nadir of the UN's reputation. In an unprecedented act, the General Assembly recognised that perpetuating this grave falsehood as a resolution formally adopted by it was a terrible mistake and revoked it in 1991. Allowing the revival of this equation, whether

in explicit or in disguised language, in another UN declaration, will irremediably taint the proceedings of this Conference.

At this eleventh hour we call on the High Commissioner, in her capacity as Secretary-General of the WCAR, to use the moral authority of her high Office to issue an appeal at the Third Preparatory Committee and to all State delegations to reject the pernicious language contained in the Draft Declaration and instead, to present to the Conference a balanced and untainted draft which will enable the Conference to deal constructively with the important issues on its agenda and thus fulfil the hopes of all those to whom human rights is a living doctrine.

We also call on the host country to take an active part in saving the Conference, at this last opportunity, from degenerating into an unprecedented low point in the international community's efforts to confront racism.

In conclusion, we repeat our view that the failure to provide the moral leadership which the Office of the High Commissioner alone can supply at this critical hour, will result in a grave regression of international human rights standards and seriously discredit the role and office of High Commissioner for Human Rights for years to come.



Participants of the Remember Warsaw Conference visiting the Janusz Korczak Memorial, at Warsaw's Jewish cemetery, guided by Mgr. Jan Jagielski of the Jewish Historical Institute (photo courtesy of Dan Pattir)

Anti-Semitism at the United Nations: The World Conference Against Racism Becomes a World Conference for Racism

Anne Bayefsky

This Conference is supposed to be about combating racism. Instead it has been seized by those who foment it. It has become a global forum **for** racism. A racist anti-racism conference. How has the UN come to promote such an environment? Can it yet pull back from the brink of a disaster for the principle of the universality of human rights, their application to victims everywhere, and from the grave discredit to the institution itself which is so close at hand? What a tragedy if the very foundation of the UN itself should be forced to serve as its epitaph.

On the ashes of the victims of Nazi persecution was built an agenda for the future protection of universal human rights standards - applicable to all races, nationalities, and religions in the words of the Universal Declaration of Human Rights. The Declaration, adopted in 1948, set the path for the subsequent adoption of a series of central human rights instruments, legally binding and now governing all of the world's States in some form. These instruments - particularly the Racial Discrimination Convention adopted in 1965 proclaim discrimination on the basis of race, colour, descent, national or ethnic origin, to be a violation of fundamental human rights. Over many years, the meaning of racial discrimination, the application of the principle as found in the Racial Discrimination Convention have been developed and applied to over 155 States now legally obligated to follow its norms. The standards of racial equality are universal, and as international law - both through customary law and by treaty - they apply to all States and to all human beings.

These are the principles. But this Conference is today's reality.

Professor Anne Bayefsky, Visiting Professor of Law, Columbia University, New York, represented the IAJLJ at the Durban Conference. These are highlights from her address in Durban.

The outset of the 21st century sees the very United Nations which stands on the ashes of 6 million Jewish dead including one and a half million children slaughtered for being born Jewish in an **unparalleled** catastrophe in human history sponsoring a world conference which gives vent - nay promotes - the Jew as undeserving and villainous, and Jewish self-determination as illegitimate and evil.



Anti-Semitism is not merely an historical phenomenon. One need only come to the World Conference on Racism to watch it metastasize.

In the draft documents of both the NGO and Government Conference:

- The word "holocaust" is in square brackets, may or may not be plural, or started with a capital H - thereby questioning the reality of Jews as the victims of the most heinous crime committed against a people in history.
- The place and the meaning of the word "anti-Semitism" in a document supposed to be condemning racial discrimination in all its manifestations remains controversial and at issue - in footnotes and in brackets.

- Language likening the Jewish State to an apartheid regime thereby criminalizing its purpose and its very essence.
- Language containing wild accusations - such as genocide or ethnic cleansing - directed only to Israel, virtually ignoring the other 190 States of the UN.

Furthermore, this Conference and its preparatory process include:

- An official UN regional conference leading up to this Conference which banned the very participation of accredited Jewish NGOs.
- Virulent hate literature - Jews with hooked noses, blood dripping from fangs, with pots of money surrounding the victims, distributed on the grounds of this Conference in officially-sanctioned booths of participants.
- Harassment and intimidation of Jewish participants registering for this Conference.
- Clothing freely distributed with the official NGO World Conference logo inciting hatred and violence towards the Jewish State.

And this Conference has become the vehicle for those who spread the biggest Nazi-like lie of all - that Jewish self-determination - Zionism - is itself racist.

Unfortunately, the UN has laid the groundwork for such an assault for decades. It has permitted and encouraged the appropriation of the language of human rights for purposes antithetical to those very human rights principles. The double-standards applied to Israel are blatant and scandalous. Israel is the only UN Member State not permitted ever to be a member of the UN Commission on Human Rights or to stand for election to the vast majority of UN posts and bodies including the Security Council - directly contrary to the UN Charter's principle of the equality of nations large and small. More resolutions have been passed condemning the State of Israel by the Commission on Human Rights than any other State on earth, while the human rights situation in countries like China or Syria are bypassed. Israel is the focus of unique examination and criticism by over a dozen different committees, rapporteurs, and so-called experts, while UN funding for human rights in every other State is grossly underfunded. Anti-Semitism was deliberately omitted in the Vienna Declaration of Human Rights. The Holocaust was deliberately omitted from the statement adopted at the General Assembly on the occasion of the 50th Anniversary of the UN Charter.

This is anti-Semitism, UN-sponsored anti-Semitism:

- Israel is not an equal member of the world community.

- Addressing racism against Jews - anti-Semitism - is controversial and stymies consensus - in the words of the Chairman of the Drafting Committee at the Vienna World Conference.
- The Holocaust is allegedly of significance only to a special interest group and its mention somehow advantages the Jewish victim.

And where are the world's leaders of civil society? Where are the NGOs who claim anti-racism is their *cri de couer*? Silencing speakers who remind them of the victims of anti-Semitism in all its forms as in meetings yesterday? Donning free T-shirts ridiculing Jewish self-determination? Harassing Jewish registrants to this Conference? Pretending 5 million Jews in a region of over 100 million people in surrounding hostile States, or 28,000 kilometers as compared to 4,500,000, 2% of the land occupied by the Arab world, are invincible and inherently unsympathetic? Morally equating the unintended civilian victims callously situated by their kin in a self-inflicted war zone with the deliberate mutilation of babies and their mothers in pizza parlours? Referring to the so-called "Jewish settler" as a sub-species of humanity, while seeking to apply the Fourth Geneva Convention to those advocating "any means" to achieve their ends?

Where is Amnesty International and Human Rights Watch and the rest of the international NGO community - which consider themselves the guardians of universal human rights standards - in this campaign to paint anti-Semitism as victimless, marginalize and trivialize Jewish participants and their fears, and to incite racial violence and hatred towards the Jewish State? In a forum perversely entitled a World Conference Against Racism. In the words of the question posed to all of us at this meeting by the conference organizers, "are **you** against racism?"

If the final document of this NGO Conference, (or the Governmental Conference which lies ahead), retains its current inflammatory racist language against Jewish self-determination and refuses to recognize and acknowledge fully the Holocaust and anti-Semitism we expect NGOs (and States) to stand up and be counted - not on the side of hatred, not extremism, nor a false consensus for the sake of external consumption. We have a right to expect, in the words of the rules of procedure, that the results of this Conference will be consistent with human rights standards. If they are not, we expect participants to clearly disassociate themselves from such a final outcome, and declare themselves to be firmly on the side of the universality of human rights standards to all victims of racial discrimination - including Jews, whether they live in Israel or elsewhere.

Report on Durban World Conference: Few Satisfied and Many Dismayed

Daniel Lack

Now that it is all over, the question arises, was it worth while? In the event, the answer is decidedly negative from the standpoint of combating racism as a human rights scourge. Never at any time previously during the decades proclaimed by the UN has such violent, racist and inflammatory language been expressed as in the three Preparatory Committee Meetings culminating in the concluding torrent of invective exchanged at the World Conference Against Racism (WCAR). The finally agreed statement on the Middle East conflict and slavery enabling the adoption of the Declaration and Program of Action was immediately challenged by acrimonious contention and statements of disassociation by numerous delegations.

This is a tragic outcome viewed against the high hopes expressed in some quarters before Durban, although expectations were visibly downgraded as successive Preparatory Committees proceeded during the course of the summer with no acceptable compromise in sight.

From the outset the three major roadblocks to achieving progress were:

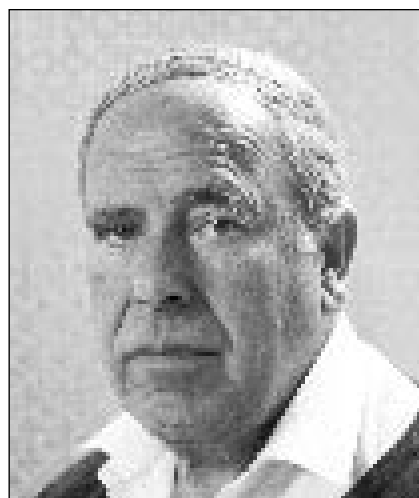
- The fanatical intransigence of the Palestinian Authority backed by the Arab and Islamic States in the attempt to politically exploit the WCAR by insisting on the inclusion of the Middle East conflict as a platform for racist propaganda to delegitimise, demonise and vilify Israel;
- The controversy over the treatment of the history of the slave trade in Africa and appropriate redress for its consequences;
- The plight of the Dalits in India and elsewhere in South-East Asia (more widely known as the “untouchables”).

As participants could clearly observe and as all media reports confirm, it was by far the first of these obstacles that played the decisive role in producing the acrimony and disharmony that envenomed the Conference itself and dug the pitfalls along the road, leading from the implacable confrontations in Geneva

to the final frustration of Durban. This hijacking and perversion of the WCAR was the major cause for the disruption of the proceedings, the side-tracking of the two other key issues referred to above and the neglect of other critically important issues such as racial discrimination practised against refugees and migrants and the racially motivated ill-treatment of indigenous peoples.

The principal victim of these excesses has been the global struggle against racism and the cause of human rights.

When the representatives of the Palestinian Authority and their Arab and Islamic State supporters finally rejected the Norwegian initiative resulting in an acceptable and balanced text about the Middle East conflict, the Israeli and the U.S. indicated their readiness to show that extra degree of compromise. They thereby demonstrated a willingness to save the Conference from total failure by waiving the basic objection of principle to accepting wording clearly singling out the Arab-Israeli dispute as a purely political conflict over disputed territory for specific attention in the context of the World Conference Against Racism.



Adv. Daniel Lack, the IAJLJ's representative to the UN bodies in Geneva, represented the Association at the Durban Conference.

Not even this gesture sufficed to overcome the intransigence of the Palestinians and their backers. They continued to insist on maintaining into the fourth day of the WCAR, the inclusion of inflammatory wording seeking to delegitimise the existence of Israel by falsely accusing it of racist policies in the draft texts to be submitted to the Conference for adoption.

Faced with this demonic and paranoid obsession with derailing the Conference convened to combat racism world wide, the U.S and Israel announced their intention of withdrawing from the Conference on 3 September. The organisations forming the Jewish coalition of NGOs (including the American Jewish Committee, Anti-Defamation League, Bnei Brith International, Co-ordinating Council of Jewish Organisations, Hadassa, International Association of Jewish Lawyers and Jurists, Simon Wiesental Centre and World Jewish Congress) did likewise.

This principled decision clearly demonstrated the determination to expose and denounce the deliberate abuse of the Conference's purposes by the false and vindictive injection of the single disruptive issue of the Palestinian question into the Conference agenda embraced by all the Arab and Islamic States as an issue of racism, despite its manifestly political and sadly increasingly military nature. The decision had a salutary effect on the WCAR.

By a persistent effort extending over the last twenty-four hours of the Conference, the South African President sought to rid the text of mendacious and inflammatory hate language. Even at that last moment and jeopardising the difficult compromise achieved on the issue of slavery, the Arab States once again insisted on putting to a vote the use of the term "racism" in connection with Israel's presence in the disputed territories. By this time, however, remaining WCAR delegates, conscious of the deliberate process of derailment and the desirability of saving the Conference from total failure, voted down the Arab motion with many delegations showing their distaste for the entire process, by abstaining or simply not voting. The compromise statement remains a travesty by its confused and ineffective condemnation of "anti-Semitism"¹ alongside "Islamophobia" and expression of concern in the same breath over "the plight of the Palestinian people under foreign occupation" and the right of refugees to "freely return to their homes". As assuredly as this grotesque wording is alien to any declaration on racism, it will similarly be excluded as an anathema in any future political settlement. The combined strongly expressed objections to this matter by the Canadian, Australian and other Western governments that remained at the Conference make this a certainty.

How did this undistinguished end to a conference saved *in extremis* from collapse, reach such a sad pass?

On July 18 last, the President of the International Association of Jewish Lawyers and Jurists addressed an urgent appeal to the UNHCHR,² Mrs. Mary Robinson and to the international community at large shortly before the third and equally inconclusive Geneva Preparatory Committee session, listing the flaws and deeply objectionable wording in the draft text of the Declaration and Program of Action to be adopted at Durban. That draft text, which arrived virtually unchanged at Durban with respect to this flawed wording, included "scurrilous and racially inspired passages which are the antithesis of the Conference fundamentals".

These serious impediments to consensus included the now well known list of objections to including the Palestinian disputed territories issue as the only political question in the whole Conference agenda - in a blatantly transparent attempt to single out Israel in abusive and inflammatory language for its alleged wrongful policies, based on a tissue of egregious falsehoods.

The text implicitly sought to revive the canard of UN General Assembly Resolution of 1975, rescinded in 1991, characterising Zionism as "racism", which UN Secretary General Kofi Anan has recognised, brought the UN into serious disrepute.

A further gross provocation included casting into doubt whether the term "Holocaust" commemorating the most terrible genocide in recorded history of six million Jews in World War Two by the Nazi regime, should be spelt with a capital "H" or with a small "h". Further, virtually every time the term "antisemitism" appeared in the text as describing a phenomenon that has claimed countless Jewish victims over the past one and a half centuries,³ and one which continues to be a source of ugly racial discrimination, it was placed in brackets to question the authenticity of this term on spurious grounds themselves redolent of racism.

This appalling amalgam grew out of the UN Human Rights Secretariat's decision to make a compilation of pre-WCAR regional conference texts whose markedly negative character developed in particular from the Asian region Teheran session barring Israel and Jewish representatives of UN accredited NGOs from attending, again on racial grounds. Tehran, it is superfluous to recall, is the capital of a country known for its violent hostility to Israel. Iran incessantly calls for Israel's destruction as part of the Iranian policy of actively promoting terrorist attacks against that country, in open defiance of international law and in grave breach of UN Charter principles.

It is this lack of moral leadership and the failure to formulate a new draft Declaration and Program of Action reflecting the real issues of concern framed in the language of the relevant instruments including notably the principles of the Convention on the Elimination of all Forms of Racism and Racial Discrimination, which set the stage for the regrettable series of events that were to lead to the Conference's undoing.

The precursor to the World Conference Against Racism was the NGO Forum Against Racism for which the NGOs forming the coalition of Jewish organisations had registered. The Conference was held at a sports stadium in Durban at which some three to four thousand NGO delegates and individual participants attended. Throughout, a racist and antisemitic climate was generated by extremist Palestinian and Islamic agitators and their Iranian and other Arab supporters including unidentified individuals from European and other countries. The succession of incidents included verbal threats and harassment against individual members of the Jewish organisations, identified by their support for issues of concern to Jews and Jewish communities throughout the world. In addition, Israel was vilified and delegitimised and repeatedly defamed as a racist, apartheid and genocidal State, falsely accused of deliberately killing Palestinian children and adolescents in clashes with Israeli Defence Forces.

The area of the stadium seethed with virulent hatred in the form of the dissemination of unadulterated antisemitic propaganda reminiscent of the Russian pogroms and the worst excesses of the Nazi period, including stereotyped caricatures in pamphlets, booklets and posters depicting Jews with hooked noses covered with blood dripping from vampire like fangs, clutching money bags. These unabashed racist materials, included such vicious canards as the *Protocols of the Elders of Zion*. The Union of Arab Jurists distributed hate literature depicting a Star of David with a superimposed Nazi swastika.

The Conference organisers made no attempt to prevent the distribution and display of this hate literature. Shirts distributed with the official logo of the NGO Forum with printed anti-Israel slogans proclaiming "Zionism equals Racism" were distributed at the entrance to the Forum and on its grounds.

Palestinian demonstrators with spiked flag poles attempted repeatedly to overrun and intimidate Jewish groups at stands displaying inoffensive explanatory materials, while chanting provocative and racist slogans reviling Jews and Israel. Police guards had to be repeatedly called in to protect the Jewish groups.

Three incidents in particular constituted an attempt to silence and intimidate the Jewish organisations in an unpardonable and unacceptable manner.

On 29 August the NGO Forum Commission on Antisemitism was interrupted by a hostile group including Palestinian and Arab activists and their supporters with the clear intention of disrupting the proceedings. It was possible to conclude the discussion only through splitting into smaller discussion groups. Subsequently, the minuted conclusions of the Commission brought to the conference organisers for agreed input into the Forum final texts were sought to be invalidated, on the trumped up charge that these conclusions did not reflect the views of the demonstrators who sought to interrupt and terminate the proceedings.

On 30 August, a press conference to present the conclusions of the Commission and describe the circumstances in which the Commission was held, was itself heckled and disrupted by a similar group of agitators yelling anti-Israeli and antisemitic slogans. The disruption by the hecklers chanting the same rabidly anti-Israeli slogans again disrupted the proceedings and prevented journalists from posing questions.

Finally at the conclusion of the Forum plenary on the Saturday night, 2 September, a key passage of the Jewish coalition statement was arbitrarily excised from the NGO Forum concluding statement dealing with the question of antisemitism, the prevalence of which was so amply demonstrated at the NGO Forum itself.

The NGO Declaration itself contained wild and unsubstantiated charges against Israel including the most extreme crimes under international criminal law including crimes against humanity, grave breaches of the Geneva Conventions and violations of humanitarian law generally, as well as allegations of specific war crimes such as ethnic cleansing and genocide, widespread and massive violations of human rights and apartheid. It called for the reintroduction of General Assembly Resolution 3379 of 1975 branding Zionism as racism and the introduction of sanctions by the Security Council under Chapter VII of the Charter against Israel for its alleged apartheid.

The Jewish coalition's statement objecting to these unsubstantiated racist accusations as a clear attempt to undermine the legitimacy of Israel as a State and as the expression of a virulent form of contemporary antisemitism, leading to incitements to hatred and violence, including torching of synagogues, physical assault and killing of Jews for supporting the State of Israel and its right to self-determination, was rejected and removed from the NGO Forum Declaration on a motion put by a group purporting

to represent the World Council of Churches. It argued that since the Jewish coalition's statement contradicted the one made by the group of NGOs representing the Palestinians, and since it was claimed to be incompatible therewith, it should not be allowed to be included in the final NGO Forum document. The motion was thereupon summarily accepted by the Conference organisers supported by the acclamation of the unruly remainder of the participants at about 11p.m. without an opportunity being afforded to the Jewish coalition to intervene and without there being anything resembling a quorum of the participants present.

