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**THE INTERNATIONAL ASSOCIATION  
OF JEWISH LAWYERS AND JURISTS**



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*The Shoes on the Danube  
Promenade*, created by Gyula Pauer  
and Can Togay, memorializes  
those who fell victim to Arrow  
Cross militiamen in Budapest  
during World War II.  
*Photo: Tourism Office of Budapest*

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Designed by Gavriel Fiske

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# Betrayal and commitment

*Association President Alex Hertman opened the “Remember Budapest” conference by recounting the fate of the Jews living in Hungary during the Holocaust. He closed his remarks with a reminder that we must never, ever allow humanity to descend into bottomless evil again.*

The story of the Jewish legal community of Hungary is one of creativity, contribution and integration into the larger community. But it is also a story of betrayal, abuse of human dignity and murder. We have convened our members from around the world in Budapest, on this day in November 2006, to tell this story, to ensure its remembrance and to provide ways to prevent the rising waves of anti-Semitism – now present all around us – from becoming a recurring nightmare of humanity’s descent into evil.

About 825,000 Jews were living in Hungary in 1941. Some 255,000 Jews, fewer than one-third of those who had resided within greater Hungary, survived the Holocaust.

The massacre of the Jews in Hungary started in July and August of 1941. Nearly 16,000 Jews, those who were aliens or whose citizenship was stated to be unresolved, were deported to German-controlled Galicia, where the Nazis massacred them near Kamenec-Podolskij in the first “five digit massacre” of European Jewry during the Holocaust. In January 1942, in the southern region of Délvidék, which was reclaimed from Yugoslavia, during an action against Serb partisans, Hungarian gendarmeries killed about 800 Jews. The gendarmeries shot their Jewish victims and threw their bodies into holes blown in the ice of the frozen-over Danube.<sup>1</sup>

But the worst of all started after the German Occupation in March 1944.

In mid-May 1944, the Hungarian authorities, in coordination with the German Security Police, began to systematically deport Hungarian Jews. SS Colonel Adolf Eichmann was chief of the team of “deportation experts” who cooperated with the Hungarian authorities. The Hungarian police carried out the round-ups and forced the Jews onto the deportation trains. In fewer than two months, nearly 440,000 Jews were deported from Hungary in more than 145 trains. Most were deported to Auschwitz. By 7 July 1944, the only Jewish community remaining in Hungary was that situated in Budapest, the capital.



In light of the worsening military situation and facing threats from Allied leaders of war crimes trials, Miklós Horthy, the Hungarian regent, ordered a halt to the deportations on that day.<sup>2</sup>

The smoothness and speed of the deportation of Hungarian Jews from the provinces was unique in the history of the Holocaust, but so was Horthy’s swift decision to order the military forces to prevent the further deportation of Jews. Although Eichmann subsequently managed to smuggle a few thousand more Jews to Auschwitz, in July the deportations came to an end, not to be renewed until after Horthy’s overthrow in October.<sup>3</sup>

But why did the Hungarian authorities obey Eichmann and his miniscule crew of a few dozen specialists? Clearly, there remained only a few months before the arrival of the Red Army, at which time those who had collaborated with the Germans were likely to be punished. Perhaps fear of the Nazis, or perhaps those who participated in the Final Solution found the threat of eventual punishment less compelling than the immediate satisfaction of seeing the Jews being deported and of perhaps acquiring houses, apartments, shops and well-paying positions. One thing is for certain: even those who bemoaned the fate of the Jews did not expect any of them to ever return.<sup>4</sup>

In October 1944, Ferenc Szálasi, the leader of the Arrow-Cross Party, came to power with the help of the Germans, after Horthy announced his appeal for a cease-fire.

It is currently quite common to hear a younger generation of Hungarians, and even some confused Jewish survivors, stating that Szálasi had come to power in March 1944 and that the Arrow-Cross militia was at least partly responsible for the brutalities of the deportation of Hungarian Jews to Auschwitz. In reality, the responsibility for such deportations was solely the work (due to the Nazi collaboration) of the old administration under Regent Horthy.<sup>5</sup>

Nearly 200,000 Jews in Budapest were terrified



when Szálasi's Arrow-Cross militia came into power. Indeed, the troops of the Red Army were unable to liberate the Pest ghetto until 18 January 1945. But until then, hundreds of defenseless Jews were murdered by the Arrow-Cross militia every day. Many Jews were tortured horribly before their death; others were simply shot and thrown into the icy Danube. The militia handed over nearly 70,000 Jews to the Germans for forced labor where they worked on the fortification system being built to "protect" Vienna. In the spring of 1945, Budapest was reduced to ruins. Out of 825,000 Hungarian Jews, 550,000 had perished.<sup>6</sup>

The activities of Raoul Wallenberg, the Swiss Consul Carl Lutz, the Papal Nuncio Angelo Rotta, the pseudo-Spanish Consul (in reality an Italian anti-Nazi) Giorgio (Jorge) Perlasca and the International Red Cross representative, Friedrich Born, constitute perhaps the best-known chapter of the Hungarian Holocaust. These courageous men used mainly the promise of diplomatic recognition by their own governments to impress the Arrow-Cross leaders; as a result, they were able to distribute protective passes to thousands of Jews as well as bring back others from the road to Austria.<sup>7</sup>

There were 3,420 Jewish lawyers practicing law in Hungary at the start of 1944. By a Hungarian governmental decree – published in the official Hungarian gazette *Budapesti Közlöny* – they were disbarred and their practices were seized and delivered to others. Those living outside of Budapest were murdered in Auschwitz in the spring of 1944. Those living in Budapest were subject to the same fate as the other Jewish inhabitants of Budapest. During this conference, we will present a new publication, authored by Yad Vashem researchers and sponsored by our Association, that lists each and every one of our Jewish colleagues who lived in Hungary in 1944 and which bears witness to the destiny of their legal practices.

Although we have assembled here in Budapest, together with our colleagues from the Hungarian and the Budapest Bar, to honor, remember and to mourn, we are also present today as a deterrent and warning to those who deny the existence of the Holocaust and who seek the destruction of Israel as the Jewish State – and here I refer specifically to the venomous statements made publicly by Iranian President Mahmoud Ahmadinejad, starting in October 2005, that Israel should "be wiped off the map" as well as to other statements made by him invoking anti-Semitic rhetoric that are blatant incitements to genocide.

We stand here together, Jews and Israelis alike, united with the other democratic communities of the world, to protest against such statements and rhetoric, and to continue our work together, at government, national and local levels, to eradicate racial hatred and anti-Semitism from all societies, all with a single impetus and objective – that the Holocaust will never ever happen again.

#### Notes

1. See L. Karsai, at the Holocaust History Project, [www.holocaust-history.org/hungarian-photos](http://www.holocaust-history.org/hungarian-photos), last visited 19 February 2007.
2. See United States Holocaust Memorial Museum, [www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005458](http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005458), last visited 19 February 2007.
3. See I. Deák, "The Holocaust in Hungary," in 45 *The Hungarian Quarterly*, 176, Winter 2004, [www.hungarianquarterly.com/no176/6.html](http://www.hungarianquarterly.com/no176/6.html), last visited 19 February 2007.
4. I. Deák, *op. cit.*
5. I. Deák, *op. cit.*
6. See L. Karsai, "Photographs documenting the Holocaust in Hungary," in *Essays*, the Mazal Library, [www.mazal.org/Hungary/Text/Hungary.htm](http://www.mazal.org/Hungary/Text/Hungary.htm), last visited 19 February 2007.
7. I. Deák, *op. cit.*

## *German Section of IAJLJ founded*

I am delighted to announce that a German Section of the International Association of Jewish Lawyers and Jurists was founded on 5 March 2007 in Berlin. Olaf S. Ossmann is the Section's president, Peter Diedrich is a vice president and Liat Tal is vice president and treasurer. Other board members are Ron Jakubowicz and Martin Cygielman. Due in particular to immigration from countries of the former Soviet Union, Germany's Jewish population has grown to more than 100,000 in recent years, making it one of the largest in Europe.

The Section's address is Nürnberger Straße 8, D-10787 Berlin. Email can be sent to [info@iajlj.de](mailto:info@iajlj.de), while the telephone and fax numbers, respectively, are +49 30 726276 33 and +49 30 726276 38.

I know that I write for every one of our members in wishing the German Section *Mazal Tov* and looking forward to working closely in furthering the aims of the Association.

# Law and morality in wartime

*Israel has fought conventional wars against states, but today must cope with a new form of war, one that challenges the Jewish law of war, much as it challenges Israeli and international law. Aviad Hacohen explores the Jewish requirement that a war be just both in purpose and in the manner in which it is fought.*

Aviad Hacohen

## Foreword

And what is the difference between the way the State of Israel wages war, and the wars waged by its enemies? The State wages war whilst upholding the law, whereas its enemies wage war whilst violating the law. The moral strength and justification of the wars fought by our Government are dependent entirely upon upholding the laws of the State: by conceding this strength and this justness, the Government serves the purposes of the enemy. Moral weapons are no less important than any other weapon, and perhaps more important. There is no moral weapon more effective than the rule of law. All should know and be aware that the rule of law in Israel will never succumb to the State's enemies.<sup>1</sup>



From its inception, this approach has been maintained by the State of Israel. It has guided the State throughout its wars, even though, at times, it has demanded a severe toll.

Such an approach means that, even as the cannons roar, the voice of the rule of law and the principles of morality can be clearly heard. It is not enough that the war itself be just (*jus ad bellum*). There need also be "justice in war" (*jus in bello*). It is no coincidence that the Torah commands the king to carry a *Sefer Torah* (Torah scroll) with him when he goes forth to war at the head of his people.<sup>2</sup> The teaching implied in this commandment is that all of the laws and commandments are binding on the king and on the people, even in times of war.<sup>3</sup> This approach contrasts that of those who hold that war cannot be carried out "according to the principles of the Magna Carta,"<sup>4</sup> and that, in wartime, there is no need to preserve and protect human rights and human dignity.

Echoes of this idea, of upholding morality in war, can already be found in the Bible. Whereas ancient

legal systems – the Code of Hammurabi, or those of Eshnunna and Lipit-Ishtar, and so on – make no mention of this issue,<sup>5</sup> the Torah offers a number of normative instructions whose purpose is to restrict the actions deemed permissible even in wartime, and to ensure that human dignity is preserved even under such difficult circumstances.

## Then and now

One of the major difficulties faced in a study of this nature is the enormous gap between the picture painted by the textual sources and the realities of our own day.

One of the risks that we face is that of anachronism. It is all too easy to draw comparisons between modern legal institutions and the ancient principles of Jewish Law.

Moreover, there is a tendency to apply contemporary legal principles and institutions to the past and to seek their parallels in ancient legal systems. This type of comparison is problematic from a methodological perspective. A fundamental principle that should guide those who seek to compare two legal systems – any two legal systems – is that due attention should be paid to the distinction between the norm and the exceptional case,<sup>6</sup> and to the many nuances and details within each legal institution. For example, in our case, any inquiry into the Jewish law of warfare must begin by looking carefully at the different classes of war identified by Jewish Law.

Jewish Law discusses three types of war – **voluntary** war, **obligatory** war, and *Milchemet Mitzvah*, a war mandated by God's commandment – though their precise definitions are subject to debate. Within these categories are subcategories applicable to different instances of warfare, such as "saving a fellow Jew from an enemy."<sup>7</sup> There is a system of "overriding principles," such as "if someone comes to slay you, arise early and slay him first"<sup>8</sup> and "your life takes precedence."<sup>9</sup> There are "common principles," such as the **concern regarding *Hillul Hashem* (desecration of God's Name)** through carrying out immoral acts,<sup>10</sup>

and the concern for “what will the nations say.”<sup>11</sup> All of these considerations must be taken into account, subject to the individual circumstances of each case.

The picture is further complicated by Israel’s need to cope with a form of warfare that is not against a “nation” or a “state,” but against a terror organization or even an individual terrorist (a conundrum not unique to Jewish Law). Under these circumstances the application of the internationally accepted laws of warfare may not always be appropriate either.<sup>12</sup>

Notwithstanding the principles common to all types of war, it is clear that there are significant differences between the wars of ancient times and those of our own day. For example, Ammon and Moab of ancient times were a different kind of enemy than the terrorists or superpowers of today; the bow and arrow and the ballista are a far cry from the military use (or potential use) of weapons of mass destruction and non-conventional weapons.<sup>13</sup> Likewise, warfare on the open battlefield is very different from warfare in built-up, urban areas populated by civilians.<sup>14</sup> Nevertheless, with due care, we will find it instructive to apply the principles, if not the specific details, relating to warfare in Jewish Law, to today’s circumstances.

One of the major sources in this regard is the “Laws of Kings and their Wars,” in the *Mishneh Torah* of the Rambam (the Hebrew acronym for Maimonides). Though written in the 12th century, when Jewish political autonomy was only a dream, the Rambam’s words have served as a guide to many on these issues. In his footsteps, as the years passed, Jewish Law developed a surprisingly extensive literature on this topic.<sup>15</sup> Apart from individual articles, entire books were published – particularly in the early days of the State of Israel – with the aim of formulating a “theory of warfare” based on Jewish legal sources.<sup>16</sup> To these sources must be added the international laws and conventions regarding warfare and weaponry, which, in the view of some scholars of Jewish Law, are also binding halachically, by virtue of the principle of *dina demalchuta dina*, the law of the land is binding.<sup>17</sup> In the following paragraphs, I would like to survey a selection of the issues that arise in this context.<sup>18</sup>

### The obligation to offer peace terms

One of the commandments of the Torah is the obligation to offer peace terms prior to engaging in warfare.<sup>19</sup> At first glance, this law seems somewhat strange, since it precludes the element of surprise, one of the key foundations for any military campaign. This is how the Torah expresses the command:

When you approach a city to wage war against it, you must propose a peaceful settlement. If [the city] responds peacefully and opens [its gates] to you, all the people inside shall become your subjects and serve you. If they reject your peace offer and declare war, you shall lay siege to [the city] (Deut. 20:10-12).

As we can see from the biblical text, this obligation was carried out even in earliest times. Although Moshe (Moses’ Hebrew name) was commanded by God, “See! I have given over Sihon, the Amorite king of Heshbon, and his land, into your hands. Begin the occupation! Provoke him into war!” (Deut. 2:24), Moshe chose to begin the campaign with a peace overture: “I sent emissaries... to Sihon king of Heshbon with a peaceful message, saying, ‘We wish to pass through your land. We will travel along the main highway, not turning to the right or the left.’” (ibid., 26-27).

According to a *Midrash* (traditional homiletic interpretation),<sup>20</sup> Moshe chose to act in accordance with his own moral conscience, even though this was, apparently, in opposition to God’s command. Nonetheless, God’s response was approving: “By your life! I shall cancel My words and adopt yours.”<sup>21</sup>

### Besieging the enemy

One of the fundamental biblical laws relating to warfare requires the army to allow the enemy, and certainly innocent civilians, the opportunity to escape in order to avoid harm.<sup>22</sup> The source of this law is found in the narrative dealing with the Israelite war against Midian. Though the Israelites had been commanded, in the strictest of terms, “Attack the Midianites and kill them” (Num. 25:17), the biblical account of the battle states, “The besieged Midian” (ibid., 31:7). On this point the Sifri, a *halachic midrash*, records a dispute between the Sages: “They surrounded them on all four sides. Rabbi Nathan said: ‘They left one side open, for them to flee.’”

Normally, where a single, named, *tanna* (rabbinic sage of the *Mishna*) is quoted in opposition to an unnamed *tanna kamma* (first *tanna* who voices an opinion on the issue), the law follows the view of the *tanna kamma*. Here, however, the Rambam rules in accordance with Rabbi Nathan’s view: “When they besiege a city to capture it, they must not surround it from all four sides, but only from three sides, and they must leave a place for a deserter or anyone who wishes to save his life.”<sup>23</sup>

Opinion is divided as to the rationale for this law. Some hold that it is based on ethical considerations,

“for it is through this that one will learn to behave mercifully, even with our enemies in time of war.” Others predicate it on pragmatic reasons: “that we should leave one side open for them to flee, **so that they do not feel constrained to put up a strong defense against us.**”<sup>24</sup> There is, of course, a major difference between these two rationales: the former would seem to apply at all times, while the latter would depend on an evaluation of the particular circumstances applying in each case.

Modern *halachists* have had to deal with this issue on various occasions. These include the incident of the Faluja Pocket during Israel’s War of Independence; the Israel Defense Forces (hereinafter: “IDF”) surrounding the Egyptian Third Army during the Yom Kippur War; and the IDF encircling Beirut during the 1982 Lebanon War. Rabbi Shlomo Goren held that, even in those circumstances, the IDF had an obligation to leave the enemy a “fourth side” so that they could flee. Rabbi Shaul Yisraeli, a member of the Rabbinical Appeals Court, disputed this view, and held that this obligation does not apply in a *Milchemet Mitzvah*, a mandatory war.<sup>25</sup>

### Harming the civilian population

One of the phenomena characteristic of Israel’s wars in the past few decades is fighting conducted in areas occupied by a civilian population. This situation raises serious questions both in terms of international law<sup>26</sup> and in terms of ethics, and both of these have received extensive treatment in the Jewish legal literature.<sup>27</sup>

Fundamentally speaking, it is clear that the innocent should not be punished for the wrongdoings of others.<sup>28</sup> However, where there is cooperation between the civilian population, or part of it, and the enemy, the distinction between them becomes blurred. Moreover, at times it is impossible to fight an enemy that is hiding among the civilian population without harming innocent civilians. The attempt to distinguish between them during the fighting may cost the lives of many soldiers. At times a controlled, proportional strike against the civilian population may turn the tide of the battle and ultimately save many lives, civilian and military alike.<sup>29</sup> These issues are particularly complex, and may not always have an unequivocal answer. Fundamentally, they are dependent on context and circumstances, and, as such, should be left to those authorized to make such decisions, who, in turn should weigh all of these considerations in order to reach the best possible outcome. The deliberation that needs to be applied by the

authorities is expressed in the following terms by the first Chief Rabbi of modern Eretz Yisrael (technically, of the British Mandate for Palestine), Rabbi Avraham Yitzhak Hacohen Kook: “Perhaps it is one of the principles of rulership, of which there are many and which are given to the nation... but which do not necessarily follow the Torah’s laws as they apply to individuals... rather, their interpretation and determination in such matters **are given to each king, in accordance with his own extensive understanding**, and it is for this reason that the king is required to write two *Sifrei Torah*.”<sup>30</sup>

### Afterword

Before closing this article, it is appropriate to note the following comments made by former President of the Supreme Court of Israel, Justice Aharon Barak:

The saying that “when the cannons speak, the Muses are silent” is incorrect.... The reason underlying this approach is not merely pragmatic, the result of political and normative reality. The reason underlying this approach is much deeper. It is an expression of the difference between a democratic State fighting for its survival and the battle of terrorists rising up against it. The State is fighting for the law and for the law’s protection. The terrorists are fighting against and in defiance of the law. The armed conflict against terrorism is an armed conflict of the law against those who seek to destroy it.... But in addition, the State of Israel is a State whose values are Jewish and democratic. Here we have established a State that preserves law, that achieves its national goals and the vision of generations, and that does so while recognizing and realizing human rights in general and human dignity in particular. Between these two there are harmony and accord, not conflict and estrangement.<sup>31</sup>

Justice Barak’s comments are also reflected in the following statement by his colleague, former Deputy President Justice Mishael Cheshin:

[W]e will not falter in our efforts for the rule of law. We have sworn by our oath to dispense justice, to be the servant of the law, and we will be faithful to our oath and to ourselves. Even when the trumpets of war sound, the rule of law will make its voice heard.<sup>32</sup>



Indeed, this is a complex issue. The concerns that are involved are the same as those that were felt by our forefather, Jacob, when he prepared himself for battle against his brother, Esau. Regarding the verse, “Jacob was very frightened and distressed” (Gen. 32:8), the Sages offered the following comment: “Frightened – that he would kill; distressed – that he would be killed.”<sup>33</sup> According to some commentators, Jacob was concerned that, in the heat of battle, he would use “disproportionate” force, force that would harm the innocent unnecessarily. Thus, for example, the Maharal of Prague (Rabbi Judah Loew ben Bezalel) writes on this verse, in his *Gur Aryeh*: “He was frightened that he might kill those who were accompanying Esau, not knowing if they had come to kill him or not, and thus his killing of them would be unlawful.”

