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The International Tribunal at Nürnberg delivered judgment on the Nazi war criminals and organizations, as seen by veteran British political cartoonist David Low, October 1, 1946. The Nazi leadership was found guilty beyond the shadow of a doubt, and sentenced to be hanged.

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# PRESIDENT'S MESSAGE



In celebrations around the world nations and individuals are marking fifty years to the end of the Second World War and its indescribable horrors. But as we celebrate we must take a sober look at the world today and ask ourselves - have we learnt the true lessons from what happened half a century ago, or are we about to commit the very mistakes which allowed that period of horror to dawn? The Nazis came to power in part because the world was slow to understand the scale of the danger posed by them and to take courageous measures to meet it. Today we face more horror on a global scale, but again the world refuses to realize the potential for catastrophe and courageously confront it.

Today's terror is two pronged. On the one hand, weapons of unimaginable destruction can be found in the hands of anyone who seeks them: international terror groups, local criminal gangs or even the discontented individual out to make society pay for his real or imaginary grievances. On the other hand, the targets of these weapons are no longer state authorities, or armed forces, or a defined people but rather any person or group which finds itself in a vulnerable location, be it a trade centre in New York, a train in Tokyo, a bus in Tel Aviv, or a communal centre in Buenos Aires,

Acquisition and assembly of weapons is facilitated by liberal firearm laws, information on Internet on how to put together explosive devices and greedy nations selling nuclear materials on the world markets.

As we go to print the trauma of the latest massacre which took place in Oklahoma City is presented on our television screens, and again, along with the expressions of horror, we witness the well known discriminatory attitude which allows these acts to happen. The Moslem society in the United States heaves a sigh of relief and expresses its outrage: relief that this time the perpetrators were not Islamic extremists, and outrage because Moslem society was subjected to abuse by its neighbours who prematurely blamed the explosion on Muslims. Why does the same community not raise its voice against similar acts of terror perpetrated by Moslems around the world? Is their silence in the face of brutal massacres perpetrated against Jews and Israelis not tantamount to condoning such acts? We are also hearing more and more voices of outraged American citizens asking how could Americans do this to fellow Americans? instead of asking: how could man do this to his fellow man?!

We must recognize that the culture of terror is a global one played out on the national as well as the international scene. It equally endangers every innocent man, woman and child in the world, whatever their creed, colour or nationality. Terror is indivisible and if you condone one form of terror perpetrated in the name of one cause, you condone all terror everywhere and you might end up as its victim.

This time in Oklahoma City it was not the hand of a Fundamentalist Moslem but that of members of a white racist militia group, fighting democratic government and advocating the killing of African Americans and Jews, among others. One aspect of the ideology of this type of group can be seen from their labelling the U.S. Federal Government as "ZOG" - Zionist Occupation Government. Has not the time come to confront the danger emanating from such groups which openly preach hate and incite to violence - protected by constitutional rights and freedoms which they cynically abuse?

It is time that men of the law everywhere combine their efforts to find the right balance between protecting the rights of the people and, at the same time, preventing, by legal means, the abuse of those rights by those who are out to destroy us.

It is not an easy task, but it must be done.

*Hadassa Ben-Zur*

# The Terrorist Connection - Iran, the Islamic Jihad and Hamas

Abstract of a lecture delivered in a colloquium on "Iran: Foreign Policies & Domestic Constraints", held at the Moshe Dayan Center for Middle Eastern & African Studies at Tel Aviv University on 3 April 1995, related to Iran's endeavours to export its revolution to the Palestinian arena; Iran's ideological impact on Palestinian -Islamic trends, and the practical aspects of Iranian -Palestinian cooperation.

Elie Rekhess



**T**he export of the Iranian revolution in its first decade of existence was restricted to the Shi'i movements in Iraq, Lebanon and the Gulf Emirates. The Iranian version of fundamentalist Islam failed to make significant headway in Sunnidominated Muslim areas.

Against the background of what may be described as a general Sunni hostility towards the Iranian revolution, the distinctive Palestinian Islamic Jihad organization appeared in the late seventies in the Gaza Strip, emerging as a militant Sunni movement steeped in Sunni actions and traditions, yet inspired and emboldened by the Shi'i revolution of Iran,

During most of the eighties the Iran-Islamic Jihad relationship was one-sided. It was the Palestinian movement which responded to its spiritual mentor. Iran paid little attention to the Palestinian movement. A change occurred in the late eighties. Following the end of the Iran-Iraq War, Iran no longer restricted itself to the Shi'i domains: instead, it opened itself up to a genuine effort to export its revolution to Sunni-populated areas, such as Sudan, Algeria, Tunisia, Egypt and the Palestinian arena. The change in Iran's external policies coincided with the eruption of the intifada which brought to the fore the saliency of Islamic militancy in the form not only of the Palestinian Islamic Jihad movement but, more forcibly, through Hamas. Following the deportation of the Islamic Jihad leadership to Lebanon in 1988, Iranian involvement with the organization was significantly enhanced.

Concurrently, and in line with its determination to export th

revolution to Shi'i dominated areas, Iran made strenuous efforts to widen its influence to the Palestinian

scene by strengthening its relations with Hamas, the rival Islamic group in the Territories which, as noted, began to emerge as a central Islamic element fomenting the intifada. The Iranian endeavour, however, was met with limited success, as the Muslim Brotherhood affiliated to Hamas was at pains at this stage to distance itself from Iran.

The situation changed again following the Gulf War and the Madrid Conference, when Iran's interests and the interests of Hamas converged. For Teheran, Hamas had several advantages. It offered another vehicle to demonstrate Iran's Islamic leadership; a channel for involving itself in the Arab-Israeli conflict. Moreover, Hamas seemed determined to fight, had the potential to strike inside Israel, and attracted great public interest. It totally rejected Israel's right to exist and was resolved to combat Israel and imperialism. All these were in line with Iranian doctrines and tactics and thus were worth, of Iranian support

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Dr. Rekhess is a senior research fellow at the Moshe Dayan Center for Middle Eastern & African Studies at Tel Aviv University. The paper was jointly prepared with Meir Hatma, a Ph.D. candidate at Tel Aviv University - School of History.

The transition in Iranian attitudes towards the mainstream Palestinian Islamic trend was clearly demonstrated in a series of moves initiated by Iran from 1990 onwards. A few landmarks: In late December 1990 Iran convened an Islamic conference on Palestine in Teheran, to which Hamas delegates were invited. A landmark in the Iranian-Palestinian-Islamic rapprochement took place in October 1991, when Iran convened in Teheran the international conference to support the Islamic revolution of the people of Palestine, an event which emerged as a counter-conference to the Madrid Conference held at that time. From that point onwards the cooperation and coordination between Iran and the Palestinian Islamic movement became tighter and more pronounced. Both parties, Hamas on the one hand and the Iranians on the other, united in pursuing a joint political goal, to foil the peace process. Iranian influence on the Palestinian Islamic militants became more visible and salient.

### **The Ideological and Political Impact of the Iranian Revolution on Palestinian Islamic Movements**

The Palestinian Islamic Jihad movement was the group most profoundly affected by the Iranian revolution. From its inception, the Islamic Jihad endorsed the Iranian revolution as an ideal movement to be implemented in other parts of the Muslim world, first and foremost, of course, on the Palestinian scene. It was

the Iranian revolution, Islamic Jihad spokesman argued, which brought home the old truth that "Islam was the solution and Jihad was the proper means". They adopted a central tenet of Khomeini's interpretation of the new Sh'ia, the constant emphasis on jihad as a symbol of activism, thereby contrasting it with the Muslim Brotherhood's approach. They adopted the principle of sacrifice and martyrdom to an uninhibited suicidal point.

Fathi Shqaqi, leader of the Islamic Jihad, saw Khomeini's greatness in his capacity to illuminate the great cultural clash between the Islamic nation with its historical tradition, its faith and civilization, and on the other hand the satanic forces of the West represented by Israel. Shqaqi has quoted fatwa issued by Khomeini which spoke of the religious duty of bringing about

the elimination, *izala*, of the Zionist entity, and allocated the income from alms for this purpose. The Iranian Jihad perception was accommodated by the Islamic movement in the Territories to the Palestinian scene. Iran, argued the Islamic Jihadists, was the only country which truly took upon itself the Palestinian cause by forming the Jerusalem Army, a force capable of waging a popular Islamic liberation war.

There remain, nevertheless, unresolved ideological contradictions in the Palestinian Islamic Jihad outlook. These emerge in the attitude adopted by the Islamic Jihad movement towards the Sunni-Sh'ia schism, the most difficult challenge to the movement. Here the Islamic Jihad has taken up the ecumenical tendency preached by the Iranian regime and has stressed the latter's pan-Islamic orientation. Islamic Jihad publications emphasize the harmony prevailing between Sunnis and Shi'is.

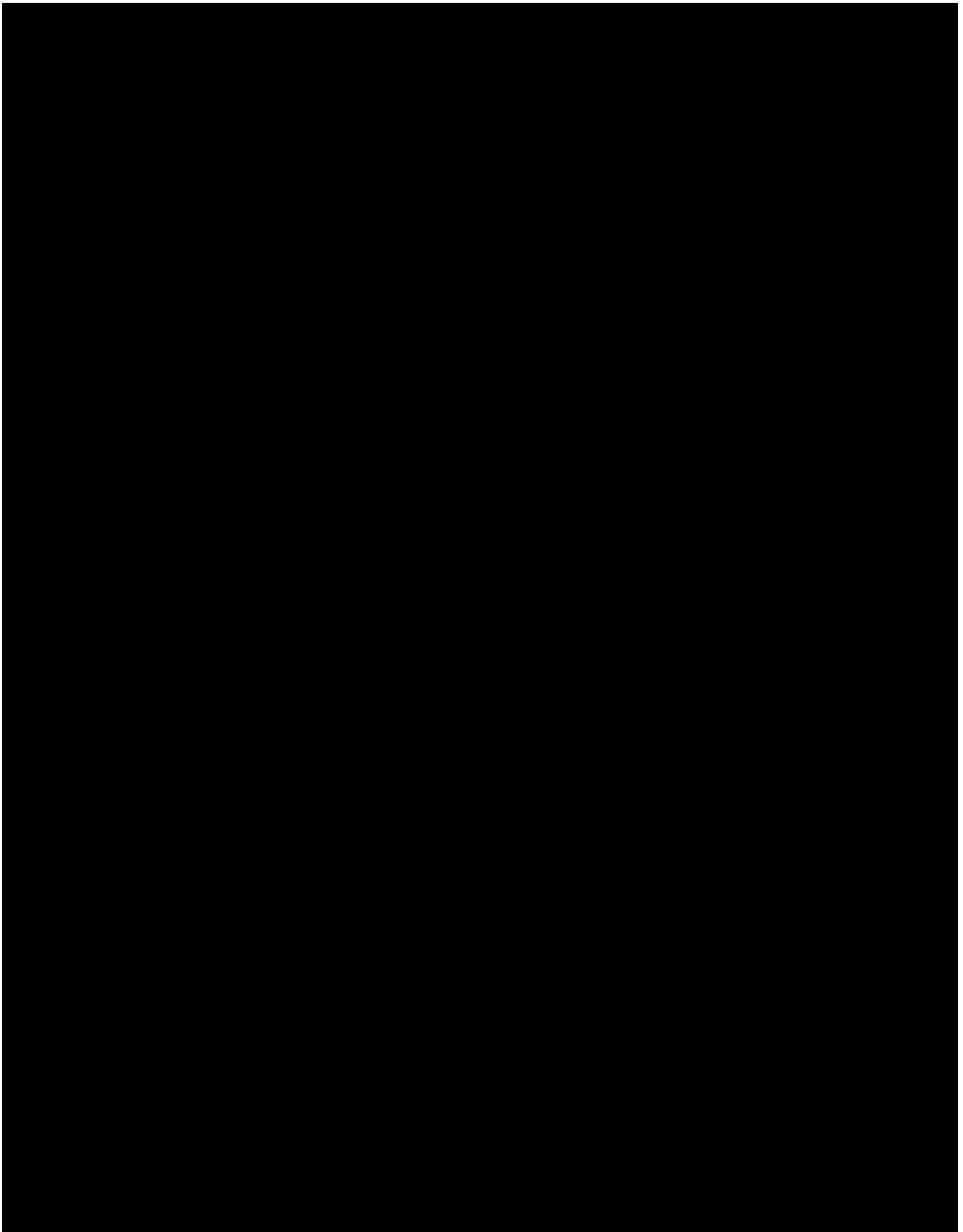
Over and over again they deny that the Shi'a is heretical. They speak of 'it as an integral part of the world of Islam and consider existing controversies as marginal matters. They cite with approval the endeavours Hasan al Bana and Sheikh Mahmoud Shaltut to bring the various schools of thought together. They enlarge on Shaltut's famous fatwa of 1959 declaring the Twelve Shi'a to be an orthodox school alongside the four other recognized schools. It is doubtful whether the Islamic Jihad's endeavour to reconcile Sunna and Shi'a has been successful. The Islamic Jihad failed to

establish a coherent consistent ideological system which would capture the support of West Bankers and Gazans.

Politically, the Islamic Jihad's views regarding such issues as the Iran-Iraq War and the peace process were and are a mirror reflection of Iran's views on these issues. Thus, for example, unlike other Sunni fundamentalist movements which sided with Iraq, the Palestinian Islamic Jihad expressed unqualified support for the Iranian stand in the Iran-Iraq War. Similarly, the Islamic Jihad negated the Madrid Conference, the Israeli-Palestinian negotiations, the Oslo agreement, and the Declaration of Principles, in full accordance with the Iranian stance.

Iran's ideological influence on Hamas is totally different. Hamas was established in the Territories in early 1988 as a mili-

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tary wing of the local branch of the Muslim Brotherhood, and as such it displayed from the outset a strong anti-Shi'i position. The Hamas covenant published in August 1988 did not echo Khomeini type thinking and made no mention of Iran. Ahmad Yassin, leader of Hamas, attacked at that time Khomeini's regime. From its inception to this day, and in direct contradiction to the Islamic Jihad, Hamas has not indulged in attempts to bridge the theological discrepancies between Sunni and Shi'a. Theologically, one may conclude that Hamas remains alien to the notions of the Iranian revolution.

With regard to its political outlook, Hamas has maintained a much more independent stand than the Palestinian Islamic Jihad. Thus, during the Gulf War Hamas adopted an ambivalent position, largely because its principal rival, the PLO, so closely identified itself with Saddam's cause. Concurrently, Hamas was careful not to alienate its benefactors in the Gulf area, mainly Kuwait. The shared interests of Iran and Hamas began to correspond following the Gulf War and the beginning of the political process.

### **Practical Aspects of the Cooperation between Iran and the Palestinian Islamic Movement**

The deportation in 1988 of Fathi Shqaqi and others to Lebanon, and the transfer of the Palestinian Islamic Jihad headquarters to Syria, thereafter, marked a turning point in the development of the Iranian-Islamic Jihad relationship. From this point on, direct contact was established between the Islamic Jihad activists and their Iranian sponsors through Iranian embassies in Beirut and Damascus, through the Revolutionary Guards stationed in Lebanon, and through Hizbullah. The Iranian sponsorship of the Palestinian Islamic Jihad was manifested politically, financially and militarily.

The State Department's office of counter-terrorism in its report on international terrorism for the year 1993 clearly established that the Palestinian Islamic Jihad received funding from Iran. In April 1993, Fathi Shqaqi told a New York newspaper that his organization has received Iranian funds since 1987. He did not specify how much money was transferred but added that money

and military equipment were transferred to the Territories to fund terror operations and to support the families of Palestinian Islamic Jihad activists. It should be emphasized that the money is not being used only for terror activity, but also for the establishment of new mosques and a socioeconomic support system in the Territories.

The contact established between the Palestinian Islamic Jihad and Hizbullah in 1988 had a particularly strong impact on the movement's military capacity and activity. The Palestinian Islamic Jihad was transformed into a paramilitary organization resembling the philosophy and structure of Hizbullah. The Jihad organization obtained arms through Hizbullah. In 1991 and 1992, members of the Jihad were logistically supported by the Hizbullah in carrying out at least three armed operations against IDF targets in the security zone in southern Lebanon.

Press reports concerning the Jihad-Hizbullah -Iranian military connection continue to be published regularly. The most recent report was published in March 1995 in Al-Watan AI-Arabi, a weekly published in Paris. Quoting unidentified Western intelligence sources, the report alleged that Iran together with Hizbullah, Islamic Jihad, Hamas and other radical Islamic movements have been making special efforts to recruit young Muslims in Europe and to train them for suicidal terror attack missions. Shqaqi himself is

quoted in this report as having declared that there exists a one-hundred strong special task suicidal unit which will be activated not only against Israeli targets but also against whoever is the enemy of Islam. The authenticity of this report still needs to be verified. One should add parenthetically here that much of the information published in overt sources concerning Iranian-Palestinian relations is fabricated. False reports are leaked to the press to serve the interests of at least four actors involved in this business - Iran, the PLO, Israel and the Islamic movements themselves. Some observers add Iraq and Syria to the list. One must therefore be very careful in handling such information or disinformation. Nevertheless, if the A/Watan AI-Arabi report is based on reliable sources, then there is definitely reason for concern.

What is known is that regular working meetings between

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Islamic Jihad leaders and Hizbullah officials continue to take place, with occasional Iranian participation. The most recent such meeting reported in the press was held between Hasan Nasrallah, the Hizbullah Secretary General and Fathi Shqaqi in October 1994.

### The Hamas-Iranian Connection

So far the Islamic Jihad-Iranian connection has been explained. The political affinity which was established between Iran and Hamas in late 1991 was followed by a series of practical steps. In October 1992 the Iranian Foreign Minister invited a Hamas delegation to Iran under the leadership of Dr. Musa Abu Marzuq, who held meetings with Khomeini and Foreign Minister Velayeti. Iran reportedly pledged to support Hamas with a subsidy of \$30 million a year and also reportedly agreed to place 3,000 Hamas fighters in training camps in Iran, Lebanon and Sudan. It also promised to help Hamas set up a radio station. Hizbullah was said to have agreed to help Hamas to mount operations against Israel, including joint attacks.

The newly established cooperation was reportedly formalized in an agreement signed in late 1992 in the city of Kum. Iran allowed Hamas to open an office in Teheran for political and propaganda activities, subsequently referred to by both parties as an embassy. The agreement, which declared Hamas to be the sole legitimate representative of the Palestinians, elicited an angry and aggressive PLO response. Arafat, troubled by the PLO's loss of ground to Hamas in the Territories, and ever wary of Iranian involvement in Palestinian affairs, denounced Iran vehemently. Saudi Arabia and the Gulf states also reportedly expressed resentment. Hamas was quick to deny that there was any agreement. The Hamas spokesman accused the PLO of fabricating the story in order to undermine Hamas's standing in the Arab world. The Hamas spokesmen added that the Iranian-Hamas connection was restricted to the political level only.

To what extent does this statement reflect actual reality? The only article in the alleged agreement that was fully implemented was the opening of a permanent Hamas representation in

Teheran, headed by Imad al-Alami, who was deported from the Gaza Strip in 1990. It is also evident that the political contacts between Hamas leaders and Iranian leadership have been strengthened in the last two years. Political bureau chief Dr. Musa Abu Marzuk, Ibrahim Ghawsha, Mohammad Nazal and other leading Hamas leaders meet with Khomeini, Rafsanjani and Velayeti regularly during their frequent visits to Iran.

What is more difficult to establish is the nature of the military and financial relationship between Hamas and Iran. On the military level, it is doubtful whether the report of guerrilla training for 3,000 Hamas men in Lebanon and Iran is true. As Martin Kramer indicated, Abu Marzuk, who denied the report, pointed out that it was logistically impossible for Iran to train Hamas activists, and there is no strong evidence to contradict or refute Abu Marzuk's claim. Similar reports concerning Hamas training by the Revolutionary Guard remain unconfirmed.

