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Graphic Design:

Ruth Beth-Or

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PRESIDENT'S MESSAGE



I

t is a great honour, and an immense pleasure, to write this, my first Presidential Message, to the members of our Association and to the readers of our journal.

Our demanding profession, modern way of life and the difficult times in which we live, do not grant us the luxury of having much spare time. For these reasons, I was deeply impressed by the great attendance at our last Congress, held both in Tel-Aviv and Jerusalem. This ability to recruit talented and successful people, who are willing to travel halfway across the globe, in order to assist in promoting novel ideas and fight malevolence, is inspiring and instills faith in me that we will be able to make the difference to which we are so readily committed.

I wish to take this opportunity to congratulate the newly elected members of the Presidency and wish them all much success in their new positions. I also wish to note that we are indebted to the retiring members of the Presidency - the new honorary members of the Presidency - Judge Hadassa Ben-Itto and Adv. Itzhak Nener, for their long standing service to our people and to those seeking justice worldwide. They have shown much devotion and dedication over the years and we hope that they will continue to contribute to our just cause.

“Europe has a problem with anti-Semitism” are the opening words of the *Manifestations of Anti-Semitism in the EU 2002-2003 Report*, published by the European Monitoring Centre on Racism and Xenophobia in March 2004. And, as we are all well aware, Europe is, indeed, encountering such a problem. Nevertheless, what is encouraging, in some sense, is the willingness of various major European establishments to combat anti-Semitism.

One of the most inspiring developments regarding the battle against anti-Semitism is draft General Policy Recommendation Number 9 of the European Commission against Racism and Intolerance (ECRI). After observing the persistence of anti-Semitism and its current increase in many European countries, ECRI established a working group to finalise a legal text specifically devoted to this issue, in the hope of contributing to the fight against all manifestations of anti-Semitism in Europe. These draft recommendations were delivered to our Association in April 2004, for our review, comments and suggestions.

Among these draft recommendations stands a noteworthy, yet not completely satisfying, vanguard reference of a European body to the “new anti-Semitism”. The ECRI draft recommendation stresses that the increase of anti-Semitism in many European countries is “characterized by new manifestations of anti-Semitism” which “have often closely followed contemporary world developments such as the situation in the Middle East”. This association, between anti-Semitism and extreme criticism of Israel, expressed so mildly in the draft recommendations, is of utmost interest to me.

Over the past three and a half years, we have witnessed a flourishing, extreme anti-Israel rhetoric, characterized by use of anti-Semitic stereotypes and Nazi vocabulary in anti-Israel campaigns (for example, a major UK newspaper publication of a cartoon showing Prime Minister Sharon devouring an infant amidst scenes of devastation, while the caption read: “What’s wrong? Have you never seen a politician kissing babies before?”). Such expression of anti-Semitism may also be heard in explicit statements that Israelis and Jews are a cosmic evil, who are to blame for world disasters (such as the November 2003 poll results, showing that more than 50% of Europeans consider Israel

to be the most dangerous country for world peace or the reference by the famous Greek composer, Mikis Theodorakis, to the Middle East conflict in November 2003, when he labeled the Jews as “the root of all evil”). An additional manifestation of anti-Semitism is the disproportionate manner in which Israelis and Jews supporting the State of Israel are attacked - objectivity is abandoned and malice and hatred are substituted for truth. And most of all - anti-Semitism is often characterized by the assertion that the very right of Israel to exist as a Jewish state should be de-legitimized.

This rhetoric, focusing on Israel and its very right to exist, has flourished to such an extent, that many are even addressing it as a new form of anti-Semitism. However, it should be noted that this phenomenon is in no way new; it has been around for decades. We all remember how the late Dr. Martin Luther King Jr. reacted to an anti-Zionist remark made by a Harvard student - “When people criticize Zionism, they mean Jews”.

What is interesting with the so-called “new anti-Semitism” is not its origins - it flows from the same tainted well and it represents the same shameful ideas as the “old” anti-Semitism - but rather the way it emerges from that contaminated reservoir.

However, it is important to note that what we are seeing here is not legitimate criticism of Israel or disagreement with it. This is something completely different and completely wicked - Israel’s history is consistently denied and ignored. Israel’s self-defence against brutal attack since the time of its foundation, has been falsely represented as aggression. Israel is expected to do the impossible, while other countries in similar circumstances are treated differently.

The Association’s comments in relation to the ECRI draft recommendations have been submitted by our loyal and thorough representative to the Council of Europe, Mr. Daniel Lack. These comments deal mainly with the above-mentioned topics, as well as with the decades of hate propaganda inciting infants and children to become “suicide martyrs”; the constant abuse of UN organs against Israel; the screening of a dramatized version of the notorious forgery *The Protocols of the Elders of Zion* by the Egyptian state sponsored television channel and finally - our organization’s request that ECRI should support the proposal that January 27, the date of the liberation of Auschwitz at the end of World War Two, be declared as the International Day for the Commemoration of the Holocaust and for the Elimination of Contemporary Anti-Semitism and All Other Forms of Racism.

Although times change and people change, anti-Semitism remains unaltered. Jews were once condemned for not cultivating the ground (after being banned from doing so); for being scattered amongst nations instead of establishing a place of their own; and for not taking measures to secure their destiny.

Now they are hated by some, for doing exactly that.

I invite you all to join our special activity, which is unique in the sense that it is legally oriented, and to initiate new measures against the rising evil of anti-Semitism.

Alex Hartman

The 12th International Congress

“Israel 2004: Dilemmas and Solutions” was the main theme of the Association’s 12th International Congress, held in Jerusalem and Tel Aviv on 23-26 March, 2004. *JUSTICE* highlights a series of presentations from the intensive programme

The Exposure of the Free World to Terrorism Motivated International Litigation

Joseph Lapid

I am greatly honoured to open this congress of lawyers and jurists from all over the world; all of them prominent figures in what some consider to be the most Jewish of professions. The Ten Commandments is still the most concise and most profound legal document ever written and our most important contribution to the civilized world. I want to thank all those responsible for this gathering and particularly the outgoing President, my good friend, Judge Hadassa Ben-Itto.

We are going through difficult times.



The number of terrorist attacks has decreased, not because there are fewer attempts, but because our security forces have been more successful in preventing them. Terror, with the barbaric attack in Madrid a recent example, has become the major global issue of our times. When the Nazis came to power in Germany in the early thirties of the last century, Jewish organizations all over the world were desperately trying to recruit international public opinion against Hitler. But they were told, “Nazi anti-Semitism, unfortunate as it seems to be, is an internal issue of the sovereign German state”. By

Joseph (Tommy) Lapid is Israel’s Minister of Justice. These are highlights from his address at the Opening Session of the 12th International Congress, in Jerusalem.

the time the Western world realized what Nazism really meant, it was too late. For years we were trying to impress upon Western minds, that Islamic terror is a fatal enemy of modern civilization.

The answer was that Islamic terror is an unfortunate phenomenon but it mainly concerns the Jewish state. Like 70 years ago, by the time the leaders of the West, and particularly of Europe, realized the danger that fanatic Islam meant to their own existence, it was nearly too late. I hope that now they understand and that in this battle we are not left alone, again.

Let me turn to an additional area of concern and that is the increasing use of international litigation against Israel for political purposes.

Globalization and the increasing interdependence between states have created, particularly during the last ten years, a new legal reality. It is a reality whereby a state is no longer completely sovereign in most of the areas of laws it is legislating, and must take into account international laws, standards and norms. It is also a reality whereby states today are subject to an increasing number of international dispute settlement mechanisms, and international courts. And, it is a reality whereby in a growing number of situations a state or its citizens can be sued or reviewed by international or foreign national courts, even without the consent of the state.

The growing internationalization of justice and law, and the increasing powers international judicial bodies have amassed have made international law and litigation a very powerful and meaningful tool. The effectiveness of this new tool is not just through the ability of the international body to render an opinion or judgment or to penalize a state or its citizen, but its powers are immensely increased through the enormous media interest and publicity these decisions and processes create. This relatively new phenomenon of international litigation, may have benefits if it serves its real purposes and if it follows normative procedures. It is also a tool however that can easily be abused and used for political purposes, and for generating a huge negative public opinion against a state or its leaders against whom a case has been brought.

Israel has always been a strong supporter of strengthening the international legal order, and the creation of international norms that will bind all states and will facilitate legal order, peace stability and trade. Like other countries in the world, it has undertaken serious review of the ways and means it has to deal with this growing and important body of International and supranational law, and of the ways in which it can contribute to the creation of new norms and standards.

Unlike most countries in the world, however, Israel has found itself over the last few years in a situation where the international

legal regime and international law are oftentimes being exploited and used against it for purely political purposes, and politically motivated lawsuits are brought against it in international or foreign courts. These, so to speak, "law suits", are painted in the colours of law and justice, and are even often argued by well-known lawyers, some of them even university professors. But the true identity of these lawsuits and their purposes cannot be mistaken. These are mostly politically motivated lawsuits, and the legal front is now used as another battlefield against Israel and its leaders. These lawsuits are much harder to anticipate and much harder to defend against than the ordinary international cases.

The damage done to Israel through the mere initiation of these lawsuits is not just with respect to the money and efforts Israel needs to exert to combat them, but, more importantly, it is damage that is created through the immense negative media coverage and propaganda against Israel which usually accompanies these "law suits". This is one point where friends of Israel, particularly those well versed in legal matters, can be of great help, by explaining in the local media and in the academia the Israeli point of view.

Israel is preparing to deal with this legal front through its lawyers and foreign office. This is a front that cannot be overlooked or underestimated. Israel is also considering, if this type of phenomenon will continue, to start making active use of the international legal system itself, whether through counter claims, civil law suits or others, against those who are violating our legal rights, and against those who are pursuing us legally and at the same time themselves violating international law.

The cases that have been brought against Israel or Israeli officials in the last few years, whether in international forums or in foreign domestic courts, have received high publicity. I would like, however, to quickly outline some of the cases. They all share a commonality, namely, that behind them stand predominantly politically motivated considerations.

- The first and most prominent example, of course, is *the advisory case currently before the International Court of Justice*, on the legal consequences of building the security fence. This procedure was triggered by a General Assembly resolution, initiated by the Palestinians and their traditional supporters.

The ICJ does not have compulsory jurisdiction over Israel. The question of the legality of the fence was brought before the Court not as a contentious case, but as a request for an advisory opinion. The case is not only purely politically motivated, but unfortunately has embroiled the International Court in a matter that any pronouncement on it may adversely interfere with any

future resolution of the Israeli-Palestinian conflict, and the operation of the Road Map, as the United States and many other countries explicitly told the Court.

The international process surrounding the case suffered from questionable issues, which I will not enter into now. One cannot however leave this subject without noting the sad reality, that of the approximately 800 pages of docket documents the United Nations recommended that the Court review in the context of this case, none addressed or related to the inhumane, abhorrent and illegal terrorism against Israeli men, women and children conducted by the Palestinians, which was the underlying reason for building the fence .

The next few examples I will share on the use of the international legal arena against Israel or Israeli officials, relate to criminal and civil litigation in foreign courts .

The last few years have evidenced a growing number of cases brought against Israeli officials in the context of so-called “universal jurisdiction” laws. A “universal jurisdiction” law is commonly referred to as such, when a country’s domestic laws permit the bringing of criminal or civil cases against a foreign official in a country’s domestic courts, even if the activity underlying the complaint is not connected to the country in which the case is brought or to that country’s citizens.

- The best known case involving Israel in this context was initiated in Belgium, *where a criminal complaint was instituted, among others, against Prime Minister Ariel Sharon*. The complaint was brought under Belgian law, which at the time, allowed for the prosecution in Belgium of any alleged commission of war crimes or crimes against humanity, regardless of the time and place of its commission. The law did not require any link to Belgium for a prosecution to be initiated, nor was the presence of the accused in Belgium a precondition for initiating proceedings.

It took several years before this issue was resolved, and the improper proceedings instituted against Prime Minister Sharon dismissed. In the meantime, the process generated great negative publicity against Israel, embarrassment and worldwide interest. I would note that the issue was only finally resolved, due to a change in Belgian legislation that was brought about by pressure from the United States, which found its officials, President Bush, Secretary of State Powell and others sued in Belgium under a similar law for not dissimilar purposes. A threat issued by the United States that it would pull out the NATO offices from Brussels if Belgium continued with these types of unfounded and duplicitous criminal law suits against its leaders, as well as other

political pressure, brought an end to these law suits.

The amended Belgian law, which still allows for universal jurisdiction on these matters, is now much more restrained, and requires, before the initiation of criminal proceedings against a foreign leader, to take into account whether the country the foreign leader is from is a democratic one, and whether it has its own reliable judicial system which may operate if it is found necessary to bring a leader to justice.

- The risk of initiation of such politically motivated cases against Israeli officials is not limited to Belgium. Attempts to initiate criminal proceedings of similar nature, were made against *Prime Minister Sharon in Sweden*, and against the Minister of Defence, Shaul Mofaz, in the United Kingdom. In Sweden, the Swedish law requires the approval of the prosecutorial authorities for proceeding with a complaint, which was not provided by the authorities in that case. In the United Kingdom, the British District Court judge refused to issue an arrest warrant against the Minister of Defence, against whom an attempt to issue such warrant was made, on the basis of diplomatic immunity.

The risk of exploitation or attempts at exploitation of the judicial systems for political purposes lies not only in the criminal field, but also in the civil one. Civil, politically motivated proceedings in foreign courts may prove to be even more difficult to curtail, as their initiation is simply through the filing of a civil summons and complaint, and they do not require any approval or review of authorities prior to their initiation. The reality is that some countries have civil legislation that permits for the filing of civil law suits against foreign acting government officials, regarding actions pertaining to their role in office, even if there is no connection to the state and the defendants are not citizens of that state. The underlying purpose of that type of “universal jurisdiction” legislation was a humane one, to provide mostly oppressed or tortured people who have been harmed by their officials, and who live in countries where there is no adequate judicial system, with a forum to bring civil law suits against them. But, this type of legislation has also been exploited for political means, and has been used to bring politically motivated law suits in foreign courts against Israel and Israelis, and now increasingly also against other officials of the free world.

I will not elaborate here on the details of these law suits, but will note that they are time and money consuming, and embroil Israel and Israelis in an international legal front that must be addressed. They are mainly being used as means of anti-Israeli propaganda and, again, I call upon Israel’s legal friends abroad, to expose such

machinations for what they are.

Before leaving this subject I would like to stress that Israel does not object to the notion of universal jurisdiction whether on criminal or civil issues, as this notion, if exercised correctly, can enhance and promote human rights and serve to punish those who otherwise would be free from criminal prosecutions. Israel itself brought Eichman to trial under such law. The problem that we face today, as do countries such as the United States and others, is that these laws are abused for politically motivated purposes.

This "litigation front" is but one of the fronts on the international law arena that Israel is facing, and it is one that, as I mentioned, is in addition to the other matters we have to deal with today.

We, as other states, are faced today with a growing reality where we are subject to numerous international agreements pertaining to almost every area of domestic law, and subject to an increasing number of dispute settlement mechanisms which have the authority to interpret these agreements. We must be cautious not to fall into any international "black lists", must take into account the legal work of international bodies and organizations, and must find a way to increase our marketability in the economically globalized world. This can only be achieved through further liberalization of our laws, and further integration of our legal system with that of the other countries of the free world. We need today, perhaps more than ever before, an understanding of foreign laws, foreign courts, and to carefully follow developments of international and supranational law in all areas of our domestic law.

The infiltration of international law into domestic legal systems, and into what has traditionally been considered areas under the sovereignty of a state, and, more importantly, the risk associated with international litigation, have required countries to closely examine and revise their traditional ways of work and thought, and to adapt to the rapidly changing reality.

The need to deal with this growing body of law and exposure is an immense task, which is not easily undertaken, and we need all the help we can get. Against Israel, international judicial forums are being used not only for legal purposes, but for political purposes as well. When we were working on the ICJ case, many lawyers turned to us to offer their help. This was very encouraging and indeed most helpful in presenting Israel's case abroad. I would like to use this opportunity to thank all of those who participated in that initiative. I would like, with your permission, to take this one step further.

Several months ago, Mr. Aaron Abramovich, the Director General of my office, began exploring the possibility of creating a

more permanent alliance between Jewish lawyers abroad and the Ministry of Justice, the purpose of which would be to allow the Ministry to approach these lawyers for assistance and information on their respective legal systems, whether on given cases or other matters. I would like to suggest that we use this forum to enhance this initiative, and suggest that any one of you, or your colleagues, who think that you might be able to assist us in any future matters, inform the Association, and that information will be provided to us.

Furthermore, I want to use this opportunity to call upon the leaders of the western world, to form an international body, wholly devoted to the fight against terrorism. Increasingly, security forces of free nations are cooperating in order to prevent terrorist attacks. But this is not sufficient any more. An adequately financed, highly motivated and well organized body, which would enjoy the support of all freedom loving governments, should engage and coordinate the know-how of security agencies, so that the fight against organizations like *Al-Qaida* should be conducted on the highest professional level. The future of western civilization may depend on the success of such an effort.

The Role of a Judge in a Democracy

Aharon Barak

I congratulate the Association on its important work, the outgoing President - Judge Hadassa Ben-Itto - on her outstanding contribution to the Association and extend my best wishes to the incoming President Alex Hertman.

In Hebrew, Jerusalem means the city of peace. But peace seems quite remote. By now there is almost war. What is our role as judges these days? Cicero is known to say that:

"Silent enim leges inter arma."

The laws are silent amidst the clash of arms, or "when the cannons fire, the muses are silent." This is not our tradition in Israel. The struggle for peace - the struggle against terror - is to occur "inside" the law, and through the tools that are lawfully approved as appropriate for a democratic state. And when law is in operation, the court is in operation. And the questions are raised: What is our role, as judges, in a democracy generally, and in times of tensions specifically?

Let me make some observations, reflecting my own experience as a judge of our Supreme Court for more than 26 years. It is my belief that the duty of a judge is to protect the individual from abusive state action, and to contribute to the meaning of citizenship and civic entitlement. In performing this duty, the court must, inevitably, be in conflict with the other branches, especially so in modern times where more and more political questions present themselves as legal questions, and are brought to be adjudicated before the courts, and especially so where the scope



of judicial review over the other branches is wider than in the past. A wider judicial review carries with it wider interest in the courts, and widening tension between the court and the other branches of government. If there will be no conflict and no tension, the court will not be fulfilling its constitutional role. Thus, criticism there will always be. Judges will always be attacked by politicians and the sectors of the public that are unhappy with the court's decisions. The attack may focus on individual results; the attack may focus on trends (too much activism; too much restraint). The attack may be polite;

the attacks may be brutal and sometimes even violent. They may, consciously or unconsciously, erode the legitimacy of the court. They may affect the independence of the judiciary.