In this spirit, the Israel Defense Forces has, in addition to the provisions of the law, adopted a Code of Ethics, known as the “IDF Spirit.” Among other things, it establishes, as one of its key provisions, the idea of “purity of arms:”

**Purity of Arms** – The IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the necessary extent and will maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or to harm prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property.<sup>34</sup>

Such sentiments are indeed appropriate for the Jewish State, whose values are both Jewish and democratic, whose inspiration is from the Jewish sources, and which has guided itself on the basis of the principles found in these sources – principles which are valid not only now but for all times.

*Aviad Hachohen, Dean of Sha'arei Mishpat College, is a senior lecturer in Jewish Jurisprudence and Constitutional Law at the College and at the Hebrew University of Jerusalem's Faculty of Law. He is also a research fellow at Jerusalem's Van Leer Institute. Perry Zamek translated this article for Justice.*

## Notes

1. HCJ (High Court of Justice) 320/80 Kawasme v. Minister of Defense et al., 35(3) *Piskei Din* (Reports of Israel Supreme Court; hereinafter: “P.D.”) 113, 132, per Justice Haim Cohen (Quoted in:

www.mfa.gov.il/MFA/Government/Law/Legal+Issue+s+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm#barak (Last visited 6 February 2007), hereinafter “MFA-Barak.” Note also the comments by Justice Landau: “We have always placed our trust in the fact that here the voice of the law is not silenced, even in the clamor of hostile acts around us.” *Ibid.*, 120: HCJ 393/82 Almaalamon v. Commander of the IDF Forces, 37(4) P.D. 785, 810; HCJ 168/91 Morcos v. Minister of Defense, 45(1) P.D. 467, 470; HCJ 2161/96 Rabachi Said Sharif v. GOC Home Front Command, 50 (4) P.D. 485,491; HCJ 5872/01 Barake v. Minister of Defense, 56(3) P.D.

2. Rambam (Maimonides), *Mishneh Torah*, Laws of Kings 3:1.

3. A far-reaching insight may arise from identification of the “war officers” with the “judges.” This would explain the enormous number of judges – “chiefs of thousands, hundreds, fifties, and tens” – which, according to the Jewish Sages (“Chazal”), comes to the enormous number of 78,600 judges! See *Sanhedrin* 18a. See also E. Samet, *Studies in the Weekly Parsha*, Part 2, 322 (5765-2005) [Hebrew].

4. In the words of the English Judge Scrutton, quoted by Israeli Supreme Court Justice Simon Agranat in HCJ 73/53 Kol Ha'am v. Minister of the Interior, 7 P.D. 871, 880.

5. See A. Shapira, “The Biblical Inclination to Limit and Mitigate Law,” 7 *Studies in Bible and Exegesis*, 335-63 (5765-2005) [Hebrew].

6. See A. Hachohen, “Shall we benefit a person in his absence?” – Studies on Class Action Claims in Light of the Principles of Jewish Law” 4 *Sha'arei Mishpat* 153-91(5765-2005), In regard to the attitude to prisoners, one can find in the Bible descriptions of extreme cruelty, such as the treatment of the fugitives of Ephraim: “And when any fugitive from Ephraim said... *sibboleth*... they would seize him and slay him by the fords of the Jordan.” (Judges 12:4-6). This does not mean that such behavior was the norm, and it certainly is not an appropriate example for later generations. See Shapira (*supra*, note 5 at 336. This is also the case in regard to the well-known statement of Rabbi Shimon ben Yohai, “The best of gentiles – (in wartime) kill him.” (*Massechet Soferim*, Higer Edition, 15:6), which has been given a variety of interpretations.

7. Rambam (Maimonides), in Laws of Kings 5:1, defines a war of this type as a “*Milchemet Mitzvah*.” See also Rabbi S. Yisraeli, *Amud Hayemini* (5726-1966), Nos. 15 and 30.

8. *Sanhedrin* 72a. See also Rabbi Hayyim David

Halevy, "The Law of Pre-emptive Killing in Public Life," 1 *Techumin* 343-48 (5740-1980).

9. Baba Metzia 62a. It should be noted that, in the view of many halachic authorities, this principle does not apply under wartime conditions, and thus it is permitted, perhaps even obligatory, for a soldier to put himself at risk of his life to save a comrade from danger. See Responsa *Tzitz Eliezer*, Part 12, No. 57; Part 13, 100.

10. Regarding the concern for *Hillul Hashem* in the context of the laws of war, there is an extensive literature relating to the case of the Gibeonites, which makes it clear that the Israelites were forbidden to break their oath to them, even though it had been obtained deceitfully. See Gittin 46a, Yevamot 78b.

11. For an expanded treatment of this issue, see "Why should the nations say" – the image of Israel in the eyes of the nations as a consideration in determining law and halacha in Jewish Law" in *A Nation Alone* [*Am Levadad*], (B. Lau, ed., 2006), 123-88, 443-54 [Hebrew]. In the particular context of the laws of war, see *Sefer Hahinukh*, Commandment 527, which states that leaving a fourth side open during the siege of a city was also aimed at preventing us from being disgraced among those who hear of the siege. See also the comments by Rabbi Aharon Lichtenstein, "Restoring Israeli National Pride," *Hatzofe*, 28 Tishri 5743 (15 Oct. 1982), 5 [Hebrew].

12. See H. Even-Chan Mudrick, *Illegal Fighters or Illegal Legislation? The Imprisonment of Illegal Fighters Law*, 5762-2002, (2005) [Hebrew]. In this regard, see HCJ 5964/92 Bnei Udda et. al v. State of Israel, 56 (4) *P. D.* 1, 6. See also HCJ 2936/02 Physicians for Human Rights v. Commander of the IDF Forces in the West Bank, 56 (3) *P. D.* 3, 4.

13. In this regard, see also M. Walzer, *Just and Unjust Wars* (1984) [Hebrew]; M. Walzer, *Arguing About War* (2004).

14. See E. Shochetman, "Endangering IDF Troops to Avoid Harming Enemy Civilians," 91 *Nativ* 20-27 (5763-2003), [Hebrew]; *ibid.*, Issue 92, 28-34 (5763-2003); Rabbi N. Guttel, "Combat in Areas Occupied by a Civilian Population," 23 *Techumin* 18-42 (5763-2003) [Hebrew].

15. For a partial treatment of this literature, see N. Rackover, *Otzar Hamishpat*, Part 1 (5735-1975) 201-05; Part 2, (5751-1991), 185-92. For certain issues of morality and war, see A. Hacohen, "Morality and War – A Selected Bibliography" in *Arakhim beMivchan Milchama* 252-56 (5743-1983); A. Sherman, "Halachic Principles in Wartime Morality," 9 *Techumin* 231-40 (5748-1988) [Hebrew]; Y. Ariel,

"Stealing from Non-Jews in Wartime," 23 *Techumin* 11-17 (5763-2003) [Hebrew]; A.Y. Sharir, "Military Ethics According to Halacha," 25 *Techumin* 426-38 (5765-2005) [Hebrew]. For a general discussion, see A. Kasher, *Military Ethics* (5756-1996) [Hebrew]; A. Kasher, "All is Fair in Love and in War?" in *Trials of Love* 157-72 (O. Ben Naftali & H. Nave, eds., 2005) [Hebrew]; M. Finkelstein, "Law in Wartime," 16 *Mishpat veTzava* 15-35 (2002) [Hebrew]; E. Gross, *The Struggling of Democracy Against Terrorism – The Legal and Moral Aspects* (2004); M. Finkelstein, "War and Morality," 30 *Justice* 11-15 (2002); D. Statman, "Targeted Killing," 5 *Theoretical Inquiries in Law* 179-198 (2004); *The Ethics of War and Peace* 95-114 (T. Nadrin, ed., 1996).

16. Two notable works are Rabbi A.D. Regensberg, *Mishpat Hatzava Beyisrael* (5709-1949) and Rabbi S. Yisraeli, *Mishpat Hamilchama* (5732-1972). See also the monumental work by the first Chief Rabbi of the Israel Defense Forces, Rabbi Shlomo Goren, the main points of which were published in the various issues of *Bamachane* over a couple of decades, and which were later published in his 3-volume collection of responsa, *Meshiv Milchama* (5743-5746-1983-1986). (For an analysis of the uniqueness of Rabbi Goren's rulings, see Rabbi M. Hacohen, "Meshiv Milchama: Rabbi Shlomo Goren's Halachic Rulings on Religion and the Army," 1 *Milvin Havivin* 3-11 (5765-2005).) There is an extensive literature on how war is perceived in Judaism. See, for example, Issue 69 of *Machanayim* (Rabbi M. Hacohen, ed., 5722-1962), all of which is devoted to the issue of war in the Bible. See also A. Meir, "War and Peace in the Philosophy of Levinas," 45 *Iyun* 471-79 (5757-1997) [Hebrew]; A. Ravitzky, "Has Halachic Thought Developed a Concept of 'Forbidden War'?" in *Multiculturalism in a Jewish Democratic State*, 523-41 (M. Mautner et. al., eds., 1998), [republished in *Herut al haLuchot* 139 (5759-1999)] [Hebrew].

17. Rabbi S. Yisraeli, *Amud Hayemini*, No. 16, Ch. 5. Cf. Rabbi Y. Shaviv, "Remember War, Don't Add to it," 9 *Techumin* 205-30 (5748-1998) [republished in *Betzir Aviezer* 105 (5750-1990)]; Rabbi A. Sherman, "International Law (in Wartime) in Light of Torah Law," 44 *Torah She-Be'al Peh* 59-78 (5764-2004) [Hebrew].

18. Other issues that I have not touched on include the transfer of prisoners, equality in military service, exemption from military service and the refusal to serve, the spoils of war, and purity of arms.

19. For the approach of the author of *Sefer*

*Hahinukh*, see *Sefer Hahinukh*, Commandment 527; for that of the Rambam, see *Mishneh Torah*, Laws of Kings 6:1: this obligation also applies in a *Milchemet Mitzvah*. See also Rabbi S. Atun, "Offering Peace Terms in Milchemet Mitzvah, to the Seven Nations and to Amalek," 3 *Massuot* 15-21 (5722-1962), [Hebrew]; Rabbi Arieli, *supra* note 16 at 108-11; Rabbi M. Hacohen, "Peace in Israel's Wars in Light of Halacha," 121 *Machanayim* 34-52 (5729-1969) [Hebrew]; Rabbi H. D. Halevy, "Offering Peace in Wartime," in *Bein Yisrael La-Amim* 17-26 (5714-1954) [Hebrew]; Rabbi S.Y. Zevin, "Offering Peace Terms in Milchemet Mitzvah, Amalek, Ammon and Moab," in *Le'or Hahalacha* 9-65 (5737-1977) [Hebrew]; Rabbi Y. Weiss, "The Call for Peace Prior to Setting Out to War," 44 *Torah She-Be'al Peh* 112-125 (5764-2004) [Hebrew]; Rabbi Regensberg *supra* note 16, at No. 14; Rabbi Goren, *Meshiv Milchama*, *supra* note 16 at Part 1, No. 1, 14.

20. Bamidbar Rabbah 19:33.

21. See Rashi, *ibid.*, who comments: "Although the Omnipresent did not command me to offer peace terms to Sihon, I learned this from the Torah, which existed prior to the creation of the world." The Rambam's commentary on the Torah (Num. 21:21) also indicates that Moshe's reasoning in this matter was independent: "Moshe decided himself to take the path of appeasement."

22. In this regard, see Rabbi A. Avidan, "Encirclement of Enemy Forces in Halacha," 7 *Morasha* 112-13 (5734-1974) [Hebrew]; Rabbi Arieli *supra* note 16, 112-113; Rabbi Y. Gershuni, "On the Law of Laying Siege from Three Sides in *Milchemet Mitzvah*," 4 *Techumin* 54-67 (5743-1983) [Hebrew]; Rabbi M. Hacohen, "The Siege in Military Ethics," 69 *Machanayim* 40-41 (5722-1962) [Hebrew]; Rabbi D. Lishinsky, "Prohibitions and Commandments in Times of Siege," 4 *Techumin* 37-43 (5743-1983) [Hebrew]; and others.

23. Rambam, *supra* note 2 at 6:7.

24. Both of these opinions are quoted by the Ramban (Hebrew acronym for Nahmanides) in his *Hasagot* on the Rambam's *Sefer Hamitzvot*, Objection 5.

25. See the article by Rabbi Goren, published in *Hatzofe*, No. 13357, dated 29 Elul 5742 (17.9.82), 7, and in his *Meshiv Milchama*, see *supra* note 16, at Vol. 3, 264-265. See also the response by Rabbi S. Yisraeli in *Hatzofe*, *ibid.*, and his article, "The Siege of Beirut in Light of Halacha," 4 *Techumin* 25-36 (5743-1983) [Hebrew]. A more recent article is by A. Edrei, "Divine Spirit and Physical Power – Rabbi Shlomo Goren and the Military Ethic of the Israel Defense

Forces," 7 *Theoretical Inquiries in Law* 255-97 (2006).

26. Article 51 (7) of the 1977 Protocol to the Geneva Convention (Protocol 1) states: "The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations." Articles 57-58 require the parties to a conflict to take all the necessary steps to avoid harming, or at least minimizing harm to, civilian populations. See also HCJ 2936/02 Physicians for Human Rights v. Commander of the IDF Forces in the West Bank, 56 (3) *P. D.* 3; HCJ 2977/02 Adalah – The Legal Center for Arab Minority Rights in Israel v. Commander of the IDF Forces in the West Bank, 56 (3) *P. D.* 6. See Walzer, *supra* note 13, at 165-190.

27. See Shochetman and Guttel, *supra* note 14.

28. It goes without saying that midrashic comments, such as "Woe to the wicked, woe to his neighbor" (Rashi, Num. 3:29), cannot serve to justify harming a large, innocent population, whose members are not willing participants in the evil acts of their neighbors. The extent of any permission to act against a civilian population depends, first and foremost, on the level of its hostility and its cooperation with the enemy. In this regard, see Y. Blidstein, "Contemporary Halachic Views of Action against a Hostile Civilian Population," 41-42 *Medinah, Mimshal Veyahasim Beinleumiim* 155-70 (5757-1997), [republished in Y. Blidstein, *Studies in the Philosophy of Halacha and Aggada* 445-56 (5764-2004)] [Hebrew] and the sources quoted there.

29. This reasoning was also used to justify dropping the atom bomb on Hiroshima during World War II.

30. Rabbi Avraham Yitzhak Hacohen Kook, Responsa *Mishpetei Cohen*, No. 143.

31. HCJ 3451/02 Almadani et al. v. Minister of Defense 56 (3) *P. D.* 30-34 (quoted in MFA-Barak).

32. HCJ 1730/96 Sabiah v. IDF Commander in Judea and Samaria, 50 (1) *P. D.* 369 (quoted in MFA-Barak).

33. Bereshit Rabbah 76:2. In some of the parallel versions and in manuscript versions, the concern "that he might kill" precedes the concern "that he might be killed," but in many of them, and in Rashi's commentary there, the concern "that he might be killed" comes first.

34. Translation taken from the official IDF website, [www1.idf.il/dover/site/mainpage.asp?sl=EN&id=32](http://www1.idf.il/dover/site/mainpage.asp?sl=EN&id=32), (Last visited 6 February 2007).



The opening ceremony took place in the restored Pava Street Synagogue, part of the Budapest Holocaust Memorial Center.

## Budapest conference: Reflections past and future

*More than 250 members and friends of IAJLJ gathered in Budapest, Hungary, November 16-19 to attend IAJLJ's "Remember Budapest" conference. The conference commemorated the Jewish lawyers and jurists who perished in Hungary during the Holocaust, continuing similar conferences held earlier in Salonika, Berlin and Warsaw.*

Appearing on the following pages are several of the lectures and addresses delivered at the conference. A highlight of the conference was the distribution to all attendees of IAJLJ's new publication "Miscarriage of Justice: The Elimination of Jewish Attorneys in Hungary during the Holocaust," which conclusively proves the disbarment and practice confiscation of some 3,400 Jewish lawyers in Holocaust-era Hungary. "Miscarriage of Justice" will soon be available in searchable database form on the IAJLJ website, [www.intjewishlawyers.org](http://www.intjewishlawyers.org).

The opening session of the conference, moderated by IAJLJ Vice President Irit Kohn of Israel and

Dr. Gábor Damjanovic of Hungary, was held in the restored Pava St. Synagogue that is now part of Budapest's magnificent new Holocaust Memorial Center ([www.hdke.hu](http://www.hdke.hu)). After an opening address by IAJLJ President Alex Hertman and a short memorial service, greetings were offered by Dr. Zoltán Lominici, president of the Supreme Court of Hungary, Dr. János Bánáti, president of the Hungarian Bar Association and Dr. Péter Feldmájer, chairman of the Federation of Jewish Communities in Hungary. Renowned Hungarian jurist Dr. Gábor Máté delivered the keynote address, "Jewish Lawyers for the Development of Law in Hungary in the 19th Century."





IAJLJ President Alex Hertman



His Excellency David Admon, Israel's ambassador to Hungary

Friday morning sessions were hosted at the Conference Hall of the Budapest Bar. The first session, "Jews in Hungary – First Half of the Twentieth Century," was moderated by Dr. Lazlo Reti, president of the Budapest Bar. Participants included professors András Kovács and Victor Karády of Budapest's Central European University and Arie Kochavi of Haifa University. The second

session, "Remembering Raoul Wallenberg," was moderated by Mirella Bamberger, formerly senior assistant to Israel's State Controller and Public Complaints Commissioner. Participants included László Karsai of the University of Szeged, Hungary, and former Canadian justice minister and McGill University law professor Irwin Cotler.

Free time until Saturday evening's gala dinner,



Left to right: Chairman of the Yad Vashem Council Yosef (Tommy) Lapid, Israeli Supreme Court Justice Edna Arbel and President of the Supreme Court of Hungary Zoltán Lomnici.



Dr. Péter Feldmájer, Chairman of the Federation of Jewish Communities in Hungary

punctuated by a formal Shabbat dinner on Friday evening, allowed conference attendees an opportunity to explore this most majestic of central European cities on the Danube.

“Anti-Jewish Policies and Practices – Old and New,” on Sunday morning, was moderated by Jeremy Margolis of Chicago. Participants were Former President and Honorary President of IAJLJ Judge (Ret) Hadassa Ben-Itto, Director of the Institute for Transborder Studies and Professor at the Department of Political Science Noemi Gal-Or of Kwantlen University College in British Columbia, Canada, and Efraim Halevy, former head of Israel’s Mossad and now head of the Center for Strategic and Policy Studies at the Hebrew University of Jerusalem.

Dr. Maria Canals De Cediell of IAJLJ’s Swiss Section moderated the afternoon session, “Remembering the Holocaust,” in which participated Dr. János Botos of the Holocaust Memorial Center and IAJLJ Vice President Haim Klugman. IAJLJ Vice President Irit Kohn delivered a concluding address, “The Role of Jewish Lawyers in Confronting Central Issues on the Jewish Agenda.”

This session was followed by several personal stories of the Holocaust, moderated by IAJLJ First Deputy President and Dean of Law at Bar-Ilan University Yaffa Zilbershats. Telling their stories were IAJLJ President Alex Hertman, Yosef (Tommy) Lapid, chairman of the Yad Vashem Council and former Israeli minister of justice, Israeli Supreme Court Justice Edna Arbel, Dr. Ferene Michael Gellert of Israel, Holocaust survivor and practicing lawyer Dr. Ákóst Bálint of Hungary and IAJLJ Swiss Section Vice President Michal Kobsa.

The conference’s closing resolution is posted at [www.intjewishlawyers.org](http://www.intjewishlawyers.org).

