

JUSTICE

The magazine of the International Association of Jewish Lawyers and Jurists

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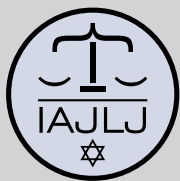
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הארגון הבינלאומי של עורכי-דין ומשפטנים יהודים (ע"ר)
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President's Message

I am honored and privileged to deliver the President's Message in this fiftieth edition of the legal magazine *JUSTICE*.

Since its first edition, *JUSTICE* has been the *shofar* (voice) of the IAJLJ and has gained the respect of the legal community.

Through its journal, the IAJLJ discusses current legal issues from a variety of points of view. Our authors, many of whom have an international reputation, are experts in their fields; recognizing this, we are frequently asked by various libraries and organizations to send editions of the magazine that contain specific articles. From the beginning our goal has been to aim for the highest standards.

In this regard, I want to take this opportunity to thank the members of the academic committee whose names are published in the masthead. Special thanks are due to Advocate Michal Navoth who is the editor-in-chief. I would like to thank Mr. Paul Ogden, our previous editor-in-chief for several years, for his contribution and devotion to the Association. Our new managing editor is Dr. Rahel Rimón, Adv. and we wish her success.

Presently the Middle East is undergoing a painful transformation. Through the UN Human Rights Council (HRC) the IAJLJ condemned President Assad of Syria and his government for the terrible massacre that began in Syria twelve months ago and is still continuing. (See text on page 46). The so-called Arab Spring has turned out to be a springboard for extremist Muslims with political aspirations and has caused chaos around the Arab world, contrary to widespread expectations at the beginning of this period. The hope for the introduction of democracy accompanied by the protection of human rights has turned out to be wishful thinking as has become evident in Tunisia, Libya and Egypt. The political future of these states is difficult to predict, but it is certain that the political restlessness will have ramifications for the entire Middle East including Israel. NGOs aspiring to promote democratic institutions and human rights, together with the IAJLJ, should come forward and make their voices heard in order to counter the extremists. An example of this move is the congress organized by UN Watch in which victims delivered a graphic picture of violations in their respective countries. The report of our representative to this congress, Advocate Gavriel Mairone may be found on our website.

For a long period following the death of Daniel Lack,

our late esteemed colleague who for many years served us devotedly and untiringly as our representative in the HRC, we did not actively participate in the Council's sessions. I am pleased to announce that after much searching we have now found a new representative, Ms. Tom Gal, and have renewed our participation; the IAJLJ's statement in the 45th meeting, 19th session may be viewed on our website.



During the autumn of 2011 we held a successful and emotional conference in Berlin. In my address I emphasized one of the main goals of my presidency, namely, strengthening the motivation of present members and recruiting new members to our ranks. In these troubled times of increasing antisemitism, notably, the recent terrible murder of innocent Jewish victims in Toulouse, and allegations of illegitimacy of the State of Israel, the need for a strong Association is paramount. I call upon all members of the IAJLJ to reach out to their colleagues to join us in achieving our vital goals. In this connection I would ask you to note the information concerning LINKEDIN and FACEBOOK in this edition of *JUSTICE*.

In response to requests from our members abroad, we sponsored a seminar jointly with the Schechter Institute for Jewish Studies in Jerusalem. The seminar dealt with the effect of Jewish religious extremism on Israeli society; numerous ideas were raised for future action in this area and the lectures attracted great praise from the participants. Continuing in this vein, our next conference which will be held in collaboration with The Institute of Comparative International Law in Lausanne from October 31, 2012 to November 2, 2012 will deal with "Religion in a Multicultural Society". We have scheduled prestigious lecturers for this conference and it promises to be an outstanding event. I look forward to welcoming you in Lausanne.

This is the place to call your attention to our improved website where our activities are listed and where you can find my end of year report as well as notifications of future events.

Last, but not least, I would like to extend my deep gratitude to the Nadav Foundation. Its generous support has enabled us to publish this journal and conduct our other important activities.

Irit Kohn
IAJLJ President

Holocaust Denial and Freedom of Speech in the Internet Era: Canada a Case Study

David Matas

Three basic approaches can be used to combat hate on the Internet in general, and Holocaust denial in particular: using the Internet to post and send information exposing Holocaust denial for what it is; interfacing directly with Internet businesses so that these businesses can prevent the use of their services for Holocaust denial; and the enactment and enforcement of legislation.¹ Using Canada as a case study this article addresses the third option, the enactment and enforcement of legislation.

For many years, Canada has implemented a wide variety of laws opposing incitement to hatred. Historically, human rights codes have proved to work the most effectively, primarily because they were usable and used when other laws were not applied and consequently they have had a real impact on stopping the spread of hatred in Canada.

More recently, though, these laws have been abused in order to harass people who have legitimately exercised their rights to free speech. This harassment has led some to question the value of these laws.

The view taken in this article is that the problem lies not so much in the principles of the laws as in the procedures for implementing them. These procedures need to be changed to prevent their abuse.