What can judges do about it? They should not abandon their role as protectors of human rights in a free and democratic society. They should not defer to the other branches when it comes to the question of the proper balance between competing constitutional values. They should not be apologetic for their non-representative character. Courts are not representative bodies, and it will be a tragedy if they will become representative. Their role is to give effect to the deep values of their society as expressed in its basic documents, its traditions, and its history. Their role is not to express the mood of the day. Judges should not be defensive in the face of the counter-majoritarian arguments. When judges declare a statute unconstitutional, their declaration fits democracy fully, because they get their review power from the democratic constitution, and because democracy is not simply majority rule, but also the protection of rights and freedoms of every individual. In the absence of human rights, democracy cannot exist. Furthermore, in most cases, the counter-majoritarian argument - imported from America - is not of great value. **First**, because

Prof. Aharon Barak is the President of the Supreme Court of Israel. This address was delivered at the Opening Session of the 12th International Congress of the Association of Jewish Lawyers and Jurists in Jerusalem.

in most cases the legislature may, ultimately, achieve his political ends by using less intrusive means. **Second**, because in many countries - unlike the United States - the legislative body may, by a special vote, amend the constitution.

Up to now, I emphasized what judges should not do, but what should a judge do? My main advice is a very simple one: Be truthful to yourself and to your judicial philosophy.

Specifically, we should be neutral with respect to the parties. Neutrality does not mean apathy to the plight of the parties. Neutrality does not mean indifference with respect to democracy, separation of powers, judicial independence or human rights. Neutrality means fairness and impartiality. It means the confidence of the parties and of the people in the judge's moral integrity, and their conviction that the judge's sole motive is the protection of the rule of law, not his own power or prestige. Neutrality means giving weight to the arguments presented before the judge regardless of the importance of the maker of those arguments. Everyone is equal before the judge.

We should be objective. We should rely on normative requirements which are external to ourselves. A judge should not impose his own subjective values on the public. A judge should reflect the basic values of the democratic society in which he lives. Of course, the judge is a product of his era, shaped by the times and the society in which he lives. Objectivity is not to amputate the judge from his or her surroundings. The goal is to permit the judge to express the deep values of his or her nation. In doing so, the judge should reflect history, not hysteria. The judge should give effect to basic values, even when those values do not correspond to the "shifting winds" of public opinion. Populism and judging are two contradictions. Thus, a judge should be sensitive to the need to maintain public confidence in the judiciary. "Lack of confidence in the judiciary" - wrote de Balzac - "is the beginning of the end of society." The judge has neither sword nor purse. All he has is the public's confidence in him. However, the need to ensure confidence does not mean the need to guarantee popularity. We have tenure in office in order to be able to overcome populism, and to give effect to the basic values of our society. Of course, basic values may change. A delicate border exists between new basic values and shifting winds of public opinion; a delicate border exists between the new social climate and the new realities to which a judge should be sensitive and public pressure to which a judge should be opposed.

We should be sensitive to the weight of our office and to the constraints it imposes. We should be self-critical and open-

minded. We should be open to new ideas. In a pluralistic society there are many points of view, and there may not be one right solution. A judge should lack any traces of arrogance. He should show intellectual humility. He should admit errors. The strength of our judgments lies in our ability to be self-critical and to admit our errors in the appropriate instances. Law has not started with us. It will not end with us.

A judge should be sensitive to tradition. Tradition means a sense of history. Tradition means an appreciation of precedent. Tradition means consensus. Tradition means a fusion of the horizons of the past and the present. It means a dialogue between generations. In this respect, every judgment is a link in a chain; a chapter in a book. We should always realize from where we came, and to where we are going. We should always look backward and forward. Our judgment must fit the existing web of law. It must be a solid basis on which the future can be built. A judge should be part of his people. It is said we sit in an "ivory tower". But my tower is in the hills of Jerusalem, not on Olympus. It is of the essence that a judge be fully conscious of his or her surroundings, of the events preoccupying the people. It is the judge's duty to study the country's problems, to read its literature, to listen to its music. The judge is part of his epoch, the son or daughter of his time, the product of his nation's history.

A judge should view his role to close the gap between life and law and make a proper balance between the need for change and preservation of the *status quo*. "Law must be stable" - said Professor Roscoe Pound - "yet it cannot stand still." Stability without change is decline; change without stability is anarchy. We must ensure stability through change. The law, like an eagle in the sky, is only stable when it moves. Our moves should usually be evolutionary rather than revolutionary. Continuity, rather than a series of jumps, is involved. But there are special moments when bold steps are required. We should not miss those moments.

At those moments, the tensions between the court and the other branches will reach their peak. This is natural. This should be anticipated. Yes, in many cases, the job of the court is to reflect the deep public consensus, and not to create it; but not in all cases. There comes a moment when the court should lead; where the court is the crusader of a new consensus. *Brown v. Board of Education* is a good example. A court cannot survive public confidence if it will announce every week a new *Brown*. But a court will not survive public confidence if it will miss the special moment to have a *Brown*.

Judges should be aware of the complexity of the human being.

Our approach should be holistic. When we construe one statute, we construe all statutes. During our life in law, we will face many conflicting theories: Naturalism, Positivism, Realism, Feminism, Law and Economics, Law and Literature, Law and... and many others. There is some truth in all of them. They reflect different aspects of the human experience. A judge will be faced with conflicting values, policies and interests. Alongside every thesis there is an anti-thesis. It is our job to have the proper synthesis. Our main tool is balancing and weighing. Those are of course just metaphors. What is meant by them is the duty to identify the values, the interest and the policies involved and to realize their relative importance at the point of conflict. By doing so, the judge should give effect to the values and principles which reflect the deeply embedded convictions of his democratic society. This balancing process by no means requires the judge to sacrifice the state on the altar of individual rights. A constitution is no prescription for national suicide. The judge's job is to achieve a delicate balance between community and individual, between the needs of the public and the rights of the individual. And when the scales are in a delicate balance, the judge should give special weight to one of the most important values - justice. The Justice should do justice. The process of balancing should be a rational process. We must manifest reason, not fiat. The method by which the judge weighs and balances and the method by which the legislature weighs and balances the same values are two different methods. The legislative process is political. The judicial process is normative. The judicial weighing and balancing should, in Professor Dworkin's terms, "fit" within the normative scheme.

It should draw itself out of the existing normative structure. The weighing and balancing in one area of the law should be affected by the weighing and balancing in other areas of the law. A judge is always faced with the problem of system.

But what should a judge do when all this advice fails? There is, of course, no one answer to this question. My answer is this: In exceptional instances, the judge should refer to his or her subjective beliefs. At this point, subjectivity is allowed to enter. The final decision will be shaped, as Cardozo observed, by the judge's "experience with life; his understanding of the prevailing canons of justice and morality; his study of the social sciences; at times, in the end, by his intuitions, his guesses, even his ignorance or prejudice." Of course, the judge should not cut corners. He should not go straight to his subjective beliefs. There is a long objective road to travel. But, after all the objective means have been exhausted, he should be allowed to apply his subjective beliefs, the product of his and her personal history.

I see my role as judge as a mission. Judging is not merely a job. It is a way of life. An old *Talmudic* saying regarding judges is the following:

"You would think that I am granting you power?
It is slavery that I am imposing upon you."

But it is an odd sort of slavery, where the purpose is to serve liberty, dignity and justice; liberty to the spirit of the human being; dignity and equality to every one; justice to the individual and to the community. This is the promise which accompanies me to the courtroom daily. As I sit at trial, I stand on trial.



President of Israel's Supreme Court Prof. Aharon Barak, and Israel's Justice Minister Joseph Lapid, at the Opening Session of the 12th International Congress

“The Jewish lawyers in the world are called to stand up with us”

Hadassa Ben-Itto

I am honoured to officially open the Twelfth Congress of the International Association of Jewish lawyers and Jurists.

I welcome our guests of honour, the Minister of Justice of Israel, Mr. Joseph (Tomi) Lapid and the President of the Supreme Court of Israel, Justice Aharon Barak, who are friends of our Association, and who have in the past expressed their appreciation for our activities in the service of the Jewish people.

Thank you both for being here in spite of your pressing duties and busy timetable.

It is with great pride and pleasure that I welcome here tonight delegations from 15 countries: the United States of America, France, England, Scotland, Switzerland, Bulgaria, Germany, Poland, Canada, Brazil, Italy, Mexico, Costa Rica, Senegal, and Israel.

I extend a particular welcome to our guests who have come from far away to participate in our conference and to bring greetings from their countries: from Senegal: the Honourable Justice Lamine Coulibaly, President of the Court of Appeal of Senegal; from France: Advocate Gerard Algazi, who brings greetings from the President of the Paris Bar, Mr. Jean-Marie Burguburu; and from Poland Mr. Wojciech Hermelinski, the Vice President of the Polish Bar Council. Their presence here signifies their respect for our activities and their support for our goals.

We also welcome the speakers who have agreed to address the grave issues on our agenda at this Congress.

Last, but not least, a hearty welcome to all those who have honoured us with their attendance at this opening session of the Congress.

To all of you I say welcome to Jerusalem.

Judge Hadassa Ben-Itto is the outgoing President of the IAJLJ. She served in that capacity for 16 years and has now been elected to the position of Honorary President. The following is her address at the Opening Session of the 12th International Congress, in Jerusalem.

As this is the last Congress of the Association at which I am presiding, please bear with me if I insert a personal note.

I have served as President of our Association for 16 years. Looking back and taking stock of what we have done all

these years, allow me to confess to a sense of pride, but also to a sense of sadness. Pride at what we have achieved and sadness because so much more needs to be done. Pride in the fact that I was blessed to be working with such a wonderful group of dedicated people, both in Israel and abroad, without whom we could have achieved nothing. I cannot mention all of them, but I extend special thanks to the First Deputy President of the Association, Mr. Izhak Nener, whose long experience, whose good advice, whose dedication, and whose constant assistance and support, were invaluable. I could not have done it without him.

Thanks also to the members of the Presidency who have helped to formulate our agenda and make policy decisions. Their support and involvement was much appreciated. Thanks to the leaders and members of our branches abroad, who work vigilantly and tirelessly in the service of the Jewish people, offering their precious time, their professional expertise, and most of all their commitment to our common cause.

A special vote of thanks to our Executive Director, Ophra Kidron, who worked literally day and night, together with her



assistant Merav Uzan, with unparalleled dedication. We could not have organised with such success the 15 international conferences that we held in the last fifteen years, without Ophra Kidron.

The founders of this Association, great men of law from various countries, formulated the agenda of the Association and composed its constitution. Their goal was to establish a center in Israel for Jewish lawyers and jurists from around the world. Some of us attended that opening conference at which the Association was founded 35 years ago, and if we need to describe in a sentence what they had in mind, it is this: realising the problems facing the Jewish people everywhere, they envisioned Jewish lawyers and jurists acting as self-appointed *pro bono* lawyers for the Jewish people; realising the centrality of Israel in the life of Jews everywhere, they decided that not only should the center of the Association be situated in Israel, but also that the centrality of Israel should be a cornerstone in its agenda.

We were recently criticised because of the relatively small number of our members, compared to the number of Jewish lawyers in the world. I submit to you that this is not a valid yardstick by which to judge the success of an association like ours.

When I used to complain to Justice Haim Cohn, the President of the Association for 20 years, that in spite of our efforts, so few Jewish lawyers responded to our call, he reminded me again and again that it is not the numbers that count, it is always the committed few who make a difference.

We do not offer business opportunities or lucrative contacts.

Our lawyers in every country work from their offices, at their own expense. At night some of them work from their homes, as I did for all these years.

The only thing we offer Jewish lawyers and jurists is an opportunity to do something for their souls.

To paraphrase a famous saying, our members do not ask what their involvement in the Association can do for them, but what they can do for the Jewish people.

I take great pride in the fact that a dedicated group of busy professionals, around the world, who all volunteer their services, have responded to our call and have succeeded in accomplishing so much.

We all know what is happening to our people these days. An unprecedented wave of anti-Semitism is raging around the world; stereotypes that were taboo after the Holocaust have become part of the public discourse, politically correct. Shameless libels against Jews are published, *The Protocols of the Elders of Zion*

are distributed in massive numbers, published on the Internet, sold by *Amazon*, quoted in Arabic and Moslem media, and are now the subject of vile television series that revive the blood libel and dare to show on-line the murder of a child by bearded Jews, his blood dripping into a bowl used to bake matzoth, which the Jews are later seen eating with relish. These series went out to millions of viewers in Moslem countries on prime time during the whole holy month of Ramadan. They are now shown in some European countries.

Unfortunately, Jews have become so used to anti-Semitism that many raise their shoulders in despair and repeat the dangerous expression which reminds us of the thirties in Europe: "what can we do, anti-Semitism has always existed and will always exist". Does this mean that we do nothing?

I have always thought that Jews have a kind of Richter scale of anti-Semitism: if it is 1 or 2, keep quiet, don't make a fuss. Number 3 or 4 - write a letter, lodge a complaint, hold a prayer meeting; number 5 or 6 - maybe arrange a demonstration. When it gets to 7-8-9 it is too late. We are actually reaching those numbers, even if we are in denial and refuse to admit it.

I believe that we lose the battle if we do not act when numbers 1 or 2 appear. When the first signs of anti-Semitic discourse emerged after the Holocaust, when the first Holocaust deniers went public, we ought to have cried from the rooftops. Instead we said keep quiet, these are small insignificant fringe groups, by attacking them we only increase their influence.

So, look what happened: we are at number 6 or 7 - and I am not exaggerating. It was enough to watch the Durban conference.

And now the violence! Synagogues are burned again, cemeteries are desecrated, Jews are attacked and told not to wear identifying items in the street, and we keep stock and publish statistics, whether acts of violence in a given month have increased or decreased.

By ignoring the culture of hatred and the blatant incitement spreading in the world, under the umbrella of free speech, we are playing into the hands of those who have very successfully adopted the Goebbels tactic.

But this is not all. It is now not only about persecuting Jews, it is openly about de-legitimizing the very existence of the State of Israel. Not only in the media, not only on the agenda of so called "human rights" and anti-globalisation movements and organizations, but also in international bodies like the UN, particularly in the Commission of Human Rights, where discrimination against Jews and Israel is so blatant that it cannot

be hidden anymore.

We worked hard for our organisation to attain official status in the United Nations and in the Council of Europe, and our representatives in these bodies are working tirelessly as you can follow if you take the time to read our journal *JUSTICE*, which has now been published for almost 10 years and which is recognized as a major platform for disseminating our ideas. You can also look at our Internet site.

We are not naive; we cannot turn the tide; we are fighting formidable powers which are well organised and financed.

Many of us read daily what is happening, drink our morning coffee, shrug and go about our daily business.

But some of us, unfortunately a minority, refuse to sit back and do nothing. We want to be able to look our children in the eyes when they will ask us later where we were when all this was happening.

We believe that we can make a difference.

Among other tools, we have at our disposal legal means that no other organisation is equipped to use so well. Can we afford not to use them?

Let me end on a positive note.

Most members of this Association, as well as its leaders in other countries, are active lawyers. I believe the time has come to elect a lawyer to head the Association. It is also time to hand over the leadership to a younger generation.

We searched for a long time, during which I was forced to postpone my retirement again and again so as not to harm our work.

I am very pleased to announce that a member of the Israeli

Bar, a well known and much respected lawyer, who definitely belongs to a younger generation, has agreed to stand for election as President of the Association, well aware of the burden he will be undertaking.

The Presidency of the Association, in consultation with our active members abroad, unanimously supports the candidacy of Attorney Alex Hertman for President, and is confident that we shall be placing the Association in good hands.

A change of leadership after so many years is not easy.

We urge all those who cherish the Association and wish to ensure its future activity, to give credit to the retiring leadership and support us in our efforts to make this change as smooth and as beneficial to the Association as it deserves.

Those of us who are firm in our decision to retire, are not retiring from the Association, we are only retiring from office. We are committed to continue our activity and to assist the new leadership in any way we can.

I stand here amongst you, not only as an outgoing President of the Association, but as a friend, a member of the legal community for most of my adult life, a proud Israeli and a committed Jew, and I urge you to join in the effort to strengthen our Association and assist all those who have its best interests at heart and who are committed to its aims.

I personally pledge to continue my work in the service of the Jewish people, and fully cooperate with all those who honestly share our agenda.

I call on all Jewish lawyers, in Israel and abroad, to respond to our call and to stand with us in this battle which has been forced upon us Jews, and which we dare not loose.



Judge Hadassa Ben-Itto, the outgoing President of the IAJLJ, addressing the Opening Session of the 12th International Congress in Jerusalem

“We look forward to hearing voices in Europe and the Arab and the Muslim world that advance public awareness of the vile nature of anti-Semitism and other hate crimes”

Daniel C. Kurtzer

There are many candidates for issues in this region that would qualify for the subject matter of your conference, which is “Dilemmas and Solutions.” I have chosen one, the issue of anti-Semitism, because it is both a dilemma - of how to deal with it - and fortunately there are some solutions that are being worked on now both internationally and bilaterally that can help us deal with this phenomenon.

For our part, President Bush has made his views known and the views of the United States government. In a roundtable discussion last May the President said, “It is very important for all of us to reject anti-Semitism wherever it is found.” The President’s message was carried out in reality just a few months later. You recall that after the speech by the then Prime Minister of Malaysia at the Organization of the Islamic Conference meeting, a speech that included anti-Semitic remarks, President Bush confronted Prime Minister Mahatir and said to him, to his face, that what he had said was “wrong and it was divisive and stands squarely against what I, George Bush, believe in.” The President brought the issue directly to the source of the problem.

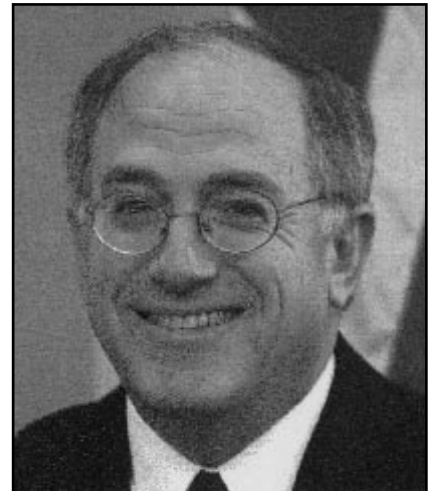
The President’s sentiments were echoed also by Secretary of State Colin Powell. He had said about anti-Semitism: “Whatever one’s calling, creed, colour or country, each of us has within us the power to speak out and to take action against anti-Semitism and all other forms of hatred directed against any man, woman or child on the face of the earth.” So United States policy is clear: we condemn and we combat anti-Semitism wherever and whenever

we see it and in whatever form it appears, and we confront other governments whenever anti-Semitism rears its ugly head.