“Remember Budapest” was held under the auspices of Terry Davis, secretary general of the Council of Europe. Justice congratulates Adv. Irit Kohn, chair of the organizing committee, and organizing committee members Adv. Arik Ainbinder and Adv. Haim Klugman for their outstanding work in organizing “Remember Budapest.” Justice thanks Dr. Ferene Michael Gellert for his help in bringing about the conference and the generous assistance of the Nadav Foundation.



Conference participants kicked up their heels at Saturday night’s Gala Dinner.

*Event photos by Kristof Nagy.*

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# The time was – and is – out of joint

*It was only in 1861 that Jews were permitted to practice law in Hungary, after which their numbers in the profession rose rapidly. Yet anti-Semitism persisted and even today, though war crimes reparations are in force, anyone can verbally attack a Jew with impunity. Further, in 2006 the Supreme Court held that those who fought the wartime regime acted illegally.*

Péter Feldmájer

Colleagues and friends: Remember Budapest is the well-chosen name of conference you are attending. You have come to a country and to a city where there are indeed things to remember. Many centuries of history, but most important of all, the nearly one hundred thousand Jews living here today, the hundreds of thousands who lost their lives in the Shoah, the Jewish lawyers and jurists who live here and who once lived here.

You came to a city, where in 1920, before the Shoah, the word lawyer also meant Jewish lawyer, for nearly three-quarters of the lawyers in Budapest were Jewish, and more than half throughout the country.

That was no small achievement, for as late as 1861 the then Supreme Court did not permit Jews to become attorneys. It was in that year that Jewish lawyers were allowed to open a law office, and then only with the special permission of the emperor. The first Jewish lawyers were Simon Goldstein and Armin Schönberger, but their co-religionists had to wait decades before they were able to become crown attorneys and judges. Yet almost one in twenty-five had done so by 1920.

You have come to a city where Jewish lawyers were deprived of their profession, where they were deported to forced labor camps, where the majority died in the concentration camps, and where the gas chamber awaited those who were still alive.

Few survived the Shoah and had the opportunity to start a new life.

Those few may have experienced anti-Semitism once more, except now it was called anti-Zionism. It did not console them that the leaders of the attacks were themselves Jewish, mostly their former colleagues.

You have come to a country where for many decades the question of war crimes reparations could not be raised. Even after the collapse of the commu-

nist regime the first government attempted to rebuff attempts to obtain reparations for the Jews. I appealed to the Constitutional Court four times until finally equal treatment prevailed. That treatment, I'm pleased to say, serves as an example for the whole cultured world, for reparations are awarded not only for property losses but also for the loss of loved ones.

The government began with communal reparations, but that was only the first step in applying the Peace Treaty signed in Paris in 1947. Equity remains to be applied in the case of assets without inheritors in the Jewish community. This in a country where a portion of the repertory of the museums yet consists of paintings and sculptures confiscated on the basis of Holocaust-era laws against the Jews.

You have come to a country where a Jewish community numbering about 100,000 members – mostly in Budapest – lives in peace as it rebuilds and strengthens community life. There are more than 40 functioning synagogues in Hungary, and we maintain Jewish kindergartens, schools and even Országos Rabbiképző-Zsidó Egyetem, the Jewish Theological Seminary-University of Jewish Studies. We also provide for Holocaust survivors in need in our 1,150-bed Charity Hospital and in our Home for the Elderly.

You have come to a country where freedom of speech is restricted in several ways, but where anyone can verbally attack a Jew, with neither penalty nor civil court sanction.

You have come to a country where, in 2006 – make no mistake, in the spring of this very year – our Supreme Court declared that during the period of the German occupation those who were against the Hungarian government are guilty, those who fought against the regime are guilty, and that the police who shot them were acting legitimately. In other words it means that those who deported and killed 600,000 Hungarian citizens, mostly Jews, that those who acted against the constitution, but within the law, are

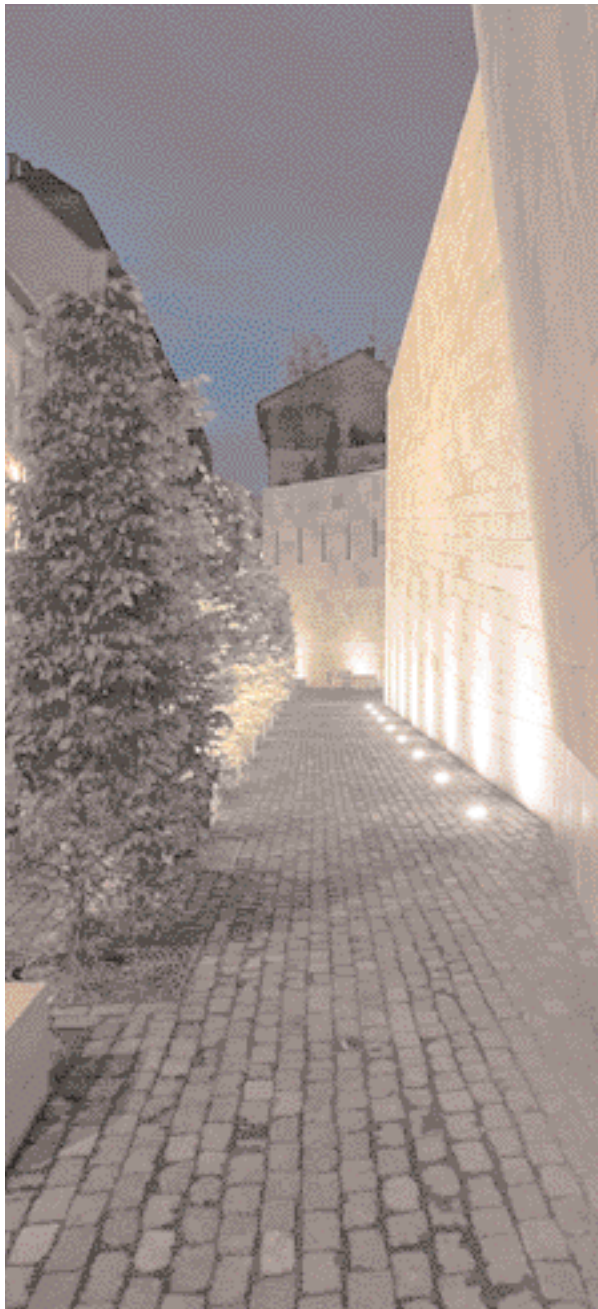




declared the good guys, while those who fought against it are the bad ones.

My paternal uncle fortunately died ten years before this declaration. I say fortunately because had he still been alive he could have been convicted by the Supreme Court for his resistance to the gen-darmerie. My paternal uncle did not get into the wagon voluntarily but escaped and lived to be 94.

Lamented Sára Salkaházi was also lucky, for her



The Budapest Holocaust Memorial Center by night.

Tamás Bujnovsky

case was taken up at the Vatican. She was a Sister of Social Service martyred for standing up against the Hungarian legal order and the police, and hid Jews in a friary. Not only those who converted to Catholicism, but those who were Jews with Jewish faith, Jewish women and Jewish children. Caught, she was brought to the banks of the Danube by the Hungarian government and the members of the Hungarian Nazi party, wielding power in the name of the state, stripped naked, shot and thrown into the icy water.

After the Archdiocese of Esztergom-Budapest and the Society of the Sisters of Social Service examined the circumstances of her martyrdom, Cardinal Péter Erdő asked Pope Benedict XVI to beatify Sister Sára Salkaházi. Chief Rabbi József Schweitzer addressed the thousands of who had gathered in her honor at a celebration of beatification held on 17 September 2006. She was declared by Yad Vashem as one of the Righteous among the Nations in 1972. Yet it seems that had the Supreme Court tried her, Sister Sára Salkaházi would have been found guilty, because she broke the law.

Dear colleagues and friends, we have many things discuss at this conference, much to talk about, many views to exchange.

I hope you will have the opportunity to get acquainted with Budapest, our capital city that so many have compared favorably with Paris. I assure you that it would not have been this beautiful had not Catholics, Evangelists, Jews, Hungarians, Slovaks and Germans worked on it together, with their love of the city connecting them.

Hungary and Hungarian Jewry not only have a past, but a bright future awaits them, and it is in the interest of all of us to promote that future. I sincerely believe that this conference will help this future be realized rapidly.

Shakespeare's hero, Hamlet, exclaims when he meets his father's ghost:

*The time is out of joint: O cursed spite,  
That ever I was born to set it right.*

In 1919 time moved out of joint for Hungary. Alas, there is no Hamlet to set it right, so Hungary awaits us, Jewish lawyers and jurists, to attend the task.

*Dr. Péter Feldmájer is chairman of Magyarországi Zsidó Hitközségek Szövetsége, the Federation of Jewish Communities in Hungary, and a practicing attorney in Budapest.*



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# Lies and libels against Jews – then and now

*Society still turns a blind eye to the dangerous lies that have again gained legitimacy on the main street, on the TV screen and at prestigious international book fairs.*

*Arab and Muslim governments openly finance new editions of  
The Protocols of the Elders of Zion. The lesson has not been learned.*

Hadassa Ben-Itto

The subject I have chosen for my address today has recently become very popular. It appears on the program of many local and international conferences under different titles. It is a subject with which I am very familiar; had I chosen the easy way out, you would probably be listening for the next twenty minutes to a set of facts that to some of you would be quite familiar.

But I am firmly convinced that we are dealing with a dangerous situation, and just repeating the well-known facts may be of some academic value, but does not begin to tackle the real issues that stare us in the face. For, my friends, the historical, psychological and, if you wish, sociological dimensions of this issue are today trumped by the urgent political connotations that play a central role in the international public discourse as a major item on the global political agenda.

So, I decided to use the short time allotted to me to deliver a message, rather than the learned lecture that you may have expected. But first, I must apologize: there is no way I can deliver in twenty minutes the intelligent presentation this audience deserves. Please bear with me if I just set out some points in a staccato manner.

Actually I would like to make three points:

- The persecution of Jews throughout the ages was always based on lies and libels.
- We Jews have never taken real initiatives to confront the libels until it was too late, and then we were faced with their inevitable consequences.
- The process has proven so effective that it was adopted by one regime after another until it threatens today not only the future of Jewry but the very existence of the State of Israel. It has been upgraded and refined into the ultimate weapon and Jews, once more, are silent.

It has been proven that you cannot effectively persecute a people without the support, active or pas-

sive, of the general population. In order to achieve this goal you must prepare the ground by a long process of brainwashing. This is as true for Muslim terrorists today as it was for Russian pogromchiks and for Nazi butchers.

They kill and slaughter not because of what they experience but because of what they believe.

Only if they believe that there is a good reason to persecute Jews will they have no moral qualms in participating in this process or suffering it in silence. This brainwashing is a long process. It passes from one generation to another and is often difficult to identify.

Anti-Semitism does not start in the sick minds of fringe groups. It has always existed, and unfortunately still exists, in the fabric of our society. It can no longer be blamed on any particular country or any particular part of the world. It is part of the social, political, economical and cultural climate in every country of the world, though it manifests itself in various ways and various degrees, different from one society to another. You may say that each society has its own brand, its own style, of anti-Semitism.

I know of no society that is completely free of it, but the significant difference between the Western and the Middle Eastern versions is that the former is not at present government-sponsored.

We constantly monitor overt manifestations of anti-Semitism. We report statistics: how many graves were desecrated; how many buildings were set ablaze; how many people were attacked.

But it does not start with these events; it ends there, exactly as wars do not start on the battlefield, they start in the minds of men. Long before it makes its appearance on the streets or in the beer halls, it is well hidden away in books and in newspapers, in learned academic lectures and in television interviews. It is stamped in the minds of young people in the form of routine stereotypes, which we Jews have learned to suffer and to ignore.



Events that unfolded before our very eyes in the twentieth century taught us that words have consequences. One clear message that marked this century is this: where everything could be said, everything could be done.

But, my friends, contrary to all our lofty declarations, it is clear that the lesson has not been learned. Society still turns a blind eye to the repetition of dangerous phenomena that may clearly lead to disaster; in the name of freedom of expression and of political correctness we again allow poisonous plants to grow and flourish in our garden, and lies and libels, that had formerly been spread surreptitiously in back alleys, have now gained legitimacy and figure proudly on the main street, on the TV screen and at prestigious international book fairs.

The history of the Jews is living proof of the Goebbels theory arguing that a blatant lie can be forged into a strategic weapon, and that the bigger the lie, the more enduring, the more lethal the weapon.

Even when the lie is exposed, it never vanishes if it has been stamped in the minds of people for a long enough period. It is sometimes disguised as an idea, shamelessly published in articles and books, on television and in films, and now on the all-powerful internet. It thus creeps into legitimate public discourse, and in an era that sanctifies unlimited free speech, at least where libels against Jews are concerned, it serves as a dangerous weapon.

Once the lie has crept into language, never to be completely expunged, it becomes a legitimate subject of discussion in the so-called "marketplace of ideas," and now even in the holy of holies, in academia.

As I plan to concentrate on what to me seems the most dangerous libel of all, I shall only mention in passing other libels, all of which played a role in the past, but have survived to this day.

First and foremost: the crucifixion. For close to 2,000 years the Christian world has perceived Jews as Christ killers, even in societies that tolerated their presence. Eruptions of violence against Jews were mostly based on religious motives. Holy wars, crusades and the inquisition all had their roots in the alleged sin of deicide. Children learned it in religious classes, priests preached it from pulpits, and the masses accepted it as the holy truth.

Even when the Holy See in Rome has finally absolved Jews of this deicide, we still get a film like "The Passion," with huge crowds of film goers excited to the point of tears at the sight of ugly Jewish crowds calling for the crucifixion of Jesus.

To serve as effective weapons these lies are carefully chosen to correspond to current beliefs and to needs, or even moods, of the population. People always need a scapegoat for the disasters that befall them, and the Jews are always there, a ready scapegoat, unprotected, the strangers in their midst, who have no effective means of discrediting the liars.

Thus, as the need arose, Jews were blamed for the poisoning of wells, for spreading the plague, and for that horrible blood libel, the murder of Christian children for ritual purposes.

If I had time I would describe how all these libels are alive today in modern form.

Maybe it is this weapon, more than physical weapons, that contributed to the success of the Nazis in turning the world upside down for 12 critical years in human history, but unfortunately, their legacy has survived their downfall and has been adopted by many societies around the world – so much so that it is openly being used again as a strategic weapon, and again, we Jews are its most prominent targets.

After the Nazi era the world cried out, unanimously, never again! But let me submit to you the sad fact that as long as there is no real solution, or even serious discussion, of ways and means to prevent the spreading of lies that bring about the disasters, the words "never again" lose their meaning.

The world is constantly faced with this irresolvable dilemma: how do we confront these lies and still preserve the basic right to freedom of expression?

As this problem is not new to intellectual discourse, any discussion of it tends to be repetitive. The lines on both sides of the argument were drawn long ago, and even as the problem has become more and more acute in the present political environment, no real solution is being offered. Unfortunately it is not yet clearly accepted that with freedom comes responsibility and accountability.

As I said before, to my mind the most dangerous lie and libel is the so-called document entitled "The Protocols of the Elders of Zion." It purports to present a real international Jewish conspiracy to dominate the world. It is neither slogan nor idea. It describes a detailed plan to do away with all legitimate political institutions and governments in the world and to crown a Jewish king, or if you will, a Jewish pope, to rule the globe.

Although the Protocols are usually listed under the title of anti-Semitism, I would argue that this diminishes and misrepresents the danger of this document.

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This is not one more manifestation of anti-Semitism, like painting swastikas, desecrating graves, or publishing obscene cartoons – as horrible as are all these phenomena.

This is first and foremost a political document, fabricated a hundred years ago for political purposes, and used since then, with great success, by various regimes with diverse political agendas. It was thus fabricated and used by Tsarist Russia, as a means of blaming the Jews for the Bolshevik revolution; it was eagerly picked up by the rest of the world gripped after the Bolshevik revolution by “the Red Scare.” It was then placed high on the Nazi agenda, promoted by Nazi organizations around the world on direct orders from Nazi headquarters in Munich, through its well-known organ “Weltdienst” (World Service) published in the nearby city of Erfurt.

None of this was done in secret. It was done openly, as a strategy, and Jews were constantly warned of its consequences by historians, by politicians, and by judges – strangely most of them non-Jews. Listing all of them would in itself more than fill the time allotted for this lecture.

But I must hasten because I have not yet touched on the present and imminent danger.

First some characteristics of the devious use of the Protocols:

- The falsehood of this forged, or rather fabricated, document, cannot today be contested by any sane person.
- In spite of all accumulated proof to the contrary, the Protocols are constantly published in every language, as an authentic document, displayed in bookshops and in book fairs, quoted in the press and on television, available on the internet, and offered for sale by Amazon.
- Every edition of the Protocols ever published is preceded by an introduction describing to the relevant public, in its own language, how this Jewish conspiracy is being implemented right now in their own country.

This is why new editions are constantly being published: in order to link the Jews to existing crises and blame that crisis on them, like the AIDS epidemic, currency devaluation, a revolution, a war, or an act of terrorism like 9/11.

After World War II, when the Nazi promoters of the Protocols vanished from the mainstream public arena, the torch was picked up by a Muslim world that has become the biggest and most prominent promoter and distributor of the protocols, as part of its official propaganda war against Jews and against Israel.

There is a reason why Arab and Muslim governments openly finance new editions of the Protocols; why they allow official and semi-official newspapers and magazines to carry excerpts from the Protocols accompanied by blood dripping Stürmer-style cartoons; why every year they finance television series based on the Protocols, to be aired to hundreds of millions of Muslims during the daily family feasts that break the month-long Ramadan fast; there is a reason why the Hamas charter bases its intent to destroy not only Israel but all Jews, on the Protocols; there is a reason why the president of Iran not only quotes the Protocols as his reason for his wish to destroy Israel, but why his country constantly publishes the Protocols and is one of their main distributors around the world, not only in Arabic, or Persian, but also in English, as was proven when an English edition of the Protocols was openly and brazenly displayed at the Iranian stand at the Frankfurt Book Fair, the largest fair of its type in the world.

Only those who take the trouble to read the mass of material that is published annually in Arabic realize the true purpose of these publications. The message is clear, and it is no different from the message of the Nazis: the Jews endanger world peace; they plan to dominate all countries and their detailed plan is being implemented before our eyes. They must be destroyed.

The message now includes not only the Jews but also the Jewish state. These Jews are a real danger to world peace, first by attempting to dominate the Middle East, and then proceeding to the rest of the world. This is not my personal interpretation; these are direct quotes that can easily be downloaded from the Internet. They appear in books published in Arab and Muslim countries, by respectable publishing houses, funded by governments, and distributed not only throughout the Muslim world but also to all Muslim communities in the west.

The Arabic editions contain introductions that are completely delusional, wild and slanderous to the last word. They describe all events in world history as facets of the devilish Jewish plot and are accompanied by horrific cartoons (permissible, apparently, as long as they do not make fun of Muslims). There is no lack of similar editions in the west.

Recent editions of the Protocols have been upgraded in order to reach a more sophisticated public. In addition to the wild accusations accompanied by blood-dripping cartoons that are still published, we now see a new trend: books disguised

in academic language that contain not only the never-varying text of the Protocols and the traditional political introductions, but also learned discussions of the so-called “Jewish Question.” These new versions brazenly confront the proof of the falsity of the Protocols. For lack of time I have chosen one outstanding example: it is well known that *The Times* of London has played a major role in revealing publicly that the Protocols were not only a forgery but a plagiarism. Times correspondent Phillip Graves hoped that this “scoop,” which earned him a byline in three Times articles published in August 1921, would also make him a candidate for the Nobel Prize. How do you confront a respectable newspaper like *The Times* of London, that headlined its articles “The Truth About the Protocols of the Elders of Zion” and even published them in a separate booklet sold around the world? The modern editions of the Protocols don’t ignore *The Times*, they just turn it into a partner to the Jewish conspiracy.

One such edition was published in the United States in 2004 and sold in respectable bookstores in large cities. The copy in my possession was purchased in a big bookstore in downtown Denver, Colorado. It has a glossy red and white cover and is also sold by Amazon for \$7.95. It contains not only the original Protocols but also many documents based on the conspiracy theory. It “delves deeply” into what it calls “the Jewish Problem,” giving the Jews credit for being smart, intelligent, Nobel Prize winners, definitely a people worthy of respect, but precisely for that reason, dangerous to the world.

