

**Editorial Board:**

Judge Hadassa Ben-Itto  
Adv. Itzhak Nener  
Adv. Myriam Abitbul  
Dan Pattir  
Dr. Rahel Rimón  
Prof. Amos Shapira  
Dr. Mala Tabory  
Dr. Yaffa Zilbershats

**Editor-In-Chief:**

Dan Pattir

**Co-ordinating Editor:**

Dr. Rahel Rimón

**Graphic Design:**

Ruth Beth-Or

**Cover:**

Summertime in Northern Israel.  
Photograph courtesy of Israel's Government  
Press Office.

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.

Tel: 972-3-691-0673

Fax: 972-3-695-3855

E-Mail: IAJLJ@goldmail.net.il

© Copyright (2002) 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  
Burlwicks 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.

**TABLE OF CONTENTS**

**President's Message** / Hadassa Ben-Itto - 2

**Four Statements by the Association to the Human Rights Commission** / David Goldberg  
and Daniel Lack - 5

**The UN Human Rights Agenda: A Strategy of Diversion** / Anne Bayefsky - 11

**Counter-Terrorism Dilemmas: Legal Perspectives** / Boaz Ganor - 14

**International Terrorism: A Global Threat** / Martin Kramer - 17

**Legal Responses: Regulating Cyberspace** / Michael Whine - 18

**THE LATE HAIM COHN (1911 - 2002) - 25**

**"The most phenomenal development in Jewish Law" - 26**

**JEWISH LAW: Proof In Biblical And Talmudical Law** / Haim Cohn - 27

**IN THE SUPREME COURT**

**The Right To Stand For Election - 38**

**FROM THE ASSOCIATION**

**French Committee of the Association concerned by anti-Semitism in France - 43**

**Joseph Roubache Honoured by the President of the French Republic - 44**

---

## PRESIDENT'S MESSAGE



---

H

aim Cohn, the founder of our Association, our President for 18 years, and our Honorary President until his last day, passed away on 10<sup>th</sup> April 2002 at the ripe age of 91.

He is mourned not only by those of us who had the good fortune to be personally acquainted with him, experienced his electrifying presence, listened to his words of wisdom and benefited from his counsel, but also by many of those who listened to him in public, read his works, and saw him on their screens.

Israel and the Jewish people have lost one of the most outstanding figures of our time, a role model for so many of us, but most of all a moral authority whose advice was sought by friends and opponents alike. In times of crisis, in times of conflict and of controversy, we felt secure in the knowledge that Haim Cohn

walked among us. In his passing he left a void that cannot be filled.

Haim Cohn played a major role in laying the foundations for Israel's legal system, and for setting the norms by which we still live. In the turbulent era that followed the establishment of the state, facing enormous challenges, the government of this young state had the good sense and the good fortune to place this young lawyer in positions that enabled him to look beyond the horizon and to realize his vision for a truly Jewish and democratic state.

Climbing the ladder of the legal establishment he filled almost all major posts in the Ministry of Justice, as State Attorney, Director General of the Ministry, Attorney General, Minister of Justice, as well as a Justice of the Supreme Court and later Deputy President of the Supreme Court.

In all these posts Haim Cohn stood out not only as a great legal mind, but also as a man of vision, famous for his courage and for his uncompromising adherence to both Jewish and democratic values.

Of all his roles and titles, he was most proud of his judicial career, his seat on the Supreme Court of Israel from which he retired at the age of 70 as Deputy President. His decisions - many of which were minority opinions - reflect his unique views on a large variety of issues, and his contribution not only to the body of precedent but also to the formation of Israeli society and the definition of its moral standards.

Unlike many of his colleagues, he never resented being left in the minority. He often spoke and wrote on the Philosophy of Dissent, and it is for this reason that we chose to publish here his dissenting opinion in one of the famous judgments of the Supreme Court.

Haim Cohn left his mark in so many fields that it would be futile to list them all. His writings fill many volumes but we chose to publish here one of his articles in the field of Jewish Law, a subject very dear to his heart. Few in our generation can boast of such deep knowledge of Judaism and of Jewish Law and of the ability to set it in the context of modern society.

Nonetheless the Holocaust had been a turning point in his life, and the basis for his disillusionment with the role of religion in making this a better world. He, who was so familiar with the culture and history of Europe, where he grew up, had a deep interest in the Christian religion and its Jewish sources. His study of Christianity led him to write one of his most famous books, translated into many languages, on *THE TRIAL OF JESUS CHRIST*, and when he quoted the famous saying of Hillel: "Do not do to another what you would not like another to do to you - *that is the whole of the law*", he quoted in the same

---

breath the words of the Sermon on the Mount: “Ye would that men should do to you, do ye even so to them: *for this is the law*”, not failing to mention that Hillel and Jesus were contemporaries.

But, describing the promise of love paramount in Christianity, he said: “It was a promise of love - not only of your neighbour but of your enemy, too. It was a promise of a world in which forgiveness would replace revenge, and generosity be substituted for avarice, in which men would no longer devour each other but serve each other in a spirit of brotherhood and conscious of the mutuality of identical interests”.

But, as he bitterly stated “Religion failed to keep its promise. From the very beginnings, brotherly love seems to have given way to, or to be regarded as perfectly compatible with, slavery, the inferior status of women, torture, and cruel and inhuman punishment. No improvement was achieved - and none attempted - to mitigate the lot of the poor and the underprivileged”.

After the Holocaust he was disappointed with all religions, including his own, and thus became one of the best known leaders of secular society. His sad conclusion was that “it is not from the religions that we can hope for a new message of universal brotherhood”.



**The Late Justice Haim Cohn and President of the Association Hadassa Ben-Itto at the former's 80th birthday celebrations**

He had great hope that after the ravages of World War II and the Holocaust, the international community would play a major role in saving humanity. When his close friend, and co-founder of our Association, Rene Cassin, received the Nobel Prize for Peace after drafting The Universal Declaration of Human Rights, he shared his dream that the United Nations would serve as a forum for nations to work together for Peace and Justice. Again, he was bitterly disappointed. Twenty five years after the establishment of the United Nations he came to the conclusion that in our time, the United Nations had singularly failed to attain its first and foremost purpose, namely, to save the world “from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”.

Yet Haim Cohn never gave up his hopes for mankind. Although in his last years he watched with sadness certain developments in our own society as well as in the international arena, he never despaired. His basic hope for a better future for mankind was now centered in his belief in a Human Rights Theory. “I submit”, he wrote in 1972, “that it is a Human Rights theory of law which can and must be called upon to provide that idealistic philosophy of which our present generation stands in so dire a need, and which the traditional other sources are no longer qualified to supply. Seen from the viewpoint

---

of religion, the injunction not to do to another what you would not wish another to do to you, is but a lofty ideal, unrelated to legal realities. But seen from the viewpoint of Human Rights, this injunction becomes the cornerstone for a great edifice of practicable and enforceable norms: no longer an aspiration for the *Civitas Dei*, for a utopian and paradisiac state, but the premise of down-to-earth regulations for everyday conduct. Nor is the sanctity of human life only an exalted theme for sermons: in a Human Rights system it takes on flesh and skin as the starting point from which all legislation takes its orientation and its purpose”.

Three years after he founded with Rene Cassin the International Association of Jewish Lawyers and Jurists in Jerusalem, Haim Cohn wrote of his Human Rights Theory: “I might be tempted to yield to many self-appointed realists who would brush all this theory away as incurably naïve were it not for the inspiring presence among us of Rene Cassin, the Grand Old Man of Human Rights, whose youthful optimism and indomitable faith shine forth so brightly and vividly as to make the scruples and skepticism appear unrealistic”.

In spite of the growing disillusionment that marked his last years, he held on to his belief in Human Rights, and throughout the 20 years of his retirement he was actively involved in the promotion of Human Rights in his writings, in his ready appearances in public and in the media and in his personal involvement in Human Right organizations.

He left his unique mark in fields like Judaism, Jewish law, Criminology and the relationship between the individual and the state. But it was matters of Civil Rights and Human Rights that occupied him throughout his career and almost to his very last day. Human Rights for him was not only a collection of rules, not only a phase of positive law, not even only a standard of legislation - it was a philosophy; ‘humanity’ for him was not an unidentified mass, it was every individual man, woman and child.

Unlike those who use Human Rights as a political weapon to further their own agenda, unlike the false prophets of Human Rights who use both international fora and international instruments to shield abuses of Human Rights, Haim Cohn was a true prophet, a staunch believer in the right of each individual to equal treatment under the law, but he also believed in cultural and economic rights, without which men and women cannot live in dignity. Thus he often spoke of the “fundamental right of everyone to be free from hunger”, the right to education, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood.

Haim Cohn leaves behind him a void which no one man or woman can fill, but his legacy lives on and we are all duty bound to hold up the values he so cherished.

He was not only my predecessor in the leadership of our Association, he was my leader, my friend and my mentor.

The world without Haim Cohn will never be the same in the eyes of his disciples and admirers. Many feel that he was the embodiment of our conscience, holding on to his beliefs and proclaiming them bravely in the most turbulent times in this country, which he loved so much and which he helped to shape.

They are both dead now, those two Grand Old Men of Human Rights, but they left us a legacy to which we must hold on, in spite of all the disappointments of our present time. It is dreamers like Rene Cassin and Haim Cohn that serve, even after death, as a beacon of light and a ray of hope for a better future for mankind.

*Hadasa Ben-Yitav*

# Four Statements by the Association to the Human Rights Commission

## “Middle East Crisis - Additional Debate”

**Joint Statement of the American Jewish Committee, Coordinating Board of Jewish Organisations, The International Association of Jewish Lawyers and Jurists, Womens International Zionist Organisation, World Jewish Congress at the special meeting convened on the Middle East crisis by the UN Commission on Human Rights, on 5 April 2002**

**Presented by Daniel Lack**

**T**his statement was prepared by the IAJLJ representative for presentation at the special debate convened on short notice on 5 April 2002 by the Bureau of the Commission as a scheduled NGO speaker. The last minute special debate was the result of a coordinated position with Mrs. Mary Robinson, the High Commissioner of Human Rights after pressure was exerted by the Arab League and OIC Member States of the Commission on behalf of the Palestine Authority observer delegation. The special sitting was designed to steamroller the adoption of a resolution giving a mandate to the High Commissioner to go on yet another one-sided fact finding mission in the territories to investigate allegations against Israel solely. This arose out of the situation in which Israel has been compelled, following the Passover massacre in Netanya on the night of 27 March, to launch the “Defensive Shield” operation as act of legitimate self-defence. No reference was made in the terms of reference of the proposed mission, to the unprecedented spate of murderous suicide bombing attacks causing the death of 124 Israelis in the month of March alone. The statement was never delivered because of the automatic Arab and Islamic majority and their supporters in the Commission, who at the last moment just before the NGOs were about to intervene, railroaded the adoption of a motion in the Commission denying them the right to take the floor.

We publish here the statement which we were not allowed to deliver.

The bloody events over the period of the Passover/Easter recess and up to the present have been cataclysmic. The successive terror atrocities committed by the various Palestinian factions causing death and destruction notably in Netanya, Jerusalem and Haifa have left scores of dead and hundreds of wounded in attacks deliberately directed against exclusively civilian targets, killing and maiming Jewish and Arab victims alike.

These terror actions by any yardstick of international law or any other measure of human conduct, constitute clear acts of war. By its measured and determined response under Article 51 of the United Nations Charter, Israel has exercised its inherent right of self-defence. It has been compelled to do so to protect the lives and security of its citizens and residents by initiating necessary measures to disband, uproot and dismantle the Palestinian terrorist coalition and its supporters

This unholy alliance has sullied and incalculably harmed the cause of Palestinian self-determination and the legitimate aspirations of the Palestinian people. The unprecedented offer made by the Government of Israel recognized virtually all reasonable demands of the Palestinian Authority, when it still deserved that appellation, and even exceeded their expectations. It was rejected out of hand by Yasser Arafat and his backers in the Arab League and in the Organization of the Islamic Conference. The deliberate campaign of violence and terror, which the Palestinian leadership then chose to resume, was a terrible miscalculation that has inexorably led to the present tragedy.



It is unmistakably clear that the Palestinian cause has been betrayed by its leadership which opted for violence and terror as an alternative to peace with honour and dignity for the Palestinian people. Incontrovertible documentary proof of the direct implication of the Palestine Authority in the current terror campaign is now emerging

The immediate priority is that the existing terror coalition must be dismantled, thereby removing the daily existential threat with which the people of Israel have once again been confronted over the last 18 months, rising to the recent intolerable climax of death and destruction on an unprecedented scale. As soon as this is accomplished, Israel is committed to withdraw from the Palestinian towns and territories that it was compelled to invest, in the exercise of its inherent and fundamental right of self-defence.

The determination of the people of Israel and its defence forces supported by increasing world public opinion once the true facts have emerged, will not permit another hecatomb to be attempted

in line with the proclaimed goal of the *Hamas* terror thugs, repeated only last week in the international press, claiming to call in the name of all Palestinians for the renewal of the *Shoah* genocide of their Nazi precursors.

In the same way that the PLO introduced terror into air travel in the 1960's and visited death on the Olympic Games in 1972, it has now spawned the phenomenon of suicide bombers whose destructive and diabolical message will threaten the world's towns and cities for decades to come if it is not now stopped in its tracks.

Let this Commission give a ringing message to the world:

No more terror! No more suicide bombers using passenger planes against skyscrapers or detonating plastic explosive belts in shopping malls and restaurants! Back to the negotiating table and reasoned human discourse between the representation of the valid process of Palestinian self-determination and the Government of the people of Israel to charter the way to peaceful co-existence.

## **“Israel and the ‘Occupied Territories’”**

**Statement made by the International Association of Jewish Lawyers and Jurists at the 58th Session of the UN Commission on Human Rights held on 2 April, 2002**

**Presented by Daniel Lack**

*The following statement was made by the representative of the IAJLJ on Item 8 of the Agenda of the UN Commission on Human Rights ritually devoted to “the question of violation of human rights in the occupied Arab territories, including Palestine”. The very wording of this agenda item, symbolizes the discriminatory treatment of this subject. It reflects the automatic majority of Member States in the UN and in the Commission belonging to the Arab League and the Organization of Islamic States and their supporters, uniting in all decisions taken by vote and reflecting their traditional prejudice and hostility to Israel. In contrast Item 9 of the Commission’s agenda on the “Question of the violation of human rights and fundamental freedoms in any part of the world”. Thus Israel is the only state in the world which is the subject of a single agenda item devoted to its alleged violations of human rights. This statement sets out the reasons why the report of John Dugard, the latest in a succession of Special Rapporteurs*

*endowed by the Commission with an exceptionally broad mandate as compared with all other Rapporteurs assigned to country specific situations, is devoid of value.*

In the form in which it appears in GA document A/56/440, the report of the current Rapporteur of this Commission Mr. John Dugard on the territorial area concerned, is worthless. It seeks to deny that the unbridled terrorist campaign of the extremist Islamic terrorist groups backed by the Palestinian Authority, exemplifies the root cause of the Arab-Israel conflict, namely the continued denial of the right of existence of the State of Israel.

Not only is this report devoid of objectivity; it is a hindrance to finding a way through the current deadlock. It explains terrorism by reference to the term “occupation” thereby endorsing the mendacious mantra endlessly intoned by all PLO spokesmen and their terrorist backers.

This statement focuses on putting to rest a falsehood based on the technique of the Nazi propagandist Goebbels, the endless repetition of the big lie, the transparent falsehood that alleged occupation of certain territory by Israel is the root cause of the present violence. Occupation as a concept is equally falsely claimed to be in conflict with international law. The acquisition of territory by a country in the course of the exercise of its inherent right of self-defence in repelling an attack by an aggressor does not constitute illegal occupation. The defending State is entitled to hold on to the territory thereby acquired until the threat of a repeated attack has abated or until a negotiated peace treaty has been concluded with the belligerent aggressor state.

The Rapporteur's allegations of breaches of the provisions of the Fourth Geneva Convention are equally false.

This false statement is categorically rejected. Violence and terrorism against Jewish presence in Palestine has predominated for the major part of the last century. It finds its undoubted origin in the racist denial of the right of Jews to self-determination and of rejection of the Zionist ideal of the right to a Jewish State.

Mr. Dugard has conveniently omitted reference to the deliberate act of aggression of the five Arab armies in 1948, seeking to strangle Israel at birth in violation of Article 2(4) of the UN Charter. When the PLO first appeared on the international scene as the harbingers of international terrorism in 1964 and adopted its Palestinian National Covenant calling for the destruction of Israel, it was three years prior to the Six-Day War of 1967. No territory was then in dispute, subsequently acquired in Israel's exercise of the inherent right of self-defence under Article 51 of the UN Charter. How does Mr. Dugard then explain Arab Palestinian violence in countless terrorist attacks against the civilian population of Israel against every canon of humanitarian law throughout the entire pre 1967 period?

The Khartoum triple "no" - no recognition, no negotiation and no peace was the response to Israel's offer to negotiate a permanent peace.

The 1973 Yom Kippur War was a further attempt by the Arab States concerned, to resort to a war of aggression as a political solution.

Mr. Dugard's politically partisan rejection of the non-applicability of the provisions of the Fourth Geneva Convention in these circumstances under its Article 2 surprises no one. Egypt had no valid title to hold the Gaza Strip as a sovereign state, nor did Jordan to Judea and Samaria, still less to Jerusalem cynically invaded by Glubb Pasha of the British led and equipped Trans-Jordan army until ousted in 1967. No account is taken of

the territory handed over by Israel under the successive Oslo Agreements concluded between Israel and the Palestine Authority. Under these arrangements 97% of the inhabitants of these areas are under the latter's jurisdiction.

All these realities completely demolish the argument of occupation as the alleged underlying cause of the violence. Dugard nonetheless argues that Israel has the potential to return to the territories. He bases himself on the recognition of Israel's right and duty to exercise its responsibility to guarantee internal security and public order for its citizens recognized for all states as part of the preservation of their territorial integrity. Israel is rightly recognized as having all the powers to take the steps necessary to meet this responsibility under the Israel-Palestinian Interim Agreement (Annex I, Article XII.1).

Article 6 of the Fourth Geneva Convention states that occupation comes to an end after a year, unless the putative occupier retains the functions of government. That Israel does not do so is explicitly recognized under the Oslo Agreements and the applicable ICRC rules and doctrine. This is all the more true, since Israel while excluding the Convention's *de jure* application has applied the humanitarian provisions of the Convention *de facto* to those territories it previously administered but on a vastly extended and improved basis reflecting contemporary human rights norms.

The reference to occupied territory, as constituting any kind of justification for terrorist violence in these circumstances is thus baseless. Under Article 42 of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, territory can only be regarded as occupied "when it is actually placed under the authority of the hostile army. The occupation only extends to the territory where such authority has been established and can be exercised."

Thus the false mantra of occupation must be dismissed as an empty slogan for attempting to justify the ugliest and most despicable terror campaign. Suicide bombing of exclusively Israeli civilian targets born of blind and fiendish hatred inculcated in the minds of the perpetrators from infancy is rapidly undermining any recognition of Palestinian legitimacy. By his false analysis of the situation the Rapporteur has done the Palestinian cause and this Commission a signal disservice.

Unless this Commission categorically and unreservedly condemns Palestinian terrorism whose hideous and barbaric reality has yet again been demonstrated over the last five days, it will bear a direct responsibility for contributing to plunging this region into a bloodbath and continued strife.