**The Iranian leadership is reportedly divided over the extent of funds to be distributed to Hamas. Another legitimate question in this context is whether Hamas itself is keen to become totally dependent on Iranian financial support**

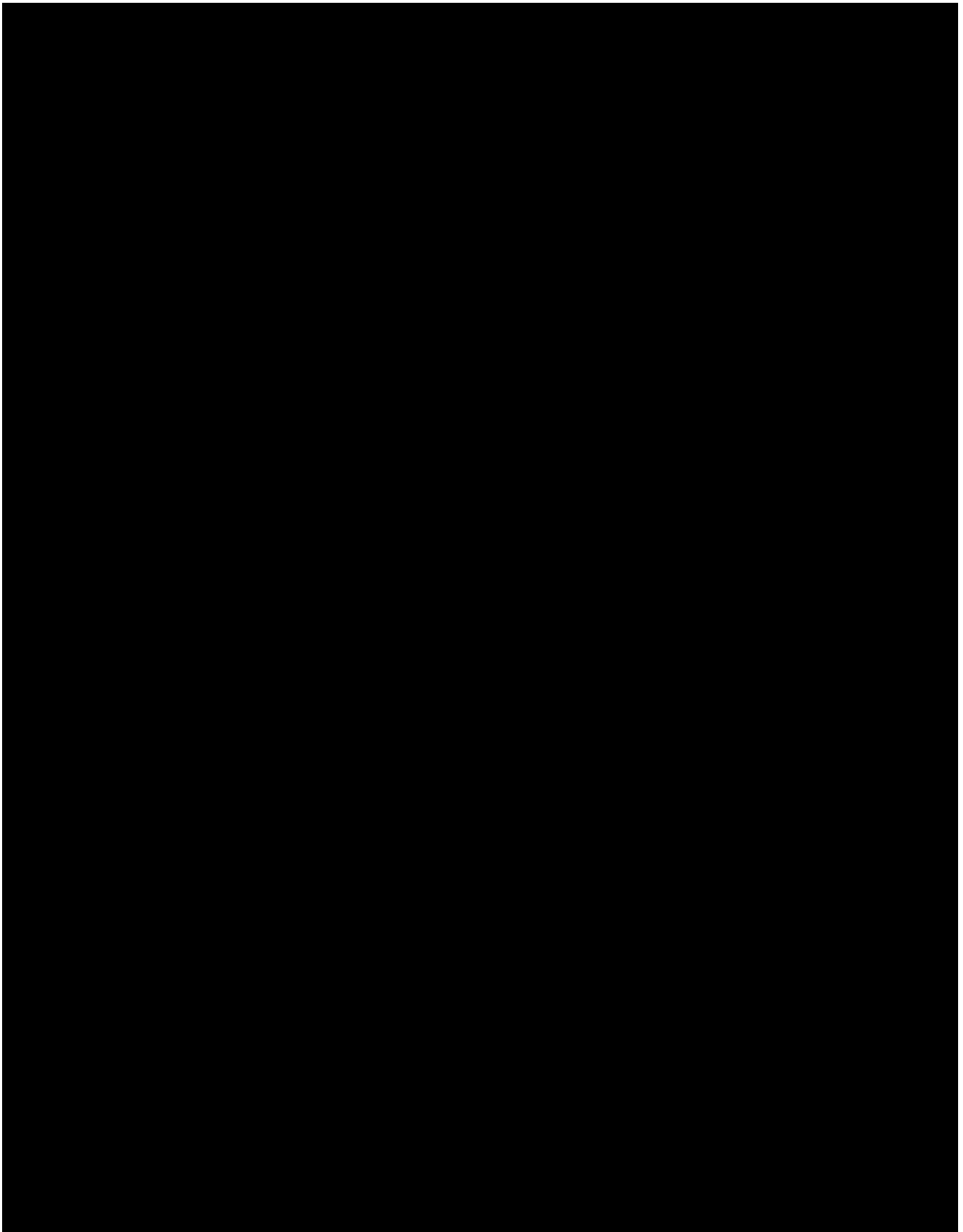
### The Hamas-Hizbullah Connection

Hamas cooperates with Hizbullah politically. Leaders of the two organizations meet regularly in Lebanon. A recent such meeting was held in October 1994 between Nasrallah and leading Hamas leaders. While it is reasonable to assume that there exists some measure of military cooperation between Hamas and Hizbullah, especially following the deportation of the four hundred Hamas Lebanon, hard evidence proving such contacts is lacking. It is questionable

whether Hamas is in actual need of external military assistance emanating from either Hizbullah or Iran. Hamas has developed its own self-sustained terror network in the Territories. It is well organized, well trained and well equipped. There is no lack of arms supply in the Territories.

Asked, following the Afula operation in April 1994, whether those who planned and implemented the operation received their training under Hizbullah in southern Lebanon, Muhammad Nazal replied:

"I think the Hamas movement is able to develop its military and security capabilities without having to seek outside help. The movement has an efficient military body that gains experience day by day."





This statement reflects much of the reality as it is.

With regard to Iranian financial aid for Hamas, a congressional report published in December 1994 states that:

“While Iran has no presence in the West Bank and Gaza Strip, in 1992 it reopened its embassy in Jordan from which Hamas activists can gain relatively easy access to the West Bank.”

The report hints that there is financial aid coming from the Iranian embassy in Jordan to Hamas. Spokesmen for Hamas admit that the Iranian people have supplied certain assistance to the Palestinian people in the Territories to help keep them steadfast, but deny having received as much as \$30 million from Iran. There are other reports from the Lebanese press indicating the sum of \$10 million, presumably per year, coming from Iran to Hamas. Again these reports are unconfirmed.

The Iranian leadership is reportedly divided over the extent of funds to be distributed to Hamas. Another legitimate question in

this context is whether Hamas itself is keen to become totally dependent on Iranian financial support. Such a development may be counterproductive from the Hamas point of view. Full identification between Hamas and Iran could harm the latter's interests, mainly in the sense that it would facilitate Israel's effort to depict Hamas as an Iranian-sponsored threat to the world order and it would legitimize harsh Israeli action against Hamas.

## Concluding Remarks

Two central questions must be addressed. First, has the exportation of the Iranian revolution to the Palestinian arena been successful? The answer is yes, but only to a limited extent. From the ideological point of view - only the relatively small Islamic Jihad organization has converted to the Shi'i-inspired Iranian

model. But, as indicated above, the Palestinian Islamic Jihad has not become a sweeping grass roots movement in the Territories. The number of its hard core members does not exceed 100-200 people. With regard to Hamas, Iran's success is considerably

smaller. Hamas remains a Sunnioriented Muslim Brotherhood movement which rejects the Iranian Shi'i model. In total contradiction to the Islamic Jihad, which became an Iranian satellite organization, fully financed, trained and backed by Iran, Hamas preserves its independence vis-a-vis the Iranians.

The second question relates to the importance of the Palestinian-Islamic connection in Iranian eyes. There has been an on-going debate over this issue. Some analysts, notably Hooshang Amiramadi of Rutgers University, concluded that despite its verbal criticism.

Iran had not taken any practical steps to foil the peace process.

An opposite view claims that Iran has inscribed the struggle for Palestine on its flag, and that Iran, through its Palestinian Islamic clients, poses a formidable Islamic threat to the stability of the Middle East in general and to the peace process in particular.

In any event, it is the relationship between Iran and the Islamic Jihad which poses the most danger. One should not underestimate Hamas, but Hamas acts first and foremost according to its own narrow interests. The Palestinian Islamic Jihad is a puppet in the hands of Iran. If and when Iran decides to explode the peace process, one should be aware that

it has the tools to carry out this mission, namely, through the Palestinian Islamic Jihad organization. It is a fearless, ruthless, fanatic, extremist organization which does not hesitate to do whatever is ordered. Whether Iran indeed wants this to happen is a question which remains unanswered.

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# President Clinton's Executive Order Prohibits Transactions with Terrorists

President Bill Clinton signed an executive order effective January 24 1995 that freezes all property, including bank deposits within the jurisdiction of the United States of 12 designated foreign organizations and 18 designated individuals. It also blocks transfers by U.S. persons to the designated individuals and organizations, including charitable contributions of funds, goods, or services.

Following is the full text of the Executive Order, with an annex listing the terrorist organizations, as released by the White House:

By the authority vested in me as President by the Constitution and the laws of the United States including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.) and Section 301 of Title 3, United States Code.

I, William James Clinton, President of the United States of America, find that grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States and hereby declare a national emergency to deal with that threat.

I hereby order:

## Section 1

Except to the extent provided in Section 203(b)(3) and (4) of IEEPA (50 U.S.C. 1702 (b)(3) and (4)) and in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date:

(a) all property and interests in property of:

- (i) the persons listed in the Annex to this order;
- (ii) foreign persons designated by the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, because they are found:
  - (A) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process, or
  - (B) to assist in, sponsor, or provide financial, material, or technological support of, such acts of violence; and
- (iii) persons determined by the Secretary of the Treasury, in coordination with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of, any of the foregoing persons, that are in the United States, that hereafter come within the United States, or that hereafter come within the possession or control of United States persons, are blocked;
- (b) any transaction or dealing by United States persons or within the United States in property or interests in property of the persons designated or in or pursuant to this order is prohibited, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of such persons;
- (c) any transaction by any United States persons or within the United States that evades or avoids, or has the purpose of evading or avoiding or attempts to violate, any of the prohibitions set forth in this order is prohibited.

## Section 2

For the purpose of this order:

- (a) the term person means an individual or entity;
- (b) the term entity means a partnership, association, corporation or other organization, group, or subgroup;

- (c) the term United States person means any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States; and
- (d) the term foreign person means any citizen or national of a foreign state (including any such individual who is also a citizen or national of the United States) or any entity not organized solely under the laws of the United States or existing solely in the United States, but does not include a foreign state.

**Section 3**

I hereby determine that the making of donations of the type specified in Section 203(b)(2)(A) of IEEPA (50 U.S.C. 1702 (b) (2)(A)) by United States persons designated in or pursuant to this order would seriously impair my ability to deal with the national emergency declared in this order, and hereby prohibit such donations as provided by Section I of this order.

**Section 4**

- (a) The Secretary of the Treasury, in consultation with the Secretary of State and, as appropriate, the Attorney General, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to me by IEEPA as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States government. All agencies of the United States government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.
- (B) Any investigation emanating from a possible violation of this order, or of any license, order or regulation issued pursuant to this order shall first be coordinated with the Federal Bureau of Investigation (FBI), and any matter involving evidence of a criminal violation shall be referred to the FBI for further investigation. The FBI shall timely notify the Department of the Treasury of any action it takes on such referrals.

**Section 5**

Nothing contained in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees or any other person.

**Section 6**

- (a) This order is effective at 12:01 a.m. eastern standard time on January 24, 1995.
- (b) This order shall be transmitted to the Congress and published in the Federal Register.

**William J. Clinton**

The White House  
January 23, 1995

**ANNEX**

**Terrorist Organizations Which Threaten to Disrupt the**

**Middle East Peace Process:**

- \* **Abu Nidal Organization (ANO)**
- \* **Democratic Front for the Liberation of Palestine (DFLP)**
- \* **Hizballah Islamic Gamani (IG)**
- \* **Islamic Resistance Movement (HAMAS)**
- \* **Jaw**
- \* **Kach**
- \* **Kahane Chai**
- \* **Palestinian Islamic Jihad - Shiqaqi faction (PIJ)**
- \* **Palestine Liberation Front - Abu Abbas faction (PLF - Abbu Abbas)**
- \* **Popular Front for the Liberation of Palestine (PFLP)**
- \* **Popular Front for the Liberation of Palestine - General Command (PFLP-GC)**

# Terrorism in the Modern World

Kenneth Mann

**L**ooking at the development of law enforcement techniques over the last 20-30 years, on one hand, and, on the other, the parallel development of techniques of terror used by radical groups - whether it be Fundamentalists or others - an educated observer

would say that terrorists are moving in greater strides than law enforcement authorities. New problems are being posed by radical groups, by virtue of their access to sophisticated weapons of small and large scale destruction, with which the law enforcement authorities in the Western world have not been able to keep up. The balance has changed. Today, radical groups have access to weaponry which, in the past, Western democracies depended on their own governmental agencies to control, as these weapons were held by these organizations exclusively. One of the major changes has been the dispersion of weapons which were previously in the hands of military and civil police into the hands of private groups of various kinds.

Terrorism has always been a problem. None of the current phenomena is unknown. The changes are a matter of degree, and to some extent a change in the kind of weaponry being used.

There are two major areas in which there have been significant changes in government responses. The first is in the arena of international cooperation, the second concerns local laws dealing with individual suspects. With regard to the first, there is a change in the extent to which countries are now prepared to cooperate with each other through police forces and international information collection programs.

Prevention of terrorism is largely a matter of early information access. The main law enforcement emphasis must be on Intelligence. Substantial shifts in law enforcement efforts have

come not so much through legal reform but more through policy making on the part of the world's leaders and on the part of the law enforcement authorities, including Interpol, regular foreign service, and foreign intelligence apparatus of various countries.

**Prevention of terrorism is largely a matter of early information access. The main law enforcement emphasis must be on intelligence. Substantial shifts in law enforcement efforts have come not so much through legal reform but more through policy making on the part of the world's leaders and on the part of the law enforcement authorities, including Interpol, regular foreign service, and foreign intelligence apparatus of various countries.**

In the area of legal reforms, the most obvious modifications relate to state authority to bring to trial terrorists who commit crimes outside the territorial jurisdiction of the country which wishes to try them. In the United States, in particular, recent legislation allows the US government to extradite under its own laws and charge in its courts persons committing crimes against US citizens outside the territorial jurisdiction of the US, in particular the Hostage Taking Act, the Aircrafts Piracy Act, and the Act to Combat International Terrorism. These new laws have built upon a tradition dating back to piracy on the high seas when certain crimes were considered to be crimes against humanity, and their perpetrators subject to seizure in every jurisdiction. This concept has been translated through domestic law in the US to provide new teeth in the local law to try terrorists who have committed acts against the US outside the US and reflects a general trend in Europe, England and the US to enable the more expeditious

extradition of terrorists. Nevertheless, serious political problems often develop. These laws are permissive and not obligatory. Therefore, cases in which one country might wish the extradition of a person may be seen as politically volatile problem in another country.

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The second major area in which there have been legal changes concerns the individual suspect. England is a good example of a country where laws relating to terrorism, particularly in relation to Northern Ireland, have led to important changes in the ability of local police forces to search and seize, arrest and detain persons without usual evidentiary requirements and the usual grounds necessary in regular domestic law relating to general crime. The evidentiary bases have been lowered and the grounds expanded so that the police may more easily arrest, search and seize, try and hold a person without providing him with rights to meet counsel, be provided with an indictment and be put on trial.

Another area in England relates to the deportation of persons suspected of involvement in a terrorist organization. The courts in England have allowed a very broad discretion to deport persons who constitute a "security threat" to the local population and the courts have indicated that they will defer to administrative Judgment in these matters.

English law has also seen the loosening of restrictions on interrogations. The English law has eliminated the "voluntariness test" for the interrogation of suspects in criminal cases. Under the old law, where a statement was not given voluntarily it was held to be inadmissible, however, under the new revised law, the prosecution no longer has to prove that the statements were made voluntarily but rather only that they were made in circumstances in which there were no violations of basic concepts of human dignity. The important legal distinction is that the norm restricting police practices is much less restrictive when the test is human dignity as opposed to voluntariness. This statutory reform applies to all criminal suspects but one may trace its origin to the problem of interrogating suspects in security cases in England.

The security cases in England and in Israel too have been the moving force behind changes in general law enforcement legislation as the new "security" concepts seep in and become part of the general domestic law of the country.

In the US one cannot identify in the domestic law the same kinds of changes as have occurred in English law. The reason is the heretofore limited vulnerability of the US to terrorism and the more limited attack faced by the US population from terrorist acts historically. Now the US is being faced with this problem domestically with an intensity not known in the past.

The Twin Towers and Oklahoma bombings must be seen as a turning point in an overall hardening attitude towards crime in the US, which is behind the move to strengthen law enforcement authorities. In the area of terrorism, the recent terrorist events in the US have brought legislators to the view that they have to find new statutory means of tackling terrorism. New legislative proposals in this area will relate to search and seizure, wire

tapping, and immigration - as part of a larger effort to define circumstances in which the US may expel and deport people.

A curious feature of law in the US, is that a number of statutes passed in the 1880s have been used in contemporary situations with modern interpretations. One finds that law enforcement authorities will use a law which has been dormant on the books and will try to enforce it to deal with a modern situation. Examples may be found in laws passed during the Civil War and periods when there were insurrections where the central government was given broad administrative powers to enforce restrictions on radical groups.

There are interesting changes in Israeli law which are parallel to English law in connection with the interrogation of suspects in police custody. Developments in the Israeli law "voluntariness test" have eaten it away without statutory reform, so that today the "voluntariness test" has largely disappeared. This was clearly pointed out by Justice Landau in his Commission Report on the Bus 300 - GSS Affair, where he noted that the courts had taken account of the needs for investigating security offences by reducing the restrictions on interrogations.

In respect of state terrorism, another area in which legislative action has been translated into administrative action is in the area of commercial relations between states more often being made dependent on the level of democratic values in the foreign state or on its policy in regard to terrorism. This is evidenced clearly in the cases of the US and China, US and Libya and US and Syria. In such cases the President of the United States is entitled to disqualify states from special economic privileges that they would otherwise enjoy, bringing pressure on them with regard to either domestic or foreign law enforcement problems.

Domestic economic sanctions are another tool used against foreign entities by preventing them from opening offices, preventing their foreign representatives from entering the country, restricting their movements within the country, freezing their assets, preventing them from funding organizations within the domestic Jurisdiction, etc. All these are ways in which a state can protect itself and its values.

Nevertheless, despite the foreign policy making, the presidential power and the administrative powers in countries which are subject to daily terrorism, the public remains significantly exposed to advanced sophisticated weapons, which continue to be available to terrorist organizations. Without a really substantial change in the way people move from one place to another, and the way in which they are examined, law enforcement authorities are unlikely to be able to deal successfully with the threat of terrorism.

In this context, an interesting comparison may be made between Israel and the US. Israel is a society which has more

information about its citizens and people who pass over its borders than any other democratic Western country. This is because of its size and the control it holds over its borders, its sophisticated attitude to and access to computer technology, and the fact that it is a single jurisdiction. The UK, Europe and the US have multiple jurisdictions with many police forces. Most of these countries, foremost the US, have no universal identity card system; movement between jurisdiction where there are different police authorities is free with little ability to track persons travelling from one place to another. Movement in and out of the borders of the US and Europe is much easier than are such movements in a small country such as Israel. The ability to collect information and control the identity of people who move in and out of the country is regarded with a higher level of concern.

Different jurisdictions have tried different remedies. In California, for example, there has been a move to disenfranchise illegal immigrants from receiving services from the state, a method used to control the people who move in and out of its borders; this has an indirect affect on what organizations are represented and the extent to which there is a basis for the development of radical groups.

In the US there is very great tolerance for low level political organization. While a sociologist or political scientist might be able to identify groups which pose a political threat to the security of the US, the ability under US law to act in such a way as to sanction or expel members of groups before they reach a level where they present a serious threat, is limited. The time lapse between reaching the danger level and committing the injurious act is very short, and the ability of law enforcement authorities to intervene in low level organizations is restricted for reasons of constitutional law, particularly the right to freedom of expression and the inability of law enforcement authorities to sanction organizations simply on the basis of their ideology.