The roots of U.S. policy, as you know, derive from the vision of our own founding fathers in the United States.

That vision was incorporated in our Constitution and our Bill of Rights. We cherish the right to worship freely, and we guard human rights and liberties. These have been incorporated and protected within our legal system.

Thomas Jefferson reflected this view particularly with respect to anti-Semitism in an 1818 letter to Mordechai Manuel Noah, who was not only an attorney but was probably one of the most prominent American Jews of his generation. Jefferson wrote to Mr. Noah the following: “Your sect by its sufferings has furnished a remarkable proof of the universal spirit of religious intolerance inherent in every sect, disclaimed by all while feeble, and practiced by all when in power. Our laws have applied the only antidote to this vice, protecting our religious, as they do our civil rights by putting all of us on an equal footing, but more remains to be done.” That from Thomas Jefferson in 1818.



Daniel C. Kurtzer is the U.S. Ambassador to Israel. He was a guest speaker at the 12th International Congress, held in March, 2004.

I am proud to say that we have done some of the things that President Jefferson said were left undone in his generation. By now nearly every state in the United States has some form of legislation protecting religious minorities as well as legislation specifically targeting hate crime offences. The United States Congress has enacted legislation in almost every sphere of hate crimes and religious intolerance. The 1964 Civil Rights Act was a model example of this, as more recently have been examples of hate crime legislation: the Hate Crime Statistics Act, the Hate Crime Sentencing Enhancement Act, and the Hate Crime Prevention Act of 1999.

The Civil Rights Act is the cornerstone of federal protection in the workplace against bigotry and discrimination. Enhancing the scope and response to intolerance and its relation to crime, Congress has enacted additional hate crimes laws for three key reasons. First, to crack and monitor crimes related to discrimination or bigotry, based on race, religion, sexual orientation, ethnicity, or disability. Second, to provide longer jail sentences, therefore deterrence for those convicted of hate crimes. And third, to criminalize hate crime activity itself. These laws have also enabled the FBI and our law enforcement institutions in the United States to focus on areas where hate crimes are most prominent.

So we fight hate crimes, we fight religious intolerance, we fight anti-Semitism at home, and we do so abroad. Every year the State Department publishes two reports: a Human Rights Report and the International Religious Freedom Report. These reports extensively monitor the practices and policies of governments around the world with respect to human rights and religious freedom.

These reports are designed, among other reasons, to give countries a tool by which to measure their own performance and to stimulate change within their own societies. In addition, U.S. representatives at home and abroad name and condemn incidents of anti-Semitism whenever and wherever they occur. Our objective is to address and thereby to remedy offending incitements and to stimulate countries to bring to justice the perpetrators of anti-Semitic hate crimes.

Let me provide some recent examples. In March 2002 an article was published in the Saudi newspaper *Al Riyadh*. They resurrected the 1840 Damascus blood libel, that hateful assertion that Jews use non-Jewish human blood in holiday rituals. The United States immediately protested, and in response, the editor of the paper issued an apology and subsequently fired the author

of the article. In 2002 the United States Embassy in Cairo, Egypt, protested the television series entitled "Horseman without a Horse" which was full of anti-Semitic myths, messages, and themes. Our Ambassador protested to the Egyptian government over the dehumanizing and inciting aspect of this television series. Unfortunately, the series itself was not cancelled but the producers did add a disclaimer in the opening segment each night that indicated that some of the events being portrayed were real and some were imaginary. They noted specifically that the series was not designed to try to prove the authenticity of the hateful *Protocols of the Elders of Zion*. This was clearly not enough, but it was a start. Subsequently, President Mubarak's senior foreign policy adviser, Dr. Osama Elbaz, published a series of articles in the influential Egyptian daily, *Al Ahrām*, in which he detailed many myths about Jews and Judaism that, he said, Arabs and Muslims must drop once and for all.

Last October during Ramadan, the domestic and international satellite television service of the terrorist organization *Hizbollah* broadcast a 29-part series, which was financed and produced by the Syrian government. This series was full of anti-Semitic and demonizing representations of Jews drawn from *The Protocols of the Elders of Zion*. Immediately our Ambassador in Lebanon and our Chargé d'Affaires in Damascus, as well as our government agencies in Washington protested publicly that such broadcasts have no place in the civilized world. Similarly, our Ambassador in Egypt reacted swiftly to the recent offensive display of *The Protocols of the Elders of Zion* at the Alexandria library. This reaction led to the removal of the *Protocols* from the library's display.

Our work is not confined to what the Administration does. Congress is also very active. Last October, for example, Senator Arlen Specter of Pennsylvania chaired a subcommittee on Palestinian education. That subcommittee witnessed commercials on Palestinian Authority Television, the official television station of the Palestinian Authority that praised suicide bombers. Since that hearing there has been some decline of incitement on Palestinian television, but not enough. Our efforts to stop such incitement and hatred continue.

So United States representatives have been active on their own but we also have been active in multilateral fora in the global struggle against anti-Semitism and in the fight for tolerance, mutual understanding, and individual rights and freedoms. For example, the United States played an active role in the Stockholm International forum for the prevention of genocide in January this

year. Our representative to that conference noted several areas of agreement in defining priorities that are designed to prevent another Holocaust.

Number one, nations must build early warning systems and use diplomacy more effectively and early enough to make a difference when anti-Semitism rears its head. Secondly, the need for justice is essential. We need to work toward bringing any perpetrator to court to deter those activities. Third, there might be exceptional cases where, when violence occurs, we have to look at military intervention as a possible remedy in order to save lives.

That conference also pointed to the importance of educating youth and the wider public against genocidal dangers as well as the need for continued cooperation among states, involving NGOs, involving UN bodies, labour, media, business, and the academic community. We worked hard with many of our allies last summer to forge a consensus in the Organization for Security and Cooperation in Europe to focus on the threat of anti-Semitism in Europe and to put in place practical measures within the OSCE in order to combat anti-Semitism. A key result is that anti-Semitism for the first time has been recognized by the OSCE as a human rights issue, not just as an issue of religious freedom. And anti-Semitism has been recognized by the OSCE as a “unique form of prejudice.”

A follow-on conference on anti-Semitism will take place on April 28th and 29th in Berlin. At that conference we expect four critical areas of concern to be addressed: first, the legislative and institutional mechanisms and government action including law enforcement; secondly, government and civil society roles in promoting tolerance; third, the role of education in ensuring that the next generation does not repeat the mistakes of their parents; and fourth, the role of the media in conveying and countering prejudice. The conference will aim to identify measures that member states can take to combat anti-Semitism and to promote tolerance. Our goal in Berlin, which is shared by many others, will be to obtain results that make fighting anti-Semitism and tracking hate crimes a major part of the OSCE structure. It is important, we believe, that OSCE members set up processes to monitor, track, and to report hate crimes. Ultimately, of course, the real test of progress will be the expansion of effective law enforcement measures to prevent and to punish such crimes.

In addition to these activities, the United States and its partners are also continuing work within the 16-nation “Task Force on International Cooperation on Holocaust Education” to promote Holocaust education in Europe. We believe this is essential to

countering anti-Semitism in Europe and elsewhere. A major focus of our efforts continues to be within the United Nations system. We as well as Israel were clearly disappointed that the Irish resolution on anti-Semitism in the 58th UN General Assembly was withdrawn. We share the view of the government of Ireland that anti-Semitism should be squarely on the agenda of the United Nations, and therefore we were pleased at the adoption of the Irish-sponsored resolution in the 2003 Commission on Human Rights on the elimination of all forms of religious intolerance including specific language on anti-Semitism.

So, President Bush, Secretary Powell, our diplomats, our leaders, and our efforts multilaterally continue to speak directly to the issue of anti-Semitism. The U.S. State Department also has a Special Envoy for Holocaust Issues: Ambassador Edward O'Donnell. This office was introduced in the mid-1990s when Stuart Eizenstat, who was then an Undersecretary of State, was leading negotiations to resolve Holocaust-related claims through compensation agreements, many of those efforts having succeeded. The special envoy's focus is on Holocaust restitution and on working to achieve a measure of justice for Holocaust survivors and victims' families.

Ambassador O'Donnell and his team are also charged with working with our allies and with our partners to combat anti-Semitism in Europe and elsewhere through promoting Holocaust education, remembrance, and research.

We look forward to hearing the results of all of these efforts. We look forward to hearing voices in Europe and the Arab and the Muslim world that advance public awareness of the vile nature of anti-Semitism and other hate crimes. We look forward to hearing the voices of religious leaders globally to sensitize their followers to practice religious tolerance, and we look forward to hearing the voices of legislators and jurists who advance the capacity of legal systems to prosecute and punish hate crimes.

Are There Viable Solutions to the Palestinian Refugee Problem?

Ruth Lapidoth

The refugee problem entails three main questions:

1. Who is a Palestinian refugee?
2. Is there a valid legal basis to their claim to a right to return to Israel, and if not - where should they be resettled?
3. Should, and if so, how should the Palestinian refugees be compensated for property left behind, and for their suffering? How should they be helped in their rehabilitation?

These questions as well as others have been tackled in various proposals, such as the draft for a framework Permanent Status Agreement that served as the basis for the Israeli negotiating team in 1999-2001, US President William Clinton's proposals of December 2000, the Statement of Principles of Ami Ayalon and Sari Nusseibah of 2002, the Geneva Initiative of Yossi Beilin and Yasser Abed Rabbu of 2003. The Geneva text includes the most detailed treatment of the issue.

The present address will review the treatment of the refugee problem in the agreements concluded by Israel and



her neighbours and will analyze the above-mentioned proposals. We will limit ourselves to a study of the question of return and resettlement. Since the Palestinians do not have a right to return to Israel - as shown in Professor Y. Zilbershat's excellent presentation (to be published in the next issue of *JUSTICE*) we will deal with resettlement as a viable solution.

Some Earlier Agreements

The refugee issue was addressed in the Framework for Peace in the Middle East signed by President Sadat of Egypt and Prime Minister Begin in 1978. It was agreed that a "continuing committee" composed of Israeli, Egyptian, Jordanian and Palestinian representatives should "decide by agreement" on the modalities

of admission of persons displaced from the West Bank and Gaza in 1967" (Article A3). It thus appears that in principle the persons displaced in the Six Day War may return, and that it was left to agree on the practicalities of their return. Generally speaking, displaced persons are those who had to migrate within the country of their residence, while refugees are those who migrated beyond those borders. With regard to refugees, it was agreed that Israel and Egypt together with other interested parties would seek to resolve the issue.

In agreements between Israel and the Palestinians (1993, 1995) the parties agreed to address the issue of persons displaced in 1967 within the framework of the quadrilateral continuing committee, the refugee issue was to be addressed in the context of the permanent status negotiations.

The Peace Treaty between Israel and Jordan (1994) contains slightly more details, including a resolution within the framework of the multilateral working group on refugees established in the wake of the 1991 Madrid Peace Conference as well as in the context of the permanent status negotiations. The Treaty also mentions UN programs and other agreed international economic programs concerning refugees and displaced persons including assistance in their resettlement (Article 8).

Dr. Ruth Lapidoth is Professor Emeritus of the Hebrew University, and Professor at the Law School of the College of Management. These are highlights from her presentation at the 12th International Congress.

In none of the above surveyed agreements is there a reference to a Palestinian right of return to Israel. Neither do the Palestinians have such a right under general international law or UN resolutions.

Practically speaking, a return of the refugees would mean the destruction of the State of Israel or the end of the Jewish state.

Hence the reverse question: where should the refugees be resettled?

Resettlement as a viable solution

The various proposals suggest rather similar solutions. Instead of dealing with each proposal separately, we will try to combine them.

1. Settlement in the State of Palestine to be established. This should be a **right of every refugee**. The modalities of their absorption are to be established by the State of Palestine. One expert proposed that even those who do not move into the State of Palestine should have the right to Palestinian

citizenship.

The other possible solutions are within the discretion of the relevant state and do not involve a right of the refugees:

2. Settlement in third countries;
3. Settlement in "host countries", namely, in those countries where the refugees are located at present;
4. Settlement in Israel.

As to the numbers to be admitted by Israel, that is to be determined by Israel at its own discretion. One text proposes that settlement in Israel should be based on humanitarian grounds. Another one suggests that in deciding how many refugees it would absorb, Israel may consider the average number accepted by other third countries.

It should be understood that no "right of return" is involved but a discretionary contribution to the process of resettlement.

According to some of the proposals, the implementation of resettlement should be entrusted to an international organ established for that purpose. As

far as possible the wishes of the refugees should be taken into consideration; they are encouraged to list more than one preference in their applications.

The resettlement would require considerable sums to be contributed by the international community (countries and organizations) and administered by a suitable Fund.

To sum up: the agreements between Israel and her neighbours have dealt with the persons displaced from the West Bank and Gaza in 1967, but the question of the refugees (mainly of 1948) has been left open for later negotiations. The various proposals on the subject recognize a **right** of settlement in the State of Palestine and also mention the possibility that other - third countries, the host countries and Israel - might also agree to admit some refugees.

The refugee problem is a sad human tragedy caused by the Arabs who started the 1948 war. It should be solved as soon as possible, perhaps even before a permanent status agreement is reached.



Prof. Ruth Lapidot addressing the Congress. Prof. Jerald Steinberg and Prof. Yaffa Zilbershats, both of Bar-Ilan University, participated in the panel

**A panel of theological experts presented three perspectives, Jewish, Muslim and Christian, on the theme “The Future of Jerusalem”.
Highlights follow**

The Spiritual Significance of Jerusalem: A Jewish Perspective

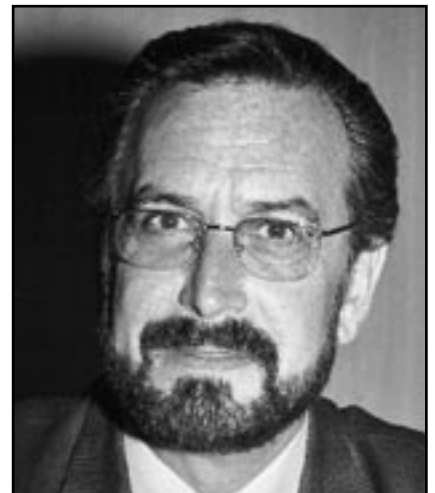
David Rosen

Scholars of religions have noted various factors that cause cities to be considered holy. There are cities that are considered sacred due to their natural location and cities that are holy as a result of the presence of objects of veneration or shrines in their midst. More usually, cities are rendered sacred in different faiths as a result of events believed to have taken place within them and often as a place where future events of the greatest consequence for humanity are anticipated. There are also holy cities - as distinct from holy places within or around them - that were either constructed to reflect a cosmic vision or which have acquired such a mythological aspect in themselves often as images of a celestial reality. All these elements are to be found in the spiritual significance of Jerusalem. While I have been asked to focus in this article upon this significance in Judaism;

Rabbi David Rosen is the International Director of Interreligious Affairs, American Jewish Committee.

Muslim and Christians will easily be able to discern the profound parallels and shared associations on this subject within their own Traditions. Learning about these, should lead us to greater mutual respect for one another and all that binds us together in Jerusalem, so that she may indeed fulfill the dream of her name - City of Peace.

As is well known, the historical relationship between the Jews and Jerusalem goes back to the reign of David when the city served as the royal center that united the disparate tribes. However, what really invested Jerusalem with spiritual significance for the Jewish people was the construction of the Temple by Solomon that gave the city its special sanctity as the place with which God chose to uniquely associate His Holy Name (*Deuteronomy* Ch.12 v.5). That location - The Temple Mount, is thus considered to have been made intrinsically holy - in fact the only real Holy Site for Judaism. For that reason, in the absence of the Temple rites for ritual purification and the precise knowledge



of the exact place of the holy of holies, Orthodox Jewish teaching prohibits Jews from entering today on to the site where the Temple itself once stood. (One might note in passing, that as a result Judaism not only poses no current threat to Islamic religious control on the Temple Mount, but in fact helps safeguard it!). Accordingly the holiness of Jerusalem is first and foremost, the emanation of sanctity from the Temple Mount which gives the whole City sanctity greater than anywhere else

beyond it. When the Temple was standing the children of Israel were obliged to go up to Jerusalem in pilgrimage three times a year (*Deuteronomy* Ch. 16 v.16 & 17). Jerusalem thus served as the focus of the spiritual unity and purpose of the people (see *Psalms* 122). Accordingly Jews continue today as in the past, to face towards Jerusalem for their prayers three times a day.

Jewish Tradition ascribes seventy names to Jerusalem, some of which are better known than others. There are those that are mentioned explicitly in Scriptures, such as Zion; Scriptural names which are identified as Jerusalem, such as Moriah; and many descriptive titles of Tradition attesting to her spiritual significance and beauty. In addition to the rich body of religious literature extolling Jerusalem's physical and spiritual virtues, the city is associated with central religious events in human history, starting with Creation itself. The foundation stone, *even hashetiyah*, was not only at the centre of the Temple, but was considered the center of the world from whence Creation had commenced and the place from which the earth for the creation of the first human being was taken. Jerusalem is also identified with events in the life of the Patriarchs. Most notable of all in this regard, the supreme Pentateuchal example of dedication to God; namely, Abraham's willingness to sacrifice to God that which was more precious for him than life itself - his son and heir. The place of Jacob's dream (which he had on his journey from home when fleeing from his brother Esau) in which he received Divine revelation and promise, is also identified by Jewish tradition with this site. Moreover in Judaism, Jerusalem acquires further cosmic significance both

as the Divine footstool underneath God's throne (and thus as the natural fulcrum, as it were, of spiritual energy in the world) and also as a mirror image of the Heavenly Jerusalem that will eventually be united with the earthly Jerusalem. This global image finds its ultimate expression in the messianic hope for the ingathering of the exiles and universal peace with the establishment of the Divine Kingdom on Earth.