## “Racism and Racial Discrimination”

**Joint Statement of The International Association of Jewish Lawyers and Jurists and the World Jewish Congress at the 58th Session of the UN Commission on Human Rights on 22 March, 2002  
Presented by Daniel Lack**

*The following statement was made on behalf of the IAJLJ together with the WJC on the subject of racism, racial discrimination, xenophobia and all forms of discrimination. Normally devoted to the current report of the Special Rapporteur on this question, on this occasion comment was concentrated on the outcome of the Durban Conference held in September 2001, preceded by the NGO Forum. Readers of JUSTICE will know from the reports contained in its No. 29 Autumn 2001 issue, the highly negative outcome of these two meetings.*

The Durban World Conference Against Racism which was to be an inspiring seminal occasion, tragically turned out to be a debacle, and to have done a profound disservice to the anti-racism agenda of the UN.

The victims of racism worldwide deserved better. The thwarting of the Conference's goals, and the damage inflicted to the cause of human rights in general, ought to be disturbing to all those who seek to end racism and xenophobia, including anti-Semitism.

My organizations came to Durban determined to try to join a common cause for fashioning a global agenda to combat racism wherever it is found. Instead, our foreboding generated from the Preparatory Conferences, and a regional conference in Tehran, was unfortunately realized in Durban.

What happened at Durban at the preceding NGO Forum and at the World Conference itself is the subject of three detailed, fully substantiated and documented reports that were submitted to the High Commissioner early in November 2001. The fact that these reports were received is not open to doubt. However, to this day receipt of these reports has not been acknowledged, still less have their contents been addressed by the Office of the High Commissioner for Human Rights.

Our conclusions of what went wrong before and during the Durban proceedings accord with those of Congressman Tom Lantos, a senior U.S. Delegate and founder of the Congressional Human Rights Caucus, writing recently in the *Fletcher Forum of World Affairs*. (Vol. 26:1 Winter/Spring 2002 pp.31 - 52). We agree with his insiders' analysis, which points in particular to the failure of leadership by the Secretary-General of the World Conference, Mary Robinson.

At the same time blame must be squarely directed to members of the Organization of the Islamic Conference. Scurrilous racist language was implanted into the texts which issued from the Tehran regional meeting, which went so far as to postulate criteria for attendance based on a policy of racist exclusion of accredited Jewish NGOs. The Tehran regional meeting, and the language inserted in the draft document discussed in Durban, included racial rhetoric aimed at delegitimizing the State of Israel, omitting references on the importance of countering anti-Semitism, and promoting Holocaust denial, all of which express racism and racial hatred against Jews and the embodiment of the self-determination of the Jewish people, namely, the State of Israel.

The language of anti-Semitism and the demonisation of the Jewish State metastasized before, during and after Durban, into the denial of Israel's right of self-defence against terrorists which now seek to destroy it. As the world knows, this barbaric terror campaign is practised by Islamic extremist groups motivated by hatred and fanaticism, as perpetrated by *Islamic Jihad*, *Hizbullah*, *Hamas* and Yasser Arafat's own *Fatah*, *Tanzim* and Force 17. Their barbarous behaviour and terrorist motivation is indistinguishable from that of Al Qaeda and the precepts of their leader, Osama Bin Ladin. The full horrors of the terrorist agenda burst upon an unsuspecting world in the events of 11 September, three days after the closure of the world's racist, anti-racism, conference.

The *Hamas Charter* in its Article 7 proclaims as its genocidal



goal, the killing of all Jews whether in Israel or elsewhere, as well as initiating terror campaigns against their claimed allies and supporters. Whether in the atrocious terrorist attacks against the Twin Towers of New York, in the cities of Afghanistan, or in the streets and population centres of Israel, they carry out the same horrific deeds inspired by the same murderous terrorist ideology. Is there any adequate means of categorizing the savagery of suicide bomb attacks against innocent victims in crowded shopping malls, in cafes and restaurant terraces, in packed buses in the rush hour? The mind recoils at the appalling horror of body parts being collected in black plastic bags belonging to innocent infants and children as a consequence of the barbarous deeds of crazed individuals, nurtured by the deliberate inculcation of a destructive hate ideology, negating the core concept of the sanctity of human life.

The relevance of this terrorist agenda to a World Conference Against Racism, Mr. Chairman, is simple. The NGO Forum branded the Jewish State as racist, and deleted the voices of Jewish victims of anti-Semitism. The representatives of the Jewish NGOs attending the Forum personally experienced the atmosphere of a vile and racist Nazi pogrom - the details of which were fully set out, but ignored by the anti-discrimination unit of the Office of the High Commissioner and the Durban follow-up agenda to date, in the comprehensive reports submitted to the High Commissioner. This disreputable effort continued in the government conference by maintaining false Palestinian claims as the most pressing issue confronting a world conference against racism. It intruded into the discussion by taking precedence over any other, and victimized Israel in the Conference outcome as a clear manifestation of a gross double standard and distortion of the meaning of racism and its propagation throughout the world. In the process, the world conference and its declaration was brought into serious disrepute in the minds of citizens in democratic states throughout the world.

The discredited Durban Declaration and Program of Action should therefore emphatically not become the standard setter for all subsequent efforts to eradicate racism and racial discrimination globally. Its text bears the scars of the unworthy, prolonged and bruising struggle to eradicate the excesses produced by the Tehran regional meeting and enduring throughout the Preparatory meetings. It culminated in the inappropriate reference to Palestinian suffering - without specific mention of Israeli suffering. It falsely cast Palestinians as victims of racism in an effort to seek gains in a political dispute over territory. Let it be clear that alleviating

the suffering of Palestinians engendered by an inherently violent confrontation, deliberately rekindled by their leadership, is indeed worthy of urgent attention alongside Israeli suffering. However, such suffering can only be remedied in the context of genuine peace negotiations. Kindling racial hatred, inspiring irrational behaviour motivated by anti-Semitism and xenophobia, will not bring an end to Palestinian suffering. On the contrary, Durban and its text has inflamed and exacerbated it. A positive outcome can only result from a *bona fide* peaceful attempt to bridge differences following the unilateral refusal by the current Palestinian leadership of the Camp David proposals, free from the threat of the resort to violence by the rejectionists.

The consequences of the hijacking of the Durban process and its outcome is not offset by the removal of more vituperative language about Israel and Jews in earlier versions, nor the inclusion of extremely limited references to anti-Semitism and the Holocaust, which followed the deletion of specific measures to combat anti-Semitism and Holocaust denial in our time. The collective conscience of states which participated in Durban following the departure of the United States and Israel, and all Jewish NGOs from across the globe, has not been cleared by such minimalist references in the light of the horrific evidence of the scourge of anti-Semitism which remains in the Middle East, as well as in Europe and elsewhere.

The institutionalization of the Durban process with its negative connotations and tainting of the anti-racism agenda of the UN has already begun through the General Assembly's recent adoption of the follow up program.

By contrast, there are pre-existing and valid means of continuing the struggle against racism, including the Convention on the Elimination of Racial Discrimination, the role of the CERD Monitoring Committee, and the work of the Special Rapporteur on Racism. These instruments and institutions should continue to be invoked with redoubled energy in consort with the machinery of well tried and effective machinery at the regional level exemplified by the programs of the Council of Europe.

My organizations are dedicated to continuing to co-operate in the struggle against racism within the framework of these institutions. Sadly, we must now also dedicate ourselves to combating the subversion of the anti-racism agenda of the UN as a vehicle for anti-Semitism in all its forms, including the demonisation of the Jewish State, which is now part of Durban follow-up itself.

# “Restricting Membership to the Commission on Human Rights”

**On 24th April 2002, the Human Rights Commission discussed the International Covenants on Human Rights. In the following statement, the Association declared its position regarding restricting membership of the Commission to states which at the least have ratified the International Covenant on Civil and Political Rights.**

**Prepared by David Goldberg and delivered by Daniel Lack**

*This IAJLJ statement was intended as a more general theme when at the last moment a second additional debate on the Middle East crisis was sprung by the Bureau of the Human Rights Commission. The time allocated to NGO observers was consequently reduced from 3.5 minutes to 1.45 minutes.*

Paragraph 6 states that, as of November 2001, the ICESCR (International Covenant on Economic Social and Cultural Rights) had been ratified or acceded to by 145 States and that the ICCPR (International Covenant on Civil and Political Rights) had been ratified or acceded to by 148 States.

The total number of States Members of the UN stands at 189 countries.

IAJLJ strongly endorses the call this Commission made in its Resolution 2000/67 that all States should become a Party to these Conventions.

However, it is interesting to correlate the ratifications and accessions against the score-sheet of the current membership of the Commission on Human Rights.

In doing so, a rather extraordinary situation is revealed. Only 11 of the 53 Commission Members have ratified or acceded to all the instruments mentioned in Doc. 2002/101. 12 out of 53 have not ratified ICCPR Optional Protocol One.

Of great concern is the fact that two Commission members, China and South Africa, have each only ratified one of the major international covenants.

Of most concern is the fact that seven Commission members have not, so far, ratified ANY of the instruments mentioned in Doc. 2002/101. These worthy seven states namely Bahrain; Cuba; Indonesia; Malaysia; Pakistan; Saudi Arabia and Swaziland and notably several amongst them, are not sparing in their generosity in dispensing their advice to the international community on what constitutes an acceptable level of adherence to international human rights standards.

IAJLJ urges that appropriate steps be promptly taken so that membership of this Commission is restricted to those States that, as an irreducible minimum, have ratified or acceded to the ICCPR.

# The UN Human Rights Agenda: A Strategy of Diversion

Anne Bayefsky

**E**very year over 100,000 people write letters about human rights violations which begin “Dear Mr. UN Secretary General” and “Dear UN High Commissioner for Human Rights”. Some of these letters complain about inflation. Some are part of mass email campaigns generated in reality from only a few sites. But many describe sad tales of human rights abuse at the hands of government, or officially-sanctioned, thugs. What happens to these cries from all over the world for help?

In theory, the end of the Holocaust began a new era in international response to human rights concerns. For the next fifty years the international community proliferated standards, treaties, agreements and resolutions. Remedies, however, were another matter.

The UN Human Rights Commission ended its annual session at the end of April. It is the central global intergovernmental human rights body in existence. It responded to those 100,000 plus messages by adopting resolutions on human rights conditions with respect to eleven of the 189 UN Member States.

UN intergovernmental human rights machinery is not keen on specifics. Its members include some of the most notorious human rights violators in the world today: China, Cuba, Iran, Libya, Saudi Arabia, and Syria. Those countries prefer devoting UN funds, (22% of which are from the United States), to criticizing Israel - lest attention wander too close to home.



The strategy of diversion has been wildly successful. Fifteen percent of Commission time and thirty percent of country-specific resolutions over thirty years are directed at this one state.

The problem is the 100,000 messages keep coming. In view of the intergovernmental response, many human rights advocates press legal avenues of redress. Over a thirty-five year time span human rights “treaty bodies” have been created to respond to individual complaints. While their decisions are almost never enforceable in domestic courts, they offer individualized attention

to human rights grievances.

There is, however, one major challenge to the treaty system’s potential success. There are almost no cases. Hardly any of the 100,000 messages sent to the UN make it into the UN’s legal track. There are no agreed-upon, transparent guidelines about directing the traffic to the legal system, and Dear Madam High Commissioner doesn’t get there on its own. This is aside from the significant problem of resources and advice necessary to transform those letters into viable cases related to legal rights.

As for the rest of the global village, ignorance is the rule. The UN “petition system”, as it is called, is the best kept secret in the UN. One and a half billion people are permitted by their states to complain about individual violations of human rights ranging from the right to vote, freedom of expression and of religion, to freedom from discrimination on any ground. But there are less than 100 cases registered by the UN human rights legal system annually. There has never been a case from places like Chad or Somalia, and only one or two from states like Algeria and Angola.

---

Professor Anne Bayefsky, Professor, York University, Toronto, Canada. She represented the Association at the Durban Conference.

In December 2000 a new UN human rights complaint system came into force giving women the right to complain of a broad spectrum of violations of women's rights, provided their country has ratified the new treaty. Thirty-six countries have done so. And not a single complaint has yet been registered.

It might be expected that the major human rights non-governmental organizations would bear considerable responsibility to inform victims of their rights and to facilitate complaints. But they are often occupied in much the same way as the intergovernmental system, concentrating on a narrow-range of states which are politically expedient. Human Rights Watch rushed out a report on Jenin and a critique of Israel, while a report on suicide-bombers operating for the past 20 months is still coming. Selectivity, as the UN calls it, is not just a governmental

problem.

The shortfalls of the UN system, lead many to pin their hopes on regional human rights systems: the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, the African Commission on Human and Peoples' Rights. But one regional group remains outside the target range. The Asian group (including China and the bulk of Muslim states) has no regional human rights system. These states strenuously avoid international human rights scrutiny and are largely successful in their efforts. No resolution has ever been passed at the UN Human Rights Commission concerning China or Syria, for example. At the just-completed Commission session, the Special Rapporteur to investigate human rights violations in Iran was deleted after six years of denying him entry into the country. The importance

## “All the news that's fit to print”?

### Author's Note:

This piece was originally submitted and accepted by the *New York Times* on 8 May 2002. After acceptance, editorial demands resulted in the submission of six new drafts, four additional drafts with smaller changes and corrections, seven drafts from the editors and 6 hours of editing by telephone. A piece, ultimately published 22 May 2002, was only accepted on condition - not only that the dynamic be significantly altered - but that the following words (in bold) be specifically omitted:

**Its [UN Human Rights Commission] members include some of the most notorious human rights violators in the world today: China, Cuba, Libya, Saudi Arabia, and Syria.** Those countries prefer devoting **UN funds, (22% of which are from the United States)**, to criticizing Israel - lest attention wander too close to home.

**Human Rights Watch rushed out a report on Jenin and a critique of Israel, while a report on suicide-bombers operating for the past 20 months is still coming.** Selectivity, as the UN calls it, is not just a governmental problem.

But one regional group remains outside the target range. The Asian group (**including China and the bulk of Muslim states**) has no regional human rights system. These states strenuously avoid international human rights scrutiny and are largely successful in their efforts. **No resolution has ever been passed at the**

**UN Human Rights Commission concerning China or Syria, for example. At the just-completed Commission session, the Special Rapporteur to investigate human rights violations in Iran was deleted after six years of denying him entry into the country.**

Narrowing the gap between international right and remedy means confronting not only the double-standards advocated by states, but the slackening of standards advocated by NGOs. Their buzz word is **listening to the “voices of the victims”**. **This was the tack of Amnesty International at the Durban World Conference Against Racism. The glitch is that voices say all kinds of things. Like South African Archbishop Desmond Tutu who recently said in Boston: “People are scared in this country [the US] to say wrong is wrong because the Jewish lobby is powerful, very powerful. Well, so what?...Hitler, Mussolini, Stalin...were all powerful, but in the end they bit the dust.”** Human rights protection is not about the self-selection of the most extreme, the loudest, or best-funded of the mob. It is about universal standards and remedying legitimate claims.

That individual's [the High Commissioner] chance to make a positive impact on the international protection of human rights will depend on his or her...willingness to confront **the UN's internal resistance to professionalism and transparency...**

Negotiations between myself and the editors over the one sentence specifically relating to Israel, included the following exchange:

of universal, in addition to regional, standards has not been eclipsed.

Narrowing the gap between international right and remedy means confronting not only the double-standards advocated by states, but the slackening of standards advocated by NGOs. Their buzz word is listening to the “voices of the victims”. This was the tack of Amnesty International at the Durban World Conference Against Racism. The glitch is that voices say all kinds of things. Like South African Archbishop Desmond Tutu who recently said in Boston: “People are scared in this country [the US] to say wrong is wrong because the Jewish lobby is powerful, very powerful. Well, so what? ... Hitler, Mussolini, Stalin ... were all powerful, but in the end they bit the dust.” Human rights protection is not about the self-selection of the most extreme, the

loudest, or best-funded of the mob. It is about universal standards and remedying legitimate claims.

The Secretary-General is now searching for a new UN High Commissioner for Human Rights. That individual’s chance to make a positive impact on the international protection of human rights will depend on his or her (a) preparedness to withstand the highly selective pressure of states, (b) willingness to confront the UN’s internal resistance to professionalism and transparency, and (c) ability to know the difference between a voice and a victim. Only universally applied human rights legal standards can light the way.

## “All the News That’s Fit to Print”

**The New York Times**

Reproduction from the New York Times front page

Original:

“...Those countries prefer devoting UN funds...to criticizing Israel - lest attention wander too close to home. The strategy of diversion has been wildly successful. Fifteen percent of Commission time and one-third of country-specific resolutions over thirty years are directed at this one state.”

Editor’s revision (15 May 2002)

“It [the Human Rights Commission] was, not surprisingly, toughest on nations that didn’t have seats on the commission this year, and especially tough on Israel (which is both politically offensive to many member states and very weak at the United Nations) and Cuba.”

Following my objections, the editor’s next revision (16 May 2002):

“The annual Human Rights Commission session...was able to agree on resolutions concerning just 11 of the 189 member states, and with its customary disproportionate focus on Israel.”

Only after continuous objection on my part, did they allow the one sentence on Israel in substantially the same terms as originally proposed.

The reference to anti-Semitism at the Durban World Conference was also the subject of interminable negotiation. Every draft received from the editor prior to the penultimate version, omitted any reference to anti-Semitism and refused to provide specific examples of the failings of human rights NGOs. In the end result, the language allowed was deliberately general and omitted the specific reference to those NGOs’ one-sided concerns in Jenin. As such, it opened the door to a response from those same NGOs challenging the allegation of their selective human rights interests. Predictably, such a letter to the editor was in fact sent to the *Times* by Human Rights Watch and Amnesty International, and was printed a few days later. When I inquired about writing a letter in response, which would have included the substance of my originally-accepted piece, I was informed that editorial policy did not permit authors of op-eds to respond to any criticism.

It seems clear that many authors would have given up on this process long before, and either withdrawn their pieces on principled grounds, or allowed their names to be put to op-ed pieces which they substantially did not write. Either way, it is a long way from the *New York Times* motto: “All the news that’s fit to print”.



# Counter-Terrorism Dilemmas: Legal Perspectives

Boaz Ganor

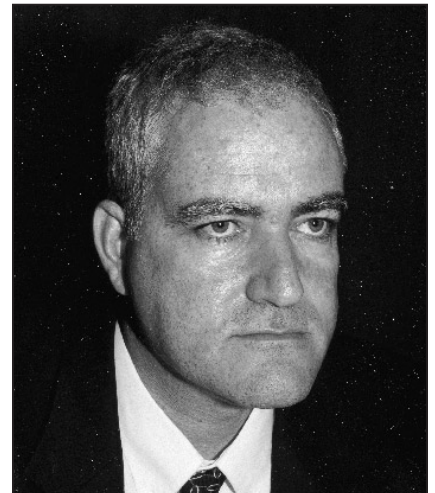
Counter-terrorism faces several dilemmas when it comes to tackle the phenomenon of terrorism. These dilemmas have been very concrete for Israel in recent decades and unfortunately have now become very concrete for other nations as well. Traveling around the world, we have found that a lot of nations today have to deal with questions relating to counter-terrorism, and in particular one on which I will focus here. In the attacks of September 11, terrorism crossed the Rubicon, and it seems natural and clear that counter-terrorism must cross the Rubicon as well. But the question is how? How can one do so in an effective way yet without causing too much harm to the democratic and liberal values of a democratic, liberal society? This is the question and it is a very difficult one to answer. We call it the democratic dilemma in counter-terrorism. We see that this dilemma is in a way connected to all layers of counter-terrorism. The first and most important layer of counter-terrorism is **gathering intelligence**. Another layer is **offensive activity**; another is **defensive activity**; we also count **punitive activity** as one of the layers of counter-terrorism, and some of us believe that **psychological warfare** is another layer of counter-terrorism.