The conceptual dividing line between security related terrorism and domestic terrorism in the US is not well recognized. The concept of a threat to the security of the US is of itself a strange one. The real test is almost universally not the security of the US itself but the security of the individual. Most of these problems are dealt with through general principles of criminal law. There is very little law in the US which specifically concerns security threats to the US.

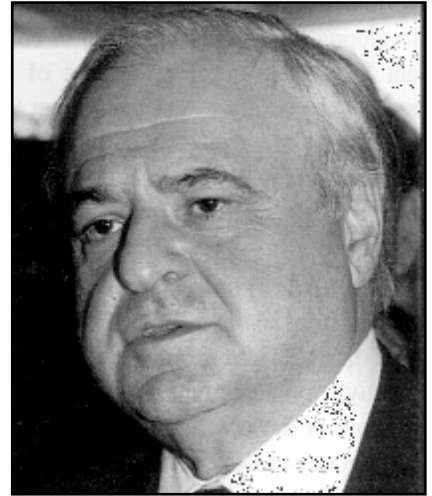
During the World War I period, a number of laws were enacted directed at preventing organized groups from obstructing recruitment into the US military and several important cases considered the rights of these groups to petition and persuade people not to enlist. During World War II, there was

the communist threat followed by the Mccarthy period, and more legislation was enacted related to the threat to the security of the US. This legislation, however, has been delegitimized through court decisions and changes of attitude in the US. Almost all the legislation which related to anti-Communist threats to state security or Communist party activity have been invalidated or rejected because of the negative associations with the Mccarthy period. Today, the US faces a new problem and needs modern genre legislation which is directed at the type of terrorism seen over the last 20 years on the international scene, as opposed to that known during World War I and II.

What can be done" - New legislation is required in respect of intelligence gathering activity. Preventative steps are required rather than punitive. We have learnt in Israel that post-event sanctions on terrorists - putting them in Jail, expelling them and delegitimizing their organizations - has limited effect. By nature, radical organizations are so strongly ideologically bent that the persons who are sanctioned become martyred, and the challenge to the person or organization through post-event sanctions only increases their will to carry out their mission. The new legislation and the attack on the problem by law enforcement authorities should therefore focus on preventative intelligence gathering. Of course, this touches on sensitive problems of constitutional rights, the privacy important in any Western democracy, where there are always prohibitions on wiretapping and surreptitious eavesdropping through electronic monitoring. In this context, an example of the different attitudes in the US and Israel may be seen in the fact that in the US secret telephone monitoring is illegal generally even if one of the parties to the telephone conversation agrees. In Israel, however, it is legal if one of the parties to the conversation agrees - thus allowing for a large spectrum of electronic monitoring which is unavailable in the US.

In the US and in Israel there are provisions for secret electronic monitoring of conversations for security related investigations. These laws depend on prior identification of suspects and high evidentiary showing that the situation is security -related; the ability of the law enforcement authorities to act where there is only a suspicion and not a stronger based factual showing is therefore limited. It is unfortunate but unavoidable that the threat to personal security posed by modern terrorist activities requires us as members of society who place a high value on privacy to reorient our thinking and forego some of the privacy which we would otherwise like to have.

# The Treaty on the Non-Proliferation of Nuclear Weapons\*



Meir Rosenne

**T**he Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is not a new document in international law. It has been around for the last 25 years. The reason why there are now so many discussions in relation to it, an Egyptian initiative and debates in the UN is because this treaty which entered into force in 1970 expires in 1995. Unusually in treaty law, it was signed for a limited period of time. The treaty itself also includes several provisions which are exceptional in legal terms. As a matter of public international law, the state subjects of the law are equal; all are on the same level and there is equality between states in terms of their independence and sovereignty. Under the provisions of the NPT, however, there are serious limitations to the sovereignty of the states; these took many years to negotiate before the treaty finally entered into force in 1970.

## The main aspects of the treaty are as follows:

First, this treaty establishes two categories of countries:

1. States which are nuclear states and which make a commitment not to transfer nuclear weapons to non-nuclear states.

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\* U.N. Doc. A/7016/Add.1; Hearings on the Non-Proliferation Treaty, 258-262.

2. States which are non-nuclear states and which make a commitment not to develop nuclear weapons.

Second, nuclear states are defined in the treaty as states which have developed and tested a nuclear device prior to January 1, 1967 (Article IX (3)). This date was chosen in order to enable China to become a member of this nuclear club. In fact, only 3 of the nuclear states (the United States, England and the Soviet Union) ratified the treaty in the initial stage and remained bound by it over the years. France and China adhered to the treaty at a much later stage.

Third, the non-nuclear states - which include all the remaining countries - are committed under the treaty not to develop nuclear devices and to put all their nuclear installations under safeguards of the International Atomic Energy Agency (IAEA) which has its headquarters in Vienna (Article 111 (1)). A wide ranging system of safeguards was established under the framework of the IAEA with inspectors appointed by member countries, the safeguards were established on the basis of technological developments and progress and are brought up to date as new technological discoveries are made.

The nuclear states also agreed to put certain of their nuclear installations, selected at their own discretion, under international safeguards. This agreement relies on the good faith of the nuclear states.

Fourth, the quid pro quo offered by the treaty:

The nuclear states made a commitment to transfer the technology needed for peaceful development to non-nuclear states (Articles IV (2) and V). These transfers were intended to enable

the non-nuclear states to benefit scientifically from nuclear developments, as nuclear plants, of course, are not only important for the technical production of nuclear energy but also enable the country establishing them to educate and develop a whole class of engineers as well as supply local energy requirements. Sweden, for example, is one of the first countries to have nearly all its electricity provided by nuclear plants, France is another.

In turn, the non-nuclear states agreed not to receive the transfer from any transferor of nuclear weapons or other nuclear exploding devices or control of such weapons or devices directly, or indirectly, not to manufacture or acquire nuclear weapons or devices, not to seek or receive any assistance in the manufacture of nuclear weapons or devices, as well as accept the safeguards referred to above (Articles 11 and 111).

This arrangement was not structured in greater detail, nor were any financial arrangements set out in the treaty; the non-nuclear states agreed to the provisions not only because of heavy political pressure placed on them but also because they thought that they would gain the benefits of nuclear technology without having to work for it.

Under Article VIII (3) the operation of the treaty was supposed to be reviewed five years after coming into force and at five year intervals thereafter to examine progress and development. The review conferences did take place and I personally participated in the first one in 1975 in Geneva. Nevertheless, the general feeling today among the nonnuclear states is that they were tricked and that none of the promises made to them were ever kept. Additionally, over the years, it has been shown that the safeguards implemented by the IAEA have not been very effective. The best example of this is Iraq. Iraq is a party to the NPT, but this did not prevent Iraq from developing nuclear weapons, a fact only discovered as a result of the Gulf War.

### **What is the status of Israel regarding the NPT?**

1. Israel stated already in the 1960s that it will not be the first country to introduce nuclear weapons into the Middle East.
2. There were periods when there was pressure on Israel to adhere to the NPT but, even without taking into account the political elements relating to the situation in the Middle East, a number of legal problems exist concerning the adherence of Israel to the NPT which cannot be overlooked. These problems are based on the provisions of this treaty and on statements made in different countries during the ratification process.

A. It is generally accepted as a doctrine of international law that if there is a state of war this treaty is not in force. When General Wheeler, who was the Chairman of the Joint Chiefs of Staff of the United States, gave testimony before the US Senate Foreign Relations Committee at the time of the ratification of the treaty, he was asked by one Senator what would happen if, for example, Holland was attacked by nuclear weapons fired by the Soviet Union, as under the terms of its treaty commitments the US would be prevented from transferring nuclear weapons to Holland to defend itself. General Wheeler replied that if there is a state of war this treaty is not in force (Hearings before the Committee on Foreign Relations, US Senate, 91st Congress, 1st Session Part 2, Feb. 18 & 20 1969).

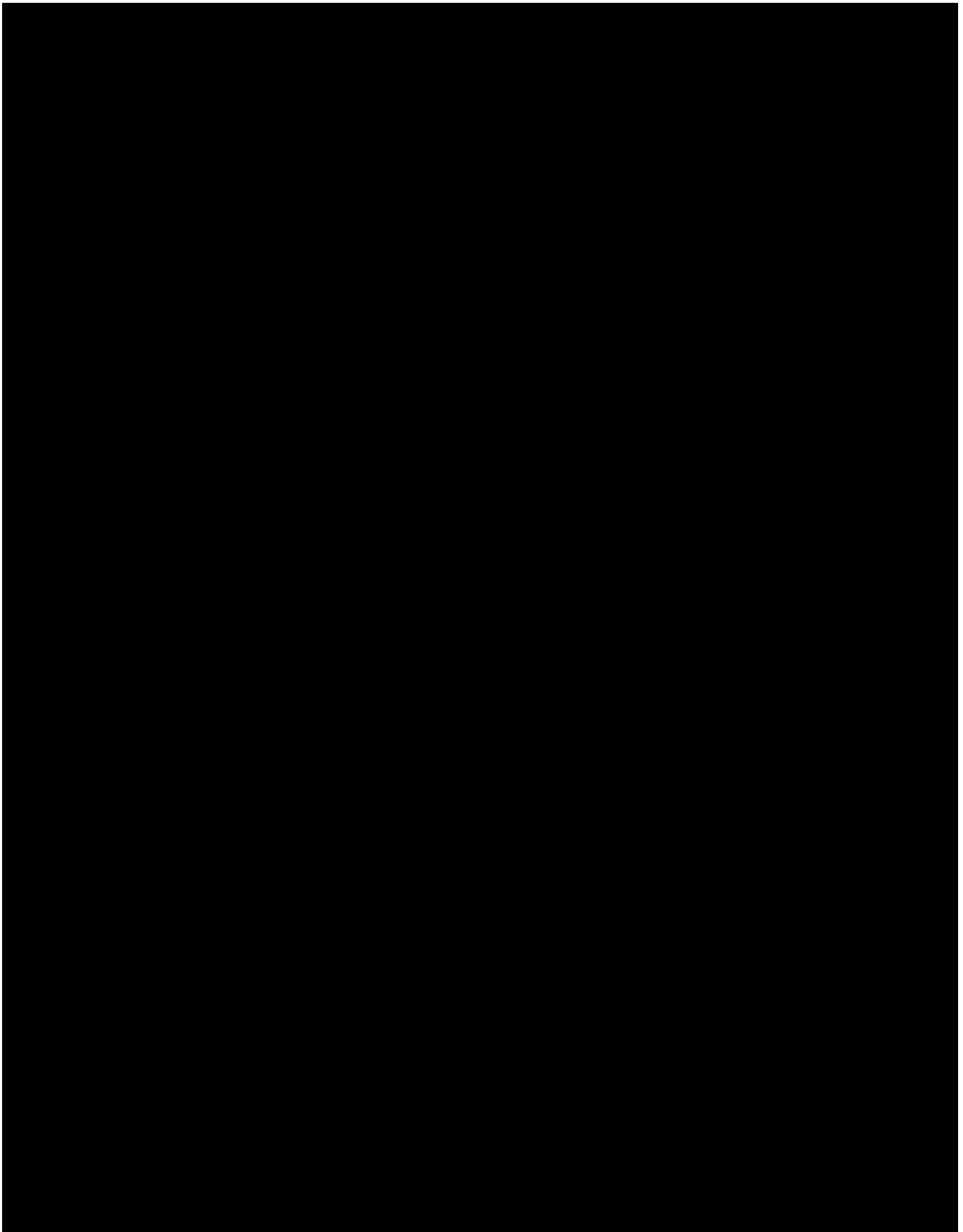
There is no doubt that apart from Jordan and Egypt, Israel today is in a state of war with the other members of the Arab League. Thus, even if Israel were to adhere to the treaty, as a matter of law such adherence would be of no effect as long as the state of war exists.

It may be noted, that three days after the statement made by General Wheeler, Dean Rusk, who then Secretary of State, sent a letter to the Committee stating that a distinction had to be drawn between a general war involving the major powers and a local war not involving nuclear powers and that in the latter case the treaty remained in force. This letter has no basis in international law. The law itself does not distinguish between a general war and a small war.

B. Equally important, when the Arab states adhered to the NPT they included reservations concerning the State of Israel. Even the Moscow Treaty of 1963 relative to nuclear tests - to which Israel is a party - contains similar reservations. Egypt, for example, introduced a reservation concerning Israel to the effect that the treaty did not apply to its relations with Israel. This meant that Israel could not complain if there was a violation of the treaty by Egypt. This reservation was withdrawn upon the signing of the peace treaty between Israel and Egypt following Egypt's commitment under the peace treaty of 1979. At the time of the Camp David Accords, the Egyptian delegation also raised the issue of Israel accepting safeguards under the NPT, this demand was rejected as not bearing specifically on Israel-Egypt relations but being a matter of general policy.

When Syria adhered to the NPT it too included a reservation concerning the applicability of the treaty to its relations with Israel even if Israel itself signed the NPT, stating that the treaty would not establish any legal links between Israel and Syria and that the treaty does not apply to the relations between the two countries. The effect of this statement is that even if Israel were





a party to the treaty, Israel can make no complaint if, today, Syria develops a nuclear device or is suspected of developing such a device. This reservation is still in force.

C. At the time of the entry into force of the NPT, there were between 50-60 members states in the IAEA who had no diplomatic relations with Israel. Any information concerning Israel which would be sent to the IAEA would automatically be sent to these countries as well. The PLO at the time also received status with the Agency. The attitude of the IAEA to Israel was most prominent when Israel bombed the Iraqi reactor on June 7, 1981. The sanctions adopted by the Agency towards Israel remained in force until the beginning of 1995. No funds were provided to Israel for holding any seminars or workshops on atomic energy. No seminar was to be held under the aegis of the AEA in Israel. The Agency also wanted to suspend Israel's membership in the Agency.

D. An additional problem on the international law level relates to the former Soviet Union. One of the original signatories to the NPT was the Soviet Union. Byelorussia and the Ukraine were members of the UN and the IAEA based on the Yalta Agreement of 1943, under which, in order to prevent Russia from feeling isolated, it was agreed that they would obtain 3 seats in the UN and be treated as independent nations. Russia signed the NPT, Byelorussia and the Ukraine did not. The issue of whether the latter two countries are nuclear or non-nuclear powers arose then and has become even more serious today - as it is unclear whether transfers of nuclear weapons to a non nuclear state by the Ukraine is in violation of the treaty. Other difficulties which must be resolved include the future of all the nuclear plants on Ukrainian soil, determinations as to whether they are bound by Russia's signature, and whether safeguards apply. These questions are particularly grave in the light of the common knowledge that plutonium is being sold on the streets of Vienna much like any other commodity.

E. A number of developments have taken place in the last 25 years which have made this treaty to a large extent irrelevant. For example, it is known that on May 18, 1974 India exploded a nuclear device. India is not a party to the NPT. The question arises whether under the terms of the NPT, India would be regarded as a nuclear power were it to sign the treaty today. To fall within the definition of a nuclear power a country must have manufactured and tested a nuclear device before 1.1.67; India did not do so, therefore, theoretically and legally India may adhere to the treaty today as a non-nuclear power, despite its actual nuclear capability.

The problem of the NPT did not prevent the United States

from initialling an agreement with Israel in 1976. I was part of the delegation which negotiated the treaty with US, under which the US was to provide Israel with 2 nuclear plants of 980 MW to enable Israel to take care of part of its electricity needs. Following the change of administration from President Ford to President Carter, new legislation was adopted according to which a country which is not party to the NPT cannot receive/purchase any nuclear plants.

It is no secret that there are a number of nuclear plants throughout the world, such as the Canadian reactor given to India, which upon transfer were not placed under safeguards. Another issue which has remained unsolved is the determination of the nature of the materials to which safeguards should be applied. A new treaty is now being discussed to include provisions which would prevent countries from developing nuclear materials, with proposals that these will apply only to the future and not to the past. These provisions have been opposed, inter alia, by Japan and Germany.

## Conclusion

Putting aside all the political problems Israel faces in the Middle East and the fact that it has been proven that the treaty is ineffective (had it been effective Iraq would not have developed the kind of potential it in fact developed in the face of available safeguards) Israel is in a unique position as a matter of international law. For the reasons given above, even if Israel signed the NPT today such a signature would be deprived of legal significance because of the state of war in which Israel exists. Thus, before Israel can even begin negotiating its membership of the NPT, a very clear statement must be given by all countries currently in a state of war with Israel to the effect that they are no longer in a state of war and that they do not intend to claim that they are entitled to use belligerent rights against Israel.

World developments, and the example of India given above, require the treaty to be revised before it is opened to the signature of countries of the world. Many of the provisions must be changed and these can be done by international conference. As noted, the treaty obligations of the member states become obsolete when the NPT reaches its 25th anniversary, although a member also has the right to withdraw from the treaty if it decides that extraordinary events, related to the subject-matter of the treaty, have "jeopardized the supreme interests of the country" (Article X (1)), in such an event it is provided that the Security Council will discuss this decision.

# Crimes That Go Unpunished

Aron Owen

**T**he War Crimes Act 1991 gives jurisdiction to United Kingdom courts to try crimes of murder, manslaughter or culpable homicide committed between September 1, 1939 and June 5, 1945 in any place which was at that time part of Germany or under German occupation.

Proceedings can be brought against any person, irrespective of his nationality at the time of the alleged offence, who subsequently became a British citizen or resident in the U.K.

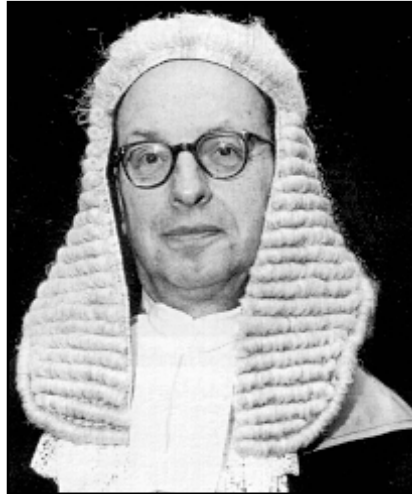
In June 1994, Earl Ferrers, the Home Office Minister, addressing the House of Lords, gave these statistics:

1. The government was setting aside more than \$ 8 million to finance the possible trial in 1994 of up to 10 suspected Nazi war criminals who found refuge in Britain after the war. Most of this money would be used to cover the cost of potential trials and legal aid.
2. Evidence against the ten, now elderly, suspects was being considered by Barbara Mills, the Director of Public Prosecutions, while a further 18 cases were still under investigation by Scotland Yard's war crimes unit.
3. The police had so far probed 369 cases and 112 suspects had died since the investigation began.
4. The government was determined to continue with the investigations which so far cost over \$ 5 million.

Despite these ministerial statements in Parliament, to date

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His Honour Aron Owen, until his retirement, was a Circuit Judge on the South Eastern Circuit. For many years the Resident Judge at the Clerkenwell County Court, he also sat in the Family Division at the Royal Courts of Justice. Judge Owen is a member of the Executive Committee of the UK Chapter of the Association.



(early 1995) no war crimes trial has yet taken place in any court in the U.K. I doubt that there will ever be such a trial.

And even if a war crimes trial does take place in a British court, I further doubt that the defendant or defendants will be found guilty.

The circumstances in which John Demjanjuk was acquitted by Israel's Supreme Court, the acquittals in war crimes trials in Australia and, above all, the passage of time - more than half a century has elapsed - all militate against any jury being convinced and sure (as they have to be) of a defendant's guilt.