The Jewish representatives then walked out as a group, expressing their disgust and disassociation from the entire process characterised as mob rule and conducted with the arbitrariness of a kangaroo court.

The absence of the Jewish coalition's balancing statement enables these preposterously wild charges to appear unchallenged and gives free rein to their blatantly, vindictive and antisemitic content.

The Jewish group subsequently made known to the High Commissioner its rejection of the inflammatory wording constituting an incitement to racist hatred and violence against Jews both within and without Israel. Further it pointed out that the language used, violated key provisions of the Covenant on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination and represented a negation of human rights standards constituting a betrayal of the values and standards of civil society.

A particularly discouraging factor was the lack of moral courage displayed by would-be leaders of the international human rights organisations such as Amnesty International, Human Rights Watch and the International Federation of Human Rights. They stood by in silence when the rights of the Jewish coalition were being trampled upon. They failed to live up to their own principles and standards and appeared to condone these abuses by refraining from criticism of these excesses.

When the offending document of the NGO Forum was brought to the attention of the High Commissioner for Human Rights, Mrs Mary Robinson in her capacity as the Secretary-General of the World Conference Against Racism, she was widely reported by the media as having found that part of the language it contained was hurtful and unacceptable and declined to receive it. However the official UN Press Release (RD/965 of 8 September 2001) prefers to state (at page 9):

"NGOs and human rights advocates from all regions of the world, had a massive presence in Durban during and prior to

the Conference's opening. Those organisations adopted an NGO Declaration and Program of Action that was presented to the President of the Conference."

The reality and the official perception of that reality are clearly at variance.

The World Conference satisfied few and dismayed many.

It breached a fundamental human rights precept. In the pursuit of an illusory consensus that proves incapable of being reached still less sustained, democratic and legal processes cannot be used as a cloak to undermine democracy itself and subvert human rights principles.

By falsely attempting to vilify Israel as a racist and apartheid State the message of South Africa's struggle was placed in a false light by the Conference hijackers. After its valiant efforts to make Durban a success South Africa deserved better.

The World Conference could not achieve consensus by falsely discrediting one State. The international community and the Office of the High Commissioner of Human Rights have been forced to recognise that the world campaign against racism cannot be compromised to placate the political interests of those who hold democracy and human rights institutions in contempt.

1. A term henceforth to be replaced by "antisemitism" in view of the deliberate and systematic abuse of the hyphenated term with the capitalised "s" by those wishing to obscure and distort the meaning of the oldest form of racial hatred.
2. United Nations High Commissioner for Human Rights.
3. Preceded by many centuries of notorious persecution in the Middle Ages including Jewish victimisation during the Crusades and the Spanish Inquisition and Expulsion.

The Appeal Judgment in the Case of David Irving v. Professor Deborah Lipstadt and Penguin Books

Jonathan Goldberg

It will be recalled that in Issue Number 24 of *JUSTICE* for Summer 2000, I described the epic judgment of Mr Justice Gray in the Queens Bench Division of the English High Court of Justice, in which he concluded that the Defendants Professor Deborah Lipstadt and her publishers *Penguin Books* were justified in having branded the famous historian David Irving a racist, a Holocaust denier, an anti-Semite, an apologist for Hitler, and most damningly, a deliberate perverter and distorter of historical evidence. This was the culmination of a sensational libel trial which had lasted many months in London in early 2000. The case and the judgment attracted enormous publicity around the world.

By contrast the judgment of the Court of Appeal which was handed down recently in late July 2001 has attracted almost no attention whatever. Yet it too merits consideration. In a written judgment of 34 pages the court refused David Irving permission to appeal. The appeal judges concluded that he had not demonstrated any real prospect of an appeal succeeding. The court reached this decision after a hearing of some 3 working days, at which Irving was represented by counsel unlike at the original trial where he had represented himself against a distinguished legal team fielded by Professor Lipstadt and her publishers. The 3 judges of the full court echoed and approved the written reasons of the single appeal judge, Lord Justice Sedley, who had earlier refused Irving

permission to appeal also, after considering the written papers only. The written reasons of Lord Justice Sedley also deserve consideration, and will be mentioned hereafter. The full court of 3 appeal judges consisted of Lord Justice Pill, Lord Justice Mantell, and Lord Justice Buxton.



Ironically all the judgments in this case from first to last can be found most conveniently set out on Irving's own website, www.fpp.co.uk. Under the title of "International Campaign For Real History" Irving's website is indeed fascinating stuff. It features a wide range of articles and publications from all over the world concerning this present litigation, together with details of Irving's busy future public speaking schedule especially in the United States, together with articles of historical interest on a wide range of subjects connected especially with the Nazis and the Second World War. But controversies such as the Jonathan Pollard case are also featured with a strong bias towards him never being released, alongside articles with such titles as *Wiesenthal Centre - The Latest Lies* and *Dossier on Disgraced Israeli PM Sharon* and various pro-Palestinian pieces.

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It seems extraordinary that the author of this website should have invested such vast reserves of energy and money (and one must question whether the money funding this most beautifully presented and High-Tec of websites is his own !) in bringing his failed libel action, in order to seek to prove that **he is not** racist or anti-Semitic. Photos of ultra orthodox Jews with black hats and spectacles and ringlets adorn the website at places of no clear relevance whatever, yet their intent is crystal clear. Quotations appear such as “Donations - David Irving still needs your help to defend his career and reputation against the mudslide triggered by Professor Deborah Lipstadt and her Israeli Paymasters at *Yad Vashem*”. The well-known historian Professor David Cesarani, the Jewish head of the Wiener Library, is described as “Dr. David **“Ratface”** Cesarani”, and extreme right wing views abound generally. The reader is even invited to attend a forthcoming historical convention in Cincinnati where Irving will be speaking, in order to discover whether Professor Lipstadt tried to kill him (and one assumes he means more than in the legal sense!). Nor has Irving accepted for one moment his defeats in the English courts, the latest of which it should be said, realistically marks the end of the road for this particular litigation. The website itself indulges in a kind of legal revisionism of its own, and the conclusions of the various English courts are attacked from every conceivable angle. Once again writings appear which purport to demonstrate that no large numbers of Jews were gassed at Auschwitz. In summary if one wants to see just how sophisticated and malevolent the contemporary faces of race hatred and anti-Semitism and historical revisionism really are, this website I suggest is an absolute “must”.

To return however to the English courts, it is sad but perhaps necessary to have to record here that none of the judges involved was of Jewish origin.

Lord Justice Sedley in his written reasons said he bore well in mind that for a professional historian to be branded a bigot and a falsifier placed a heavy burden on the Defendants who sought to justify it. He pointed out that there was much about which two historians could legitimately differ, and differ angrily, without either of them meriting such a description. But he found no reason to differ from the trial judge in his finding that the Applicant’s very own character as it had emerged in the evidence was “the cement between the bricks”. What might in another historian have been casual misreadings of the historical evidence, emerged in the Applicant’s case as “sedulous misinterpretations all going in the direction of his racial and ideological leanings”. He pointed out that there is no law in England against Holocaust denial and that

it is a fundamental liberty not only to be contentious but also to be wrong. He bore in mind also that anti-Zionism and anti-Semitism are not necessarily the same thing. Here however the Applicant had himself invoked the law by suing his antagonists. He had issued a challenge which the Defendants had met. His denial that Auschwitz was a place of mass extermination was central to the case against Irving and he had been betrayed by his very own historical methods, notably his reliance on the discredited Leuchter report.

It will be recalled that Leuchter is an American, and a so-called “consultant on executions”, who had advised several American prisons on their judicial execution procedures. He has no formal professional qualifications whatever. He had visited Auschwitz in 1988 to conduct certain quasi-scientific tests of his own, and had afterwards given “his best engineering opinion” that none of the facilities there were utilised for the execution of human beings. The only gassing which took place there with cyanide was to fumigate lice from clothing. In accepting Leuchter’s bogus science said Lord Justice Sedley, the Applicant had demonstrated once again his willingness to sacrifice objectivity in favour of anything which would support his chosen form of Holocaust denial. Lord Justice Sedley noted that Irving had however succeeded in proving at trial that a small number of the allegations made against him by the Defendants were untrue, in particular when the Defendants had claimed that he had a self portrait of Hitler above his desk, that he had once shared a platform with terrorists of the *Hamas* and *Hizbollah* movements, and that he had stolen certain valuable microfiche documents from Russian archives thus risking damage to them. Nonetheless the trial judge was right to conclude as he did that these matters were trivial only, when set against the sea of more serious allegations which the Defendants had succeeded in proving against Irving, and thus they could not further damage his real reputation. Lord Justice Sedley noted but dismissed Irving’s suggestions that the expert witnesses ranged against him at trial by the Defendants had been paid excessive fees which destroyed their impartiality, and that Mr Justice Gray himself had been influenced in his judgment by a fear of adverse press comment. (It is worth stating in this connection that Irving’s website maintains to this day a vicious campaign against the main expert witness who was called against him at trial, Professor Richard Evans, who is a distinguished Professor of Modern History at Cambridge University and who is in effect accused of corruption in the historical evidence about Hitler which he gave to the court).

In their single composite judgment in the full Court of Appeal, the three judges expressed fulsome admiration for the “comprehensiveness and style” of the judgment of Mr Justice Gray, which they noted had itself now received the unusual accolade of being published in book form without any further commentary, by *Penguin Books*. In that form it ran to 350 pages. They did accept in theory the central argument of Irving. This was that in order to win, Professor Lipstadt and her publishers would need to establish not merely that the weight of the historical evidence was against the views he had expressed, but also that on the evidence available to him at the time he was writing, his views were wholly unreasonable and not ones which could honestly have been held by any rational historian with knowledge of the Third Reich. It was further argued for Irving that he had never denied that the Nazis and their collaborators murdered millions of Jews. He had never sought to justify such conduct. He indeed accepted that after June 1941 a policy of murdering all Jews in occupied Europe had become State policy but only “at Himmler’s level”. Irving’s central argument was that Hitler had been kept wholly in the dark about it however, by the insubordinate Himmler and Goebbels. In order to demonstrate his historical objectivity, Irving relied on the fact he had himself disclosed a conversation he himself held long afterwards with Himmler’s brother, who had told Irving “that Heinrich was such a coward that he would never have done this without Hitler’s orders”.

The court found nonetheless that the trial judge had applied all the correct tests. He was justified in his conclusions that Irving had deliberately falsified and misrepresented the historical evidence time and again in his published works. As Mr Justice Gray had rightly noted “The issue with which I am concerned is Irving’s treatment of the available evidence. It is no part of my function to attempt to make findings as to what **actually happened** during the Nazi regime. The distinction may be a fine one but it is important to bear it in mind”. The trial judge had correctly assessed the credibility and reliability of the expert historians called by the Defendants. He was justified in his findings that Irving’s published and spoken words directed against Jews, either individually or collectively, were hostile, critical, offensive and derisory in their references to Semitic people, their characteristics and their appearances. He was entitled to conclude that “the inference which is clearly to be drawn from what Irving has said and written is that he is anti-Semitic, and that he has on many occasions spoken in terms which are plainly racist” and likewise that Irving had associated to a significant extent with named individuals who were all right wing extremists.

Regarding Auschwitz, the appeal judges approved the conclusion of Mr Justice Gray (after his massive sifting of the historical evidence):

“that having considered the various arguments advanced by Irving to assail the effect of the convergent evidence relied on by the Defendants, it is my conclusion that no objective, fair minded historian would have serious cause to doubt that there were gas chambers at Auschwitz and that they were operated on a substantial scale to kill hundreds of thousands of Jews”.

Regarding *Kristallnacht* (the events of November 1938 during which Jewish property throughout Germany was systematically ransacked) the trial judge was fully entitled to have concluded that Irving had deliberately twisted his sources and quoted them out of context in order to portray Hitler as being kept in the dark about these events. He had done the same when writing about the shooting of the Jews of Riga in November 1941. He had placed impossible weight on a minor document by a minor functionary from the German Foreign Ministry called the Schlegelberger Note of 1942, which attributed the following hearsay remarks to Hitler:

“The Reichsminister informed me that the Fuhrer had repeatedly declared to him that he wants to hear that the solution to the Jewish question has been postponed until after the war is over”.

Irving had referred to this at trial as “a high level diamond document” proving that Hitler was not party to the extermination of the Jews carried on by his underlings. But the judge had found that no reputable historian could possibly ignore the mass of contrary evidence, and he was persuaded by Professor Richard Evans that this note was just as likely to have been concerned with the complex problems thrown up at the time for the Nazis in deciding how to treat half-Jews (*Mischlinge*).

It is not within the scope of this short article to cite all the other instances in which Irving had distorted his historical sources, according to the judges, but the following example may be thought particularly telling. In 1943 there were some 750,000 Jews living in Hungary. The Nazis pressured the Hungarian Government to deport them to camps but the Hungarians were reluctant to comply. Hitler met with Admiral Horthy, the Hungarian leader, on April 16th and again on April 17th 1943. (The Hungarians still refused to hand over their Jews thereafter of course and Hungary was subsequently invaded and occupied by the Germans). There was good historical evidence that at the first meeting on April

16th Hitler had sought to persuade Horthy to agree to expel the Hungarian Jews, but had however reassured him that there would be no need to kill them. This evidence consisted of the minutes taken by officials of both sides at the meetings and which were clearly reliable. The following day on April 17th however, by contrast, both Hitler and Ribbentrop according to these minutes had spoken to Admiral Horthy in uncompromising and unequivocal terms about their genocidal intentions in regard to the Hungarian Jews. In particular Hitler himself was recorded in these minutes as saying:

“If the Jews in Poland did not want to work they were shot. If they could not work, they had to perish. They had to be treated like tuberculosis bacilli ... That was not cruel ... Why should one bear the beasts who wanted to bring us Bolshevism? Nations which did not rid themselves of Jews perished”.

In his book *Hitler's War* Irving had quoted the above remarks of Hitler, but had immediately followed them with the words:

“But they can hardly be murdered or otherwise eliminated”, Horthy protested. Hitler reassured him ‘there is no need for that’.”

In other words, Irving had transposed remarks made by Horthy and Hitler in the first April 16th meeting, and had improperly added them to the account of the second April 17th meeting, in order to convey the false impression that Hitler was reassuring Horthy on their final meeting on April 17th that there was no need to kill the Jews of Hungary. Irving's counsel had asked the appeal court to consider afresh whether this transposition might not have been merely innocent. The trial judge had concluded “Irving materially perverts the evidence of what passed between the Nazis and Horthy on 17th April” and the appeal judges saw no reason to doubt that conclusion. Numerous other examples of selective misquotation were cited by them from the judgment of Mr Justice Gray in this same context. In conclusion, Irving had not persuaded the appeal court that the general conclusions of the trial judge were in any way unjustified. Indeed they agreed with the trial judge.

The present writer permits himself the following despairing comments on this whole sad saga of litigation. We live as never before in an age of “spin”. Reality exists nowadays at two levels. One is what actually happens. The other is the way it is portrayed by the propaganda machines and the media. We see examples of it every day in big things and small. Our politicians who

should set an example are usually the worst offenders. The truth is massaged and manipulated and distorted at every level by expert propagandists feeding the media whose appetite for stories is insatiable and greedy. It happens for example, each time a terrorist group employs an eloquent spokesperson, often an educated and moderate sounding woman, to be the acceptable face of portraying some such act as a bomb at a discotheque, as allegedly being a brave act of resistance in a war of liberation for occupied lands. But it happens no less I suggest when publicity hungry lawyers rush to give press conferences on the steps of the court outside court hearings, giving out exaggerated and one-sided accounts of their clients claims in a language and style which the clients probably could not even dream of. It is a mad roundabout upon which we are all embarked today and which nobody seems able to get off. “The medium is the message” for all of us it seems.

In such a world unhappily, it may matter little that five eminent English judges have painstakingly sifted through a mountain of legal and historical evidence in order to reach balanced and fair conclusions. Few will bother to read them, and those who do are likely by definition to be the sort of people who did not need to have their eyes opened to these events in any case. What remains in the subconscious memories of the mass of people may more likely be the graphic images on Irving's website of gold-digging Jews who purchased expert testimony in order to manipulate the judicial process, but who will never (he proudly assures us in effect) break the indomitable and free spirit of this independent historian dedicated to the pursuit of historical truth, which for him includes an appreciation of Hitler's good name. The worldwide burst of publicity and propaganda which he has achieved may best explain why this sophisticated and dangerous man (supposedly made bankrupt by the costs of this brave fight for the truth) brought his libel case in the first place.

New Swiss Cantonal Parliamentary Initiative Amending Code of Penal Procedure

Philippe A. Grumbach

The controversial trial in which the International League Against Racism and Antisemitism (LICRA) and a Holocaust survivor were involved, concerning the prosecution of Geneva bookseller for having disseminated Roger Garaudy's negationist book *The Founding Myths of Israeli Policy*, once again demonstrated the inadequacies of Swiss Federal and Cantonal procedural law.

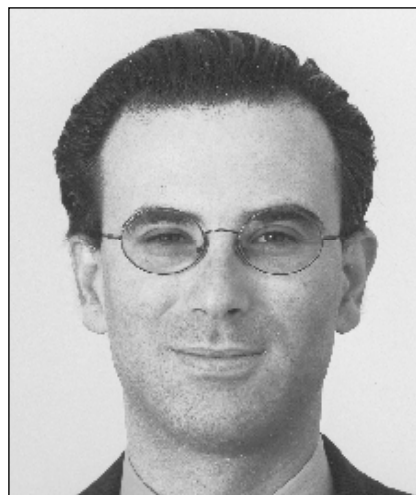
It will be recalled that the Swiss Supreme Court, in a judgment rendered on 10 August 2000, refused to recognise that a survivor of the Nazi death camps or families of *Shoah* victims had a right to constitute themselves as *partie civile* (or *amicus curiae*)¹ in criminal proceedings brought against Holocaust deniers.

Examining the preliminary procedural question of whether a victim of genocide, his relatives or an organisation pre-eminently concerned with the outcome of such proceedings, could appear as *partie civile*, the Swiss Supreme Court ruled that this was not possible, since the Geneva Code of Penal Procedure (Art. 25) did not extend to these categories of persons.

Faced with this incomprehensible and grotesque result, the writer of this note was privileged to be in a position to propose a draft law to the Geneva *Conseil d'Etat* (Council of State) on 30 August 2000 with the purpose of amending the code of criminal procedure in this respect. The draft stated as follows:

"With regard to penal proceedings for denial of genocide in accordance with Art. 261 *bis* Section 4 of the Penal Code,

survivors and their descendants shall have the capacity to constitute themselves as *partie civile*. The same right shall be conferred on associations which have as their statutory object representing victims of a genocide or their descendants".



Reacting in record time to this proposal, the Geneva Parliament unanimously decided in May 2001 to deal with this legal *lacuna* by adopting a provision even more comprehensive than the one originally proposed. It provides as follows:

"Art. 25 Section 2 (new provision)

With regard to penal proceedings introduced for the denial, minimising or justification of genocide pursuant to Art. 261 *bis*, Section 4 of the Swiss Penal Code of 21 December of 1937 (CPS), survivors of genocide and their relatives as defined in Art. 110

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1. A term usually describing an association or organisation or an individual recognised as having a demonstrated interest or important testimony to contribute on an issue to be decided in civil or penal proceedings, on behalf of a party thereto.

of the CPS shall have the capacity to constitute themselves as *partie civile (amicus curiae)*.² The same right shall be conferred on associations constituted for not less than three years, having as their statutory aim combating racial discrimination or representation of victims of genocide”.