Successes

A direct link exists between the collapse of the Heritage Front,² the Ku Klux Klan,³ the Aryan Nations⁴ and other extreme right-wing groups in Canada on the one hand, and the work of human rights commissions and tribunals, on the other hand. The latter have acted against individuals and groups to combat hatred when no other state institution could meet the task.

A. Malcolm Ross

Malcolm Ross was a former elementary school teacher who believed there was a Jewish conspiracy to control the world. For Ross, this hatred was not just a private opinion; it was a public cause. Although Ross did not teach his hatred in school, his mere presence in a publicly funded classroom was a highly visible symbol of

antisemitic bigotry and caused a stir.

In Canada, it is impossible to launch a private prosecution for the criminal offence of incitement to hatred. The prosecution requires the consent of the Attorney General. Successive Attorneys General in New Brunswick refused to consent to the prosecution of Malcolm Ross. Ross's employer, New Brunswick School District 15, warned Ross against further publication of his views but did nothing further.

David Attis, a parent of three Jewish students in the school district in which Ross taught, filed a complaint with the New Brunswick Human Rights Commission in April 1988 claiming that, by tolerating Ross, the school board was discriminating against his children on the basis of ancestry or religion. In August 1991 a Board of Inquiry consisting of one member, Brian Bruce, found that the school board had discriminated against the Attis children by creating a poisoned environment in the school district and ordered the school board to remove Ross from the classroom. Ross challenged the order in the courts as a violation of his rights to freedom of expression and religion under the Canadian Charter of Rights and Freedoms.⁵ In April 1996, the Supreme Court of Canada upheld the order.⁶

B. Ernst Zundel

Ernst Zundel used the mail to disseminate Holocaust denial propaganda. Holocaust survivor Sabina Citron



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1. See David Matas, *BLOODY WORDS: HATE AND FREE SPEECH* (2000).
 2. *Canadian Human Rights Commission v. Heritage Front* (1994) 3 F.C. 710, Tremblay-Lamer J.
 3. *League for Human Rights of B'nai Brith Canada v. Manitoba Knights of the Ku Klux Klan* T.D. 15/92, December 16, 1992.
 4. *Nealy et al v. Johnston et al* (1989), 10 CHRR 6450.
 5. Constitution Act, 1982, Schedule B - Canadian Charter of Rights and Freedoms, 1982,
 6. *Ross v. New Brunswick School District No. 15*, (1996) 1 S.C.R. 825.

complained about Zundel to the Minister responsible for the Post Office. The Minister issued an interim prohibitory order on the grounds that Zundel was using the mail to commit the offence of wilfully promoting hate propaganda. A Board of Review recommended lifting the order, which the Minister did in October 1982.

Sabina Citron sought the consent of the Attorney General to prosecute Zundel for wilfully propagating hatred. The Attorney General refused his consent.

Sabina Citron then launched a private prosecution against Zundel under a provision of the Criminal Code that prohibited wilful publication of news that the publisher knew to be false and that caused or was likely to cause injury or mischief to a public interest. The Attorney General of Ontario took over the prosecution. Zundel was convicted and sentenced to nine months in prison.

Zundel appealed. In August, 1992, the Supreme Court of Canada upheld his contention that the provision of the Criminal Code under which he had been convicted was unconstitutional as it violated the guarantee of freedom of expression.⁷

Sabina Citron next tried the Canadian Human Rights Commission complaining that Zundel had violated the prohibition in the Canadian Human Rights Act⁸ against promoting hatred “telephonically” because of an Internet website hosted in the United States called the Zundelsite. In January 2002, the Tribunal found against Zundel.

In May 2003, the Government of Canada issued a certificate that Zundel posed a risk to the security of Canada, for the purpose of removing him from Canada. Zundel challenged the reasonableness of that certificate in Federal Court. In January 2005, Mr. Justice Blais, in upholding the reasonableness of the certificate, relied, in part, on the Canadian Human Rights Tribunal decision against Zundel.⁹

Zundel was deported to Germany. There he was convicted of Holocaust denial in February 2007 and sentenced to five years in prison. He was released in March 2010.

C. Terry Long

Terry Long of the Church of Jesus Christ Christian - Aryan Nations used the telephone to communicate a sequence of racist, antisemitic telephone messages.¹⁰ In response, B'nai Brith Canada approached the Attorney General of Alberta for a prosecution. It asked the *Red Deer Advocate* not to run the ads containing the Aryan Nations phone number. It complained to the Alberta Press Council about the ads in the *Red Deer Advocate*. It approached the Alberta Telephone Company to take action against the use of its phones for hate propaganda. None of these

avenues was effective. Only the Human Rights Commission was prepared to act.

In May 1989, the Human Rights Tribunal ordered Terry Long to cease communicating the hate message by phone. He complied with the order.¹¹

Abuse

A. The *Western Standard*

The Danish newspaper *Jyllands-Posten* asked twelve cartoonists to draw cartoons of the prophet Mohammed as a test of whether the threat of Islamic terrorism had limited freedom of expression in Denmark. The paper published the cartoons in September 2005 and the Alberta publications *Western Standard* and *Jewish Free Press* republished them. The Edmonton Council of Muslim Communities filed a complaint in February 2006 to the Alberta Human Rights Commission about the cartoons.