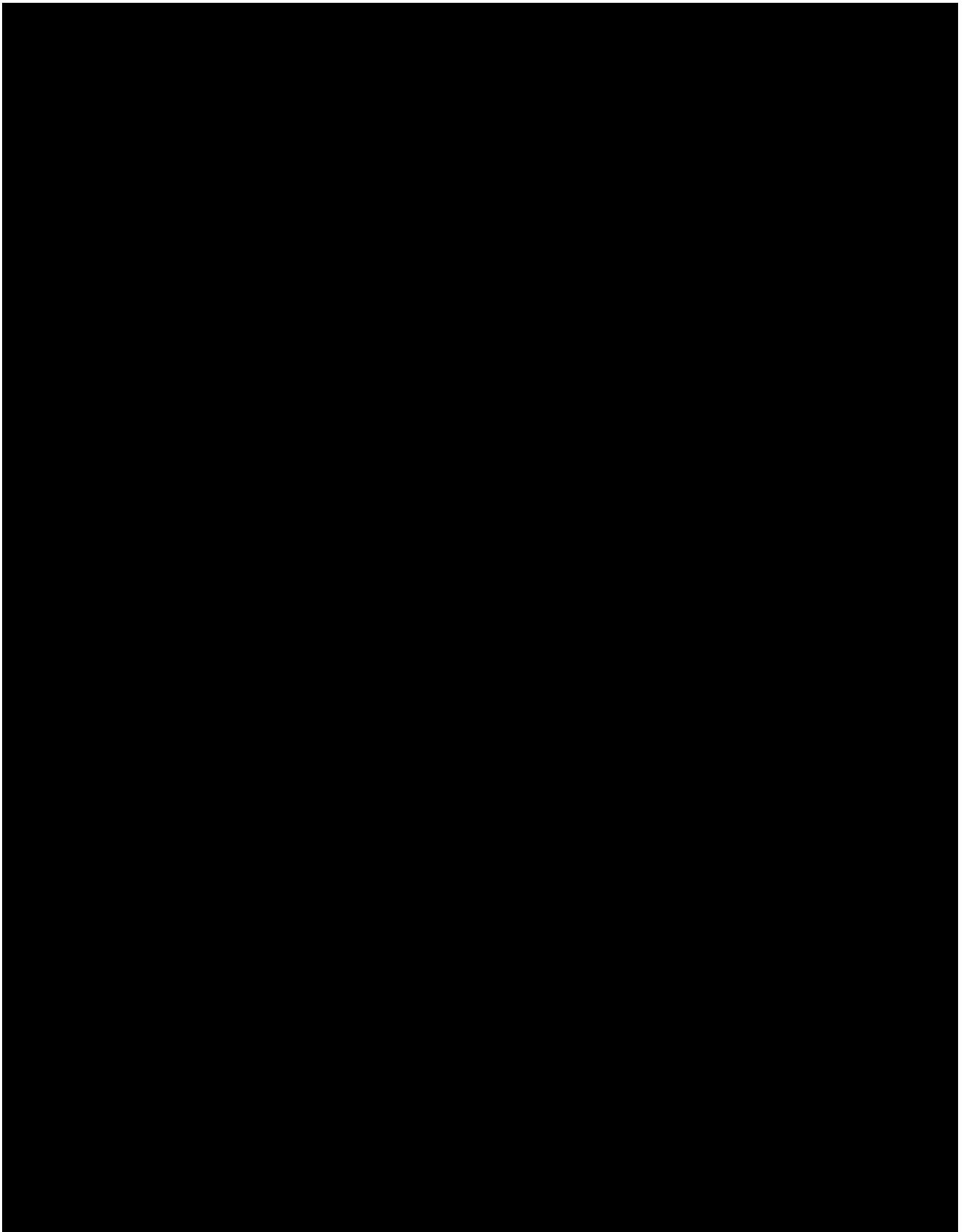
Indeed, I now sometimes think, in moments of despair, whether it might not be better to keep in a state of suspense those suspected of murder and ghastly atrocities and against whom a prima facie case of having committed such crimes exists. Let the threat of proceedings hang over their heads causing them, I would hope, sleepless nights, rather than have the prospect of an abortive trial with an acquittal.

Because if these people are totally innocent of the allegations made against them, there is nothing to stop them taking proceedings for libel and claiming huge damages.

Although we have not yet had, and might never have, the criminal proceedings of a war crimes trial, there are on record, the civil proceedings relating to two libel actions where actual incidents of war crimes were given as evidence and tested in British courts.

## The Gecas Libel Case

The more recent of these two was the libel suit brought by Antanas Gecas in 1992. Gecas, a Lithuanian, who had come to the U.K. after the war, became a British citizen and retired peacefully in Edinburgh.



He sued Scottish Television following their allegations that he had committed war crimes in Lithuania and Byelorussia in 1941. Gecas (born Gecevicius) had been named by the Simon Weisenthal Centre in Los Angeles as one of 17 persons who were war criminals living in Britain. Bob Tomlinson, a Scottish journalist, felt impelled to pursue enquiries regarding Gecas who was living in Scotland.

He was to discover, inter alia, the sickening and horrifying facts of thousands of Jews, innocent men, women and children, being murdered in Kaunas, Lithuania and in towns and villages in Byelorussia during the last three months of 1941.

The Nazis used what were termed "HIWIS" (Hilfswillige), local volunteers, to carry out atrocities in conquered countries. Gecas joined a Lithuanian auxiliary police battalion in July 1941 and became a platoon commander.

Tomlinson visited Moscow, Vilnius and sites of mass killings in Lithuania and Byelorussia. He experienced enormous difficulties and frustrations in finding witnesses and documents.

But enough evidence was generated for Scottish Television to broadcast an hour-long documentary, Crimes of War on July 22, 1987. Gecas began his libel proceedings three years later.

His case was that, as a Lithuanian, he fought beside the Germans in order to drive the Russians from their illegal occupation of his country. He denied shooting or killing anyone and maintained that this platoon of the 12th Lithuanian Auxiliary Battalion had carried out only guard duties protecting German soldiers.

It would have been much cheaper for Scottish Television and their insurers to have apologized to Gecas and paid him damages for libel. It is to their credit that they refused to do so.

There then ensued the enormous task of getting witnesses to come forward at a time when communism was collapsing and Lithuania was breaking free from the Soviet Union.

The trial, presided over by Lord James Milligan, started in February 1992 in Vilnius, Lithuania where a number of witnesses gave evidence. Never before had a Scottish court conducted a hearing outside Great Britain.

Thereafter the hearings were resumed and concluded in the High Court in Edinburgh. Lord Milligan gave his reserved judgment on July 17, 1992. After a full summary of the evidence, he said:

"The pursuer [Gecas] committed war crimes against Soviet citizens who were old men, women and children. I am clearly satisfied on the evidence as a whole upon the standard of proof agreed to apply to this case that the pursuer participated in many operations involving the killing of innocent Soviet citizens, including Jews in particular, in Byelorussia during the last three months of 1941 ... It inevitably follows that the pursuer committed war crimes against innocent civilians of all ages and both sexes in the course of these specific operations, it not being in dispute that he was in active command of his platoon throughout the period..."

**It would have been much cheaper for Scottish Television and their insurers to have apologized to Gecas and paid him damages for libel. It is to their credit that they refused to do so. There then ensued the enormous task of getting witnesses to come forward at a time when communism was collapsing and Lithuania was breaking free from the Soviet Union.**

It is to be noted that Lord Milligan, in condemning Gecas as a person who had committed war crimes, said he was "satisfied" on the basis of all the evidence. That verb "satisfy" connotes the "beyond reasonable doubt" standard of proof applicable to criminal trials as contrasted with the "balance of probability" standard for civil trials. Judges, in criminal trials in English courts, direct the jury that they must not convict unless they are satisfied so that they are sure of the defendant's guilt.

Lord Milligan, an experienced Scottish Judge, was so satisfied; and there was no appeal from his judgment. Yet, despite this clear finding by a High Court Judge in Edinburgh, Gavin Ruxton, of the Scottish Crown Office War Crimes Unit, announced on February 3, 1994 that the Unit was to be disbanded. He said that after investigating 17 cases (and those would have included the Gecas case), the decision was taken that in no single case could they amass sufficient evidence to mount a war crimes prosecution under the stem rigours of Scottish criminal law.

### The Dering Libel Case

The other libel suit, relating to war atrocities, took place in the High Court in the Strand in London in 1964 some 27 years

before the passing of the 1991 War Crimes Act. It lasted 18 days and was tried before Mr. Justice Lawton and a jury.

The well-known American author, Leon Uris, had written a book called Exodus. It is a very long novel about the tribulations and triumphs of the Jews in Europe and the Middle East in the 20th century. In the novel a few pages deal with the Auschwitz death camp. And there is one paragraph, consisting of just a single sentence, which described human guinea pig experiments having as their object the mass sterilization of Jews. The paragraph reads:

"Here (i.e. in Auschwitz) in Block X, Dr. Wirth used women as guinea pigs and Dr. Schuman sterilized by castration and x-ray and Clauberg removed ovaries and Dr. Dehring (spelt with H) performed 17,000 experiments in surgery without anaesthetic."

There was a Dr. Wladylaw Alexander Dering (spelt without H), a general practitioner under the National Health Service, practising at 145 Seven Sisters Road, London, N.7. He was Roman Catholic born in Poland. He qualified as a doctor in Warsaw in 1928.

In June 1940 he was arrested by the Gestapo in German occupied Warsaw and taken to Auschwitz. He was in that camp as a prisoner from August 1940 to January 1944.

Whilst there he carried out operations in an operating theatre in Block 21 during the years 1941, 1942 and 1943.

He left Auschwitz and went to a hospital which was under the direction of the Nazi S.S. doctor, Professor Clauberg. He was arrested by the Russians when they arrived in 1945. He was released and went back to Poland but he left Poland because he feared for his life there and came to England in 1946.

In January 1947 he was taken to Brixton prison and held there for some 19 months, pending an investigation whether he should be extradited to Poland as a war criminal; a number of countries had asked for his extradition.

In the event, he was released for lack of evidence. He then worked in a hospital in London as a gynaecologist and obstetrician and later obtained an appointment with the Colonial Medical Service in British Somaliland where he stayed for 10

years prior to coming back to London to practice as a doctor. He had been awarded the O.B.E.

It was this Dr. Dering who said he had been libelled in that paragraph in the Exodus novel which, he said, referred to him, and stated that he had performed 17,000 experiments in surgery without anaesthetic. He sued three defendants: Leon Uris, the author; William Kimber & Co. Ltd. the publishers; and Purnell & Sons Ltd, the printers.

At an early stage the printers, Purnell & Sons made an apology to Dr. Dering, agreed not to print any further copies of the book, save with the omission of the offending paragraph, and

paid him \$500 by way of damages and an agreed sum for costs. So the printers dropped out of the proceedings.

But the author and the publishers put in a defence claiming justification - and justification is a complete defence to an action for libel - they pleaded Justification but with 3 exceptions:

1. They said that whilst the Plaintiff, Dr. Dering, had carried out a large number of experimental operations on both men and women, they did not seek to support the precise figure of 17,000.
2. They did not allege that the operations were performed entirely without anaesthetic but that only a spinal anaesthetic was used (itself causing great pain) and without any premedication or preliminary injection to deaden pain, and so that the subject was conscious throughout the operation.
3. They admitted the operations did not take place in Block 10; they took place in Block 21 at Auschwitz.

Dr. Dering's case was that, unlike the other doctors mentioned in the book - Drs. Wirth, Schuman and Clauberg, who were all Nazi S.S. doctors - he was a prisoner doctor who had to do what he was ordered to do; that he had no choice and that if he refused he would have been shot or sent to the gas chambers or otherwise severely punished.

And he said that he did his best for the unfortunate victims of the Nazi experiments. These victims, all Jews, were young girls

**Dr. Dering's case was that, unlike the other doctors mentioned in the book - Drs. Wirth, Schuman and Clauberg, who were all Nazi S.S. doctors - he was a prisoner doctor who had to do what he was ordered to do; that he had no choice and that if he refused he would have been shot or sent to the gas chambers or otherwise severely punished.**

and young men. The Nazi doctors had subjected the sexual organs of these young people to powerful x-rays to discover if such irradiated organs would thereafter no longer function and the subject would be effectively sterilized. Dr. Dering said that he carried out operations to remove irradiated ovaries from the girls and the irradiated testicles from the young men; the Nazi doctors wanted to examine these organs. He said there was a danger that if such x-rayed organs were left in the body they might become cancerous. And, in any event, if he had not done the operations - and he was a skilled gynaecological surgeon - some Nazi orderly would have done them without any skill or the victim would have been sent to the gas chambers

immediately.

All the operations he said were carried out normally, no pain was inflicted, the girls were not crying and the wounds healed up.

If the evidence at the trial had been limited to that of Dr. Dering and a witness who gave evidence for him - that witness was another Gentile Polish prisoner doctor, Dr. Grabczinski, who had assisted Dering with some of the operations - if that had been the case it is quite probable that Dering would have succeeded in his libel action and would have been awarded huge damages.

Because, initially, the only evidence available to contradict Dr. Dering was the statement of a Dr. Alina Brewda, a Jewish woman prisoner doctor at Auschwitz who said she had been present throughout all the operations carried out by Dr. Dering on the girls; she was there to comfort them because they were terrified and screaming.

Dr. Dering said he knew Dr. Brewda from his student days in Warsaw and he saw her at Auschwitz but he denied she was ever present at any of the operations.

So it would have been just her word against his and that of his Polish colleague, Dr. Grabczinski.

But a remarkable document was discovered. It was the Auschwitz prison hospital operations register, now preserved in the National Museum at Oswiecim in Poland.

Dr. Dering admitted in his evidence that there were registers which he kept when he started operating in 1941 in Block 21 at Auschwitz. The one surviving register, which was produced at

the trial, contained entries written by Dr. Dering himself in neat tabulated columns.

They recorded, in his own handwriting:

- the operation serial number
- the date
- the tattooed number of the prisoner
- the prisoner's surname and first name
- the diagnosis in Latin terminology
- the name of the surgeon
- the name of his assistant or anaesthetist if any and the name of the anaesthetic administered, and finally the nature of
- the operation performed.

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**Eight of the ten Jewish women from Salonika in Greece, upon whom Dr. Dering had performed ovariectomies on one day, 10 November 1943, as shown in the register gave evidence. And six men, all Jews, were traced who had their testicles removed by Dr. Dering at Auschwitz in 1943 and they gave evidence.**

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The number of the first operation entered in the surviving register in Dr. Dering's handwriting was 14,139 on 22nd February, 1943; the last in his hand was 18,064 on 28th August 1943.

It was from this register, in which Dr. Dering had made careful records, that the Defence were able to gather the evidence to trace witnesses, some of the actual victims of Dr. Dering's surgery who, miraculously in 1964 were still alive. So that, at the trial, the jury was given the true and hideous picture of what was happening in 1943 in this little section of Auschwitz.

Eight of the ten Jewish women from Salonika in Greece, upon whom Dr. Dering had performed ovariectomies on one day, 10 November 1943, as shown in the register gave evidence. And six men, all Jews, were traced who had their testicles removed by Dr. Dering at Auschwitz in 1943 and they gave evidence.

It was a highly dramatic moment in the court when each of these witnesses rolled up a sleeve and showed the Judge and jury the number tattooed on the left arm, the number corresponding with the number in Dr. Dering's register and with their names.

Their evidence - and as Lord Gardner who was counsel for the Defendants said, "No one could ever forget what happened on the day on which that person had organs forcibly removed so that he or she would not therefore be able to procreate children" - their evidence was of a scene much worse than anything in Dante's Inferno.

The girls were lined up in the annex to the operating theatre. Dr. Dering injected a girl with a spinal anaesthetic while she was forcibly held down by two orderlies. Great pain was caused, the girls screamed.

The girl was forcibly carried into the theatre by the orderlies and strapped down on the operating table, tilted at an angle of about 30° with the girl's head downwards.

Dr. Dering then made abdominal incisions and cut off the ovary and the victim was conscious throughout.

A medical expert, called by the Defence, Professor William Nixon, Professor of Obstetrics and Gynaecology at the University of London and Examiner for the Universities of London, Cambridge and Wales, had examined each of the eight Jewish women who gave evidence. Of the ten girls Dr. Dering had operated upon that one day in November 1943, two had died soon after the operation. One, called Bella, died the same night in agony as the result of the awful wounds inflicted upon her.

Professor Nixon said he had practised surgery in China, Africa and the Middle East but never, in all his surgical life, had he seen such scars as he saw when he examined these eight women which was 21 years after their operations; such scarring, such deficiency, such pigmentation. It was crude, bad surgery. And completely unnecessary. Cancer, he said, does not develop after external radiation of ovaries or testicles.

Each of the women stated how their lives for ever afterwards had been blighted. They felt ill most days. They had married but they could not have children.

Dr. Dering's excuse that he had no choice but to obey the Nazi doctors' orders upon pain of death or serious punishment, was shown to be false, first by his own evidence. Dr. Dering said that he had been asked to give phenol injections into the hearts of some prisoners; this was a lethal injection. He had refused and had been threatened with awful punishment. When Lord Gardner cross-examined him about this punishment, it transpired that all that happened was that he was not allowed to go outside the grounds in his free time for a fortnight.

Dr. Adelaide Hautval, the last witness called by the Defence at the trial, was a devout Protestant born in France. She qualified as a doctor in 1934. After the Germans occupied France, she was arrested in 1942 and taken to a prison in Bourges where there were a number of Jewish prisoners.

She protested to the Gestapo about the way Jews were being treated in France. The Germans then said: "Because you defend them you can share their lot."

She had been kept imprisoned, made to stitch a yellow star on her clothes and wear a band with the words *Amie des Juifs*, "Friends of the Jews".

In January 1943 she was sent to Birkenau. She was tattooed with a number 31,802. Dr. Wirths, an S.S. Doctor, put her in Block 10 where there were about 100 women, French and Greek, all Jewish. Later convoys brought in more French, Belgian and Dutch Jewesses.

Dr. Hautval refused point blank to assist in taking part in any experimental operations but she was not punished for her refusal. She told the Nazi S.S. Dr. Wirths that they had no right to dispose of the life and destiny of others.

And when Dr. Wirths said to her, "Can't you see these people are different to you?" she gave the devastating reply, "There are several other people different from me, starting with you."

The only laughter in court during this terrible case was when Lord Gardner asked her, "And were you shot?" and Dr. Hautval replied, "No."

Throughout the whole trial Dering expressed not one word of regret for what he had done.

The Judge began his summing up with these words:

"Members of the Jury, you and I have sat in this court now for 3.5 weeks and we have had to listen to evidence revealing one, and it is only one, facet of what future generations will probably come to describe as the greatest crime that has ever been committed. I have been a student of history all my life, and I cannot think of any crime that begins to compare with Auschwitz."

But he reminded the Jury that they were **not** a war crimes

**Lord Hailsham, the Lord Chancellor, in the course of his judgment, referred to the fact that we lived in the age of the Holocaust of the Jews and of international terrorism on the scale of massacre. The overriding objects of the criminal law, he said, had to be to protect innocent lives and to set a standard of conduct which ordinary men and women were expected to observe.**



tribunal; they were trying a civil case according to the laws of England.

The Jury retired just before 12 noon (on 6th May 1964) and returned with their unanimous verdict at half past two. They found for the Plaintiff, Dr. Dering, and awarded him one ha'penny damages, at that time the smallest coin in the realm. By that contemptuous award, the jury showed how they felt about Dr. Dering's claim that he had been libelled.

The publishers had paid \$2 into court. The Judge ordered Dr. Dering to pay all the costs of the Defendants (i.e. the author and publisher) after the date of payment in and he also had to pay his own prior costs.

One year later Dr. Dering was dead. He died of cancer in July 1965.

### The Defence of Duress

One matter touched upon in the Dering case was the question of duress. Dering had claimed that he acted under duress, that he was forced to do the acts he did. In the course of his summing up, Mr. Justice Lawton said:

"Fear was no excuse for murder... nor for doing really serious injury. Lord Gardner was undoubtedly right when he said that people must make a stand at some time. There did come a point when you had to say, 'I will die rather than do this.'"