This procedural innovation is fundamental, since Geneva is the first Swiss Canton to afford this possibility on behalf of victims of genocide in such prosecutions.

Accordingly, associations such as LICRA and the victims of genocide will no longer be prevented in Geneva from being heard in proceedings in which they have a pre-eminent concern. LICRA will henceforth be able to lead the struggle with the help of Parliaments of other Swiss Cantons so that Art. 261 *bis* of the Swiss Penal Code on racial discrimination extends to victims of genocide and associations appearing on their behalf in similar circumstances, the same rights as those provided by the Canton of Geneva.

It will be recalled that in the *Ferraglia trial*,³ Jewish communities and anti-racist associations were deprived of the possibility of appearing as *partie civile*⁴ before the Swiss Supreme Court. This

situation is both politically and legally deplorable and weakens the effect of legislation against racial discrimination.

It should be recalled that most European countries which have a comparable legal institution, grant anti-racist associations and Jewish communities as well as individual persons who are able to demonstrate the relevance and importance of their acting in this capacity, the right to appear as parties in such proceedings.

It is for this reason that it is to be hoped that this welcome Geneva initiative, will be followed by the other Cantons as well as by the Swiss Confederation itself.

It should be made unmistakably clear that conferring on surviving victims of genocide and those acting on their behalf, the right to appear as *partie civile* is not limited exclusively to Holocaust victims but applies also with respect to Rwandan, Cambodian and all other victims of genocide.

2. *Ibid.*

3. See *JUSTICE* No. 22 Winter 1999, page 34.

4. See first footnote on p.1.



Opening session of the Remember Warsaw Conference. The speaker is Adv. Andrej Kalwas, President of the Polish National Council of Legal Advisors

Remember Warsaw

Remember Warsaw is the third of a series of conferences commemorating Jewish lawyers and jurists who perished in the Holocaust and their contribution to the law in their respective countries. The Warsaw International Conference was held on May 9-13, 2001, by the IAJLJ, under the auspices of the Secretary General of the Council of Europe. Co-Sponsors were The Polish National Council of Legal Advisors; The Polish National Bar Association; The Polish Judges Association; and European Judges and Prosecutors for Democracy and Freedom. More presentations from the Warsaw Conference will appear in the next issue of *JUSTICE*.

“I would like to live in Kracow or in Jerusalem”

Wladyslaw Bartoszewski

It is a fact, that as I stand before you - I am playing different roles: that of a witness of a horrific era, that of historian, and also - the Polish Minister of Foreign Affairs.

The most important thing for those who are becoming acquainted with Poland is the fact that someone with my biography could have become Foreign Minister. My friend and predecessor in this post, Professor Bronislaw Geremek, was the only head of a Foreign Ministry in the world to live in a ghetto until he was 10. I, as his successor, am the only Foreign Minister in the world to be an honorary citizen of Israel. This surely means that

Professor Wladyslaw Bartoszewski is the Minister of Foreign Affairs of Poland. Highlights from his address at the Remember Warsaw Conference.



things are not that bad with today's Poland. Let me also add that in Poland - as in any democracy - you become a Minister not because you want to, but because you get elected. That means that the voters

accept our biographies and our view of the world.

This is the second time that I am Foreign Minister. I held the post for the first time in 1995 and very quickly - after just two months in office - I went to Jerusalem. I paid a visit to the then Foreign Minister Peres and Premier Rabin. Minister Peres, joking about by honorary citizenship of Israel, said: *Can you believe it: Israel - such a small country - and yet it has two Foreign Ministers, you and me.* That was an amiable joke. But seriously - one thing is certain: it isn't easy to be the Foreign Minister of Israel. Is it easier in Poland? - I would be acting unprofessionally if I answered that question.

I am very happy, that such a large group of lawyers from different countries has

come to Poland. I have great respect for lawyers, there were lawyers in my family, though I am a historian - not a lawyer. So, if I dare address such an audience, it certainly will not be on legal matters.

I have been friends with many Jewish lawyers. I was particularly close to Gideon Hausner. He was in Poland to prepare the indictment in the *Eichman trial*. I tried to help him as much as I could. During our work together our relationship became deeper, it developed. We remained in touch until his death. I also knew a lawyer in Jerusalem by the name of Szczupak, who was an active member of the Pilsudski faction.

And so, it is a historian that is addressing you, and a Varsovian - since my family has lived in Warsaw for generations. The oldest evidence of the Warsaw roots of my family dates back to the times of Napoleon. In this city I experienced beautiful things, and terrible things - and the most horrific. And I still live here today.

Any normal person likes to reminisce about his childhood. My childhood was not typical. I spent that part of my life as a minority, an ethnic minority in a Jewish community. I lived with my family in an apartment owned by the bank that my father worked for, in Bielanska Street, at Tlumacki, where there were almost no *goyim*. Religious Jewish landlords were reluctant to rent to them. My father was an employee of the Bank Polski, which was situated in Bielanska Street. And so, we lived on the edge of the Jewish quarter. I still recall, not without sentiment, my father's matter-of-fact attitude; he was a banker and financier, who rejected any intolerance. And he expressed that succinctly: *What idiocy! It's all the same to me if someone's a Jew or a Turk -*

as long as he is solvent! To me, as a child, that simply meant that if a person was honest, responsible and decent, then regardless of his origin you were friendly toward him.

What do children do? Before they go to school - children play. That's what I did. Where did we play? - In the nearest park. The nearest park was the Krasinski park. Who played in the Krasinski park? 99.5% of the children there were Jewish and half a per cent were Polish. Naturally, I could understand Yiddish because that's what the children spoke. Later, as my Yiddish deteriorated, I learned German in secondary school. But, even today, I can understand what you are talking about. I remember when I was playing with some boys, a devout Jewish mother shouted: *Son, come here, don't play with that stupid goy*. When I got home, I asked my mother: *why am I supposed to be a stupid goy?* My mother just laughed. That taught me that it's normal for people to be different. Some are nice and friendly, and others are not.

My mother and father maintained social contacts with their Jewish friends. Those were intelligentsia families: bankers, lawyers, engineers, journalists. In such company you did not raise religious or other sensitive subjects. Those were simply social gatherings - and that was obvious to me. I addressed the Jewish friends of my parents as "aunt" or "uncle", and I didn't realize that some of them were Jewish until after the War broke out.

When Isaac Bashevis Singer described the Jewish Warsaw, and later left for the United States, I was in high school. I was much younger than he was, but old enough to remember the streets that he described. One-third of the population of my city was Jewish, every third person. Where else did you have such a capital

city in Europe? I shall not reminisce about the period of the War: that is a separate subject and this isn't the right occasion for it. In the excellent Encyclopedia of the Holocaust, edited by my friend Israel Gutman, published in English in Israel and the United States, there are chapters that deal with *zeglota*, the history of that period, the Warsaw Ghetto and its struggle. There is even the personal entry: *Bartoszewski*.

Allow me two more observations. First of all - how did it happen that I started helping Jews during the War? At the beginning of the War I found myself in Auschwitz, Auschwitz Eins. I spent seven months in that first concentration camp, where Poles were practically the only inmates. I saw such atrocities, that as an eighteen-year-old I was a person who had experienced as much as someone of eighty. Luckily, as a result of "film-script" coincidence I was released. Before I was detained in a round up and imprisoned in Auschwitz, I had been an employee of the Polish Red Cross. The Polish Red Cross and the German Red Cross were both members of the International Red Cross in Geneva. As a result, energetic efforts were made to get me released. When I left the camp, I decided that that situation was unacceptable, that something had to be done.

Everyone knows the situation that when there is a fire or a flood, one says to oneself: "people are suffering, something must be done, someone has to help". That is what I thought then: "there is a fire" and someone has to help. And if someone - why not I? I was scared, really scared, because I am not the hero type. However, I believe that fear does not relieve one of responsibility. For, if we act that way, only the stronger will prevail - and not those who are right.

Since I was the youngest co-founder of the Council for Assistance to Jews in Poland, in 1942, my older, more merited colleagues are now dead. I live and can talk about that.

We know from our common Bible that once, ten righteous men could not be found to save Sodom. Fortunately, during World War Two there were many who risked their lives for others. The *Yad Vashem* Institute in Jerusalem has verified and honored some six thousand Polish names. In some cases those were whole families. We are talking about some eight to nine thousand people, whose sense of dignity and moral duty, stemming from belief in the same God, was stronger than fear. That is very little, but, at the same time - very much. During my lifetime I spent eight years in prisons and camps of various kind. I must say that every helping hand was priceless. As concerns those eight years, I say: dictators didn't like me, but that was mutual!

You are in Poland, which has functioned in a democratic system for just ten or eleven years. Therefore, we have been

able to say the truth, to freely discuss and educate for that period of time. It is a difficult path, but - believe me - there are very many people in Poland who have taken it with great commitment and enthusiasm. You can believe me that a dishonest Pole, an ignoble Pole, a chauvinistic Pole is more painful to me than to you, because I want my people to be magnificent. But, since I'll turn eighty in a few months, I think I have the right to voice the following reflection. I believe that every nation has more or less the same percentage of scoundrels and idiots and that one scoundrel can do more bad than ten decent people can do good. We have 39.5 million citizens. I would like to believe that the percentage of scoundrels and idiots in Poland is below one per cent. That was not a government statement, that was a reflection of an older man

You are yet to see Kracow, one of the most magnificent Polish cities, with a very good tradition of coexistence between nationalities. You will also go to one horrible place - Auschwitz-Birkenau. When you conclude your trip around

Poland, you should reflect calmly and objectively about this country, with the rationality of lawyers - that it is a country displaying much vitality and energy, that it loves freedom. Also, that Poles - along with their intellectual and professional industriousness - are a nation with many difficult traits. But, if there is another country that in terms of chaos and impossible people resembles Poland - it is Israel. I care a lot about that country and that is why I follow events in Israel with great interest.

Let me end this way: three years ago a German paper, *Frankfurter Allgemeine Zeitung*, asked me to answer a questionnaire. One of the standard questions was: *Where would you like to live, if you did not live in your present place of residence?* I replied: *in Kracow or Jerusalem*. And that's what they printed.

I hope that your experience of Poland will be important and interesting. I am glad to have met you. Take care - Shalom!



Panel discussion at the Remember Warsaw Conference. From L. to R.: Adv. Monika Krawczuk; Mgr. Jan Jagielski; Supreme Court Justice (Ret.) Gabriel Bach; Mr. Konstanty Gebert

“The anti-Zionist campaign was to persecute someone for his political opinion”

Dariusz Stola

My paper will focus on perversion. The perversion of politics and language.

First, there is a semantic aspect to the perversion. The problem is that “the anti-Zionist campaign” of 1967-68 was not a campaign against the Zionists, for the word “Zionist” or “Zionism” was a code for “Jew” and “Jewish”. To make it more perverse, a “Zionist” did not necessarily have to be Jewish. One could be classed as a Jew simply by being included within the group of so-called Zionists. This can be easily understood by those who have read George Orwell’s *1984* and know the ‘new speak’ of the totalitarian regime in that book.

The other aspect, not semantic but practical, of the perversion of the 1968 campaign, was that under the Communist regime, like the Polish regime, it was quite natural to persecute someone for his or

her political opinions or for being Zionist. It was nothing extraordinary. But the anti-Zionist campaign persecuted people because of their origin, their ethnicity. That is what gave the anti-Zionist campaign a certain novelty. To persecute someone as a socialist, liberal or Catholic, was fine, nobody was surprised, but to persecute people because of their origin or their family name was a novelty.

The social factor of anti-Jewish prejudice existed, but much more important was the strictly political factor. Poland was actually a totalitarian State and the role of government cannot be underestimated. In particular, the Communists, self-declared Marxists, followed a highly unorthodox form of Marxism, defining people on a biological, almost racist basis. This was not new. Anti-Zionism had become orthodox in the Communist movement in the 1950s, thanks to the great father of progressive humanity, Joseph Stalin. In 1968, it was recycled to meet new demands.

All this was a consequence of the events in 1967. In June 1967, following the Arab-Israeli Six-Day War, the Communist countries, with the exception of Rumania, sided with the Arabs and broke off diplomatic relations with Israel. An anti-Israeli propaganda campaign began.



Poland added its own specific features to this campaign. It regarded Israel as a lackey of American imperialism, fighting against the progressive Arab nations. Propaganda against CIA agents in the Middle East followed. However, Polish Communist leaders quickly added a domestic internal dimension to the campaign. Unexpectedly, the First Secretary of the Party, Wladyslaw Gomulka, the most important person in the State, aided this campaign. In a public lecture about the Near Eastern crises, given in June 1967, a couple of days after the war, he said “we cannot tolerate people who sympathize with the aggressor.” Of course, the “aggressor” meant Israel.

Dr. Dariusz Stola is a senior historian at the Institute of Political Studies at the Polish Academy of Sciences. He focuses on the political and social history of Poland in the 20th century, in particular on Polish-Jewish relations, international immigration and the Communist regime. Among his recent publications is a study of the anti-Zionist campaign in Poland 1967-8.

"We cannot remain indifferent towards the fifth column in our country." "Fifth column" goes back to Mussolini's "fifth column" in Rome, and in Poland it meant the fifth German column of September 1939. The comparison was perverse, it compared the Jews, alleged Zionists, to Nazi sympathizers in Poland 1939. To some extent this was the result of Gomulka's perception of an imminent threat of global war. He saw the Near Eastern crisis as the beginning of a much more serious global conflict between the Soviet bloc and the West. He was fueled by the security service reports of the alleged sympathy on the part of the Polish Jews for Israel, their disloyalty and even the fact that some volunteered to the Israeli army in 1967.

Other members of the Politburo opposed Gomulka, arguing that he had no right to say such things. Without precedent, Gomulka agreed to edit the sentences about the "fifth column" from the official published version of his speech, leaving only a reference to people who sympathized with Israel.

The following months, between June 1967 and March 1968, was a period of what I call, "a crawling campaign". That means that at that time, the security service began widespread efforts to identify actual and potential Zionists. Identification was very simple. Who could be a Zionist? Naturally, a person of Jewish origin. Millions of screening files of potential Zionists were prepared in case of need. The secret police having invested so much time and effort into preparing for something, the 'something' had to happen. This happened in March 1968.

The main event of 1968 was the student rebellion. Polish students rebelled against the government in a way similar to the

French students, but the bone of contention was different. They did not rebel against oppressive family structure. They rebelled against a repressive regime, against censorship and against marginalizing national culture. Some of them were persecuted. It happened that these students were of Jewish origin. Very quickly, three days after the beginning of the student riots, the press began to present the rebellion as being manipulated by a Zionist conspiracy. The press made use of the participation of young people of Jewish origin - but these young people were no longer Jewish in any real sense. Their parents' generation was highly assimilated, and they were mostly children of Jewish Communists. Nonetheless, these facts sat well with the security paranoia of the time, with the so-called Zionist threat to the whole Soviet bloc, and they were useful in the intra-party struggle between the factions.

The Communist party was not monolithic. In the 1960s, Gomulka was losing a lot of the popularity he had in 1956 when he returned from the period of his Stalinist isolation. During the Stalinist period, he was marginalized and even arrested. In 1956, he became a national hero even for the new Communists. But in the late 1960s, disappointment in him was quickly bringing him to the end of his political career. Others were looking for the chance to become number 2 and possible number 1 in the future. One such person was Moczar, the head of the Ministry of Interior, *i.e.*, the head of the secret services. There is evidence that the secret service manipulated the party leadership to push Gomulka and other leaders against the Zionists as instigators of the student rebellion.

Two days after the beginning of the

press campaign a central body was created for the press. All the newspapers except for an independent Catholic weekly, were directed from this center. Soon, a wave of public meetings spread around the country. Workers from various factories, institutions and public administrations around the country, spontaneously voted and wrote letters to the First Secretary in which they expressed the same opinions. Thus, the workers of one factory declared that:

"We swear in memory of those who died for the power to the people that we will clean from Polish soil with our workers' fists all the instigators and leaders of the coup against the working class and present government. We will not permit revisionists and Zionist rioters to accuse us of anti-Semitism."

Quite sophisticated comments from workers.

The miners from Silesia demanded a purge of Zionist elements from party ranks, that they be removed from their positions and their children refused permission to continue university studies. The demands were far reaching, extending not only to Zionists but also to their children.

Simultaneously, a purge began and the purge began with the top ranking Jewish Communists. The top person was Roman Zambrowski, a member of the Communist party since the 1920s, former member of the Politburo, former Deputy Prime Minister, former Minister, former Member of the National Council - *ex-everything* in Communist Poland. At that time, he was sidetracked but nevertheless, he remained a symbol of the so-called Poava faction which had still been powerful in 1956. In 1968 Zambrowski was just the Deputy President of the National Chamber of Control, a supervisory body. Just three

days after the beginning of the campaign, the local party in his institution gathered and in one meeting expelled him from the party. Regular party members could expel someone who had held all major positions in the country. It was a clear message, a green light. If Zambrowski could be dismissed, so could anyone else.

Very soon the purge spread to university professors, cooperative bookkeepers, doctors, actors, filmmakers and ordinary workers. Everyone wanted to show that he or she was vigilant. But the practice of a totalitarian regime is not just for orders to come down the line. There is also a very individual private interest, which is given an opportunity to be realized. Comrades, citizens and even non-party members, now obtained their opportunity. That was a very powerful tool. All this was happening when to a large extent Communist ideology was eroding. Not many people believed in the utopia of the great Communist future. Thus, individual motivation was the driving power behind the campaign.

Why did Gomulka unleash the campaign? Certainly there was a top level decision to allow such an action. First, the campaign was a reaction to the student protest, as well as to some dissent amongst intellectuals in the late 1960s. It was a very handy instrument to fight the rebellion, because it compromised its leaders as alien and perverse. They were accused of being part of a Jewish/Zionist conspiracy which served West German interests. The press maintained that the Zionists had struck a deal with the West German, ex-Nazi revisionists, to restore the pre-war German border, *i.e.*, to take away one-third of contemporary Poland. The allegation was of a Jewish-Nazi conspiracy against the Socialist government. Again, quite sophisticated.

Second, it was the instrument to prevent the spread of the rebellion outside the universities, especially to the workers. The popular mood in the late 1960s was very bad, especially since the autumn of 1967 when the government increased food prices. The anti-Zionist campaign gave Gomulka two additional years of power, until December 1970, when another increase of food prices caused his downfall.

I believe that the objective of Gomulka staying in power was probably the primary one, particularly in the light of what was happening in Czechoslovakia. Gomulka and other Communist leaders were very afraid of the "Czech disease" spreading into Poland. The campaign was therefore an effective preventive strike against pro-liberal thinkers.