If we try to analyze where the democratic dilemma appears in all these layers, I would say that it lies in the layer of intelligence, which I would count as the first and most important link in the chain of swatting terrorist attacks. Why? Because intelligence is necessary for all other layers of counter-terrorism; however, this layer is highly problematic when we try to analyze the democratic dilemma. Almost all intelligence gathering measures can inflict harm, thereby endangering liberal and democratic

values. Thus, for example, in surveillance cases, obtaining permission to tap the conversations of perceived terrorist organizations is problematic. In Israel at least, the approval of a judge is needed and even then, there are some areas where tapping is

restricted. For example, listening in to the telephone calls of religious leaders, *Imams*, is not allowed even though we know, unfortunately, that some of the *Imams* (not all of course) are involved in executing terrorist attacks.

Another problematic aspect of the democratic dilemma in the intelligence layer concerns methods of investigation: there has been a huge debate in Israel about what is or is not permitted during the interrogation of terrorist suspects. We know the Israeli invention of the "use of moderate physical pressure" which, until just over a year ago, was accepted by the Israeli courts, but is accepted no longer. The extent of the difficulty of this dilemma is illustrated by the case of one perceived suicide attacker - Zacarias Moussaoui - who was regarded as the twentieth suicide attacker in the atrocities in Washington and New York. This person came to the United States from England where he had lived for a long time, although he held French nationality. In the United States he started to study at flight school and the suspicions of his trainers were aroused when he said right at the beginning that he was not interested in taking off and in landing; all he wanted to learn was



---

Boaz Ganor is the head of the terrorism project at the Interdisciplinary Center in Herzliya, Israel. This article is based on his presentation at the Panel on International Terrorism: a Global Threat, during the Jerusalem Conference *Standing by Israel in Time of Emergency* (December 12-14, 2001).

how to navigate the airplane in the air. The instructors called the FBI; the FBI arrested him and found that he also had immigration problems. Moussaoui was in the hands of the Americans for two weeks before the atrocities occurred. I do not know the exact methods used by the Americans, but I find it inconceivable that believing the suspect to be at that time a member of the Bin Laden gang, knowing that Bin Laden was trying to target the United States, knowing that there was an effort to infiltrate the United States in order to execute terrorist attacks on American soil, knowing that something was wrong with the suspect because he did not want to learn how to land or take off, the authorities did not have concrete knowledge of what was about to happen. In that case, the question of what could or could not be done in the interrogation became very concrete; in that case the lives of more than 3,000 people were at stake.

This was an extreme case. In most cases one does not know whether the person being interrogated has or does not have concrete intelligence information about possible future terrorist attacks. One should read in this connection the book of the former Security Services Chief, Carmi Gillon, in which he wrote of this dilemma when he was at the head of the pyramid and responsible for giving the instructions to use limited physical force against the suspected terrorist. He would say to himself:

“Well, I have concrete information that this person whom we have taken in - knows something which will probably bring us to the terrorists who are going to carry out an attack. Maybe we can thwart this attack. But maybe the intelligence that I have is not true; maybe somebody just framed this person...”

Most cases are not clear-cut and it is very difficult to decide when and how to use harsh interrogation methods. This is the democratic dilemma in the intelligence layer.

But we have another problem, and I refer to the next layer, to offensive activity. One specific method of offensive activity is targeted killing. Around the world, this is one of the biggest criticisms of Israel. Targeted killings are not allowed. How does Israel dare to engage in them? The argument of the critics is that using targeted killings amounts to killing the criminal without any trial. In this regard, we have to ask ourselves a basic question which has not yet been solved. Is terrorism a criminal activity? I believe that terrorism is not a criminal activity; terrorism is a type of war and if that is so, then we should use the methods that are recognized as legitimate in times of war against people who belong to the military branches of a terrorist organization.

They initiate, carry out, train, and prepare the terrorist attack and therefore under all international legislation, targeted killing is lawful. Targeted killing is right; more than that, if we analyze this offensive method, and we compare it to other methods of offensive activity in counter-terrorism, I would say that this is more moral than the others. It is much more selective. Here one chooses a specific person who is engaged in terrorism; one does not bomb a residential area or a base, which might endanger the lives of many people.

This is true, however, only if one is targeting people who are in the chain implementing the terrorist attacks against one's state; it is not as a measure of punishment, nor should one attack the political or administrative branches. The decision is very difficult but this should be the yardstick by which we measure this activity.

Even in defensive activity, we face a democratic dilemma. For example, in Israel when we go into a mall or a cinema, we are used to being asked to open our personal bags. This is an invasion of privacy; it was inconceivable in the United States until recent times. Now there is an understanding for the need for these measures.

If we talking of the punitive layer, there are questions of administrative punishments: detentions and demolition of houses which are definitely part of the democratic dilemma. These are issues of emergency legislation, and most counter-terrorism laws around the world, not only in Israel, are based on emergency legislation. Other matters such as bringing suspects to trial and the privileges they can or cannot have are also part of the problem. This short list gives an impression of just how problematic and how comprehensive the democratic dilemma is in counter terrorism and especially in what is known as domestic counter-terrorism, or the phenomenon of domestic terrorism.

Another issue from another arena concerns what in my view is one of the fundamental questions in international cooperation in counter-terrorism, *i.e.* cooperation between states. President Bush has created a coalition against terrorism. In 1996, we saw another coalition in Sharm-a-Sheikh against terrorism. What are they against? What is terrorism? This has been the subject of a huge debate over the years but there is no accepted definition as to what is this phenomenon that we are all against. Just the opposite: the only thing that, until September 11, most scholars and most experts from the practical world did agree upon was that a) it is impossible to reach an agreement upon the definition of terrorism; and b) nobody needs such a definition, because one can

have international counter-terrorism cooperation without having an acceptable objective definition of terrorism. In a way they were right. Israeli intelligence, the security services and American intelligence can cooperate without defining the phenomenon of terrorism. They know what they are talking about; but for all other layers of cooperation in counter-terrorism, I believe that there is a great need to agree one objective definition which will be acceptable at least to most of the civilized world (and by 'civilized world', I am not necessarily referring to the Western world, or rather not only the Western world but other countries from the Third World as well).

All of us know the saying "one man's terrorist is another man's freedom fighter". That is the basic criticism made against anyone who tries to define terrorism but what does it mean? It means that everything is subjective. Anyone who fights against me is a terrorist, and anyone who fights against somebody else - is a freedom fighter, an anarchist, a revolutionary or a guerrilla fighter. This saying, however, is misleading because it confuses means and goals. Freedom fighting is a goal; terrorism is a measure to achieve this goal. How then can we reach an objective definition of terrorism? I would suggest that we apply the laws of war which are already internationally accepted, and are also written in the Geneva and Hague Conventions. These laws distinguish between soldiers, military personnel who deliberately attack the military personnel of the other side in times of war, and war criminals, *i.e.*, military personnel who deliberately attack civilians, and the people who send them on that mission. Where a state uses deliberate violence against civilians not in times of war, that is defined as a crime against humanity. Basically, therefore, we have a moral law which is already accepted, but it refers to states.

What I would argue is that we should adopt this moral law and apply it to a situation of a war between an organization and a state. If one accepts this, then one may distinguish between terrorism and guerrilla warfare. Terrorism therefore would be the deliberate use of violence against civilians in order to achieve political, ideological, and religious aims whereas guerrilla warfare would be the deliberate use of violence against military personnel and infrastructure in order to achieve the same aims: political, ideological and religious. Consequently, if a guerrilla warrior, a person who was engaged in perpetrating direct violence against military personnel and infrastructure were captured, I would not hesitate to give him the protection that prisoners of war get. If a terrorist is captured, I would try him as a war criminal. This distinction, of course, is sometimes difficult to accept, because if I

am right, attacks against one's own military personnel, soldiers and infrastructure would not and should not be defined as terrorism. Attacks against IDF soldiers in Lebanon would not be terrorism but guerrilla warfare. The American definition, accepted by the State Department, is much the same although the word "non-combatants" is used rather than "civilians". Terrorism is the deliberate use of violence against non-combatants; meaning that if a terrorist attacks a soldier, even at times when he is on vacation, is not prepared or is not in the battlefield, he would be regarded as perpetrating terrorism by the American definition. I, as an Israeli, regard this as a good definition but I cannot see the international community accepting it, and in particular not several countries that one would wish to draw into the coalition against terrorism.

One may ask why it is necessary to have a definition at all. In my opinion, without this kind of objective definition, all coalitions and all international legislation on counter-terrorism, comprise no more than lip service. Thus, for example, just recently the International Criminal Court was created, the charter of this criminal court mentions that it will try all kinds of criminal activity, but it excludes at least one - terrorism. Why? The answer appears there - because there is no acceptable definition of terrorism.

With regard to extradition conventions - there are dozens if not hundreds of such treaties - both bilateral and multilateral - but all of them state that if the basic reason for the criminal activity was political, then the judge will not necessarily have to abide by the treaty. And as already noted, the reason for terrorism is always political. If one talks about fighting states which sponsor terrorism, then without a definition such as that proposed above and without legislation that is based on that definition, the French or Germans or others could use the strategy which they call the "critical dialogue". These countries do not accept the American boycott of Iran, Libya and the like because they have a different perspective: they say they have to keep their political ties with Iran or Syria because they have to have a dialogue with them and *via* this dialogue, criticize them and teach them that they are not going in the right way.

Thus, we should not wait until these countries understand that they have to join the international fight against states which sponsor terrorism; we should practice and force them to practice measures against states which sponsor terrorism by international

*continues on page 17*

# International Terrorism: A Global Threat

Martin Kramer

**E**ven before September 11 2001 it was self-evident that terrorism was not the problem of one or two or half a dozen states but a global issue. Now, after September 11th, everyone recognizes this simple fact: terrorism is itself globalized; it is the dark side of globalization itself. The West, led by the United States, is now engaged in a war on terror and it may well become the Cold War of the 21st century. There are many ways to attempt to deter terrorism, and if we let our imaginations roam, the means at the disposal of a state faced with terrorism seem almost unlimited. Israel has used perhaps the widest range of such means, but even Israel has never used all the means at its disposal for a very simple reason: some of these means are outside Israeli law or outside the laws of other states or outside international law. The challenge to the policy-maker is to find an effective balance between the means of deterrence and the limitations of the law.

September 11th is going to bring about a lot of changes in legis-

---

Dr. Martin Kramer moderated the Panel on International Terrorism: A Global Threat during the Jerusalem Conference on *Standing By Israel in Time of Emergency* (December 12-14, 2001). Dr. Kramer of Tel Aviv University, is a senior fellow at the Moshe Dayan Center for Middle Eastern and African Studies and the editor of *The Middle East Quarterly* which is based in Philadelphia. These extracts are from his introductory remarks at the Jerusalem Conference.

---

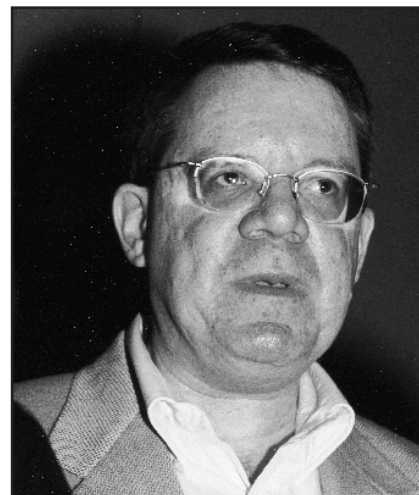
*continued from page 16*

legislation, based upon a definition of terrorism.

To summarize, I believe that today the international community needs two moral laws in order to create an effective international counter-terrorism policy. The first moral law would be this definition which should be as widely accepted as possible. The second moral law is a change in the balance of interests of any particular state in such a way as to cause the state to understand that, in the wake of September 11, counter-terrorism is the most important interest of any civilized state; more than any political, economic or other interest. This was not so until today. I believe that it should be and I hope that the international community will

lation; it is going to bring about an effort to re-define terrorism. The taboo was broken on September 11th, but the United States has also broken a taboo in response. Since September 11th: it has done something that it has not done in this part of the world since 1953: it has

removed a regime from power, in Afghanistan. Secondly, we see that the response of the United States has been a military response, using military means, and already the first steps have been taken towards setting up the administration of military justice to deal with this. We are now in a stage of transition, and in a stage of transition in which what lawyers say, can influence the way in which these issues will be dealt with in the years to come.



begin to understand this because what we have seen in the attacks in New York and Washington and even what we have seen since in terms of the anthrax letters, without necessarily connecting them to Bin-Laden or to any one else - is another crossing of the Rubicon. Things that we counter-terrorism experts thought that though possible had a very low probability of happening - and were closer to science fiction - have started to become true. Therefore, I believe that these steps need to be adopted and executed right now.



# Legal Responses: Regulating Cyberspace

Michael Whine

**T**he widely differing approaches adopted by countries to hate on the Internet are slowly shifting. The absolute protection of free speech attitude of the USA is under attack, by both European countries and in international fora, as states which face active anti-democratic opposition groups use cyberspace to communicate with each other, and with the world, and promote hatred of minorities and Holocaust denial.

In this brief paper I set out some of the legal issues concerned and note the progress made in prosecuting hate in cyberspace. I also suggest some of the solutions to the growing problems which are being pursued. My own belief is that neither one approach nor another is the right one, but rather that a mixed approach involving voluntary self-governance and legal sanctions are likely to be the most effective. This mix can be varied according to particular circumstances and governmental approaches.

## The Legal Position in the UK

In March 2001 the then Home Office Minister Mike O'Brien stated that 'the law on incitement to racial hatred applies to material on the Internet which comes within our jurisdiction'.

He added that monitoring criminal activity was a matter for the police and revealed that the government is assisting the Internet Watch Foundation in setting up a complaints hotline to report racially inflammatory material.<sup>1</sup>

Subsequently his successor at the Home Office, Angela Eagle, stated in response to a parliamentary question, that:

"The government continues to apply the principle that the law should be applied to criminal material on-line as it is to material

off-line. The government condemns those who produce race hate material, including those who seek to distribute this material *via* the Internet.

The Public Order Act 1986 already deals with a range of material, which is threatening, abusive or insulting and intended or likely to stir up racial hatred and can be applied to material on the Internet that falls within our jurisdiction. The government has strengthened the provisions of the 1986 Act in amendments made by the Anti-Terrorism, Crime and Security Act 2001. This means the maximum penalty for those inciting racial hatred has risen from two to seven years imprisonment. It is also now an offence to incite racial hatred against a racial group abroad. We have asked the police and the Crown Prosecution Service to work together to pool knowledge and experience in the investigation and prosecution of race hate material".<sup>2</sup>

As stated, the primary legislation against incitement to hatred is the Public Order Act, which in Part III, Section 19, states that:

"A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if:

- He intends thereby to stir up racial hatred, or
- Having regard to all the circumstances racial hatred is likely to be stirred up thereby.

In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public."<sup>3</sup>

Michael Whine, University of Sussex, Centre for German-Jewish Studies. These comments were presented at a symposium on *Internet Racism*, held on 9th April 2002.

1 "Minister Condemns Antisemitism on Web", James Kaye, *London Jewish News*, 30 March 2001.

2 Internet (Racist Material), *Hansard*, 18 March 2002.

3 Racial Hatred, Section 19, Part III, Public Order Act 1986, *HMSO*.



The Anti-Terrorism Crime and Security Act 2001 added additional offences impelled by 'religious' hatred to those motivated by 'racial' hatred.

It defined a religious group as meaning a group of persons defined by reference to religious belief, or lack of religious belief.

The 2001 Act also increased the penalties for racial (and religious hatred) offences from two years to seven years, thereby underscoring the seriousness with which the government now viewed these offences.<sup>4</sup>

Secondary legislation is contained within the Malicious Communications Act 1988. This allows for 'the prosecution of any person who sends to another person a letter or other article which conveys a message which is indecent or grossly offensive, a threat, or information which is false and known to be or believe to be false by the sender or any other article which is, in the whole or part, of an indecent or grossly offensive nature.'<sup>5</sup>

The Criminal Justice and Police Act 2001 subsequently amended the Malicious Communications Act to include mail sent electronically, and it increased the penalties for an offence from a fine (on level four) to imprisonment for a term not exceeding six months or to a fine not exceeding level five.<sup>6</sup>

At approximately the same time, in January 2001, the Minister at the Home Office Lord Steve Bassam wrote that:

"the government is beginning to develop a strategy for tackling racist material on the Internet and that it is conscious that any response needs to be both proportionate and enforceable."

He stated that the government is conscious of the experience of other countries in attempts to regulate content or access to Internet sites and it is for this reason that it was working with bodies such as the Internet Watch Foundation and to bring the Internet Service Providers together with the police, National Criminal Intelligence Service (NCIS) and the Crown Prosecution Service (CPS) who were co-ordinating a response on racially inflammatory material.

He added that the government was working with European partners in the EU and the Council of Europe on better international co-operation standards on dealing with hate material and on cyber-crime generally.<sup>7</sup>

All the above deal with criminal offences, but a case brought before the civil courts is worth noting at this point because it illustrates the differing approaches adopted by the English and the American courts on attaching responsibility. In *Godfrey v. Demon Internet Ltd.* a British court refused the comparison of the role

of an Internet service provider with that of a telephone company. It accepted the suggestion that because Demon Internet chose to store electronic messages on their server they were not merely owners of an electronic device through which postings were transmitted, but in effect publishers. The general principle of libel applied therefore, and a defamatory statement remains whatever the medium through which it is transmitted.<sup>8</sup>

The American approach was highlighted in *Lumney v. Prodigy Services Company* (1999), where the New York Court of Appeal compared the role of an ISP to that of a telephone company, *i.e.* a conduit.

In a recently published article it was stated that

"the law in this area is still at an embryonic stage, the development in this country, following *Godfrey*, would appear to be in the direction of establishing the ISPs responsible for defamation if they store material or have any form of editorial control over the contents. This direction moves away from the American decisions that are attempting to limit the responsibilities of the ISPs. The risk to ISPs in this country will therefore inevitably increase as the possibilities of bringing an action against the author of the piece diminish with the constant growth of the Internet. ISPs will have to use greater control and responsibility over the newspaper groups and web sites on their server and remove offending pieces. Libel reading of Newsgroups and web sites may well become a necessity as the English courts find ISPs responsible for defamatory comment on their sites".<sup>9</sup>

The *Godfrey v. Demon Internet* libel action must now more or less signal the end of unmoderated anonymous Internet publishing in the UK, as the judgement set a precedent for allowing libel by messages posted on electronic bulletin boards.

This has implications for newspapers such as *The Guardian* and *The Independent* whose moderated Usenet systems have recently hosted blood libels against the Jewish community and

4 Race and Religion, Part 5, Anti-Terrorism, Crime and Security Act 2001, [www.hmso.gov.uk/acts/acts2001](http://www.hmso.gov.uk/acts/acts2001).

5 Malicious Communications Act 1988, [www.hmso.gov.uk/acts/acts1988](http://www.hmso.gov.uk/acts/acts1988).

6 Malicious Communications, Section 43 Criminal Justice and Police Act 2001, [www.hmso.gov.uk/acts/acts2001](http://www.hmso.gov.uk/acts/acts2001).