Of the twelve Danish cartoons that Levant republished in the *Western Standard*, the one which caused the most controversy was a drawing of the head of the prophet Mohamed with a lit smoking fuse of an explosive poking out of his turban.

To call all Muslims “terrorists” is a slur against Muslims and a legitimate subject of complaint to a human rights commission or tribunal. It is an attack against individuals based on their religious affiliation. However, a criticism of the prophet Mohamed is more in the nature of an attack against Islam than an attack against Muslims, more blasphemous than hate speech.

Moreover, the Organization of Islamic Conference endorses a definition of terrorism which excludes from the definition a common form of terrorism; targeted attacks on innocents where the attacks are committed in a “people’s struggle including armed struggle against foreign occupation, aggression, colonialism and hegemony aimed at liberation and self determination”. In practical terms, this means that targeted attacks on innocent Jewish civilians in Israel is permissible.

Though this definition of terrorism is highly politicized, the Organization of Islamic Conference justifies it by relying on Islam. The Charter of the Organization asserts that the organization bases its stances on Islamic values. It is hypocritical, on the one hand, to assert that terrorism in the name of a “people’s struggle including armed struggle against foreign occupation, aggression, colonialism

7. *R. v. Zundel* (1992) 2 S.C.R. 731.

8. Canadian Human Rights Act, R.S., 1985, c. H-6.

9. *Re Zundel* 2005 FC 295.

10. See *supra* note 4, p 15.

11. *Id.*

and hegemony aimed at liberation and self determination” is an Islamic value and, on the other hand, to complain about a cartoon that illustrates Islam being hijacked by terrorism through the depiction of an explosive peering out of a turban worn by the prophet Mohamed. The cartoon, in this context, is fair comment.

The Alberta Human Rights Commission has the power to dismiss a complaint it considers without merit at any time.¹² The Commission dismissed the complaint of the Edmonton Council of Muslim Communities as being without merit more than two years after the Commission received it. A complaint without merit should have been dismissed far more quickly than that.

B. Maclean's

The Canadian Islamic Congress (CIC) filed a complaint against *Maclean's* magazine with the British Columbia Human Rights Tribunal, the Ontario Human Rights Commission and the Canadian Human Rights Commission for publishing an excerpt from Mark Steyn's book, *America Alone*¹³ in October 2006. The Canadian Human Rights Commission dismissed the complaint on the ground that the excerpt was polemical but not extreme. The British Columbia Human Rights Tribunal similarly found that the article was not likely to expose the complainants to hatred.¹⁴

In April 2008 the Ontario Human Rights Commission dismissed the complaint on the basis that the Commission did not have jurisdiction to consider it. Chief Commissioner Barbara Hall, in announcing the dismissal, accused the *Maclean's* excerpt of Steyn's work of “portraying Muslims as all sharing the same negative characteristics, including being a threat to the West”. The statement was problematic on both procedural and substantive grounds. It came out of the blue without any opportunity for prior submissions. Additionally, the Commission did not point to anything in the *Maclean's* article that justified the condemnation.

The Commission failed to distinguish between criticism of people based on their religion and criticism of a political ideology derived from a religion. The Commission did not differentiate between condemnation of Muslims and condemnation of Islamism or political Islam. The Commission decried Islamophobia without reference to the Organization of Islamic Conference's definition of Islamophobia as defamation of the Islamic religion, as well as without reference to the literal meaning of the word. Literally, Islamophobia means fear of Islam, not fear of Muslims.

C. B'nai Brith Canada

In February 2004, the Executive Director of The Islamic Social Services Association of the United States and Canada

Shahina Siddiqui filed a complaint against B'nai Brith Canada with the Manitoba Human Rights Commission. The complaint related to a seminar held in October 2003 which she claimed had been biased against Muslims.

The seminar was directed at first responders to terrorist attacks against the infrastructure of our civil society. The presentation was made by the US-based Higgins Counterterrorism Research Centre, and repeated in several cities in Canada.

No one who attended the seminar filed a complaint with the Manitoba Human Rights Commission. Shahina Siddiqui herself was not present at the Winnipeg seminar but based her complaint on what she had been told about the seminar. There were no complaints to B'nai Brith Canada or to human rights commissions from anyone attending the seminars presented by Higgins in any of the other Canadian cities.

The evidence of the alleged violation came from sources who were never disclosed to B'nai Brith, despite a disclosure request. The complaint itself referred only to “comments from some in attendance” without indicating who or how many those “some” might be.

B'nai Brith did not participate in the Winnipeg seminar. A B'nai Brith representative attended only briefly. None of the alleged comments was made in the presence of the B'nai Brith representative. B'nai Brith was unable to confirm, from its own investigations which involved questioning several people who attended the event, that the alleged offending remarks were ever made.