Third, there was a hidden objective, never explicitly told but now seen from the Politburo minutes of the period. The attacks on the Zionists re-stimulated the conflict within the Politburo. As mentioned above, Gomulka had been prevented from publishing his accusation against the Zionists in June 1967. In 1968, the attack on the Zionists gave the proponents of the campaign a strategic advantage over those who wanted to defend the Jews. The defenders of the Jews were forced into a corner, and Gomulka re-consolidated the party leadership on his own terms. Edward Ochab, a staunch Stalinist, resigned in protest over the campaign. He was one of the last Communists, unable to accept the fact that a Communist could use racist attacks against people of Jewish origin. A number of other people, including Minister of Foreign Affairs Adam Rapacki, Minister of Defence Pechalski, and a number of Deputy Ministers were dismissed or resigned of their own accord. Gomulka,

skillfully playing his cards, made Mieczyslaw Moczar a Deputy Member of the Politburo but demanded that he abandon the post of Minister of the Interior. In symbolic terms, Moczar advanced because being a Deputy Member of the Politburo was more important than being a Minister, the Politburo being more important than government. However, in practice, he lost his political basis. He lost control of the secret services. Gomulka gave the Ministry to a person whom he could trust implicitly.

There was a fourth reason to start the campaign - the dismissal of a number of former high-ranking Jewish Communists. This green light for the purge began a wide process of change in the Communist bureaucracies. Poland was one huge bureaucracy. Under Gomulka this bureaucracy stabilized. But time was passing and a new generation of *apparatchiks* entered the market, waiting for the older comrades to leave their posts. This was a generation of people who had begun their careers in Stalinist youth organizations in Poland of the 1950s. They were very eager to advance at any cost and this was their chance. Often, they were driven by the desire to remove someone from an important position and take that position for themselves.

In none of the above is there any link to Zionism. The government could have pacified the student rebellion without raising the Jewish issue. It could have made a preventive strike against reformists; it could have started the generational change in the bureaucracies, all without resorting to anti-Zionism. However, while not necessary, anti-Zionism was a useful tool because it served to attain the above objectives. The Jews were multi-functional. I believe that the party

leadership was not motivated by anti-Jewish prejudice but by functionality. It was a highly rational decision. A good politician is a politician who reaches several objectives in one step. That is a high quality politician. And Gomulka proved that he was one.

With regard to the nature of the campaign, it was directed from the top, but had a very strong component of individual motivations. Though these motivations could not be reduced only to anti-Jewish prejudice, there was one very strong anti-Jewish prejudice, called "Jewish Communism". Jews were Communists and Communists were Jews. Communism was bad for Poland because it was Jewish, not because it was Communist. Another perversion of the campaign was to use this prejudice saying that Stalinism, the Communism of the Stalinist period, was bad because the Jews were ruling Poland. When Jewish Communists would be removed, Communism would be fine again. Jews were the dark side of Communism.

Polish right-wing nationalists, who had been using the argument of Jewish Communism to fight the Jews or to fight Communists, probably never imagined that in the future, *i.e.*, in the 1960s, the Communists themselves would be using that argument to purify their party, to revitalize the faith and trust in Communism, but a Polish Communism. It was a way to nationalize Communism, hence the title given to Moczar's followers, "National Communists", or "Reds and Blacks" - a combination of Fascist right-wing ideology with membership of the Communist party.

The stereotype of Jewish Communism has very deep roots which may be traced back to the Middle Ages, to the myths

of Jews spreading disease. Not new in European culture, it was a powerful instrument, an interpretation of a very old stereotype going back several centuries. Communist propagandists, who were usually not very sophisticated people, were using ideas that were at the same time, crude, brutal but also sophisticated and subtle, pushing the button of unconscious emotions.

Also popular in the campaign was the theme of Jewish treason - Jewish spies, Jewish agents. Again in a perverse way, the press published lists of former Communist security or intelligence agents who had defected to the West. The press usually gave two names - a Polish name and a Jewish name. That again was intended to exploit a much older prejudice, namely, that the Jews were treacherous and enemies of Poland, but stressing that Jews were enemies of Communist Poland. Their treason was treason not just against Poland but against the socialist bloc in general. Again, this stereotype had much deeper roots, because the image of the treacherous Jew was familiar from the story of the Apostle Judas, European literature, and from the prophetic vision of George Orwell, whose character Emanuel Goldstein, fit the image of the treacherous Jew in the propaganda campaign of 1968.

Apart from the purge, the major result of the campaign was emigration. It was a perverse emigration. Jews were not just forced to leave. They were allowed to leave. That was great privilege. In 1968-1970, some 14,000 left, declaring that they wished to emigrate to Israel. Not all were Jewish. Before leaving Poland, they had to declare their intention to go to Israel, however, because they were not of Jewish origin, some were refused passports - showing that the police knew

the origin of the applicants. Two conditions had to be met: the right origin and a declaration of emigration to Israel.

At the same time, some 8,000 people, mostly Polish ethnic Germans, were refused exit permits to go to Germany. I found letters to Gomulka in which applicants wrote: "Comrade Gomulka, you said that those who do not believe Poland to be their homeland can leave. We believe Germany to be our homeland. Why don't you let us go?" These applicants saw that again Jews had privileges. The favour to leave. Of course, the conditions under which these people decided to leave were quite often very dramatic. They were people without a job, recently expelled from the party, who could not find work in public institutions. In a Communist country where the government was the employer of almost everybody, this meant that information not to reemploy that person was relayed from one office to another leaving only very basic jobs available.

Further, there was social pressure against the Jews from all directions. People looking at them - "you ugly Jew, why don't you go to Israel? What are you doing here?" Their neighbours, looking at their apartments - "you have such a nice apartment". Even people just asking out of interest - "so when are you leaving?" For the younger generation in particular, it was traumatic. They were Polish. As one of the emigrants later wrote, "I am a political emigrant. I am a Pole of Jewish origin, but I was not permitted to be Polish in my own country. I was forced into being Jewish." A number of these people were forcibly returned to their Judaism, excluded from Polishness.

Personal Recollections: The Years of the German Occupation

Itzhak Nener

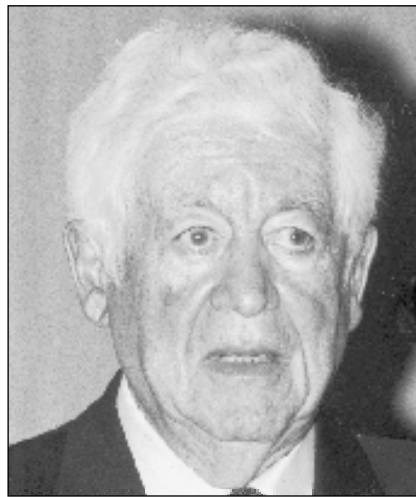
This session takes us back to the dark years of the Holocaust. The mass extermination of Jews by the Nazi Germans began 60 years ago in June 1941. The uprising of the Warsaw Ghetto, which has become a symbol of heroic resistance to the Nazi military forces took place exactly 58 years ago. Let us not forget that there were also small uprisings in several other ghettos and revolts in some extermination camps as well as a small number of Jewish partisans fighting in the forests of Poland.

58 years after the Warsaw Ghetto uprising, the question being asked, again and again, is why did it occur so late? Another question is why did so few resist? Other questions that should be asked are:

Is it or isn't it true that facing the Nazi armed forces were Jewish masses without arms and without support from almost any of the local population? Paralyzed by fear, many of these people were deceived by the Nazis into believing, as they were led into the gas chambers, that they were being taken for a bath, and afterwards to work.

Is it or isn't it true that the attitude of a large majority of the local population

Adv. Itzhak Nener, First Deputy President of the Association, presided over the panel discussing *The Years of the German Occupation* and the *Personal Recollections* of survivors and family members of those who died in the Holocaust. Following are extracts from his remarks.



was not only a function of the rewards or punishments offered by the Germans - including death to those found helping Jews - but also of the prejudice felt against the Jews, which had been intensified by Nazi propaganda?

Is it or isn't it true that while thousands of Polish people endangered their lives and the lives of their families by hiding Jews and helping them to escape, by providing false Aryan papers or food, many more collaborated with the Nazi extermination machine, thereby helping to solve the "Jewish problem"?

Is it or isn't it true that in the face of the hostility of substantial segments of the population, the indifference or neutrality of the majority of the local people, the greediness of the collaborators and the fear

of German reprisals and punishment, the chances of finding refuge from deportation was extremely small?

Isn't it true that in the aftermath of the Warsaw Ghetto uprising, the attitude of some Polish underground organizations, especially in Warsaw, changed entirely. Some help was extended to Jewish fighters and some cooperation took place between Jewish fighters and Polish underground organizations, especially in Warsaw?

One could also ask the question why so few fighters, 750 in total, participated in the Warsaw Ghetto uprising? Could more help have been given by the Polish underground organizations - like *Armia Krajowa* and *Partia Robotnicza*?

Finally, why did the Allies - who had learned of the genocide being perpetrated by the Nazis almost at the beginning of the Holocaust - and who watched the heroic battle of the Ghetto fighters, do nothing to help them? Could they have helped them?

In this context I would like to quote a passage from a Polish underground newspaper *Norod*, a publication of a centrist, liberal, intellectual group, also represented in the Polish Government in Exile in London. There, in a long article entitled "The Slaughter of the Jews", the following observation was made:

"If this will continue, within a short period Warsaw will say good-bye to the

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Dr. Taglicht: A vast knowledge and a prodigious memory

Bruria Taglicht-Werber

In the last few days we have heard about the history and fate of the Jewish population in Poland, its contribution to the local culture in general, and especially its contribution to the legal profession. We should give this population names and faces. Preserving the individual memory and passing it from one generation to the next can do this.

I shall speak about one family - mine - and about one Polish-Jewish-Israeli jurist - my father, Dr. Henryk Hersch Zvi Taglicht. His 3 first names already give an inkling as to his history.

The city of my parents and grandparents is Lodz - they were all born there but they died in other places, some of them unknown. My paternal grandfather died in the Warsaw Ghetto. My maternal father's ashes are scattered in Auschwitz. One of my aunts, Renia, perished in Pawiak and others in places I do not know. I personally was saved by Poles, Tad Salek and his sister Wisia Deneke, and planted trees in their name in *Yad Vashem* in Jerusalem. My daughters are Israelis. As of now, I am the only living link between my closest family's past and future and it is a powerful, almost overwhelming experience.

Adv. Bruria Taglicht-Weber of Tel-Aviv, told the Conference about her late father, Dr. Henryk Zvi Taglicht.

My father believed that what was done during the Holocaust could be neither an excuse nor the subject of individual praise. He never spoke to me about those dark years, but they never deterred him from acting according to his conscience and better judgment.

My father, born in 1908, graduated from the "Hebrew Gymnasium" in Lodz and matriculated in Hebrew and Polish - he was fluent and articulate in both.

He was admitted in the 1920s to the Law and Administration Department of Jagiellonski University and his doctoral thesis was on *The Rights of Minorities in Poland*. He belonged to a minority but until 1939 this fact constituted no obstacle to his progress.

During his first year at the University a Polish student belonging to the National Party called him a dirty Jew. My father punched him in the eye, the Pole broke my father's nose and they were both summoned before a disciplinary court. My father was found not guilty.

After graduating and until 1939 he practiced civil law in both Lodz and Warsaw, where he pleaded before the High Court. With the outbreak of war we left Lodz and moved to the Jewish part of Warsaw - 6, Leszno Str. Within a short time he was appointed supervisor of the Committee for Jewish Welfare called ZTOS and directed the Society for the Care of Jewish Children and Orphans.



He was also the Presiding Judge of the Honorary Tribunal of ZTO and it should be noted that the Warsaw Jews were prejudiced against "refugees" like my father and usually did not appoint them as officials. My father was an unusual, and sometimes disputed exception.

The deportation and "Actions" in the Warsaw Ghetto started in July 1942. My parents had connections with the Polish underground. My mother's sister, Renia, was a friend of Wisia Deneke, one of the Polish resistance heroes, and they both worked with J. Korczak. In 1942 or 1943 they were caught, tortured and executed in Pawiak. Thanks to Wisia's connections I was taken out of the ghetto, and shortly afterwards I was followed by my mother. My father stayed in the ghetto until

January 1943, working in a broom factory. Finally he escaped hidden under a pile of garbage in a garbage cart.

One of my father's closest friends was Eng. Bryskier, a "Warszawiak" who wrote a detailed history of everyday life in the ghetto. Before being deported to Maydanek, he buried dozens of copybooks in a cellar and they were found after the war and published by his daughter. He described long discussions held with my father as to which actions should be taken and described him as a man of "crystal like character".

From 1943 my father, who was blond and blue-eyed, lived on the "Aryan" side. When we met he was introduced to me as my uncle (since my mother's cover story was that her husband, a Polish officer, had been killed in action). I used to say - that this uncle looks so much like my father...

Immediately after the War we returned to Lodz and within a short time - between April 1945 and 1948 my father was appointed legal adviser of several ministries - Post and Telegraph, Trade and Commerce and others.

Together with several High Court Judges he founded a cooperative publishing house and edited a magazine called *Prawo*. He was the founder and editor of the civil section, the objective being to publish commentaries on Polish post-War legislation.

My father's great love was Civil Procedure. In 1946 he was nominated as the Vice President of the Disciplinary Court of the Polish Bar.

In 1948 he became the legal advisor of *Keren Kayemet Leisrael*. It was at about this time that he decided to leave Poland, because, as he used to say, "one totalitarian regime is enough for a lifetime". In Israel, where he was no more Hersch nor Henryk, but Zwi, he reached the prestigious post of District Attorney for Haifa and the North. He specialized in fiscal cases and had such

a reputation for his vast knowledge and prodigious memory that the story went that if the reference given by Dr. Taglicht was not exact something was wrong with the textbook.

He died in 1984, aged 76, and his granddaughter, who is present here, is a fledgling lawyer carrying on the family tradition.

I hope that those days she spent in Warsaw will make her remember our story and she will transfer it to her children. As was aptly said in the opening speech, the story will go from parent to child - so that the history, the names and the faces will never be forgotten.

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last Jew. If it would be possible to conduct a funeral, the reaction would be interesting. Would sorrow or tears accompany the coffins, or perhaps joy? The northern quarter [the part of Warsaw where the Jews lived] was inhabited for hundreds of years by hostile strangers. Hostile and strange both to our interests and mentality and hearts. Let us not show false feelings, unlike at funerals [where there are] professional mourners, let us be earnest and honest. For the individual Jew human being, we feel sorry, and, if possible, let's extend help to the stray or hiding. But let us not strive for an artificial sorrow for the dying nation that was not close to our hearts. In face of the execution of the verdict of history, let us be serious and honest."

Among the millions who were slaughtered in the Holocaust were thousands of Jewish jurists, lawyers, professors of law and judges, who had lived in Poland before the Second World War. Many of these jurists perished together with their families. Most were either slaughtered in the gas chambers or murdered in or near the ghettos.

Despite approaching about 100 *landsmanshaften* for their testimonies, not

a single person contacted us asking to participate with his or her memories of Jewish lawyers who died in the Holocaust. A few had written some lines about the life and contribution in pre-War Poland of jurists who eventually shared the same fate as six million other Jews.

Among those few who expressed their willingness to share their memories is a lawyer, now in Israel, whose father, Dr. Henryk Taglicht, a prominent lawyer, succeeded in surviving the Holocaust. Another participant in this panel is representing a judge in Israel, whose father, Dr. Henryk Strasman, was murdered together with 15,000 other Polish officers in Katyn by the Russians. A Polish Supreme Court Justice Maria Teresa Romer agreed to share with us her memories of hiding and saving a Jewish jurist.

After great effort, we succeeded in obtaining from a variety of sources lists of Jewish jurists who were active in Poland before the War. Some of the lists also contained a few details of their contributions in various fields. Most of the persons on these lists perished in the Holocaust. A few were exiled to the far provinces of the Soviet Union following the Russian invasion of Poland. A small minority survived the years of exile and war and rebuilt their lives in Israel and other countries. I would like to stress that the lists are very partial.

In this session we pay special tribute not only to those mentioned here and whose names are included in the lists, but to all the Jewish jurists who lived in Poland and contributed so richly to Poland and to Jewish life.

At this session we also pay special tribute to all those Polish people who saved Jews, endangering their lives and the lives of their families. Their deeds will never be forgotten.

Dr. Strasman: his PhD thesis was discovered in the U.S. Library of Congress

Gavriel Strasman

Dr. Henryk Strasman was one of the most prominent Jewish lawyers in Warsaw in the 1930s. He served as the assistant to Wacław Makowski who was the Public Prosecutor.

Dr. Strasman obtained his legal degree in the University of Warsaw and served in the Ministry of Justice for several years.

Dr. Strasman received his *Doctoris Iuris* title from the University of Warsaw on the 4th of February 1929. He worked on his thesis in the Institute de Criminologie de l'Université de Paris. The subject of his thesis was *Abortion as a Criminal Offense* based on research of contemporary and past legislation (including references related to the subject mentioned in the Bible).

Dr. Strasman sent his thesis to the Library of Congress in Washington, D.C., where his older son discovered it in 1997.

Dr. Henryk Strasman and his wife, Alicia (Known as Lilka), were originally part of

Judge Gavriel Strasman reminiscing in the Conference about his late father, Dr. Henryk Strasman. Gavriel (Andrzej) Strasman, is a trial judge in Israel. Before that he was a journalist for many years, thus following both his mother and father's choice of careers.



Dr. Henryk Strasman

the upper middle class Jewish intellectuals in Poland who were successfully assimilated in the high Polish social strata. Their meeting with Ze'ev (Vladimir) Jabotinsky (the founder of the Revisionist Movement) around 1937 changed their lives. Dr. Strasman became one of the most prominent persons to glue the relations between Jabotinsky - and later the *Irgun Zvai Leumi* ("Etzel" - anti-British armed underground organization) in Palestine - and the Polish Government. His main contact was Count Michał Lubiński, the then *chef-de-cabinet* of Józef Beck, Poland's Foreign Minister. Mrs. Strasman

became the editor of *Jerozolima Wyzwolona*, the publication of the Zionist Revisionist Movement.

Dr. Strasman became the main negotiator on behalf of the Zionist Revisionist Movement with the Polish Government regarding the purchase of weapons for the *Irgun* in Palestine. In turn, the Polish Government enabled officers of the *Irgun* who came from Palestine to receive training in guerilla warfare.

During the German siege of Warsaw in September 1939, when the military situation of the Polish capital was desperate, Alicia Strasman gave the keys of the *Irgun*'s arsenal, hidden in Warsaw, to a local commander of the Polish Army, in order to help the national effort to protect the State against the Nazi invasion.

Dr. Strasman did not survive the War. He was a captain in the reserves and was back in uniform on August 28, 1939. Dr. Strasman was serving on the Southeastern front when captured with many other Polish soldiers by the Soviet Army, which had invaded Poland from the East. He was held in the Starobielsk P.O.W. camp and was later executed in Katyn by the N.K.V.D. with 15,000 other Polish officers.