A whole chapter deals with refuting the proof of the forgery. Aware of the mass of existing proof, I could hardly believe what I read.

Thus *The Times* of London becomes part of the Jewish conspiracy. Others who exposed the forgery under oath, in courts of law, including a Russian princess and a French theologian, are presented as having criminal records.

A special committee of the United States Senate published in 1964 an official report that the Protocols were a forgery. This was a unanimous report of nine non-Jewish senators, yet this book,

printed in America exactly forty years later, dares state the following passage:

“It is noteworthy that not one of these numerous and contradictory refutations bears an honest, non-Jewish signature.”

It seems that not only western editions find it necessary to discredit the London *Times*. Even in Muslim countries the role of *The Times* in revealing the truth about the Protocols is well known, and true to the new trend new editions in Arabic shamelessly libel this respectable English newspaper. I shall limit myself to one quote, from a book published in 2006 by Dr. Muhammad Ali Hawat, vice president of Ibb University in Yemen, and former military attaché to the Yemeni embassy in Cairo, entitled: *The Zionist media and their system of propaganda*, he deals with *The Times* of London:

“Since the (London) Times, the oldest British newspaper was founded (1788), it has served as a tool of Jewish destruction and of the hidden Jewish government, and operates in accordance with the (devious) plots designed by the Jewish devils either behind the scenes or overtly, with neither fear nor shame.”

Ladies and gentlemen, that which I have presented to you today is only the tip of the iceberg. We must realize that this is a most ingenious weapon, too good to be abandoned.

It is easier to blame one group for everything bad that happens rather than try to understand the complex and multifaceted causes of the problems of the world.

I believe, my friends, that we are all duty-bound to stop ignoring it. Confronting this danger is not easy. There are no ready solutions, but leaving the blinders on our eyes should not be an option. We do so at our peril.

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# The looming confrontation

*The war against anti-Semitism in the 21st century may shape up into one of the most crucial encounters of the Jewish People since it went into exile two thousand years ago. Efraim Halevy told attendees at IAJLJ's "Remember Budapest" conference that it may even constitute a grave challenge to its very survival.*

**Efraim Halevy**

The nature of the dilemma that Jews have often faced on the global stage was no better highlighted than in the uprising of Budapest in October and November of 1956, just over 50 years ago. The Jews of Budapest found themselves caught in the maelstrom and they were divided in their assessment of the situation and over the course they should follow.

There were those Jews who were members of the Communist Party, including several very prominent figures, who feared that the revolution would bring to power not only traditionally freedom loving parties but also powerful remnants of the fascist parties that collaborated with Nazi Germany in World War II and who were known and declared anti-Semites. They had sent many Jews to their death in the gas chambers. And there were the Jews who joined forces with those fighting for freedom from Soviet and Communist oppression and who believed that a free Hungary would give the Jews their liberty to move to wherever they wished. There was not one agreed solution and therefore the Jews were divided even as the Russian tanks crushed Hungarian resistance in the streets of this beautiful city of Budapest.

The 21st century supposedly confronts us with a similar dilemma, but the circumstances are markedly different. Muslim communities are growing rapidly throughout Europe; more than ten percent of the European Union's population is Muslim and the percentage is to grow in the years to come. According to UN statistics and forecasts, by mid-century major German cities will have Muslim majorities. Russia, with a population of 147 million of whom 25 million are Muslim, might find itself with 50 percent Muslim inhabitants around the year 2050. There is a growing movement among Muslims in Europe to promote a multi-cultural approach to life in European countries and thus to permit communities to conduct their lives in semi-autonomous conditions. These communities

naturally cultivate and promote political positions on international issues dividing the Western world and the expansionist goals of radical Islam, including, of course, the dispute between Israel and the Palestinians. What should the position of Jews be on such issues as girls wearing scarves in French schools or women wearing veils in the streets of Britain? Should Jews align themselves with those who believe that freedom of faith and religion entails permitting each religious community to pursue its way of life regardless of accepted norms of conduct generally accepted in the western world? Or should the modern day Jew throw in his lot with those who advocate a common code of conduct that is binding on all inhabitants in a given area and necessitates them compromising on some of their traditional rules of behavior?

These supposedly specific and localized issues are complex, for they are fast becoming an aspect of greater causes of a political nature, and some would say of an existential nature. The growing Muslim presence in Europe is destined to give this community a major say in forging the policies, both domestic and foreign, of key states on the continent. The link between the wishes and aspirations of the Muslim states in the Middle East and the interests of neighboring countries in Europe, given their growing Muslim populations, is destined to become ever more pronounced and direct. Moreover, the lines separating religion and state will become increasingly blurred as the century gathers steam. The concept of a secular state in which church and state are separate and never should meet in practical life will be brought into question as this century makes its way along the path of history. In such a context could anti-Semitism take a much more radical form, bringing back memories of the 20th century?

As nations and states brace for struggles to maintain their social and political values, will they confront the more radical forms of Islam in their midst or might they feel inclined to make concessions involving both



their domestic policies towards Jews and their policies on the Middle East in an attempt to stave off the threats that Islam might pose to the secular way of life practiced by western societies in our modern age? Is this unthinkable?

The war against anti-Semitism in the 21st century may shape up into one of the most crucial encounters of the Jewish People since it went into exile two thousand years ago, and might constitute a grave challenge to its very survival.

The strategy for the survival of the Jewish people in the critical period ahead should therefore be the subject of serious thought and debate in the next few formative years.

I would like to offer a few tentative guidelines for such a fatal deliberation.

First, let it be said that the anti-Semitism of the 21st century will be inseparably linked with the political and religious aspirations of many nations of the world; in Europe radical Islam is in full sway; so it is in Asia. On the American continent it is still in an embryonic stage but it is certainly taking root. We will not witness a repeat of the religious wars of days gone by; this time there will be confrontation where the Muslims will be both the enemy without and the enemy within. Muslim citizens in Europe will be struggling in their own way alongside their religious and ethnic compatriots in their mother countries and the "lines of combat" will therefore be at times blurred and unclear. It will be a politico-religious struggle between a culture that combines religion and state into one unified concept as opposed to a blend of religion divorced from and running parallel to secularism. Whether we like it or not, and I am sure that we cannot like it, the issue of the attitude to the Jews in general and Jewish national aspirations in particular will fast become a focal component of this wider confrontation.

Second, let it be said that the Jews of the world will not have the luxury of choosing sides since there will be no room on the Muslim side for a viable Jewish presence. Stated in stark terms, the Jewish religion is not a missionary one. Judaism does not encourage conversion; as we all know the opposite is the case. Islam is a missionary religion and in the past has even resorted to mass conversion of Jews, in no other country than Iran of days gone by. Jewish destiny is therefore linked with the free secular world and in the confrontation that is fast looming its fate is linked with the ultimate success and victory of that world. Judaism and the Jewish People cannot survive in a world ruled by Islam.

Third, the world of liberty and freedom will not be homogenous in its attitude to the Jews. There will be those who will welcome the Jews as equal and valuable partners in the struggle for national and cultural survival and there will be those who will look upon the Jews as an unnecessary and even harmful liability. There will also be those whose traditional hatred for the Jew will become that much more prominent. The "Jew" could be regarded as a convenient scapegoat and as such expendable.

Fourth, the Jews will have to navigate in a rough and turbulent world and will have to adapt themselves to strange and unattractive bedfellows to assure their existence. The stakes are such and the new rules of combat will be of a nature that will require compromise on our part in deference to our allies and partners.

The Jews of the world have been traditional fighters against racism and have always joined hands with all those who have championed full civil and human rights for all segments in society. Now we are entering a new era in which there are those who demand equal rights and freedom of religion, but simultaneously wish to preserve their right to promote an entirely different approach to the relation between state and religion, and between a state in one corner of the earth and the legitimacy of a state in another corner of the earth. And, in a growing number of cases, there are those who claim the right to use violence, including terrorist acts perpetrated against innocent civilians to achieve their aim.

In an unusual public appearance less than a week before this conference convened, British Security Service Director General Dame Eliza Manningham-Buller revealed the following:

- Since the successful terrorist attack in London on 7 July 2005 five major conspiracies were foiled saving many hundreds or thousands of lives
- The Service is currently working on 200 groupings and networks totaling more than 1,600 identified individuals who are actively engaged in plotting and facilitating terrorist acts in Britain and overseas
- More than 100,000 U.K. citizens consider the attacks of 7 July to be justified

Let me quote from her text:

(W)hat motivates young men and women to carry out acts of terrorism . . . al-Qaeda has developed an ideology which claims that Islam is under attack and needs to be defended. This is a powerful narrative that weaves together

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conflicts from across the globe . . . from long standing disputes. Afghanistan, the Balkans, Chechnya, Iraq, Israel/Palestine, Kashmir and Lebanon are regularly cited by those who advocate violence . . .

This is the picture in Britain alone; multiply it by at least 25 – the number of current members of the European Union, slated to grow by two in January 2007 – and the present scope of the challenge takes on a very threatening character.

This developing situation, an extremely varied and complex one, will require a much more nuanced and sophisticated approach on the part of Jewish leadership to the challenges of the twenty first century. This is not an easy hand to play; but we need to face up to reality as it is and as it might develop.

Where does Israel fit into this picture?

We seem to have come round full circle. In the history of the Jewish people over the last 150 years the “Zionist” solution to the ills and problems of the Jewish people was adopted by a minority of us. Most Jews did not aspire to join the national movement of renewed independence in what was traditionally the “Land of Israel” (“Eretz Yisrael”), and even after the Holocaust most Jews around the world preferred to stay where they were or migrate to countries of demonstrated economic opportunity. The vast majority of those who could, did not opt to come; many of those who wished to come could not do so because they did not enjoy freedom of movement. And yet, today, as of a few months, the Jewish community in Israel is the largest in the world. And this at a time when the stakes in the Middle East have risen to a level without precedence. The destruction of Israel has become the avowed policy of a regional power, Iran, and it is clear that Iran is making every possible effort to obtain and develop the means that it believes will make such a policy doable.

Under these circumstances, there are even those among us who believe that the establishment of the State of Israel has become a liability for the Jewish People. The argument is that its policies directed at the Palestinians and other Arab and Muslim states in the region have provoked the “House of Islam” and driven it into its present world-wide campaign. Therefore, it is said, not only the Jews of Israel but all of world Jewry will pay the ultimate price of this folly. Hence the only road to redemption and salvation lies in the dissolution of our state; this would remove the most bitter bone of contention between the Jews and Islam from the agenda and it would not only save the Jewish

People from destruction but would also rescue the free world from the jaws of Islamic terror. Appeasing Islam with Israeli currency will thus save Jewry and will save western civilization.

I agree that the destiny of Israel and the Jewish people are currently inter-related but I reject the so-called solution via the dissolution of the State of Israel. We are here to stay and stay we will.

Thus, the Jews are “doomed” to live with Israel or in Israel, whichever option they choose. And, by virtue of its predominant role today in the everyday life of the Jewish people it is destined to play a leading role in the forefront of defeating anti-Semitism as it has never been defeated. What, then, is the roadmap of combat against anti-Semitism in its 21st incarnation?

In the present circumstances, given that anti-Semitism is bound up with the struggle among nations, cultures and philosophies, it is inevitable that the campaign must be conducted by an empowered leadership that will be capable and effective in exercising judgment and employing a variety of assets. The campaign must be conducted on a national level. Israel has the means, the status and the responsibility to perform this role. The defeat of anti-Semitism has become part of Israel’s destiny. Israel now assumes prime responsibility for conducting and winning the battle against anti-Semitism. It will lead this battle and will ensure ultimate success.

It will be necessary to educate the Jewish public and impress upon it both the gravity of the challenge and the strong prospects of success and victory. It will be essential to convince the Jews of the world to tread carefully and to caution them against the instinctive desire to find quick and easy and local remedies. We must all realize that we are in for the long haul and we must do all we can to avoid mistakes.

It is our mission as Israelis to assure Jews everywhere that Israel is indestructible, as it surely is. Israel is facing a grave threat, perhaps the most serious threat it has ever faced in its existence, in the form of the Iranian effort to produce weapons-grade enriched uranium. This effort, coupled with the declared policies of the Iranian president, cannot and should not be ignored. But contrary to what leading Israelis say, day in day out, this is not an existential threat because Israel has several options to deal with Iran, which will never be able to destroy Israel. I am pleased that the prime minister of Israel has recently expressed himself forcefully on this matter in exactly such terms. Let us not forget the well known dictum: ‘forewarned is forearmed,’ for we are both forewarned and forearmed

and we have been engrossed in dealing with this threat for more than a decade and a half! We must have done at least “something” during that long period of time.

Public confidence in Israel’s guaranteed existence as a state is a *sine qua non* to our ability to live and thrive as a nation. It is vital for all Jews in the Diaspora because their destiny and the destiny of Israel are now inseparably bound. Morale is a vital ingredient for survival and it must be constantly cultivated and promoted. We have done too little in recent months in this vital area and the time has come to quickly make amends on this crucial front.

A word needs to be said about the most recent outbursts of President Ahmadinejad of Iran in which he has called into question whether the Holocaust ever really happened. That he is a fanatic is without doubt, but he is by no means mentally unbalanced. He is not the first to take this issue up: none other than Dr. Mahmoud Abbas, alias Abu Mazen, wrote his doctoral thesis in Moscow on this very subject.

Why this Muslim preoccupation with the Holocaust? The recurrent recourse to this matter is embedded in the notion that the Holocaust was, and to a large extent still is, the ultimate justification for the nations of the world in their decision to support the establishment of the Jewish State. Hence, if you discredit the Holocaust, the justification for creating a Jewish state collapses. If you discredit the Holocaust, you deliver a body blow against Jewish communities worldwide and weaken their position inside the societies where they reside and quite often flourish. This claim concerning Israel is, of course, totally false, for the Jewish People launched the project of statehood 50 years and more before that terrible event.

In previous presentations I have spoken in similar vein; what has changed during the last year is a traumatic awakening in Europe that its way of life is truly under acute threat. Terrorism has emerged as something ominous and real: Plots foiled to blow up aircraft leaving from London or trains traveling in Germany have sharpened public vigilance and heightened concerns of the individual. The hysterical reactions in the Muslim world to caricatures in Denmark or to remarks recently made by the Pope have served to sensitize the free world as never before. A gutted Danish embassy in Damascus and a dead nun in Africa are symbols of what is sure to come.

Jews must tread warily in this explosive and developing situation; the passions that fan the flames in Copenhagen, Paris, London and Berlin are the same that stoke the fires of modern day anti-Semitism.

Much of what is happening does not, on the face of

it, appear to be related in any way to hatred of Jews. But we all now know and realize that there is an underlying link between these disparate manifestations.

European enlightenment on the central challenge that it now faces is not yet universal; many on the continent are still in a state of denial. There is, for instance, an official government policy in France to deny any relationship between the riots that gripped the country towards the end of 2005 and the rise of militancy among Muslims.

We would do well to tread warily and not yet take frontline positions; let us be prudent, discreet and patient. Let us monitor developments with care and prepare ourselves properly.

Before I conclude, please permit me a word on the current situation. The war in the summer of 2006 was, without doubt, an unusual and surprising event. The outcome of this war is still in dispute; did Israel win this war, or did it lose it? Who won the war? I do not wish at this point to launch into a detailed dissertation on the subject, but let me say that I know of one party that lost this war and I refer to Iran. A quarter of a century of investment in training, weaponry and strategic assets was very badly damaged. Iran’s strategic missiles were completely destroyed on the first day of the war and, believe me, somebody had to tell the Israel Air Force where to find them. Those in Tehran who think and analyze the situation know full well that Tehran lost and in a big way.

So, as we approach the challenges of this century we should do so out of a conviction of confidence that we will win this one, be it in the streets of London or Paris or New York or in the heart of Beirut or in the wilds of southern Lebanon. This war is global, its goals are global and the outcome will therefore be global.

Due to the inter-relationship between developments in the Middle East and those in metropolitan Europe, between the war against Islamic fundamentalist terrorism and the struggle between Islamic orthodoxy and European state secularism, the outcome of the confrontations in the Middle East will have a vast effect on the end game in Paris, in London, in Berlin, in Rome and even in Moscow. The crucial battlefield is in the heart of the Middle East; it is there that the contest will be lost and won. That’s because victory can only be had on the territory of your adversary. The forces of freedom and enlightenment are already waging the war for liberty, equality, democracy and human rights inside the Middle East and their victory will bring us, the Jews as well, both in Israel and the world over, our ultimate triumph. Israel is



playing a pivotal role in this existential confrontation between the forces of justice and evil and in so doing is serving the most sacred and significant interests of the Jewish People in this century.

I know this appears to be advice urging a more passive role, but it is important to realize that the nature of terrorist conspiracies is such that the task of neutralizing them can only be effective if performed at the state level.

It is important that the Jews of the world tailor their daily reactions to the larger considerations and not be enticed by momentary incentives to cut local deals and arrangements with Muslim adversaries. We must all behave in a responsible and sensitive manner.

Specifically, I strongly urge the Jews of the world to rely on the security services in the countries where they reside. More than ever, they have a direct interest in preventing acts of violence against Jews in any form.

Jewish communities worldwide are now sensitive to their duty to create legal means of protection as an addition to that provided by the authorities. Vigilance must be maintained and this is in any case advised as part of the general alert that now exists in most major cities round the world.

So how should the Jew position himself or herself on the issue of the scarf worn by the school girl in France or the veil worn by the married Muslim woman in London? Should he or she join the fray in support of multi-culture or multi-religion or should he or she join the secularists and make concessions on wearing the *yarmulke* and *tsitsit* – the skullcap and fringes – in public? I think these symptoms pale into insignificance as we look over our shoulder at the entire panorama of historical clashes between beliefs and societies that will mark this new century of ours.

Maybe, in light of all I have just said, these are no longer the right questions and as we all know, deciding what are the right questions is the key to finding the appropriate answers. I am convinced that we will succeed in formulating the correct questions and that we must be confident we will find the right answers.

*Efraim Halevy was head of Mossad, Israel's intelligence service, from 1998 to 2002. Since 2003 he has been head of the Centre for Strategic and Policy Studies at the Hebrew University of Jerusalem.*

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An eight-meter high wall surrounding the courtyard of the Budapest Holocaust Memorial Center memorializes Hungarian victims of the Holocaust. The names of the victims are engraved onto the glass wall, here shown reflecting the restored Pava Street synagogue that is now part of the Center.



Zoltán Kardos

# Allied war crimes policy: The issue of crimes against Jewish nationals of Axis countries

*The refusal of British and American officials to recognize crimes against the Jews of Axis countries as war crimes was of a piece with the lack of generosity and outright insensitivity that generally characterized the Anglo-American response to the Holocaust.*

Arieh J. Kochavi

Most scholars who deal with the issue of the punishing war criminals of World War II focus on the Nuremberg Charter and the trials themselves. The guiding principles of trying war criminals, however, were formulated during the war. In contrast to legal scholars, who naturally concentrate on the novelty of the legal aspects of this issue, as well as on the development of international law, I propose to examine the question of Allied policy toward war criminals in the context of the domestic and international politics of the two major Anglo-Saxon Powers, the United States and Great Britain.

It may be said at the outset that neither the American nor the British leadership considered the punishment of war criminals to be a prime objective for the immediate post-war period. Throughout most of the war, as well, both Washington and London gave the war crimes issue a low profile, and they postponed making decisions for as long as they could. What prompted this inaction was not only apprehension at possible German reprisals against Western POWs. The two Allied powers also wished to avoid any commitment to take part in the enormous number of war criminal trials that could be expected after the war.

That British and American citizens were not directly exposed to the horrors of German occupation may also have played a part. It may be that their physical distance from war crime scenes engendered a certain callousness – many of the officials who dealt with the issue appeared insensitive to the suffering of people under German domination. For these bureaucrats, war crimes merely constituted one more aspect of the war, and certainly not among the most important.