B'nai Brith representatives did attend similar seminars in other cities in their entirety, but did not hear anything untoward. After the complaint was more than four years old, the Manitoba Human Rights Commission decided to appoint an independent expert to make a “determination” on the merits of the complaint. B'nai Brith Canada asked the Commission to indicate the name of the expert and to disclose the information provided to the expert so that it could correct inaccuracies in materials submitted and fully respond to the complaint. The Commission refused disclosure of the information requested “at this time” and indicated that the information requested would be disclosed later, before the Commission decided on the complaint, but only after the expert had provided his/her written report.

12. Human Rights, Citizenship and Multiculturalism Act (Alberta, Ca.), Section 22(1).

13. Mark Steyn, *AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT* (2006).

14. *Elmasry and Habib v. Roger's Publishing and MacQueen* (No. 4), 2008 BCHRT 378.

The complaint was dismissed in March 2009, more than five years after it had been made; the reason was “no reasonable basis in the evidence” to support the complaint.¹⁵

The Manitoba Human Rights Commission has the power to dismiss a complaint which it considers frivolous or vexatious. Yet, it took over five years, with this power, to dismiss a complaint which had no reasonable basis in the evidence.

D. The Russian ban

Although this article focuses on Canada, I have a duty to disclose that something I wrote was banned in Russia as being extremist literature. In August 2008, the Pervomayskiy court of the city of Krasnodar banned a report I had co-authored with David Kilgour which concluded after investigation, that Falun Gong practitioners were being killed for their organs. In August 2008 the ban was upheld on appeal by the Krasnodar regional court.

The report was published in three versions, first in July 2006, second in July 2007 and third in book form under the title *Bloody Harvest* in November 2009. The first and second versions were translated into Russian and distributed in Russia.

Falun Gong is a set of exercises with a spiritual foundation which was banned in China in 1999 because its increasing popularity led the Communist Party to fear for its ideological supremacy. Following the banning, practitioners of Falun Gong were arrested and asked to renounce the practice in writing. Those who refused to renounce it, even after torture, disappeared in their hundreds of thousands into the Chinese gulag, a network of re-education through labour camps. These camps became a vast forced organ donor bank.

The Russian ban was based on an opinion by a person whom the court considered an expert, who stated that what we wrote:

can create for the readers a negative image of China, its social and political system, representatives of authorities, medical workers, military, etc.

Reforms

Procedural reforms are inevitably contextual. What is proposed here for Canada would not necessarily apply globally. However, the Canadian human rights system prohibiting hate on the Internet needs at least the following changes to protect it from the abuse we have seen:¹⁶

Costs

One element of justice is equality of arms. Where

commissions interpose between the complainant and the target, complaints are cost free; however, the target may be put to great expense. In such a case, the principle of equality of arms is not respected.

Human rights commissions and tribunals need to have the power to award costs to the winning side. Where a commission has assumed conduct of a case on the side of the complainant but then loses at the tribunal level, the tribunal should have the power to award costs not just against the complainant but also against the commission.

Decoupling screening and investigation

Human rights commissions have been overwhelmed by complaints. Investigating and then conducting them have caused substantial delays. In British Columbia the response has been to abolish its commission and instead allow complainants to directly access the tribunals. In Ontario, the commission survived, but it has been taken off case work and complaints will go straight to the Tribunal.

These reforms, while dealing with a substantial problem, have been misplaced. The screening and conduct functions of commissions need to be decoupled. Commissions should be screening complaints in every case. Additionally, they should have the power to take ownership of a case, its investigation and pursuit in selected cases as they see fit.

Consent of Attorney General

Whether or not obtaining the state’s consent is necessary or advisable for a criminal prosecution for incitement to hatred, it is certainly advisable and may even be legally necessary, by Canadian Charter of Rights and Freedoms standards, for civil proceedings. For, once a proceeding is civil, the standard of proof is less. In a civil proceeding, proof on a balance of probabilities is sufficient, rather than the criminal standard of proof beyond a reasonable doubt. The higher standard in criminal proceedings serves as its own brake on frivolous proceedings. A consent requirement for civil proceedings is necessary, at least in practice if not in law, to compensate for the lower standard of proof.

15. Joseph Brean, *No basis’ for B’nai Brith hate charge*, National Post, March 12, 2009.

16. See David Matas, *Hate jurisdictions of human rights commissions*, available at www.bnaibrith.ca (last visited March 13, 2012).

Choice of forum

As the complaint against *Maclean's* showed, it is possible to pursue what is essentially the same complaint in several Canadian jurisdictions simultaneously. Each forum addresses the complaint as a matter of substance, without regard to the fact that the same complaint has been filed elsewhere.

Multiple frivolous complaints against the same respondent, coupled together with the absence of power of the tribunals to award costs to the successful side, compound the injustice. Targets of frivolous complaints wrack up costs fighting off the same complaint in several fora at one and the same time. With the advent of the Internet, this risk escalates exponentially, because the same material is available everywhere at once.

The ability to make several complaints at once in different jurisdictions against the same target means that the complaint power can be used as a way of harassing the object of the complaint. That avenue of harassment needs to be cut off. Complaints should be heard in one forum only. The appropriate forum should be the one with the most substantial connection to the complaint and the parties. No other jurisdiction should have the power to entertain essentially the same complaint.