“The greatest mitzvah that we can do is to record memories”

Charles E. Ehrlich

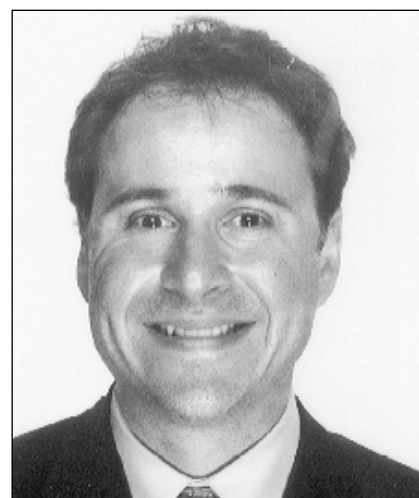
Every day at the Claims Resolution Tribunal in Zurich we are confronted with history on paper. At the urging of Judge Hadassa Ben-Itto, eight lawyers from the CRT made the trip to the Association’s *Remember Warsaw* conference, in part to gain a more tangible and direct personal connection. We formed a very conspicuous group - much younger than average, and with name badges identifying all of us from Switzerland (much to our own surprise).

The speakers included a number of distinguished Polish historians and jurists, and the conference also included tours of Jewish sites in Warsaw and Krakow, as well as visits to Treblinka and Auschwitz. The largest number of attendees came from Israel, and included several lawyers who had brought their children and grandchildren with them, to share the past with the next generation. To visit these sites with a group such as this made for an even more memorable experience and

put our work into its proper historical perspective.

At the Tribunal, it is too easy to view claimants as numbers and to see ourselves as claims processors, trying to meet deadlines and to keep the whole operation flowing. However, the greatest *mitzvah* that we can do is to record memories, to allow claimants to tell us their stories and the stories of their families, that the millions murdered by the Nazis and their henchmen be remembered and that their memories live on. No amount of money can put the past right, but the least we can do is remember that we are not dealing with Claimant #1234 but with a human being, a human being who lost loved ones without a trace, and that these loved ones, whether or not they were the account holder of a particular account, were also human beings.

I put flowers down at the railroad crossing in Birkenau, across which a great aunt - my grandfather’s beloved sister - passed on her way to be murdered. With the flowers I left a calling card with “Leopoldine Ehrlich, Wien, Oesterreich” on it - may her name be remembered today. In Treblinka I wandered among the thousands of broken stones of the monument there, many inscribed with the names of unpronounceable Polish villages which had Jewish populations



before the War, and recognized the names of hometowns of many of the claimants whose files I see every day or of members of their families. Human beings destroyed with no trace and no one to remember them. They may have been absolutely normal people with normal everyday lives, but they were human beings, and every one deserves to be in someone’s memory.

For many of us on the trip, one of the most memorable sights was the demeanor of our colleague Dov Rubinstein on his return from Warka, his father’s hometown. Dov took a daytrip there, equipped with a diagram drawn by his father showing where things once were in the town his father had not been back to since he was nine. Dov’s watch - all time - stopped

Dr. Ehrlich, an American whose father left Vienna in June 1938, is Senior Staff Attorney at the Claims Resolution Tribunal in Zurich, which adjudicates claims to Swiss bank accounts from the Nazi-era. He attended the Remember Warsaw Conference. His reflections from the visit to Poland.

the moment his car left Warsaw. Dov never met his family. No photographs exist. Nothing remains but his father's childhood memories, and this has visibly haunted Dov. Yet when he arrived in Warka, everything was as his father remembered - the diagram was perfect. Dov visited his father's house and school, and saw where other members of his father's extended family lived. Everything was there. His father's memory was vindicated, his relatives were alive in memory, and Dov now had a personal relationship to his lost family. To witness his transformation upon his return that night at dinner was a wonderful sight.

In 1938, 3.5 million Jews lived in Poland. Today, there are 5,000. Krakow, a city which in 1938 had seven active synagogues, today has fewer than 100 Jewish citizens (the visit by our Conference more than matched that number). Most towns had a Jewish population. Jews were transported from all over Europe to extermination in Poland. Today, not a marker remains in most places (including Warka), and it is too easy to think from looking around that nothing ever happened there. Auschwitz I (the original camp, which was quickly outgrown) has been turned into a museum with gift shops - a valuable museum to be sure, but

sterile compared with the expanse of Auschwitz-Birkenau or the stones of Treblinka. Yet even in Treblinka, accessible *via* a pleasant wooded path, the birds are somehow allowed to sing.

Returning from Poland, life must go on, and it does. But it goes on now complete with memories of people not only forgotten but obliterated. As we begin working on CRT-II, handling claims stemming from the settlement of the class-action lawsuit in New York against the Swiss bank, with its enormous increase in claims from survivors and their families and its stream-lined processes, we must always remember to remember.



Lawyers from the Claims Resolution Tribunal in Zurich, Switzerland, who attended the Remember Warsaw Conference, with the Association's President, Hadassa Ben-Itto, who is a judge in the Tribunal

The Steiger Trial

Barbara Letocha

In September 1924, the President of the Republic of Poland, Stanislaw Wojciechowski, came to visit Lvov on the occasion of the opening of the Eastern International Fair. His visit was to underscore the fact that Lvov, a bone of contention between Poles and Ukrainians, belonged to Poland.

The capital of Eastern Galicia, Lvov was a city of clearly Polish character. But in its vicinity also lived Ukrainians possessing a high degree of national awareness. After the end of World War I, both Poles and Ukrainians claimed these territories.

By the end of 1918, it was clear that the War was coming to an end. The Central States (Germany and Austria-Hungary) had been defeated. Austria-Hungary had fallen apart and Russia was seriously weakened by the October Revolution. Circumstances were favourable for emerging aspirations to liberty on the part of peoples who had lived in the territories previously occupied by Central States and Russia. Like the Poles, the Ukrainians tried to establish their own independent State.

On 18 October, 1918, the Ukrainian National Council was formed under the

chairmanship of Eugeniusz Petruszewicz. Its intention was to establish a Ukrainian State covering the territory of Eastern Galicia, Bukovina and Carpathian Ruthenia.

On 1 November, Ukrainian troops seized Lvov. Similar actions took place in all the cities of Eastern Galicia, with the exception of Przemyśl. At this stage, Poles initiated a fight to recover Lvov.

On 9 November, a company set out from Krakow to relieve Lvov. At the end of November 1918, after a gory battle, the Poles seized the city. This marked the start of the pogrom of the Jewish population, despite the fact that at the time of the Polish-Ukrainian hostilities the Jews had proclaimed their neutrality. Jewish houses and synagogues were set on fire, Jewish stores were plundered and Jews were murdered. The Jewish pogrom was condemned in resolutions adopted by the municipal councils of Lvov and Krakow, but such condemnations could not undo the deaths of innocent people.

The Polish-Soviet war, which started with an expedition of Polish troops to Kiev in 1920, shattered the Ukrainian dream of an independent State. Under a peace treaty concluded between Poland and the Soviet Republic in Riga in 1921, the territories of Western Ukraine were incorporated into the Polish State.

The Ukrainian Military Organization was established out of the remnants of the



Ukrainian army, many of the soldiers of which had returned to civilian life. The Organization viewed itself as a “promoter and legate to the testament of the grand Ukrainian army”. It demonstrated its military preparedness not in open struggle but through acts of terrorism. These were aimed *inter alia* against those Ukrainians who were of the opinion that there could be an alternative political program and tactic to that of killing the representatives of the Polish State and society. But also active in those days was a Ukrainian organization known as *Wola* (“Will”) which was in control of six military districts in Eastern Galicia. Its goal was to “mount a victorious battle for the liberation of the Ukrainian people”. Although Ukrainian organizations would tend to change their names, their goal remained the same: Ukraine’s independence. In 1923, the

Mrs. Barbara Letocha from the National Library, Warsaw; former head of the section of U.N. documents at the Institute for Foreign Affairs in Warsaw. Highlights from her presentation at the Remember Warsaw Conference.

Ambassadors' Council recognized Poland's sovereignty over Eastern Galicia; Ukrainians saw this as an injustice and a betrayal.

The visit paid by the Polish President to Lvov on September 5 was highly ceremonial and celebrated as a special holiday. Crowds of local residents welcomed the head of state, paying his first visit to the capital of Eastern Malopolska since his election. At the initiative of the Jewish Religious Community the local synagogue celebrated a service that was attended by a Jewish community manifesting its joy over the President's visit to Lvov. 7000 policemen were charged with ensuring public security. Nonetheless, in spite of tight security, at about 3 p.m., when the Presidential cavalcade was crossing Mariacki Square on its way from the fair, an attempt was made on the President's life. A bomb thrown from among the crowd of onlookers fell under the President's carriage, but although it began to smoke when hit by the horse's hooves, it failed to explode, harming neither the President, nor his entourage, nor anyone in the crowd. A few minutes after the attempt, the police arrested a Jewish student, Szlomo Stanislaw Steiger, who was indicated as the assassin by Maria Pasternak, an actress working at local theaters. On the orders of the Director of the Lvov Police, Reinlender, the investigation was handed over to Lukomski, the Chief of the Criminal Police. At the time of his arrest and throughout the investigation, Stanislaw Steiger pleaded not guilty.

A few days after the assassination attempt, the editors of the *Chwila* ("Moment"), a Lvov Zionist weekly, received a letter signed by the Main Board of the Ukrainian Military Organization

(UWO). It stated that the Organization's members had been behind the attempted assassination of the President of the Republic of Poland on 5 September. It claimed that the assassin had remained at the site of the crime for a few minutes after the failed bomb attack, as he was resolved to finish his job with the aid of a revolver. However, he had been unable to implement this plan and had headed for safety without being stopped. The communique made an appeal to free innocent Stanislaw Steiger and expressed regret that the attempt by the Ukrainian Military Organization had unintentionally harmed a person of Jewish origins. The editors of the *Chwila* immediately communicated this information to the prosecutor's office.

Following an investigation, at the request of the prosecutor Malina, Steiger appeared before a summary court on 15 September 1924. The Law of 23 May, 1873 on criminal proceedings, which was then applicable in the territories of the former Austrian partition, provided for the institution of summary justice, although at the time of Steiger's trial consideration was being given to the possibility of abolishing summary proceedings.

Summary proceedings, though a shortened form of court proceedings, rested on the principle of oral evidence and openness, and retained the indictment and the right of defence. There was no jury and no right of appeal. At the request of a prosecutor, persons brought to summary justice could include persons caught red-handed, or persons whose guilt, it was believed, could be immediately established. If the Defendant was found guilty by a unanimous decision of the summary court, he would be sentenced to death. There was no right to appeal

the sentence of the summary court, and a petition for clemency had no suspending effect. The death penalty was to be carried out within two hours of the court's ruling, but at the express request of the convicted person it was also possible to grant him an extra hour to prepare for death.

When Stanislaw Steiger appeared in court, he was pale and clearly exhausted. He said later:

"Fear of death that every convict must experience immediately before the final sentence, was also a feeling I experienced in the most ghastly way. I saw no rescue at all. As I stood facing the court it was clear to me that I had to remain calm and use all means of self-defence".¹

The jurors consisted of Wladyslaw Mayer, the President, Justices Huth, PhD, Socha, PhD, Dukiet, PhD, Alfred Laniewski was the prosecutor and Michal Grek, PhD was Steiger's defence counsel.

After two hot days of a trial that was the focus of unfailing attention on the part of the Jewish community and after the speech by defence counsel Michal Grek, the local criminal court in Lvov delivering summary judgment held that, in view of the lack of unanimity, the case should be handed over for examination in regular proceedings.

Steiger was saved. Owing to one vote he remained among the living. One dissenting vote helped the system of justice to save itself from loss of face and from committing a crime.

But a question remained - how many innocent people had been executed after being sentenced to death by the summary court in Lvov?

1. *Nasz Przegląd*, Warsaw, December 25, 1925, no. 354.

Steiger's case moved the conscience of the legal community and in the discussions on the draft of a new code of criminal proceedings it was suggested that summary courts should be liquidated.

The summary court had upheld the arrest of Stanislaw Steiger. The investigation was entrusted to the examining magistrate Gustaw Rutka, while Dr. Piotrowski was to discharge the duty of the recording clerk.

At the time of the investigation, a picture began to emerge of the Defendant's life. Born on 14 December, 1900, in Lvov, he was well educated. At the time of the War he studied in Vienna, followed by legal studies at the Jan Kazimierz University, and employment in the company S.A. Koloniale.

Steiger was a member of *Makabea*, a Zionist organization, credited as having established the first Jewish National Fund headquarters in Polish territories.

Steiger collected membership fees for such Palestinian funds as *Keren Kayemet* and *Keren Hayesod*. He maintained no contacts with Communist organizations. His knowledge of Communist ideas came from books on economics.

Witnesses who testified before the tribunal said that he was a good student and employee.

The first day of the trial was set for 12 October, 1925, in the Lvov local court on Batorego Street.

Jan Franke chaired the tribunal consisting of three judges. Hryniewiecki acted as the prosecutor, the defence consisted of Lejb Landau, PhD, Michal Grek, PhD, Michal Ringel, PhD, Natan Loewenstein, PhD, and Rozencranc. In December the defence was reinforced by Eugeniusz Smiarowski.

President Franke was also an

experienced prosecutor and civil court judge. During the trial he was in full control of the proceedings. He frequently dismissed questions that the defence addressed to the witnesses. This conduct was potentially positive in legal terms, as if the rulings proved unfavourable to the Defendant, the defence could file a *cassation* request with the Supreme Court, arguing that the issues had not been sufficiently clarified.

Attorney Natan Loewenstein was a Deputy of the Austrian Parliament for many years, a Deputy of the Polish Parliament in 1919, and a leader of the trend towards assimilation in Galicia. In 1918, he defended soldiers of the Polish Legion who had been accused of treason by the Austrian government. He was a Polish nobleman.

Michal Grek, President of the Lvov Bar, had acted as a defence counsel in criminal and political trials for 30 years. His court speeches were marked by humour and were delivered in impeccable literary Polish. From the start he believed that Steiger was innocent and it was because of him that the summary court did not sentence Steiger. He was Catholic.

Born in Przemyśl, Lejb Landau, received an orthodox education at a *yeshiva*. He worked as a legal trainee for Herman Liberman, a Deputy of the Polish Parliament and a member of the Polish Socialist Party. He was a member of the Jewish Socialist Party.

Michal Ringel was a Lvov Zionist activist and senator.

Eugeniusz Smiarowski, a Parliamentary Deputy, President of the League for the Defence of Human and Civic Rights, and a defence counsel in political trials, came from Warsaw to defend Steiger of

whose innocence he was positive from the beginning of the trial.

The jury consisted of twelve people picked at random out of thirty-four nominees. They were clerks, bakers and shoemakers. None of them was Jewish.

Before the trial began, the following event took place. On the occasion of the Jewish holiday of *Simchat Torah*, the court allowed Steiger to stage the *Hakafot* ceremony in his cell on Saturday evening. As he was carrying the Pentateuch rolls, Steiger felt pain in the area of his kidneys. He managed, however, to conclude the ceremony. After the guests departed, the pain became more acute and Steiger asked for a doctor who diagnosed a muscle injury and prescribed the necessary treatment. This fact alone was grounds for the *Gazeta Codzienna*, an anti-Semitic daily published by Mieczyslaw Tumen, to issue a special supplement in which it claimed that Steiger had tried to flee from prison.

Although the daily's anti-Semitic campaign was mounted before the trial, it continued throughout the court proceedings and also after Steiger was acquitted. The daily's editors attacked the defence lawyers and witnesses testifying in favour of the Defendant, including Parliamentary Deputy Leon Reich, who was allegedly involved in a conspiracy to clear Steiger of any charges and free him.

Deputy Henryk Rosmarin, vice-chairman of the Jewish caucus in the Polish Parliament, intervened with the Prime Minister and Minister of Justice against the anti-Semitic campaign.

According to the indictment, Steiger had committed offences under the Criminal Law of 27 May, 1852, applicable in the former Austrian partition, and the Law of 1885 on explosives. Steiger was charged with the crime of treacherous murder with

the use of explosives, which for unknown reasons did not result in the killing of the President. The indictment was based on the deposition of Maria Pasternak. According to prosecutor Hryniewiecki, Steiger had committed the assault because he was not satisfied with the social order in the Polish State. To support his charges, the prosecutor quoted Steiger as saying that Jews were the hosts rather than guests in Poland, as they had lived there for 600 years.

Steiger's membership in a terrorist or Communist organization was not proven, and accordingly, the defence argued that the indictment created a crime without a motive. There was no direct cause and effect relationship between dissatisfaction with the social order and committing murder.

When analyzing the investigation in Steiger's case, one must also examine the main trial.

The 1873 Law on criminal proceedings did not provide for the parties to review each other's contentions in preliminary proceedings. This was detrimental both to the prosecution and to the defence. The prosecutor was unable to get to know his adversary and his defence, and only in the main trial was it possible to see that the charges were untenable. Similarly, the defence remained ignorant of the arguments to be used by the prosecution in support of the indictment. Under the 1873 Law, the main evidence was to be produced at the trial which, for that reason, was labeled the main trial.

In judicial practice, the prosecution and investigating magistrates used this rule to the disadvantage of the Defendant and the main trial was turned into a correction of the investigation.

Steiger's trial is a classic example of

how this rule worked in reality. A reform of the criminal proceedings was proposed, aimed at equalizing the rights of the prosecutor and the defence throughout the entire preliminary proceedings and allowing openness during the investigation. It was argued that an investigating magistrate, when forced to act under the supervision of both parties, would refrain from Inquisition-like practices and that the main purpose of the investigation would no longer be to convince the accused that he had really perpetrated the crime of which he was accused.

The above legal and procedural regulations were in no way an excuse for lack of good will and procedural irregularities on the part of officers in charge of the investigation. Michal Ringel said at the time of the main trial that police records of Steiger's interrogation, carried out immediately after his arrest, bore no date, time of the interrogation, or signatures of those who drafted them.

Officer Lukomski tried to persuade Steiger to plead guilty, saying that military experts had told him that the bomb was not dangerous and could not possibly kill anyone.

When Steiger claimed that he was innocent, he heard: "Shut up, you Bolshevik Jew!"

The first expert opinion presented during the trial was intended to prove that the bomb was highly effective, but the defence, possessing extensive expertise in pyrotechnics, managed to show that the prosecution's witnesses were not expert.

Deputy Chief of Police Leon Kajdan had attended the interrogations. His name was mentioned in a report by a special commission set up to examine the condition of political prisoners in Lvov. In an interview given to a Warsaw Jewish

daily *Nasz Przegląd* ("Our Review"), member of the commission, Deputy Abraham Insler said that Kajdan was known for his exceptionally brutal behaviour towards inmates.

Jan Sawicki, Chief of the Political Police for the Lvov Province, was at the site of the assassination attempt 15 minutes after it took place and then at the police station when the main prosecution witness, Maria Pasternak, gave her deposition. Sawicki disclosed contradictions in Pasternak's statement and expressed the opinion that the investigation had not proceeded correctly. He did not see sufficient evidence to put Steiger on trial. At a conference that preceded the summary trial, Sawicki expressed his opinion, but Lukomski espoused quite a different point of view. Because of local and personal ambitions the observations of the two Warsaw political policemen, Piatkiewicz and Swolken, were also ignored. Sawicki also tried to establish whether the assassin came from a Communist environment, but failed to convince Lukomski that Steiger was not a Communist activist and that, in fact, the police had no evidence that Steiger was a member of Communist organizations. It may be seen from the trial records that the minutes, including Sawicki's testimony, which the recording clerk Piotrowski drafted at the time of the investigation, were falsified. During the main trial witnesses testified that during the interrogation Magistrate Rutka threatened, Piotrowski shouted at them and tried to make them testify as he wanted.