During most of the war, two bodies – the British Foreign Office and the U.S. State Department – were the principal departments that shaped their countries'

respective policy on the war crimes issue. In many respects, the State Department followed the path taken by the Foreign Office. In general, the Foreign Office simply wanted to avoid any commitment to an established policy. Anthony Eden, Britain's foreign secretary during the war, had learned a major lesson from the handling of the war criminals issue following World War I. This lesson was that no commitment should be made to hunt down and bring to trial thousands of Germans after the war. Revenge was better left to Berlin's neighbors.

Eden wanted each Allied government to try only those cases involving offenses that had been committed on its own territory or against its own nationals. The fate of "outstanding enemy leaders," as he called them, should be decided by political decision. Eden was firmly against creating international courts or enacting special ad hoc laws. What he wanted was a quick return to a peaceful atmosphere in Europe, and he feared that the trials might drag on for years.<sup>1</sup> To a large extent, these were the principles that Eden presented to the War Cabinet in mid-1942, and these were the principles that guided Whitehall until the end of the war.

In Washington, President Franklin D. Roosevelt, in general, never gave careful consideration to the war criminals problem. His early statements purporting to demonstrate America's determination to punish war criminals were aimed mostly at placating the governments-in-exile. Roosevelt's pronouncements were meant to encourage those under Nazi occupation to endure, and also to mollify Jewish organizations in the United States. In most instances, his statements on the issue were not the result of any serious deliberation. Indeed, they reflected no concrete plan.

International law during World War II did not include as a war crime any offense committed by an enemy nation against either its own nationals or against the nationals of other Axis countries.



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Throughout most of this period, the governments of the two major Anglo-Saxon powers adhered to the prevailing concept and opposed deviations or broad interpretations of international law. Although they considered German atrocities against, for example, Polish citizens to be war crimes, Britain and the United States were at first unwilling to place the outrages perpetrated against Hungarian, Romanian, and of course against German nationals, in this category. Such acts, the two Allies argued, should be deemed elements, however horrendous, of the domestic policy of a sovereign state.

Jewish leaders in the United States and Britain were stunned to learn in mid-1942 that both London and Washington had made a distinction between atrocities committed against Allied nationals and those directed against Axis citizens like Jews. British officials negated the arguments that the Jews were a special class of victim; they warned against accepting the claim that all crimes committed by the Nazis against Jews "are to be classed as war crimes."<sup>2</sup> The flow of information on the massacre of Jews during 1942 and 1943 had an insignificant effect on British and American officials who dealt with the issue of Axis crimes.

A turning point in regard to the issue of crimes against Jewish nationals of Axis countries came in October 1943, with the establishment of the United Nations War Crimes Commission.<sup>3</sup> Several Commission representatives, but in particular the American representative, Herbert Pell, challenged the guidelines issued by both the State Department and the British Foreign Office not to investigate crimes against Axis nationals.

Shortly after the War Crimes Commission began its work, Pell, whom I would call the unsung hero of my story, raised the question of crimes that the Germans had perpetrated, and were still committing, against citizens of the Reich. He insisted on allowing the Commission to investigate such offenses. Pell believed that the Commission should collect and assess evidence of crimes and acts of inhumanity perpetrated by German authorities against their own nationals, especially Jews, and this should be done from the day Hitler became Germany's chancellor. Pell was convinced that the measures being taken against the Jews had been designed to eliminate a national element that had obstructed Germany's preparations for war.

Pell refused to accept what he viewed as a distortion in international law. International law held that a country's atrocities against its own nationals belonged to the realm of a sovereign state's domestic policy. Being a layman, Pell did not delve into the

legal aspects of the issue. Moral and political considerations alone, in his opinion, should direct the Allies in their treatment of Germany's crimes. He was motivated, first and foremost, by genuine shock and anger at the torture and massacre of millions of European Jews. Pell had become acquainted with the terrifying force of Nazism in 1941, when he served in the U.S. embassy in Hungary until Budapest declared war on the United States.

Knowing the prevailing attitude in the State Department toward this issue, Pell hoped to advance his views through the president. He therefore wrote directly to Roosevelt. If the United Nations War Crimes Commission were not allowed to investigate offenses against German Jews, he told the president, no organization would likely investigate these particular atrocities. He argued that these heinous crimes were being committed solely on account of the religion and race of the victims.<sup>4</sup>

Following his usual cautious path, Roosevelt refrained from committing himself to any unequivocal stand on Pell's proposal. While supporting the general proposition that Germany and its satellites should be required to answer for their atrocities against the Jews, the president declined to broaden the Commission's jurisdiction. He assumed that a large percentage of the perpetrators in the pre-war period were also guilty of atrocities during the war, and therefore they would be subject to punishment as war criminals.

Secretary of State Cordell Hull bluntly rejected Pell's arguments. He asserted that to punish enemy government officials for actions taken against their own nationals pursuant to their own country's laws "would constitute an assumption of jurisdiction probably unwarranted under international law."<sup>5</sup>

Determined to interpose his own view, Pell proposed to his colleagues on the War Crimes Commission that its Legal Committee should define the term "crimes against humanity." It should refer, among others, to crimes committed against stateless persons or against anybody because of the person's race or religion. The United Nations Commission, he maintained, was the single body in the world that could deal seriously and effectively with the question of the enemies' crimes against their own nationals. The persecution of Catholics, Jews, Protestants, Poles and Czechs, Pell argued, "had been carried on by the German Government avowedly because these people were the enemies of Germany, and to strengthen the military power of Hitler's Empire."<sup>6</sup>

The notion of crimes against humanity was hardly in common usage at the time. However, condemna-

tion and punishment of “inhuman acts” had long been forbidden by international law. The 1868 Petersburg Declaration stated that the dictates of humanity must take precedent over the needs of war. The introduction to the 1907 Fourth Hague Convention Concerning the Laws and Customs of War on Land specified that in situations not specifically provided for in the convention, “the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations.”<sup>7</sup> The term “crimes against humanity” was not a novel phrase. It had first appeared in a declaration published by the governments of France, Britain, and Russia on 28 May 1915 in reference to the massacres that had been carried out among the Armenian population in Turkey. As a result of American insistence, though, the 1919 Treaty of Versailles included no reference to the “laws and principles of humanity.”

Opinions on the issue differed within the Legal Committee of the War Crimes Commission. Several members thought that “crimes against humanity,” in particular crimes against the Jews and other persecuted minorities in Germany, came within the province of the Commission. On the other hand, the Commission’s chairman, Cecil Hurst of Britain, contended that when the various governments had accepted His Majesty’s invitation to form the Commission, the scope of the term “war crimes” embraced only violations of the laws of war committed by the enemy against nationals of the Allies. Unless specific instructions were received from the various governments to investigate other crimes, he insisted, the Commission could not deal with crimes against Axis nationals.

Once again, Pell tried to enlist Roosevelt’s support. Pell almost certainly was encouraged by the president’s public condemnation of the extermination of European Jewry, regardless of nationality. The German invasion of Hungary on 19 March 1944 brought under Nazi domination another very large Jewish community not included among Allied nationals. Five days later, Roosevelt published a statement reiterating his determination to punish those responsible for mass murder. This statement, however, did not reflect any formal decision on the part of the Administration to punish war criminals who perpetrated crimes against their own nationals.

In fact, toward the end of June 1944, Secretary of State Hull presented Roosevelt with a memorandum that had received the support of the secretaries of war and of the navy. The memorandum was adamant that the War Crimes Commission should not assume juris-

diction over acts perpetrated by an Axis power against its own nationals. Furthermore, Hull blurred the fact that his interpretation of the term “war crimes” excluded, among others, the massacre of Hungarian Jews that was being executed at that very time.

Publicly, however, Hull was careful to conceal his true views on the issue of punishing war criminals. He confirmed the appalling reports of mass killings of Hungarian Jews by the Nazis and their Hungarian quislings. The secretary of state also created the impression that the Administration supported taking retribution against the “puppet Hungarian government.”

Roosevelt approved Hull’s memorandum without delving into the issue. Had Roosevelt seriously examined the secretary of state’s recommendations, he probably would have realized that they diverged from the spirit of his own past statements. These had seemingly implied that the United States intended to bring the perpetrators of the mass killings to trial.<sup>8</sup>

In London, the War Cabinet on 28 June 1944 adopted the recommendations of the Lord Chancellor, who had argued that the horrible ill-treatment of German Jews – their massacre included – did not fall within the category of war crimes. In a discussion in the Foreign Office on the issue, the argument that was accepted centered on the fact that the offenses in question were not crimes under German law at the time they were committed. The Allies could not therefore prosecute the offenders. If such acts were offenses in the legal sense at all, it was contended, they constituted violations of German law, not of international law or the laws of the customs of war. The Allies could not assume responsibility for enforcing “universal retrospective justice” in Germany.<sup>9</sup>

Although Pell did not yet throw in the towel, he did conclude that nobody in Washington or London actually cared about the problem of Axis crimes against their own nationals. Changing tactics, he now tried to enlist the War Refugee Board to his cause. The War Refugee Board, established by Roosevelt in January 1944, was mandated to take all necessary measures to rescue and assist the victims of enemy oppression.

The board, however, failed to persuade the State Department to alter its stand. Still, the board’s involvement assured that knowledge of the Administration’s refusal to regard offenses committed against Jewish nationals of Axis countries as war crimes would not be limited to the corridors of the State Department and the White House. The leading figures on the War Refugee Board were Treasury



Department officials, one of whom was involved in preparing the well known Morgenthau Plan for post-war Germany. The plan called, among others, for the deindustrialization of Germany and the summary execution of war criminals. According to the Morgenthau plan, those who had caused the death of a victim "because of his nationality, race, color, creed, and political conviction,"<sup>10</sup> would also be punished.

Secretary of War Henry Stimson, who led the campaign in Washington against the Morgenthau plan, argued that in the long run it would prevent achieving world peace. Stimson also firmly opposed bringing war criminals to trial for "excesses" committed within Germany, whether before or during the war. In a letter to the president, Stimson argued that Allied courts "would be without jurisdiction in precisely the same way that any foreign court would be without jurisdiction to try those who were guilty of, or condoned, lynching in our country."<sup>11</sup>

Stimson, however, was soon to reverse his stand and promote a plan that included trying Axis war criminals who had committed atrocities against their own nationals on racial, religious, or political grounds. This plan had been prepared in the War Department. However, the secretary of war's sudden change of position owed principally to political expediency.

Stimson had been trying to influence the Administration to adopt the War Department's plan for putting major war criminals on trial rather than summarily executing the German leadership as Morgenthau wanted. He now came to realize that Washington's stand on the issue of crimes against Axis nationals was encountering criticism – criticism coming not only from Jewish organizations in the United States.

In addition, Stimson was well aware of Morgenthau's sensitivity to the plight of European Jewry. The secretary of war, in fact, was convinced that Morgenthau's plan derived from the fact that he was Jewish. Nevertheless, Stimson recognized the need to placate Morgenthau in some manner, and a commitment to punish Germans who had perpetrated atrocities against Axis nationals, most of them Jews, might pacify the treasury secretary. The Morgenthau plan had won the president's support. Stimson knew, therefore, that in order to undermine it, the War Department had to disapprove the accusation that it supported "soft" treatment of Germany. Exempting Germans from crimes they committed against their own nationals would only strengthen the department's conciliatory image.<sup>12</sup>

The Stimson-Morgenthau collision over the treat-

ment of postwar Germany was a watershed in Washington's handling of the war criminals problem. Under the shadow of the forthcoming Big Three meeting in Yalta in February 1945, a memorandum entitled "Trial and Punishment of Nazi War Criminals" was signed by the secretary of war, the secretary of state and the attorney general and presented to Roosevelt. The memorandum, which had been prepared in the War Department, suggested that Germany's leaders, as well as every member of the SA, the SS and the Gestapo, should be charged both for pre-war atrocities and for horrors committed against their own nationals, neutrals, and stateless persons during the conflict.<sup>13</sup>

Washington preferred not to go public with its new stand on crimes against Axis nationals. However, it was coerced into doing so by the press on 1 February 1945. The American statement caught the British by surprise. One day earlier, Richard Law, the British minister of state, had enunciated his government's policy during a debate in parliament. The policy proclaimed that crimes committed by Germans against Germans "are in a different category from war crimes and cannot be dealt with under the same procedure."<sup>14</sup> The British clung to their position until the end of the war.

With the conclusion of the war, the Americans now led a concerted effort to prepare the machinery and the procedure for an international military tribunal. From 26 June to 8 August 1945, jurists from the United States, the Soviet Union, France and Britain, meeting in London, engaged in tense negotiations. These ended with the signing of an agreement on the prosecution and punishment of the major war criminals of the European Axis. Article 6, paragraph (c) of the resultant Charter of the International Military Tribunal of the Nuremberg Trial Proceedings Vol. 1 established the concept of "crimes against humanity." According to the article, persecutions on political, racial or religious grounds could be tried only if they were perpetrated in the execution of or in connection with war crimes or crimes against peace. This definition effectively excluded atrocities committed before the outbreak of the war on 1 September 1939.

The Nuremberg Tribunal, as the International Military Tribunal was popularly called, dealt at length with the persecution of the Jews. Nevertheless, it gave the term "crimes against humanity" a restrictive interpretation. The Nuremberg court held that it could not accept a general declaration that the policy of persecution, repression and murder of civilians in Germany before the beginning of the war in 1939 constituted crimes against humanity within the

meaning of the Charter. War crimes committed after the onset of the war, however, did constitute crimes against humanity – as the atrocities had been committed in execution of, or in connection with, the aggressive war.<sup>15</sup>

Although the Nuremberg Tribunal gave the term “crimes against humanity” a restrictive interpretation, the way was paved for the adoption of concrete norms in international law in regard to the suppression and prevention of crimes against humanity. Genocide, for example, became recognized as an international crime with the UN General Assembly Resolution of December 1946. Subsequently, the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948, clearly stated that, whether committed during a time of peace or a time of war, genocide, or the intention to destroy a national, ethnic, racial, or religious group, was a crime under international law.<sup>16</sup>

To a great extent, considerations other than legal issues influenced both British and American officials in dealing with the war criminals issue during World War II. Their adherence to then-prevailing international law was most likely a convenient pretext. Both London and Washington wished to avoid involvement in an enormous number of war criminal trials after the war. The failure to punish German war criminals following World War I acted as a constant warning against too broad a commitment to bringing war criminals to trials.

Public statements issued by leading American and British officials up to the end of 1944 had created the false impression that all perpetrators of atrocities would be punished. In practice, the prevailing stand in both London and Washington was not to view any massacre of Axis nationals as a war crime.

Herbert Pell, Roosevelt's appointee to the War Crimes Commission, frustrated London's and his country's efforts to push aside the sensitive issue of crimes perpetrated by the enemy against its own nationals. Disregarding the limitation of then-prevailing international law, Pell argued that the law should be adjusted to the special circumstances of the present war. Pell clearly defined the challenge facing the formulators of the Allied policy toward war criminals when he stated: “We are either statesmen preparing new laws for new conditions or solicitors' clerks torturing precedents and twisting rules to make them fit cases which unquestionably were not in the minds of the judges who originally enunciated them.”<sup>17</sup> His activities assured that the issue of Axis atrocities against their own nationals would not be neglected in

the formulation of U.S. policy toward war criminals.

Washington's new stand, however, was primarily the result of an internal political calculation by Stimson, the influential secretary of war, rather than any adherence to moral or legal considerations. For their part, British military courts in the British occupation zone in Germany adhered to Britain's original policy even after the war. They never tried Germans for crimes committed against Jewish German nationals.

In the final analysis, one cannot avoid the conclusion that the refusal of British and American officials to recognize crimes against the Jews of Axis countries as war crimes was of a piece with the lack of generosity and outright insensitivity that generally characterized the Anglo-American response to the Holocaust.

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#### Notes

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2. PRO, FO371/34368/C8282, Minute by Roger Allen, Foreign Office, 30 July 1943.
3. A. Kochavi, “Britain and the Establishment of the United Nations War Crimes Commission,” *The Eng. Hist. Rev.* 323-49 (1992).
4. Franklin D. Roosevelt Library, Hyde Park, New York (hereinafter “RL”), Pell Papers, Box 25, File: Roosevelt, FO, 1936-1945, Pell to Roosevelt, 16 February 1944.
5. United States National Archives, College Park, Md. (hereinafter “NACP”), RG84, London Embassy, File: 711.6 UNC, Hull to Pell, No. 7, 13 March 1944.
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7. Quoted in L. Friedman, *The Law of War: A Documentary History* Vol. I 309 (1972). Regarding the Petersburg Declaration *see ibid.*, 192-93.
8. A. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the question of Punishment* 143-51 (2001).
9. PRO, FO371/38999/C9971, Memorandum by

*See War crimes, page 43*

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# A chronicle of evil

*At least 400,000 Hungarian Jews were deported to Nazi death camps. Among them were several thousand Jewish lawyers, disbarred by official decree and their practices given to Magyar guardians. To commemorate them, and to alert the world to today's rising anti-Semitism, IAJLJ has published "Miscarriage of Justice." This book was distributed at the Remember Budapest conference, where IAJLJ Vice President Haim Klugman delivered an address on which this article is based.*

**Haim Klugman**

Eight years ago the International Association of Jewish Lawyers and Jurists launched a series of conferences to commemorate the Jewish lawyers who perished in the Holocaust.

When our Association decided to hold a conference commemorating the Hungarian Jewish lawyers who perished during those terrible years, we asked ourselves if it were also possible to undertake a research project that would produce a list of the Jewish lawyers who were excluded from the Hungarian Bar, in mid-1944, near the end of World War II, only because they were Jews.

The idea was that each and every one of us has a duty to preserve their memory. We felt that this research project could serve as a signal that those Jewish lawyers had not been forgotten and that their suffering should not remain known only to their descendants.

We remember them as human beings, but we must also remember them as members of professional and intellectual communities, whose contribution to Hungarian society lives on, and serves as a reminder that they lived and practiced their profession in Hungary.

The Association called for independent research that would collect the names and representative personal stories of these lawyers who lost their profession, and in so many cases, their lives.

Dr. Gavriel Bar-Shaked of Yad Vashem, Dr. Julia Bock of Long Island University and Yosef Stern carried out this mission with great commitment and expertise. The result is "Miscarriage of Justice: The Elimination of Jewish Attorneys in Hungary during the Holocaust," published by the Association, distributed at the "Remember Budapest" conference, and now in preparation as a searchable online database.

"Miscarriage of Justice" is a chronicle of the Jewish

legal community of Hungary during the Holocaust, the most complete volume of research yet undertaken on the subject. It is but one chapter of the horrific tragedy that befell hundreds of thousands of Jewish citizens of Hungary during 1939-1945, those black years when simple human decency was almost swept away in the face of the Nazi onslaught.

The book lists the names of 3,420 Jewish lawyers who practiced law, as advocates, in Hungary in 1944. A prime ministerial decree disbarred them, and their practices were given to Magyar guardians. The bearers of these names were Hungarian citizens who, though they loved their country and their profession, and identified strongly with Hungarian nationalism, were cruelly driven out of the Hungarian judicial system and sent to a brutal fate.

The individual stories related in "Miscarriage of Justice" are the recollections of brothers, sisters, children and grandchildren of Jewish lawyers and jurists whose livelihoods and often lives were lost during that period. In many cases, official documents back up these stories; in others, only cherished memories remain.

The research is based in part on data found in the 1944 edition of the official Hungarian government gazette, *Budapesti Közlöny*, published after the carrying out by local bar associations of Prime Ministerial Decree No. 1.210/1944, which called for the disbarment of Jewish lawyers and the magyarization of Jewish law offices.

The main sources of biographical information on individual lawyers were the collection of Pages of Testimony at Yad Vashem, the Jerusalem-based Holocaust Martyrs' and Heroes' Remembrance Authority, and data in the NAMES project, sponsored by the Beate Klarsfeld Foundation. Other sources include the memorial albums published by the Archives



of the Museum of Military History in Budapest and the Yad Vashem archives.

It is noteworthy that Bar-Shaked, Bock and Stern were denied the full cooperation of various state archives during their research. Access to important documents may have further clarified the fate of Hungary's Jewish lawyers.