7 Letter to author, Lord Steve Bassam, Home Office, 9 January 2001.

8 *Godfrey v. Demon Internet Ltd.*, Queens Bench Division, *All England Law Reports*, 1999.

9 Adam Cannon, Internet libel: who is responsible?, *New Law Journal*, 28 January 2000.

messages which commend the *Protocols of the Elders of Zion* and other anti-Semitic forgeries to readers. The papers could be held responsible for the offensive content of material which promotes hatred unless they can show they have taken reasonable care to remove or bar such content.<sup>10</sup>

## European cases

For historical reasons Germany has been among the most proactive in prosecuting racism on the Internet. Legislation against the public use of Nazi slogans and logos has been used to block web sites and prosecute neo-Nazi groups promoting Holocaust denial. However such action comes at a time of increasing use by far right groups. A German security service report in 2000 suggested that German neo-Nazi sites make up almost a quarter of the global total of sites run by far right organisations. In April 2000 the then Justice Minister Herta and Paul Daubler-Gmelin told the press that the Ministry was working on a blacklist of sites which she planned to ask ISPs to block.<sup>11</sup>

Germany's increasing frustration in a situation which allows German Nazi groups to use US providers to evade prosecution is apparent. In April 2001 this frustration led the police to raid more than a hundred computer buffs in a new crackdown on the illegal trade of Nazi songs over the Internet.<sup>12</sup>

In January 2001 Germany successfully prosecuted Australian Holocaust denier Frederik Toben for promoting Holocaust denial on his own web site, which was accessible in Germany. In this case Toben virtually dared the German authorities to prosecute him by announcing his planned visit to the country to promote his Adelaide Institute, a Holocaust denial web site.<sup>13</sup>

However the German verdict's scope was limited to individuals with their own web sites, thus excluding liability for ISPs which may serve only as conduits for neo-Nazi content or Holocaust denial.

In March 2002 the leading Swedish evening newspaper, *Aftonbladet*, shut down its on-line comment Forum following a court ruling that it was responsible for death threats against Jews posted on its site.

Posts expressing pro-Nazi comments had been made in October 2000, but 'owing to some technical problems, they were not deleted from the Forum (which is moderated) for some time'. The editors subsequently removed the posts but were charged with agitating against an ethnic group and were found guilty. The court ruled that *Aftonbladet* was responsible, as a publisher, for the comments posted on its site. The Forum is operating again, but

only during business hours, including the weekend.<sup>14</sup>

In France the Tribunal De Grande Instance de Paris in November 2000 ordered Yahoo to remove Nazi memorabilia from its auction site, and although a US court had declared that the US Constitution protected material originating in the US from being regulated by overseas authorities, the French court acted on French law which prohibits the display of racist material.

However Yahoo subsequently did remove the material and banned Nazi auctions on-line.<sup>15</sup>

Their decision followed that of American on-line auctioneer eBay, which in May 2001 discontinued the sale of Nazi memorabilia after American Jewish organisations had complained.<sup>16</sup>

In both cases the decisions taken by the American-owned companies were based on commercial considerations rather than legal ones.

In Switzerland Thomas Stricker, an assistant professor at the Zurich Technical University, was successfully prosecuted in March 2000 for providing links to neo-Nazi, Holocaust denial and racist web sites from his university home page. The action was brought under the Swiss anti-racism laws.<sup>17</sup> The following year the three largest Swiss ISPs announced they were blocking access to more than 750 far right web sites following a campaign by the Basle-based Children of the Holocaust Group. However a number of the dumped Nazi web pages subsequently moved to the US.<sup>18</sup>

10 See *Guardian Talk*, [www.guardian.co.uk](http://www.guardian.co.uk); *The Independent Online*, [www.independent.co.uk](http://www.independent.co.uk).

11 Germany cracks down on Internet Nazi music trade, Adam Tanner, *Reuters*, 10 April 2001.

12 World wide web of laws threatens the Internet, Ian De Freitas, *The Times*, 9 January 2001.

13 It's bloody hard to run a forum (in Sweden), Drew Cullen, *The Register*, 8 March 2002, [www.theregister.co.uk/content](http://www.theregister.co.uk/content).

14 Ordonnance de Refere du 20 Novembre 2000, Tribunal de Grande Instance de Paris, [www.legalis.net/jnet/decisions/responsabilite/ord\\_tgi-paris\\_201100.htm](http://www.legalis.net/jnet/decisions/responsabilite/ord_tgi-paris_201100.htm).

15 Fighting and Containing Hatred on the Web, Policy Despatch no.57, *Institute of the World Jewish Congress*, January 2001.

16 Net auction site bans Nazi items, *The Independent*, 4 May 2001; Tom Tugend, 'Nazi' auctions banned, *Jewish Chronicle*, 18 May 2001.

17 Racist web links land Swiss professor in court, Michael Gardner, *Times Higher Educational Supplement*, 17 March 2000.

18 Gisela Blau, Swiss Net Servers block Nazi Pages, *Jewish Chronicle*, 2 March 2001.

The same anti-Nazi group now targets posters of racist material on discussion groups, and threatens to expose them and report them to their employers. So far the action has proved successful.<sup>19</sup>

In Norway the Asker and Baerum District Court near Oslo convicted Tore W Tvedt, founder of the Vigrid far right group, in April 2002, of posting racist and anti-Semitic propaganda on his web site. The court ruling stated that it put special weight on Tvedt's efforts to draw children and young people into his anti-Semitic and racist beliefs and sentenced him to a term in prison.

The case set an international precedent by holding the defendant responsible for the contents of his home page, even though it was posted on a server that was based in the United States and out of Norway's jurisdiction.<sup>20</sup>

### Legal Action in Australia

Australia successfully prosecuted Frederik Toben for Holocaust denial material posted on his Adelaide Institute web site. His case arose after the Human Rights and Equal Opportunity Commission ruled that his web site was 'racially vilificatory of Jewish people' in a civil action brought by the Executive Council of Australian Jewry. When Toben refused to remove the contents the Australian Federal Court enforced the decision, but Toben fled Australia and sought asylum in Tehran from where he has been organising international Holocaust denial conferences, together with European neo-Nazis who have likewise fled criminal sanctions in their countries of origin.

Toben had previously been found guilty in Germany of incitement, disparagement and insulting the memory of the dead (Germany's anti-Holocaust denial legislation) and served seven months of a ten month jail sentence.<sup>21</sup>

### The American standpoint

A number of states now have hate-crimes laws which allow the prosecution of those who encourage violence against racial or religious minorities. For example, the Illinois House of Representatives approved a bill to crack down on race group leaders who encourage violence. In May 2001 the State of Texas passed a hate crime bill that strengthens penalties for offences against minorities, gays and others. In passing the James Byrd Jr Hate Crimes Act, State Governor Rick Perry stated that 'This law sends a signal to would-be criminals that if you attack someone because of their religion or race or gender, you face stiffer penalties.'<sup>22</sup>

It is estimated that currently at least eighteen states have

such legislation, although the right for judges to impose harsher penalties for hate-crime bias on top of maximum penalties was refused in the Supreme Court ruling in *Apprendi v. New Jersey*. Here the court invalidated an additional penalty for hate-crime bias beyond the maximum penalty for the underlying crime, although bias motivation or discriminatory selection can still be used to impose a maximum sentence against a convict for a particular crime. The decision here was based on the argument that imposing an additional sentence on top of a maximum sentence was like a separate crime that must be weighed by the jury and not by the judge.<sup>23</sup>

However, hate on the Internet is still generally governed by the First Amendment to the Constitution which allows the absolute right to free speech unless the message involves direct incitement to violence. This view was most recently upheld for the Nuremberg Files case.

In 1998 the Planned Parenthood pro-abortion family planning organisation successfully sued the American Coalition of Life Activists (ACLA) in an Oregon court and won \$ 71 million in damages. ACLA had published the so-called 'Nuremberg' files naming doctors who provided abortions.

A number of these were victims of bombings or arson attacks, including Dr Barnett Slepian who was assassinated, allegedly by James Kopp, who subsequently fled the US to France and who is now the subject of a US extradition request. However in March 2001 the Federal Appeals Court in San Francisco overturned the verdict and said that ACLA had merely exercised its right to free speech although some of its statements were highly offensive. It did not ever make direct threats of violence.<sup>24</sup>

In another case in March 2001, Alex Curtis, a California-based neo-Nazi activist pleaded guilty to using his Internet site to

19 Aktion Kinder das Holocaust, *www.akdh.ch*, Final Conflict 1580, 6 March 2001.

20 Rare Case Has Norwegian Man Convicted of Racism on the Web, *Associated Press*, 24 April 2002.

21 Henry Benjamin, Australia clamps down on revisionism and racism, *Jewish Chronicle*, 13 April 2002.

22 Texas Governor Signs Bill for Tougher Hate Crimes Penalties, *Los Angeles Times*, 12 May 2001.

23 Adam Cannon, *op cit*.

24 Court Protects Anti-Abortion Site, *Associated Press*, 29 March 2001; Duncan Campbell, Seven doctors have been murdered, now judges rate in favour of abortion hit list, *The Guardian*, 30 March 2001.

encourage racism and racial harassment, although this formed only part of the charge against him. The greater charge which led to his conviction was for threatening a Congressman and other officials and vandalising two synagogues.<sup>25</sup>

One civil case that was prosecuted in the criminal courts however allowed a prosecution for posting threats and hate messages on a web site. In April 2001 the US District Court ruled that Ryan Wilson and his Alpha HQ web site had violated federal housing laws by posting threats and hate messages on his web site. The case arose following a successful civil action brought by Pennsylvania state attorneys against Alpha HQ who had identified on their site, by name and photographs, a local human relations council (The Reading-Berks Human Relations Council) and one of its staff members, Bonnie Jouhari, stating that she was a race traitor and should beware. Pictures on the web site of Bonnie Jouhari and her daughter, and her house in flames, suggesting that they be attacked, were subsequently prosecuted as a criminal case and Ryan Wilson was fined \$1.2 million.<sup>26</sup>

## European Regulation

The European Union recognises the right to freedom of expression but qualifies this by also noting that it carries with it duties and responsibilities which include the restriction of hate speech.

In 2001 the European Monitoring Centre on Racism and Xenophobia (EUMC) prepared a statement for the European Commission hearing on computer-related crime.<sup>27</sup> This subsequently led to the declaration 'On combating racism and xenophobia on the Internet by intensifying work with young people'.

This emphasises the need to encourage ISPs based in the Union to provide means for the public to report racist and xenophobic contents that they encounter on the Internet, and the need to encourage co-operation between ISPs and police and legal authorities in the Member States in order to combat racist and xenophobic material.<sup>28</sup>

In April 2001 the draft European Union Convention on Cybercrime was published, with subsequently an additional protocol to make it a crime to spread racist and xenophobic propaganda through computer networks. At the time of writing this is still being negotiated in Strasbourg.<sup>29</sup>

The European Commission has also agreed to take action against racism on the Internet. In January 2001 it stated that

"the Commission will also examine the scope for action against racism and xenophobia on the Internet with a view to bringing forward a Framework Decision under Title VI of the TEU covering both off-line and on-line racist and xenophobic activity."

The Framework Decision is supposed to expand the Joint Action Against Racism and Xenophobia of 15 July 1996, which deals with communication offences, that is public incitement of racial discrimination or violence, public condoning or racist violence, public denial of crimes against humanity. Additionally it deals with offences of public dissemination and distribution of racist material and participation of racist groups and organisations.

The basic idea will be contained in the principle "what is illegal off-line is illegal on-line".<sup>30</sup>

Another European Commission initiative is the safer Internet Action Plan. In 1999 the Community adopted the multi-annual Safer Internet Action Plan dedicated to the creation of a European network of hotlines, the encouragement of self regulation and codes of conduct, the development of filtering and rating systems and the encouragement of "awareness actions".<sup>31</sup>

## United Nations Conventions

The International Convention for the Elimination of Racial Discrimination, which stipulates in Article 4 that nations ratifying

25 Calif. Supremacist Pleads Guilty, *Associated Press*, 16 March 2001; Alex Curtis Pleads Guilty, *Midwest Action Report*, No.38, March 2001, [www.newcomm.org](http://www.newcomm.org).

26 Neo-Nazi from Fishtown fined \$1.2 million for hate crime, *Philadelphia Inquirer*, 14 April 2001; Michael Whine, *Far right extremists on the Internet, chapter in cybercrime - law enforcement, security and surveillance in the information age*, Routledge, London and New York, 2000.

27 Short statement on behalf of EUMC at Public Hearing of the European Commission regarding computer-related crime on 7 March 2001 in Brussels, [europa.eu.int/ISPO/eit/InternetPoliciesSite/Crime/PublicHearingPre.../EUMC.htm](http://europa.eu.int/ISPO/eit/InternetPoliciesSite/Crime/PublicHearingPre.../EUMC.htm).

28 Declaration by the Council and the representatives of the Governments of the Members States, meeting within the Council of 28 June 2001 on combating racism and xenophobia on the Internet by intensifying work with young people, Document 401X0712 (01), Official Journal C196, 12 July 2001, P0001-0001, [europa.eu.int/eur-lex/en/lit/dat/2001/en\\_401X0712\\_01.html](http://europa.eu.int/eur-lex/en/lit/dat/2001/en_401X0712_01.html).

29 Niraj Nathwani, Legal Affairs advisor EUMC, The European Union is beginning to tackle the problem of racist web sites, *EUMC news*, issue 06, September 2001.

30 Niraj Nathwani.

31 Niraj Nathwani.



the Convention are required to criminalise the dissemination of ideas based on racial superiority or hatred, remains the primary international instrument against the promotion of hate. The Convention requires signatory states to declare illegal and prohibit any organisation promoting or inciting racial discrimination.

However inconsistency in applying the Convention and differing views on the rise of the Internet as a medium for promoting hate has led the UN to establish an enquiry into states' prosecution of hate in cyberspace. A resolution of the UN Commission on Human Rights recently requested the Commissioner to:

"undertake research and consultations on the use of the Internet for the purposes of incitement to racial hatred, racist propaganda and xenophobia, to study ways of promoting international cooperation in this area, and to draw up a programme of human rights education exchanges over the Internet on experience in the struggle against racism, xenophobia and anti-Semitism".<sup>32</sup>

Summarising the replies received, the Office of the High Commissioner (OHCHR) noted that:

"Several respondents recognised the dangers posed and harm caused by the use of the Internet for the purposes of incitement to racial hatred, racial propaganda and xenophobia. The Internet can, however, also serve as a tool in the fight against racism, racial discrimination, xenophobia and related intolerance. The use of the Internet to distribute positive information and materials, research and facts about immigrants and minorities can support action against racism and anti-Semitism, raise awareness, promote understanding and increase tolerance. It can be effective in increasing the susceptibility of people to negative and harmful material and that inciting racism and xenophobia."<sup>33</sup>

It went on to recognise that some governments recognise the importance of racist and xenophobic material on the Internet and the initial stages of considering the issue. Those countries with less developed Internet capacities had requested the assistance of the OHCHR and the international community. Other governments reported that existing provisions in their domestic penal codes could be used to prosecute. The OHCHR urged international co-operation and co-ordination to help establish international standards and practices and to provide technical assistance to countries with less-developed Internet capacities. It noted that the issue of regulation of the Internet is a complex matter which required yet further study and consideration by the international community.

In a background paper prepared for the Commission it was

stated that:

"Those efforts to combat racism on the Internet have to date been successful only in part...The analysis of the current situation leads to the following conclusions:

One should not expect any technology-only solutions to the problem of racist content on the Internet taking into account today's efforts...

It is possible in several countries to take legal action against parties that are supporting racist content by providing the Internet infrastructure necessary to access or spread such illegal content...

In some countries, notably the United States of America, racist and hate speeches *protected* by the right of freedom of speech as guaranteed in the First Amendment to the United States Constitution and may therefore be freely published on the Internet..."

The author of the report suggested that such material is unlikely to slow down or even decrease as the Internet is too useful and interesting a tool for racist and hate-groups not to be used in their mission. He pointed out that proposed self-regulatory schemes would not be able to stop any significant amount of racist content due to the decentralised structure of the Net where the industry could not be expected to self-regulate itself completely. He did however note that there is no such thing as a 'law-free zone' on the Internet. Actions always have a contact to at least one jurisdiction since every action or offering on the Internet originates from somewhere and in most cases requires the use of at least one server. Acts by law enforcement authorities would necessarily be limited unless other countries are willing to assist them and have similar laws. The report author therefore suggested that one should not expect effective combating of racist speech on the Internet by relying solely on action at the receiver's end, whether by self-regulation or government regulation. Action should therefore be primarily directed at the source. The only solution he suggested therefore was a combination of strategies including self-regulation, legal and political anti-hate laws, the geographic limitation of

32 Cited in Consultation on the use of the Internet for the purpose of incitement to racial hatred, racial propaganda and xenophobia, Preparatory Committee WCAR, 1-5 May 2000, UN General Assembly, A/CONF.189/PC.1/5, 5 April 2000.

33 Consultation on the use of the Internet, *op cit*.



racist speech, effective content identification and civil actions against providers.<sup>34</sup>

The most recent statement by the UN was the Durban Declaration published after the World Conference Against Racism, held in South Africa from the end of August to September 2001. This welcomed the positive contribution made by information and communication technologies, including the Internet, in combating racism and urged states to implement legal sanctions, in accordance with relevant international human rights laws against racial incitement on the Internet.

It called on states to encourage ISPs to establish and disseminate specific voluntary codes of conduct and self-regulatory measures and to establish mediating bodies at national and international level. It also called for the appropriate legislation to prosecute those responsible for incitement to racial hatred or violence, the training of law enforcement authorities and public denunciation of racist and xenophobic messages through all new information and communications technologies. Considering the urgency of the matter it further called for prompt and coordinated international responses to what is perceived to be a rapidly evolving phenomenon in order that international cooperation should be strengthened.<sup>35</sup>

## Conclusions

The differing views on the issue of free speech in general and in cyberspace in particular suggest that consensus among states is a long way off. Moreover the concept of cyberspace as a free and unregulated medium is an attractive one although generally it is now acknowledged that it is not a lawless vacuum. Pressure by European states where, for historical and current political reasons, the banning of Nazi activity and the dissemination of racist ideology is important for the defence of democracy conflicts with views generally held in America. However despite the inability to pass US federal legislation a number of states have now begun to see that cyberspace is no different from any other medium, and that it is often words that incite violence.

However the issues of dual criminality and jurisdiction remain unresolved and are likely to do so for a long time. It is clear therefore that any coordinated attempt to reduce offensive content will have to be directed at the point of origin, as much as at the point of receipt. Given the differing views taken by states it will only be through such a mixture of a voluntary and legal means that this will be achieved. However the commercial imperative should also not be ignored. Responsible site providers will not

wish to be associated with the dissemination of hatred, and as the Yahoo and eBay cases suggested, the management of commercial enterprises are responsive to public opinion.

34 David Rosenthal, *Racism on Internet: Legal and Technical, Expert Seminar on Remedies Available to the Victims of Racism, Racial Discrimination, Xenophobia and Related Intolerance etc.*, in preparation for WCAR, Geneva, 16-18 February 2000.