Further, during the investigation, the letters sent by the Ukrainian Military Organization to the editors of the *Chwila* were dismissed.

In July 1924, the same organization

addressed another letter to the President of the Lvov Court, Hawel, and again the letter was not invoked at the time of the summary trial, although it continued to lie on Hawel's desk only 30 meters away from the room where Steiger was tried.

Two days before the assassination attempt, *i.e.*, on 3 September 1924, when it was already known that Lvov would be visited by President Wojciechowski, the UWO threatened Councillor Szpetycki that blood would be shed, should he decide to hold a reception for the President in St. Jura's Cathedral. Those letters were enclosed with the case file at the request of defence counsel Landau on 17 October, 1925. It clearly followed from these letters that an assassination attempt was contemplated by the Ukrainian Military Organization whose very existence was questioned by the indictment.

On 7 November 1924, the Lvov police received the files of Teofil Olszanski. He had been detained upon crossing the Polish-German border without a passport and had testified before a court in Bytom that he was the assassin who had attempted to take the President's life. Olszanski was granted asylum in Berlin. During the trial, Lejb Landau observed that in the case file there was no evidence that the investigating magistrate had ordered an examination of the documents regarding Teofil Olszanski. In November 1925, as a result of diplomatic intervention by the Polish government, the tribunal was given the records of Teofil Olszanski's interrogation.

Born in Chyraw in 1905, Teofil Olszanski was the son of a Ukrainian priest. He joined the Ukrainian army when he was 14 years old. But he became sick and had to return to Przemyśl where he continued with his studies in the lower

secondary school. In 1922 he joined a clandestine military organization.

The Ukrainian 'migr' community essentially espoused two programs that differed only in their manner of implementation. Leading the proponents of the first plan was Petruszewicz; the second was Konowalec. Both groups were basically involved in anti-Polish agitation, the main difference between them being that Konowalec's group had a purely terrorist profile, whereas Petruszewicz was strongly opposed to any acts of terror. Olszanski made his assassination attempt on the orders of Konowalec, the commander of the Ukrainian Military Organization. Konowalec was financed by German *hackenkreuzlers* (Nazis) who were highly interested in instigating acts of terror in the Polish borderlands.

Olszanski won the support of German and Fascist groups that aimed at compromising Poland.

But Ukrainian 'migr's feared that none of the progressive German parties would tolerate them, unless they changed their attitude to Steiger's case and revealed the documents of the real assassin, Olszanski. Konowalec delivered Olszanski's manuscript including a detailed description of the assassination attempt to Moses Waldman, a Jewish attorney working for the *Judische Rundschau* in Berlin. Waldman noted that the perpetrator had wished to attack Poland's policy and rule in Galicia as epitomized by the person of President Wojciechowski.

Konowalec made the publication of Olszanski's deposition dependant on the outcome of his consultations with lawyers who were to check if Olszanski would be extradited to Poland and in which country there would be no danger of his being extradited to Poland should he

appear before the court. He also demanded that Olszanski be provided with sufficient money to emigrate to Canada or the United States.

In his speech before the court, Michal Ringel said that the Ukrainian terrorist organization, which was at the service of *hackenkreuzlers* (Nazis), wanted to accomplish three objectives: to create a conflict between Jews and Ukrainians, to drive a wedge between Poles and Jews, and to put the whole blame for the criminal act on the Jews. But their main motive was to discredit Poland in the eyes of the entire world as a country of barbarians.

In December of 1925, Teofil Olszanski's deposition taken by the Berlin police was read before the Tribunal. It offered a very detailed description of the circumstances of the assault, chemical composition of the bomb and description of the assailant's clothes.

What was the legal consequence of the fact that Olszanski admitted to having attempted to assassinate the Polish President and that his deposition was sent to the Lvov court?

The prosecutor did not withdraw the charges. After the trial, Lejb Landau said that Olszanski's deposition had no direct impact on the fact that Steiger was eventually acquitted.

The fact that Olszanski confessed to having committed the crime and that other witnesses confirmed the circumstances of the assassination shattered the members of the jury and made them more critical about other testimony supporting the indictment.

Dozens of witnesses were heard during the trial, including some who had not been interrogated at the time of the investigation.

No records were made of the

interrogation of Aneta Franzosis in Vienna because she made her deposition in German. Adolf Finel was sent away because he tried to offer information indicating other perpetrator(s). Indeed, Adolf Finel was persecuted for testifying in favour of the Defendant. When boarding a train, he was stopped by a secret agent, who asked: "Are you in possession of bombs, or have you delivered bombs to Steiger?" Finel answered: "I am only interested in wholesale, so it is quite likely that he bought one at one of my customers".

Adolf Finel was a co-owner of a factory named "Eagle", which manufactured chocolate bombs; after the trial ended, he distributed them in the streets of Lvov where the Jewish population rejoiced upon Steiger's acquittal.

When it became clear that there was no longer a risk of the death penalty, trial coverage by the press even began to verge on the humorous.

Michał Grek concluded that according to the deposition given by Maria Pasternak, Steiger would have needed three hands but where was the third one? The Presiding Judge, Frank, asked the Chief of Police Lukomski why he was not speaking in a normal voice but crowed like a rooster? Lukomski modulated his voice to imitate people who had testified during the interrogation. The *Hajnt*, a Warsaw Jewish daily, published a satirical cartoon showing Steiger's trial in 1925. The whole jury was asleep. The judges and Steiger had long beards. The Presiding Judge, Franke, asked Maria Pasternak, who was shown as an old stooped lady: Do you recognize the accused? Her answer: Yes, I do, it was he who tossed the bomb.

In his final speech defence counsel Loewenstein quoted the witnesses who

had testified in favour of the Defendant, *i.e.*, Orlicka, Eckstein, Michał Ulam and Jakub Kutin.

He also referred to the indictment and noted that Stanisław Steiger was fully entitled to feel at home on the Polish soil, as had been Bernard Goldman, the great assimilator and participant in the January Insurrection of 1863, who was eventually exiled to Tobolsk. Bernard Goldman had not felt like a guest on Polish soil, he was its son. This was best evidenced by the school named after Czacki, opened in Lvov on his initiative, and Goldman's Lecture Room, set up by his successors, which was open both to Jews and Poles, and which, initially was financed by Henryk Sienkiewicz, among others.

Steiger's final word addressed to the court was: "I conclude by saying what I said at the very beginning: I am innocent".

On 17 December 1925, Stanisław Steiger was acquitted. Eight members of the jury concluded that on 5 September Steiger had not thrown a bomb with a view to taking the President's life.

Was any legal remedy available under the laws applicable in the territory of the former Austrian partition in the event that a jury found the Defendant guilty? If the judges were convinced of the Defendant's innocence, they could refer the case for re-examination by another jury in the next term of office.

This solution was used by the court of Małopolska on several occasions.

Stanisław Przybyszewski, a dramatist and writer, said about the trial:

"The conscience of the Polish people is reflected in the decision of eight members of the jury who acquitted Steiger. At the moment they decided to end Steiger's tragic plight, they acted

in compliance with moral judgment of Polish conscience [...] Instigators, who continue to rage, will eventually go silent. The time will come, for it has to come, when harmony will reign and there will be complete understanding between Poland and her peoples".²

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Knowledge of the Law - Fiction or Ideal?

David Mishan

If we examine the various legal systems that have operated since ancient times, we find that none of them mention any obligation to study the law. In particular, there is no legal requirement for ordinary citizens to spend any time or effort in studying the laws under which they live.

The teaching of law is aimed solely at the community of legal practitioners, in order to preserve and develop the legal tradition.¹ Should one ask: If so, how should one achieve the goal of ensuring that the law is kept? You may answer him: By publicizing the law. One of the characteristics of an enlightened regime is the fact that the law is published, and that it does not take effect until published. Upon publication of the law, a presumption of knowledge of the law is deemed to exist, or, in its negative formulation, “Ignorance of the law is no defence.” However, legal scholars have, for some time, given thought to the fact that official publication of a law does not necessarily lead to its being known. The courts, too, have recognized this fact. Indeed, in order to avoid miscarriages of justice, they have eroded the presumption of knowledge of the law.² This “erosion” has recently acquired statutory status in Israeli law, in Section 34s of the Penal Law, 5737-1977, which gives the court the authority to acquit a person of criminal responsibility as a result of ignorance of the law, where the error was “reasonably unavoidable.”

Furthermore, even if the fiction of publication of the law were to be true, publication of a law would not necessarily be sufficient to ensure knowledge of its norms. Laws are formulated in general terms, subject to multiple interpretations. This leaves a great deal

of room for the interpretation of the courts, which may vary from one instance to another, or from one judge to the next. Thus, it is impossible to know in advance exactly what the law would be in a particular case. Legislation is replete with references to the discretion of the court. Similarly, terms such as “public order” or “good faith” have no intrinsic meaning, but acquire meaning based on the rulings of the courts in various cases.

The Obligation of Study and Review in Jewish Law

In *Deuteronomy* 6:4, one sees the famous scriptural verse:

“Hear O Israel, the Lord our God, the Lord is One”.

Later in the same passage, the *Torah* commands the Israelite:

“And these words, which I command you this day, shall be on your heart. And you shall teach them to your children and speak of them, when you are sitting in your house, or going along the way, and when you lie down and when you rise up” (*Deut.* 6:6-7).

This commandment is repeated in the portion of *Ekev*:

“And you shall teach them to your children, speaking of them, when you are sitting in your house, or going along the way, and when you lie down and when you rise up” (*Deut.* 11:19).

The *Torah* does not identify the specific “words” which are to be taught to the following generations. However, a simple interpretation would suggest that the study mentioned in the

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1. The staff at the CLS have developed this idea further. They hold that the teaching of law is a tool to ensure the continued control of the ruling socio-economic class. See: D. Kennedy, “Legal Education as Training for Hierarchy”, *The Politics of Law* (ed. D. Kairys, 1990) p. 38.
2. See: M. Dan-Cohen, “Acoustic Separation,” *Har. L. Rev.* 97 (1984) 625.

verse is not limited to these specific passages alone,³ but rather establishes a commandment to study the whole *Torah*.⁴

Ramban (Nachmanides) indicates the reason behind the commandment to study the *Torah*:

“And you shall teach them to your children... thus we are commanded that our children shall know the commandments. And how can they know them, if we do not teach them?!”

Thus, the reason for children’s *Torah* study is to ensure that they know the commandments and carry them out. Support for Ramban’s statement can be found in a *Talmudic* passage dealing with the value of *Torah* study:

And already when Rabbi Tarfon and the Elders were gathered in the upper story of Nitzah’s house in Lod, this question was raised before them: Which is more important, study of *Torah* or the performance of the *mitzvot*? Rabbi Tarfon spoke up and said: Performance of the *mitzvot* is more important. Rabbi Akiva spoke up and said: Study of *Torah* is more important. All of them spoke up and said: Study of the *Torah* is more important, for study brings one to the performance of *mitzvot*.⁵

In fact, over the years the Sages were not content solely with this “practical” reason, according to which the purpose of *Torah* study was to promote the knowledge and practice of the commandments. *Torah* study was seen as the highest spiritual occupation, which lifts those involved therein to the highest spiritual levels. One who studies *Torah* is attached to God himself, and can, through his study, influence all of existence.⁶ Nonetheless, the basic rationale, which sees study as promoting fulfillment of the commandments, still remained in effect.⁷ The transmission of the tradition from one generation to the next is the basis of the commandment of *Torah* study. In *Kiddushin*, the commandment to study *Torah* is described in terms of a failure to do so, that is, the case where one has not studied in one’s youth. This is the implication of the *Talmudic* passage regarding the father’s obligation to teach his son *Torah*. The *Talmud* asks:

To teach him *Torah*. From where [do we know this]? As it is written: And you shall teach them to your children (*Deut.* 11:19). **And where one’s father has not taught him, he is obligated to teach himself**, as it is written: And you shall study [them].⁸

Between the Law of the *Torah* and the Teaching of the Law

As noted above, among the Jewish people *Torah* study has a

spiritual dimension, beyond the simple knowledge of the laws, since the *Torah* is not seen simply as a “legal system.” As a result, there are some researchers who are doubtful as to the *Torah*’s ability to serve as a source of inspiration or basis for comparison with other legal systems.⁹ However, it seems that one may indeed make a comparison between Jewish law and other legal systems, since, although they are not identical systems, they share a common wish to guide human behaviour. One may therefore ask: Why did other legal systems not develop or promote the knowledge of the law or its dissemination among the people?¹⁰

To answer this question, we first need to look at a phenomenon experienced by anyone trained in legal thought, when he faces the *Talmudic* passages dealing with property law. These passages deal with an almost infinite range of cases, which differ from each other in only minor respects. The *Talmud* examines each of these differences, to determine whether they are sufficient to change the basic law, and, if so, to what extent. If the person studying such a passage is also trained in general law, he must wonder: wouldn’t it be sufficient to state the principle, and leave the decision in a specific case to the judgment of the court? Is it indeed possible to foresee all of the variations and distinctions that may arise between various cases? Why did the *Talmud* need to go into all these cases, and at such length? Justice M. Zilberg noted this phenomenon in his book, *This is the Way of the Talmud*. In discussing a case relating to the return of lost property, he writes:

It is clear that, were the matter to come before the courts, the judge could, after hearing the testimony of witnesses and experts, determine all of the circumstances and draw the most appropriate

3. Although the last part of the verse - “when you lie down and when you rise up” - is used by the Sages to teach the specific obligation of reciting the *Shema* in the evening and in the morning.
4. For this reason a number of *Amora'im* held that the recitation of the *Shema* was a Rabbinic ordinance. See *Brachot* 21a.
5. *Kiddushin* 40b.
6. On the ideal of *Torah* study among the Jewish people in general, and Rabbi Hayyim of Volozhin’s method in particular, see N. Lamm, *Torah Lishmah* (1972), p. 77f.
7. See Y. Levy, *Shaarei Talmud Torah* (1987), p. 20f.
8. *Kiddushin* 29b; the conclusion is derived from the verse in *Deuteronomy* 5:1.
9. S. Stone, “The Jewish Legal Model” 106 *Har. L. Rev.* (1993) 813.
10. See B.T. Viviano, *Study as Worship* (1978), in which the author notes the phenomenon of *Torah* study among the Jews as seen by neighbouring peoples in Second Temple times. See also M. Greenberg, below (note 19).

logical conclusion. But what should the average citizen, the man in the street, one who does not have a grasp of this whole system, do? You might say: He [the finder of lost doves] may sit and do nothing until the owner of the dovecote takes him to court. Yes, that would be so, were the issue faced [by the finder] simply one of law. If, however, the question is, from the outset, not one of law, but rather one of conscience, does this not require that the legal norm be perhaps less elegant, and more clearly stated? Less flexible, and more accurate? **Jewish law, in general, is a legal system that is addressed mainly to the citizen, and not to the judge.**

Based on this, we may answer the question posed above: general law displays a certain indifference in relation to the dissemination of its norms,¹¹ since it is addressed not to the citizen, but to the judge. Its basic formulation is *ex post factum*.¹² As for Jewish law, we have already pointed out that one of Jewish law's unique qualities is that it is addressed to the citizen, and not to the judge. But this phenomenon itself requires explanation. The jurist Robert Cover,¹³ in a short article published after his death, noted a unique aspect of Jewish law, which may shed light on our topic.

According to Cover, a basic element in most legal systems is the concept of "rights". Everyone talks about rights of various sorts: civil rights, human rights, rights of the child. There are some who would even extend the concept to the rights of animals, plants and inanimate objects. This fundamental concept is based on the myth underlying the legitimacy of the legal system. Man is seen as a free, independent being, and he is required to give up his freedom within the framework of some social contract. In order to balance and limit this renunciation, particular care is given to ensuring human, civil and other rights.

By contrast, one of the fundamental elements of Jewish law is the concept of "commandment." The *Torah* stresses "the obligations of the individual." Now we can understand the rhetorical distinction noted by Zilberg: Secular law is addressed to the judge, and guides him in deciding when he is entitled to use his authority to impair a citizen's freedom. By contrast, Jewish law is addressed to the individual. It makes known to him his obligations. The tradition of fulfilling one's obligations is passed from father to son within the framework of the command to study *Torah*. Even Abraham, the father of the nation, was noted for this:

"For I have known him, that he shall command his sons and his household after him, keeping the way of the Lord, to do righteousness and justice" (*Genesis*, 18:19).

The Scope of the Command to Study the *Torah*

We mentioned previously that the *Torah* does not specify the exact identity of "the words" which are to be taught. Rather, this was left for the Sages to determine. There is an ongoing debate within the *Halachic* literature, from *Talmudic* times on, regarding the extent to which a person is required to study *Torah*. The basis of this difficulty lies in the question of how to resolve two contradictory trends, both well established, in *Torah* study: On the one hand, *Torah* study, like all other commandments, is an obligation that devolves upon every Jew, whatever his financial and intellectual state. On the other hand, in order to grasp the totality of the *Torah*, in all its details, one would need to dedicate all of one's time to *Torah* study. For most people, involved in earning a living, this would be impossible. How then can the ideal of knowledge of the law be achieved?

This question was the subject of debate between *Tannaim*:

The Rabbis taught: "And you will gather in your grain" (*Deut.* 11:14) - For what reason did Scripture have to say this? For since it is stated: "This book of the *Torah* shall not depart from your mouth" (*Josh.* 1:8), it would be possible to think that the words of Scripture here are meant literally as they are written. Therefore the *Torah* states: "And you will gather in your grain" - Lead, together with [*Torah* study] a life conducted in the way of the world. These are the words of Rabbi Yishmael. Rabbi Shimon ben Yohai says: Can it be as you say? If a man plows at the time of plowing, sows at the time of sowing, reaps at the time of reaping, threshes at the time of threshing, and winnows at the time of winnowing - what will become of the study of *Torah*? Rather, when Israel carries out the will of the Omnipresent, their work is carried out by others, as it says: "And strangers will arise and shepherd your flocks, etc." (*Isaiah* 61:5). But when Israel does not carry out the will of the Omnipresent, they shall do their own work, as it says, "And you will gather in your grain." And not only that, but even the work

11. Zilberg did differentiate between criminal and civil law, but, in spite of this distinction, it is clear that criminal law is directed to **the judge** and not the ordinary person. This principle is expressed in the principle of interpretation, formalized in Section 34u of the Penal Law, 5737-1977, which requires each criminal law to be interpreted according to its purpose, and only where there are a number of interpretations that fulfill that condition, should one adopt the interpretation that treats the responsible party most leniently.
12. It should be noted that offences in the Penal Law are formulated in *post facto* terms: One who does such and such, his punishment shall be such and such, and not in *ab initio* terms: "Thou shalt not do..."
13. R. M. Cover, "A Jewish Jurisprudence" 5 *J. of Law and Religion* (1987) 65.

of others is done by them, as it says: "And you shall serve your enemies" (*Deut.* 28:48). Abaye said: Many did in accordance with Rabbi Yishmael's view, and were successful; in accordance with the view of Rabbi Shimon ben Yohai, and were not successful.¹⁴

Rabbi Shimon bar Yohai wondered: is it possible for one who spends his time working the land to be free to study *Torah*? Nonetheless, he did not rule that a person had to study at all times and ignore his livelihood. Indeed, his view elsewhere seems to be different from that stated in *Berachot*:

Rabbi Yohanan said in the name of Rabbi Shimon ben Yohai: Even if a person only reads the *Shema* in the morning and evening, he fulfills [the verse] "[this book of the *Torah*] shall not depart [from your mouth]" (*Joshua* 1:8).¹⁵

This passage implies that Rabbi Shimon ben Yohai's statements in *Berachot* are not meant to be a *Halachic* ruling, but simply to express wonderment: If a person, fully within his rights, spends his whole day plowing, sowing and reaping, when will he learn *Torah*? As with any debate between two radically different possibilities, there are those who adopt one or other of the extreme positions, and others who create a synthesis between them. An opinion of the first type, reflecting one of the radical positions, can be seen in a statement of Rabbi Baruch Ber Leibowitz¹⁶ [20th century, one of the leading *Roshei Yeshiva* in Lithuania]. He writes:

Thus it is clear that it is required of every Jew to see to it that his son and grandson become *Torah* scholars, erudite in *Torah*, as it says: "And you shall teach them to your children" (*Deut.* 6:7).