Jewish lawyers practicing in Hungary during the Holocaust era comprised more than half of the country's lawyers. Beyond disbarment and practice confiscation, many lost their lives after deportation to death camps in the spring and summer of 1944 along with at least 400,000 Hungarian Jews – half of Hungary's Jewish population. The deportation rate of Hungarian Jews during that period was unequalled in any other European country. Most survivors fled to Western countries, many helping to found the modern State of Israel in 1948.

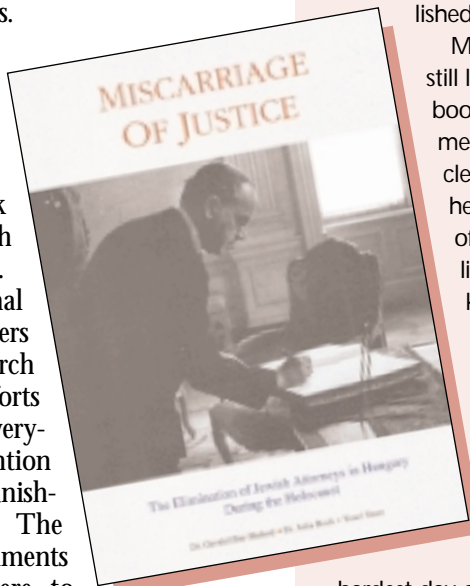
We know that most of the lawyers in the list perished in the Holocaust. Those few who were saved and succeeded in escaping after being humiliated and persecuted played a remarkable role in the countries where they rebuilt their lives.

We hope that "Miscarriage of Justice" serves as a reminder to the world, and in particular to our Hungarian colleagues, that we must all work together for a future in which this can never happen again.

The International Association of Jewish Lawyers and Jurists views this research as part of its continuing efforts to advance human rights everywhere, including the prevention of war crimes and the punishment of war criminals. The Association calls on governments and individuals everywhere to heed rising acts of anti-Semitism that only 60 years after history's greatest act of genocide are again threatening Jews worldwide.

IAJLJ acknowledges the generous assistance of the Nadav Fund in making possible the publication of "Miscarriage of Justice."

*Haim Klugman is Vice President and Secretary General of the International Association of Jewish Lawyers and Jurists.*



## Closing the circle

Shosha Schoner-Einat

I first heard about "Miscarriage of Justice" on the second day of the "Remember Budapest" conference in Hungary's capital, my hometown.

It was only there that I learned of the research carried out by Yad Vashem on the Hungarian Jewish lawyers of the war period, all of whom were deeply humiliated – although not for the first or for the last time – when their license to practice law was rescinded in 1944.

My great-grandfather, Jeno Varadi, was a very well known lawyer in Budapest in the inter-war years. So on opening "Miscarriage of Justice," the first thing I did was look for his name, which I finally found on page 87.

Alongside his name I saw the name of one of his colleagues, a non-Jew, who took over his well-established law practice.

My wonderful grandmother Margit, today 87, still lives in Budapest. When I told her about the book, she was very moved and excited and told me about that day, which she remembers very clearly. Grandmother Margit was working with her father in the office, when two government officials arrived and politely asked him, just like that, to give them his license and the keys to the office.

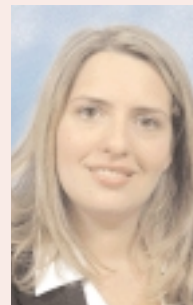
My great-grandfather Jeno knew there was nothing to do, so he handed over the license and the keys, and that was that. He felt that his career had just ended and that his life would soon end too. Somehow, despite much suffering, he managed to survive. But he always reminded my grandmother that that day was the

hardest day of his life.

I made Aliyah in 1990, leaving Hungary at the age of 17. Today, at 35, I'm a lawyer in Israel, practicing law, just like my great-grandfather did more than 60 years ago, except that I deal mostly with matters between Israel and Hungary. Without earlier realizing it, I closed the circle – for both of us.

My grandmother Margit tells me that the day I was admitted to the Israel Bar was one of the happiest days of her life.

*Shosha Schoner-Einat practices law in Tel Aviv.*





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# Could the Hungarian Holocaust have been averted?

*Contemporary research suggests that there was a direct connection between the Hungarian government's attempt to break away from the German alliance and the worsening of the Hungarian Jews' chances of survival.*

András Kovács

The question seems to be absurd. How could it have been? How could the Hungarian Jews, the last substantial Jewish group in continental Europe, avoid the destiny of their co-religionists in a country that was one of the first allies of Nazi Germany on the continent and the first one in which anti-Semitism very early became a part of the state ideology and that was the first to introduce anti-Jewish laws after World War I?

Yet the question turns out to be not illegitimate at all. In the fifth year of the war, two years after the infamous decision on the "final solution," nearly 900,000 Jews were living in a country in the middle of Nazi occupied Europe. Though deprived of some basic rights and threatened by labor service on the front or expulsion for not being a Hungarian subject, the majority still lived in relative security. How was all that possible? And if it was possible until March 1944, through all the years of Nazi rule in Europe, would it not have been possible to endure a few more months? In March 1944 the Soviet Red Army was already very close to the Hungarian border, the Western allies took Rome in June 1944, the opening of a third front in the West was foreseeable, and the pressure on the German military and economy grew day by day. Was it really inevitable that more than one half million Hungarian Jews would become victims of the persecution?

There is no doubt that the dominant political elites of the post-WW I authoritarian regime of Hungarian Regent Miklós Horthy were anti-Semitic, and, especially after 1938, they gradually implemented laws and regulations corresponding to the demands of old type political anti-Semitism. This anti-Jewish legislation abolished the accomplishments of emancipation. Between 1938 and March 1944 some 300 laws and edicts were enacted by the Hungarian authorities that brutally limited

the rights and at same time aimed at expropriating the assets of the country's Jews. However, the Horthyite Hungarian anti-Semitism was not "eliminationist anti-Semitism." Horthy refused repeated German demands to physically persecute and deport the Jews. It was no surprise then, that every participant in the debates on the Hungarian Holocaust agreed that the majority of Hungary's Jewish population could have survived the war had the German occupation of Hungary not occurred. The question that must be asked, therefore, is whether the German occupation of the country could have been averted.

This question is difficult to answer, for the simple reason that historians have to this day been unable to agree on the real motive behind Germany's decision to occupy Hungary in March 1944. If we were to accept that one of the ultimate goals of Hitler's wars was the eradication of the "enemy race" and it was really a "war against the Jews," as Lucy Dawidowicz, the author of the book of the same title firmly believes, then Hungary's chances of escaping German occupation were indeed small, considering that up until the country's occupation the Hungarian authorities had resisted German demands to deport Jews. Other historians represent a more refined but similar position. William MacCagg, for example, believes that in the case of countries with a small Jewish population, it might perhaps be worth examining whether Hitler subordinated his primary goal - the eradication of the "enemy race" - to rational considerations, either strategic or political.<sup>1</sup> However, in Hungary, which even as late as March 1944 had a substantial Jewish population, the ultimate motive for the occupation must have been the enforcement of the "final solution" and in this sense the occupation of Hungary was unavoidable.

The most prominent historian of the Hungarian Holocaust, Randolph L. Braham, is of a different opinion. According to Braham, "the Germans' deci-

sion to occupy Hungary resulted from a series of complex political/military factors: the unsolved 'Jewish question,' though important, was not the determining one."<sup>2</sup> He believes that the Germans followed primarily strategic goals: in the worsening military situation they wanted to secure the unconditional loyalty and obedience of their allies. They were extremely worried about the political developments in Hungary, most notably the attempts of the Hungarian government to reduce the war effort and to establish contacts with the Allied Powers. Braham believes that Miklós Kállay, prime minister between 1941 and 1944, who wished to avoid occupation both by Germany and by the Soviet Union, was an incompetent politician. Kállay's illusions about the possibility of arranging a separate armistice with the Allied Powers proved completely unfounded; he failed to make the necessary military arrangements; he failed to rid the political and military leadership of pro-Nazi elements; and his "secret" Western connections were monitored throughout by German intelligence. Braham concludes: "His failure to take any precautionary military measures at home facilitated first the German and then the Soviet occupation."<sup>3</sup> It is probable that even if Kállay had avoided all shortcomings, he could not have prevented the inevitable Soviet occupation; at best he could possibly have dissuaded the Germans from wasting their desperately needed forces on the occupation of a loyal country - but this, of course, would have made the crucial difference for the Hungarian Jewish community.<sup>4</sup> He states explicitly: "Ironically, it appears in retrospect that had Hungary continued to remain a militarily passive but politically vocal ally of the Third Reich instead of provocatively engaging in diplomatic maneuvers that were essentially fruitless, if not merely aimed at establishing an alibi, the Jews of Hungary might possibly have survived the war relatively unscathed."<sup>5</sup>

István Deák, the eminent Columbia University historian, who, after the publication of Braham's book joined the debate, shares Braham's opinion. Deák sums up the conclusion of Braham's book with provocative sharpness: "The frightening conclusion we must draw is that for the Jews in a given country to have had a chance of survival, that country had to be loyal to the Germans."<sup>6</sup> Therefore, Deák too holds the opinion that greater political shrewdness on the part of the Hungarian government (i.e., a better show of collaboration) could have saved the country from occupation and the Jews from depor-

tation. Deák believes that in any given country the fate of the Jews depended largely on the status of that country among the European countries that were either under German occupation or under German influence at the time.

In countries under German influence the measures against the Jews took three different forms. In certain countries, primarily in Poland and the Soviet Union, special SS units carried out the mass murders directly. Elsewhere, the German authorities arranged for the setting up of Jewish councils, which was an indirect way to effect the introduction of discriminatory measures and deportations. Finally, there were regions where the Germans tried to achieve the same results by putting pressure on national governments. It was only in this last case that sabotage of the organized and full-scale deportations could be attempted - as in the case of Italy under Mussolini and in Romania and Slovakia after 1942. It seems that the third scenario applied to Hungary until April 1944, when it was replaced by the second scenario that was to prove so fateful to Hungary's Jewish population; this continued to apply until July 1944. When the deportations were suspended in July 1944, the Hungarian government once again regained some measure of control over events. Then, following Horthy's radio announcement on 15 October of a ceasefire between Hungary and the Allied Powers, the situation once again grew to resemble the second scenario. From all of this it can be inferred that there was a direct connection between the Hungarian government's attempt to break away from the German alliance and the worsening of the Hungarian Jews' chances of survival.

What makes Braham's and Deák's final conclusion so frightening is that it challenges the established anti-Fascist view. Specifically, this conclusion suggests that when attempting to determine the moral responsibility of the collaborating regimes, instead of treating them with sweeping condemnation, these governments should be judged on an individual basis, always bearing in mind the concrete form of their collaboration as well as its consequences.

Although one can agree with this methodological principle, the question is whether it is directly applicable to the Hungarian example. According to MacCagg, for example, it was not the resistance of the regent, Miklós Horthy, that delayed the start of deportations; the simple truth was that Hitler did not think the time was right for their efficient exe-

cution.<sup>7</sup> He stresses that the dates are significant. Until 6 June 1944, when the Allied Powers landed in Normandy, the survival chances for the Jews were indeed better in those countries where the government collaborated with the Germans in one way or another. Nevertheless, in countries with a large Jewish presence this collaboration could only postpone the deportations. After D-Day, however, the national governments found themselves in a position to resist more actively and to be able to save Jewish lives. By that time Hitler was unable to commit troops to fighting governments that defied his orders. When Horthy suspended the deportation of Jews on 7 July 1944, the Germans could do nothing about it. This particular fact, by the way, has some relevance for determining the responsibility of Hungary's political leadership: for a whole month, this leadership passively watched the full-scale deportation of the country's Jews, taking no advantage of the new strategic situation at a time when they were certainly informed about the atrocities of Auschwitz: it was established in the 1970s that Horthy had been aware of these atrocities at the latest in June 1944.<sup>8</sup> But the newly discovered and analyzed reports of Hungarian ambassadors in neighboring countries, sent to the Ministry of Foreign Affairs, suggest that the Hungarian authorities must have known what had happened to the Jews of Croatia, Slovakia and other countries as early as 1942.<sup>9</sup>

Despite contradictions in the details, during the 1980s most of the participants in this debate essentially agreed that collaboration with the Germans - at least under certain circumstances - could have helped the persecuted Jews. Historians should accordingly be prepared to face the unpleasant truth: the interests of the Allies, whose aim was to end the war quickly, did not always coincide with the interests of the Jews who were trying to survive it.

Now, more than 20 years after the first major discussion on Braham's provocative thesis, we know much more about the circumstances of the German occupation of Hungary and about the motives and intentions of the Nazi leadership. The conclusion seems to be less frightening than it was 20 years ago. It is most probable that "satisfactory collaboration" in the eyes of the German authorities could not have meant less than the physical persecution of the Jews.

Historians, however, seem to agree that the direct motivation of the invasion was of a pragmatic nature. On the one hand, the German political and military leaders were afraid that Hungary might quit the

German alliance, and, on the other, they were eager to mobilize the still partly untouched Hungarian economic and military resources for their purposes.<sup>10</sup> But they put these pragmatic considerations into the ideological context of their anti-Semitic policy. They explained the reluctance of the Hungarian authorities to participate more intensively in the German war efforts by the presence of a large Jewish population in the country and by the influence of the Jewish elite on Hungarian political decision makers. On the other hand, by forcing the Hungarian authorities to carry out the deportation of the Hungarian Jews, they wanted to hinder any Hungarian government negotiations with the allies by making them accomplices in the most serious war crimes.<sup>11</sup> Thus the direct motives of the German invasion were pragmatic while the annihilation of the Hungarian Jews was a logical part of these pragmatic considerations in the eyes of the German authorities.

Even if so, the question of the inevitability of the mass murder of Hungarian Jews has not disappeared from the new historical debate. This new debate was launched mainly by the position taken by some German and Hungarian historians.<sup>12</sup> According to them the German occupation of the country was unavoidable, though the invaders arrived in Hungary with only vague plans concerning the Jewish population. They did not have a ready-made blueprint for the deportation of all Jews from Hungary; they would have been satisfied with the achievement of more limited goals, such as the complete expropriation of Jewish property, obtaining a large group of Jewish forced laborers and with the separation of the Jewish and non-Jewish population in ghettos and camps inside of the country, as in Poland before 1942.

If this was the case, then the behavior of the Hungarian authorities was the decisive factor in determining the future of the country's Jews. Christian Gerlach and Götz Aly and the Hungarian historian László Varga share this view, namely that the Germans did not know to what degree the various elements of Hungarian society - the authorities, the population and so forth - would resist the deportation of the Jews from their country, and even in the case of a strong passive resistance they would have given up the idea of a total deportation. They decided on the total annihilation of the Hungarian Jews only then, when they had seen the readiness of the Hungarian authorities to collaborate. What all this means is that, again, the Hungarian collaboration is the key issue in the explanation of events following the German inva-

sion of Hungary, but exactly with the opposite meaning than in the debate of the 1980s. The bottom line of this reasoning is that without Hungarian collaboration the majority of the Jews of the country could have survived even the phase of the German occupation.

This position was fiercely criticized immediately after its appearance, and the debate continues. László Karsai, the main critic of the Gerlach/Varga thesis, represents a position that could be seen as a slightly modified version of Braham's original provocative thesis - with the "frightening conclusion." The Hungarian Jews could have survived the Holocaust, he states, had the Hungarian government acted as the Antonescu-led Romanian government did. Unhesitatingly, and even with a display of enthusiasm, it should have put as many troops and as much raw material and food at the disposal of the German military as was demanded, and then, at the appropriate moment, depending on the military situation, switched to the side of the Soviets. The cautious attempts at a separate peace, and especially the fact that the Hungarian government refused to send additional, significant military units to the Eastern front during 1943, directly and indirectly sealed the fate of Hungarian Jews because these actions provoked the Germans to occupy Hungary.

Thus, at this peculiar historical moment the interests of the Hungarian Jews contradicted the interests of the Allies to win the war as quickly as possible. After the German occupation there was no further chance to save the Jews states Karsai.<sup>13</sup> There is no substantial proof for the Gerlach/Varga thesis; moreover, the documents substantiate the opposite: deporting and killing the Jews was perhaps not the reason but an explicit purpose of the occupation. Further, though Hungarian collaboration was decisive in carrying out the deportations, at the same time it kept open a way to save Jews: had Horthy resigned after the German invasion, he would not have been in a position that allowed him to stop the deportations in July 1944, and by that to save the lives of the majority of Budapest's Jews.

In summing up the lessons of this decade-long dispute, we can only conclude that in every phase of the series of events leading to the Hungarian Holocaust there were obvious chances to save more lives than were in the end actually saved: between 1941 and 1944 perhaps more collaboration, between the German invasion and D-Day a cautious mixture of sabotage and collaboration, after D-Day

a more decisive resistance. However, one thing seems certain: the focal question of all future research and reasoning on the Hungarian Holocaust will remain that which I broached at the beginning of this article. Could the Hungarian Holocaust have been averted? This question alone demonstrates the uniqueness of this terrible event.

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### Notes

1. A. Benton, H. Fein & W. O. MacCagg, "Genocide In Hungary: An Exchange," with a response by I. Deák, 29 *New York Review of Books* No. 9, 54-56 (1982).
2. R. L. Braham, *The Politics of Genocide*, 362 (1994).
3. *Ibid.*
4. *Ibid.*, 248.
5. *Ibid.*, 225-26.
6. I. Deák, "Could the Hungarian Jews have Survived?" 29 *New York Review of Books* No. 1, (1982).
7. See MacCagg, *supra* note 1.
8. A copy of the famous Auschwitz Protocols compiled by Rudolf Vrba-Rosenberg and Jozef Lanik-Wetzler was sent him latest by this date. On the history of the Protocols see Auschwitzi Jegyzőkönyv (Auschwitz Protocols). Edited and commented by György Haraszti, Múlt és Jövő Kiadó, Budapest 2005.
9. L. Karsai, "The Fateful Year: 1942 in the Reports of the Hungarian Diplomats." Presentation at the conference "*The Holocaust in Hungary: Sixty Years Later*," held at the United States Holocaust Memorial Museum, Washington, D.C., 16-18 March 2004.
10. See Gerlach and Aly, *Das letzte Kapital*, 91-113.
11. This factor is stressed by Longerich 565-70).
12. See C. Gerlach & A. Götz, *Das letzte Kapitel. Der Mord an den ungarischen Juden 1944/1945*, (2002) and L. Varga, "The Logistics of the Holocaust," presentation at the conference "*The Holocaust in Hungary Sixty Years Later: A European Perspective*," held at the Hungarian Academy of Sciences, Budapest, 16-18 April 2004.
13. L. Karsai, "Could the Hungarian Jews have survived the Holocaust? New answers to old questions," in 4 *Jewish Studies at the CEU 2004-2005*, 63-78 (A. Kovács & M. Miller, eds., 2006).



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# “Targeted killings”

*On 14 December 2006, the Supreme Court of Israel, sitting as the High Court of Justice, issued a judgment regarding the government's policy of “targeted killings.” The Court held that the law of targeted killing is determined in the customary international law, and the legality of each individual such act must be determined in light of it. The Court's English summary is reproduced below.*

## HCJ 769/02 The Public Committee against Torture in Israel v. The Government of Israel

### Summary of Judgment

The Government of Israel employs a policy of “targeted killings” which cause the death of terrorists who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That was the question posed before the Supreme Court.

### International Armed Conflict

The Supreme Court, in a judgment delivered by the President (ret.) A. Barak, with President D. Beinisch and Vice-President E. Rivlin concurring, decided that the starting point of the legal analysis is that between Israel and the terrorist organizations active in Judea, Samaria, and the Gaza Strip, there exists a continuous situation of armed conflict. This conflict is of an international character (international armed conflict). Therefore, the law that applies to the armed conflict between Israel and the terrorist organizations is the international law of armed conflicts. It is not an internal state conflict that is subject to the rules of law-enforcement. It is not a conflict of a mixed character.

A fundamental principle of the customary international law of armed conflict is the principle of distinction. It distinguishes between combatants and civilians. Combatants are, in principle, legitimate targets for military attack. Civilians, on the other hand, enjoy comprehensive protection of their lives, liberty and property. The Supreme Court rejected the view according to which international law recognizes a third category of “unlawful combatants”.