On a number of occasions the English courts have had to consider the defence of duress. In the most recent case, *R. v. Howe, Bannister, Burke, Clarkson* [1987] 1 AC 417, the House of Lords dealt with the appeal of four convicted killers. They claimed that they had been ordered to kill and should have been allowed a defence of "duress".

They lost their appeals. The Judges held that the defence of duress was not available to a person charged with murder, whether as a principal in the first degree (the actual killer) or as a principal in the second degree (an aider or abettor).

Lord Hailsham, the Lord Chancellor, in the course of his judgment, referred to the fact that we lived in the age of the Holocaust of the Jews and of international terrorism on the scale

of massacre. The overriding objects of the criminal law, he said, had to be to protect innocent lives and to set a standard of conduct which ordinary men and women were expected to observe.

He quoted Article 8 of the Charter of the International Military Tribunal, Treaty Series No. 27 of 1946 at Nuremberg which was, at the time, universally accepted as an accurate statement of the common law both in England and in the United States of America:

"The fact that the defendant acted pursuant to the order of his government or of a superior shall not free him from responsibility..."

**The Talmud (Pesachim 25B) recounts how a man came to Raba and said: "The Prefect of my town has ordered me to kill so and so, or he will kill me." Raba replied: "Let him kill you; you must not commit murder. Why should you think that your blood is redder than his? Perhaps his is redder than yours."**

Lord Hailsham said that whilst "superior orders" is not identical with "duress", in the circumstances of the Nazi regime, the difference must often have been negligible. And he pointed out that under Article 6 of the said Charter, the expression "war crimes" expressly included that of murder.

The principle in Jewish jurisprudence that "the law exonerates him who acts under compulsion" was always subject to many exceptions and provisos. In particular, the offence of murder was one that a person must not commit even if it

might cost him his life.

The *Talmud (Pesachim 25B)* recounts how a man came to Raba and said: "The Prefect of my town has ordered me to kill so and so, or he will kill me." Raba replied: "Let him kill you; you must not commit murder. Why should you think that your blood is redder than his? Perhaps his is redder than yours."

Both the Jewish Law and the English Common Law are the same and clear on this score: that it is no defence to the crime of murder that the perpetrator was forced or ordered to commit it.

What is far from clear is whether those persons, still alive, who murdered Jewish men, women and children in Europe in the 1940's will ever be brought to trial or, if tried, will ever be convicted.

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# The Deckert Case: Chronology of Events

**In past issues we have reported on various stages of the proceedings taken against the German right-wing activist Günter Anton Deckert. Here we set out the chronology of events leading to the latest hearing before the District Court of Karlsruhe.**

## **Incident - 10 November, 1991.**

Deckert organised a public NPD (German National Democratic Party) meeting. Fred Leuchter, the main speaker, gave a speech denying the existence of concentration camps for mass extermination of Jews. Deckert was accused of supporting these statements.

**Round 1 - 13 November, 1992:** The District Court of Mannheim found Deckert guilty of offences under Sections 130, 131, 186 and 189 of the German Criminal Code and imposed a suspended sentence of one year imprisonment. The court found Deckert guilty of instigating racial hatred (Section 130) without however elaborating sufficiently - as was held by the Bundesgerichtshof in Round 2 - whether Deckert had attacked the human dignity of Jews, a precondition for the charge under Section 130.

**Round 2 - 15 March, 1994:** The Bundesgerichtshof (highest German Court of Appeal) gave judgment in the appeals of both defence and prosecution. The court reversed the District Court judgment and remanded the case to a different tribunal of the District Court. The main ground for this ruling was that the District Court's findings did not sufficiently support the charge of racial hatred. However, in its capacity as an appeal court considering points of law, the court was unable to consider issues of fact relating to the point of violation of human dignity.

**Round 3 - 22 June, 1994:** A second tribunal of the District Court of Mannheim sentenced Deckert to one year's suspended sentence, in compliance with the requirements established by the Federal Court for applying Section 130. The District Court found Deckert guilty of instigating racial hatred. The Judgment was widely criticized, because in the grounds for the sentence and its suspension it gave credit in somewhat ambiguous terms to Deckert's motivations and convictions.

**Round 4 - 15 December 1994:** Following the prosecution's appeal against sentence, the Federal Court of Justice held that the District Court's deliberations regarding the sentence were inappropriate (for the reasons set out below) and remitted the case to the District Court of Karlsruhe, for resentencing.

**Round 5 - 21 April 1995:** The District Court of Karlsruhe increased the sentence and imposed two years imprisonment on Deckert.

## **Federal Court of Justice - 15 December 1994 (Round 4, see above)**

The court held that the extent of the sentence had to be decided by the District Court. As a matter of German law, an appeal exists as to a point of law in respect of a sentence where the sentence itself is defective either because the facts do not adequately support it or because the District Court's reasoning

does not lead to the appropriate legal sentence (in accordance with accepted principles of sentencing). The Federal Court may only look at whether the District Court complies with those accepted legal standards.

The basis for the District Court's sentence is the guilt of the offender, however, the court must also take into account those circumstances which are not a defence in themselves but which nevertheless mitigate the severity of the offence.

According to the Federal Court, the reasons given by the District Court for the mitigation of Deckert's guilt and sentence were not legally valid. The mass murders and gas chambers of World War II were a known fact of which the court had taken judicial notice; the fact that the accused denied or was not convinced of these facts was therefore not a sufficient ground to mitigate his guilt:

"A person who closes his eyes to an historic truth and refuses to acknowledge it, does not merit a milder sentence, a fortiori as offences such as instigation of race hatred... endanger public peace (in particular)."

The accused's self-proclaimed intention to strengthen the German people against Jewish claims, was also incapable of mitigating his guilt - because of its basis in the denial of the Holocaust. This was based on the most manifest and gross political misjudgment and that was not a reason to mitigate his guilt and therefore his sentence.

The Federal Court held that in fact by mitigating the sentence on these wrongful grounds, the District Court had relied on an argument which was itself the core of the accusation.

The Federal Court evaluated Deckert's position emphasizing Jewish claims against Germany, and placed it in the overall context of Deckert's ideas, noting that they were all the more inappropriate for use in mitigation of sentence because under the constitutional basic order of the Republic there is no basis at all for mitigating the guilt or criminal liability of a person who implicitly describes part of the population as inferior beings and that this is particularly true with regard to "Jews living in Germany after the persecution of the past centuries up to the Nazi genocide". The court held that the uniqueness of the mass

murder committed under Nazi rule, and the consequences of this event, preclude arguments in mitigation of guilt in a matter of criminal law when the accusation is instigation to racial hatred, insult and the like.

The court offered advice to the tribunal due to next hear the case, noting, for example, that the accused's removal from the civil service in the past should have served as a warning to him and the fact that had not done so was to be considered as an aggravating element in respect of the sentence.

The court examined the issue of the suspension of the sentence and held that under the criminal code a sentence may only be suspended if it can be assumed that the convicted person will behave properly in the future - under the simple threat of the sentence - without it actually being enforced. In this case, the District Court had assumed that this was the case on the basis of its rather positive assessment of the character of the accused. The Federal Court doubted this assessment because in the past the accused had consistently violated his obligations under civil service law, and under the penal code, so that his past behaviour was characterized more by stubbornness than by any other trait and this was not a positive element. The court held that - on the basis of the biography of the accused - one would need stronger arguments in favour of suspension of sentence than just the accused's assertion that in the future he would refrain from committing criminal offences. This was particularly true as the District Court itself had said that it was not to be expected that the accused would change his political convictions in the future.

Finally, the Federal Court held that when considering the suspension of the sentence the District Court due to consider the case in the next round should take bear in mind that political agitation and stiffing up of racial hatred are particularly apt to endanger the legal order.

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*The Association gratefully acknowledges the assistance of Mr. Wolfram Reiner, Councillor for Legal and Consular Affairs at the Embassy of the Federal Republic of Germany in Israel, in preparing this report.*

As stated in previous issues of JUSTICE, we continue to report on other lectures presented during the World Council Meeting held in Rome, in June 1994

# Legal Protection Against Anti-Semitism - The Case of Italy

Georgio Sacerdoti

**T**his article considers Italian law and a number of relevant cases relating to "group libel", slander based on racial or religious hatred and legal protection therefrom. In a number of significant cases dealing with anti-Semitism, various jurisdictions, including in particular the Italian Supreme Court, laid down important precedents interpreting and applying criminal provisions enacted pursuant to major conventions in this area and especially the Genocide and Racial Discrimination Conventions.

Italian law differs from that of other countries, such as France, in that there is no comprehensive penal legislation dealing generally with incitement to discrimination and discrimination as such, on grounds of race or religion. Nor has Italy enacted legislation against the denial of the Holocaust in its various forms, as has Germany. This may be because until recently racism has been an unknown phenomenon in Italian society, where immigration from Third World countries is a new development. Also,

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since the war, expressions of anti-Semitism have only been sporadic.

Nevertheless, Italy has a series of provisions of domestic or international

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origin that address these problems and may be used to combat such attitudes; these were reinforced in 1993.

### Anti-Fascist Legislation

Law No. 645 of 1952 against any revival of the fascist movement and party

prohibits apologia, i.e., public praising and advocacy of fascism as well as fascist demonstrations and displays. These provisions were reinforced in 1975, when Law No. 152 added the slandering of democracy, racist propaganda, the promotion of racist ideas and methods, and conduct typical of Nazi organizations, to the list of prohibited acts.

One of the reasons for the less than frequent enforcement of provisions combatting support and propaganda of racist hatred as well as slander of religion, is related to the protection of freedom of expression under the Italian Constitution in accordance with UN and European Conventions.

However, the Constitutional Court has held on several occasions that freedom of expression is limited by the need to protect other constitutional values. Compatibility between these kinds of provisions and freedom of expression has been based by the court on the requirement that the advocacy of those objectionable ideas or ideologies be of such a character as to involve the "actual danger" that illegal actions may ensue therefrom.

### Effect of International Conventions

Another aspect to be considered is the relevance for Italy of international agreements protecting rights which may clash in specific instances with the right to expression of opinions. This aspect is especially important as the Italian Constitution does not contain any general or specific clause balancing different rights or setting forth their mutual limits,

Italy is a party both to the Genocide Convention of 1948 and to the

Convention Against All Forms of Racial Discrimination of 1965, and has enacted appropriate legislation in respect of both.

Article 8 of Law No. 962 of 1967 implements in Italy the obligation of Article III(c) of the Genocide Convention, namely, that the act of "direct and public incitement to commit genocide" be made punishable.

Article 3 of Law No. 654 of 1975, providing for the ratification of the Racial Discrimination Convention, states:

"For the purpose of implementing Article IV of the Convention a penalty of imprisonment for a period from one to four years shall be imposed on:

- (a) Any person who, in any way whatsoever, disseminates ideas based on racial superiority or racial hatred;
- (b) Any person who, in any way whatsoever, instigates discrimination or inspires the commission of or commits acts of violence or incitement to violence against persons because they belong to a national, ethnic or racial group."

## Judicial Policy

Three judicial cases have tested the effectiveness of the above laws and, specifically, the concrete applicability of international conventions through national legislation against group libel and slander.

1. The case decided by the Italian Supreme Court (*Corte di Cassazione*) on 29 March 1985, dealt with the first and only instance of the application in Italy of the legislation enforcing the Genocide Convention.

The facts were as follows: In 1979, during a basketball match in Varese (near Milan) between the Maccabi team of Tel Aviv and the local team, a group of fans

of the latter, which later proved to be an organized gang of neo-fascist youth, staged an anti-Semitic demonstration against the Israeli team. Slogans in support of Nazism, the death camps, and even the "final solution" were shouted. Banners such as "one, hundred, thousand Mauthausen" were displayed.

The defendants were found guilty and sentenced for incitement to, and apologia of, genocide under Article 8 of Law No. 962 of 1967 enforcing the convention in Italy. The sentence was upheld on appeal.

The main argument of the defendants

**The mere public praising of a crime is not sufficient to constitute an offence. As no danger of genocide could have been provoked by the demonstration, the defence claimed that the accused had to be acquitted.**

presented to the Corte di Cassazione was that according to Italian jurisprudence, advocacy of illegal conduct is a crime only when it is carried out in such a way or under such circumstances as to amount to incitement likely to induce others to commit a crime. The mere public praising of a crime is not sufficient to constitute an offence. As no danger of genocide could have been provoked by the demonstration, the defence claimed that the accused had to be acquitted.

The arguments relied on by the *Corte*

*di Cassazione* in rejecting those defences are worth quoting *in extenso*:

"The rule of Article 8 of Law No. 962 of 1967, although establishing a crime of apologia, cannot be interpreted as provisions of this type usually are. In most cases, it would be an impossible crime - that of inciting through advocacy, directly or indirectly, the commission of the crime of genocide - particularly, if one requires some practical result, a concrete danger of provocation.

It is immaterial to discuss which kind of ensuing danger should be required, such as race violence or other occurrences of intolerance. The subjectmatter of the instigation or public praising of genocide referred to in Article 8 of the Law of 1967 is not violence, nor racial intolerance, not even the danger of bloody riots but genocide, that is, the extermination of an ethnic group.

Should another interpretation be used, the crime of Article 8 would be impossible or possible only in very special historical and political moments and could only be committed by persons finding themselves in a special position who could instigate this crime in such moments.

One must conclude that the crime of Article 8 requires only the conduct that is set forth by this provision, conduct which is punished by itself because of its intolerable inhumanity, the hateful praise of racial intolerance inherent in it' because of the horror that is caused in the conscience of civilized persons by the memory of Nazi extermination and by the current suffering of some people of Africa and Asia".

This holding and its underlying interpretation should be praised for its stated moral inspiration - which is quite unusual in *Cassazione* judgments. This interpretation conforms to Article 3(c) of the

Genocide Convention, giving it effective meaning. "Direct and public incitement to commit genocide" should be judged according to objective criteria and should not depend upon the likelihood that such incitement could have some effect upon the audience.

2. Another relevant case decided by the Cazzazione Court, Judgment No. 65 of 16 January 1986, concerned the publication in a rightist Rome daily of a letter to the editor containing gross anti-Semitic slanderous expressions, addressed especially against the State of Israel and its citizens.

Proceedings were initiated against the editor and the journalist in charge of letters to the editor, for having failed to exercise due diligence so as to avoid the publication in their newspaper of text which could be labeled as incitement to genocide or to racial hatred.

On appeal to the Cazzazione Court, it was held that all the elements required by Article 3 of Law No. 654 of 1975 enforcing the Racial Discrimination Convention were present. The Court held, however, that the facts also led to the consideration of a more serious crime, namely, defamation by means of the press, which therefore had to take preference.

This judgment is especially interesting and attracted attention because of its holding that the provisions of defamation or slander may be applied when the victims are a loosely defined group of persons like those belonging to a group or a faith, provided that certain conditions are met. Members of a race or religion may be the victims of crime. In the case at issue it was held that they were properly represented by the Jewish Communities since both are recognized

as legal persons under Italian law. Even an individual member, such as Avv. O. Bisazza Terracini, who raised the issue, can be considered a victim and is therefore entitled to introduce a claim inclusive of moral damages.

3. The third case is rather peculiar in that it does not involve court action or a court judgment but was held before a Press Council overseeing the conduct of journalists. The facts were as follows: In November 1987, a well known financial weekly in Milan published a lengthy article in its front page containing negative comments on how "Jewish bankers" had allegedly been able to avoid the drop

**An experienced journalist should have known beforehand that using racial stereotypes reminiscent of Nazi propaganda in the text and cartoon was unacceptable under professional standards**

which had affected stock exchanges the previous month. The article was accompanied by a cartoon featuring an anti-Semitic caricature of a well known Italian businessman of Jewish descent.

The Lombardy Press Council, acting on a complaint by the Milan Jewish Community, chaired by myself, initiated disciplinary proceedings.

The lengthy decision of the Lombardy Council should be commended in that it held that the professional (ethical) standard to be applied by it was different and independent from that of the penal law.

The rules of the profession required avoidance of the publishing of news and comments "which exacerbate the moral conscience of society". An experienced journalist should have known beforehand that using racial stereotypes reminiscent of Nazi propaganda in the text and cartoon was unacceptable under professional standards and would elicit protests.

In conclusion, it should be stressed that freedom of the press is not only limited by penal provisions. Honour and reputation which must be protected by law against arbitrary interference (Article 12 of the Universal Declaration) can be ensured through various channels and standards. Indeed, restrictions on freedom of the press, in order to guarantee the respect and the protection of the rights and reputation of others as well as of public order, are the consequence of "the special duties and responsibilities" connected with freedom of expression under Article 19(2)(a) of the International Convention on Human Rights.

## Conclusion

Finally, in view of the resurgence of neo-Nazism and xenophobia, in December 1992 the Italian Government submitted to Parliament a Bill on "urgent provisions against racial, ethnic and religious discrimination" providing inter alia for the reinforcement of the sanctions in Article 3 of Law No. 654 of 1975 providing for the ratification and enforcement of the Racial Discrimination Convention. The Bill was transformed into Law No. 122 of 25 April 1993, and approved by law on 25 June 1993.

# Claims for Restitution of Jewish Property in Eastern Europe

Eli Nathan

**T**he Holocaust of Eastern Jewry resulted not only in the physical annihilation of six million Jews but also in the almost total dispossession of Jewish property, individual and communal, the extinction of thousands of Jewish communities and the decimation of many other communities, mostly in the countries of Central and Eastern Europe.

After the end of the Second World War, limited measures for the restitution of Jewish properties in these countries were enacted.

With the advent to power of communist regimes since 1947, positive steps taken to redress the enormous material wrongs caused to Jewry in those countries came to a complete standstill and measures of restitution previously enacted in countries such as the former Czechoslovakia, Romania, Bulgaria and Hungary, ceased to be implemented. In consequence, even much of the property restored to its original owners or to their heirs was subsequently nationalized and taken over by the state in the course of the wholesale transformation of the economy of those states.

In addition, the annihilation of millions of Jews resulted in vast amounts of Jewish property spoliated during the



Holocaust becoming heirless or unclaimed. In Poland, for example, out of a pre-war Jewish population of 3.5 million Jews, only about 400,000 Jews survived the Holocaust.

In 1989, with the collapse of the communist regimes in the countries of Eastern Europe and the rise to power of governments committed to the democratic process and to a market economy, many of which also became parties to international human rights conventions and other instruments postulating respect for private property, the foundation was laid to attack the problem of the restoration of Jewish property, and to remind these governments and world public opinion that the time had arrived to redress as far as possible the enormous wrongs caused to European Jewry during the Holocaust.

To date, almost five years after the

advent to power of the new regimes, none of these countries has so far enacted a program of comprehensive and satisfactory restitution legislation.

Where such legislation has been enacted it has been found to be largely deficient and inadequate. Where these countries enacted legislation for the privatization of nationalized property they failed to take into account the basic fact that Jewish property had already been confiscated during the Holocaust many years before the communist measures of large-scale nationalization of private property were actually taken.

## Legislative Deficiencies

Where, as in Hungary, compensation was provided for the loss of property in lieu of restitution in kind, compensation was linked to the reprivatization of the economy and persons deprived of their property were allotted state bonds conferring rights to purchase shares in denationalized former state enterprises.

Under the Hungarian Compensation Laws of 1991 and 1992, compensation is†very partial and regressive, providing 100 percent compensation for damages in an equivalent of up to \$2,600, 10 percent for damage over \$5,200 and limiting the total compensation to an equivalent of \$70,000. Hungary is the†only country in Eastern Europe which has so far passed compensation laws.