Hear both sides

Human rights commissions and tribunals should follow due process. The general power which commissions have to promote human rights should not be used to comment on the merits of complaints over which they have no jurisdiction, particularly when they have not heard from the other side on the merits.

Altogether apart from its content, the reaction of the Ontario Human Rights Commission to the complaint against Steyn and *Maclean's*, commenting on the substance of the complaint at the same time as the complaint was dismissed on jurisdictional grounds, was inappropriate. Even if one puts aside the wrongheadedness of the content, the procedure was unfair.

The right to know your accuser

It would seem basic to a respect for human rights that a person should not be asked to answer anonymous accusations based on rumour. The then Canadian Privacy Commissioner John Grace, in his testimony before the Standing Committee on Public Accounts on December 12, 1989, stated that one of the rights conferred by the Privacy Act:

is to know what accusations against us are recorded in government files and who has made them. Whether such accusations are

true and well intentioned, as some may be, or false and malicious, as other may be, it is fundamental to our notion of justice that accusations not be secret nor accusers faceless.¹⁷

Yet, there is nothing in the Human Rights Acts or Codes preventing the pursuit of anonymous complaints. A complaint can be based on rumour, and the source of the rumour need not be disclosed to the target of the complaint. The legislation should require that those who make an accusation be identified to the target of the complaint.

The right to disclosure

As fundamental to justice as the right to know your accuser is the right to know your judge and the case against you and to have an opportunity to respond. In substance, the Manitoba Human Rights Commission case against B'nai Brith Canada violated these basic principles. The law must provide that whenever a human rights commission engages an independent expert to advise on a complaint, the identity of the expert and the materials disclosed to the expert must be made available to the parties with an opportunity to respond before the expert's report is written.

Conclusion

The abusive Canadian complaints set out here all came from leaders of the Canadian Islamic community. Of the three sets of complaints, one set was made by the Edmonton Council of Muslim Communities, a second set by the Canadian Islamic Congress and the third by the Executive Director of The Islamic Social Services Association of the United States and Canada.

Domestically, this pattern echoes the international behaviour of the Organization of Islamic Conference. The Organization of Islamic Conference (OIC) has a political agenda which includes banning blasphemy of Islam, tolerating terrorist acts against Jewish civilians in Israel, and anti-Zionism.¹⁸ All of these agenda items are antithetical to human rights. Yet, the OIC, turning human rights on its head, uses its geo-political weight and voting power to pursue this agenda through the United Nations human rights mechanisms.

17. Minutes of Proceedings and Evidence on the Standing Committee on Public Accounts, Issue No. 20 (12/12/89), at p. 10.

18. See David Matas, *Reforming the Reformed United Nations Human Rights Council*, available at www.bnaibrith.ca (last visited March 13, 2012).

It is impossible to enhance respect for human rights through reliance on people who do not believe in human rights. The failure of the United Nations human rights system and the Russian courts cannot be blamed on procedure or structure. The best standards and systems in the world can be corrupted by people who do not believe in the standards and want to divert the systems to serve their own ends. The fact that the OIC or Russia can corrupt human rights standards does not reflect on the standards, just on the corrupters.

Nonetheless, the Canadian experience shows that the problem of abuse of human rights standards and mechanisms is not easily solved. Even rights respecting states can see their systems go awry under the assault of complainants whose complaints have little or nothing in substance to do with human rights, albeit the complainants themselves may be acting out of what they see as a human rights motivation.

Unless proper procedures are in place, human rights systems can become vehicles for human rights abuse. We cannot assume that every complaint to a human rights

system is well founded or even well intentioned.

In addressing the construction of legal structures to combat incitement to hatred we must avoid two extremes. We must avoid the construction of systems which become so easy of access and so hard to defend against that they become vehicles for enforcing conformity of discourse, for shutting down free speech. We must also avoid the dismantlement of all legal protection so that incitement to hatred has free rein.

We need to approach the construction of human rights systems generally and systems combatting hate on the Internet in particular from a double perspective. We need to have systems effective enough to protect targets of incitement to hatred and we also need systems which are impermeable enough to withstand the assaults of those with little evidence or their own agendas which have little or nothing to do with human rights. ■

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Holocaust Denial as Racial Vilification; Freedom of Speech and the Internet: The Australian Experience

Stephen Rothman

The Jewish Community in Australia: Some Salient Facts

Somewhat unusually, the Jewish community in Australia can specify the exact date on which it commenced. There were 16 Jewish convicts on the First Fleet, which landed in Sydney Cove on January 26, 1788.

British colonisation of Australia commenced partly as a consequence of the American War of Independence and involved the transportation of petty and political prisoners to Australia. Just over 300 convicts arrived in the First Fleet. That was probably the moment at which the Jewish community reached its highest percentage of the non-indigenous population. A significant number of convicts were Irish “political prisoners” and many convicts were transported for offences for which, nowadays, no conviction would be recorded. For example, a famous Jewish convict in the First Fleet, Esther Abrahams, was transported for shoplifting some lace.