A totally different approach can be seen in the writings of Rambam (Maimonides) [Egypt, 12th century]. The obligation for each individual is only to study a minimal amount. However, the task of covering all of the *Torah*, and acquiring the "crown of the *Torah*," is not given as an obligation, but rather as an ideal and a challenge for those who wish to take it on and who are able to do so. This is how Rambam expresses the two positions:

Every Israelite is under an obligation to study *Torah*, whether he is poor or rich, in sound health or ailing, in the vigor of youth or very old and feeble [he] is under the obligation to set aside a definite period during the day and at night for the study of the *Torah*, as it is said "And you shall meditate therein day and night" (Rambam, *Laws of Torah Study*, 1:8)
He whose heart prompts him to fulfill this duty properly, and to be crowned with the crown of the *Torah*, must not allow his mind to

be diverted to other objects. He must not aim at acquiring *Torah* as well as riches and honour at the same time. "This is the way for the study of the *Torah*. A morsel of bread with salt you shall eat, and water by measure shall you drink; sleep upon the ground and live a life of hardship, while you toil in the *Torah*" [*Avot* 6:4]. "It is not incumbent upon you to complete the task; but neither are you free to neglect it" [*Avot* 2:21]. (*ibid.* 3:6)¹⁷

Between these two approaches, we find that of Rabbi Meir Simcha Hachohen of Dvinsk [Lithuania, 20th century], who offered a creative solution to this "eternal dilemma."¹⁸ In his opinion, the commandment to study *Torah* differs from the other commandments; for all other commandments, the scope of the obligation to carry out the commandment is identical for all, from the most humble to the highest-born. Not so in regard to *Torah* study: the obligation for *Torah* study is not uniform. Rather, it varies in accordance with the student's ability and situation.¹⁹

A review of Jewish history indicates that both ends of the spectrum co-existed: *Torah* study remained, over the years, part of the tradition of the nation as a whole,²⁰ while in every generation there were individuals who dedicated all their time and energy to *Torah* study. Steps were even taken to ensure that *Torah* study would not become the exclusive domain of the elite, but would remain the heritage of the whole nation. Among those means was the public reading of the *Torah*, and the public sermons on *Shabbat* and Festivals.²¹

14. *Berachot* 35b.

15. *Menachot* 99b.

16. *Birkat Shmuel*, *Kiddushin*, 27.

17. Support for this approach can be found in *Avot* de'Rabbi Nathan (Version A), ch. 41, "Rabbi Shimon": "Rabbi Shimon says: There are three crowns. These are they: The crown of *Torah*, the crown of the priesthood, and the crown of royalty, but the crown of a good name is above all of them. The crown of priesthood - how? Even if one were to give all the gold and silver in the world, the crown of the priesthood will not be given to him, as it is said: "And it shall be for him and for his descendants after him a covenant of eternal priesthood" (*Num.* 25:13). The crown of royalty - even if one were to give all the gold and silver in the world, the crown of royalty will not be given to him, as it is said: "And my servant, David, shall be prince over them for ever" (*Ezek.* 37:25). **But the crown of *Torah* is not so: whoever wishes to take part in the work of the *Torah*, let him come and take**, as it is written: "Let each one who is thirsty go to the water" (*Isaiah* 55:1). See Rambam, *ibid.* 3:1.

18. *Or Sameach* on Rambam, *Laws of Torah Study*, 1:8.

Conclusion

The Jewish people have always been noted as “a wise and understanding nation,” in part because of the phenomenon of *Torah* study. The phenomenon of legal study by all strata of the nation is unique among the Jewish people. Even more unusual is the joy that accompanies this study, something that has no counterpart in any other legal system. We have seen that secular law recognizes, in the main, human rights. Therefore, it is addressed not to the ordinary citizen, but to the judge, since it is he who is responsible for social order and for finding a balance between conflicting rights. By contrast, the *Torah* addresses itself to every man, and places before him the challenge: “To establish²² the world under the Kingship of God”.

19. Support among the *Rishonim* for this approach can be found in the words of Rabbenu Nissim: “Every person is **obligated** to constantly study, day and night, **according to his vigor**” (*Nedarim* 8a).
20. M. Greenberg “Three Conceptions of the *Torah* in Hebrew Scriptures” *Studies in the Bible and Jewish Thought* (1995) p. 11.
21. Y. Gilat, “The Sermon and the Reading of the *Torah* in the Synagogue on *Shabbat*”, in: *Jews and Judaism in the Second Temple Period*, Oppenheimer, Gafni and Stern (eds.), Jerusalem, 1993, p. 266
22. From the *Aleynu* prayer, recited at the end of every service. The version noted here is taken from the Yemenite (Tikl'al) prayerbook. The text there differs from the version used in most prayerbooks, “to repair the world”, since the world is not seen as being fundamentally flawed.

IDF Military Advocate General Promoted

In an impressive ceremony in the IDF Chief of Staff's office, on the eve of the Jewish New Year, Brigadier-General Dr. Menachem Finkelstein, the IDF Military Advocate General, was promoted to the rank of Major General. In addition to the Chief of Staff (Lieutenant-General Shaul Mofaz) and other senior members of the IDF General Staff, the many participating dignitaries included the Minister of Defence Binyamin Ben-Eliezer, Israel Chief Rabbi Lau, Attorney General Eliakim Rubinstein and former Chief Justice of the Supreme Court Meir Shamgar.

This will be the first time in Israeli history that the Military Advocate General, the IDF's chief lawyer, will hold the second-highest rank in the IDF, equal to the other senior members of the General Staff and second only to the Chief of Staff himself. The promotion, coupled with the fact that the Military Advocate General was recently invited to participate, on a permanent basis, in the IDF General-Staff meetings, serve as a significant vote of confidence in the work of General Finkelstein and the Military Advocate-General's Unit.

The Military Advocate-General's Unit, which includes over 200 lawyers and legal officers, has always advised the IDF on legal matters. However, the current conflict with the Palestinians has brought about an even deeper level of involvement, including the participation of military lawyers

in operational planning and targeting, at the highest levels of the military. General Finkelstein's promotion is positive proof that the IDF, similar to the US military, has embraced the concept of real-time legal advice, viewing the military



lawyer not as an interfering or inhibiting entity, but rather as a valued and contributing factor in the decision-making process.

In addition to his well-established legal reputation, General Finkelstein is also a well-respected scholar in Jewish *Halacha*, holding a PhD in Law from Bar-Ilan University for his thesis on the various aspects of conversion to Judaism. His subsequent book on conversion is widely acknowledged as being a leading publication on the topic, serving as a preferred source of information for religious and secular scholars alike.

Terror and the Right to Freedom of Expression

**Further Criminal Hearing 8613/96 Jabarin v. State of Israel
Before President Aharon Barak, Deputy President
Shlomo Levin, Justices Theodor Or, Eliezer Maza,
Itzhak Kedmi, Dalia Dorner, Yaacov Tirkel
Given on 27.11.00**

The two judgments in the Further Hearings described below concern terror related offences, namely, supporting terrorist organizations and sedition respectively, and their relationship with the right to free expression.

The first Further Hearing followed a judgment given by the Supreme Court in Criminal Appeal 4147/96 on 20.10.96 by Justices Goldberg, Maza and Kedmi, convicting the Petitioner, Jabarin, of the offence of supporting a terrorist organization contrary to Section 4(a) of the Prevention of Terrorism Ordinance - 1948 (hereinafter: "the Ordinance"). The Further Hearing concerned the interpretation of this Ordinance. Its particular importance ensued from its implications for freedom of speech.

The second Further Hearing followed a judgment given by the Supreme Court in the *Kahana case*. The original judgment in appeal was abstracted in *JUSTICE* No. 17 of June 1998, p. 44. For further details see below.

The Jabarin Case Justice Or Judgment

During 1990 and 1991, the period of the first *Intifada*, Jabarin, a journalist from Um-al-Fahem, published three articles expressing support and encouragement for throwing stones and Molotov cocktails. Subsequently, he was charged with supporting a terrorist organization contrary to Section 4(a) of the Ordinance:

"Section 4:

A person who -

(a) published, in writing or orally, words of praise, sympathy or encouragement for acts of violence calculated to cause death

or injury to a person or for threats of such acts of violence shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine."

The Magistrate's Court convicted him, his appeal to the District Court was dismissed, and a further appeal to the Supreme Court was also dismissed (except in respect of two of the articles in connection with which the State agreed to his acquittal). The Supreme Court dismissed the appeal on the basis of the principle established in Cr./App. 2831/95 *Rabbi Ido Elba v. State of Israel*, 50(5) P.D. 221 regarding the interpretation of Section 4(a).

The Elba Judgment

The Elba judgment given by a special panel of seven judges referred primarily to the offence of incitement to racism contrary to Section 144b(a) of the Penal Law - 1977. With regard to the offence in Section 4(a) of the Ordinance, Justice Maza held that it was not an element of the prohibition that there be a cumulative potential for the danger. In his view "calculated" referred to the acts of violence and not to the words published. The words "cause death or injury to a person" were only intended to describe the type of act of violence. Finally, the prohibition followed from the nature of the violent act and not from the fact that it was attributed to a terrorist organization.

Justice Goldberg agreed with this approach. Justice Barak also thought that "calculated to cause death or injury to a person" referred to the act of violence and not to the words of praise, and therefore that the section did not require the element of potential danger that the acts of violence occur following the publication. However, contrary to Justice Maza, Justice Barak believed that the section posed a cumulative test, relating to the nature of the acts described and having the function of testing whether the acts described were likely to cause death or serious injury.

The original Jabarin judgment was given five months after the *Elba case*. Justice Maza adopted his own interpretation of Section 4(a) of the Ordinance given in the latter case; Justices Goldberg and Kedmi concurred.

The Petitioners

Counsel for Jababin argued that the interpretation given to Section 4(a) was too broad and severely and unjustifiably harmed the principle of free speech. In his view the test of near certainty had to be adopted, as this was the test accepted by Israeli case law when balancing free speech against public safety.

Section 4(a)

Justice Or held that Jabarin should be acquitted of an offence under Section 4(a) because in his view Section 4(a) referred to the violent acts of a "terrorist organization", within the meaning of the Ordinance, and the encouragement to acts of violence published in the case at hand did not meet this requirement.

Justice Or accepted Justice Maza's approach that Section 4(a) should not be expanded to embrace all acts of violence that could cause the death or injury of a person. However, in Justice Or's view it had to be restricted further than to acts of violence which characterized terrorist activity, so that it applied solely to acts of violence performed by terrorist organizations.

Justice Or noted that the interpretation of a section must be made within the context of the law as a whole. A review of the Prevention of Terrorism Ordinance revealed that it related throughout to the activities and infrastructure of terrorist organizations with the aim of eradicating these organizations. Section 4(a) had to be read within this context. This interpretation was supported by the margin note to the section as well as by the historical and statutory background of the Ordinance. The Ordinance was originally enacted following the assassination of Count Bernadot and his assistant in Jerusalem in 1948 and in view of the provisional government's desire to disband the Jewish underground.

Freedom of Expression

An examination of the prohibition in Section 4(a) detached from its statutory context and historical background might create the impression that it was infringing freedom of expression in an extreme and disproportionate manner. This first impression was corrected if one looked at the section in the proper context and in the light of its purpose, namely, to eradicate the infrastructure of terrorist organizations. Against the background of the particular gravity of this danger, the legislature believed that it would be right to take the far reaching step of also making it an offence to publish praise for violent acts of a terrorist organization, even if the violent acts had already been committed, even if the person uttering the praise was not a member of such an organization and

even if he himself did not pose any danger. Moreover, the section did not require that any harm potentially occur as a result of the publication.

The State had contended that this interpretation led to an undesirable result in that it would not embrace the situation in which encouragement was given to acts of violence committed by individuals, as opposed to terrorist organizations. In Israel the danger posed by individuals was as concrete as that posed by organized groups and the State contended that such an interpretation would leave the prosecution without tools for coping with persons inciting individuals to commit violent acts having a terrorist character. The State proposed that Justice Maza's test in the *Elba case* and original Jabarin judgment be upheld. Justice Or accepted that the Ordinance had to be given a modern significance but held that it would be inappropriate to expand the scope of the section. In his view the Ordinance dealt with organized terrorism and not with acts of violence committed by individuals. Such organizations, if not eliminated at inception, could spread like a cancer in society, endanger its foundations and even undermine the basis of the regime. In the light of this danger it was possible to understand the severity of the measures adopted by the Ordinance. Breaching the boundaries of Section 4(a) and applying it to other situations, with which it was not designed to deal, could undermine the balance which enabled severe infringement of freedom of speech - but only in order to deal with the extreme phenomenon of terrorist organizations. Other statutory provisions existed which would enable the State to deal with incitement, such as the offences of sedition and incitement to racism in the Penal Law - 1977.

In the instant case, Jabarin's articles did not constitute an offence contrary to Section 4(a) of the Ordinance. This was because even though throwing stones and Molotov cocktails were acts performed by both individuals and terrorist organizations, Section 4(a) was not designed to deal with violent acts characterizing terrorist activities but rather it sought to prevent support for terrorist organizations. It was not necessary for the publication to expressly refer to the terrorist organization but it had to show support for a violent act that it was known was committed by such an organization. A publication showing support for violent acts without reference to who was committing them was outside the scope of the section.

Here the publication supported and encouraged violence without giving weight to who was committing it; moreover, part of the article concerned violence which Jabarin himself had committed

or sought to commit. The State had not contended that Jabarin was a member of a terrorist organization. According the article did not support a terrorist organization by praising or encouraging acts of violence committed by it and therefore Jabarin's appeal had to be upheld and his conviction overturned.

President Barak and **Justice Dornier** concurred.

Justice Tirkel also concurred and held that Jabarin's comments deserved harsh condemnation but that they should not be prevented or their sting removed through the force of Section 4(a) of the Prevention of Terrorism Ordinance. Defending the right of the Petitioner to make these comments was not a defence of the slander but a defence of the right of a person holding a different opinion to make such comments.

Justice Kedmi dissenting preferred Justice Maza's interpretation of Section 4(a) as expressed in the *Elba case*. According to Justice Kedmi, two questions arose in the instant case. First, whether there had to be a "probable connection" between the publication of the praise or encouragement of the act of violence, and the actual occurrence of the violence. Second, whether Section 4(a) only related to encouragement of acts of violence carried out by terrorist organizations as opposed to individuals operating independently. Justice Kedmi left the first question open. With regard to the second question he preferred the interpretation under which Section 4(a) referred to the encouragement of acts of violence of the type characterizing terrorist activity, irrespective of who carried it out. Justice Kedmi took this approach in the light of the language of the subsection which did not expressly require the acts to be committed by a terrorist organization and the fact that the violent acts described in the subsection repeated the provisions of Section 1 of the Ordinance which referred to the characteristics of a terrorist organization. The language of the subsection was not flawed and did not require to be rectified by interpretation. He also took this view in the light of what he regarded as the purpose of the legislation, namely, combatting the activities of the terrorist organization, *i.e.*, the terrorist type activities for the pursuit of which the organization was established.

Justice Kedmi emphasized that terrorism was often conducted by individuals and noted for this purpose the accepted definition of terrorism in the United States which referred to terrorism by individuals:

"Terrorism is the threat or use of violence for political purposes by individuals or groups, whether acting for or in opposition to established governmental authority, when such actions are

intended to shock, stun, or intimidate a target group wider than the immediate victims."

(D. E. Long *The Anatomy of Terrorism* (1990) 3).

The judge emphasized that the threat posed by such "non-organized" terrorism was on the increase and difficult to foil in view of the isolation of the perpetrators. In view of all this he saw no justification for distinguishing between praise for the violent acts of members of an organization and praise for similar acts performed by persons who were not members of any organization. He accepted that this view conflicted with the basic right to freedom of expression, however, that right was not absolute but relative and could be impaired in a proportional manner by virtue of the right to life and security.

Justice S. Levin also dissenting took the view that Section 4(a) could not be limited to acts of violence committed solely by terrorist organizations. In the particular circumstances, Justice Levin believed that a Court interpreting the section did not have the option of applying a general norm of freedom of expression which would limit the language of the law, and which would have the effect of discharging the accused from criminal liability. In Justice Levin's view, therefore, the Court should have held that Section 4(a) also applied to those performing violent activities characteristic of terrorist organizations.

Finally, **Justice Maza** dissenting reiterated his view expressed in the *Elba case* and in the first appeal in the *Jabarin case* and noted that he was strengthened in this view by the opinions of Justices Levin and Kedmi.

Further Criminal Hearing 1789/98 State of Israel v. Binyamin Kahana
Before President Aharon Barak, Deputy President Shlomo Levin, Justices Theodor Or, Eliezer Maza, Itzhak Kedmi, Dalia Dornier, Yaacov Tirkel
Given on 27.11.00

Precis

In Issue No. 17 of *JUSTICE* an abstract was given of the judgment in the initial appeal to the Supreme Court in this case. We noted that the case concerned allegations of sedition brought against the Appellant in relation to a flyer held and disseminated by the Appellant during an election campaign, in which he called upon the Government of Israel to bomb Arab villages in retaliation for injuries to Israeli citizens. The Supreme Court by a majority (Justice Matza dissenting) upheld the Appellant's appeal against

the decision of the District Court of Jerusalem, overturning the decision of the Magistrate's Court of Jerusalem to acquit the Appellant of sedition, and restored his acquittal. We set out the highlights of Justice Goldberg's judgment, and some of the points raised in the dissent and Justice Barak's opinion. Justice Barak agreed with Justice Goldberg's conclusion on the basis of his own analysis of the relevant sections of the Penal Law - 1977. The State requested a Further Hearing on two primary issues: the substance of the protected value in the offence of sedition (*i.e.* whether the protected value was the structure of the regime - as the majority believed in the initial appeal - or the values of society) and the nature of the standard of probability to be applied in such cases. For the factual background and strict issues of criminal law, see Issue 17 and the judgment in the Further Hearing. This abstract is primarily concerned with statements of principle in connection with the offence of sedition and the limitations it imposes on freedom of expression.