Where any legislation has been

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Judge Eli Nathan, a former Judge of the District Court in Jerusalem, is Legal Counsel of the World Restitution Organization.

enacted in Eastern Europe claims are confined to natural persons, thereby excluding properties of Jewish communities and associations where such properties have not already become heirless.

In addition, restrictive provisions exist as to nationality and residence of the claimants in a recently adopted Czech law, under proposed Polish reprivatization legislation, and to some extent in the Hungarian laws already noted.

These restrictive provisions ignore the fact that Jews who were wrongfully deprived of their property and survived the persecution do not fulfill the residence and nationality requirements because they were forced to emigrate from their countries of ordinary residence as a result of the persecutions.

As for further discriminations, in Hungary for instance, legislation for compensation in respect of personal suffering discriminates against victims of racial persecution compared to victims of political communist persecution.

These discriminatory provisions are incompatible with the principles of customary international law and the principles of human rights enshrined in international agreements to which many of the countries have adhered, and which rule out any discrimination, inter alia, on account of racial, social or national origin.

Equally unsatisfactory is the position in regard to the restoration of property of still existing Jewish communities.

The Czech government recently tabled a bill for the restoration of a very limited number of Jewish communal properties in the Czech Republic. The bill, which did not obligate the local authorities - which hold the majority of Jewish communal assets - to restore them to the communities, failed to receive parlia-

mentary approval. In other countries, restoration is proceeding to a limited extent within the framework of legislation providing for the restoration of Church property. The provisions of some of these laws are unsatisfactory and inappropriate to the assets of Jewish properties. Thus, under a Hungarian law of 1991, restitution is made conditional upon the religious body's ability in terms of personnel and financial means to use the assets for their original purpose. Such a provision completely disregards the fact that many of the existing communities have suffered serious losses both in membership and in financial resources as a result of the Holocaust.

A notable exception in this field of communal property is Slovakia where in October 1993 a law was passed, partially due to the active intervention of the World Jewish Restitution Organization, enabling the Jewish community to reclaim communal property taken since the persecutions in that country started on 2 November 1938.

As far as heirless property is concerned, except for Hungary and Romania no laws have been passed to date for the transfer of such properties to organizations representative of survivors of the Holocaust. A Hungarian law of 1946, establishing a Jewish Rehabilitation Fund was never implemented. Hungary thus failed to honour its obligations in that respect under the Peace Treaty of 1947. In so far as Romania is concerned, it is unclear if and to what extent a law of 1948 on the transfer of heirless property was ever implemented.

Under a Polish law of 1946 relating to abandoned property, Jewish property which was not repossessed within a period of 5 years in respect of moveable property and 10 years in respect of

immoveable property passed to the state as abandoned property. In this way vast amounts of property of Jewish Holocaust victims passed to the state.

## Jewish Restitution Claims

Jewish restitution demands cover claims for the restoration of properties of existing Jewish communities; legislation for the restoration of individual properties or payment of fair compensation where restoration is impossible; transfer of heirless and unclaimed properties of individuals, communities and associations to the representatives of the Jewish people; and, where appropriate, legislation providing compensation for personal suffering.

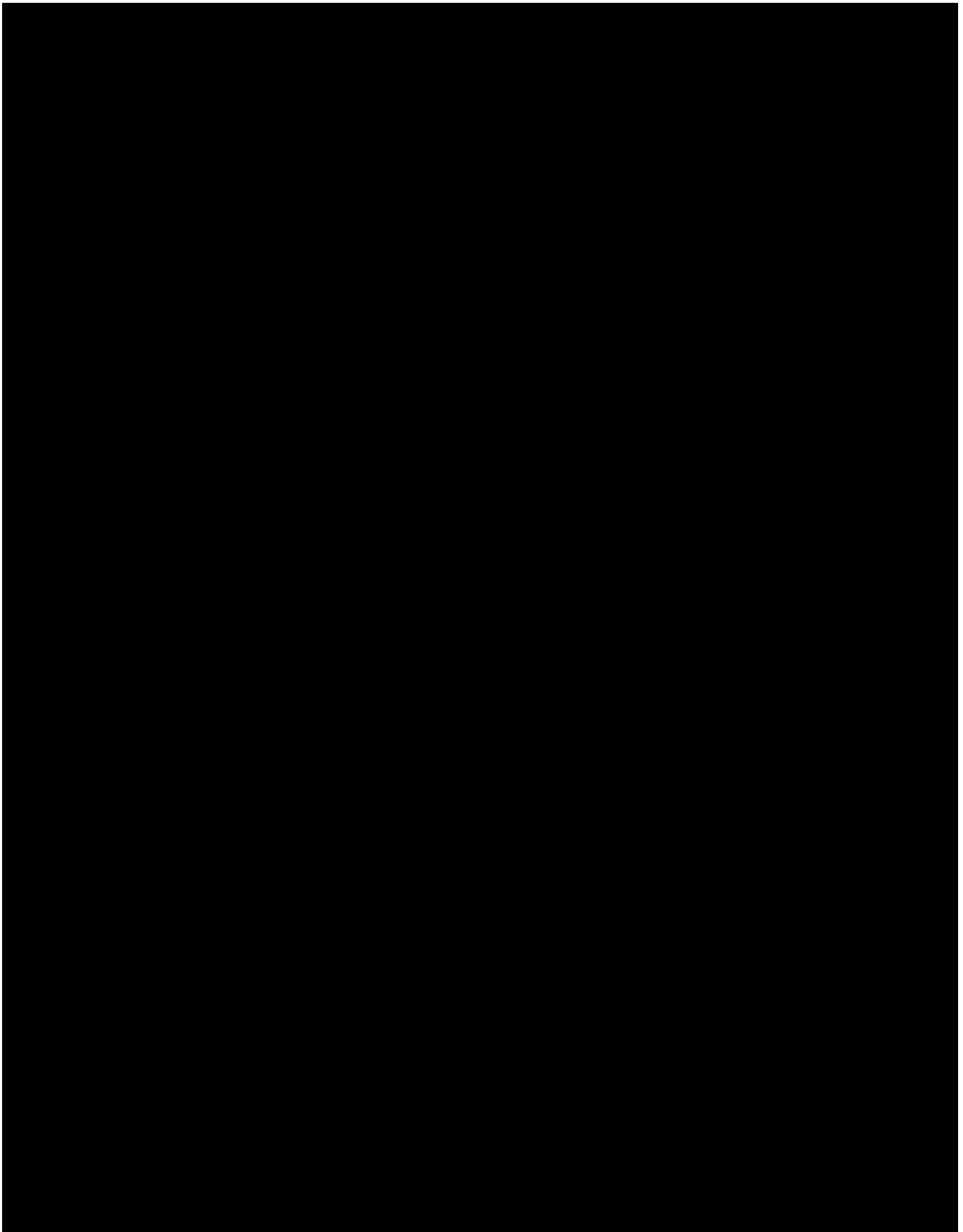
In so far as the respondent countries are concerned, the claims may be divided into the following two categories:

1. Claims against countries, formerly satellites of Nazi Germany, Hungary, Romania and Bulgaria, and to some extent Slovakia and Croatia which during the war were actively associated with Germany and participated in the persecution of their Jewish populations.

2. Countries which during the war were under German occupation like the Czech Republic, Poland, Serbia, Bosnia, the Baltic countries, the Ukraine, Moldova and Belarus.

The legal basis for the claims against Hungary and Romania is the Peace Treaties signed in 1947 between the Allies and the Associated Powers with these countries, as well as general principles of international law and elementary justice demanding the restoration of property which has been wrongfully taken, human rights and respect for private property as enshrined in the European Convention for the Protection of Human Rights, Protocol





No. I to that Convention securing the protection of property rights and other international instruments.

Articles 25 and 27 respectively of the Peace Treaties with Hungary and Romania, which were adopted largely as a result of the efforts of the Jewish Organizations at the Paris Peace Conference, obligate these countries to restore property of persecutees, or if restoration is impossible to pay fair compensation therefor, and to transfer heirless and unclaimed properties of persecuted persons, organizations or communities for the purpose of relief and rehabilitation of the survivors.

The other countries belonging to this category of states are responsible owing to their association with Nazi Germany in the war and the part taken by them in the persecution of the Jews.

In so far as countries under German occupation are concerned, it would be an intolerable situation if states respecting the principles of justice and international law and adhering to the principles of human rights and respect for private property were not to remedy a situation where vast amounts of Jewish property wrongfully taken from their lawful owners in the course of crimes against humanity would not be restored to them or their heirs. The same principles would apply to property wrongfully taken from Jewish communities and associations, whether such communities or associations do still exist or whether they have been exterminated in the Holocaust.

In actual fact, such property has either been taken over by the states concerned and largely retained by them since then, or it has been transferred by the states to municipalities, other public bodies or individuals.

In so far as heirless or unclaimed property, whether of individual persecutees or

of public bodies is concerned, the laws of bona vacantia applicable to heirless property under the civil law cannot be held to apply under the extraordinary situation where vast amounts of property have become heirless as a result of crimes against humanity committed against the Jewish population in those countries. No state should be allowed to derive material benefits from that unprecedented situation. Heirless and unclaimed property, instead of enuring to the benefit of those states where the crimes have been committed, should properly be transferred to representative Jewish successor organizations and used for purposes of relief and rehabilitation for the survivors of the Holocaust.

Except for the Peace Treaties with Hungary and Romania, this principle has been enshrined in the Final Act of the Paris Conference of Reparations of 1946, in the State Treaty with Austria of 1955, in the laws passed by the Occupation Authorities of West Germany in 1947, 1949 and 1952 respectively, in legislation passed on 23.9.1990 in respect of the territory of the former German Democratic Republic, in a Greek law of July 1946 and in a legislative decree of 11.5.1947 in Italy.

The World Jewish Restitution Organization was established in co-ordination with the government of Israel in 1992 by the principal Jewish organizations such as the Jewish Agency for Israel, the World Jewish Congress, the American Jewish Joint Distribution Committee, the Conference on Jewish Material Claims against Germany and others, with the object of recovering Jewish assets in the countries of Eastern Europe and to receive compensation for personal suffering of Holocaust survivors in those areas.

The Organization is regarded as the

legal and moral representative of world Jewry in regard to claims of Jewish properties in Eastern Europe. Its locus standi is also based on various precedents established by the international instruments referred to above and on Protocol No. 2 between the Federal Republic of Germany and the Conference on Jewish Material Claims signed in September, 1952. The Organization's efforts are directed towards receiving official legal recognition of its representative standing by the governments of Eastern Europe.

Restitution of Jewish property is not a matter solely for the local Jewish communities, taking into account also the fact that the majority of Eastern European Jewry was annihilated during the Holocaust and most of the survivors emigrated after the war to Israel and to other countries.

However co-operation and coordination of efforts with the Jewish communities is essential. With that end in view the Organization has signed agreements with most of the Jewish communities in the countries of Eastern Europe and is at present negotiating together with the representatives of the communities with the governments of the Czech Republic, Slovakia, Romania, Hungary, Poland, the Baltic Republics and Belarus on ways and means of restoring Jewish properties.

The World Jewish Restitution Organization calls for the support of world Jewish public opinion in general and of the Association of Jewish Lawyers in particular in its efforts to redress the enormous material wrongs caused to Eastern European Jewry which remain unmitigated 50 years after the end of the Holocaust thereby making a substantial contribution to the advancement of human rights and the rule of law.

# The North American Free Trade Agreement

Marcos Berkman



Some people may wonder what the North American Free Trade Agreement is all about. Briefly, NAFTA is a set of rules that Canada, the United States and Mexico have agreed upon in order to sell and buy products and render services in North America. It is called "free trade" because these regulations define how and when trade barriers to products and services among the three countries will be removed; how and when permits, taxes and licenses, as well as particular tariffs and duties will be eliminated. It is also an agreement that establishes procedures to solve the differences that may arise in trade relations between nations.

The agreement does not mean that will, at once, totally unblock trade between our nations. It has been decided to immediately open to competition only those products and services to which Mexico agrees. A transition period of between 5 to 15 years has been negotiated for other products in respect of which Mexico is less efficient and is working to improve its quality, or is modernizing its technology and production methods.

NAFTA is a reality that will mark a

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huge transformation in America, along with a significant development in global trade. For the first time the United States has set up a permanent basis to create a constructive economic and political link with Latin America.

Canada and the United States were the world's largest trading partners even before the negotiation of the U.S.Canada Free Trade Agreement, which phased out barriers in the beginning of 1989 when it came into effect.

Mexico's economy is at present only 5% the size of that of the United States and Canada combined. So the immediate effect of adding Mexico - NAFTA's real innovation - might be compared to adding an economy the size of Holland's to the European Community.

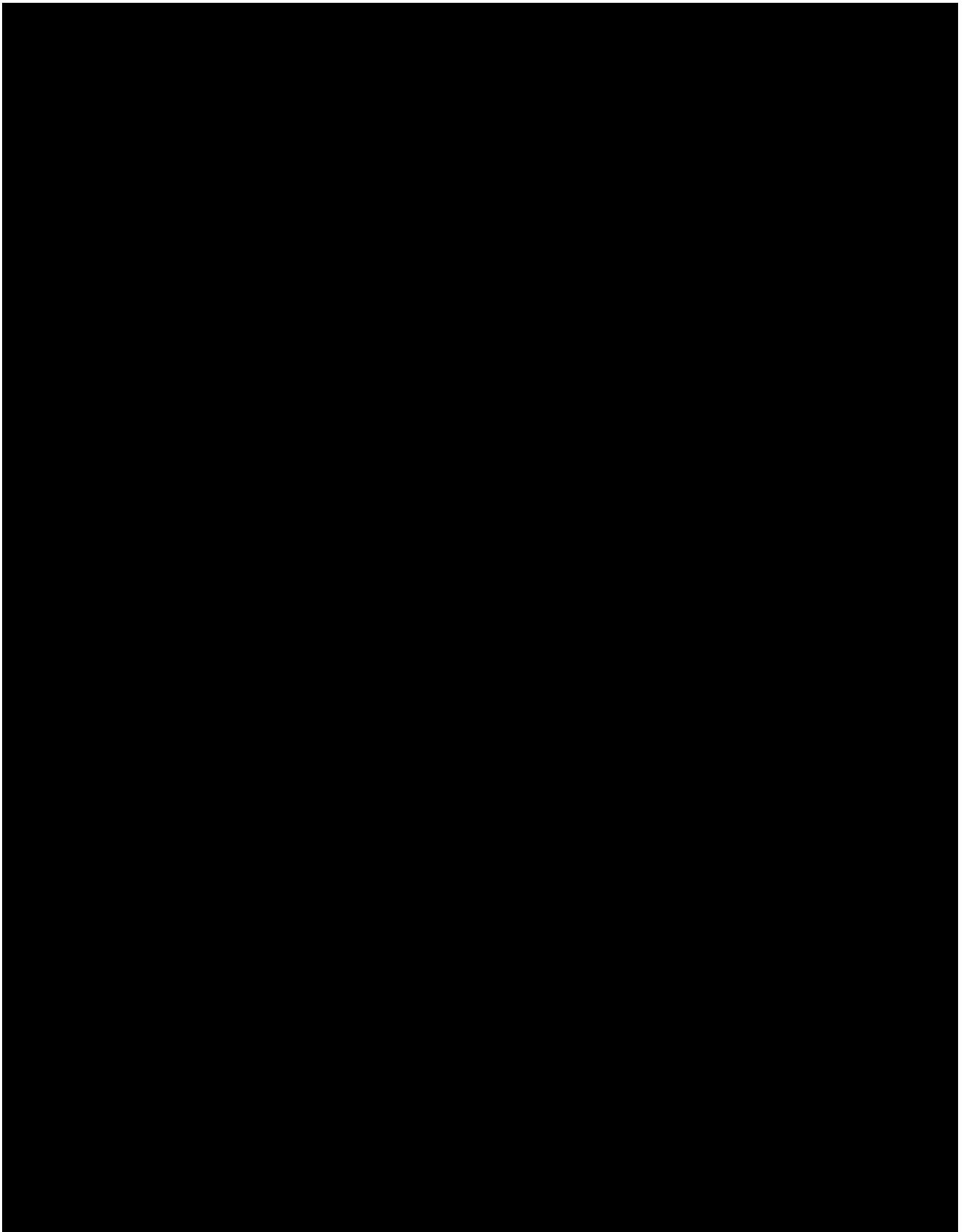
## Advantages of NAFTA

1. Mexico has now become a founding member of the world's largest free trade zone, as well as the first Latin American country to be admitted to an organization that is expected to play an increasingly important role worldwide; it is precisely because of this that Mexico has caught the interest and attention of other large areas of the world.
2. The agreement will guarantee broad and permanent access for Mexican products to the great North American

market, consisting of more than 360 million people.

3. NAFTA will also guarantee that the reforms already undertaken to create a stable and active economy will continue, because it strikes against protectionism. At the same time it will establish an innovating framework in which Latin American nations and regional blocs may reunite for broader hemispheric protection, accelerating their incorporation into North America's trading market. Mexico's business arrangement with them may allow in future the negotiation of a Continental Free Trade Area Agreement.

Mexico has already signed agreements with Chile and Costa Rica, and has almost concluded its negotiations with Honduras. On June 13, 1994, the Presidents of Mexico, Columbia and Venezuela approved a trilateral free trade agreement that went into effect January 1, 1995. This Treaty sets forth clear and permanent regulations for a potential consumer market of 145 million people, which



represents a third of the population of Latin America and the Caribbean.

4. The significance of this kind of multi-lateral treaty lies in its capacity to increase growth and productivity, improving America's domestic and international competitiveness. NAFTA negotiations recognize, however, the difference between Mexico's level of development and that of its North American neighbours - which is why 70% of Mexican exports will be free to enter the former's markets, and only 40% of products will be free to enter Mexico.
5. NAFTA promises to create jobs and to improve productivity. As companies profit from the advantages offered by the size of the market they will produce for more people and create jobs for more Mexicans, lower their costs and become more efficient. However, as competitive pressure is augmented on all three members, in each of them employment will increase in some industries and fall in others.
6. The real case for NAFTA is that free trade and free markets have the same virtues (they make countries better off) and the same drawbacks (people must adapt to change).

Economic integration between the United States and Mexico, which has continued for years, is surely better assisted by a legal framework that rationalizes and administrates it. The ratification of NAFTA was the culmination of a decade long process of tradeliberalization between these countries, which was also accelerated by Mexico's accession to the General Agreement on Tariffs and Trade (GATT) in 1986. The United States was

the source of income of some 70% of Mexico's total imports last year and the market for 76% of its exports; Mexican tariffs on American goods have fallen from 100% in 1981 to 10% now, and American tariffs on Mexican goods average 4%.

Conclusion of the NAFTA regime simplifies the practicalities of trading at a stroke, but its effects are also evolutionary and cumulative. Companies and investors will be able to make long term plans with the assurance that the continued integration of the American, Canadian and Mexican economies is guaranteed by the Treaty and placed beyond the reach of any capricious governmental action.

Over the longer term, 10-15 years perhaps, the substantial benefits of NAFTA and the trust which it has engendered in Mexico could be spread to America and Canada; the extent to which that actually happens depends mainly on Mexico's success in adjusting to its new commercial environment. For whatever America's own critics might say, the country that is really making an economic leap of faith by signing NAFTA is Mexico.

Breaking down trade barriers will expose Mexican firms to their competitors who are often far wealthier, have a better instructed work force and own more sophisticated technology. Yet despite that expectation, NAFTA has won popular support in a Mexico that has for a long time been hooked on state ownership, as well as on import substitution. It is because NAFTA provides an opportunity to build a more prosperous, democratic and equitable nation, under certain conditions, that the risk was taken.