35 Declaration, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 8 September 2001, United Nations.



Late flowering at Mount Carmel. Courtesy of Israel Government Press Office

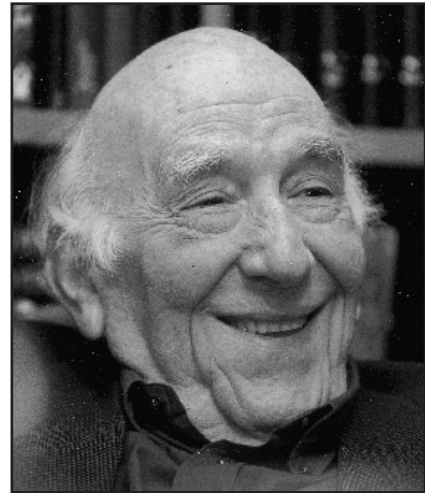
# HAIM COHN

1911 - 2002

Justice Haim Cohn, a founding father of Israel's legal system, a lifelong fighter for civil rights in Israel and the Honorary President of the Association, died on 10 April 2002, aged 91.

Born in Lübeck, Germany, to an esteemed rabbinical family, Haim Cohn studied Hebrew and the *Talmud* with his grandfather, and read philosophy and Semitic languages at Munich University. After studying under the renowned Zionist Rabbi Isaac Kook in Jerusalem, he returned to Frankfurt to complete his education in law, before opening his first legal practice in Palestine in 1933.

In 1948, Cohn was asked to prepare the legal system for the new State of Israel, integrating the plethora of ancient Jewish, Roman, Ottoman and British laws, all of which had made an impact on local Palestinian laws and norms. With the establishment of the State, Cohn became the country's first State Attorney and served as Director General of the Ministry of Justice. In 1950, he became Attorney General, serving in that role for a decade, until 1960. In 1960, Cohn was appointed to the Supreme Court, where he served until 1981, rising to the position of Deputy President of the Court.



Cohn's involvement with human rights issues brought him an appointment to the first UN Commission on Human Rights. He sat on the World Court of Arbitration in the Hague, founded the Israeli branch of Amnesty International and was the first President of the Association for Civil Rights in Israel. In 2001, he lent his name to the establishment of the Justice Haim Cohn Center for the Legal Defense of Civil Rights, a non-profit organization which also does *pro bono* work for the needy. Cohn's crisis in faith but abiding attachment to Judaism and its humanistic values led him to become a founding member and honorary President of the International Federation of Secular Humanistic Judaism.

Together with Nobel Peace Prize Laureate Rene Cassin, Justice Haim Cohn founded the International Association of Jewish Lawyers and Jurists. He held the post of President for 18 years and Honorary President until his death.

Among his books were *The Trial And Death Of Jesus*, and *Human Rights And Jewish Law*. In 1980, he received the Israel Prize.

At the funeral ceremony conducted in Givat Shaul cemetery in Jerusalem, Supreme Court President Justice Aharon Barak eulogized Haim Cohn, saying "the State of Israel bows its head to the one and only of his generation, who left us. We, the judges of Israel, led by the Supreme Court's justices, bow our heads to our older brother, who has left us." He added that Cohn's "spirit of liberalism, tolerance and understanding, the spirit of love of mankind, the spirit of civil rights, the spirit of love of Israel and the State of Israel, the spirit of love of the Hebrew law" would remain.

- On the following pages: The first International Lawyers Conference, organized by Justice Cohn, as well as two of *JUSTICE*'s regular columns - *JEWISH LAW* and *FROM THE SUPREME COURT OF ISRAEL* - dedicated to Justice Cohn's memory.

## “The most phenomenal development in Jewish Law”

**I**n August 1958, 10 years after the establishment of Israel, Haim Cohn, then Attorney General of Israel, initiated and organized an International Lawyers Conference in Jerusalem, which was attended by close to 500 lawyers, judges and law professors from various countries, including such personages as Professor Rene Cassin from France, Professor Zelman Cowen from Australia, Lord Denning and Sir Devlin from England and Sir William Fitzgerald, the former Chief Justice of Palestine.

In addressing the Conference Cohn quoted Israel's Declaration of Independence, stating that “this is not merely a statement of aims and a future policy - it is the credo of the State of Israel”.

“There is one matter”, he said, “in which our Declaration differs from all other Declarations of Independence and that is - if I may put it in one word - it's Jewishness”.

The Jewishness, he said, appears in three aspects of the operative part of the Declaration:

“First it is said, generally, that the State of Israel is the Jewish State in the Land of Israel; second, it is promised that this new State will be open to all Jews who wish to join, and its foremost task and purpose is expressed to be the ingathering of exiles; and third, the vision of the prophets of Israel is called in aid to provide the source for the ways in which freedom, justice and peace are to be established and maintained. Taking these three aspects together, it may be said that the State of Israel is Jewish by origin, by purpose, and by orientation; and it is needless to say that the founders of the State saw no possibility of conflict between this origin, this purpose and this orientation and the great freedoms inscribed on the banner of this as of every modern state.”

A great admirer of Jewish Law, he perceived in the *Talmud* “a magnificence of legal creativeness” which at that time had no parallel.

In his words “The most characteristic feature of *Talmudic* Law is the divergence of opinions; there is hardly any legal problem on which the opinions of the scholars are not divided”.

Addressing the ever-existing conflict on the interpretation of the *Halacha*, the conflict between the majority and

the dissenters, among whom he often found himself, he fascinated the participants to the Conference by reciting a famous legend which, in his words, “affords the best illustration of the spirit of Jewish law”. We quote the legend verbatim as presented by Haim Cohn:

*The Story goes that Rabbi Eliezer tried in vain to persuade the majority of the scholars that he was right and they were wrong. And when they refused to accept his view, he said, “If the Halacha is as I say, this tree shall prove it”; whereupon the tree was uprooted and moved for a hundred yards (and there are others who say four hundred yards). But the scholars said to him, “Trees are no evidence”. Then he said, “If the Halacha is as I say the water shall prove it”; whereupon the water flowed backwards. But the scholars said to him, “Water is no evidence”. Then he said, “If the Halacha is as I say, the walls of this schoolhouse shall prove it”; whereupon the walls of the house started to fall down. Rabbi Yehoshua (one of the majority) got angry at the walls and shouted, “When scholars debate the Halacha, it's none of your business!” Whereupon the walls ceased to fall down, out of respect for Rabbi Yehoshua, but they did not stand erect again, out of respect for Rabbi Eliezer. Then he said, “If the Halacha is as I say, Heaven shall prove it”; whereupon a voice came from heaven and said, “What do you want of Rabbi Eliezer, the Halacha is always as he says!” But Rabbi Yehoshua stood on his feet and said, “The Torah is not in Heaven; the Law has been handed down to us on earth from Mount Sinai. And we no longer take notice of Heavenly voices, for the Law which we were handed down provides that decisions shall be taken by majority”. The Talmud goes on to relate that one day one of the Rabbis met the Prophet Elija, and he asked him, “What did God Almighty, Blessed be He, do at the time” and Elija replied, “He smiled, God Almighty, and said, ‘My children have defeated Me, My children have defeated Me’.”*

In winding up Haim Cohn said:

“This coming down from Heaven to earth, this transition from the divine to the human, from the irrational to the rational, seems to me to be, for the lawyer, the most phenomenal development in Jewish Law”.

# Proof In Biblical And Talmudical Law

Haim Cohn

**P**roof as the prerequisite of any finding of fact, and *a fortiori* of any finding of guilt, has from earliest times been based on divine precedent. God Almighty did not make use of His omniscience to establish that Adam and Eve had eaten of the prohibited fruit: first He called unto Adam, asking him, "Where art thou?", then He interrogated him as to whether and why he had eaten of the forbidden tree; and only when both Adam and Eve had confessed, did God pass sentence.<sup>1</sup> Or, when Cain had slain Abel, the Lord again first asked Cain, "Where is Abel thy brother?", and when he denied any knowledge of his brother's whereabouts, God adduced as proof of the killing that "the voice of thy brother's blood crieth unto me from the ground" - whereupon Cain confessed.<sup>2</sup> And when the people built a tower "whose top may reach unto heaven", God decided to come down "to-see the city and the tower which the children of men builded", before taking any punitive action.<sup>3</sup> This was the first local inspection in legal history - soon to be followed by another one, when the grievous sins of Sodom and Gomorrah prompted the Lord to "go down and see whether they have done altogether according to the cry of it which is come unto me";<sup>4</sup> and only after satisfying Himself of their guilt, did He punish them. The classical commentators already observed that God needed not go down in order to learn what was going on: the purpose of the biblical stories is to teach the judges that they may never convict on the strength of their own knowledge, but must first satisfy themselves of the facts by legal proof.<sup>5</sup> Adjudication on the strength of legal proof is thus elevated to an act of *Imitatio Dei*.<sup>6</sup>

In the biblical legal codes we find the requirement and mode of legal proof more particularised. In the earliest instances, there is the party's oath<sup>7</sup> and the real evidence of the *corpus delicti*;<sup>8</sup> later

the emphasis shifts to proof by witnesses. It is a great sin for a man who is able to testify to any fact from his own knowledge of what he had seen, not to come forward when required as a witness.<sup>9</sup> The availability of witnesses is the indispensable prerequisite in criminal cases, the rule being that no man may be found guilty of, or punished for, any offence unless upon the evidence of at least two witnesses.<sup>10</sup> This rule applied both to judicial and to sacerdotal guilt-findings,<sup>11</sup> but apparently did not apply to non-criminal proceedings. The famous trial held by King Solomon between the two women who each claimed to be the mother of the child in dispute,<sup>12</sup> is a good example of a noncriminal trial without witnesses. In quasi-criminal cases, such as restitution of stolen property, the two-witnesses-rule would seem to apply,<sup>13</sup> but it is in respect of cases of this kind that we find in earlier sources the party oath as mode of proof. In later periods the party oath may have been resorted to only in cases where no other proof was available.<sup>14</sup>

1 Gen. 3:3-19.

2 Gen. 4:9-13.

3 Gen. 11:5-8.

4 Gen. 18:21.

5 Rashi (Shelomo Yizhaki, 11th century) *ad Gen. 11:5*; *Midrash Tanhuma, Noach*.

6 A similar claim was later made by and for the medieval Christian inquisitors: see Lea, *The Inquisition of the Middle Ages*, New York 1921, Vol. 1 p. 406; Coulton, *Inquisition and Liberty*, Boston 1959, p. 130.

7 Ex. 22: 10.

8 Ex. 22:13.

9 Lev. 5: 1.

10 Deut. 17:6 (capital offences), 19:15 (all offences).

11 Deut. 19:17.

12 1 Kings 3:24-25.

13 See Jackson, *Theft in Early Jewish Law*, Oxford 1972, p. 227.

14 *B Shevuot* 45a, 48b.

The late Justice Haim Cohn, of Israel's Supreme Court, published this article in his work *Selected Essays*, Bursi Publishing House, 1991.



Needless to say that biblical law excels in findings of fact (and of law) by divine revelation: the *Urim* and *Tumim* which the high priest kept in the “breastplate of judgment”<sup>15</sup> were an inexhaustible, irrefutable and unfailing source of divinely revealed truth. It is self-evident that where such divine revelation was relied upon, testimonial or other evidence was superfluous and, indeed, blasphemous: still the law was that no criminal sentence could be passed unless upon the testimony of at least two witnesses even by priestly courts. It would therefore appear that the alternative provided for by the law, either to resort to judges or to resort to priests,<sup>16</sup> was open to litigants in non-criminal cases only; if they chose the judicial forum, they had to establish their cases by judicial proof; if they chose the sacerdotal forum, no proof was required of them. It has been suggested that where no judicial proof had been forthcoming, the judges would refer the matter for decision to the priests<sup>17</sup> - but this is mere conjecture. Instead of dismissing a case for want of proof, judges may, of course, have advised the party concerned to seek the help of the priests with a view to being vindicated by divine revelation.

A distinction must be made between sacerdotal interpretation of divine revelation and the divine judgment in a trial by ordeal: while the former is a mode of fact-finding recognized in biblical law, the latter is virtually unknown to biblical law. The only instance in which an elaborate ordeal proceeding is provided for, is the case of the woman suspected of adultery: in the nature of things, no witnesses are in cases of this kind available at all, and neither the suspicious husband nor the protesting wife could be relied upon even on their oaths. The guilt or innocence of the wife would therefore be conclusively established by the effect which the bitter water she was made to drink would have upon her body.<sup>18</sup> It is significant that the reason given for its abolition was that with the proliferation of adulterers the bitter water would no longer be effective.<sup>19</sup>

But quite apart from ordeals, divine judgment plays a very important role in biblical law. All punishment and all reward derive originally and ultimately from God. Even though human agencies may be entrusted with authority to inflict punishment in certain well-defined cases, God’s own overriding punishing power remains unaffected. Divine punishment is independent of, and often additional to, judicial punishment: there are several instances in which capital punishment is prescribed for particular offences and yet the threat of divine punishment is superadded.<sup>20</sup> While all judicial punishment is perforce uncertain, depending on the offender being caught, evidence of at least two witnesses

against him being available, and “the people of the land not hiding their eyes from him”<sup>21</sup> divine punishment is certain, inescapable, and of catastrophic potential and unpredictability, and thus a much more effective deterrent: God will not suffer His laws to be disobeyed with impunity<sup>22</sup> whether or not judicial proof is available to establish their violation. There are a good many offences for which divine punishment is the only penalty prescribed: it has been suggested that those are offences mainly committed in private, for which witnesses will not usually be available, such as sexual offences<sup>23</sup> or the eating of prohibited food;<sup>24</sup> or that they are mostly of religious and ritual character, such as failure to circumcise<sup>25</sup> or to bring certain sacrifices<sup>26</sup> or to observe holy days<sup>27</sup> - for which kind of sins judicial sanctions might have appeared inappropriate.<sup>28</sup> The threat - and the certainty - of God’s impending punishment, in His own time and in His own measure, hovers over the offender constantly and inescapably; and however merciful, because of its vagueness and lack of immediacy, this threat of punishment may appear to modern criminals, in ancient times its psychological effect must have been devastating. The wrath of the omnipotent and omniscient God being directed particularly at yourself and being certain to strike at you with unforeseeable force and intensity any day of the year and any hour of the day, was a load too heavy for a believer to bear. The *talmudic* jurists discerned the inhumanity inherent in divine punishment, and set about to abolish it, divine or not. The law as ultimately laid down is that no offender is liable to divine punishment, if and when he has been tried for the offence, for which divine punishment is prescribed, by a human court,

15 Ex. 28:30.

16 Deut. 17:9, 12.

17 Falk, *Hebrew Law in Biblical Times* Jerusalem, 1964 p. 60.

18 Num. 5:15-31.

19 *M Sota* IX 9.

20 e.g. Ex. 31:14; Lev. 20:2-5.

21 Lev. 20:4.

22 Deut. 28:58-59, 32:35-41; *et al.*

23 Lev. 18:29, 20:17-18.

24 Lev. 7:25-27, 17:10, 14.

25 Gen. 17:14.

26 Num. 9:13.

27 Lev. 23:29-30; Ex. 12:15-19.

28 *Sifra Kedoshim* 1:19.



has been found guilty on the strength of legal proof, and has undergone the penalty of flogging.<sup>29</sup> Divine justice, meted out solely by virtue of divine omniscience, has thus been superseded by human justice based on judicial proof.<sup>30</sup>

The divine punishment was, and remained, the only sanction for trying to prove one's case by a false oath,<sup>31</sup> and King Solomon prayed to God to react immediately on the true oath by "justifying the righteous", and on the false oath by "condemning the wicked, to bring his way upon his head".<sup>32</sup>

The most important contribution by biblical law to the law of evidence as it later developed was doubtless the two-witnesses-rule. As administered in biblical times, the rule appears to have been rigid and to have left the judges no discretion in weighing and probing into the reliability and credibility of the witnesses - or else the trial of Naboth, the witnesses against whom were notorious misfits,<sup>33</sup> would have had a different result. The first cross-examination of witnesses which is reported and which did, indeed, lead to the acquittal of the accused because of discrepancies in their testimonies, dates from post-biblical times.<sup>34</sup>

While the main function of the witnesses was, of course, to testify and establish the case against the accused, they had the additional function of serving as executioners: "The hands of the witnesses shall be first upon him to put him to death, and afterward the hands of all the people".<sup>35</sup> This additional and most cumbersome duty was certainly apt - and probably intended - to render them conscious of the heavy responsibility they undertook in testifying in a capital case: they were to bear not only the moral responsibility for causing the accused to be convicted on the strength of their testimony, but also the actual responsibility for putting him to death. If this burden was too heavy for a prospective witness to bear and he would shirk his duty to come forward and testify, divine punishment would in due course strike him down.<sup>36</sup> On the other hand, the designation of witnesses, who were anyway involved in the case, for carrying out the sentence of the court, may also have stemmed from deep-rooted scruples about appointing and recognizing public executioners.

The minimum requirement of at least two witnesses has been rationalised by an early Jewish philosopher in the following terms:

"There is also the beautiful rule that the evidence of a single witness is never admissible. Firstly, a single witness may be mistaken in having seen or heard a thing, he may have overlooked something or have erred: for a thousand reasons there may be thousands of false imaginations. Secondly, it would be highly

unjust to rely on a single witness as against one or several accused: against several, because they are entitled to greater credit than the one testifying against them; and against one, because the single witness does not surpass him in number; and why should the witness be believed rather than the accused, the one who accuses rather than the one who defends himself? In a situation in which there is neither preponderance nor disadvantage on either side, the good judge abstains from judgment."<sup>37</sup>

There are, however, several instances in the Bible in which the two-witnesses-rule appears to have been disregarded, such as the conviction of Achan on the strength of his confession, albeit corroborated by the *corpus delicti* and by the drawing of lots;<sup>38</sup> or the conviction of Saul's manslayer "out of his own mouth",<sup>39</sup> (which conviction was in fact unjustified, for Saul had actually killed himself<sup>40</sup>); or the production of real evidence *in lieu* of testimony.<sup>41</sup> None of these instances had any impact on the development of the law: not only was the two-witnesses-rule maintained throughout, but both confessions and circumstantial evidence were strictly banned from criminal proceedings and deprived of all probative incriminatory value.

With the two-witnesses-rule in full force and vigour, *talmudical* law concentrated on devising measures to assure the greatest possible reliability of the testimonies of witnesses. The most important of these measures was the introduction of judicial cross-examination.

To ensure the truthfulness of witnesses in criminal cases they were to be cautioned by the court that they would be rigorously cross-examined, and that they must be conscious of their grave

29 *M Makkot* III 15.

30 For a fuller treatment, see my *Penology of the Talmud*, in: *Jewish Law in Ancient and Modern Israel*, New York 1971, p. 80.

31 *Ex.* 20:7, *Deut.* 5:11, *Zechariah* 5:3-4.

32 *1 Kings* 8:31-32.

33 Sons of Belial means men who have shaken off all yokes: *1 Kings* 21:10, 13. Flavius Josephus claims that witnesses had to be such that their evidence could be accredited by their past lives: *Antiquitates Judaicae* IV 219.

34 In the apocryphal book of *Susanna*, added to the canonical book of *Daniel*.

35 *Deut.* 17:7.

36 *Lev.* 5: 1.

37 Philo Judaeus, *De Specialibus Legibus* IV 53-54.

38 *Joshua* 7:19-26.

39 *2 Samuel* 1: 16.

40 *1 Samuel* 31:14.