Accordingly, when the Jewish people was in exile, Jerusalem served as the focus of their prayers and dreams for restoration, to the extent that both in prophetic and Rabbinic literature, Jerusalem became a symbol and personification not only of the land, but of the people itself. These hopes, that placed their trust in Divine mercy and promise, found their expression in the three daily prayer services and in grace after every meal. Perhaps the most poignant and succinct of these prayers is the blessing that we continue to recite after the Scriptural readings in the Sabbath morning service. "Have mercy on Zion, O Lord, for she is the house of our life. And deliver the grieving soul (*i.e.* the people of Israel) speedily in our days. Blessed art Thou O Lord who makes Zion rejoice with her children". Recognition of the unequalled sanctity of Jerusalem was maintained in Jewish religious consciousness as it continues to be today, through restricting certain prayers and religious rituals to Jerusalem alone, thus heightening the ideal of living in the city. However, many who were unable to realize this goal were sent for burial in Jerusalem (mainly on the Mount of Olives), both so that their final resting place should be on holy ground and above all to await the ultimate messianic resurrection at the center stage

of those final events.

The memory, meaning and hope of Jerusalem is similarly sustained in the Hebrew calendar.

No matter how far away from Jerusalem Jews may be and no matter what season it may be there, the calendar that determines their year and its festivals, celebrates the agricultural seasons of Zion. And in their prayers not only do they face Jerusalem, but they recite the order of the Temple offerings, as they were offered up on each calendar occasion, almost two thousand years ago. In addition special days of mourning for the destruction of Jerusalem and the exile, sustains the central character of the city in the spiritual life of the Jew. Moreover, at the conclusion of the two most prominent religious ceremonies in the Hebrew calendar; the holiest day of the Jewish year, the Day of Atonement, when Jews fast for twenty five hours; and the Passover meal on the first night of this seminal festival of Jewish life and history, Jews continue to recite the words that nurtured the vision throughout the millennia - "*leshanah haba'ah biYerushalayim*" - next year in Jerusalem.

Indeed Jerusalem is so inextricably part of Jewish religious consciousness and practice, as well as of its religious vision and hope, that the words of the above-mentioned Sabbath morning prayer are no exaggeration. She is indeed "the house of our life".

The Sanctity of Jerusalem in Islam: A Muslim Perspective

Mithkal Natour

Throughout the world, holy places are objects of honour and adoration, and a source of religious inspiration and spiritual renewal. Sadly, in our region, and most especially in this land, many sacred sites have become coveted and contested objects that are a major cause of enmity and strife. Judaism and Islam sanctified the same site in Jerusalem. Today, the sanctity of this site is contaminated by impure self-interests and egoism that feed the hatreds that have brought upon us wars and the killing of thousands of innocents.

Both Jews and Muslims try to deny or downplay the significance of the site to the other. I believe that one should not and cannot dispute the innermost feelings of another individual, especially a person's deepest sense of the sanctity of a particular place. Any attempt to suppress or restrain love and affection for a holy place will only strengthen it.

In Islam, a place or object becomes holy when it brings the believer closer to God. A stone can be located in the most holy or most defiled place. If it is in a holy place, it becomes holy; if it is in a defiled place, it loses its sanctity. The holiest stone in Islam is found in the southwestern corner of the Ka'aba, the most sacred mosque in the world, which is located in Mecca in Saudi Arabia. Pilgrims to Mecca kiss this stone. The righteous Khalif Omar ibn Al-Khattab, who received the keys to Jerusalem in 638, once kissed this stone and said to it "I know that you can neither



help nor hinder me, but I nonetheless kiss you because I saw Muhammad, may His memory be blessed, kiss you."

The Sanctity of Jerusalem

Jerusalem is known in Islam by the name *al-Kuds*, which is Arabic for "the Holy One." The place is holy to Muslims everywhere, regardless of their race, nationality or native tongue. It does not have 'owners' *per se*. Rather, those who live near it are responsible for safeguarding and maintaining it, and ensuring that all believers will have free access to it.

The city is not mentioned by name in the *Kur'an*, but it is referred to in *Sura* 17, called *al-Isra*, which means "nocturnal journey." This *Sura* is also known as "the Children of Israel," because most of it deals with the Children of Israel. In the first verse of the *Sura*, *al-Aksa* ("the Farthest") Mosque is mentioned: "Glory to Allah who did take His Servant for a journey by night from the Sacred Mosque

to the Farthest Mosque whose precincts we did bless, in order that we might show Him some of our signs: For He is the One who heareth and seeth (all things)." By linking *al-Aksa* Mosque in Jerusalem with the most sanctified mosque in the world - *al-Ka'aba*, this verse added a great deal of sanctity to *al-Aksa* and Jerusalem.

According to classical Islamic faith and piety, Muhammad of blessed memory was transported by night from Mecca to Jerusalem and from there the Prophet ascended to heaven. This miraculous journey, which took place in 621, constitutes the first element that established the sanctity of Jerusalem for Muslims from the very beginning of Islam. How did this nocturnal journey take place? Muhammad related that the Angel Gabriel provided him with a winged mount the size of a horse, which was called *al-Buraq* because the journey took place with the speed of lightening. He mounted the animal and instantly arrived in Jerusalem, where he tied his mount to a ring in the western wall of the mosque, as previous prophets had done. Thus, what is known in Jewish tradition as the Wailing or Western Wall is known in Islamic tradition as *al-Buraq*.

When Muhammad reached the mosque, all the prophets that preceded him were waiting to receive him. They allowed him to lead them in prayer and thus confirmed him as a prophet. From the vicinity of the holy rock (*sakhra*) in the center of the area of *al-Aksa*, Muhammad ascended to heaven and from there returned to Mecca.

The presence of the *al-Aksa* Mosque from time immemorial is the second element that gives sanctity to Jerusalem

Dr. Mithkal Natour, Professor of Islamic Law, Religious College, Baqa El Garbiya, Israel.

in Islam. According to Islamic tradition, the first house of worship of God was *al-Ka'aba*, which was built by the Angels at the dawn of Creation. Forty years later they built *al-Aksa*, which was restored in later ages by Jacob, David and Solomon and, once again, by Omar ibn al-Khattab at the dawn of Islam in the 7th century CE. For the first sixteen or seventeen months after the founding of Islam, the Prophet and his followers prayed in the direction of Jerusalem, as did the prophets that preceded Muhammad. Only later was *al-Ka'aba* fixed as the direction of prayer for Muslims.

The first mosque that Muslims built in Jerusalem after the famous nocturnal journey of Prophet Muhammad was the sanctuary that Omar ibn al-Khattab built on the foundations of the mosque that was first built by the Angels. The *al-Aksa* Mosque and the nearby Dome of the Rock as we know them today were built by the Umayyad Khalif Abd al-Malik ibn Marwan and completed in 691 by his son al-Walid.

From the beginning of Islam, *al-Aksa* has been an integral part of Muslim doctrine and piety. Muhammad included it with the two holiest mosques in Islam, namely *al-Ka'aba* in Mecca and the Mosque of the Prophet in Medina, both in Saudi Arabia. In the words of the Prophet: "One must not travel to pray except for three mosques: *al-Ka'aba*, the Mosque of the Prophet, and *al-Aksa*.

According to tradition, a prayer in Mecca is like 100,000 prayers in any other place; a prayer in the Mosque of the Prophet or in *al-Aksa* is equivalent to 500 prayers in any other place.

There are other sayings of the Prophet that exalt Jerusalem and encourage Muslims to live in the city, or at least to visit it: "He who starts his *hajj* from Jerusalem, his sins are erased as if he was born anew." Another saying: "He who gives charity in Jerusalem receives 70 times the reward he would receive in another place." Further, according to the Prophet: "He who lives in Jerusalem makes *jihad*, a holy war for God's sake against infidels." Here it is important to stress that Muslims do not consider Jews and Christians infidels. Islam affirms both Judaism and Christianity, as it is written in *Sura 2 (al-Baqarah)*, or "the Heifer": "The messenger believes in what hath been revealed to him from his Lord, as do the men of faith, each one (of them) believes in Allah, His Angels, His Book and His Messengers. We make no distinction (they say) between one and another of his Messengers."

The third factor that fixed Jerusalem's holiness in Islam is the fact that the city will be the site of the Final Judgment. Muhammad of Blessed Memory said: "This is the land of the gathering of the dead and their resurrection." The valley between *al-Aksa* and the Mount of Olives is known as Wadi Gehenna, traditionally

associated with Hell, because on the Day of Judgment all humankind will assemble on the Mount of Olives and pass to *al-Aksa* via a razor-thin bridge suspended over the Valley of Gehenna. He whose sins are more numerous than his righteous acts will plummet into Hell.

The City Today

Any political solution for Jerusalem must provide for Muslim sovereignty over the sacred sites of Islam in the city and guarantee that all Muslims will have free access to them. These holy places belong to all Muslims throughout the world and no Muslim can relinquish control over them. The Palestinians are the guardians of these places by virtue of the fact that they live in their immediate vicinity.

No Arab today wishes to see *el-Kuds* divided. I hope that the wall currently being built by Israel in the eastern part of Jerusalem is not intended to re-divide the Holy City. When we finally sign on a true and lasting peace, there should be no reason to prevent Palestinians from making the eastern part of the city their national capital. Of course, Jews must be assured that they will always be able to freely visit their holy places in the eastern part of the city. Thus, they should have control over the Western Wall and the access routes to it, just as Muslims and Christians must have control over and free access to their holy places.

Needless-to-say, there must also be fully equal services - water, electricity, roads, schools, security, *etc.* - for all residents of the city, but these are matters that politicians understand better than I do. I truly hope that we will reach the day when we can live together in security, freedom, mutual respect and good neighbourly relations in a Jerusalem that belongs to all of its residents. It is our fate as Jews and Arabs to live together in *Yerushalaim/el-Kuds*. We have had enough of animosity and war. Let us give peace a chance in Jerusalem so that the Holy One might once again truly be a source of spiritual inspiration and religious renewal.



Dr. Mithkal Natour addresses the 12th Congress. On the panel are Archbishop Constantin Aristarchos and Rabbi David Rosen

The Future of Jerusalem: A Christian Perspective

Constantin Aristarchos

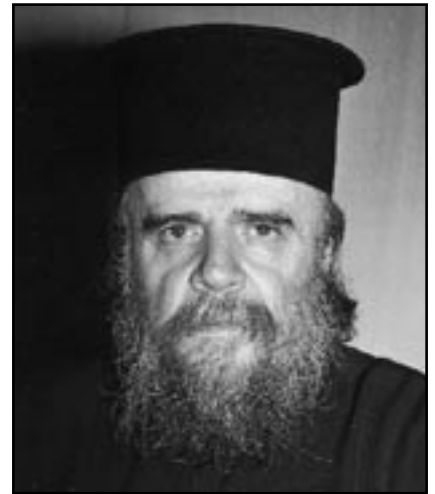
Lecturing on the future of Jerusalem requires reference to the present and to the past. Speaking only about the future of Jerusalem might give the false impression that its history starts today, whereas it is one of the most ancient cities in the world. A future structure of Jerusalem can be viable and firm only with deep foundations in the present and in the past. For this link between the future and the past I think I have the acquiescence of the sides interested in Jerusalem who support their claims by proving their antiquity in the depths of the past.

In this regard it should be said that Jerusalem has inherited from the past a positive and a negative heritage. It has the advantage and the disadvantage of being pursued by religions and nations as a religious and national center. It bears today one of the major world problems awaiting solution. Similar parallels are the unsolved problems of Cyprus and Serbia. This two day conference aspires to contribute to the solution of this problem by selecting and presenting the positive elements of the heritage of Jerusalem.

Archbishop Constantin Aristarchos is the Chief Secretary of the Greek Orthodox Patriarchate of Jerusalem.

My presentation from a Christian point of view is an attempt by someone who has lived for over forty years in Jerusalem to add a little stone to the building of a more hopeful future in it. This presentation encompasses, in so far as possible, a happy medium between various Christian opinions concerning Jerusalem without any claim to exclusiveness.

Undoubtedly, Jerusalem is historically and spiritually the mother of all Christians, since it gave birth to the events which prepared humanity for Christianity. For Christians, many of the prophets of the Old Testament lived and preached in Jerusalem. The Temple of Solomon in Jerusalem was the center of the religious life of Judaism for over a millennium. Jerusalem, "when the fullness of the time was come" (*Gal.* 4, 4), gave birth to the events which signified the inception of Christianity and marked the history of humanity. For Christians - the New Covenant of God was written in Jerusalem with all nations. In Jerusalem the church was born on the day of the Pentecost. From Jerusalem the church departed on its long journey all over the world and spread the message of the Gospel; the message of forgiveness, love and reconciliation. In Jerusalem the first Judaeo-Christian Community lived, which remains for ever the exemplary model of Christian and Jewish relations



and of human and economic equality. Due to these holy events, Jerusalem is holy for all Christians.

It is the spiritual mother of all Christians under Christian or non-Christian political sovereignty. Christians possessed political sovereignty over Jerusalem only from 325-638 A.D. During this Roman-Byzantine period the first magnificent churches of Christianity were built, the Church of the Holy Sepulchre in Jerusalem and the Church of the Nativity in Bethlehem. Many other churches were built as well in places connected to Jesus and to the Apostles' lives. Many monasteries flourished in the Judaeo desert. Among them, that of St. Sabas remains until today an exemplary

model of monastic life. All these comprise a valuable part of the cultural heritage of the Holy Land today. Christians also held short political sovereignty over Jerusalem during the period of the Crusaders.

The spiritual claims of the Christians over Jerusalem were expressed during the two thousand years of Christianity mainly through the Local Church and through the Brotherhood of the Holy Sepulchre which has been incorporated into the Jerusalemite Church since the early 4th century. To both of these, this speaker has the blessing to belong. This Church was promoted by the 4th Ecumenical Synod in 451 A.D. to the rank of the fifth Senior Autocephalous Patriarchate and, with Jerusalem as a See was granted the pastoral responsibility for the three Palaestinas of that time, the territories of Israel, Jordan and Palestinian Autonomy in terms of today. Thus, these territories of the Holy Land are not free for re-evangelization as was the view of the other Christian denominations which established themselves later in the Holy Land.

Throughout the centuries, this Church bore the storms of political vicissitudes and in its capacity of discernment survived them. Its rule of existence and behaviour was a religious and not a political criterion. According to this criterion, the Local Church, in spite of its love of Jerusalem, fled to Pella during the period of the destruction of the Temple in 70 A.D. Also in accordance with this principle, the Patriarch of Jerusalem Sophronios in 638 A.D., despite the importance of Byzantine political sovereignty over Jerusalem, delivered the city, following the defeat of the Byzantines in Caesarea and in the River Yarmuk, to Omar Hatab in order to save the lives of the its Christian and

Jewish citizens and preserve the Holy Shrines. The preservation of the Christian witness in the environment in which it was revealed under alternating political authorities is the care of the Mother Church of Jerusalem.

This Church, having suffered a long period of dispute concerning its rights in the Holy Land, especially during the Ottoman Sovereignty, finds herself since the Conference of Paris (1856) and that of Berlin (1878) in a situation of coexistence and cooperation, of a *modus vivendi* with the other Christian Communities within the framework of the *Status Quo*. This Church acknowledges the fact that the Holy City of the Christians is also the Holy City of Judaism and Islam. It recognizes the indelible religious character of Jerusalem. It recognizes the fact that in Jerusalem there is a certain religious situation formed throughout the centuries which should be respected by all sides. It is not a coincidence that the most respected Holy Sites of three religions, Judaism, Christianity and Islam, are in Jerusalem: the Western Wall, the Church of Resurrection and the Dome of the Rock. In these three

Holy Shrines are reflected the faith, the feelings, the desires and the dreams of the peoples of Jerusalem. This reality should be respected. Any attempt to act independently of this reality touches the rights of the others in life, property, peace and freedom and will be a failure.

Concerning the resolution of the issue of Jerusalem between Israel and the Palestinian Authority, the Mother Church of Jerusalem prays eagerly for a peaceful, just and permanent solution. It urges the two interested parties to tolerance and mutual acceptance. It leaves the resolution to the political capacity and discernment of the two sides with an appeal to respect and guarantee the personal, historical and religious rights of all, whatever their creed. The peace and welfare of Christians and of every citizen of Jerusalem and the Holy Land is the object of prayers and of the efforts of the Church in Jerusalem.

Thus, in such a spirit of love for our fellow man, humility and tolerance, let us behave in the earthly Jerusalem and then let us be sure that God will accept us as worthy citizens of the spiritual and heavenly Jerusalem.



Participants at the Plenary of the 12th International Congress

The Impact of the Current Security Situation on Civil Legal Practice: Commercial Transactions

Richard J. Mann

For nearly four years, the State of Israel has faced a resurgence of Palestinian violence. Approximately 1,000 Israelis have been murdered. During this same period, the Israeli economy, already battered by the security situation, has suffered as a result of the worldwide economic recession that has characterized this time period.

It is difficult to isolate these causes and determine whether the “Nablu Effect” or the “Nasdaq Effect” has had the greater impact. Empirical evidence indicates to me that the world economy is the more important factor influencing the Israeli commercial environment. For instance, despite the absence of any dramatic improvement in the security situation, the business community in Israel has experienced a significant improvement in the past few months as the world economy, and in particular international capital markets, begin to improve. This improvement can be measured in private equity investments and especially in initial public offerings and secondary offerings in the United States and in Israel.

For those of us engaged in commercial legal practice, the recent challenges have



been significant, regardless of the primary cause. A number of observations related to the security aspect of this situation follow. Some are general in nature, others more specific. What unifies them is recognition that commercial lawyers, because of our focus on promoting and facilitating business growth and activity, must be creative and flexible when acting in an environment of uncertainty and insecurity.

Observation No. 1: Fear of Flying

The first and foremost obstacle facing prospective commercial partners considering investments or activities in Israel is the perceived danger involved in visiting Israel. Physical presence at the site of a proposed investment or joint venture

provides a level of legal and commercial comfort that cannot be readily replaced, even in the age of advanced telecommunications. Unless there is no alternative, few will transact in a location that they are unwilling to visit. Furthermore, in times of government warnings regarding travel to a country or region, such as US State Department warnings, company policy and insurance considerations may limit the ability to travel.

Observation No. 2: Innocents Abroad

The cost of capital from abroad for Israeli companies has increased because of the security situation in Israel. In the past, Israeli companies were thought to have suffered from a valuation discount because of their location in Israel. This discount appeared to be disappearing but may now be rebounding. A similar effect is manifested also in the form of country risk in commercial lending. In capital markets, during the latter part of the 1990's, the prevailing perception was that the discount applied to Israeli companies seeking to raise funds in international markets was slowly disappearing. Traditionally it had been thought to be as much as 5-7%. Because of the collapse of international capital markets beginning in 2000, it is difficult to measure that discount today. However, perhaps as an indirect indicator of this measure, private equity investors often strongly encourage Israeli companies to restructure as US

Richard J. Mann leads a team of attorneys who focus on representing Israeli and foreign clients in implementing complex transactions, and leads the firm's technology and traditional practice group.

companies (Delaware or otherwise) in order to present a US face to the world. There may be many reasons for this phenomenon (including corporate and tax considerations), but the unattractiveness of Israel in some circles surely plays a role. In commercial lending, the cost is clearer. Israeli companies which may have found themselves in the past to be attractive borrowers, today face prohibitively high interest rates from most international lenders. In an economy like Israel's which suffers from limited lending capacity and high regulation, the inability to arrange foreign participation in lending syndicates poses a tangible challenge.