Mexico's administration has pursued NAFTA as part of a dual strategy:

1. Economically, the trade agreement is to provide Mexico's ailing economy with the foreign capital injection that it has long required to achieve a sustainable growth.
2. Politically, an expanding Mexican economy linked to that of its Northern neighbours may help to continue our democratic transition.

The truth about NAFTA from the US and Canadian point of view may be summarized in five proposals: NAFTA will have no effect on the number of jobs in the United States and Canada.

- \* NAFTA will not hurt but may help the environment.
- \* NAFTA will, however, only produce a small rise in overall US real income.
- \* NAFTA may also lead to a small rise in the real wages of unskilled US or Canadian workers.
- \* For the United States, NAFTA is essentially a foreign policy rather than economic issue.

NAFTA is North America's strategic response to global economy but, as often happens, the medicine has been confused with the malady and those buying the NAFTA idea can hardly promise quick relief for global anxiety. What is certain is that NAFTA will help our countries achieve better future living standards.

The rest of the world should applaud NAFTA as it should applaud any other improvement aimed at trade-freedom.

# The Fundamental Agreement between Israel and the Holy See

*In this issue we report on two reactions to Judge Haran Fainstein's "Dissenting Opinion" concerning the Israel Vatican agreement (JUSTICE No. 4).*

*Editor's note: Signed articles published in JUSTICE are the responsibility of their author and do not necessarily reflect the views of JUSTICE.*

**Letter to the Editorial Board by His Excellency Archbishop Andrea di Montezemolo, Apostolic Nuncio to Israel.**

Dear Sirs,

In JUSTICE (No. 4 Winter 1995, p. 41) Judge Haran A. Fainstein writes a "Dissenting Opinion" on the Fundamental Agreement between the Holy See and the State of Israel, in which he claims that the Canon Law of the Catholic Church includes "anti-Jewish" laws (because, as he says, "the Catholic Church has not taken any step in order to extract these anti-Jewish laws out of its Canon Law").

Frankly, I am very much surprised by the publication of the Judge's article. The Canon Law of the Catholic Church does not contain any "anti-Jewish laws". There are none to be found in the Code of 1917, not to mention the most recent codifications following the Second Vatican Council.

I think it much more significant to point out that, subsequent to its publication in the official gazette of the Holy See (Acta Apostolicae Sedis 86 (1994), pp. 716-729), the Fundamental Agreement is officially part of the Catholic Church's body of law. In that document, which is a ratified international treaty, the Holy See reiterates "its condemnation of hatred, persecution and all other manifestations of anti-Semitism directed against the Jewish people and individual Jews anywhere, at any time and by anyone" (cf. Art. 2.2 of the Fundamental Agreement). Moreover and jointly, the "Holy See and the State of Israel are committed to appropriate cooperation in combatting all forms of anti-Semitism and all kinds of racism and of religious intolerance, and in promoting mutual understanding among nations, tolerance among communities and respect for human life and dignity." (ivi, Art. 2. 1). ■

**Letter to the Editorial Board by Rabbi David Rosen, the former Chief Rabbi of Ireland, and currently, a member of the Permanent Bilateral Commission which negotiated the Fundamental Agreement between the Holy See and the State of Israel.**

Dear Sirs

It would be more than disingenuous to claim that with the establishment of full relations between the Holy See and the State of Israel, prejudices and bias that have been the product of almost two millennia of Christian teaching in general and of the Catholic Church in particular towards the Jews and Judaism, suddenly no longer exist. Nevertheless, to ignore the transformation that has taken place in the official positions and teaching of the Catholic Church is not only untruthful, it is damaging to these enormously positive developments for the Jewish people and Israel.

Reference was made in the last issue of JUSTICE (Winter '95) to medieval legislation of the Church regarding Jews. In my presentation to the World Council Meeting of the IAJLJ in Rome last year (the text of which was published in the previous issue of JUSTICE), I addressed the far more profound and disturbing theological positions that underlay such legislation and other discriminatory enactments, such as those of the fourth Lateran Council that may even be seen as a prototype for the Nuremberg Laws themselves.

Yet, it is precisely because of this context, that the transformation with and since the Second Vatican Council is so remarkable. The Second Vatican Council convened by Pope John XXIII laid down the guidelines for the Catholic Church in the modern world superseding that before and amongst its most

momentous promulgations was that known by its first words, "Nostra Aetate", dealing with the relationship with Jews and Judaism.

It is not irrelevant to point out that even the Codification of Canon Law of 1917 did not contain discriminatory legislation against Jews. However it should be understood that the modus operandi of Catholic legislation does not require a formal repudiation of enactments that are patently rejected by new promulgation. Nostra Aetate not only condemned anti-Semitism as well as the idea of particular corporate Jewish responsibility present or past for the death of Jesus of Nazareth, but it condemned any idea that the Jewish people should be seen as rejected by Heaven in any way and affirmed that the Divine Covenant made with the Jewish people has never been revoked and is eternal.

In so doing, all such previous anti-Jewish enactments were repudiated. Furthermore the stage was set for the subsequent documents, in particular The Guidelines of 1975 and the 1985 document known as The Notes on The Correct Way to Present the Jews and Judaism in Preaching and Catechesis in the Roman Catholic Church. Pope John Paul II has made numerous statements affirming the "special closeness" of the Jewish people, the "unique bond of common parenthood" that Christianity shares with it, and has frequently condemned anti-Semitism as "a sin against God and man". All these render any past discriminatory legislation against Jews per se as not only obsolete, but as unequivocally repudiated. Moreover, we may note amongst the many statements issued by the Vatican's Commission for Relations with Judaism, its declaration following the meeting with the International Jewish Committee for Inter-Religious Consultation in Prague in 1990 that "the fact that anti-Semitism has found a place in Church teaching requires an act of Teshuva - repentance".

The changes of the Second Vatican Council were incorporated in Canon Law in the updated codification of 1983 and the official teachings of the Catholic Church made explicit in 1992 in the Universal Catechism of the Catholic Church. These are the binding documents which serve as the authoritative points of reference on the official current position of the Catholic Church. However, we might also take note of the fact that the Fundamental Agreement between the Holy See and the State of Israel which declares itself in the preamble to be part of the process of reconciliation between the Catholic Church and the Jewish People, is now an integral part of the Catholic Church's

legal body. In this Agreement moreover the Holy See not only condemns anti-Semitism (as it has done in the past), but actually commits itself to actively fighting anti-Semitism.

As many have said, what has been achieved is only a beginning. The signing of the Fundamental Agreement and the normalization of relations between Israel and the Vatican is the culmination of the beginning of a new relationship that commenced with Nostra Aetate. Nevertheless the comments of Judge Haran Fainstein that were published in the last issue of JUSTICE make it clear that many, if not most Israelis and even the very much better educated, are quite unaware of these changes and do not understand the extent to which they have rendered obsolete and invalid past theological presumptions and their legal consequences.

Indeed in the past I have found little receptivity in Israel when I have referred to the changes of Nostra Aetate and subsequent documents. Generally the understandable reaction has been - if everything is so much better, then why does the Vatican not have full relations with the State of Israel? Perhaps now that this has been rectified, there will be a greater willingness, especially on the part of those who seek truthful understanding, to discover the reality of this historic transformation that reached its summit with the Israel-Vatican accord.

# Compromise in Jewish Law

Ya'akov Habba

**A**bout three years ago the Courts (Consolidated Version) Law - 1984 was amended. The principal purpose of the amendment was to confer upon a judge jurisdiction to rule by way of compromise in a matter being heard before him if the parties to the action so agreed.

Further, the amendment empowers the judge to propose to the parties that they apply to an external body to help them reach a compromise or act as an arbitrator in the dispute. Both the possibility of judgment by way of compromise and the possibility of transferring the matter to an external process of arbitration or compromise are conditioned on the agreement of the parties.

In Jewish Law the possibility of resolving conflicts within the framework of a compromise or out-of-court arbitration proceeding is recognized and frequently utilized. Similarly, the Dayan (Rabbinical Court judge) is entitled and possibly even obliged to suggest to the parties that he compromise between them without completing the trial, or rule on a matter which comes before him as an arbitrator. However, the law does not consider the possibility that the Dayan initiates an out-of-court settlement or arbitration.

The parties themselves are entitled to

choose, at any stage in the proceedings, to apply to a body outside the Rabbinical Court which can act as an arbitrator or which can compromise between them, however, when the matter is brought

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before the Rabbinical Court the court will not transfer the case of its own accord to another body, although as noted, it may hear it as an arbitrator, and in any event it is obliged to attempt to obtain the agreement of the parties to give judgment by way of compromise.

The discussion here after focuses on judgments by way of compromise.

## The Priority of Compromise

In the Babylonian Talmud (Sanhedrin 6,b) reference is made to a dispute between the Tannaim (authorities quoted in the Mishna) concerning the nature of the compromise and the extent to which it is desirable. One opinion holds that a Dayan who causes the parties to reach a compromise is to be deemed to be a transgressor, as in a compromise the truly meritorious party loses part of what is due to him, amounting to a form of plunder of his rights. Apparently, the intention here is not a transgression on the level of the criminal law, but a transgression in the moral sense. In any event, this opinion reflects a negative attitude to compromises.

In contrast, an opposite opinion holds that a compromise is a positive act which has in it an element of Mitzvah (meritorious deed). A Dayan who causes the parties to compromise promotes peace in the world, and therefore it is his duty to make an effort to compromise between the litigants before him. Conclusion of the dispute by way of compromise agreeable to both parties and accepted by them leaves both parties satisfied, whereas a judicial determination in favour of one of the parties leaves the other unsatisfied. From this follows the priority of compromises which promote peace between the parties.

Ya'akov Habba, Faculty of Law, Bar Ilan University, Ramat-Gan.



A third opinion advocates a middle way and its attitude to compromises is neutral, i.e., reaching a compromise is allowed and is neither a transgression nor a Mitzvah.

The rulings of the Halacha have adopted the opinion that making a compromise is meritorious, and should be preferred to a ruling which accords with the strict letter of the law. Thus R. Joseph Karo (Shulchan Aruch, Hoshen Mishpat 12, 2) states:

"It is a Mitzvah to ask the litigants at the start: do you desire law or compromise... And every court which makes a lasting compromise is to be praised."

The reason for preferring compromises is not only the reason set out in the Talmud that compromises promote peace in the world. The preference for compromises also arises out of the fear of our sages lest the Dayanim sitting in judgment fail to plumb the truth of the Torah. Thus, the sages have aspired to a situation in which the dispute between the parties is resolved by way of compromise agreed to by both parties, without need for recourse to Torah law (R. Ya'acov Ba'al Haturim, *ibid.*).

The Da'van must suggest the option of resolving the dispute by way of compromise prior to the commencement of the substantive hearing, although he is empowered to do so also after the judicial process has begun and even after the completion of pleadings by the parties, provided however that the case has not been concluded. After the conclusion of the case, delivery of judgment by the Dayan and determination of rights and liabilities, the Dayan again is not entitled to impose a settlement upon the parties. There are those, however, who are of the opinion that even then the Dayan can

suggest a compromise and persuade the parties to accept it, although he cannot force a compromise on the parties at that stage even if the case is one where, had the Dayan not delivered his judgment, he would have been entitled to do so (*Siftei Cohen and Netivot HaMishpat on the Shulchan Aruch, ibid.*).

### **Circumstances in which the Dayan may Impose a Compromise**

In ordinary circumstances the Dayan may persuade and place his whole weight behind a settlement between the parties. The Dayan may initiate the settlement, suggest its contents and attempt to gain the acceptance of the parties. Generally,

### **The Dayan must suggest the option of resolving the dispute by way of compromise prior to the commencement of the substantive hearing**

he may not force it upon the parties; this is clear as by its very nature compromise is a consensual end to a dispute between rival parties.

However, in certain circumstances the Dayan is entitled to forcibly impose a settlement on the parties and in this way to resolve the dispute between them. In these circumstances the significance of the settlement is that the Dayan does not decide the case fully in favour of one of the parties, but partially accepts the claim. Hereafter, we shall consider the criteria according to which the Da'van determines the nature of the compromise, however, first we shall clarify in which

circumstances the Dayan will impose a settlement upon the parties.

One circumstance is the situation in which the Dayan cannot reach a decision in the case, either because of the nature and substance of the dispute or because of the equal balance of the evidence. In such a situation the Dayan must impose a settlement on the parties in order to bring the dispute to an end. R. Asher Ben Yehiel has held (*Responsa: Rosh*, Rule 107, Section 6):

"... to give notice that there is no power or right to conclude the trial with the parties still divided, and that it is necessary to finish and complete the trial in order to bring peace to the world. And for this purpose the sages empowered the Dayan to decide according to his own discretion, where the matter cannot be clarified through evidence and facts, occasionally by assessment, and occasionally as the Dayan sees fit - without reason and without evidence and without assessment, and occasionally by way of compromise."

As noted, the inability to decide may arise from the very nature of the conflict, for example: where the question was not determined by the Posekim (Rabbinic authorities on Halachic questions) and the law is in doubt (see *Responsa Shvut Ya'acov*, Part A, Section 109). Similarly, it is possible that the inability to decide may arise from a factual uncertainty. R. Yoseph Terani (*Responsa Hamabit*, Part A, Section 269) refers to the situation where in the light of all the circumstances, the court retained a considered doubt as to the facts:

"And against their will they reach a compromise in accordance with the force of law and they converse with each other about the fact that the law

does not allow one to be believed more than the other, unless the Dayanim prefer the pretexts of one to those of another and base their opinion thereon..."

Thus also in Shulchan Aruch (Hoshen Mishpat 12, 5):

"The Dayan has power to make a legal compromise where the matter cannot be determined and he is not entitled to deliver a judgment which does not resolve the issue."

The Rabbinical Court in the State of Israel has also utilized this power, and in certain cases has imposed a compromise upon the parties (see Rabbinical Court Decisions 4, 267; R. Ct. Decisions 7, 114 at page 131. See also Rambam, Hilchot Ishut, 14, 16).

From the Responsa of Hamabit (Part B, Para. 121) another consideration arises which will cause the Dayanim to impose a settlement upon the parties; this can be defined as a consideration of equity. When the Dayanim see that considerations of equity require a compromise between the parties and not a decision in favour of a specific party in accordance with the letter of the law, they are entitled to impose a settlement. The case considered relates to a person who received from another possession of a building in order to secure his debt - in a type of mortgage. The Halacha is that if the building is destroyed while still in the possession of the lender, the debtor is not obliged to build it and indeed the lender is entitled to rebuild it at his own expense (in order that in the meanwhile he can live there or so as to make it easier for him to execute the debt when the time comes). In the case under discussion, the lender built the house at his own expense

and near the completion of construction (before the lender managed to enjoy the house) the debtor asked to repay his debt and recover possession of the building. Despite the fact as aforesaid that the strict law was that the debtor was not required to reimburse the lender's expenses, Hamabit held that the Dayan was under a duty to impose a settlement between the parties and obligate the owner of the property to participate in the expense of its renovation.

"...And if he the money holder (the

**When the Dayanim see that considerations of equity require a compromise between the parties and not a decision in favour of a specific party in accordance with the letter of the law, they are entitled to impose a settlement.**

lender) returns and builds and disburses a lot on the construction. If the owner of the house comes to redeem it immediately or after a short period, the money holder can say to the house owner it is not just that I took from you an old house and I built it anew... and on this a compromise must be forced upon them as the Dayanim see fit..."

Thus also a judgment of the Rabbinical Court in the State of Israel (Vol. 8, 240 at p. 252) states that where the Dayanim cannot uphold the claim because of an obstacle in the laws of evidence, such as the absence of 2 witnesses, but from the

aggregate of the circumstances and evidence the Dayan feels that it would not be just to dismiss the claim for that reason, he must refrain from dismissing it and force a compromise on the parties.

A third situation in which the Dayan is entitled to give judgment by way of compromise is considered by R. Mordechai Halevy in Responsa Darchei Noam, Even Ha'ezer, Section 18). Reference there is to special circumstances where the Dayan is incapable of checking the issue completely. In special circumstances when it is impossible to reach a just conclusion and examine the claims and issues properly, and so that the Dayan does not fall into error, it is proper that he compromise between the parties and not decide in favour of one of them.

The final type of case referred to in this context of a forcible imposition of a settlement by the Dayan, is the case where the determination of the suit requires an oath by one of the parties. In general, our sages have expressed reservations about swearing oaths. Even an oath about a truthful matter is not desirable, and it is certainly prohibited where it is a false oath. The imposition of an obligatory oath always embodies the risk, even if only a remote risk, that the oath maker will swear to a lie. Because of the gravity of the prohibition on swearing to a lie and the desire to refrain from swearing at all in so far as possible, it has been held that the Dayan is entitled in such cases where the determination of the suit necessitates making an oath, to opt for a compromise. The Dayan is entitled to impose a settlement and force it upon the parties in order that they do not swear those oaths. Generally, the Dayan

must opt for the compromise in these cases, although he retains a discretion whether or not to force the compromise or the oath upon the parties. One may assume that among his considerations, the Dayan will weigh the gravity of the oath and the level of risk that the oath maker will swear a false oath (see Shulchan Aruch, *ibid.*, paragraph 5; Rabbinical Court Decisions, Vol. 4, 317; Responsa Igrot Moshe, Hoshen Mishpat, Part A, Section 32 and more).

### The Nature and Contents of the Compromise

First, one should recall the principle in the Shulchan Aruch which imposes norms equivalent to those applicable to a Dayan upon a person who attempts to create a compromise between the parties, whether he is the Dayan himself or another external arbiter. The arbiter must act with complete objectivity and propose a fair compromise which takes into account the interests and claims of both parties. In the words of the Shulchan Aruch (*ibid.*, Paragraph 2):

"And in the same way as he is warned not to slant the trial so he is warned not to slant the compromise in favour of one of the parties more than the other."

The nature of the compromise is subject to the discretion of the Dayan in accordance with the circumstances of each case. However, the Halachic rule is that the compromise must "approximate the judgment". This means that the compromise must be as close as possible to the judgment which would have been delivered had no compromise been reached. Of course, this depends on the stage at which the compromise is offered and the reasons which caused the Dayan

to opt for the compromise. The later the compromise is in the trial proceedings - where the Dayan has before him all the facts and evidence - the greater the requirement that the compromise approximate the judgment. In contrast, when the compromise is made prior to the hearings getting underway or before a substantive hearing has taken place - it will be more difficult to provide a compromise which is close to judgment. This is also the case where the Dayan forces a compromise because of his inability to settle the dispute; in such a situation it is reason

**The nature of the compromise is subject to the discretion of the Dayan in accordance with the circumstances of each case. However, the Halachic rule is that the compromise must "approximate the judgment".**

able to assume that the compromise will tend to favour a middle approach. However, where the compromise is intended to preclude the swearing of an oath it should favour the party entitled to an oath and against the party due to make it (for example see the Rabbinical Court Decisions 4, 317 p. 320).

Generally, the Dayan must hold a hearing and hear the contentions of the parties even if the final determination is by way of compromise, so as to enable him to propose or conclude a compromise close to judgment. However, as noted, where this is impossible - either because of the inability to hold a hearing

or because of the inability to prefer one party's contentions over those of another, a settlement must be reached which will provide a balance between the parties.

In relation to a compromise close to judgment, the Posekim have referred to a ratio of 113 to 213. That is to say the compromise will lean towards the person whom the judgment would tend to favour - in a way which enables him to receive two-thirds of the financial value of his claim. However, this ratio is not mandatory and is merely used as a yardstick, each case is decided according to its own circumstances.