### Harm to Civilians

The Supreme Court decided that members of the

terrorist organizations are not combatants. They do not fulfill the conditions for combatants under international law. Thus, for example, they do not comply with the international laws of war. Therefore, members of terrorist organizations have the status of civilians. However, the protection accorded by international law to civilians does not apply at the time during which civilians take direct part in hostilities. This too is a fundamental principle of customary international law. It is expressed in Article 51(3) of the 1977 Additional Protocol I to the Geneva Conventions which states as follows:

**“Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities”.**

Thus, a civilian, in order to enjoy the protections afforded to him by international law during an armed conflict, must refrain from taking a direct part in the hostilities. A civilian who violates this principle and takes direct part in hostilities does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy the protections granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, e.g. those granted to a prisoner of war.

When can it be said that a civilian takes part in **hostilities**? Hostilities are acts which are intended to harm the army or civilians. A civilian takes part in hostilities when he is engaged in such acts, or when he prepares himself for such acts. It is not required that he carries or uses arms. When can it be said that a civilian takes a **direct part** in hostilities? A civilian bearing arms (openly or concealed) who is on his way to the place where he will use them, or is using arms, or is on his way back from such a place, is a civilian taking a direct part in hostilities. So are those who decide on terrorist acts or plan them, and those who enlist others, guide them and send them to

commit terrorist acts. On the other hand, civilians who offer general support for hostilities, such as selling of food, drugs, general logistic aid, as well as financial support, take an indirect part in hostilities. How shall we understand the scope of the words “for such time” during which the civilian is taking direct part in hostilities? A civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detaches himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization and commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack for the entire time of his activity. For such a civilian, the rest between hostilities is nothing other than preparation for the next act of hostilities. These examples point out the dilemma regarding the requirement which “for such time” presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the “revolving door” phenomenon, by which each terrorist can rest and prepare for the next act of hostilities while receiving immunity from attack, is to be avoided. In the wide area between those two possibilities, one finds the “gray” cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case. In that context, the following four things should be said: First, well based, strong and convincing information is needed before categorizing a civilian as falling into one of the discussed categories. Innocent civilians are not to be harmed. Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking a direct part in the hostilities. The burden of proof on the army is heavy. In the case of doubt, careful verification is needed before an attack is made. Second, a civilian taking a direct part in hostilities cannot be attacked if a less harmful means can be employed. A civilian taking a direct part in hostilities is not an outlaw (in the original sense of that word – people deprived of legal rights and protection for the commission of a crime). He does not relinquish his human rights. He must not be harmed more than necessary for the needs of security. Among the military means, one must choose the means which least infringes upon the humans rights of the harmed per-

son. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed. Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required. Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent. In appropriate cases compensation should be paid as a result of harm caused to an innocent civilian. Fourth, every effort must be made to minimize harm to innocent civilians. Harm to innocent civilians caused during military attacks (collateral damage) must be proportional. That is, attacks should be carried out only if the expected harm to innocent civilians is not disproportional to the military advantage to be achieved by the attack. For example, shooting at a terrorist sniper shooting at soldiers or civilians from his porch is permitted, even if an innocent passerby might be harmed. Such harm conforms to the principle of proportionality. However, that is not the case if the building is bombed from the air and scores of its residents and passersby are harmed. Between these two extremes are the hard cases. Thus, a meticulous examination of every case is required.

#### Justiciability

The Supreme Court rejected the position of the State that the issue of targeted killings is not justiciable. First, this position must be rejected in cases that involve impingements upon human rights. Second, the disputed issues in this petition are of legal nature. They involve questions of customary international law. Third, these issues were examined by international courts and tribunals. Why do those questions, which are justiciable in international courts, cease to be justiciable in national courts? Fourth, the law dealing with preventative acts on the part of the army which cause the deaths of innocent civilians requires ex post examination of the conduct of the army. That examination must – thus determines customary international law – be of an objective character. In order to intensify that character, and ensure maximum objectivity, it is best to expose that examination to judicial review. That judicial review does not replace the regular monitoring of the army officials performed in advance. In addition, that judicial

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review is not review instead of ex post objective review, after an event in which it is alleged that innocent civilians who were not taking a direct part in hostilities were harmed. After the (ex post) review, judicial review of the decisions of the objective examination committee should be allowed in appropriate cases. That will ensure its proper functioning.

### **The Scope of Judicial Review**

The Supreme Court decided that the scope of judicial review of the decision of the military commander to perform a preventative strike causing the deaths of terrorists, and at times of innocent civilians, varies according to the essence of the concrete question raised. On the one end of the spectrum stands the question regarding the content of international law dealing with armed conflicts. That is a question of determination of the applicable law, par excellence. That question is within the realm of the judicial branch. On the other end of the spectrum of possibilities is the decision, made on the basis of the knowledge of the military profession, to perform a preventative act which causes the deaths of terrorists in the area. That decision is the responsibility of the executive branch. It has the professional-security expertise to make that decision. The Court will ask itself if a reasonable military commander could have made the decision which was made. Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. To the extent that it has a legal aspect, it approaches the one end of the spectrum. To the extent that it has a professional military aspect, it approaches the other end of the spectrum.

### **A democracy fights with one hand tied behind her back: The ends do not justify the means**

In conclusion, the Supreme Court observes that in a democracy, the fight against terror is subject to the rule of law. In its fight against international terror-

ism, Israel must act according to the rules of international law. These rules are based on balancing. We must balance security needs and human rights. The need to balance casts a heavy load upon those whose job is to provide security. Not every efficient means is also legal. The ends do not justify the means. In one case the Court decided the question whether the state was permitted to order its interrogators to employ special methods of interrogation which involved the use of force against terrorists, in a "tickling bomb" situation. The Court answered that question in the negative. In President Barak's judgment, he described the difficult security situation in which Israel finds itself, and added:

We are aware that this judgment of ours does not make confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties (HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53(4) PD 817, 845).

### **The decision**

Thus it is decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law. The law of targeted killing is determined in the customary international law, and the legality of each individual such act must be determined in light of it.

# Targeted killing policy: Insufficiently limited

*In its recent judgment on the “targeted killing” policy, the Supreme Court gave reasons when a targeted killing may be justified and unjustified. The Court pointed out several limitations but did not do enough to set out the appropriate boundaries.*

Mordechai Kremnitzer

Targeted killings, assassination, elimination and preventive killing are all various synonyms used to describe the measures undertaken by the Israeli government, whereby the army fatally harms a person involved in terrorist action. Within the confines of the petition served by the Public Committee against Torture in Israel, the Supreme Court of Israel extensively discussed the legality of the preventive killing measure.<sup>1</sup> The leading opinion was given by President Aharon Barak (retired), concurred by President Dorit Beinisch and Vice President Eliezer Rivlin. The Court dismissed the petition and ruled that it is not possible to determine in advance that every targeted killing is either legal or illegal. The Court ruled that once a resident of the territories is directly involved in hostilities, according to Article 51(3) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (hereinafter: “Protocol I”), he becomes a legitimate target. The Court chose to classify the conflict as an international conflict and examined the legality of the policy from the perspective of armed conflict in international law.<sup>2</sup> This article focuses on the compelling arguments in the Court’s ruling as well as on its weaker arguments. According to my view, the authority to kill was not limited sufficiently.



## The compelling arguments

### 1. Illegal Combatants Category

The Supreme Court took the view, contrary to the State’s arguments, not to make use of the problematic category of illegal combatants.<sup>3</sup> Humanitarian Law

distinguishes between combatants and civilians.<sup>4</sup> The combatants’ entitlements are detailed in the 1907 Hague Regulations,<sup>5</sup> while civilians are classified as non-combatants and are therefore entitled to protection.<sup>6</sup> The category of illegal combatants is aimed at classifying people who take active part in the conflict while at the same time neither distinguish themselves from civilians nor comply with the rules of warfare. The two problematic aspects of this category are the asymmetry between the means that can be applied against illegal combatants and the protection granted to them – like combatants they may be killed at any time, however they do not enjoy the protection of legal combatants.<sup>7</sup> Considering the absence of a strong legal foundation in international law to this third category, and its blurring impact on the distinction between combatants and civilians, the Supreme Court was wise not to use it in its argumentation.

### 2. Classification of Article 51(3) as Custom-Based

One of the State’s arguments in response to the petition dealt with the “partial custom” of Article 51(3) of Protocol I, which sets out that “civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” In Israel the incorporation of international law agreements into legislation is conducted via adoptive legislation. Nonetheless, the rules of customary international law are incorporated intuitively.<sup>8</sup> The State argued that it is possible to harm a resident of the territories who is involved in hostilities without confinement to the time limit set out in the Article, as the time limit is not binding in Israel because it does not reflect customary international law. This argument is unconvincing as it divides the rule into two, notwithstanding that the



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two elements complete each other. The State aimed to gain the benefit of the Article while abandoning its constraint. Therefore, the Court was reluctant to accept the State's arguments and ruled that the Article in its entirety forms part of customary international law.

### 3. "Well Founded Information" Condition

The Court ruled that well founded and verified information is required prior to classifying a resident of the territories as an active participant in hostilities. The heavy burden of providing this information lies on the shoulders of the military, and if there is doubt a careful examination of the information is required before it can be acted upon.<sup>9</sup> This condition, when acted upon, minimizes the possibility of error and limits the arbitrariness of the process.

### 4. Independent Examination

The Court ruled that following an injury to a resident of the territories who participated at such time in direct hostilities, a thorough examination must be conducted as to the identity of the injured party and the circumstances surrounding his injury. The Court also ruled, and rightfully so, that such an examination must be conducted by an independent body and that under certain conditions one should consider paying compensation to innocent civilians caught up in the incident.<sup>10</sup>

### 5. Proportionality Principle

The Court ruled that the principle of proportionality plays an important part in international law with regard to armed conflict.<sup>11</sup> In this context it is important to mention the significance of the recognition of the proportionality principle. Furthermore, President Barak chose to mention two examples of instances where concrete danger exists. The instances describe a sniper shooting at soldiers or civilians from his home's balcony. In the first instance, the soldiers shoot back at him and hurt an innocent bystander; this is considered to be a proportionate action. In the second instance, the house is bombed from the air thereby hurting dozens of residents and bystanders; this response is considered as disproportionate.<sup>12</sup> These examples present an acute danger situation whereby a sniper shoots at civilians or soldiers. The examples also conform to the rule that such action can only be undertaken when acute danger exists.<sup>13</sup>

## The judgment's weaknesses

### 1. The "For Such Time" Category

As mentioned above, Article 51(3) of Protocol I grants the authority to harm civilians who directly participate in hostilities during the duration of the hostilities. The Court only stated with regard to the time limit set out in the Article that he who joins a terrorist organization and performs a number of hostile actions, with short interludes, loses his immunity, thereby eliminating the revolving door phenomenon.<sup>14</sup> The Court distinguished between this situation and a situation where an individual ceased to be involved in hostilities, despite doing so in the past, and regained his immunity. Naturally the difficult cases are the ones between the rather clear cases. Indeed, if the Court had clarified that the "revolving door" instance is the only expansion of the time constraint, it would have been adequate. However, the Court chose to treat it as a clear case scenario, thereby leaving the time constraint open to a wide interpretation.

The Court distanced itself from the model of direct confrontation ("hostilities") as an activity while addressing the function of combat, which is closer to the status of a combatant.<sup>15</sup> In addition the Court refrained from qualifying the "functionaries" as "full time terrorists." According to this test as long as a civilian performing the function of a combatant, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack. This model can be contrasted with a test that is based on examining a current hostile activity of a resident, such as the carrying out of a terrorist attack from its beginning, where the hostile nature of the activity can be identified clearly. Indeed, the "function of a combatant" approach characterizes the individual based on his past actions, which in turn creates a presumption of continuity. Intelligence information on past actions of an individual is used to assess the likelihood of this individual's participation in similar terrorist attacks in the future. This type of classification based on past actions is fundamentally different from classification based on real-time events such as the handing over of an explosive belt to a suicide bomber. Therefore, in practice the Court's ruling comes very close to the status of illegal combatants. Justice Rivlin commented on this issue in his judgment:

The interpretation proposed by my colleague President Barak in fact creates a new

group, and rightly so. It can be derived from the combatant group (“unlawful combatants”) and it can be derived from the civilian group. My colleague President Barak takes the second path. If we go his way, we should derive a group of international-law-breaking civilians, whom I would call “uncivilized civilians.” In any case, there is no difference between the two paths in terms of the result, since the interpretation of the provisions of international law proposed by my colleague President Barak adapts the rules to the new reality. That interpretation is acceptable to me. It is a dynamic interpretation which overcomes the limitations of a black letter reading of the laws of war.<sup>16</sup>

From an interpretation point of view on “civilians involved in hostilities” there are two possible approaches: the expansive approach and the narrow approach. From a closer inspection of Article 51(3) of Protocol I, it seems to suggest a narrow interpretation: “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”

The general rule is one of civil immunity, whereby active participation in hostilities is the exception to the rule. Such exception should be interpreted in the narrow sense. Considering that humanitarian law provides us with the distinction between civilians and combatants, one should avoid an attempt to blur the differences between the two by creating a broad exception. Minimizing the scope of exception to the category of civilians would inevitably minimize the injury to the distinction between the two categories. Therefore, due to the importance of this distinction a narrow interpretation is more favorable. In addition, Protocol I states that in case of doubt as to the classification of an individual as a civilian, he should be considered to be a civilian.<sup>17</sup> This approach is also derived from the problematic nature of identification and the possibility of error. As long as the targeted killing is conducted in the course of hostilities, the risk of error is mitigated and the arbitrariness of the killing diminishes.<sup>18</sup> This is another supporting argument for applying a narrow interpretation. Narrow interpretation of time constraints is also important, especially considering that with regard to the “directness” of the participation in hostilities, the Court has not adopted a narrow approach. An expanded interpretation might also support the arguments of some terrorist organizations that Israeli civilians are not

“real” civilians but military targets since many of them are potential combatants due to their status as military reservists.

## 2. Lack of Framework Confines

### *Lack of chronological confines*

The Court did not set out the proper confines of a time framework in which targeted killing may be performed. With respect to chronological confines, the Court described the armed conflict as ongoing. The Court stated in its ruling that “the general, principled starting point is that between Israel and the various terrorist organizations ... a continuous situation of armed conflict has existed since the first *Intifada*.”<sup>19</sup> It is doubtful whether one can view the first *Intifada* as an initiation of an armed conflict. On the other hand, the second Intifada brought about an armed conflict that existed in various stages of the uprising; it was not, however, a constant confrontation. The ruling that it is a prolonged and continuous armed conflict creates a glorification of the terrorists as it places them as an equal to the Israel Defense Forces (hereinafter: “IDF”), i.e., as participants in an armed conflict. Furthermore, the description of the conflict as a continuous conflict presents additional hardship to recognized periods of calm that may advance the pursuit of peace. It also harms the State’s interests such as motivating tourism and the raising of foreign capital.<sup>20</sup>

### *Lack of geographical confines*

The Court did not set out territorial borders for the use of targeted killing. This is indeed a disadvantage. It is appropriate to limit the state power to perform targeted killings only to territories that are outside sovereign rule and effective control, in territories where there are no other means to prevent terrorism. There is a difference between a pre-existing condition of authority, as suggested here, and an internal condition that assumes the existence of authority such as the “least harmful means” condition. Furthermore, an internal condition may be based on various assumptions regarding the existence of a different means. In areas under the effective control of a state, law enforcement measures must be applied and there is no option of exercising other means. Where in the territories Israel has effective control is a complicated issue beyond the scope of this article.<sup>21</sup>

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## 2. Civilians as “Human Shields”

Especially controversial is the Court’s ruling that residents of the territories who act as “human shields” to terrorists and do so willingly, with an intention to aid the terrorist, are viewed as direct participants in the hostilities.<sup>22</sup> Indeed, it may be just to remove some of the protection awarded to residents of the territories who chose to act as “human shields.” In other words, when the relevant parameters are considered on the scales of proportionality, the fact that civilians are acting as human shields is a relevant factor to be taken into account. This consideration is also relevant when addressing the issue of compensation payments to residents hurt in the course of a legitimate targeted killing. There seems to exist a difference between those residents of the territories who are actively involved in hostilities, either by shooting at soldiers or by executing suicide bombings, and those who act as human shields. The latter are passively protecting the terrorists by limiting the ability to move in on a target, however they do not create by their actions a new risk factor. Therefore, to consider human shields as actively taking part in hostilities and as legitimate targets seems to be far-reaching. Individuals choosing to act as human shields are often the terrorist’s relatives, his wife, children or parents who seek to protect his life. To upgrade their protective activity into hostile activity seems unjustified.<sup>23</sup>

The Court distinguishes between innocent civilians and those acting as human shields of their own free will with intention to assist a terrorist organization. There are cases between these extremes to which the Court does not refer. It is also difficult to distinguish between those acting as human shields of their own free will and those civilians forced to act as human shields or those who are in the vicinity of a terrorist just by chance. An additional problem lies in making this distinction in practice. Naturally, the ruling on this issue is not based on a legal process but is rather an operative ruling on the basis of intelligence assessment. The difference between an innocent bystander and a person acting as a human shield is based on the state of mind of the individual, while the circumstances of their presence in the vicinity of the terrorist may seem to be the same.<sup>24</sup> Let us consider a parallel situation in Israel. An Israeli civilian purchases a flat near the IDF headquarters. Would this person be considered a human shield and a legitimate target? Would it be appropriate to investigate this individual’s motives and aims?

## 3. Prohibition of Arbitrary Killing

Among the protected rights recognized by international law are the rights to life and the right to a fair trial. It is the right of every person not to be deprived his life arbitrarily.<sup>25</sup> Among the examples of arbitrary deprivation of life are arbitrary executions.<sup>26</sup> When a court grants its approval to kill a human being on the basis of his actions in the past and on intelligence information collected, it enables an execution based on a suspicion supported by another suspicion. Is this not an arbitrary deprivation of life? Such a case can be contrasted with a killing conducted in combat during a hostile activity where such a question does not arise. The Court does not treat this question in its judgment.

## 4. Legal Doctrine in Practice

### *The reality of targeted killing*

The Court ruled, and rightly so, that deadly force may not be used against a resident of the territories who is actively involved in the hostilities if it is possible to use a less harmful means such as arrest and trial. The addition of the least harmful means is a favorable step. Nonetheless, when the military applies this condition it can be assumed that the attitude would be in favor of mitigating the risk to troops. In fact it is hard to expect military commanders to impose risk on their soldiers.<sup>27</sup> In addition, there is also the fear that the targeted killing option will be selected in order to prove to the public the ability to function or out of retribution rather than prevention.<sup>28</sup>

### *An independent investigation*

An independent after-the-fact investigation was chosen as a means of control and enforcement of the limitations imposed by the Court. The Court did not specify the character of such investigations. It is unclear whether this is the best method to achieve this goal. It can be assumed that because sensitive information is involved the likely candidates are former military or security services officers. However such an investigation may be biased because of a “pro-establishment” inclination of the investigators. In addition any criticism voiced may present the State in an unfavorable light and may bring about sanctions, formal and informal, against those involved in the decision making and in the execution, as well as against the State under international

law. It is unclear why the Court did not choose to implement an examination mechanism prior to the carrying out of the operation. The advantage of such a mechanism is that it may prevent unnecessary killings. Some of the difficulties pointed out above do not exist if an early examination is conducted, in which a suspecting and independent legal eye views the information.<sup>29</sup>

#### *Commission to evaluate the effectiveness of the policy*

The Court refrained from addressing the issue of the effectiveness of the policy. However it is hard to criticize the Court for choosing not to do so. Yet, an opportunity was missed to oblige the security authorities to examine the effectiveness of the system using periodic evaluations conducted by an independent body.<sup>30</sup> The officials setting out the policy and those who execute it are too involved due to their decisions and actions and therefore are unable to assess its effectiveness properly. In the absence of examination there is no way to verify that what is considered to be effective is indeed so.