Observation No. 3: The Best Offence is a Good Defence

One of the perceived risks from doing business in Israel is the risk of a terrorist attack at a business partner's facility, which undermines the ability of the business partner to operate. In the information technology and technology licensing spheres, the risk is often focused on the protection of proprietary source code or technology needed to support the licenses granted. License holders have demanded from time to time that back up source code be deposited outside of Israel. This can be achieved relatively easily, but there can be additional cost and disclosure risk involved. In a tragic footnote to the 9/11 World Trade Center disaster, a company residing high up in one of the towers had specifically required an Israeli company to deposit technology source code in a safe in the tower so as not to be dependent entirely on possible events in Israel. In addition, Israeli companies, like their counterparts worldwide, face increasing costs of implementing back-up support systems. These may be contractually mandated to ensure uninterrupted service even following disruptive activities, or may be just best practice to protect a business operation. But duplication and back-up do

not come without a cost which must be built into the price of goods and services, impacting competitiveness.

Observation No. 4: Pride and Prejudice

We often take for granted that Israeli companies will not be able to compete in many markets in the world because of political considerations. The economic costs of the boycott are very real, and felt in many markets, particularly for Israeli products aimed at developing countries. In the last few years, as Israel's perception in the world has declined, the informal embargo of Israeli goods has regained momentum. A recent campaign in Belgium showed a picture of a Jaffa orange, one of Israel's most identifiable exports, being squeezed and blood dripping out, for example. Products produced in Judea, Samaria, Gaza and the Golan Heights now frequently require special labeling, and are not permitted the "Made in Israel" label. When given a choice, a customer may opt for the non-Israeli option if only to avoid any local backlash.

Observation No. 5: War and Peace

Lawyers are always tested when things go wrong. During times of great uncertainty, especially when combined with economic downturn, the possibility of stumbling is greatly increased. Among the manifestations of this observation is the increased focus on contract provisions that were often considered boilerplate in the past. Issues that may arise include (a) A state of war: How does one define Israel's current situation? If it is war, does that excuse an Israeli party from contract performance? Presumably, in most instances, it would be neither wise nor appropriate for an Israeli party to raise this defence. However, during the period leading up to the Iraq attack, for example, Israeli exporters experienced difficulties in delivering products on

time because of the significant reduction in incoming flights and shipments, and the unwillingness of many crews to stay overnight in Israel during that period. The line between war and non-war (peace is not relevant in this context) can be gray. (b) Venue: Choice of venue for court actions or arbitrations has frequently been a subject of negotiations. Israeli companies have generally been required to compromise on a US location, or a European site such as London or Geneva. Unfortunately, the negotiating balance has shifted even more because of the security situation, and more and more Israeli parties are faced with the potential cost and inconvenience of litigating abroad.

Observation No. 6: Around the World in 80 Days

One of the earliest effects on existing business relationships between Israeli companies and their international counterparts was the shifting of meetings, which would otherwise have been held in Israel, to locations outside of Israel. This impact was felt both at the level of board of directors meetings, and at ongoing project management reviews. Israeli companies were frequently forced to incur additional expense and the loss of valuable management time. Common locations included Cyprus and Italy because of their proximity and perceived security. Often meetings were held at airport hotels to which executives flew in and out on the same day. When all parties agree as to location sites, the issue was less burdensome. However, in drafting commercial and shareholder agreements, it has become important to focus on the mechanisms for setting meeting sites, and the notice necessary to arrange attendance. The ability to conduct meetings remotely, by teleconference for example, is crucial. This was particular true in the period leading up to the American attack on Saddam Hussein where incoming travel to Israel virtually stopped.

The Use of the Claim of Israel as a War Zone for not Returning Abducted Children under the Hague Convention

Irit Kohn

International child abduction is a phenomenon that has become widespread over the years. Advancements in methods of transportation have simplified international travel, making the world a smaller place. As a result, the world has seen an increased number of relationships and marriages between citizens of different countries and children that are born as a result thereof. Likewise, it is not uncommon for couples to travel abroad for work or study purposes and bring their children with them or have children born to them while abroad. Subsequent breakdowns in these relationships and a desire on the part of one party to return to their "home" state have therefore resulted in an increased number of abductions of children beyond international borders.

The international community recognized that it was preferable to combat this international phenomenon in the civil framework, rather than in criminal proceedings, through inter-country cooperation. As a result, the Convention on the Civil Aspects of International Child Abduction was concluded on 25 October 1980



at The Hague. The State of Israel joined the Convention on 1 December 1991, and incorporated almost all of the articles of the Convention into its internal law by enacting the Hague Convention Law (Return of Abducted Children) 5751-1991 (hereinafter: the Hague Convention Law). Today there are 74 member countries.

The goals of the Convention are set out in Article 1:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State

are effectively respected in the other Contracting States.

The objective is to bring about the immediate return of the child to his habitual residence, as the courts of that country are the appropriate courts to deal with the subjects of custody and access and all matters concerning the child.

The Convention provides the mechanism and framework for requests from one contracting state for the return of children abducted to another contracting state. It requires that each Contracting State designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. Pursuant to the Hague Convention Law, the Central Authority for Israel is the Attorney General, who in turn delegated this authority to the Department of International Affairs, Office of the State Attorney, Ministry of Justice.

In addition to an application being made by a Central Authority

Adv. Irit Kohn is the Director, Department of International Affairs, Israel's Ministry of Justice. At the 12th Congress, Adv. Kohn was elected Vice-President acting as Coordinator with International Bodies. She would like to express her deepest gratitude to Mrs. Leslie Kaufman, without whose assistance she could not have brought this article to fruition.

for the return of a child, Article 29 of the Convention provides that a person/institution/body may also apply directly to the judicial or administrative authorities of a Contracting State.

It should be pointed out here that there are two possible forms of “abduction”. One is what is termed “wrongful removal”. This occurs when a person removes a child from his place of habitual residence without the consent of another person having custodial rights. As almost all of the cases involve disputes between parents, we shall discuss the matter in this context. The other type of “abduction” is what is termed “wrongful retention”. This occurs when, for example, a parent travels with a child to another country for a specific period with the consent of the other parent and is to return at a specified time, however at the end of that period she or he refuses to return and retains the child in the other country despite the objection of the other parent.

In order for a parent to establish that there has been a wrongful removal or retention under the Convention, he must meet the conditions set out in Article 3 - specifically that the country from which the child was removed/retained was the child’s habitual residence, that the parent had custodial rights under the laws of that country, and that his or her custodial rights were actually being exercised at the time of the removal/retention.

If these requirements are met, Article 12 of the Convention then provides that upon an application to the court in another Contracting State for the return of the child, the court shall order the return of the child forthwith. (This section differentiates between applications made within one year of the abduction and beyond one year, but for the purposes of this article these sections shall not be discussed.)

While Section 12 speaks of the obligation to order the return of the child, life shows us that not everything is black and white, and that there are situations where the return of a child might not be justified. The Convention addresses this by providing a number of exceptions which, when proven, allow the court to refuse to order the return of the child.

The exceptions are set out in Articles 13 and 20. Those articles provide as follows:

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

a) the person, institution or other body having the care of the

person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.

As was stated by Professor E. Perez-Verain her “Explanatory Report”, *Hague Conference of Private International Law, Acts and Documents* (1980), vol. 3, 434,

“...(the exceptions) to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter.”

A vast body of case law has emerged with respect to claims that have been made under Article 13(b) in particular, in which the “taking” person has tried to oppose the return of the child. Claims that have been regularly raised have included, for example: that the “taking” parent refuses to go back to the country of habitual residence and then claims that the resulting separation from that parent will cause severe harm to the child; that there is a lack of financial resources in the country of habitual residence; that the taking parent fled because of violence on the part of the other parent. Courts in Israel and other countries have repeatedly interpreted the exceptions in the narrow manner as stated by Professor Perez-Vera above. An often-quoted case in this respect is the decision of a United States court in the case of *Friedrich v. Friedrich* U.S. Court of Appeal, 6th Cir, No. 2, 78 F.3d 107, in which the court stated that:

“We believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g., returning the child to a zone of war, famine, or disease.

Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”

For the purpose of this article we shall focus on what has been termed the “war-zone” claim as referred to above, a claim that has been and is still being raised by abducting parents *vis-à-vis* the current security situation in Israel.

Since time immemorial, Israel has been fighting for its right to exist as an independent Jewish state. Even since declaring its independence in 1948, Israel has had to continue to defend itself, on and off, from enemy attacks and from terrorism. Since the most recent *intifada* broke out in September 2000, a number of cases have arisen wherein a parent has abducted a child from Israel and then claimed that Israel is a war zone and that therefore to return the child to Israel would place the child in an intolerable situation, as contemplated by Article 13(b).

In cases where such a claim was raised or is raised, the Central Authority for Israel has felt it incumbent upon itself to intervene, in coordination with the Ministry of Foreign Affairs and the National Council for the Child (a non-governmental organization whose mandate is to protect and advance children’s rights), and to provide its opinion as to why the current situation in Israel does not meet the requirements of the “grave risk of harm/intolerable situation” exception in Article 13(b), and therefore this claim should not be allowed as a basis to refuse to order the return of children to Israel.

In its opinion, the Central Authority noted that such claims had been raised even in previous years, including a 1996 case, *Freier v. Freier*, 969 F. Supp. 436 (E.D. Mich. 1996), in Michigan, United States. At that time, the court, in dismissing the claim, noted that schools and businesses were open, that people could enter and exit the country freely, and that despite the abducting mother’s expression of fear and anxiety over returning to Israel, she chose to live in Israel for over fourteen years and raise her children there.

The Central Authority stated in its opinion that the same facts analyzed by the Michigan court are applicable today. Israeli citizens and residents continue to lead normal lives and to go about their daily business. Shops and businesses continue to operate as normal. Kindergartens, schools and universities have remained open continually. Parks and recreational facilities are open to the public, and cultural, sporting and leisure events have continued without interruption (all with increased security). The

public transport system continues to operate as usual. Airports are open, and both citizens and tourists can enter and exit the country freely. There has been no evacuation of children or other citizens from the country. On the contrary, there continues to be a steady stream of people wishing to immigrate to Israel from various countries. Educational programs for foreign students are continuing to operate. All government offices continue to operate, as do the courts and the social welfare services. It is noteworthy that there has been no decrease in the average annual number of incoming cases (abductions to Israel) being processed by the Israeli Central Authority in the past three years. Clearly, one would expect a significant decrease in abductions to Israel if the situation there were to present a “grave risk”.

The Israeli Central Authority provided its opinion to the Central Authority of the country to which the child was abducted, and requested that the opinion be brought to the attention of the court hearing the appeal of the application for the return of the child. In addition to this opinion, the Israeli Central Authority further provided an opinion of the Director General of the National Council for the Child in Israel, Dr. Yitzchak Kadman. In his opinion, Dr. Kadman states that “Being highly familiar with the state of children and youth in Israel, [the Council] can unequivocally determine that despite the situation prevailing in the State of Israel today, and despite the difficulties involved, it cannot be determined in a far-reaching and general manner that children in Israel are at severe risk as formulated by Article 13(b).”

Dr. Kadman further states that despite the situation prevailing in Israel, children continue with their daily routine and that there is no basis to the sweeping assertion that their welfare is in severe danger. He noted that educational settings have continued to operate as usual, as have youth movements, community centers and enrichment classes. Therapeutic entities and hot lines have been set up where necessary. He further noted that cultural, sporting and leisure events continue on a regular basis, and that families continue to frequent shopping malls. He concluded that there was no basis to the argument that children kidnapped from Israel should not be returned due to an anticipated severe risk to their welfare should they return, and that to allow this argument will thwart the objective of the Convention in ensuring the right of children not to be kidnapped from their place of residence.

As a result of the above intervention, most of the earlier lower court decisions refusing to return children to Israel on the basis of the “war zone” defence were overturned on appeal. Furthermore,

the last several recent cases have been dismissed by the courts of first instance hearing the cases.

Countries that have dismissed this defence include the United States, England, Canada, France, Germany, Argentina, Denmark, Belgium and Holland. The following is a summary of those cases.

United States

In the case of *Silverman v. Silverman*, the United States Court of Appeals for the Eighth Circuit, in its judgment of August 5, 2003, overturned a lower court decision which refused to order the return of two children to Israel, based in part on the lower court's finding that Israel was a zone of war and that the children would face a grave risk of physical harm if returned. The Appeal Court cited the *Freier case* above, and noted that "No subsequent case has found that Israel is a "zone of war" under the Convention. In fact, there does not appear to be another case that finds any country a "zone of war" under the Convention. Nor does the District Court cite any evidence that these children are in any more specific danger living in Israel than they were when their mother voluntarily moved them there in 1999. Rather, the evidence centered on general regional violence, such as suicide bombers, that threaten everyone in Israel. This is not sufficient to establish a "zone of war" which puts the children "in grave risk of physical or psychological harm" under the Convention."

In *Bilu v. Bilu*, the Superior Court of Arizona, Maricopa County, in its judgment of May 7, 2003 also rejected the "war zone" defence. It states that "the weight of the evidence established that life is "as normal".... With people free to come and go, and businesses, schools, government buildings and restaurants open and operating."

England

Stock v. Stock is a decision of the Court of Appeal in England, given on July 3, 2002. The lower court had rejected the mother's claim that Israel is a war zone. The court noted that life continues in Israel, that "there is no organised state evacuation or mass exodus. There is no direct threat to [the child] or her parents. No one has threatened them specifically. The threat, if there is one, is one of a general risk of harm, of being caught up in an unpredictable attack, being in the wrong place at the wrong time." The court concluded that "while the population of Israel has to be watchful, and there must be anxieties and uncertainties in everyone's mind who live in that country, the risk of direct harm

befalling [the child] as a result of acts of terrorism is not as great as the mother would wish me to believe."

The mother appealed, claiming in part that as she was the child's primary care giver she would be forced to return with the child. She claimed that she was psychologically incapable of coping with the current security situation and that her fear and distress would communicate itself to the child thereby causing the child grave harm.

The court stated that the question is not whether there is a state of war in Israel but whether there is a grave risk of harm to the child if she is to be returned there. The court took into account the mother's situation, but stated that there was no evidence that the mother would not receive satisfactory medical attention. It held that the mother did not satisfy the court that the child was at grave risk of harm from the breakdown in the mother's health. The test was not whether the return would place the mother in an intolerable situation, but rather the child, and in this case the mother did not meet this burden.

Canada

The Superior Court of Justice in Ontario in the case of *Cornfeld v. Cornfeld*, after reviewing the evidence submitted, rejected the abductor's argument that returning the children to their home in Israel would pose a grave risk of harm under Article 13(b), and ordered the children returned to Israel. The court stated that in measuring the risk to determine whether or not it is "grave", it is important to consider the environment to which a parent or the parents voluntarily exposed the children previously. The parents had lived in Israel for many years and the children were born and raised there. There were risks of harm during this period, yet the parents did not seek to remove their children from that environment. The court noted that the mother had not taken any steps in Israel to have the Israeli courts determine whether a move out of Israel was appropriate. The court held that "in order to successfully invoke article 13(b), the Respondent must establish on a balance of probabilities that there is a very strong likelihood that harm will occur. The court was not satisfied that the onus had been met.

The court further noted that the same claim had been dismissed by courts in other countries, including the *Freier case* in the United States (see above), and the *Altheim case* in Argentina (see below).

The mother appealed the court's decision, however her appeal was dismissed and the children returned to Israel in December 2001.

France

In the case of *Azoulay v. Azoulay*, the abductor raised a similar argument, pursuant to Article 13(b). The Tribunal De Grande Instance de Paris, Affaires Familiales, in a ruling dated December 21, 2001 rejected this defence and ruled that the child should be returned to her home in Israel. The court noted that the political situation has always been tense ever since the creation of the State of Israel in 1948, and that despite this states of affairs the mother lived in Israel permanently, and the child had spent her whole life there prior to being wrongfully removed to France. The only evidence that the mother brought was of a state of general danger in a time where functioning of everyday life is assured, means of public transport are functioning, and educational establishments are open, and the Director of Security of the Ministry of Education attested that in the area of the child's school there was no terrorist attack. The mother filed an appeal, which was rejected by the Appeal Court.

Similar arguments were raised in the cases of *Zenou v. Zenou*, *Zaouch v. Zaouch*, *Haviv v. Haviv* and *Ben Said v. Lebouef*. In each instance the French court rejected this argument and the children were returned to Israel.

Germany

On October 2, 2003 the Palitinate Higher Regional Court of Zweibrücken in the case of *Weis v. Zait*, rejected a mother's appeal of a lower court order ordering the return of a child to Israel, one of her claims being that Israel is a war zone. The court noted that while the security situation had worsened in recent weeks, "Israel's security situation has been strained, to a greater or lesser degree, for many years and this was particularly true at the moment when the Defendant decided to live permanently in this country and even to raise a family here. Conditions have not worsened considerably since. Israel is by no means a region of war or a similar crisis where a responsible person would avoid living. If certain rules are observed and the advice of the competent security authority is followed, everyday life in Israel may be considered as normal, even against the background of the political situation, which has been strained for many years. Taking into consideration these external conditions of life, the Defendant made her decision willfully, not only for herself, but also for her child, and she must accept all the risks which admittedly arise therefrom."

Likewise, in a decision dated 12 February, 2001, of the District Court of Zweibrücken in the case of *Watkins v. Watkins*, the court,

in rejecting a similar claim, stated that "the violent disturbances in the Near East occur not only since October 2000 but already at a point in time when it was in accordance with [the parents'] lifeplan to live in Israel."

Argentina

In *Altheim v. Altheim*, the court in Argentina, rejected the same type of argument raised by the father. The court reasoned that terrorist acts based on police, national and religious intolerance occur all around the world, even in Buenos Aires where the father currently resides with the child. The court stated that if the father felt that living in Israel would pose such a grave risk of harm, he would not have moved there with his family in 1997. The court also noted that Israel has lived in a state of conflict with its Palestinian neighbours for years, over periods of greater and lesser conflict, and despite this, Israeli citizens continue with their daily lives.