### Conclusion

1. The Halacha in Jewish Law is that the Dayan must attempt to bring the parties to agree that the case will be determined by way of compromise.
2. The Dayan must initiate a compromise, however, generally he is not entitled to force it upon the parties.
3. In special cases the Dayan may force a compromise upon the parties where it is impossible to decide the case in the normal way because of a doubt as to the law or the facts; where considerations of justice so require; where it is impossible to resolve the issue in contention; and in order to prevent the swearing of an oath.
4. The compromise must be fair and impartial.
5. As much as possible the compromise must approximate the judgment.

*This article is based on an answer which I gave within the framework of the "Shema" Project. Thanks are due to Rabbi Men- Batist, the head researcher of the Project for his helpful comments, I was also assisted by A Shoctman, "Legal Procedures" (Jerusalem, 1988) 208-216.*

# The Alleged Cover-Up of the Spy Israel Ber

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C.F. 19/1651 Issar Harel v. "Davar" Ltd., Newspaper for the Workers of Israel, Yoram Peri, Editor-in-Chief of "Davar", Daniel Bloch, Editor-in-Charge.

(Unpublished)

Before Judge S. Sirota

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## Precis

The Plaintiff, Issar Harel, one of the founders of Israel's Secret Service filed a defamation suit in respect of allegations that he had covered up for the spy Israel Ber. The District Court upheld his claim considering the relationship between freedom of expression and freedom of reputation and declaring that the latter was protected under the Basic Law - Human Dignity and Freedom.

## Liability

### A. The Claim

The Plaintiff, one of the founders of the Israeli General Secret Service (GSS), stood at its head from 1948 to 1952. From 1952 to 1963 the Plaintiff headed the Central Institute for Intelligence and Security (the Mossad) and was in charge of the security services of the State of Israel. The suit was filed in respect of an article published on 2 August 1991 in the newspaper "Davar", edited by Defendants 2 and 3. According to the Plaintiff, the article, written by David Ben-Yaakov, contained serious allegations and libels. Inter alia, the Plaintiff was accused of "covering up for the spymaster Israel Ber for 11 years" and "using violent illegal means and fabricating charges against the man who had accused Israel Ber". The article referred to two previous articles published in the Jerusalem Post, in 1984 and 1988, which referred to similar allegations by Ben Yaakov.

The Defendants refused to publish an apology in the manner required by the Plaintiff. The Plaintiff set his claim at NIS

### B. Grounds of Defence

1. According to the Statement of Defence - the publication was true and of public interest. The Defence claimed that the

publication was a critique of a literary work and expressed an opinion on the Plaintiffs history and actions. The Defence also claimed that reasonable steps had been taken to ensure that the publication was true and that they acted in good faith in accordance with their professional duty to their readership, without intending any malicious or other harm to the Plaintiff.

The Defence also alleged that the publication was no more than a reiteration of matters which had been published earlier and which had not been denied by the Plaintiff. and that therefore he had not suffered any damage. The Defendants stated that they had been willing to publish an apology and negotiations had been conducted for this purpose with the Plaintiff, however, as the Plaintiff had demanded publication of the apology as drafted by him, including defamatory words against the author of the article, his demand was rejected.

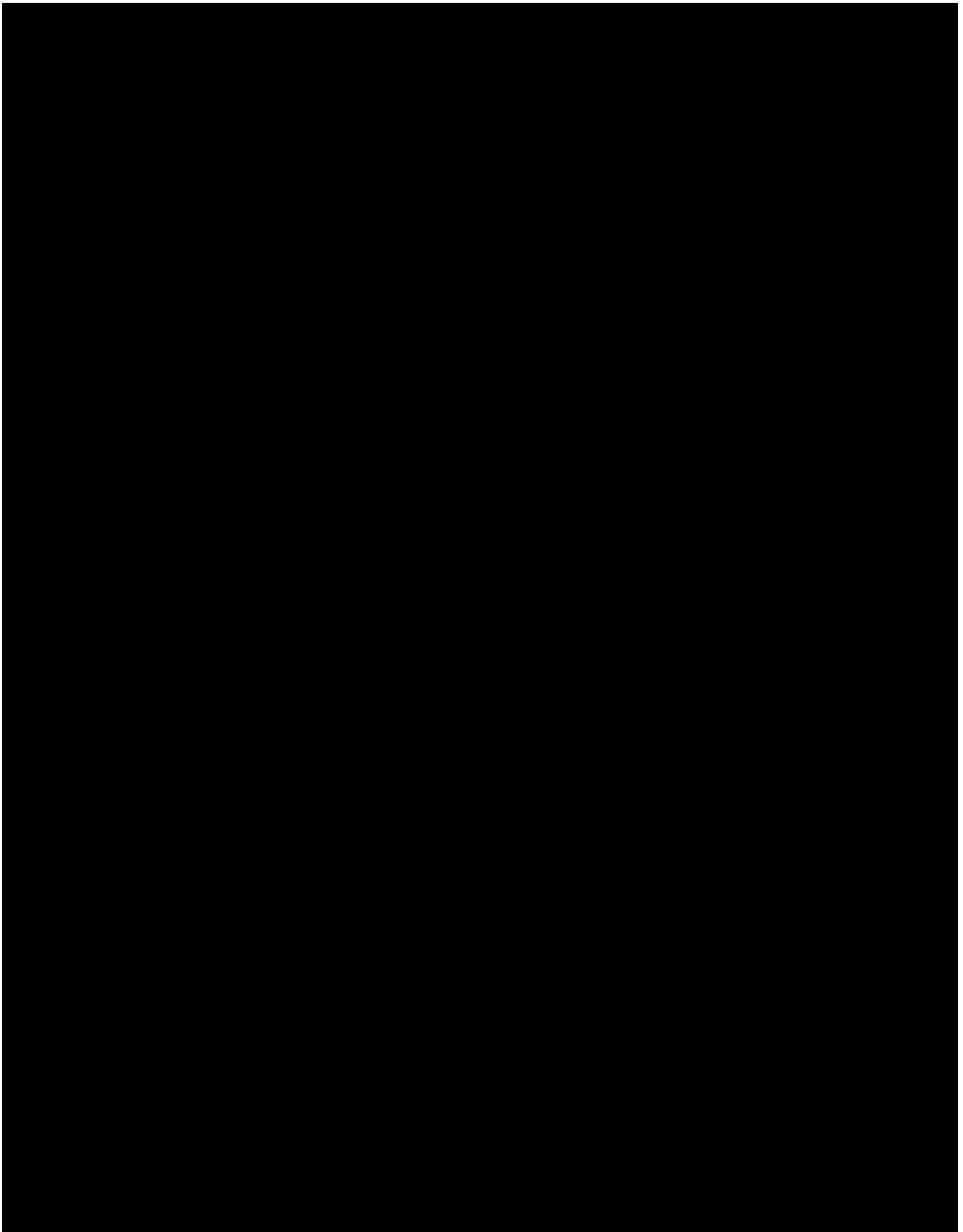
2. During the interlocutory stages before the Registrar it was decided to divide the claim into 2 stages: liability and damages. During the course of the hearing the Defendants retracted their claim that the publication was true. The Defendants relied on the defences set out in Sections 15 (4) and (6) of the Defamation Law, 1965 (hereinafter "the Law").

### C. Evidence

The court described Daniel Ben-Yaakov ("the Author") as argumentative, hot tempered and strange. It found that he was embittered him and filled with hate against the Plaintiff.

Regarding the alleged reprisals: the court found that even on the basis of the Author's evidence it is impossible to learn that the Plaintiff was behind the reprisals., if there were any. The Author had admitted that he had never met the Plaintiff and had never been told that Issar Harel was watching him. The court noted that the origin of the Author's wild allegations was the late exposure of Israel Ber who had been tried for espionage and disclosure of official secrets to Russian agents. Israel Ber died while still in prison.

The court found that the driving force behind the article was the unwarranted hatred of the Author for the Plaintiff: the article



has none of the characteristics of a book review.

The entire article was dedicated to the Israel Ber affair - one of the topics of the book purportedly being reviewed while attributing the late exposure of Ber's treachery to the Plaintiffs wrongful desire to cover up for him. The Author had relied on an article in the Jerusalem Post as a neutral source but failed to disclose to the public that he was referring to statements which had been quoted from him.

#### **Plaintiff's Evidence**

The Plaintiff had considered the Israel Ber affair in his book *Soviet Espionage - Communism in the State of Israel*. The Plaintiff did not commend himself for revealing the treachery of Ber but told the facts as they were, indicating the damage caused by the late revelation. The Plaintiff had warned the then Prime Minister David Ben Gurion about Ber, preventing him being given a military appointment in 1954 but failing to prevent his appointment as head of the History Branch in the Ministry of Defence. The court found as a fact that not only did the Plaintiff not cover up for Ber but he did everything in his power to narrow his possibilities of advancement in the face of Ber's many supporters. In 1961 strict operational surveillance was imposed on Ber although he was caught by chance.

#### **Other Witnesses**

None of the other witnesses supported the Author's claims of cover up and persecution.

#### **Daniel Bloch, Editor-in-Charge**

Nothing in his statements supported the Defence claims. He did not claim to have examined the article before sending it to print, nor to have checked its truth in any other way. Under cross-examination the Defendant admitted that the term "cover-up" was too severe and that the reference to unlawful violent means should have been deleted. He also agreed that the Plaintiffs picture above the article and subheading - which were the responsibility of the page editor - were improper.

The court concluded that the editor acted unprofessionally and superficially, inter alia, because he had not looked through the book under review and did not know that Ber's part in the book totalled 10 out of 600 pages.

The court found that the absence of current affairs in the article, the location of the Plaintiffs picture, with the addition of the slanderous subheading, raised an assumption of malice,

although, being a civil claim, the Plaintiff was not required to prove intent to harm (Section 15 of the Law).

The court emphasized that a different attitude is adopted towards an editor who publishes an article by a journalist whom he knows from his work in a newspaper, and an editor who publishes an article written by someone with whom he does not routinely work. In the latter case the editor must take special care.

#### **D. Findings**

The court held that there were no grounds for the slanderous statements in the article either in the matter of the Plaintiffs cover-up of the spymaster Israel Ber for a period of 11 years, or in the persecution of the Author because of his "disclosures". The Defendants had not succeeded in satisfying the burden of proof that they checked the Author's statements prior to publication. The Defendants had published the article under the pretext of a book review. The Author had used unrestrained language in attacking the Plaintiff - as appeared from the subheading which was the responsibility of the editor. The sinister spirit behind the piece could also be seen in the choice of the Plaintiffs picture to embellish an article which purported to be a "review" of a book written by others. It was no secret that the Author hated the Plaintiff and wished to hurt him. There was no support for the additional defence that they had relied on an earlier publication, and legally - reliance on an earlier publication is not a defence (*C/A 34/71 R. Benidon 26(1) P.D. 529*; *C/A 492/89 Slonin v. Davar & Others 46(3) P.D. 827*).

The interpretation of the defences provided in Section 15 of the Law was considered in *F/H 9/77 Electricity Co. v. Ha'Aretz 32 P.D. 337*. The majority opinion delivered by Justice Landau (adopting the minority opinion of Justice BenPorat in the appeal) has not been changed to this day, and the Supreme Court of Israel recently followed it (President Shamgar dissenting) in *C/A 334/89 46(5) P.D. 555* and *C/A 259/89 46(3) P.D. 48, 54*.

The court held that the inspiring words of Justice Landau are even more appropriate to the constitutional position today. His comments were made prior to the enactment of the Basic Law: Human Dignity and Freedom. Today the Basic Law gives primacy to a man's right to freedom and honour - Section 2: "No injury may be caused to the life, person or dignity of a human being as a human being"; Section 4: "Every person has the right to protection of his life, his person and his dignity". There is no express provision relative to freedom of speech or freedom of

reputation, however, the term "dignity of man" includes both.

The court accepted the primacy given to freedom of expression; stating that this right is so-well anchored in the rulings of the Supreme Court that in the name of this principle freedom has also been given to commercial publications which contain implied vulgarities (H.C.J. 606/93 Promotion of Initiatives and Publishers (1981) Ltd. v. Israel Broadcasting Authority and Others, Supreme Court Judgments Vol. 93(1) 1667). However, as with all freedoms, freedom of expression also gives rise to a duty not to turn it into freedom of contempt.

The court quoted President Shamgar statement concerning the primacy to be given to freedom of expression:

"Freedom of expression and the provisions of law which are intended to restrict it are not of equivalent value and identical, however, to the extent that accords with what is written, at all times preference must be given to the preservation of the right rather than to the legal provision which contains the restrictive tendency..." (majority opinion in 723/74 31(2) P.D. 281).

This formed the basis of President Shamgar's approach to the interpretation of Section 15(4) of the Defamation Law:

"Under my approach there is no need to seek support for this important point in the words of Sections 15 and 16. The criteria set out in Section 15 of the Law should properly be interpreted according to their substance and open policy and in a way which does not lead them to be imbued with constraints which are not requisite. Moreover, the presumptions created by the legislature in Section 16 and the burden of proof arising therefrom support the assumption that the legislature intended to ameliorate the position of the publisher, who does not act maliciously. The incorporation of a fact within a publication which is substantively an expression of opinion, does not therefore have to be interpreted restrictively .....

In contrast, Deputy President Landau held that freedom of expression should not be treated as a super-right:

"If we are to be precise, here the freedom of the citizen confronts the right of the citizen, i.e., his freedom to state what is in his heart and hear what others have to say, against his right not to have his honour and good name harmed; if there is any place to rank the two, I would place the right above the freedom... It appears that this is the way the drafters of the Basic Law Bill: Human Dignity and Freedom present the matter".

And his conclusion:

"The formula which places the right to a good name on an equal

footing with the right to life reminds us of the saying of our forefathers: 'whoever shames another in public, it is as if he is guilty of bloodshed'. Today we call this 'character assassination'... Thus, if freedom of expression is a super-right, how would we term the right of a man to defend his honour and good name?"

The court held that according to Justice Landau's interpretation there must be a reference to facts and the facts must be true. In respect of the expression of opinion, the publisher is given a defence in certain circumstances even if there was no truth in the opinion :

"the very intermingling of the two elements is likely to cloud the written words and allow the insertion of untrue defamatory facts into the expression of opinion. The writer must indicate on what facts he relies - and these must be accurate (except for accompanying details which do not cause real harm), and after indicating the facts, he may draw conclusions by expressing an opinion on them, however on condition that he explains and differentiates between the facts and the conclusion..." (p. 350).

## E. Conclusions

The court concluded that it could not release the Defendants from liability on the grounds of good faith, as they had not taken reasonable steps prior to the publication to ensure its truth - in accordance with Section 16(b) of the Law - and that the principle which guides the court is that the issue of good faith must be tested according to the sources of information examined by the publisher.

## Damages

The Defendants sought to reduce the damages to be awarded the Plaintiff on the following grounds:

1. **The difficult financial condition of the newspaper "Davar":** The court held that ridicule and slander have an impact and their distribution is not measured by the number of subscribers.
2. **Earlier publication:** The court held that a distinction must be drawn between prior publications and concurrent publications as occurred in the case of C/A 492/89 Slonim v. "Davar" and Others 46 P.D. 833, relied on by the Defendants. Thus, rules relating to the right of the injured party to choose a particular newspaper to sue are not relevant here. The previous publication in the Jerusalem Post can not act as a fig leaf for the Defendants.

3. **Absence of an apology:** The court sharply criticized the defendants' conduct and their failure to lessen his damage. The court noted that they could have published a more moderate apology, than demanded by the Plaintiff, or a unilateral apology in their own words.
4. **Passage of time:** The court found that the publication of the article after the passage of such a long period of time, and even if it once contained a grain of truth, is a serious matter - as was noted by Judge Zvi Tal (as he then was) in C/F 172/88 before the District Court of Jerusalem, in which he awarded a plaintiff NIS 500,000 and costs compensation for defamation. The defamatory article in that case had been published 30 years after the plaintiff had been convicted of murder. By law, the conviction had been "erased" 29 years after the conviction.
5. **Plaintiffs reputation:** The court listed some of the Plaintiffs impressive exploits:
  - A. The establishment of democratic norms in Israel's secret service.
  - B. The eradication of dangerous internal terrorism - the murder of Bernadott and Kastner.
  - C. The dissolution of left and right wing undergrounds.
  - D. Organizing protection of Jews around the world.
  - E. Organizing Moroccan Jews and smuggling thousands of them into Israel.
  - F. Dealing with Nazi war criminals.
  - G. Capturing Adolf Eichmann.
  - H. Exposing Russian spies.

...

And noted that any one of these feats on its own was sufficient to earn the Plaintiff a place in Israel's halls of honour. The court found that the venomous article coming from a reputable newspaper had caused the Plaintiff great mental anguish. Had the Defendants apologized immediately and set the record straight they would have saved the Plaintiff suffering, shame and the trial.
6. **Principles guiding levels of compensation:** Following the enactment of the Basic Law: Human Dignity and Freedom, a type of "constitutional revolution" has occurred with regard to certain of the basic human rights in Israel, including the right to reputation. In C/A 214189 43 P.D. 874, Justice Barak refers to the need to award suitable compensation to a person who has been injured by a defamatory publication. In the light

of the above, the court found that a higher ceiling of compensation should be set than was applied in the past, particularly in view of the long line of cases in which the Supreme Court of Israel has held that injury to a man's reputation is worse than injury to his person.

Defamation may be oral or in writing, worst of all is a defamation published in the media, see Justice Berenson's remarks in C/A 552/73 30(1) P.D. 589:

"I see no conflict between safeguarding the reputation of an individual by awarding fair compensation for publishing a libel in a newspaper and guaranteeing freedom of the press - the law has established reasonable boundaries... I would say the opposite. Because of the widespread dissemination of the press and its enormous power to cause harm, it requires greater restraint. If there is adequate self-restraint - all is well; if not, the courts will ensure it by awarding suitable compensation .....

In the instant case, the position was even more grave as the publication was motivated by pure malice.

7. **Compensation criteria in defamation cases:** The court noted that judges are free to award damages for pain and suffering in accordance with the circumstances. In this case damages would be awarded according to the nature of the libellor and the injured party in all the surrounding circumstances including the absence of an apology. At the advanced age of the Plaintiff an apology has great significance and in defamation cases advanced age is an aggravating circumstance which increases the level of damages.
8. **Plaintiff's damages:** The compensation must reflect the anguish as well as provide relief for damage due to the Plaintiff. At the same time a judicial policy must be adopted which does not limit freedom of speech. In all the circumstances the Plaintiff would be awarded NIS 300,000, costs and legal fees.



Following are the legal provisions considered in Issar Harel v. "Davar" Ltd., see p. 44.

## The Defamation Law 5725 - 1965

### Section 15(4)

In a criminal or civil action for defamation, it shall be a good defence if the accused or defendant made the publication in good faith under any of the following circumstances:

- (4) the publication was an expression of opinion on the conduct of the injured party in a judicial, official or public capacity, in a public service or in connection with a public matter, or on his character, past actions or opinions as revealed by such conduct.

### Section 15(6)

In a criminal or civil action for defamation, it shall be a good defence if the accused or defendant made the publication in good faith under any of the following circumstances:

- (6) the publication was a criticism of a literary, scientific, artistic or other work which the injured party had published or publicly exhibited, or of an act he had performed in public, or - in so far as pertinent to such criticism - an expression of opinion on

the character, past, actions or opinions of the injured party as revealed in such a work or act.

### Section 16(a)

If the accused or defendant proves that he made the publication under any of the circumstances referred to in Section 15 and that it did not exceed what was reasonable under the circumstances, he shall be presumed to have made it in good faith.

### Section 16(b)

The accused or defendant shall be presumed to have made the publication otherwise than in good faith if -

- (1) the matter published is not true and he did not believe it to be true; or
- (2) the matter is not true and he had not, prior to publishing it, taken reasonable steps to ascertain whether it was true or not;
- (3) he intended to inflict greater injury by the publication than was reasonable in defending the values protected by Section 15.