41 *Ex.* 22:12, *Deut.* 22:17. And cf. *Gen.* 31:39.

responsibility. The full text of the admonition of witnesses prescribed in capital cases is worthy of reproduction:

“You ought to know that capital are unlike civil cases. In monetary matters you can make restitution, and your offence will be expiated. But in a capital case you will be accountable for his blood and the blood of his posterity until the end of time... Therefore was Adam created single - to teach you that whoever destroys a single life, is deemed to have destroyed the whole world, and whoever preserves a single life, is deemed to have preserved the whole world. And also in order that there may be peace among men - that one should not say to the other, my father was greater than yours... And also to declare the glory of God - that if a man coins many coins from the same stamp, all the coins will be identical; but God coined every man from the stamp of Adam, and not one of them is identical with any other. Therefore ought every man to say, for my sake the world was created. And should you ask yourselves, why for us this trouble of testifying? You should remember the law that he who has seen or known and does not testify, shall bear his iniquity. And should you ask yourselves, why incur guilt for the blood of this man? You should remember what is written, when the wicked perish there is joy”.<sup>42</sup>

Witnesses were in fact cross-examined by the court, each witness separately and not in the hearing of the other witnesses, and their evidence would not be accepted or acted upon unless all testimonies were found to be consistent with each other in all relevant particulars.<sup>43</sup>

The biblical injunction, “thou shalt then inquire and make search and ask diligently”,<sup>44</sup> was literally interpreted to require testifying witnesses to be subjected to three different kinds of examination: enquiry (*hakirah*), investigation (*derishah*) and interrogation (*bedikah*).<sup>45</sup> Originally the rule was held to apply in all cases, both criminal and civil,<sup>46</sup> but later it was relaxed to apply in criminal cases only (and possibly in quasi-criminal cases of tort), so as not to render the recovery of debts too cumbersome and thus “shut the door before the borrowers”.<sup>47</sup> In the language of Maimonides, the 12th century codifier:

“It is the duty of the court to interrogate the witnesses and examine them and question them extensively and probe into their accuracy and refer them back to previous answers so as to make them desist from or change their testimony if it was in any way faulty. But the court must be very careful lest, by such examination, the witness might learn to lie”.<sup>48</sup>

*Hakirah* is the examination relating to the time and place at which the event occurred.<sup>49</sup> Every examination has to start with questions of this kind, which are indispensable.<sup>50</sup> The particular

legal importance of this part of the examination lies in the fact that the answers here given afford the sole possible cause for allegations of perjury.<sup>51</sup>

*Derishah* is the examination relating to the substance of the facts at issue: who did it? what did he do? how did he do it? was he warned beforehand?<sup>52</sup> Or, in civil cases, how do you know the defendant is liable to the plaintiff?<sup>53</sup> This part of the examination being likewise indispensable, it is sometimes regarded as part and parcel of the *hakirah*.<sup>54</sup>

*Bedikah* is a cross-examination relating to accompanying and surrounding circumstances and not directly touching upon the facts in issue.<sup>55</sup> The more a judge conducts examinations of this kind, the better,<sup>56</sup> because they lead to the true facts being established.<sup>57</sup> On the other hand, questioning of this kind is dispensable, and judgment may be given on the testimony of witnesses who were not subjected to *Bedikah*.<sup>58</sup> The conduct and amount of such cross-examination is at the discretion of the judges; they ought to insist on it whenever there is the least suspicion of an attempt to deceive or mislead the court.<sup>59</sup> Such suspicion may arise, for instance, where several witnesses testify in exactly the same words - which would not normally happen unless they had learnt their testimony by heart.<sup>60</sup> In these cases, cross-examination should concentrate on the points on which suspicion arose and not be allowed to spread far and

42 *M Sanhedrin* IV 5.

43 *M Sanhedrin* V 1-4; and *cf.* *Mark* 14:59.

44 *Deut.* 13:15.

45 *B Sanhedrin* 40a.

46 *M Sanhedrin* IV 1.

47 *B Sanhedrin* 3a, 32a; *B Yevamot* 122b.

48 *MT Edut* 1:4.

49 *M Sanhedrin* V 1, *B Sanhedrin* 40b.

50 *Novellae Ran* (Nissim Gerondi, 14th century) *ad Sanhedrin* 40a.

51 *MT Edut* 1:5.

52 *M Sanhedrin* V 1, *B Sanhedrin* 40b.

53 *M Sanhedrin* III 6.

54 *MT Edut* 1:4.

55 *MT Edut* 1:6.

56 *M Sanhedrin* V 2.

57 *Deut.* 13:15; *Sifrei Deut.* 93, 149; *B Sanhedrin* 41a.

58 *Novellae Ran* (*supra*, n. 50) *ad Sanhedrin* 40a.

59 *B Shevuot* 30b-31a; *MT Sanhedrin* 24:3 and *Edut* 3:2.

60 *J Sanhedrin* III 8; *Rosh* (Asheri, 13th century) *ad Sanhedrin* 3,32.

wide.<sup>61</sup> If notwithstanding all cross-examination the witness sticks consistently to his story but the judge is not satisfied that he is telling the truth, he should disqualify himself and let another judge take his place,<sup>62</sup> or he might even, if satisfied that there had been an attempt to mislead the court, furnish the innocent party with a certificate to the effect that no other judge should entertain the suit against him.<sup>63</sup>

Where two sets of witnesses contradict each other on a matter material to the issue (*i.e.* either under *Hakirah* or *Derishah* as distinguished from *Bedikah*), the evidence of either set is insufficient in law to establish the facts at issue. The reason is that there is no knowing which of the two groups of witnesses is telling the truth and which is lying.<sup>64</sup> Where there are, however, inconsistencies or contradictions within the evidence of one set of witnesses and none within the other, the evidence of the consistent group will have to be accepted, the other being dismissed as untruthful because of being inconsistent. After a fact has judicially been established on the strength of the testimony of two (or more) consistent witnesses, the finding of fact will not necessarily be affected by contradictory witnesses coming forward after judgment;<sup>65</sup> but the court may always be moved to reopen a case where fresh evidence has become available.

Contradictions on matters not material to the issue will not normally affect the admissibility of the testimony<sup>66</sup> - though the court has always the discretion to reject testimony as unreliable because of contradictions even on immaterial points.<sup>67</sup> But in civil cases the general rule appears to be that testimony is not rejected unless on account of contradictions on the facts in issue.<sup>68</sup> Where one of two witnesses positively testifies to a fact in issue, and the other says that that fact is unknown to him, the testimony of the former is deemed to be contradicted; but where the fact testified to is not material to the issue, the ignorance of the second witness would not amount to contradictions. As there is no knowing whether the contradiction or the contradicted evidence was true, neither will be regarded as perjury.<sup>69</sup> And while evidence of perjury must be given in the presence of the perjured witnesses, evidence contradicting previous testimony may be given in the absence of the former witnesses.<sup>70</sup>

*Talmudical* law does not know of the rebuttal of evidence, witnesses for the defence testifying in rebuttal of the testimony given by the witnesses for the prosecution. All witnesses were witnesses for the court, and the court had to satisfy itself of their objectivity and neutrality. Thus, a witness in a criminal case was not allowed to raise a point in favour or against the accused, as

otherwise he would appear as if usurping the functions of the judge.<sup>71</sup> When the witnesses had testified and the court had found their testimony admissible and reliable so as to afford sufficient proof of the commission of the act with which the accused stood charged, a public announcement had to be made inviting any person who would be able to raise a point in favour or in defence of the accused, to come forward and speak out.<sup>72</sup> Such persons were not formal witnesses: they would informally acquaint the court of any fact or circumstance likely to arouse in the minds of the judges a doubt as to the guilt of the accused. Even the accused himself was entitled to raise such a point in his favour or defence, and if there was any substance in it the court would have him brought back from the place of execution, even four and five times. Such points did not, of course, automatically result in an acquittal, but they served as sufficient cause to have the trial reopened and the case reconsidered. There is no explicit presumption of innocence in *talmudical* law; the requirements of proof of guilt are, however, so stringent and rigorous, and the possibilities of raising doubts and establishing a defence so wide and flexible, that a conviction is much more difficult and an acquittal much easier to obtain than under a rebuttable presumption of innocence.

Thus, it was said that a court ordering the execution of a criminal more than once in seven years, would be called lethal, and one scholar added, not in seven years but in seventy years.<sup>73</sup> A discussion ensued as to how it could be avoided to pass capital sentences, when a capital charge had been duly proved by the clear testimony of two qualified and consistent witnesses: according to

61 *Novellae Ran* (*supra* n. 50) *ad Sanhedrin* 32b; *Responsa Ribash* (Isaak ben Sheshet, 14th century) 266; *Rema* (Moshe Isserles, 16th century) *ad HM* 15:3.

62 *Responsa Rosh* (*supra* n. 60) 68,20.

63 *B Shevuot* 30b-31a; *B Sanhedrin* 32b; *Mt Sanhedrin* 24:3.

64 *MT Edu* 18-2, 22:1.

65 *J Yevamot* XV 5.

66 *B Sanhedrin* 41a; *Novellae Ran* (*supra* n. 50) *ad loc.*

67 *MT Edu* 2:2.

68 *B Sanhedrin* 30b; *MT Edu* 3:2.

69 *MT Edu* 2:1.

70 *B Ketuvot* 19b-20a; *MT Edu* 18:5.

71 *MT Edu* 5:8.

72 *M Sanhedrin* VI 1.

73 *M Makkot* I 10.

(biblical) law, capital sentences would in those cases be obligatory. In answer to that query such intricate and tricky forms and ways of cross-examination of witnesses had to be devised that would be apt to confuse them, entangle them in contradictions, render their memories shaky and uncertain, and thus cause their testimony to become untrustworthy<sup>74</sup> and thus would enable the court to acquit the accused and refrain from passing capital sentences in a perfectly legal manner.

Another stratagem to render convictions more difficult was the rule that it was not sufficient for the witnesses to prove that the accused had committed the offence: they had to testify also to the fact that the accused had expressly been warned by them beforehand that it was a criminal offence to commit that act, and what his punishment would be if he committed it.<sup>75</sup> In other words, talmudical law requires as *mens rea* the knowledge of illegality, and ignorance of the law is a good defence to any criminal charge. Like the *actus reus*, the *mens rea* cannot be proved but by two witnesses who had themselves actually informed the accused of the particulars of the law involved - like the eyewitnesses who had themselves seen the accused committing the act. Previous warning of illegality was held to be unnecessary where the nature of the offence or its planning rendered the warning impracticable, such as in cases of perjury<sup>76</sup> or nightly burglary,<sup>77</sup> or where it was redundant, such as where the accused was a recidivist who had previously been warned<sup>78</sup> or a man learned in the law.<sup>79</sup>

Another device to assure that the two consistent witnesses be also truthful, was to qualify only such persons as eligible witnesses who could reasonably be presumed to be honest. This result was achieved by way of disqualification of such persons as had to be suspected of dishonesty - and in the course of disqualifications, there were added to the list of incompetent witnesses all those persons who had to be suspected of faulty memories or perceptions. Maimonides lists ten classes of persons who are not competent to testify, namely: women, slaves, minors, lunatics, the deaf, the blind, the wicked, the contemptible, relatives, and the interested parties.<sup>80</sup>

**Women:** Maimonides gives as the reason for the disqualification of women witnesses the use by Scripture of the masculine gender when speaking of witnesses,<sup>81</sup> but this was later questioned in view of the fact that "the whole *Torah* always uses the masculine form".<sup>82</sup> Another reason was suggested in the *Talmud*: the place of a woman was in her home and not in court,<sup>83</sup> as the honour of a king's daughter was within the house;<sup>84</sup> and by dragging women out of their homes into the hustle and bustle of the

court, some degradation would be caused to them. But women were admitted as competent witnesses in matters within their particular knowledge, for instance, on customs or events in places frequented only by women,<sup>85</sup> in matters of their own or other women's purity,<sup>86</sup> for purposes of identification, especially of other women,<sup>87</sup> as well as in matters outside the realm of strict law.<sup>88</sup> In post-*talmudic* times, women were admitted as witnesses where there was no other evidence available.<sup>89</sup>

**Slaves:** Witnesses must be free citizens.<sup>90</sup> A person who is in the bondage of another is presumed to be so loyal to his master as to testify according to the latter's wishes and not according to his own knowledge.

**Minors:** A person is incompetent as a witness until he reaches the age of 13. Between the ages of 13 and 20, he is competent as a witness in matters regarding movable property, but in respect of immovable property he is competent only if he is found to have the necessary understanding and experience.<sup>91</sup> From the age of 20, all disqualification by reason of age is removed.

**Lunatics:** In this category are included not only insane persons whose minds are permanently deranged,<sup>92</sup> but also idiots and epileptics, as well as monomaniacs who "go around alone at nights, stay overnight in cemeteries, tear their clothes, and lose everything they are given".<sup>93</sup>

74 *B Makkot* 7a.

75 *T Sanhedrin* 11:1; *B Sanhedrin* 8b.

76 *B Ketuvot* 32a.

77 *B Sanhedrin* 72b.

78 *B Sanhedrin* 81b.

79 *B Sanhedrin* 8b.

80 *MT Edu* 9:1.

81 *MT Edu* 9:2. And see *Sifrei Dent.* 190, *B Shevuot* 30a.

82 *Kesef Mishne* (by Joseph Caro, 16th Century) ad *MT Edu* 9:2.

83 *B Shevuot* 30a, *B Gittin* 46a.

84 *Psalms* 45:14.

85 *Rema* (*supra* n. 61) ad *HM* 35:14 and *Darkei Moshe* (*id.*) ad *Tur HM* 35:3; *Beit Yossef* (by Joseph Caro, *supra* n. 82) ad *Tur HM* 35:15.

86 *M Ketuvot* II 6; *B Ketuvot* 72a.

87 *B Yevamot* 39b.

88 *B Bava Kamma* 114b.

89 *Responsa Maharam Rotenburg* (13th century) 920; *Responsa Maharik* (Joseph Kolon, 16th century) 179.

90 *M Bava Kamma* I 3, *M Rosh Hashana* I 8.

91 *B Bava Batra* 155b; *MT Edu* 9:8.

92 *MT Edu* 9:9.

93 *B Hagiga* 3b; *T Terumot* I 3; *MT Edu* 9:9-10.



*The Deaf:* Both the deaf and the dumb are included in this category. “Despite the fact that their vision may be excellent and their intelligence perfect, they must testify by word of their mouth, and must hear the warning which the court administers to them” - and as they cannot speak or hear, they cannot testify.<sup>94</sup>

*The Blind:* “Despite the fact that they may be able to recognize voices and thus identify people, they are by Scripture disqualified as witnesses, for it is written, he hath seen or known<sup>95</sup> - only one who can see can testify.<sup>96</sup>

*The Wicked:* According to the Bible, the “wicked” or the “guilty” are unjust witnesses.<sup>97</sup> They are divided into five groups: criminals, swindlers, perjurers, illiterates, and informers. “Wicked” or “guilty” are epithets attributed to persons who have committed capital offences<sup>98</sup> or are liable to be flogged;<sup>99</sup> but even other criminals are incompetent as witnesses, the disqualification attaching to them not by virtue of the kind of offence they committed nor by virtue of the kind of punishment to which they are liable, but by virtue of their unreliability because of their wicked minds.<sup>100</sup> Into the category of swindlers fall thieves and robbers (even if not convicted as criminals but only made liable for restitution in civil adjudication), usurers, tricksters, gamblers, gamesters, as well as idlers and vagabonds who are suspected of spending their time in criminal (though undetected) activities.<sup>101</sup> Tax collectors who have no fixed salary but receive as remuneration a portion of the taxes collected, are suspected of dishonesty and therefore incompetent witnesses.<sup>102</sup> A witness once found guilty of perjury, could never again be a competent witness, even though he had made good the damage caused by his false testimony.<sup>103</sup> A man who has no inkling of Bible and *Mishnah*, nor of any civilized standards of conduct, is presumed to be idle and disorderly and therefore incompetent as witness<sup>104</sup> - but this presumption is rebuttable by evidence that, notwithstanding his illiteracy and primitiveness, his conduct is irreproachable.<sup>105</sup> A fortiori, agnostics and heretics, including transgressors of the law from conviction or malice, are wholly and irrevocably disqualified. Though not technically transgressors of the law, informers are considered worse than criminals and hence incompetent.<sup>106</sup>

*The Contemptible:* It is presumed that people who do not conform to the conventions of society, for example, by eating in the streets or walking around naked or accepting alms from strangers in public, would not shrink from perjuring themselves, and are therefore incompetent witnesses.<sup>107</sup>

*Relatives:* The biblical injunction that parents should not be put to death “for” their children nor children “for” their parents,<sup>108</sup>

was interpreted as prohibiting the testimony of parents against children and of children against parents<sup>109</sup> and served as authority for the disqualification of relatives in general.<sup>110</sup> The *Mishnah* lists as disqualified relatives: father, brother, uncle, brother-in-law, stepfather, father-in-law, and their sons and sons-in-law;<sup>111</sup> later the rule was extended to cover nephews and first cousins.<sup>112</sup> Where the relationship is to a woman, the disqualification extends to her husband.<sup>113</sup> The fact that a disqualified kinsman does not actually maintain any relations with the party concerned is irrelevant.<sup>114</sup> Witnesses who are related to one another are incompetent to testify together in the same cause, and witnesses related to the judge are incompetent to testify before him.<sup>115</sup>

*Parties:* As relatives are incompetent to testify for or against the party to whom they are related, *a fortiori* is the party himself incompetent to testify for or against himself: “a man is nearest related to himself.”<sup>116</sup> But while the disqualification of relatives results only in their testimony being inadmissible in evidence, there can be no “testimony” of a party at all,<sup>117</sup> and everything

94 *MT Edu* 9:11.

95 *Lev.* 5: 1.

96 *MT Edu* 9:12.

97 *Ex.* 23: 1: “put not thine hand with the wicked to be an unrighteous witness”.

98 *Num.* 35:31: “murderer guilty of death”.

99 *Deut.* 25:2: “the wicked man worthy to be beaten”.

100 *MT Edu* 10:2; *Rema* (*supra* n. 61) *ad HM* 34:2.

101 *M Sanhedrin* III 3, *M Rosh Hashana* I 8; *MT Edu* 10:4.

102 *MT Edu* 10:4; *Rema* (*supra* n. 61) *ad HM* 34:14.

103 *B Sanhedrin* 27a; *MT Edu* 10:4.

104 *M Kiddushin* I 10, *B Kiddushin* 40b; *MT Edu* 11:5.

105 *MT Edu* 11:2-4.

106 *MT Edu* 11:10.

107 *B Kiddushin* 40b, *B Bava Kamma* 86b, *B Sanhedrin* 28b.

108 *Deut.* 24:16.

109 *Sifrei Deut.* 280; *B Sanhedrin* 27b.

110 *MT Edu* 13:1.

111 *M Sanhedrin* III 4.

112 *MT Edu* 13:3.

113 *MT Edu* 13:6.

114 *MT Edu* 13:15.

115 *B Makkot* 6a; *HM* 33:17.

116 *B Sanhedrin* 9b-10a; *B Yevamot* 25b.