Denmark

In the case of *Shapira v. Barse*, the City Court of Vejle, in its decision of December 7, 2001, rejected this same claim. The court noted that the situation in Israel had not changed significantly since the mother first came to Israel or since 1994 when the child was born, or since September 11, 2001. It held that the situation in a state in which there are terrorist attacks or where there is a danger of a future terrorist attack does not in itself constitute a real and serious danger to the mental and physical health of a child. The court noted that in recent weeks there had been Palestinian suicide bombers in a number of cities in Israel, and that the Israeli army had taken retaliatory measure, both of which had led to incidents of fatalities. However, since the start of the *intifada* in 2000 the security situation had not changed significantly, therefore the danger of terrorist attacks is only general and it does not justify the parent removing the child from the country. The mother appealed the decision, however her appeal was rejected.

Belgium

On 17 April, 2003 the Court of First Instance of Brussels granted a mother's request for the return to Israel of her two children, rejecting the father's claim based on the security situation in Israel. The court noted that the international jurisprudence showed that the majority of cases acknowledged that a delicate situation

did exist in Israel, but that this did not prevent its citizens from leading normal lives, it did not prevent schools and businesses from functioning normally, and it did not prevent citizens from entering and leaving Israel. The reasons raised by the father (which related in part to the threat of an attack by Iraq on Israel as a result of the United States war against Iraq) did not show any special physical or psychological danger to his children, but rather a general context under which the population lives. The court noted that Israeli citizens are not leaving *en masse* due to the situation. The court felt that the mother was in a position to know to what danger she might be exposing her children, as she, contrary to other Israelis, had the option to leave Israel with the children, based on their Belgian citizenship. It felt that the mother was best able to draw conclusions as to whether there was a real danger in Israel. Furthermore, the court felt that the Israeli courts were the proper courts to assess the situation in Israel, taking the best interests of the children into account.

Holland

On 2 December, 2003, the District Court of Haarlem granted an application by a father in Israel for the return of his eight-year-old son. The court rejected the mother's defence based on the situation in Israel, relying both on the position of the Central Authority for Israel in its opinion, as well as the opinion of the Director General of the National Council for the Child. The court held that it was not sufficiently demonstrated that the situation is so dangerous that the exception under Article 13(b) applies.

Countries that have allowed the claim

While the overwhelming majority of countries have held that the "war zone" claim fails to meet the requirements of Article 13(b) of the Convention, two countries have refused to return children to Israel on the basis of such a claim. Those countries are Australia and Spain. In the Australian decision of *Genish v. Department of Community Services*, a mother appealed to the Full Family Court of Australia a lower court decision ordering the return of two children to Israel, despite her claims concerning the situation in Israel. She introduced further evidence at the appeal hearing, specifically a tourist travel advisory issued by the Department of Foreign Affairs and Trade, which in its open line stated that "Australians should defer all travel to Israel." The parents lived in and operated a hotel/restaurant complex in northern Israel. The travel advisory stated that all population centers in Israel were at a very high risk of terrorist attacks, and that targets in

the past had typically been areas where large numbers of people gathered, including hotels and restaurants. Despite evidence from the Commander of Security Services of the area in Israel in which the family lived, which stated that that area was one of the most secure and trouble free in Israel, the court relied on the travel advisory and, in its decision of 27 May, 2002 refused to return the children to Israel.

The Israeli Central Authority protested the appeal court's decision to the Australian Central Authority, on two bases. Firstly, it stated that the travel advisory should have been irrelevant, as travel advice for tourists should have no bearing on whether or not to return children to their place of habitual residence, to the country in which they were born and had led ordinary lives as citizens. In addition, immediately subsequent to the issuing of the decision, the Israeli Central Authority learned that three weeks prior to the decision, a new, downgraded travel advisory had issued, the opening line of which stated that "Australians should consider carefully their need to travel to Israel at this time." It therefore was of the view that the decision of the Full Court was based on factual error (the out-of-date travel advisory), which led to an erroneous decision. It requested that the matter be brought before the Australian courts on a motion to reconsider or though an appeal to the High Court.

The Australian Central Authority advised that no application for special leave would be made to the High Court, as they believed that the chance of success was negligible. The Minister of Justice of Israel at the time then wrote to the Australian Justice Minister, noting that the new travel advisory had not been brought to the attention of the Full Court prior to their decision, and asking for the Minister's intervention. Unfortunately, there was nothing that the Australian Justice Minister could do in the matter.

The Israeli Central Authority remains of the view that the decision of the Australian court is erroneous and should not be used as a precedent, for the reasons set out above. The decision further flies in the face of the overwhelming majority of decisions from several countries which held that the situation in Israel does not constitute a grave risk within the meaning of Article 13(b) of the Convention. This includes countries where travel advisories had also been in effect at the time of the court's decision, including the German case of *Zait*, cited above.

In the Spanish decision of *Menahem v. Menahem Ramirez*, the Judge of First Instance of Barcelona, on 15 January, 2002 dismissed a father's request for the return of his child to Israel, basing his decision in part on what he described as the "exceptional

circumstances” existing at the present time in the State of Israel, which in his opinion was made even more serious due to the father being a career officer in the Israeli army. (The court further gave great weight to the fact that the mother had exercised custody in an effective and uninterrupted manner since the child’s birth, while the father had done so for only eight months - however it must be noted that the mother abducted the child when she was eight months old, therefore it was for this reason only that she exercised “effective and uninterrupted custody!!”).

The decision was appealed to the District Court of Barcelona, however the appeal was dismissed. It is the view of the Israeli Central Authority that this decision should also not be relied upon as a precedent. Like the Australian decision, it is in direct contravention of the prevailing international jurisprudence on the issue. Furthermore, the “career army officer” reasoning can only be viewed as a red herring, as there was no evidence to prove or even suggest that the father’s employment placed the child in danger. To allow the defence to succeed in such cases would severely erode part of the foundation of the Convention.

Summary

As is evidenced by the case law, the courts in at least eight countries have consistently rejected the defence lodged by the abducting parent that returning the child(ren) to their home in Israel would place the child(ren) at grave risk of harm under Article 13(b). The courts reasoned that general statements made by the abductor regarding terrorist incidents in Israel, even if “supported” by news reports or foreign ministry warnings were, in and of themselves, insufficient to demonstrate that return to Israel would place the child(ren) in imminent harm of physical danger, within the meaning of Article 13(b) of the Convention.

There must be proven a specific risk to the particular children, not just a general risk to the population. A common thread that appears in these decisions is that the situation in Israel is not new - it has basically existed off and on since the creation of the state in 1948. In the cases, the parents had lived in Israel for several years, if not all their lives, and had chosen to give birth to and raise their children there, or to move there with their children and make it their home. The parents had voluntarily chosen to expose their children to the situation there despite knowing the possible risks, and had never sought to leave before. Therefore, the parents could not now suddenly take advantage of the situation and use it as a basis to justify trying to unilaterally change the child’s place of habitual residence.

The proper course of action would be for that parent to file an application in the court of the country of habitual residence seeking the court’s permission to relocate with the child. That court is the court that will have the best evidence available to make such a decision, including, if necessary, expert evidence from psychologists, social workers, *etc.*

After the recent events in the United States, Spain, and other countries, terrorism today is a worldwide problem, with terrorist attacks being perpetrated against civilians in many countries. Under the Hague Convention, the issue is not which country is the “safest” or “best” country for the child - (that determination should be made in the country of habitual resident of the child) - the issue is which country is the child’s habitual residence. Any subsequent decisions concerning the custodial framework and country of habitual residence of the child should, barring any proven exception, be made by the courts of the country of habitual residence, based solely on the principal of the best interests of the child.

The failure to return a child to her country of habitual residence, based on terrorist incidents which occur in that country, without proof of grave risk of harm to the child, threatens to undermine the very cornerstone of the Convention - the prompt return of children to their homes.

It is hoped, in the interests of protecting children and the aims of the Convention, that should this claim be raised in future cases, the courts hearing those claims will continue to follow the predominant opinion of almost every court that has dealt with the claim, and order the return of children to their habitual residence in Israel.

“He may not leave the Sanctuary”

Aviad Hacoen

Freedom of movement has, for a long time, been recognized as a fundamental human right. This freedom is reflected in the individual's ability to move freely from place to place, to live where he desires, and to leave or enter the country at will. In the modern discourse on human rights, it is an expression of the individual's independence and liberty.¹ At the same time, as with other rights, it is not absolute; it must be balanced against other fundamental rights, such as the security of the state, public order, property rights, and so on.

The idea of restricting an individual's freedom of movement can be seen from a number of different perspectives.² Clearly, the most serious infringement of a person's liberty would be his imprisonment as a result of a judicial sentence or arrest warrant. On a lower level would be to restrict a suspect's movements to a particular location, commonly referred to as “house arrest.” Less serious would be to require that a person remain in a particular town or city. Even less restrictive would be to restrict a person's movement by forbidding his entry into a specific place. The next level down would be to prevent a person from leaving the country. (This may apply to someone accused of a crime,³ or to someone who is legally required to pay some debt, in which case the intention is to protect the property rights of the creditor⁴). Finally, the least restrictive level would be to forbid entry into a **specific country**, such as enemy territory.

Alongside these more general restrictions, there are, at times, restrictions on freedom of movement for a specific period, both by virtue of law and by virtue of judicial decisions. Such restrictions might be applied, for example, during demonstrations or during

visits by foreign dignitaries, either to ensure public order or to protect the well-being of those taking part in the demonstration or of the visiting dignitary and his party. It goes without saying that everyone's freedom of movement is restricted to a certain extent when traveling on the roads, to protect the welfare and



1. In Israeli law, the right to leave the country unimpeded has been recognized as an independent right. In other legal systems, such as United States constitutional law, it is derived from the general principle of freedom. See Y. Zilbershats, “Right to Leave Israel and its Restrictions on Security Grounds”, Israel. See A. Barak, *Parshanut BaMishpat - Parshanut Hukatit* [Interpretation in the Law - Constitutional Interpretation] (Jerusalem, 1994), p. 428 (Heb.), and note 164 *ibid.*; see also: Y. Zilbershats, “*Zechut HaYetziah MiMedinah*” [The Right to Leave a Country], *Mishpatim* 23 (1994) 69; *idem.*, “*Ikuv Yetziah MeHaAretz al-pi Tzav shel Beit Mishpat*” [Preventing a Person from Leaving a Country by Court Order], *Mechkerei Mishpat* 12 (1995) 71.
2. High Court of Justice, *Sheikh Raed Salah et al. v. Minister of the Interior* (unpublished); comments of Justice Turkel.
3. See Misc. Criminal Motions 6654/93 *Binkin v. State of Israel*, 48(1) P.D. 290; Misc. Criminal Motions 1986/94 *State of Israel v. Amar*, 48(3) P.D. 133.
4. For the perspective of Jewish law on this issue, see E. Shochetman, *Seder Hadin* [Procedure] (Jerusalem 1988), p.412f; E. Ben-Yitzhak, “*Ikuv Yetziah Min HaAretz*” [Restriction of Exit from the Country], Ministry of Justice Parshat Hashavua sheet, *Vayetze*, No.99, 5763/2002.

Aviad Hacoen is Director of the Center for the Teaching and Study of Jewish Law at “Sha’arei Mishpat” College. He teaches Jewish Law and Constitutional Law at the Hebrew University of Jerusalem and at “Sha’arei Mishpat” College. Perry Zamek translated this article for *JUSTICE*.

safety of the public. At other times, freedom of movement may be set aside in favour of freedom of religious expression, or the desire to avoid offending “religious feelings”⁵, as in the closure of streets to vehicular traffic on Shabbat.

Freedom of Movement - A Constitutional Right

With the advent of Section 6 of Basic Law: Human Dignity and Liberty, the right to leave the country was established as a constitutional right. The provisions of the law are simply stated: (a) All **persons** are free to leave Israel. (b) Every **Israeli national** has the right of entry into Israel from abroad.

Although the right of movement **within Israel**⁶ is not explicitly stated in the Basic Law, it has been argued that this omission does not in itself establish the absence of such a right. On the contrary, it is recognized in Israeli law as a fundamental right. In any event, it is reasonably well established that even those laws that were already in force prior to promulgation of the Basic Law must now be interpreted in light of that law. Thus, the courts have ruled:

The right to leave the country, which is in fact part of the general right of freedom of movement, has achieved, with the adoption of the Basic Law, a normative, constitutional, supra-legal status. Therefore, the import of this right, and the considerations inherent in it, has increased in Israeli law as compared with the period prior to the Basic Law. This increased importance of considerations of freedom of movement and exit from the country may find expression in the interpretation of laws granting specific rights to issue orders preventing exit from the country.⁷

In recent years this issue has often been dealt with before the courts in Israel. At times the cases related to preventing debtors from leaving the country, so that they could not escape paying their debts. Other cases related to preventing individuals from leaving the country, out of concern that they might harm the security interests of the State.⁸ At times restrictions were placed on individuals' movements within the country, either by means of administrative detention or by the courts restricting the areas in which they could remain or reside.

I should like to briefly consider this issue from the point of view of the Jewish legal sources. However, rather than repeating what has already been covered by others - issues such as preventing debtors from leaving the country or restricting the movements of criminal suspects by means of detention or arrest - we will look at restrictions based on other considerations.

The Fundamental Principle: “Proclaim Liberty throughout all the Land unto all the Inhabitants thereof”

As in other issues in Jewish Law, there is no single text or source dealing with freedom of movement and the restrictions that may be placed upon it. This issue is buried in dozens of other passages, and it is from these that we need to derive the fundamental principles and the various exceptions that might apply to them.

The emphasis on freedom of movement as a fundamental aspect of human liberty is reflected in a verse that appears in the Biblical passage dealing with the Jubilee (and which is inscribed on the Liberty Bell): **“Proclaim LIBERTY throughout all the Land unto all the Inhabitants thereof”** (Lev. 25:10).

The Sages of the Talmud noted that the word for freedom used in this verse, *dror*, appears only once in the whole Torah, in this

5. As in the closure of Bar-Ilan Street in Jerusalem on Shabbat, High Court of Justice 5016/96 *Horev v. Minister of Transport*, 41(4) P.D. 1.
6. It should be noted that the proposed bill for the “Basic Law: Human and Civil Rights” (*Hatzaot Hok* 1085, 1933, p. 448), included the right of freedom of movement within the borders of the state: “All persons are entitled to move [freely] within the country, establish their residence therein, and leave it; this right may not be restricted except by means of law.” In time this right was narrowed until what remained was the right to leave the country. This was mainly due to the concerns of the religious parties that the proposed section would prevent the closure of streets to traffic on Shabbat, or maintaining the special character of the religious neighbourhoods. See Y. Karp, “*Hok Yesod: Kevod HaAdam VeHeruto - Biographia shel Ma'avakei Koach*” [Basic Law: Human Dignity and Freedom - a Biography of Power Struggles], *Mishpat U-Mimshal* 1 (1993) 340.
7. Application for Leave to Appeal 7209/93 *Weisglass v. Weisglass*.
8. See Regulation 6 of the Emergency Regulations (Departure for Overseas) 5708-1948, which states: “The Minister of the Interior may forbid the departure of a person from Israel, if there exists a basis for suspecting that his departure may harm the security of the State.” See also HCJ 4706/02 *Sheikh Raed Salah et al. v. Minister of the Interior* (unpublished); HCJ 658/80 *Taha et al. v. Minister of the Interior*, 35(1) P.D. 249; HCJ 386/85 *Badir v. Yosef Tov*, 39(3) P.D. 54; HCJ 3290/94 *HaMoked LeHaganat HaPrat et al. v. Minister of the Interior et al.* (unpublished). This issue has been raised recently in light of the restrictions placed by the security services on the exit of Mordechai Vanunu, Israel's “atomic spy,” from the country.

passage,⁹ as opposed to the more common use of words related to the Hebrew *hofesh*.¹⁰ The Sages explain that *dor* is associated with freedom of movement and the right to live wherever one chooses: “Everyone holds that *dor* is an expression of freedom [*herut*]”¹¹ ... Said Rabbi Yehuda: What is the intent of the term *dor*? As one who dwells where he dwells (*kemedayer bei dayera*), and carries merchandise throughout the land” (*Rosh Hashanah*, 9b). Rashi sees the expression “*kemedayer bei dayera*” as expressing the idea of freedom of movement: “That he dwells wherever he chooses, and is not subject to [the will of] others.”¹² Similarly the *dor* (sparrow) is so called because it moves freely from place to place (*Shabbat*, 106b).

Biblical Restrictions on Freedom of Movement

We already find mention of restrictions on the movement of individuals or groups in the Bible. This is perhaps hinted at in the story of the expulsion of Adam and Eve from the Garden of Eden, and the placement of “guards” to prevent them returning there: “**He drove the man out**, and stationed east of the garden of Eden the cherubim and the fiery ever-turning sword, **to guard the way to the tree of life**” (*Gen.* 3:24). On the other hand, their son, Cain, who was doomed to be “a restless wanderer on earth” sees his wanderings as a restriction on his freedom, and complains: “Behold, You have **banished** me today from the face of the earth” (*Gen.* 4:14).