#### Proportionality

The Court did not set out standards for examining the proportionality requirement. Specifically, it is unfortunate that the Court did not limit explicitly the justified injury to bystanders only to instances when the action is carried out in order to prevent an acute danger.

#### Conclusion

The Court was right in the generalization according to which a targeted killing may be justified and may be unjustified subject to the circumstances. The Court pointed out several limitations of targeted killings, however, it did not do enough to set out the appropriate boundaries.

The Court quotes in agreement Antonio Cassese:

[I]f a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into

question and the whole body of law relating to armed conflict would eventually be eroded (p. 421).<sup>31</sup>

Following the clarification of the Court that the information upon which decision makers base their decision must be “well founded” and “verified,” they still decide upon suspicion. If Cassese is right, then the Court in its judgment did not confine the use of targeted killings sufficiently.

*Mordechai Kremnitzer is Bruce W. Wayne Professor of International Law at the Faculty of Law at the Hebrew University of Jerusalem. He is also a senior fellow at the Israel Democracy Institute. The author wishes to express his indebtedness to Inbar Levy for her excellent assistance in the preparation of this article.*

#### Notes

1. HCJ (High Court of Justice) 769/02 The Public Committee against Torture in Israel v. The Government of Israel, (13 December 2006) (hereinafter: “*The Public Committee against Torture*”). A similar petition had been heard and rejected by the Supreme Court in the past. See HCJ 5872/01 Muhamad Baracha v. The Prime Minister, 56(3) *Piskei Din* 1 (Reports of the Supreme Court of Israel; hereinafter: “*P.D.*”) (29 January 2002).

2. *The Public Committee against Torture*, *supra* note 1, at Para. 21 of the judgment. The Court ruled that the conflict between Israel and terrorist organizations is an international armed conflict without fully explaining its decision.

3. *The Public Committee against Torture*, *supra* note 1, at Para. 28 of the judgment. Although President Barak refers to the terrorists as “unlawful combatants,” See Para. 25 to the judgment.

4. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 75 *U.N.T.S.* 973 (hereinafter: Fourth Geneva Convention); Protocol I 1125 *U.N.T.S.* 3; The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 *U.N.T.S.* 609; Hague Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention, 1899 (No. II), 1907 (No IV) 36 *Stat.* 2277, *T.S.* No. 539, (hereinafter: “Hague Regulations”).

5. Hague Regulations, *supra* note 4, at Arts. 1-3.

6. Protocol I, *supra* note 4, Art. 50(1).

7. M. Kremnitzer, “Are All Actions Acceptable in



the Face of Terror? On Israel's Policy of Preventative (Targeted) Killing in Judea, Samaria and Gaza," 26 *Israel Democracy Institute, Policy Paper No. 60* (2006).

8. R. Lapidot, "The Status of Public International Law in Israeli Law," 19 *Mishpatim* 807-829 (1990).

9. *The Public Committee against Torture, supra* note 1, at Para. 40 of the judgment.

10. *Ibid.*

11. *Ibid.*, Para. 42.

12. *Ibid.*, Para. 46. I assume the court presumption was that the consequences may be predicted in advance.

13. D. Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?" 16 *Eur. J. Int'l L.* 171-212 (2000). On the other hand, the examples presented by the Court are not typical to the measure of targeted killing as they reflect a situation of an immediate danger.

14. *The Public Committee against Torture, supra* note 1, Paras. 39-40 of the judgment.

15. *Ibid.*, Paras. 31, 35.

16. *Ibid.*, Para. 2 of the judgment of Justice Rivlin.

17. Protocol 1, *supra* note 4, at Art. 50(1).

18. *The Public Committee against Torture, supra* note 1, at the judgment of Justice Beinisch.

19. *Ibid.*, Para. 16 of the judgment.

20. H. Fass (ed.), *The Battle of the 21st Century: Democracy Fighting Terror* – Discussion Forum chaired by D. Meridor, 26 (2006).

21. See Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995. [www.state.gov/p/nea/rls/22678.htm](http://www.state.gov/p/nea/rls/22678.htm) (Last visited 2 March 2007).

22. *The Public Committee against Torture, supra* note 1, at Para. 36 of the judgment.

23. See Fourth Geneva Convention, *supra* note 4, at Art. 28. Protocol I, *supra* note 4, at Art. 58.

24. This issue is also demonstrated in a verdict given by the Supreme Court regarding the "Early Warning" procedure. According to the "Early Warning" procedure, Israeli soldiers wishing to arrest a Palestinian suspected of terrorist activity may be aided by a local Palestinian resident, who gives the suspect prior warning of possible injury to the suspect or to those with him during the arrest. See HCJ 3799/02 *Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF* (6 October 2005). The Court ruled that the "Early Warning" procedure contradicts international law. Regarding the element of the local resident's consent

to assist the forces in combat, which is a necessary condition for receiving such assistance, the court ruled that it can be determined that there is no permissible way to obtain such consent. In light of the inequality between the occupying force and the local resident, it is not to be expected that the local resident will reject the request that he relay a warning to the person whom the army wishes to arrest. Therefore the situation in which such consent would be requested should be avoided.

25. See Art. 4 (1) of the 1966 International Covenant on Civil and Political Rights.

26. E/CN.4/1983/16 Paras. 74-75.

27. *Supra* note 7, at 34.

28. *Supra* note 20, at 28. A contrary consideration may be the wish to capture a suspected terrorist for the sake of gathering saving life information.

29. Acting as the devil's advocate. See *supra* note 7, at 36.

30. See P. B. Heymann & J. N. Kayyem, *Protecting Liberty in an Age of Terror*, 109 (2005).

31. *The Public Committee against Torture, supra* note 1, at Para. 40 of the judgment.

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#### War crimes

from page 28

Allen, 17 July 1944.

10. U.S. Department of State, *Foreign Relations of the United States: Diplomatic Papers* (hereinafter "FRUS"), (Washington, D.C., 1958-1968), 1944, The Conference at Quebec, 101-08, Morgenthau to Roosevelt, 5 September 1944.

11. FRUS, 1944: The Conference at Quebec, 124-25, Stimson to the President, 9 September 1944.

12. See Kochavi, *supra* note 8, 155-61.

13. NACP, RG107, Secretary of War, FSCC of McCloy, ASW 000.51, War Crimes, WCWF, Memorandum for the President, 22 January 1945; B. F. Smith, *The Road to Nuremberg* 114-151 (1981).

14. PRO, FO371/46795/C398, Minute, 6 February 1945.

15. *International Military Tribunal: Trial of the Major War Criminals before the International Military Tribunals*, 42 Vols, Vol. I 247-55 (Nuremberg, 1947-49).

16. *History of the United Nations War Crimes Commission and the Development of the Laws of War* 191-204 (1948).

17. NACP, RG 238, WWII, War Crimes Record, UNWCC, Office of U.S. Commissioner, UNWCC Chairman, Pell to Hurst, 8 May 1944.

# Israel Bar loses appeal against IAJLJ

Ariel (Arik) Ainbinder

The Supreme Court of Israel has dismissed an appeal by the Israel Bar against the unequivocal judgment of the Jerusalem District Court from November 2004 in favor of the IAJLJ. In doing so it severely criticized the legal and moral basis of the Bar's arguments.

Following the March 2004 IAJLJ Congress in which elections were held for Association officers, the Israel Bar brought suit in May 2004, questioning the legality of the election procedure.

The Bar claimed that a group of Israeli lawyers accompanying its president, Dr. Shlomo Cohen, were prevented from entering the business meeting of the Congress at which the elections were held.

In contrast to Dr. Cohen, who joined IAJLJ by completing a standard membership form and paying his fee, the members of his entourage had never registered for membership and, in addition, had never participated in any IAJLJ activities. The sole reason for their appearance at the elections was to prevent the elections from taking place, a matter which would have eventually left IAJLJ without a functioning board.

The principal argument of the applicants – both in their initial claim and in their appeal – was that by virtue of arrangements that had been reached between the Bar and the Association, all members of the Bar would become members of the Association by virtue of their membership in the Bar.

The Association confirmed that in the past, members of the Bar were indeed granted a special status, expressed in their right to join the Association without paying membership fees. However, it was always necessary for them to engage in a personal and voluntary act of joining. Moreover, the exemption from paying membership fees had been cancelled years before the elections under dispute.

The Association argued that the activities of a group of lawyers, who had never shown any interest in the activities of IAJLJ and who had never joined it, formally or informally, accompanied the president of the Israel Bar

into the election meeting of an association against which for years he had conducted a personal struggle, proves that the claim represented a misuse of legal proceedings.

The Association also held that the principal argument of the Israel Bar was not only wrong (i.e., that the arrangements between the parties had never granted membership in the Association for all the members of the Bar by virtue of their membership in the Bar), but was also void legally and constitutionally. In this regard the Association stressed that membership in the Bar being a mandatory condition for practicing law in Israel, such membership cannot, according to the Israeli constitutional and legal framework, cast a person into the membership of an association such as IAJLJ that requires identification with its purposes and goals as a condition of membership.

As previously reported in Justice 40 (Winter 2004), the Jerusalem District Court dismissed the claim, stressing, *inter alia*, that “making a person unknowingly a member of a corporation is incompatible with the principle of freedom of association, which comprises part of human dignity within the meaning of Basic Law: Human Dignity and Liberty 1992-5772, and which includes within it the very decision to associate.” Therefore, the court upheld the IAJLJ position: not only had the arrangements between the parties never made members of the Bar members of IAJLJ, but the argument itself is void and unconstitutional.

The Supreme Court strengthened the judgment of the District Court, determining that “automatic alliance without the person's knowledge, in a linkage mechanism that is being pled for by the Bar, binds the members of the Bar to the Association's objectives without asking them if indeed they identify with those objectives. This kind of arrangement hurts the autonomy of the personal will and human dignity and liberty.”

The Supreme Court dismissed the appeal, confirming once more the legitimacy and legality of the 2004 elections, and obliged the appellants to pay the costs of the Association and legal fees in the sum of NIS 20,000.

Advs. Ehud Arzi, Amos Bentzur, Yifat Shkedi and Keren Am-Shalem Nadler represented IAJLJ. Advs. Boaz Ben-Zur and Oded Neshet represented the Israel Bar. The Court's decision can be found online at <http://elyon1.court.gov.il/files/04/710/117/z15/04117710.z15.HTM>.

*Adv. Ariel (Arik) Ainbinder is executive director of IAJLJ.*

## Correction

A quotation was mistakenly attributed to Ruth Wedgwood in the article titled “Israel's asymmetric wars” that appeared in Justice 43. The quotation has been removed from the text of Justice 43 appearing on the IAJLJ website.

# IAJLJ protests Egyptian Holocaust denial conference

Irit Kohn

On 27 December 2006 Egypt's principal opposition party, the Egyptian Arab Socialist Party, held a Holocaust denial conference that included such grossly distorted expressions of anti-Semitism as "The Protocols of Zion." Following on the heels of the widely publicized Holocaust denial conference held two weeks earlier in Teheran and considering Egypt's continuing desire to play a moderating role in the Israeli-Palestinian conflict, IAJLJ decided to write a letter of protest to President Hosny Mubarak.

In the spirit of the collegial decision reached at our "Remember Budapest" conference in November 2006, we asked our representatives throughout the world to send the same letter of protest to the Egyptian ambassador in their home country. We chose to present the letter on 27 January 2007, the United Nations' International Holocaust Memorial Day. IAJLJ colleagues in 14 countries participated, including Argentina, Bulgaria, Canada, Chile, Finland, France, Germany, Hungary, Israel, Italy, South Africa, Switzerland, the United States, the United Kingdom and Turkey. In addition, letters were sent to the Egyptian ambassadors at the UN Human Rights Council in Geneva and at UN headquarters in New York. In Israel, our effort was publicized in two radio newscasts.

As of 15 March, no response has been received from Egypt.

*Irit Kohn is a Vice President of IAJLJ, Acting as Coordinator with International Bodies*

International Association of Jewish Lawyers and Jurists



January 17, 2007  
Your Excellency President Hosny Mubarak  
Arab Republic of Egypt  
Abdeen Palace  
Cairo

We have recently learned that Egypt hosted a conference on Holocaust denial on December 27, 2006 under the banner "The Holocaust Lie." This is a matter of great concern to us.

As the International Association of Jewish Lawyers and Jurists we were astonished that such a conference could be held in a leading, moderate Arab country that enjoys the fruits of a peace treaty with Israel.

The conference served as a venue for the dissemination of virulent anti-Semitic themes and propaganda including the infamous "Protocols of the Elders of Zion."

In our view this can only serve as fuel that will further inflame violence and extremism throughout the Middle East and beyond. We are certain that such developments do not accord with the basic policies that you, Mr. President, and your Government have pronounced and support.

We take this opportunity to draw your attention as well to the continued publication of books, articles and cartoons in the Egyptian media that have a distinct anti-Semitic flavor.

We appeal to you to exercise your authority to put an end to these activities, activities exceedingly detrimental to the cause of peace and moderation that is so close to your heart.

Yours Sincerely,  
Alex Hertman, Adv., President

Irit Kohn, Adv., Vice President, Coordinator with International Bodies

# IAJLJ membership no proof of judge's partiality

*A Scottish judge was cleared of alleged partiality stemming from her membership in the International Association of Jewish Lawyers and Jurists*

Michal Navoth

An asylum seeker, Fatima Helow (hereinafter: the "petitioner")<sup>1</sup> applied to the *nobile officium* of the Court of Session, Scotland's supreme civil court (hereinafter: the "Court"),<sup>2</sup> in the exercise of its supervisory jurisdiction, to set aside an interlocutor of Judge Lady Cosgrove (hereinafter: the "judge") of November 2004. The judge had refused an application by the petitioner for statutory review of a decision of the Immigration Appeal Tribunal. The Tribunal had refused to allow her leave to appeal a decision refusing her asylum in the United Kingdom.<sup>3</sup>

The petitioner claimed refugee status, having been in the Sabra-Shatila refugee camp in Lebanon. In September 1982 several members of her family were among the inhabitants of the camp that were killed after Lebanese Phalangist militia entered the camp. At the beginning of the present decade a criminal complaint was filed by the relatives of the victims in Belgium against Ariel Sharon, Israel's Minister of Defense at the time when Israel entered Lebanon in the summer of 1982. The petitioner actively assisted in the preparation of this criminal procedure. She then appeared on television and was interviewed regarding the massacre. She claimed asylum and human rights protection because of her Palestinian ethnicity, Muslim religion, sex and her support of the Palestine Liberation Organization. She was afraid of persecution from Israeli, Syrian and Lebanese authorities.<sup>4</sup>

Upon receiving the judge's interlocutor, the petitioner's solicitors decided to make further inquiry about the judge. By means of the Internet search engine Google they discovered information about her which had been publicly available on various websites. One website was that of the International Association of Jewish Lawyers and Jurists (hereinafter: the "Association"), [www.intjewishlawyers.org](http://www.intjewishlawyers.org). They



learned that the judge had been a member since the inauguration of the Scottish branch of the Association in 1997.<sup>5</sup>

In its long Opinion of 16 January 2007 (hereinafter: the "Opinion") the Court examined the petitioner's allegation, which was based on material derived from the website. The question before it was, whether, by reason alone of the judge's membership in the Association and on consideration of its published material, the fair-minded and informed observer would conclude that there was a real possibility of apparent partiality on the part of the judge, albeit unconsciously, in her determination that the petitioner's application for statutory review should be refused. The Court noted that the petitioner rightly disavowed any argument based on the judge's Jewishness, and that the petitioner had not claimed that the judge's opinion itself disclosed any bias.<sup>6</sup>

The Court referred to three categories based on information found on the home page of the website and quoted relevant passages: "Membership," "Policy Statements" and "The objects of the Association." The latter could be discovered from the home page under the heading "Pursuing human rights." The Court also discussed the contents of the magazine *Justice* and in particular its section titled "President's Message" in the issues of *Justice* which were brought to its attention.<sup>7</sup>

According to the Court, it was not suggested, nor could it be, that it was inapt for a judge to be a member of a professional association of lawyers and jurists, and in particular of the Association, or that the members were other than they appeared to be, distinguished members of their professions. Furthermore, no criticism was directed at the aims and objects of the Association, as referred to above, which its members, including the judge, could share by virtue of their membership.<sup>8</sup>

Apart from the President's Messages in the issues of *Justice* that were produced, the Court found no



reason to think that the contents of the magazine were such that a fair-minded and informed observer would conclude that there was a real possibility of partiality on the part of the judge by reason of their publication and, it might be, of the judge's having read them. Every issue of Justice had a disclaimer, in commonplace terms, clarifying that the views of contributors were not necessarily those of the Association. Readers were left to agree or disagree with what they read.<sup>9</sup>

As to the President's Messages, the Court examined a statement by the Association's President that referred to the Sabra-Shatila massacre and quoted it in the Opinion.<sup>10</sup> The Court noted that the statement "... did not, on a fair reading, seek to suggest that there had been no Israeli complicity in what had been done on the ground by others; rather it noted that Israel's position alone had been the subject of investigation and accusation."<sup>11</sup>

With respect to statements made on behalf of the Association and published on its website, the Court held that it could not reasonably be assumed that every member of that widely-based international organization would necessarily share all the views apparently expressed by its representatives on diverse and varying issues.

The high point of the case made by the petitioner was not that the judge necessarily shared the views referred to, but that she might have been "influenced" by them. The Court found no reason to suppose that any independent-minded judge of the Court of Session, having taken the judicial oath, would be influenced in that way.

The Court observed that while the statements generally demonstrate sympathy for the Israeli position, the emphasis was on a desire that Israel be accorded fair treatment vis-à-vis Palestine in the

United Nations and in the courts. Thus, the Court concluded that the judge's membership in the Association might make her sympathetic to Israel's position desiring fair treatment for Israel. It would, however, be unduly sensitive to conclude that there was a real possibility of bias on behalf of the judge.<sup>12</sup>

Accordingly, the Court refused the prayer of the petition.<sup>13</sup>

*Adv. Michal Navoth is Coordinating Editor of Justice.*

#### Notes

1. [2007] CSIH 5 P2135/05 Fatima Helow, petitioner, to the *nobile officium* of the Court of Session, See [www.scotcourts.gov.uk/opinions/2007csih05.html](http://www.scotcourts.gov.uk/opinions/2007csih05.html) (Last visited 22 February 2007).

2. See [www.scotcourts.gov.uk/session/index.asp](http://www.scotcourts.gov.uk/session/index.asp) (Last visited 22 February 2007). As to the power of the Court of Session to provide the remedy of *nobile officium* see: *supra* note 1, at Para. 2.

3. *Supra* note 1, at Paras. 1, 12-15.

4. *Ibid.*, Paras. 8-12.

5. *Ibid.*, Para. 16. A year earlier, in 1996, Judge Hazel (Aronson) Cosgrove was appointed on a permanent basis to the Court and became Lady Cosgrove. See [www.theherald.co.uk/news/news/display.var.1126944.0.0.php](http://www.theherald.co.uk/news/news/display.var.1126944.0.0.php) (Last visited 22 February 2007).

6. *Ibid.*, Para. 42.

7. *Ibid.*, Paras. 18-22.

8. *Ibid.*, Para. 42.

9. *Ibid.*, Para. 43.

10. *Ibid.*, Para. 22.

11. *Ibid.*, Para. 44.

12. *Ibid.*

13. *Ibid.*, Para. 46

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# צדק

**ENGLISH:** 1. justness, correctness. 2. righteousness, justice. 3. salvation. 4. deliverance, victory.  
[**ARAMAIC:** צדק (he was righteous), **SYRIAC:** זדק (it is right), **UGARITIC:** ṣdq (= reliability, virtue), **ARABIC:** ṣadaqa (= he spoke the truth), **ETHIOPIC:** ṣadaqa (= he was just, righteous)] Derivatives:  
**צדקה** **POST-BIBLICAL HEBREW:** alms, charity. Cp. **ARAMAIC** צדקתא (= justice). **PALMYRENE** צדקתה (= it is right).  
**צדק** 1. just, righteous. 2. pious.

*After Ernest Klein, A Comprehensive Etymological Dictionary of the Hebrew Language for Readers of English. 1987: Carta/University of Haifa*

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