117 *Rosh* (*supra* n. 60) *ad Makkot* 1,13-14, and *Responsa* 60,1; *Novellae Ramban* (Moshe ben Nachman, 13th century) *ad Makkot* 6; *Novellae Ran* (*supra* n. 50) *ad Sanhedrin* 9b.



he says in court is properly classified as pleading. But a witness is disqualified, even though not formally a party, whenever any benefit may accrue to him from his testimony, as when he has some stake in the outcome of the case.<sup>118</sup> The benefit must, however, be present and immediate and not merely speculative.<sup>119</sup> The question whether some such direct or indirect benefit may accrue to a witness is often puzzling: “these things depend on the discretion of the judge and the depth of his understanding as to the gist of the case in issue” and its possible consequences.<sup>120</sup> It is a well-established custom that where local usages or regulations are in issue, townspeople are competent witnesses, even though they may, as local residents, have some parochial interest in the case.<sup>121</sup> There is no disqualifying “interest” in criminal matters: thus, even kinsmen of the murdered man are competent witnesses against the murderer, those of the assaulted against the assailant, and the victim of an offence is a competent witness against its perpetrator.<sup>122</sup>

The range of disqualifications is, thus, so wide that in order to evade the burden of testifying, people would claim to belong to one of the categories of disqualified witnesses. Hence the rule evolved that no witness may say of himself that he is (or was) so wicked as to be disqualified from testifying.<sup>123</sup> A party who wishes to disqualify a witness of the other party has to prove his incompetency by the evidence of two other competent witnesses.<sup>124</sup> The disqualification of a witness because of his criminality is not regarded as smacking of a criminal conviction, hence no previous warning is required; but it has been held that in cases of improper conduct and continuous transgressions, a person should not be permanently disqualified as a witness unless previously warned that this would be result of his persisting in his conduct.<sup>125</sup>

Where the court suspects a prospective witness to be incompetent, it may decline to hear his testimony,<sup>126</sup> until satisfied that he is competent. Where a witness has given evidence, and it subsequently transpires that he was incompetent, his evidence is regarded as having been wrongly admitted; but the case will be reopened and reheard only if the particular incompetency was derived from Scripture (as that of criminals) or had previously been decreed by public proclamation.<sup>127</sup> A person called to testify together with another whom he knows to be incompetent, must decline to testify, even though the incompetence of the other may not yet be known to the court.<sup>128</sup> The rationale of this rule appears to be that since the incompetence of any one witness invalidates the evidence of the set of witnesses to which he belongs,<sup>129</sup> the

testimony of the competent witness would be useless and a waste of judicial time. In civil cases, parties may stipulate that, any legal incompetence notwithstanding, the evidence of witnesses named be accepted and acted upon by the court.<sup>130</sup>

Disqualification for reason of criminality is terminated after the witness has served the sentence imposed upon him;<sup>131</sup> in cases of wicked persons not liable to punishment, when it is proved to the satisfaction of the court that they have repented and are no longer to be classified as “wicked”, their past is no longer to be held against them.<sup>132</sup> There are elaborate provisions to guide the court as to what acts constitute sufficient proof of repentance. In the case of relatives, their disqualification as witnesses is removed after the relationship or affinity has come to an end.<sup>133</sup>

As any financial interest in the testimony disqualifies the witness, the stipulation or acceptance of any fee or remuneration for testifying invalidates the evidence.<sup>134</sup> Where the witness has returned the fee before testifying, his evidence may be admitted - the reason being that the disqualifying rule was intended mainly as a deterrent.<sup>135</sup> A man suspected of testifying for remuneration is not a credible witness and should not be believed.<sup>136</sup> A man who hires false witnesses to testify for him is answerable to Heaven, as a man who pays witnesses in return for their suppressing their evidence.<sup>137</sup>

118 *B Bava Batra* 43a; *MT Edu* 15:1, 4.

119 *HM* 37:10.

120 *MT Edu* 16:4.

121 *Responsa Rosh* (*supra* n. 60) 5:4; *HM* 37:22.

122 *Rema* (*supra* n. 61) *ad HM* 33:16.

123 *B Sanhedrin* 9a; *MT Edu* 12:2.

124 *M Sanhedrin* III 1; *MT Edu* 12:1.

125 *MT Edu* 12:1; *HM* 34:24.

126 *MT To'en veNit'an* 2:3; *Rema* (*supra* n. 61) *ad HM* 34:25.

127 *B Sanhedrin* 26b; *MT Edu* 5:3; *HM* 36:1.

128 *MT Edu* 10:1; *HM* 34:1.

129 *M Makkot* I 8; *MT Edu* 5:3; *HM* 36: 1.

130 *M Sanhedrin* III 2; *MT Sanhedrin* 7:2; *HM* 22:1.

131 *MT Edu* 12:4.

132 *MT Edu* 12:5-10.

133 *MT Edu* 14:1.

134 *M Bekhorot* IV 6.

135 *Rema* (*supra* n. 61) *ad HM* 34:18.

136 *T Bekhorot* III 8.

137 *MT Edu* 17:7.

While the two-witnesses-rule imposed by Scripture reigned absolutely in criminal causes, it was in the law of evidence in civil cases that the genius of the talmudic jurists, unfettered by Scriptural restrictions, could develop fully. The obstacle that there was to be “one-manner of law”<sup>138</sup> was overcome with the assertion that the law takes pity on the property of people, and if the standards of proof in civil cases would be as strict and rigorous as in criminal cases, nobody would lend another any money anymore, for fear the borrower would deny his debt or the memory of a witness would fail him.<sup>139</sup> A balance had therefore to be struck between the exigencies of formal justice which laid the burden of proof squarely upon the plaintiff,<sup>140</sup> and commercial and judicial convenience which required the greatest possible elasticity in handling and discharging that burden.

The fundamental rule that the plaintiff has the burden of proving his claim is based on the presumption of the rightful possession by the defendant of the chose in action: so long as the defendant’s possession was not proved to be unlawful, it will not be disturbed - hence a defendant in possession is said to be always in a better position than the plaintiff.<sup>141</sup> But in order to raise the presumption of title, the possession must be accompanied by a claim of right;<sup>142</sup> and where the defendant in possession does not claim a right thereto, the burden is shifted unto him to prove his right to retain the chose in action. Or, where a claim is made according to custom, and the possession of the defendant is contrary to custom, such as in a claim for workman’s wages,<sup>143</sup> the presumption of rightfulness operates in favour of the plaintiff and shifts the burden of proof unto the defendant. In actions between heirs, where the defendant is in possession of part of the estate, his claim of right is not any better than that of any of his co-heirs, and he will have to prove that his possession is rightful.<sup>144</sup> Where a man was seen to take a chattel out of a house, it was held to be on him to prove that he had taken it rightfully,<sup>145</sup> presumably because his possession was too recent to raise any presumption of rightfulness. Past possessions which had meanwhile ceased, could give rise to a presumption of title only where the other party was not in possession either.<sup>146</sup> These rules do not apply to land and houses, but only to money and chattels: for immovable property there must be an uninterrupted possession of three years coupled with a claim of right, to raise a presumption of title.<sup>147</sup> In order to mitigate the burden of proof and to simplify the judicial process, a vast number of quasi-presumptions, rooted in the psychology of human conduct, have been established: they would govern the case until and unless the contrary is proved. To give a

few examples; nobody wastes his words or his money in vain without good cause;<sup>148</sup> nor will anybody stand by inactive when his money is taken away or his property endangered;<sup>149</sup> or when he is threatened with a wrong.<sup>150</sup> A man does not pay a debt before it falls due;<sup>151</sup> nor does a man tolerate defects in a thing sold to him<sup>152</sup> - but then nobody buys a thing without having first seen and examined it.<sup>153</sup> A debtor will not easily lie in the face of his creditor nor a wife in the face of her husband<sup>154</sup> nor anybody in the face of a man who must know the truth.<sup>155</sup> A man is not expected to remember things which do not concern him.<sup>156</sup> A man will not leave his house empty and his household unprovided for;<sup>157</sup> but he is apt to understate his fortune so as not to appear rich,<sup>158</sup> and will rather have one ounce of his own than nine ounces of his neighbour’s;<sup>159</sup> nor will he sell and dispose of his property unless for a good cause.<sup>160</sup> No man commits a wrong except for his own benefit.<sup>161</sup> The manifest purpose of an act is its normal consequence (“the bride knows what she gets married for”).<sup>162</sup> No person is lighthearted in the hour of his death,<sup>163</sup> and nobody

138 *Lev. 24:22; M Sanhedrin IV 1.*

139 *J Sanhedrin IV 1.*

140 *Sifrei Deut. 16; B Bava Kamma 46b.*

141 *B Shevuot 46a; MT Toen veNitan 8:1.*

142 *M Bava Batra III 3.*

143 *B Bava Metzia VII 1.*

144 *B Yevamot 37b.*

145 *B Bava Batra 33b.*

146 *B Bava Metzia 100a.*

147 *B Bava Batra III 1-3.*

148 *B Ketuvot 10a, 58b.*

149 *B Shabbat 117b, 120b, 153a; B Sanhedrin 72b.*

150 *B Bava Batra 60a.*

151 *B Bava Batra 5a-b.*

152 *B Ketuvot 75b-76a.*

153 *B Bava Metzia 3a.*

154 *B Ketuvot 22b.*

155 *B Bava Kamma 107a.*

156 *B Shevuot 34b.*

157 *B Ketuvot 107a.*

158 *B Bava Batra 174b-175a.*

159 *B Bava Metzia 38a.*

160 *B Bava Batra 47b.*

161 *B Bava Metzia 5b.*

162 *B Shabbat 33a.*

163 *B Bava Batra 175a.*

would defraud the Temple treasury.<sup>164</sup> Then there are special presumptions that an agent has duly performed his agency,<sup>165</sup> or that a priest duly performs his duties of his office.<sup>166</sup>

A particularly strong - and rather unique - presumption is known as the presumption of credibility. It is based on the notion that a party or a witness has an intimate knowledge of the matter in issue and has no reason to distort it and to defraud the court. Thus, for instance, when a man says he divorced his wife and she is free to marry, his word is taken as conclusive proof, not only because the matter is within his own knowledge, but also because he has no reason to distort it, as he could still divorce her now.<sup>167</sup> The same applies to a woman who says that her husband has divorced her: she has no reason to lie, because she could have refrained from disclosing her marriage in the first place.<sup>168</sup> Or, an action will not lie for land which the defendant had told the plaintiff he had bought from the plaintiff's father: he will be believed that he had indeed bought it, because he need not have disclosed at all that it had ever belonged to the plaintiff's father.<sup>169</sup> Some of these presumptions of credibility are even irrebuttable, because based on Scripture: for instance, a father's nomination of his firstborn son.<sup>170</sup> But most of these presumptions of credibility lend themselves to rebuttal: for instance, the presumption that nobody lies about matters which are ascertainable,<sup>171</sup> or the presumption that astonishing and extraordinary occurrences are always remembered.<sup>172</sup> Conversely, a man whose words were proved false on one point, will no longer be believed on other points in the same case, unless he adduced independent proof for them.<sup>173</sup> The presumption of credibility also extends to statements made spontaneously for purposes unconnected with the litigation,<sup>174</sup> as well as to statements to one's own detriment (not including the detriment of one's wife or children).<sup>175</sup>

Then there are presumptions which may be designated as presumptions of common sense. A person is presumed to act reasonably and properly, notwithstanding any outward appearance to the contrary: his acts will be judged not according to appearances, but according to reason. Thus, as a man is presumed not to give away the whole of his property during his lifetime, a *donatio mortis causa* will be annulled if he recovers from illness, it being assumed that he must have acted under a mistake.<sup>176</sup> A husband giving the whole of his property to his wife is irrevocably presumed to have given it to her in trust only and not to have deprived himself and his children of all property.<sup>177</sup>

Presumptions and quasi-presumptions are taken notice of by the court *ex officio*, and in this respect are similar to matters of

custom and usage.<sup>178</sup> Not unlike the concept of "judicial notice" in modern law, they replace formal evidence which would otherwise have to be adduced by the party on whom the burden of proof lies. In some cases, especially those involving marital status, courts will take *ex officio* notice also of common repute or widespread rumour.<sup>179</sup>

It is only where neither presumption nor common usage avails the party bearing the burden of proof, that he must discharge it by adducing evidence: and where no witnesses are available to testify he may discharge it by documentary proof or by taking or administering an oath. The oath is admitted only as residuary proof, where no other proof is available;<sup>180</sup> and where judgment had been given on the strength of an oath and then witnesses came forward and testified, the judgment is quashed.<sup>181</sup> The oath is a party oath, originally administered as purgatory oath to the defendant, but later admitted also as confirmatory oath of the plaintiff.<sup>182</sup> It is admitted to deny or confirm a liquidated claim only,<sup>183</sup> except for trustees and agents to whom it may be administered also for unliquidated claims.<sup>184</sup> Persons who are incompetent to testify as witnesses are disqualified from taking an oath.<sup>185</sup> The right to have an oath administered to one's debtor is

164 *B Shevuot* 42b, *B Arakhin* 23a.

165 *B Gittin* 64a.

166 *J Shekalim* VII 2.

167 *B Bava Batra* 134b-135a.

168 *M Ketuvot* 11 5.

169 *M Ketuvot* 11 2.

170 *Deut.* 21:17; *B Bava Batra* 127b.

171 *B Yevamot* 115a.

172 *B Hullin* 75b.

173 *B Bava Metzia* 17a.

174 *B Gittin* 28b.

175 *B Yevamot* 47a.

176 *B Bava Batra* 146b.

177 *B Bava Batra* 131b.

178 *J Pe'ah* VII 6.

179 *B Gittin* 89a, *B Ketuvot* 36b.

180 *B Shevuot* 45a, 48b.

181 *B Bava Kamma* 106a.

182 *M Shevuot* VII 1.

183 *B Bava Metzia* 4b-5a.

184 *M Shevuot* VII 8.

185 *M Shevuot* VII 4.



enforceable in a separate action<sup>186</sup> which (semble) devolves on one's heirs,<sup>187</sup> but the duty to take the oath is, of course, personal only. Before administering an oath, the court must warn the deponent of the gravity of the oath and of the inescapability of divine judgment for a false oath; and the court also warned the party at whose instance the oath is administered, that he ought to abstain if his case was wrong.<sup>188</sup> A party's refusal to take the oath would normally result in judgment being given against him;<sup>189</sup> but the court could, either in addition to or in lieu of giving judgment, pronounce a ban against the party who disobeyed the order of the court in refusing to take the oath.<sup>190</sup>

At the end of his illuminative paper contributed to this Volume,<sup>191</sup> Robert Legros quotes Donnedieu de Vabres as saying that there were three distinctive phases in the evolution of the law of evidence: the religious, the sentimental, and the scientific. The system here presented in outline belongs, of course, to the religious phase - implying, however, clear anticipations of the sentimental and of the scientific to come. The most remarkable feature of the talmudical species of religious law is, indeed, that the divine law, by definition and nature immutable, was by human agencies for human ends and with human means changed and

remoulded, but the divine and religious character of the law was in no way diminished or affected. The divine inspiration which Jewish legal and theological tradition ascribes to the talmudical law reformers was sufficient to elevate their reforms unto the pedestal of divine law - the Oral Law to supplement and complement the Written Law. But the secular legal historian will appreciate their achievement for what it actually was: on the one hand, the maintenance and even aggravation of strict legality in the field of criminal law; and on the other hand, the flexibility of wide judicial discretion, and the utilization of all psychological and scientific knowledge of the time, in order to render the process of law smooth and just.

186 *B Bava Metzia* 17a.

187 *B Shevuot* 48a.

188 *B Shevuot* 39a.

189 *B Shevuot* 45a.

190 *MT To'en veNit'an* 1:4-5.

191 See *infra* pp. 149-173.



View of a Galilee hillside. Courtesy of Israel Government Press Office

# The Right To Stand For Election

---

**Yardor v. Central Elections Committee for the Sixth Knesset Before President Shimon Agranat, Justice Yoel Sussman and Justice Haim Cohn**  
**Elections Appeal No. 1 of 1965. Reported in 19(3) P.D. 365**

---

## Precis

**T**he “Socialist List” applied to the Elections Committee for inclusion in the approved list of candidates for election to the Sixth Knesset. The Knesset Elections Act provides that any 750 persons entitled to vote in the elections may submit such a “list” of candidates, and the “Socialist List” has been duly subscribed and was formally valid according to law. The List included the names of ten candidates, five of whom were members of an association which had been declared illegal by order of the Minister of Defence in exercise of powers vested in him by emergency legislation. It was not disputed that that association propagated the abolition of the Jewish State in the territory formerly known as Palestine and its replacement by a Palestinian democracy.

The Elections Committee (headed by a Justice of the Supreme Court) refused to admit the “Socialist List”. Lacking explicit power for any such refusal, the Committee was advised that it had authority “to read into the Elections Law an implicit term to the effect that illegal associations cannot qualify as lists of candidates for Knesset elections”. The reason compelling such disqualification was stated to be that “democratic institutions and concepts may not be used as a means to undermine the democratic rule”.

On appeal to the Supreme Court, the majority upheld the decision of the Elections Committee.

---

Justice Cohn’s dissenting judgment, delivered close to half a century ago, is particularly relevant in view of the recent public debate concerning the right of Arab lists to stand for election. This dissenting judgment was published in the late Justice Haim Cohn’s *Selected Essays*, Bursi Publishing House, 1991.

The following are excerpts of Cohn J.’s dissenting opinion. (The first part of the opinion, dealing with the possible disqualification of any illegal association as such, is here omitted.)

## Justice Haim Cohn

There remains the second possibility, *i.e.*, - that the Committee is empowered to disqualify candidates’ lists if they aim at undermining the existence or integrity of the State. We are concerned with elections to the Knesset, which embodies the sovereignty of the State in its own sovereignty; and to deny the sovereignty of the State while sitting in the Knesset is a contradiction in terms. For this reason, it is proper - and perhaps necessary - that the Central Election Committee be vested with the power to prevent those who refute the principle of our sovereignty from entering the Knesset.

I shall say immediately that I agree wholeheartedly that it is necessary for power to be vested in a given body, be it the Central Election Committee, the Knesset itself, or the Court, to exclude from the Knesset such heretics who are traitors to the State and assist its enemies. But it does not follow that such power is indeed vested in a given body, including the Central Election Committee, under existing Law.

In a state governed by the rule of law, a person may not be deprived of a right, be he the most dangerous, treacherous and despicable scoundrel, except and only in accord with the law. Neither the Central Election Committee nor this Court are legislatures in this State; the Knesset is the legislative organ which confers the authority, if it so wishes, to mete out treatment in accord with a man’s conduct and the effects of his actions. In the absence of such legislative authorization, neither common sense, necessity, love of one’s country nor any other consideration, whatever that may be, can justify taking the law into one’s own hands and depriving another person of his right.

The learned Attorney-General contends that if indeed the law contains no express authorization of the Central Election Committee, it does imply and intimate such authorization; and the Committee needs no more than such insinuation, particularly where the legislative intent and will are revealed therein. This argument is based on a provision found in Sections 1 and 2 of the



Law and Administration Ordinance, 1948, and it impressed me at first; however, after studying the matter I reached the conclusion that that provision does not contain even a hint of an intimation as to the legislature's intent or its attitude regarding the question before us. And this is the provision:

"Representatives of Arabs being residents of the State who recognize the State of Israel will be co-opted on the Provisional Council of State (in Section 2: on the Provisional Government) as may be decided by the Council..."

The argument goes - and correctly so, as regards the construction of the provision itself - that *expressio unius est exclusio alterius*. Arab residents in the State who recognize the State of Israel shall be included in the Council of State; Arabs who do not recognize the State of Israel, even though resident therein, do not have a place in the Council of State. This provision is consonant with the Declaration of Independence of the State in which the members of the Arab people resident in the State of Israel were called upon to take part in the upbuilding of the state "on the basis of full and equal citizenship and due representation in all its provision and permanent institutions" - if they wish to take part in the upbuilding the State, they will be assured appropriate representation in the State's institutions; which does not apply where they not only refrain from taking part in the upbuilding of the State, but, also harbor its total destruction

It is true that the Knesset has now taken the place of the Provisional Council of State: the Attorney-General therefore claims that what was befitting to the Council of State is now proper for the Knesset; and since the Socialists List is a list of Arabs who, although Israeli residents, do not recognize the State and do not wish to take part in its upbuilding, but, to the contrary, wish to destroy and annihilate it - the law ordains that they not be allowed to take their place in the Knesset.