Of course, we also find the idea that accused persons or criminals¹³ may have their freedom of movement restricted. Similar rules also applied to holy places, or their immediate surroundings, as in the case of Mount Sinai, where the Israelites were forbidden to ascend or even approach the mountain¹⁴ “Beware of going up the mountain or touching the border of it” (*Ex.* 19:12). Specific provisions applied to the *Mishkan* (Tabernacle), and later to the Temple, from which those who were *tame* (ritually impure) were excluded. [The condition of *tumah* was caused by contact with the dead, or by certain bodily discharges, or by certain diseases.] The *Cohanim* were not permitted to leave the Tabernacle during the seven days of their dedication,¹⁵ and the *Cohen Gadol* [High Priest] was expressly forbidden to leave the Temple area during his mourning for a close relative: “**He may not leave the sanctuary**. He will then not profane his God’s sanctuary.”¹⁶

The Israelites were also commanded to restrict their movements on the Sabbath: “Mark that the Lord has given you the Sabbath; therefore He gives you two days’ food on the sixth day. Let everyone remain where he is: **let no man leave his place** on the

seventh day” (*Ex.* 16:29). This is the source of the prohibition against going outside the “Sabbath boundary,” as described in the Talmud (*Eruvin* and elsewhere).¹⁷

Freedom of movement is also mentioned in the passage dealing with the cities of refuge. When a person killed someone accidentally, he could flee to one of these cities, where he would remain “until the death of the *Cohen Gadol*.” However, this was a voluntary restriction of movement, aimed at preventing the inadvertent killer from himself being killed by the “blood avenger.”¹⁸

9. In the *Prophets* it occurs six times, in connection with those freed from slavery (see, e.g., *Is.* 61:1; *Jer.* 34:8). Ezekiel calls the Jubilee year, “the year of *dor*” (*Ezek.* 46:17). The use of *dor* as the name of a bird appears in the Psalms: “Even the sparrow has found a home, and the swallow [*dor*] a nest for herself” (*Ps.* 84:4, JPS translation).
10. See, e.g., *Ex.* 21:2, 5, 26-27; *Deut.* 15:12-13, 18.
11. Note that the word *herut* does not appear at all in the Bible.
12. This appears in Rashi’s commentary on the Torah, *Lev.* 25:10. See also his commentary on the Talmud, *ibid.* sv *kemedayer*. See also Sifra, *Behar*, 2. It should be noted that the *’Arukh*, the oldest Talmudic dictionary, collated by Rabbi Yehiel ben Natan of Rome (Italy, early 11th century), derives the Talmudic expression from *do’ar* [post], explaining the expression thus: Just as the posts can go from place to place without restriction, so too can the free man. Others understand the term on the basis of the word *dir*, meaning a flock of sheep that goes from place to place.
13. As in the case of Joseph, who was placed in prison (*Gen.* 39:40), or the person caught gathering sticks on Shabbat, who was placed “under guard” (*Num.* 15:34), that is, temporary arrest. As to his identity and the punishment meted out to him, see my article, “*Ki lo porash - Perek beHilchot Mehalelei Shabbat - BaYamim Hahem, BaZeman Haze*” [“For it was not specified” - A Case Study in the Laws of Desecration of the Sabbath - Then and Now], Rabbi Yeshayahu Hadari Jubilee Volume [*Kotlenu* 16] (Jerusalem 2004), p. 15 (Heb.).
14. See Encyclopedia Talmudit, Vol. 8, p. 172, sv *Hagbalah*. There is a need to distinguish between freedom of movement in the “desert,” which has the status of public property, open to all, and freedom of movement within private property, where there may be property rights that conflict with the right of freedom of movement.
15. *Lev.* 8:33-36. See also *Torat Cohanim ibid.*, 1, 42, and the commentary of the Ramban there, and his commentary to verse 35. On the other hand, a number of commentators, such as the *Hizkuni (ibid.)*, tend to limit this restriction of their freedom to leave the Tabernacle to daylight hours only.
16. *Lev.* 21:12. A simple reading of the text views this as a prohibition, but some commentators understood this as being permissive (*i.e.* that he may remain there).
17. See Talmud Bavli, *Eruvin* 51a. Compare: Talmud Yerushalmi, *Eruvin* 3: 4 (21a); 4:1 (21d).
18. See *Num.* 35:32; *Josh.* 20:6.

Restrictions on Freedom of Movement - Purpose and Extent

The restrictions on freedom of movement were expanded in the Talmudic and post-Talmudic halachic literature. For example, it was forbidden for a person to leave the Land of Israel and travel abroad unnecessarily.

A particular prohibition existed with regard to Jews traveling to or settling in Egypt, based on the verse “For the Egyptians whom you see today you will never see again” (*Ex. 14:13*).¹⁹ Some authorities sought to impose a ban on Jews returning to Spain (in the aftermath of the Expulsion) or to Germany (following the *Shoah*), but these prohibitions were not generally accepted as binding halacha. Indeed, later authorities sought to limit the effect of such bans, either by reinterpreting the relevant texts more restrictively, or by identifying changed circumstances that made such bans ineffective or irrelevant.²⁰

In communities in which the number of Jewish residents was small, regulations were imposed preventing members of the community from traveling outside the town, when there was a concern that there would not be a *minyan* of ten adult males for Shabbat or festival services. This type of ruling can be found in early responsa from France and Germany, as well as in responsa from later periods.²¹

The source of this restriction is in the Tannaitic literature, in the *Tosefta* (*Baba Metzia* 11:27). The Sages there permit the “people of the town” to restrict the freedom of movement of certain tradesmen living in the town, if there are no substitutes available. The reasoning behind this is that these tradesmen “serve the public”, and the public interest overrides the individual’s right of freedom of movement and occupation:

One who is a bathhouse-keeper, or barber, or baker, or money-changer serving the public, and there is no one there other than he [who carries on that trade], and he desires to return to his home [in another town] for the festival - he may be prevented from doing so until he appoints another in his stead. But if he [initially] conditioned his business [on being able to leave the town for the festival and return home], before the *Beit Din*, or if the townspeople had violated their agreement with him, then he is permitted to go.

From this halacha we can see that the restriction on freedom of movement and occupation of these tradesmen was only to be to an extent “no greater than necessary.” However, if there was some other way of achieving the “proper purpose”, such as the presence in the town of another tradesman who can provide the necessary

service, or where these tradesmen “appointed another in their stead,” then the townspeople had no right to restrict the freedom of movement or occupation enjoyed by the tradesmen.

Similarly, in some places, the freedom of occupation of itinerant merchants was limited, and they were not permitted to move freely within the community’s boundaries, in order to protect the livelihood of the local residents.²²

Another communal ordinance forbade young members of the community from strolling outside the town limits, out of a concern that they might become involved in “immoral acts.” This how this issue is addressed in the responsa of Rabbi Yosef Karo:²³

At that same time the Sage thought to order the appointment of persons to regulate all matters in the town... and all the congregations subscribed to this, and it was announced in all the synagogues, without exception... they [also] determined to introduce a regulation that would prevent improper behaviour, since they saw that, because of the blatant sins of the generation, and the fact that the young men and boys of the town would go walking outside the town on Shabbat, in places which are known for evil-doing and terrible transgressions, they agreed that they should not be permitted to walk on Shabbat outside the town in those places where people usually walked, and all the communities accepted this upon themselves.

19. The source of this prohibition is the Jerusalem Talmud, *Sukkah*, 5:1 (45b). This prohibition was, over time, limited in various ways, and ways were found to permit living in Egypt. Indeed, halachic authorities of the stature of the Rambam and Ridbaz (and, in our own times, Rabbi Ovadiah Yosef) left Israel to live in Egypt. See: Rambam, *Mishneh Torah*, Laws of Kings 5:7; *Hagahot Maimoniot* and *Ridbaz*, *ibid.*; *Responsa Tzitz Eliezer*, Part 14, No. 87; *Responsa Yehaveh Da’at*, Part 3, No. 81; Y.D. Gilat, *Perakim BeHishlalshelut HaHalacha* [Studies in the Development of Halacha] (Ramat Gan, 1992) p. 388 (Heb.); Rabbi M. Hacohen, “*Or Hadash al Yeshivat HaRambam BeMitzrayim*” [A New Light on the Rambam’s Living in Egypt], *Ishim Utekufot* (Jerusalem, 1977), p.180 (Heb.).
20. See: Rabbi Y. Gershuni, *Hadarom* 32 (5731), p. 48; Z. Harkavy, *Shevet V’Am* 5 (5720), p. 87.
21. Responsa of Rabbi Meir of Rothenburg, Prague edition, No. 1016. See also the parallel version in Responsa of Rabbi Meir of Rothenburg, Berlin edition, No. 865 (p. 32); Maimonidean Responsa, Laws of Property, No. 27.
22. Restriction of the freedom of movement was often accompanied by a “communal ban”, which prevented merchants from one town from moving to a different town. For interpretative approaches that limited the damage to freedom of movement in such cases, see A. Hacohen, *Interpretation of Communal Ordinances in Jewish Law* (Dissertation, Jerusalem 5763), pp. 213-216, and the sources quoted there.
23. Responsa *Avkat Rochel* by Rabbi Yosef Karo, No. 206. For a similar ordinance, see *Responsa Mahari ben Lev*, Part 3, No. 4.

Freedom of Movement and the Status of Women

At times the Sages allowed individual freedoms to be curtailed, to protect the status and condition of women. For example, they forbade husbands from traveling to far-away places, if such a trip would affect the wife's conjugal rights. This issue is discussed first in the Mishnah (*Ketubot*, 5:6), which limits the husband's freedom of movement: "The students of the Sages may go to study Torah, without [their wives'] permission, for a period not greater than 30 days. The workers - one week." That is, even for a proper purpose, such as the study of Torah or obtaining a livelihood, a husband may not leave his wife for too long a period without obtaining her consent. Based on this principle, the husband's freedom of movement would be restricted if it was clear that he would not be able to return home within a short time.

We find evidence of this rule being enforced in the Geonic period, when the courts restricted the movements of merchants who sought to travel for commercial reasons, and who would be away from home for an extended period. Thus, we find in a responsum of Rav Hai Gaon,²⁴ who was asked:

[R]egarding one who travels across the sea, and whose wife has said to him: I do not consent to your going, [unless] you write me a conditional *get* [a bill of divorce that would become effective if he does not return within a given period]. Can she thus prevent him from going, or not? Response: We do not find that she can force him to write her a bill of divorce. However, she may prevent him from setting out and distancing himself from her for a period in excess of that stated by the Sages... As we have learned, that he may not leave without [her] consent for a period in excess of 30 days. Therefore she may prevent him, **and the Court may prevent him from traveling further than permitted.**

And thus the halacha is codified in the *Shulchan Aruch*: "The wife may prevent her husband from traveling for business anywhere other than a nearby place, so as not to suspend her conjugal rights, and he may not depart [for a longer journey] unless it is with her permission."²⁵

Similarly, a woman can prevent her husband from leaving the Land of Israel, if there is the possibility that she may be left an *aguna*, since the "proper purpose," prevention of her becoming an *aguna*, outweighs the husband's right of freedom of movement.²⁶ This restriction was formalized in Regulation 106(1) of the Procedural Regulations for the Israeli Rabbinical Courts, 5753, under which the *Beit Din* may consider a request to prevent a husband leaving Israel, if it is claimed that there is the possibility that he will leave his wife an *aguna*. However, the same result

may be achieved if the husband deposits a *get* with the *Beit Din*, or even by means of a conditional *get* (which would take effect only if the husband fails to return within the time specified therein).²⁷ This is also the case when the *Beit Din* has ruled that the husband is not required to give his wife a *get*. In that case, the wife is not "entitled" to the divorce, and consequently the husband's right of freedom of movement should not be denied.²⁸ A similar outcome is achieved when the husband posts a bond to ensure his return.

Although the Rambam forbids, in principle, any action that negates the wife's freedom of movement, he recommends that, for reasons of modesty,²⁹ she be severely restricted:

24. *Orchot Hayyim*, Part 2, p. 103 (found in *Otzar Hageonim, Ketubot*, p. 186).
25. See: *Responsa Rosh*, Rule 43, No. 13; *Responsa Tashbetz*, Part 1, No. 1; *Responsa Rashbash*, No. 498; *Shulchan Aruch, Even HaEzer*, 76:5. See also Rabbi Y.M. Toledano, "Ikuv Nesiat HaBa'al al pi Teviat Halsha" [Prevention of a Husband's Travel on the Basis of the Wife's Claim], *HaTorah VeHaMedinah* 5-6 (1953-54), pp. 114-118 (Heb.); E. Shochetman, *Seder Hadin* (note 4, above), p. 415.
26. See also: HCJ 852/86 *Aloni et al. v. Minister of Justice*, 41(2) P.D. 1, comments of Justice Elon, from paragraph 7; Application for Annulment of Marriage 1229/92 *Shwatz v. Shwatz* (unpublished); Regarding the general authority of the rabbinical courts to issue orders restraining travel abroad, see: HCJ 3914/92 *Lev et al. v. Tel Aviv Rabbinical Court et al.*, 48(2) P.D. 491; HCJ 578/82 *Moshe Naim v. Jerusalem District Rabbinical Court et al.*, 37(2) P.D. 701.
27. *Shulchan Aruch, Even HaEzer*, 154:8. For the balance required between preventing a woman being left as an *aguna* and protecting the fundamental right of freedom of movement after enactments of the Basic Law: Human Dignity and Liberty, see the *Lev case* before the High Court of Justice (note 26, above); HCJ 4358/93 *Tzuk v. Supreme Rabbinical Court*, 48(4) P.D. 563; and HCJ 4976/02 *State Attorney-General v. Netanya District Rabbinical Court et al.*, 46(5) P.D. 345, comments of Justice Beinisch. Following the enactment of the Basic Law, Section 7b(2) of the Religious Courts (Summons) Law, 5716-1956, which establishes the necessary balance between denial of freedom of movement and preventing a woman from being left an *aguna*. Compare: Regulation 384 of the Civil Procedure Regulations, 5744-1984.
28. E. Shochetman, *Seder Hadin* (note 4, above), p. 416. Note the concern regarding the possibility of a "forced *get*" ("*get me'useh*"), if the restraining order against the husband causes him to give his wife a *get* (*ibid.*).
29. Rambam, *Mishneh Torah*, Laws of Marriage, 13:11. This restriction is also dependent on Moslem custom, based on the warning of the Prophet Mohamed in the Koran (33:32-33, on p. 462 of the Rivlin edition). See also A. Grossman, *Hassidot u-Mordot* [published in English as *Pious & Rebellious: Jewish Women in Medieval Europe*] (2nd edition, Jerusalem, 2003) p. 174f (Heb.).

That any woman has the right to go to her father's house to visit him, to the house of mourners [to comfort them] and to a wedding feast, to extend thereby kindness to her relatives and neighbours, so that [in turn] they will [do the same for her], **and she is not in prison that she should not be able to come and go.** However, it is improper for a woman to be constantly wandering about in the squares and the streets. And a husband has the right to prevent her from doing so, and **should not let her go out more than once or twice in a month, as necessary,** for the most appropriate thing is for the woman to remain at home, as it is written: "The King's daughter is all glorious within" (Ps. 45:14).

Historical records from that period, and certainly those of later periods, indicate that this "recommendation," to limit the freedom of movement of women, was influenced by the practices of the surrounding Moslem society, but was not actually kept in practice.³⁰

An example of an attempt to limit a woman's freedom of movement can already be found in the Mishnah: "One who takes an oath not to benefit from his wife or her earnings, if she goes to a house of mourning or to a wedding celebration, must divorce her and pay her *ketuba*, since he is preventing her [from doing *mitzvot*]. And if he claims it is because of another reason [because of immoral persons who frequent such places] - he may do so" (*Ketubot*, 7:5). That is, negation of a woman's freedom of movement may provide grounds for divorce. Indeed, while both Talmuds justify this prohibition on practical grounds - that

"tomorrow she might die, and none will come to eulogize her" - Rambam holds that restricting the woman's freedom of movement is inherently invalid, "for it is as though he imprisoned her and locked the door before her."³¹

Conclusion

Our study of Jewish legal sources has shown that one of the fundamental values is that of human liberty - to "proclaim liberty throughout all the land, unto all the inhabitants thereof." One of the expressions of that liberty is the right of freedom of movement. Nonetheless, like other legal systems, Jewish Law does recognize that this right may be restricted at times, provided that it is done for a "proper purpose" and to an "extent no greater than is required."

30. Note that, in spite of the Rambam's status as a pre-eminent halachic authority, no later halachic codifier repeats this "recommendation". See Grossman (previous note), p. 181f.

31. See Rambam, *Laws of Marriage*, 13:13. Indeed, if the husband claims that he is prohibiting her from going to places frequented by immoral persons, he may thus restrict her. At the same time, basing himself on the Talmudic discussion (*Ketubot* 72a), Rambam rules that a mere claim that there are immoral people there is insufficient - it has to be a place "frequented by immoral people."



Adv. Alex Hertman, the newly elected President of the IAJLJ, addressing the 12th International Congress

“Barghouti’s orders for terror attacks were sometimes based on instructions” from PA Chairman Yasser Arafat”

**State of Israel v. Marwan Bin Khatib Barghouti
Before Judge Sarah Serota, Judge Avraham Tal,
Judge Dr. Amiram Binyamini
Judgment given on 20 May 2004**

Precis

Marwan Barghouti was convicted by the District Court of Tel-Aviv of the deaths of four Israelis and a Greek monk. Israel had charged that Barghouti was responsible for more than 26 Israeli deaths and that he funnelled money to terrorists. Barghouti declared his desire to turn the trial into a political trial, refused to give evidence or bring witnesses and would not permit his defence counsel to cross-examine prosecution witnesses. The Court therefore weighed the statements and admissions he had given to the General Security Services; statements provided by other terrorist activists to the GSS or police during interrogation; documents seized from Barghouti’s offices; his utterances to the media; as well as evidence provided by the victims of the terror, eye witnesses and GSS operatives.

The Court acquitted Barghouti of most of the charges holding that he did not have direct control over the terrorists. The convictions were for a shooting incident in 2001 which took the life of a Greek Orthodox monk, an Israeli in the West Bank in 2002, and three people at a Tel-Aviv restaurant in 2002. Barghouti was also convicted of one count of attempted murder for an attempted car bombing at a Jerusalem shopping center. The ruling also stated that Yasser Arafat encouraged attacks but had not specifically ordered them. “Yasser Arafat would not give him direct orders but made sure that those under him understood when he was interested in a ceasefire and when he was interested in attacks against Israel... Arafat also viewed the Defendant as the man who controlled the field operatives and would even rebuke him when

an attack was carried out without him knowing of it beforehand.” At the time of the judgment, Barghouti had been held in an Israeli jail for more than two years. He had previously been thought to be a potential successor to Yasser Arafat. Barghouti was eventually sentenced to 5 terms of life imprisonment and an additional 40 years all to be served concurrently.

Charges

The indictment against Barghouti charged him with the offences of premeditated murder, an offence in accordance with Section 300(A)(2) of the Penal Code, 5737-1977 (hereinafter “the Penal Code”); incitement to murder, an offence in accordance with Section 300(A)(2) together with Section 30 of the Penal Code; accessory to murder, an offence in accordance with Section 300(A)(2) together with Section 31 of the Penal Code; attempted murder, an offence in accordance with Section 305(1) of the Penal Code; conspiracy to commit a crime, an offence in accordance with Section 499 of the Penal Code; activity in a terrorist organization, an offence in accordance with Section 2 of the Prevention of Terrorism Ordinance; and membership in a terrorist organization, an offence in accordance with Section 3 of the Prevention of Terrorism Ordinance.