There developed an immediate and enduring relationship between members of the Jewish community and members of the Catholic community, each of which was a minority religion and culture within an outpost of a colonial power with an established religious bias.

With Governor Macquarie’s arrival in Australia (then called New South Wales, the other states of Australia being formed in and after the 1850s), interesting developments occurred with repercussions to the present day. Within the first week of European settlement, illegal religious ceremonies occurred. With the arrival of Governor Macquarie, different religious services were legalised, even before this occurred in the United Kingdom. Further, Governor Macquarie emancipated the convicts, forming the basis for the embryonic nation that would develop. For example, despite the discrimination against Irish Catholics in general British culture, he recognized St Patrick’s Day as an official public holiday in 1810.

Fast forward 90 years. New South Wales appointed a Jewish Chief Justice. He resigned after two weeks because

of the level of resistance to his appointment and leadership, apparently due in part to antisemitic sentiment.

Fast forward a further 60 years to 1938. Australia’s Jewish community leadership sought to be more British than the British. Thus, for example, the first Australian-born Governor General, also a Chief Justice of Australia and the only Jewish judge in the history of the High Court of Australia, opposed the partition of the British Mandate; opposed the establishment of the State of Israel; and opposed immigration of “foreign Jews” from Europe to Australia.

At that time, Australia conducted the so-called “White Australia Policy”, which discriminated against non-European, non-Christian immigration.

Nevertheless, the relationship between the Catholic Church and non-establishment members of the Jewish community continued, and the influence of the Catholic Church on the Australian Labor Party was significant. The conservatives in Australia (then represented in part by a political party called the United Australia Party) opposed European Jewish immigration to Australia, and the UAP Government infamously gave instructions for the Australian delegate to the 1938 Evian Conference to say: “We [Australia] do not have a racial problem and we do not want to import one.”¹

At the end of the War, the ALP was in government and established Australia’s first Ministry for Immigration. Notwithstanding the White Australia Policy, the Federal government took steps to circumvent immigration restrictions, and it allowed a relatively large number of Jewish immigrants into Australia. Many displaced persons of various ethnic backgrounds immigrated. Some had a history of antisemitic sentiment and activity, and some were even war criminals. The faulty immigrant-selection process was due, at least partially, to the desire to expedite



1. “Australian Memories of the Holocaust”, available at: http://www.holocaust.com.au/mm/i_australia.htm

the entry of Holocaust survivors.

The Government's wartime Foreign Minister chaired the UN Committee on Partition and became president of the third session of the United Nations General Assembly.² Australia campaigned for the establishment of the State of Israel, and support for the state is now extremely strong, bipartisan and constant. Such support is also strong amongst the general population, despite significant anti-Israel sentiment in the press.

Due to Australia's post-war immigration policy, Australia's Jewish community, compared to others of the Diaspora, comprises the highest percentage of Holocaust survivors (and descendants). But the community is very small. There are between 120,000 and 150,000 Jews in Australia, living mostly in Melbourne and Sydney.³

A further matter that needs to be highlighted, for present purposes, is the unusual, if not unique, nature of Australia's robust democracy. Among its peculiar features are the following:

First, we have compulsory voting. All citizens are required to vote; failure to vote without reasonable excuse may result in prosecution and a fine. Secondly, we have a multiculturalism that is the opposite of a "melting pot" approach. Differences in ethnic cultures and practices are encouraged, provided that they are perceived to be consistent with "the Australian way of life". Australia is tolerant of idiosyncratic behaviour, as long as it does not interfere with the enjoyment of others. Thirdly, there is an egalitarian attitude that is often expressed as resistance or irreverence to authority. These "oddities", I might add parenthetically, are, in my view, a result of some of the activities of Governor Macquarie and the strong influence of the Catholic Church in Australia. Whereas the US considered the 1960 election of a Catholic president to be a groundbreaking event, it has not been deemed unusual or noteworthy to have a Catholic Prime Minister in Australia.

Lastly, Australia does have a written constitution, but no bill or charter of rights. The Australian Constitution owes much to the US model both in what it does and does not contain. The Australian Constitution has no express guarantee of freedom of speech. It does guarantee democratic government and an independent judiciary. Our Federal Supreme Court, called the High Court of Australia, has determined that freedom of speech is an implied guarantee in the Constitution, at least when such speech is part of, or aimed at, elections or public agitation for ideas and government policy.

Jewish and Shoah (Holocaust) education

The Jewish community has expended significant resources on education in the community. Approximately

60% of Jewish children attend Jewish day schools, which are subsidized, in varying degrees, by the Federal Government.⁴ Further, the community offers Hebrew language to State-run schools with a significant Jewish population, and Jewish studies and history classes to Jewish students at those schools before and after normal school hours.

Additionally, the Jewish community has succeeded in enshrining the Shoah as part of the compulsory curriculum for all students in Australia. This, of course, depends on the education of teachers and the resources available to them. Therefore, we have now also professionally developed a full teacher guide and resource kit for the use of all schools in Australia, and we subsidize teacher-education programs at Yad Vashem.