This argument ignores the political and legal background of the Declaration of Independence of the State of Israel and the enactment of the Law and Administration Ordinance. The vast majority of the Arab who were then resident in the State were suspected of being hostile to the State, if not in actuality at least in potential; and it transpired very soon, many of them not only refused to recognize the State but even fought against it and cooperated with its enemies from without to destroy it. As opposed to these, there were also Arabs who from the very start, or with the passage of time, recognized the existence of the State and decided to remain and make their lives therein. It is obvious that

under the state of war in those days it was necessary and proper to differentiate and distinguish between these two categories, between enemy and supporter, or even enemy and neutral - not only to prevent the enemy access to State institutions but also to assure the supporter that he would not be discriminated against on grounds of his religion or nationality.

In the meanwhile times have changed and the law has been consolidated. Most of the enemies among the Arab residents in the State have left the country; and the Arab residents who did not leave the country or returned lawfully between the time of the State's establishment and the enactment of the Nationality Law, 1952, became nationals of the State of Israel under Section 3 of that law; the same applies to Arabs born in Israel after the State's establishment; and one must assume that an additional number of Arab nationals obtained their nationality through naturalization under Section 5 of that Law. All these are no different from the Jewish or other nationals of this State, neither as regards their rights to vote and to be elected to the Knesset, nor as regards any other legal matter; all are equal before the law, including the Knesset Election Law, unless there exists a special law (such as, for example, the Law of Return or the Days of Rest Ordinance) which contains an express provision to the contrary.

There is no express or implicit provision in either Basic Law: the Knesset or the Knesset Elections Law that allows any kind of discrimination, for whatever reason, between Jewish and non-Jewish nationals; there is, likewise, no room to distinguish and discriminate between Jewish nationals who do not bear allegiance to the State or do not recognize it and Arab nationals who do not bear allegiance to the State or do not recognize it. We, unfortunately, also have a group of Jews who declare day and night, in speech and in action, their refusal to recognize the State; but the learned Attorney-General admitted in reply to my question that no one would consider preventing them from submitting a list of candidates for election to the Knesset if they so desired. The argument is that these two categories of persons are dissimilar in that the first maintain contact with our surrounding enemies, whereas the second are confined within the four sides of their guarded walls (in more than one sense). But we have already seen in these courts Israel nationals, not Arabs, who served the enemy and suffered the legal consequences - and no one contemplated the possibility of denying them their rights as citizens; not because they were not deserving of such sanction but because under existing law it is impossible to impose it.

From the words of several Committee members who participated

in the debate, one hears the thread of an argument that there are grounds to fear that the El-Ard members, who are candidates on the instant list, are trying to enter the Knesset on order received from the enemy with whom they maintain contact, and that success in this strategy would be a victory for the enemy and a downfall and disgrace for the State. I am prepared to assume that this assumption is correct in terms of information, and from a political point of view the consideration based thereon is certainly reasonable and legitimate. But from the point of view of the law it seems to me that this assumption and fear is immaterial. It is clearly possible that the governments waging warfare against Israel are well informed as to the details of Israel's constitutional regime and that they resolved to take advantage of it to their injurious ends; but that in itself - absent a legal norm - is no justification or cause on our own part to refute our existing constitutional regime. On the contrary, our pride lies in the freedom of opinion and association and the absence of discrimination in the State of Israel, and we regard with contempt and abhorrence regimes, such as those of our enemies, in which only one political party, the ruling one, is allowed or in which the entire power of government is concentrated in the hands of a dictator or a military junta. At times when the needs of war forced upon us by our neighbors - require such, the legislature in Israel - including the subsidiary legislature which is authorized to issue emergency regulations - will know to authorize whosoever requires authorization to take all the necessary measures of defence, and not only in the field of battle; but the State of Israel differs from its enemies in that, as far as it is concerned, even the object of war does not justify improper means, and any measure that contravenes the law or is taken without legal authorization and which denies civil rights is improper, and no judge in Israel will support it.

Moreover, even where the law expressly authorized the denial of a certain right from a national and the concerned right was a fundamental civil right, such as freedom of opinion and speech, this court refused to support the exercise of that legal power where the denial was not necessary to prevent a present, clear and substantial danger. (*Kol Ha'am Co. Ltd. v. Minister of Defence* (1953) 7 P.D. 871). I fail to discern the substantial, clear or present danger to the State, its constitution or its rights, which is imminent in the participation of this candidates' list in the Knesset elections. And if one wishes to argue that this danger is concealed from the courts and known only to the security agencies of the Government, I would reply that the material before the

Central Election Committee, that was also submitted to us, does not justify, and certainly does not require, a finding that such danger exists, and, moreover, the attention of the Committee members was not referred to any substantial danger as if it were actually imminent.

In the absence of conclusive evidence as to the presence of such danger, the deprivation of a citizen's rights might be regarded as a sanction for past conduct and opinions; and the Central Election Committee is certainly not authorized to impose such sanction.

Hence, even the fact that the candidates in this list are Arabs who do not recognize the State of Israel and who support its enemies does not empower the Central Election Committee to refuse to confirm their list.

There are states in which the security of the state or the sanctity of the religion or the achievements of the revolution and dangers of counter-revolution, and similar kinds of values, pardon any crime and atone for any action performed without authority and contrary to the law. Some of these states have invented for themselves a "natural law" which is superior to any legal norm and annuls it when necessary, in the sense that necessity knows no law. Those are not the ways of the State of Israel; its ways are the ways of law, and the law is issued from the Knesset or by virtue of its express authorization.

The right to vote and to be elected to the Knesset is one of the fundamental rights of the citizen not only in the State of Israel (Section 6 of Basic Law: The Knesset) but in every enlightened state (see Article 21 of the United Nations Universal Declaration of Human Rights). It is clear that this right cannot be withdrawn or impaired by the government except in accordance with the law. And this is what Article 29(2) of the Universal Declaration of Human Rights provides:

"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Although this Declaration is not binding in international law it nevertheless determines minimal standards for the legislative conduct of democratic states; and let us not ourselves fail to meet those standards.

The problem concerning us has in fact been regulated in many countries by way of express legislation.

In England, even prior to the rules of the common law, any person convicted of treason or a felony was disqualified from being elected to Parliament. In the words of Blackstone, these are disqualified from being elected: "... aliens born, or minors ... any of the twelve judges, because they sit in the lords' house; ... the clergy, for they sit in the convocation; ... persons attainted of treason or felony, for they are unfit to sit anywhere." (Vol. 1, p. 175). In the reign of Queen Victoria, a statute was enacted according to which any person convicted of treason or felony, and sentenced to death or to hard labour or imprisonment for a period exceeding twelve months was, until he had suffered the punishment or received a free pardon, incapable of being elected or sitting as a Member of Parliament (33 & 34 Vict. c. 23, s. 2).

That statute was extended to Ireland (see *Rogers on Elections*, 20th ed. p. 26); and in Ireland it happened that a candidate for election to Parliament was indicted for high treason and detained under arrest pending judgment in his case, and those in charge of the elections disqualified his candidacy. The court ruled that so long as he had not been convicted in accordance with the law, he was no less eligible than any other candidate (*New Ross Case* (1853) 36 English & Empire Digest, p. 274, note c).

One may therefore deduce a *fortiori*: where a statute exists that disqualifies traitors from being elected, the law does not disqualify one indicted for treason even where he is already standing trial; a *fortiori*, where the law does not disqualify traitors, as aforesaid; and even more so where the candidate has not even been indicted for treason.

It should be noted further than in England (and in the majority of states in the U.S.A.) it is the privilege of the House of Representatives to exclude a person, even if duly elected, if the Parliament deems him unworthy to sit in it (see *Rogers, op. cit.*, p. 27).

The powers to prepare and conduct the elections, which are vested with the Election Committee under the Knesset Elections Law are vested in England with an official called the "Returning Officer". In one case such official purported to determine whether a certain candidate was eligible or disqualified according to the law, and the courts quashed those decisions as *ultra vires* (*Pritchard v. Mayor of Bangor* (1888) 13 App. Cas. 241; *Harford v. Linskey* (1899) 1 Q.B. 852), and even though the English official does not resemble our Central Election Committee, one may learn from these precedents not only that it is desirable to separate the technical control of the conduct of the elections from the determination of the qualification or disqualification of a certain

candidate or a certain candidates' list, but also how important it is to take care, particularly in the law of elections, that the authorities charged with their conduct do not exceed the bounds of their power as determined in the law.

The second example which I wish to bring comes from the United States of America:

According to Section 3 of the 14th Amendment of the U.S.A. Constitution, no person shall be a Senator or Representative in Congress who, having previously taken oath to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid to the enemies thereof.

Since this is the only disqualification mentioned in the Constitution, the law in the U.S.A. is that no other disqualification may be added except through further amendment of the constitution (Willoughby, *Constitution of the United States*, 2d ed., Vol. 1, p. 602). However, there was no need for that in actuality, since according to Article 1 of the Constitution, each house of Congress shall be the sole judge of the elections, returns and qualifications of its own members; and each house may with the concurrence of two-thirds expel one of its members even though he was duly elected. These complementary powers to judge the qualification of an elected member and to expel a member even though he has already served as such, have been exercised by the two houses of Congress numerous times so as to prevent unworthy and unfaithful persons from sitting in them.

Finally, I shall mention the *Grundgesetz* of the Federal Republic of Germany, which provides in Article 21 as follows:

"(1) The parties participate in creating the political will of the people. The foundation of a party is free. Its articles of association shall accord with democratic principles. The parties shall give public account as to the sources of the means at their disposal.

(2) Parties which, according to their object or their partisans' conduct, intend to limit the fundamental order of a free democracy or to endanger the existence of the German Federal Republic are unconstitutional. The question of non-constitutionality shall be decided by the Constitutional Court.

(3) Details shall be determined in the federal laws."

Opinions have been voiced that this provision is irreconcilable with the freedom of political opinion; but the German Constitutional Court ruled that it gives expression to a militant democracy the object of which is to prevent the undermining of the free democratic order by non-democratic elements under the cover of legitimate parliamentary activities; this consists in

preventive and defensive measures, and not sanctions for past actions (Verf GE 5/142, quoted in Hamann, *Grundgesetz*, 2nd ed., p. 219).

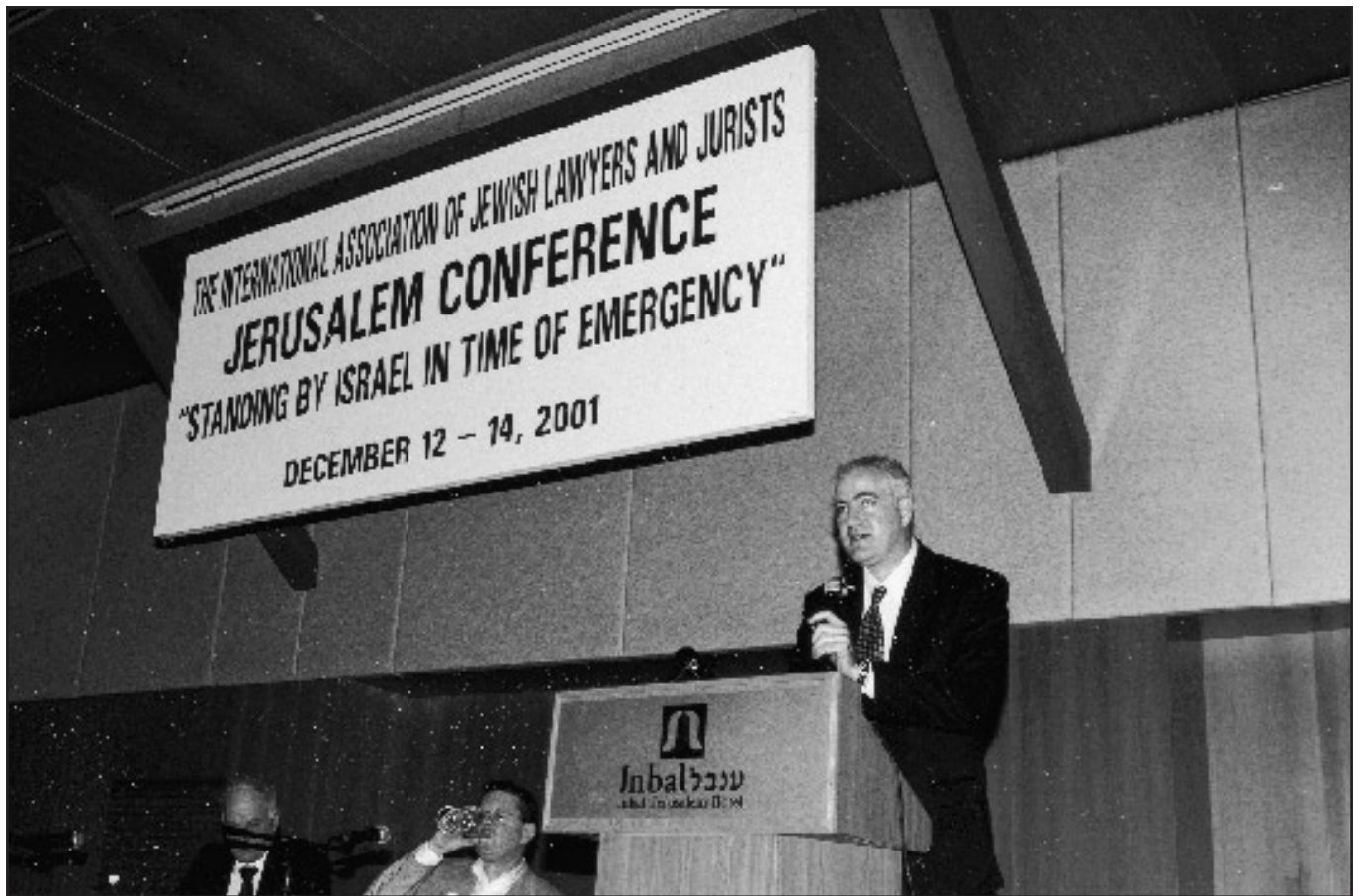
This is, in my opinion, a legislative course that can serve as an example to our own legislature.

Section 6 of Basic Law: The Knesset, which assures every Israel national over the age of twenty-one years the right to be elected to the Knesset, determines only one single disqualification to that right, which is, "unless a court has deprived him of that right by virtue of any law". The law that authorizes the court to deprive that right has not yet been enacted; no such authority exists even as regards persons lacking legal capacity, neither under the Legal Capacity and Guardianship Law nor at all.

If this matter, which came before the Central Election Committee and comes now before this court, and the conclusion I have reached, being compelled by the law, or more accurately, by the

silence of the law and its non-existence - shall move the legislature to enact a statute that will protect the State against insurgents and saboteurs from within, then this hearing will not have been in vain, and the grave problem posed to us will have found its solution in proper and fitting manner.

I would allow the appeal and quash the decision of the Central Election Committee not to confirm the Socialists List.



Boaz Ganor from the Interdisciplinary Center in Herzliya, Israel addressing the Jerusalem Conference on *Standing by Israel in Time of Emergency* (see p. 14)



# President Chirac addressing the Association's concerns about anti-Semitism: "Be Assured of our Vigilance"

**O**n 6th May 2002, M. Roubache, President of the French Committee of the Association wrote to the President of the Republic, Jacques Chirac, on the day after his election, to express the Association's concern about new forms of anti-Semitism prevalent in France and to ask for vigorous action by the authorities to combat this situation.

The office of President Chirac responded on the 30th of May stating in particular that he had asked everyone to take the

necessary measures to guarantee the protection of the citizens and institutions of the French Jewish community (see accompanying letter).

In the difficult period currently being faced by Israel following an unequalled wave of violence, coupled with another outbreak of anti-Semitism in France occurring in an atmosphere in which Israel is being unfairly portrayed by the media, the French Committee

*continues on p. 44*

## OFFICE OF THE PRESIDENT OF THE REPUBLIC

*Principal Private Secretary*

SCP/E & A/N8128

Paris, 30th May 2002

Dear President Roubache,

You recently sent the President of the Republic a copy of the proceedings from the symposium that your organisation held at the Council of Europe in Strasbourg on the theme: "From Xenophobia to Anti-Semitism and vice-versa: an inevitability for Europe?".

Mr Jacques Chirac sincerely thanks you for this document which he has read with the greatest attention.

As you know, Mr Jacques Chirac has repeatedly called for responsibility and tolerance following the odious and unacceptable acts that you describe.

Thus, on the 2nd of April 2002, the Head of State met Patrick Klugman, President of the Union of French Jewish Students, at the Elysée Palace, and repeated on that occasion his "unreserved condemnation of the attacks which the people, goods and symbols of the Jewish community have been subject to".

After underlining the necessity of finding and very severely punishing the perpetrators of these acts and this deeply shocking behaviour, he asked that all necessary measures be taken to guarantee the protection which the people and institutions of the French Jewish community have the right to expect.

"The responsibility for respect, tolerance and dialogue with regard to freedom of thought, freedom of expression and religious freedom, are cardinal virtues which cannot in any way be challenged" the President of the Republic added at the close of the meeting.

Please therefore be assured of the Head of State's vigilance to combat behaviour which is unworthy of our country and contrary to the values on which our Republic is based.

Yours sincerely,  
**Annie Lheritier**



## Joseph Roubache Honoured by the President of the French Republic

The Association warmly congratulates Joseph Roubache, President of the French Committee of the IAJLJ, upon being awarded the rank of Officer in the National Order of the Legion of Honour, the highest decoration with which France honours its citizens.

By this award, the French Republic recognised the dedication shown by Joseph Roubache to defending human rights and his contribution, through the legal profession, to the fight against all forms of racism and anti-Semitism.



*continued from p. 43*

has initiated a large number of activities, either on its own or in collaboration with other organisations.

These included vigorous protests against an anti-Israel petition, widely distributed within the Paris law courts, and signed by numerous lawyers, calling for “co-ordination for peace in the Middle East” and shortly afterwards the formulation itself of a petition which was distributed to all Parisian lawyers and which was signed by 500 lawyers within a few days, including such important persons as the President of the Catholic group in the law courts, and the Inter-Ministerial Delegate for the Liberal Professions.

On 29th April 2002 more than 600 people attended a meeting held in the Paris *Maison du Barreau* [Bar Offices] in the presence of six former presidents of the Bar, Georges Flecheux, Bernard Bigault Du Granrut, Dominique De La Garanderie, Bernard Vatier, Guy Danet and Mario Stasi, on the theme: *The rise of anti-Semitism in France - A result of the situation in the Middle East? - Role of the media?* The French Committee of the IAJLJ noted the damaging effects of biased media coverage regarding the conflict in the Middle East and the growing influence of Islamic fundamentalism in France.

Also in May, members of the French Committee participated in a mission to the large American Jewish institutions in New

York and Washington, to explain the new form of anti-Semitism in France, linked to the conflict in the Middle East and to French policy in this conflict.

Most recently, on 6th June 2002, the French Committee organised a conference, bringing together one hundred of its most important members, to examine the anti-Israeli nature of the dispatches issued by the agency *France-Presse* which provides 90% of the information received by French newspapers. The French Committee of the IAJLJ is currently planning liability proceedings against this press agency.

## Per Ahlmark Honoured

The Association congratulates Per Ahlmark, former Deputy Prime Minister of Sweden and a vigilant fighter against anti-Semitism, upon receiving an honorary doctorate from the Hebrew University in Jerusalem.