Background

The facts alleged in the indictment were that Barghouti was the head at the terrorist organizations Fatah, Tanzim and Al-Aqsa Martyrs Brigade in the Judea and Samaria region. Following the outbreak of the violent events in September 2000, known as the “Al-Aqsa Intifada”, Barghouti led, managed and operated intensive terrorist activities against Israeli targets, in accordance with the policies determined at that same time by the management of the terrorist organizations in which Barghouti was involved. Barghouti was charged with having committed the above acts by conspiring with senior field managers of the terrorist organizations, who were responsible for actually committing the terrorist activities together with terror activists who were part of

and subordinate to the above organizations.

The terrorist activities included, *inter alia*, suicide attacks and murderous shooting attacks which resulted in hundreds of Israeli citizens and soldiers losing their lives, as well as the injuring and wounding of hundreds of others.

Barghouti was charged with having committed extensive and ongoing activities that were an integral part of the terrorist activities, including enlistment of activists to the terrorist organization, funding and organization of a framework for the activists who committed the terrorist activities, obtaining weaponry, and intensive funding of the purchase of weaponry, funding different needs of the activists who committed the terrorist activities, which freed them from the need to support their families, solicitation and incitement of members of the terrorist organizations, both via the media and via gatherings and public displays, to commit acts of terror.

Barghouti managed and operated the terrorist activities, was updated on everything relevant to the acts of terror committed by the field commanders, and in some of the cases was directly involved in the terrorist activities perpetrated by those subordinate to him, such as in the attack committed against the "Sea Food Market" in which 3 people were murdered and many others wounded, the murder of the late Yoela Chen, and the wounding of an additional passenger on Route 443 committed as a result of the Defendant's incitement and call for revenge after the death of Ra'ad Karmi and other instances.

The evidence against Barghouti was based on the testimony of field commanders who were subordinate to him, the Defendant's statements during the interrogation, documents seized in his office during Operation Defensive Shield, expert opinion, *etc.*

According to the prosecution, the offences for which Barghouti was charged created a presumption of danger both to the security of the state and the security of the public, in accordance with Section 21(A)(1)(B), Section 21(A)(1)(C)(1), Section 21(A)(1)(C)(2) and Section 21(A)(1)(C)(4) of the Criminal Procedure (Enforcement - Arrest Powers) Law, 5656-1996.

The extreme danger posed by Barghouti could first and foremost be discerned from his position as head of the terrorist organizations detailed above, whose goal was the execution of murderous attacks against Israeli citizens and soldiers. Furthermore, his status and activities, which included the leadership, management and operation of terrorist activities as detailed above, were in and of themselves enough to demonstrate the danger posed by him.

Judgment

In an a very lengthy judgment which dealt extensively with

the background of the terrorist organizations, the status of the Defendant in these organizations, the testimony of various captured terrorists and their connection to Barghouti as well as his statements in that connection, Barghouti's link to the terror attacks which were the subject of the charges and the relative weight of the evidence, the District Court eventually concluded that Barghouti was guilty of the deaths of four Israelis and a Greek monk, and rejected any claim that his admissions had been coerced out of him.

The District Court noted that "the Defendant most of the time did not have direct contact with the field operatives who carried out the attacks. That connection was maintained through associates close to the Defendant. Barghouti was responsible for providing the field units with money and arms via these associates."

The Court ruled that Barghouti was directly responsible for a January 2002 terror attack on a gas station in Givat Ze'ev in which Israeli Yoela Chen was murdered. The attack was carried out at his direct order in revenge for the assassination of Ra'ad Karmi. Barghouti had admitted his responsibility for this attack.

The Court also held that the attack in which a Greek monk was murdered in Ma'aleh Adumim in June 2001 was also carried out at the instruction of Barghouti, and Barghouti also approved the March 2002 attack at Tel Aviv's Seafood Market restaurant in which three people were murdered, as well as a car bomb attack in Jerusalem.

The Court held that Barghouti's orders for terror attacks were sometimes "based on instructions" from Palestinian Authority Chairman Yasser Arafat - "Arafat would never give explicit instructions for attacks but he let it be known when the timing was right".

"He made sure his subordinates understood very well when he was interested in a cease-fire and when he was interested in terror attacks against Israel".

Legal Analysis

In its legal analysis, the Court defined the terms "terrorist activities" and "membership of a terrorist organization" under the relevant legislation and held that it had been clearly proved by testimony and documents that Fatah, Tanzim and Al-Aqsa Martyrs Brigade were such organizations. Likewise, the activities of the Defendant had been clearly proved so that he was not just "a person performing a function in the management or instruction of a terrorist organization" within the meaning of Section 2 of the Prevention of Terrorism Ordinance but had stood at the head of the organization, set its policy and made propaganda speeches on its behalf in the media - thereby satisfying the elements of Sections

2 and 3 of the Ordinance in relation to proof of “membership in a terrorist organization”.

The Court then turned to an examination of offences committed by two persons ‘jointly’ as a ‘team’, the offence of counselling or procuring another person to commit an offence and aiding another person to commit an offence. The Court held that for the ‘team’ offence to be committed specific acts had to be performed that exceed mere preparation and are accompanied by the necessary mental element. The Court distinguished between a ‘team’ offence and an ‘aiding’ offence and noted that this distinction had become very important following a 1984 amendment in the law whereby the punishment of a person aiding an offence was half that of a ‘team’ offender. Thus, the maximum punishment which could be imposed on a person aiding a murder was 20 years imprisonment while that of a person committing murder jointly with another was subject to mandatory life imprisonment, in the absence of circumstances mitigating his liability.

The distinction, factually, turned on direct or indirect participation in the offence and the extent of autonomy or control in relation to the commission of the offence. For the team offence to be committed it was not necessary for both parties to commit all the elements of the offence. The Court considered the various tests proposed in the case law to distinguish between the two types of offences both in relation to the acts which had to be committed and the mental element required and stressed the greater involvement required in the ‘team’ offence (*i.e.* all the offenders had to have an identical *mens rea*) compared to the ‘aiding’ offence.

The Court noted that it followed from the case law that participation in planning an offence was a clear sign of a person engaging in a ‘team’ offence, and in such a case it was unnecessary for that person to be physically present at the scene of the murder itself. Thus, a person conspiring to commit murder might be engaged in a ‘team’ offence provided he took a real part in implementing the plan and possessed the necessary mental element.

The Court analysed the meaning of the term “aiding” and noted the behavioural nature of the offence, indirect nature of the participation involved and the lower mental element required. The Court explained that “turning a blind eye” to an outcome was equivalent to “awareness” of the nature of the act and the existence of the relevant circumstances. The Court examined in depth the case law concerning “turning a blind eye” and noted the subjective nature of the tests involved, but also that the courts were now introducing the objective test of a reasonable man. Ultimately, the Court ruled that the test was that a person who suspected that another was about to commit a particular offence,

but refrained from examining this issue, and helped another to commit the offence knowing that his acts would, almost certainly, aid the commission of an offence by that other - if it would be committed - would be regarded as aiding an offence under Section 31 of the Penal Code.

The Court then turned to an examination of the offence of procuring another to commit an offence and the distinction between this and the offence committed by an associate ‘team’ offender described above. After considering the legislation and case law the Court concluded that a person procuring an offence possesses the same degree of responsibility as the person committing the primary offence, as he is deemed to be a prime participant in the offence, in contrast to a person who aids an offence who is regarded as a secondary offender.

The Court noted that a person could not be convicted of the offence of generally procuring murder, by calling for terrorist attacks to be committed against Israel. This conduct more properly fell within the ambit of the offence of incitement to violence or terror (Section 144D2 of the Penal Code). Likewise, it was not possible to convict a person of a general offence of aiding the commission of murder, by providing funds or weaponry for the purpose of the commission of various offences which were not specific. The proper offence to be charged in such circumstances was providing means for the commission of a felony under Section 498 of the Penal Code, an offence specifically enacted for cases where it was not possible to prove the certain knowledge of the person providing the means regarding the intention of those receiving them to commit a specific offence.

Conclusion

Having examined the facts and the legal framework the Court concluded that there was clear proof that the Defendant had made a real contribution to the terrorist attacks perpetrated by Fatah, Tanzim and the Al Aqsa Brigade, even if he did not participate in the actual attacks.

The Court’s conclusion was that “the assistance provided by the Defendant to terrorist organizations, in the funneling of funds and weapons, as well as the recruitment and training of field operatives created the conditions needed in order for the terrorists units to perpetrate the murders”. The Court held that “the Defendant was, without a doubt, aware of this fact... He operated with the definite goal of aiding terrorists in carrying out murder attacks”. There was not just a reasonable suspicion or “turning a blind eye” on the part of the Defendant but a real knowledge that the terrorists were carrying out and would continue carrying out murderous attacks against Israel using the means and monies he had provided to

them for that specific purpose.

Nonetheless, apart from the four cases (referred to above) there was no evidence that the Defendant had been involved in the planning and implementation of the attacks or that he knew in advance about the attacks which were due to be carried out by the field operatives, whom, in practice, he commanded. Barghouti did not have **full** command of the field operatives and the unit commanders; they had and exercised a significant amount of discretion in planning and carrying out the attacks - sometimes carrying out attacks within the Green Line, contrary to Barghouti's own views. Thus, in relation to the majority of the attacks referred to in the indictment there was no evidence that Barghouti was aware of an intention to commit "a specific offence relating to a specific target" as required for the offence of aiding the commission of a felony. His assistance was general and did not relate to a specific attack or to a specific perpetrator. He merely made sure that the field operatives would be sufficiently supplied and funded. This was true also in relation to the offence of procuring the commission of a crime attributed to the Defendant. There was no general offence of procuring murder. When a defendant was not aware of an intention on the part of a perpetrator to commit a specific offence it was not possible to prove a causal connection - *i.e.*, that the primary perpetrator was procured by the Defendant to commit the offence. Indeed, the facts showed that it was not necessary at all to procure operatives to commit the offences, generally the field operatives and their local commanders operated on their own initiative and took care not to involve the Defendant personally in planning or carrying out the attacks.

Likewise, as a matter of principle and case law, it was not possible to regard the Defendant as "jointly" carrying out all the offences charged in the indictment, because of his lack of knowledge regarding the intention to carry out **specific attacks** (apart from the 4 cases mentioned in which he was personally involved). Likewise, except in the 4 cases, the Defendant had not been personally involved in initiating, planning or carrying out the attacks and he had not been a full partner in all the decision making processes.

The Court held that under the law currently prevailing in Israel it was not possible to convict the leader of a band of criminals or a terrorist organization as a person committing a "joint" crime with the members of the group actually committing the crime; nor was it possible to convict them of aiding or procuring the commission of the crime, when the leader himself was not personally involved in the specific crime concerned - either before or during its commission. This was the case even when it was clear that the leader was giving his blessing to the commission of the offence and was granting his people general help unrelated to a specific crime.

Ed. Note

In a sentence delivered on 6 June 2004, the District Court of Tel-Aviv sentenced Barghouti to five 25-year jail terms for murder of the five individuals - plus another 20 years for ordering the failed Jerusalem car bombing and an additional 20 years for belonging to a terrorist organization - all periods to run consecutively.

Mexican Congress Passes an Initiative for an Anti-Discrimination Law that includes Anti-Semitism as a form of Discrimination

On 10 April, 2004, the Mexican Congress unanimously approved the Initiative for the Federal Law to Prevent and Eliminate all Forms of Discrimination.

On 29 April, the Senate unanimously approved the same Initiative, which was sent to President Fox to be signed into law.

Article 4 of the law states that:

"Any distinction, exclusion or restriction based on ethnic or national origin, sex, age, disability, social

or economic condition, health, pregnancy, language, religion, opinion, sexual preference or marital status or any other act that nullifies or obstructs equal rights for all people will be considered a discriminatory act.

Any form of anti-Semitism or xenophobia will also be considered as discrimination".

It is worth noting that during the session in which the Initiative was passed at the Congress, the representatives of two of

the major political parties (PRI - Partido Revolucionario Institucional and PRD - Partido de la Revolución Democrática), underlined the importance of including anti-Semitism in this Initiative; this represents an important step towards the recognition of the fact that Mexican society is plural and diverse.

Since 1995, the Jewish Community of Mexico has actively participated in the drafting and promotion of this law.

Follow up Meeting between the UN Acting High Commissioner for Human Rights and the New President of the IAJLJ

Special Report

Present at the meeting which took place on 8 June, 2004, at the office of the UN High Commissioner for Human Rights in Geneva:

Bertrand Ramcharan, Acting High Commissioner for Human Rights (AHC)

Alex Hertman, Adv., President of the International Association of Jewish Lawyers and Jurists (IAJLJ)

Daniel Lack, and **Maya Ben-Haim Rosen**, IAJLJ Co-Representatives to the UN in Geneva

Daniel Lack introduced the new IAJLJ President to the AHC.

Alex Hertman expressed his appreciation to the AHC for his support in combating anti-Semitism. He stated that the IAJLJ recognised the valuable contribution of the AHC in the struggle against all forms of prejudice and discrimination and regretted his departure. He wished him every success in his important new post and expressed the desire of the IAJLJ to collaborate with the AHC in his future career in which his accumulated wisdom and signal contribution to the cause of human rights would undoubtedly constitute an important factor. He presented the AHC with a copy of the last issue of *JUSTICE* recording his previous meeting with the IAJLJ.

The AHC spoke about his future plans which could well allow for such possibilities of further co-operation to be explored.

Daniel Lack reminded the AHC of the specifics of the last meeting with the past President and representatives of the IAJLJ on 15 January, 2004 as well as the issues that were raised during that meeting and were left for further examination, notably the establishment of a World Holocaust Memorial Day.

The AHC expressed his support for this idea. However, he recommended that launching this initiative in the UN in the current political climate, given that the consensus concerning the use of the word 'Holocaust' even in the context of the genocide of Jews during the Second World War was regrettably contested in certain quarters, could delay its successful outcome. He thought that a better approach would be to commence this initiative outside the UN, by bringing together several respected and influential personalities such as Eli Wiesel to establish a Committee of Patronage whose members would themselves decree a Holocaust Memorial Day possibly acting together with other appropriate independent partners. This could create a momentum that might later make it

possible for the UN also to adopt the Holocaust Memorial Day.

Alex Hertman asked why, despite the fact that the UN Human Rights Commission's Special Rapporteur on Contemporary forms of Racial Discrimination requested the Commission in his final recommendations to mandate him to write an annual report on manifestations of anti-Semitism, together with one on Islamophobia, the Commission's resolution made no mention of this specific recommendation.

The AHC replied that the Special Rapporteur did not need additional authorisation from the Commission to write the report. He could simply write one *de facto*. He suggested that the IAJLJ should approach the Special Rapporteur directly in Paris where he resided, about the writing of this separate report. The latter was known to be very open-minded and he would be amenable to any reasonable proposal. The Special Rapporteur had several options in this regard. He could write a report based on occurrences in particular countries as Country Reports or as an overall thematic report.

Alex Hertman enquired about the Special Rapporteur's specific recommendation in his report on

Islamophobia, concerning the establishment of a Monitoring Centre on manifestations of anti-Semitism and Islamophobia and whether the Commission in its resolution on this subject had approved the proposal.

The **AHC** explained that in his report on Islamophobia, the Special Rapporteur proposed various projects. Not all of them, as in the case of the Monitoring Centre, were on the UN's agenda or were within its current budget. The Resolution adopting the report was of a general nature. In view of the current climate, such a Monitoring Centre would not be financed by the UN. The AHC suggested that an institution outside of the UN could take an initiative in this respect.

Alex Hertman noted that there was a startling omission of any reference to anti-Semitism in the resolution on the inadmissibility of certain racist manifestations in the form of neo-Nazism and the glorification of SS-like racist behaviour.

The **AHC** replied that this issue went to the core of the political context in which the resolution of the Commission was introduced. The best way to tackle the problem was by submitting as much information as possible to the Special Rapporteur directly. He also recommended a meeting with the Special Rapporteur Mr. Doudou Dième, in order to expose to him the full context of the issue. After receiving such information, the Special Rapporteur would certainly study the subject with full attention and focus.

The **AHC** also thought that the best place to tackle the problem of information on anti-Semitic manifestations was through the UN Sub-Commission on the Promotion and Protection of Human Rights (previously named the Sub-Commission on Prevention

of Discrimination and Protection of Minorities), which was in its latest form less political and more professional.

Maya Ben-Haim Rosen appreciated the fact that the Special Rapporteur had studied the information that the IAJLJ submitted to him and had made reference to it in his report.

Alex Hertman commented on the fact that the resolution entitled "Combating Defamation of Religion" had also become a battleground for political struggle. In that resolution, no reference was made with regard to anti-Semitism or to attacks on any other religion or its followers. It concentrated exclusively on attacks on Islam, and reports of prejudice against Moslems.

Daniel Lack underlined the fact that IAJLJ had never expressed any opposition to the study of Islamophobia. The only objection that had been voiced was the deliberate attempt whenever possible, to exclude any reference to anti-Semitism either in the context of condemning racism or religious intolerance. He pointed out that the Resolution on the Defamation of Religions was adopted by a small majority, since many members of the Commission felt that its reference to Islam alone was exclusive with no mention of the defamation of Jewish and Christian minorities in various countries. He also pointed out that in the principal Resolution on Religious Intolerance, a preambular paragraph did in fact pay lip service to mentioning anti-Semitism and "Christianophobia".

The **AHC** said that other Jewish NGO's had raised this issue previously. The reaction in the context of both racism and religious intolerance was that the more reference to anti-Semitism was insisted on, the greater the resistance would be from the same hostile sources. That is why the AHC suggested taking

this issue to the UN Sub-Commission where one of the individual experts should be asked to start a review process which could eventually lead to the study of anti-Semitism in the form of a report to be submitted during the 2005 session. A resolution on this proposal could be conceived on the following lines:

"The Sub-Commission, recalling its historic role in studying discriminatory practices and phenomena,

Believing that it would be important to undertake a review of contemporary problems with regards to discrimination on the grounds of race, religion, or gender, ...

Designates X to prepare a review of issues that would require study and analysis by the Sub-Commission,

Requests X to submit a preliminary outline to the Sub-Commission..."

The use of the word "review" instead of "study" had importance, since its budgetary implications were more modest. The result would be the same, namely a parallel report to that of the Special Rapporteur on Islamophobia, starting within the Sub-Commission. The AHC then recommended an expert capable of carrying out such a study which could then be developed for more extensive use. Following the precedent of a UN study of anti-Semitism, it would assist the acceptance and the implementation of the idea of a Holocaust Memorial Day within the UN.

The meeting ended on a note of cordiality and a mutual desire to remain in contact.

The **AHC** indicated that he would be in Geneva during the month of July to hand over his responsibilities to the new High Commissioner.

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