Freedom of Speech Issues in Australia

Freedom of communication... is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision.

(Australian Capital Television v. Commonwealth
(1992) 177 CLR 106, per Mason CJ at 140).

This passage best summarizes the rationale of the judgments guaranteeing Constitutional protection to communications about political matters. The adumbration of the guarantee was a controversial expansion of guaranteed implied rights in the Constitution. For some small period afterward, with a differently constituted Court, the reach of the guarantee was seemingly narrowed. The High Court, particularly under Gleeson CJ, took a more textual approach to the guarantee. The High Court sought to narrow the approach by making clear that the question to be asked was not what was required by representative and responsible government but, rather, what the terms and structure of the Constitution prohibit, authorise or require: *Lange v. Australian Broadcasting Commission* (1997) 189 CLR 520 at 566-7.

The Court made clear that laws prohibiting misleading voters on how to vote or how to vote for particular candidates were legitimate, since they facilitated the voting

2. Evatt, Herbert Vere (Bert) (1894–1965) by G. C. Bolton.
3. <http://www.ecaj.org.au>.
4. Australian Council of Jewish Schools, see <http://acjs.edu.au>.

process (see *Langer v. AEC* (1996) 186 CLR 302), but laws prohibiting “untruthful” campaigning were probably not legitimate. Further, the impact of a robust labour history and political agitation seemed to have led to a strengthening or broadening of the guarantee by construing the protected activities to extend well beyond the written or spoken word to strikes and agitation more generally and to untruthful, irrational and misleading material:

The Constitutional implication does more than protect rational argument and peaceful conduct that conveys political and governmental messages. It also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications. To many people, appeals to emotions in political and government matters are deplorable or worse. That people should take this view is understandable, for history, ancient and modern, is full of examples of the use of appeals to the emotions to achieve evil ends. However, the use of such appeals to achieve political and government goals has been so widespread for so long in Western history that such appeals cannot be outside the protection of the constitutional implication. (*Lange v. ABC, supra*, per McHugh J).

Reference was made in the judgments to the famous lines in *New York Times v. Sullivan* (1964) 376 US 254 and *Roth v. US* 354 US 476 regarding “unfettered interchange of ideas”, “vigorous advocacy” and “abstract discussion” and “to the national commitment to robust ... unpleasantly sharp attacks on government and public officials”. The High Court also extended these concepts to defamation issues, stating that qualified privilege, as a complete defence to defamation, applied where public policy dictated that the duty and right to communicate overrode the private right to protection of reputation: *Roberts v Bass* (2002) 212 CLR 1; *Cush v. Dillon* [2011] HCA 30 at [12].

The latest authority in this area, from the High Court at least, is *Coleman v. Power* (2004) 220 CLR 1 in which the High Court declared invalid legislation that limited or made illegal politically-motivated communication because it was conduct that was insulting unless the limitation was based on the conduct being intended or reasonably likely to involve a violent response or induce violence. Currently, there is before the Court of Criminal Appeal in NSW a challenge to a conviction for sending insulting and offensive mail on the basis of the foregoing protections. The mail in question is a series of letters to the next of

kin of deceased or injured Australian soldiers in Afghanistan accusing the soldiers of being murderers. I can make no further comment because it is a matter before a court comprised of judges of my court.

Racial vilification and the *Racial Discrimination Act*

Australia has a legislative scheme that prohibits racial discrimination and renders racial vilification unlawful. There are State enactments and Commonwealth (Federal) legislation, which have a similar effect. I will deal with the Federal scheme (*Racial Discrimination Act* 1975 (Cth)).

Part IIA—Prohibition of offensive behaviour based on racial hatred

18B Reason for doing an act

If:

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done because of the person’s race, colour or national or ethnic origin.

18C Offensive behaviour because of race, colour or national or ethnic origin

- (1) It is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act* 1986 allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public; or

- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

As can be seen from the foregoing, any conduct that is performed in public; is reasonably likely to offend, insult, humiliate or intimidate members of the group against whom it is directed; and is done because of the race or ethnic origin of the group is unlawful and orders may be issued to prevent the conduct continuing and, although strictly limited in amount, to compensate for the damage done by the conduct.

The Jewish community constitutes a race and ethnic group, according to binding authority in Australia, following similar judgments in the UK and elsewhere: see *Miller v. Wertheim* [2002] FCAFC 156 at [14]; *Jones v. Scully* [2002] FCA 1080 at [110] - [113], per Hely J; *Jones v. Toben* [2002] FCA 1150 at [68] - [69], per Branson J; and *King-Ansell v. Police* [1979] 2 NZLR 531; *Mandla v. Dowell Lee* [1983] 2 AC 548 at 564; *Commission for Racial Equality v. Dutton* [1989] 1 QB 783 at 799. As a consequence, conduct, including the publication of material that is offensive to the members of the Jewish community is, if the acts are performed because of the race or ethnicity of Jews, unlawful.