The Charges

It should be noted that the Kahana was charged with seditious acts, an offence under Section 133 of the Penal Law - 1977 ("the Law") and seditious publications, contrary to Section 134(c) of the Law.

Section 133 states:

Any person who does or attempts to do or, or makes any preparations to do, or conspires with any person to do, any act with a seditious intention is liable to imprisonment for five years.

Section 134(c) states:

Any person who without lawful excuse is in possession of a publication of a seditious nature is liable to imprisonment for one year and the publication shall be forfeited.

Sedition is defined in Section 136 of the law, as follows:

For the purposes of this article 'sedition' means -

- (1) to bring into hatred or contempt or to excite disaffection against the State or its duly constituted administrative or judicial authorities, or
- (2) to incite or excite inhabitants of Israel to attempt to procure the alteration otherwise than by lawful means of any matter by law established, or
- (3) to raise discontentment or resentment amongst inhabitants of Israel, or

- (4) to promote feelings of ill-will and enmity between different sections of the population.

Judgment

Justice Theodor Or giving the leading judgment held that the value being protected by the statutory sedition offence was not limited to the structure of the regime; even though such a limitation would significantly reduce the scope of the offence and thereby the infringement to freedom of expression.. Justice Or noted that the offence of sedition was an anachronistic remnant of the period of the British Mandate over Palestine and that it had to be adjusted to the modern reality of a State possessing a democratic character.

Since the offence was not restricted the Court had to determine which additional values (apart from the structure of the regime *per se*) were protected. Were they "the hard core" values contended by the State, namely supra values of a democratic State which would have to be identified by the Court, or, would such a "basket" offence be overly broad and embrace all contentious issues in the Israeli public and political discourse, as contended by counsel for Kahana? Justice Or thought that the identity of the values protected by the offence of sedition could not be determined by classifying them as part of the "hard core" basic rights in a democratic regime. Rather, such values had to be determined in accordance with the various sub-provisions of Section 136, which expressed the purpose of the statute. The determination had to be made against the background of contemporary reality and taking into account basic principles that had to be given suitable weight in the interpretation of legislation.

Sections 133 and 134 provided criminal sanctions for acts and publications of sedition, and thereby imposed restrictions on freedom of expression. There was a judicial dispute as to whether freedom of expression also embraced racist expressions. President Barak was of the opinion that freedom of expression, in its "internal" sense, also contemplated political-racist expressions, spreading disaffection and hostility between sections of the public (Cr/App. 2831/95 *Rabbi Elba v. State of Israel*, 50(5) P.D. 221). Justice Maza thought differently. In any event, all agreed that there could be a clash between freedom of expression and other values, which in certain circumstances, could be overriding. Such other values could be brought under the umbrella of public order, and included values such as democracy, public peace and security, human dignity and public feelings. The test was - if there was a probability - at a level which was determined in accordance

with the nature of the clashing interests - of harm to public order by a particular expression, freedom of expression would be limited to the extent that it endangered, to the level of probability as aforesaid, that public order. The real dilemma here was to determine the appropriate balancing formula between the extent of the application of the sedition offences on one hand, and the level to which freedom of expression would be safeguarded, on the other.

Since the offence of sedition gave rise to the fear that freedom of expression would be infringed beyond what was necessary and that the principle of legality would be infringed, the application of the offence was circumscribed by a number of statutory limitations (as explained by Justice Maza in the original appeal) as well as by a judicial determination that in view of the circumstances of its commission, outcome and public interest, the act was trivial.

Social Unity

Justice Or held that the value underlying Section 136(4) was safeguarding the ability of various sections of the public to live alongside each other in peace and security, in "social unity". Incitement directed against sectors of the public for racist or ideological reasons thereby causing hostility and calling for violence to be committed against such sectors - infringed that value of social unity. Social unity was particularly important in such a diverse, multi-cultural, pluralistic society as that of Israel,

in which minorities and members of different religions lived, and was necessary in order to prevent the fabric of that society from being torn apart. Preservation of social unity was not the exclusive or even natural province of criminal law but fell within the ambit of the educational and cultural systems of the country. Nevertheless, criminal law could make its contribution and could be used as a device for dealing with the extremist, dark potential existing in a heterogeneous society. In this context its function was to deal with conduct sowing hatred and violence among different sections of the public aimed at sundering the fragile fabric holding these different sectors together.

In certain situations such conduct took the form of words which, taking into account their content and circumstances, could harm the social order. The force and power of words had not to be despised. Justice Or held that though the public discourse in a democratic society had to be open and sharp, it had to be subjected to limits. This was the place where the prohibitions set out in Sections 133 and 134 of the Penal Law came in, combined with the definition in Section 136(4). In this format, the purpose of these provisions was to set the limits of freedom of expression in the public discourse, and remove from their ambit publications that could excite disaffection and hostility among different sections of the public.

In Justice Or's view, a publication which seriously and in clear language called for violence against part of the public, tended "to



Participants of the Remember Warsaw Conference at a memorial site in the Treblinka Death Camp (photo courtesy of Dan Pattir)

excite disaffection and enmity” within the meaning of the section. This was true even if the publication did not call for immediate violence but was a general call. Such a publication could lead to hatred and an atmosphere in society that would ultimately lead to the outbreak of acts of violence. Such a publication created a potential of violence or joined a potential that could break out on a date upon which the publisher had no control. Justice Or emphasized that the harm to the social order had to be grave, in the sense of possibly leading to deep divisions in society. Not all tensions in a heterogeneous society could be eliminated. Second, the publication had to have the potential of causing hatred between sections of the public not merely between individuals.

The Probability Test

Following a comprehensive analysis of the judgments in the original appeal and the language of the statutory provisions, Justice Or held that a probability test (*i.e.* the potential for harm) existed within the framework of Section 134(c). The level of probability of the sedition would be examined in accordance with all the circumstances of the case, not only the contents of the publication itself. Occasionally, the public atmosphere in which the publication was made, the place and date of publication, and the identity of the public exposed to the publication had importance. The Court did not necessarily have to enter the head or heart of any particular sector of the public in order to know what actual effect the publication had had on it. In substance, the probability test was a test of logic and common sense. Justice Or thought that likewise Section 133 contained a probability element. As to the threshold of the probability, Justice Or preferred the test of near certainty. He believed it proper to balance the infringement to freedom of expression (which might arise even when there was no threat of immediate violence) by means of a strict test. Further, the near certainty test was accepted in the case law as an appropriate balancing formula in relation to the clashing values in the instant case: freedom of expression versus public order.

In the instant case, Kahana’s publication carried a message filled with manifest and severe violence. It called for the bombing of Arab villages within the territory of the State of Israel. It referred to the Arab population as a whole as a fifth column and thereby opened the way for bloodshed.

The message did not stand alone it was part of a campaign by Kahana’s party before the latter was precluded from standing for election to the *Knesset*. The expression was not one time but part of a well planned array of expressions intended to

sow the seeds of dissension, and which carried the potential of creating deep social division between the Arab population and the Jewish population in Israel. The flyer was directed at the entire Jewish population and accordingly was designed to embed in that population or part of it, deep hatred towards another population, the Arab population. The cumulative effect of these expressions, could, to a standard of near certainty, contribute to the hatred felt by some of the Jewish population towards the Arab population in the State of Israel, and accordingly also to acts of violence.

The relationship between Kahana and Jabarin

Justice Or noted that in the *Jabarin case* he had voted to acquit the accused even though the article under discussion there included a violent and dangerous message. The difference between the two cases ensued from the different offences with which the accused had been charged; sedition in the *Kahana case* and an offence under Section 4(a) of the Prevention of Terrorism Ordinance in the *Jabarin case*. Justice Or explained that Section 4(a) when read apart from the Ordinance and the historical background of the legislation, was a draconian section which was difficult to accept in a democratic country which held freedom of expression dear. The section did not contain a probability test connecting the publication and the potential for the realization of any harm. It established an assumption of dangerousness in relation to every publication falling within its limits. By so doing it severely infringed freedom of expression. The unusual severity of the section could be explained by its purpose, namely, to combat the infrastructure of terrorist organizations. Applying these rules to Jabarin’s article led to the conclusion that his acts were directed at the whole population and not at terrorist organizations. Accordingly, Jabarin was acquitted of the offence under Section 4(a).

In contrast, Kahana was accused of the offence of sedition under Section 134(4) of the Penal Law. The purpose of this offence was to enable the continued existence of a pluralistic Israeli society. The provision contained statutory limitations on its application and was also circumscribed by the requirement for severe harm. Additionally, it had to meet the probability test. Application of these requirements to the instant matter led to the conclusion that Kahana had to be convicted of this offence.

The two had been accused of offences that were different as to their elements and as to the values that they were designed to protect, and accordingly no analogy could be drawn between them.

Justice Or held that accordingly the petition had to be upheld and the District Court conviction reinstated.

President Barak in a brief dissenting judgment reiterated his opinion in the original appeal and held that the offence of sedition was limited to danger to public and legal order and that the value protected by it was preventing harm to the stability of the regime. President Barak was strengthened in his opinion by Justice Or's opinion in the *Jabarin case*. A narrow interpretation of the broad language of the statute was necessary in order to make the interpretation of the law compatible with basic concepts of Israeli democracy, including freedom of expression and the principle of legality. As in the *Jabarin case*, one needed an approach whereby harmful speech alone was not enough, and an additional element was needed in order to transform the harmful speech into a criminal offence. In the *Jabarin case* the additional element was that the harmful speech would encourage acts of violence by a terrorist organization. In the *Kahana case*, the harmful speech would endanger legal and public order. Although two different statutes were involved they raised the same problem of interpretation, and indeed in President Barak's view the *Kahana case* was actually "stronger" than the *Jabarin* situation in terms of the possibility of circumscribing the harmful speech.

President Barak agreed with Justice Or that the probability standard to be applied was one of near certainty but held that it was not met in the instant case and indeed in the circumstances of Kahana's publication there was not even a reasonable and real possibility of the risk materializing. Accordingly, President Barak would have dismissed the Further Appeal.

Deputy President S. Levin concurred with the judgment of Justice Or.

Justice Kedmi also concurred with the judgment of Justice Or and its outcome although his view of the nature of the probability test differed. In his view, the danger primarily ensued from the "nature" of the prohibited act as opposed to its potential for self-fulfillment, and this nature was not conditional upon the degree of likelihood that the danger would actually be realized.

Justice Dorner concurred with the judgment of Justice Or that the petition had to be upheld and with his interpretation of the term "sedition" in Section 136. Nonetheless, while she, like Justice Or, believed that freedom of expression applied to sedition, Justice Dorner did not think that the offences set out in Section 133 and 134(c) included the element of probability that the sedition would excite disaffection against sections of the public. In Justice Dorner's view, the seditious content of the publication, together

with the mental element and the knowledge of the seditious content, as well as the defence in Section 138 (intended to ensure freedom of expression and political debate) guaranteed that the infringement of freedom of expression would not exceed what was necessary. In view of the fact that two Justices of the Supreme Court (Justice Or and President Barak) themselves disagreed about the existence of an objective circumstance which was an element of the offence, it would be difficult to meet the requisite level of proof in a criminal trial that the accused was aware that the flyer would - to the level of near certainty - create hatred towards the Arab public. In such circumstances, Justice Dorner held that had she thought that the probability test was an element of the offence, she would have found it difficult to agree to Kahana's conviction of the offence of which he was accused.

Justice Dorner considered the test of whether the accused wished to achieve the prohibited outcome and ultimately concluded that the requirement for the existence of a purposive mental element, in addition to the seditious content, limited the infringement to freedom of expression. In the instant case, the content of the publication evidenced that it gave rise to hatred and disaffection and the accused, who had disseminated it during the campaign for election to the *Knesset*, aspired to achieve this result. Accordingly, Justice Dorner held that the State's petition should be upheld.

Justice Tirkel dissenting agreed with President Barak for the reasons mentioned by him and the grounds he himself had set out in the *Jabarin case*.

Justice Maza concurred that the petition should be upheld and noted that this was compatible with his minority opinion in the original Kahana appeal decision. Nonetheless, he disagreed with both Justice Or and President Barak that the offence of sedition was dependent upon the satisfaction of the probability test. As in the *Elba case* in relation to incitement to racism, the offence of sedition did not include the element of a potential outcome that had to be tested according to a probability standard. For these reasons and for the reasons set by Justice Dorner, Justice Maza was of the opinion that offences of sedition did not include a probability element.

Accordingly the petition was upheld in accordance with Justice Or's judgment.

Abstracts prepared by **Dr. Rahel Rimón**, Adv.



הארגון הבינלאומי של עורכי־דין ומשפטנים יהודים
The International Association of Jewish Lawyers and Jurists

A Personal Appeal **To our Colleagues in the International Legal Community**

In the aftermath of the Durban Conference, which we all watched on our screens, there can be no doubt that what happened there affects us all personally.

Some of us saw it coming; for others it was a rude awakening.

It is time for each and every one of us to stand up and be counted among those who are ready to contribute their share in this battle which is being waged against Israel and against the Jewish People.

Each one of us has a moral choice to make: do we ignore what happened and go back to our daily business or do we join those who are committed to do their share in confronting the issues that have become a major part not only of our Jewish agenda, but also of the world agenda.

The International Association of Jewish Lawyers and Jurists, founded in 1969, has been representing Jewish issues in the international arena by using the expertise and the standing of its members around the world.

Accredited to the UNITED NATIONS as an NGO Category II, we have been most active in the UN bodies in Geneva, and our delegates were literally on the firing line at the Durban Conference, doing their share in the attempt to provide a balance to the unprecedented wave of hatred and incitement against Israel and against all Jews.

You can learn about our activities from our website www.intjewishlawyers.org

We urge you to join us in order to strengthen our ranks.

We also urge you to participate in an **Emergency Conference** to be held in Jerusalem, December 12-14, 2001. We hope that the enclosed program will convince you that at this crucial moment in Jewish history staying away from such a conference would not be an acceptable option.

Hadassa Ben-Itto

Judge Hadassa Ben-Itto
President



הארגון הבינלאומי של עורכי-דין ומשפטים יהודים The International Association of Jewish Lawyers and Jurists

JERUSALEM CONFERENCE

STANDING BY ISRAEL IN TIME OF EMERGENCY

December 12-14, 2001, Inbal Hotel, Jerusalem

Programme

Wednesday, December 12, 2001

- 18.00-19.30** Reception by Mr. Sallai Meridor,
Chairman of the Executive,
Jewish Agency for Israel and World Zionist
Organization
- 19.30-21.00** OPENING ADDRESS by the President of
the Association
Judge Hadassa Ben-Itto
- ISRAEL'S ECONOMY IN TIME OF
CRISIS
Minister of Finance (invited)

10.30-11.00

Coffee Break

11.00-12.30

INTERNATIONAL TERRORISM: A
GLOBAL THREAT
Moderator: *Dr. Martin Kramer*
Senior Fellow, The Moshe Dayan Center
for Middle Eastern and African Studies,
Tel-Aviv, University

COUNTER TERRORISM DILEMMAS:
LEGAL PERSPECTIVES

Mr. Boaz Ganor
Executive Director, The International Policy
Institute for Counter-Terrorism,
The Interdisciplinary Center, Herzliya
DETERRING TERRORISM: STATES,
ORGANIZATIONS, INDIVIDUALS
Professor Ariel Merari
Director, Program for Political Violence,
Tel-Aviv University

Thursday, December 13, 2001

- 09.00-10.30** HUMAN RIGHTS ISSUES IN A
CONFRONTATION WITH
NON-STATE BELLIGERENTS - A
DELICATE BALANCE
Moderator: *Dr. Yaffa Zilbershats*
Vice Dean, Faculty of Law, Bar-Ilan
University
THE CURRENT CONFLICT -
LEGAL ASPECTS
Colonel Daniel Reisner
Head of International Law Department, IDF
THE CURRENT CONFLICT -
OPERATIONAL ASPECTS
Major General Giora Eiland
Chief of the Planning Branch, IDF

13.00-15.00

Lunch with Minister of Foreign Affairs (invited)
Host: *Judge Hadassa Ben-Itto*,
President of the Association

15.00-16.30

HOLY PLACES IN THE HOLY LAND
Moderator: *Professor Ruth Lapidot*
The Hebrew University, Jerusalem

THE TEMPLE MOUNT - SOME LEGAL
AND POLITICAL ASPECTS
Dr. Shmuel Berkovits, Advocate

THE TEMPLE MOUNT TO JEWS -
HARAM-ESH-SHARIF TO MOSLEMS:
THE ARCHAEOLOGICAL ASPECT
Professor Yoram Tsafir
The Institute of Archaeology, The Hebrew
University Jerusalem

16.30-17.00

Coffee Break

17.00-18.30

ANTI-ISRAELI BIAS IN THE
INTERNATIONAL ARENA
Moderator: *Dr. Meir Rosenne*
Former Ambassador of Israel to the U.S.A
and to France

BIAS AGAINST ISRAEL IN UNITED
NATIONS BODIES
Ambassador Yaakov Levy
Representative to the Mission of Israel to
the United Nations, Geneva

RACISM AT DURBAN: THE REALITY
Professor Anne F. Bayefsky
Visiting Professor of Law, Columbia
University, U.S.A.,
Representative of The International
Association of Jewish Lawyers and Jurists
at the Durban Conference

POLITIZATION OF INTERNATIONAL
CRIMINAL LAW
Ambassador Alan Baker
Legal Adviser, Foreign Ministry of Israel.

20.00-21.30

Reception by Mr. Ehud Olmert,
Mayor of Jerusalem

Friday, December 14, 2001

09.30-12.00

INTERNATIONAL MEDIA AND
PUBLIC OPINION:
SETTING THE RECORD STRAIGHT
Moderator: *Professor Amos Shapira*
Faculty of Law, Tel-Aviv University

COMBAT AND MORALITY: REALITY
AND IMAGE
Major General Menachem Finkelstein
Military Advocate General

DOES THE MEDIA AFFECT NATIONAL
AND DEFENCE POLICY MAKING?
Mr. Dan Pattir
Editor-in-Chief of *JUSTICE*,
Former media adviser to the Prime
Minister of Israel

LOW INTENSITY CONFLICT WITH
HIGH RESOLUTION: CAN WE WIN?

Dr. Raanan Gissin
Senior Foreign Press Adviser to the Prime
Minister of Israel

WHY DOES THE MEDIA GET IT
WRONG?

Mr. Ehud Yaari
Middle East Commentator, Channel 2

12.30-14.30

Lunch with the Prime Minister (invited)
Host: *Advocate Itzhak Nener*,
First Deputy President of the Association

Friday night:

Optional Shabbat Dinner. To be booked
and paid in advance:
\$35 per person (plus VAT for Israelis)

Saturday, December 15, 2001

Morning:

Guided tour of Jerusalem

20.00

Informal meeting of participants for
exchange of ideas

RATES:

4 nights accommodation on bed and breakfast basis at the Inbal
Hotel (Laromme)
per person sharing a double room: \$385
Single room supplement: \$198

The rates include:

4 nights accommodation including breakfast
2 receptions
2 lunches
2 coffee breaks
Guided tour of Jerusalem

There will be no registration fees.

For further information & registration, please contact
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