This is not the place for a general discussion on some of the more controversial judgments on this legislation. It is sufficient to note that there are some on which reasonable persons might differ as to their unlawfulness.

Very recently, a judgment of the Federal Court has been the subject of criticism because it forced a journalist to retract comments about the activities of persons who, he alleged, were not legitimately described as indigenous. This was an issue that arose from the operation of the defences to the *prima facie* unlawfulness to which I now come.

The important issues so far are that the legislation outlaws racial vilification and exempts from the prohibition statements made reasonably and in good faith in an artistic performance, or in a genuine discussion for academic, scientific, artistic or other genuine purpose, which would clearly include political debate, or in fair comment on an issue of public interest, if the comment be the expression of a genuine belief of the person making the comment.

The last mentioned aspect of the available defences reiterates certain issues that arose in the common law defences to defamation: see *Bellino v. ABC* [1996] HCA 47; 185 CLR 183 and particularly footnote 108 thereto. Public interest may be difficult to define, but it is not based on a generalisation that does not include a reason to examine and vilify the target group. So, in the case of Holocaust denial, public interest in truth in history is not a reason in the "public interest" for this purpose unless some proven conduct of the Jewish community relevantly relating to the Holocaust was the underlying rationale for Holocaust denial.

Nevertheless, for the purpose of the current aspect, it is sufficient to state that, from a constitutional perspective, the racial vilification provisions have been held to be constitutionally valid, consistent with the protection of political communication, and, effective against antisemitic publications, because Jews are a racial or ethnic group for the purposes of the legislation.

The Toben cases

The Jewish community utilised the racial vilification legislation in relation to Internet publications of Frederick Toben. This is the same person who was jailed in Germany for propagating Holocaust denial. He is an Australian citizen, resident in Adelaide. He published and maintained an Internet site entitled *The Adelaide Institute* that dealt mostly with Holocaust denial and also reproduced material which had been published elsewhere, particularly in the US. The Executive Council of Australian Jewry took on the case on behalf of the Jewish community (see *ECAJ v. Scully* (1998) 79 FCR 537), but for technical reasons it also represented an officer of the Council, who, during the period, had become its President.

The cases stand for some fundamental principles. First, Holocaust denial is generally offensive, insulting and intimidatory to the Jewish community. Secondly,

publication on the Internet is a “publication not in private”. And Holocaust denial of the kind issued by Toben on his *Adelaide Institute* website was vilificatory and unlawful. The Court ordered the removal of the offending publications and restrained the respondent, Toben, from publishing material in or to the same effect in the future: see *Jones v. Toben* [2002] FCA 1150 per Branson J.

There were significant problems with the processing of the case, not the least being the attitude of the respondent. He sought, first, to make the proceeding a trial on the “truth” of the Holocaust. Secondly, his attitude of non-cooperation made it extremely difficult to progress, and lastly, the nature of the burden of proof became an ever present difficulty in the particular circumstances of the Internet.

The difficulty with people like Toben, who seek a public audience for their theories, is that court proceedings provide a rostrum from which to promulgate the very material that is sought to be removed. Another major difficulty is associated with the nature of the Internet itself. It is extremely difficult to prove authorship. It is even more difficult to prove the content of a website on a particular day or at a particular time in circumstances where the Internet site is constantly changing. But the most problematic aspect is the enforcement of Court orders.

In the Toben case, once the orders were issued, and the appeal was dismissed (*Toben v. Jones* [2003] FCAFC 137), the ownership of the website was purportedly transferred to another, rendering the ongoing effect of the orders nugatory.

In this particular case (i.e. *Toben*), contempt proceedings were successfully prosecuted, as was a subsequent appeal, and contempt orders issued which led to Toben’s arrest and imprisonment in Australia, albeit for a period of three months: see *Toben v. Jones* [2009] FCAFC 104 and *Jones v. Toben* (No 2) [2009] FCA 477. The Full Court described the period on appeal as lenient, but the prosecutor had not sought to appeal the period on the basis of inadequacy, nor do I suggest that the sentence was able to be appealed.

Philosophical resolution of freedom of speech

As stated earlier, we have balanced the desire for freedom of speech and the desire to ensure that all citizens are treated in a manner that respects their inherent features by prohibiting vilification and allowing defences for certain purposes performed in good faith.

This is a similar approach to that of the Canadian Supreme Court, in its response to reconciling conflicting rights – a task it is empowered, if not mandated, to fulfil by the Canadian Bill of Rights (and earlier, by the Charter

of Rights).

Ultimately, no freedom of speech guarantee is absolute. Thus, even the US allows the prohibition of incitement to violence or shouting “Fire” in a crowded theatre and thereby causing panic. The fundamental question is where one draws the line.

In Australia, we have thus far taken the view that the right to enjoy political freedom unimpeded by intimidation based on race, gender, colour or creed is more important than some absolute freedom of speech. The converse allows for the laying of the groundwork for the treatment in practice of people as second class citizens based on their inherent characteristics. Yet that debate does not seem to occur in the US, despite its history regarding the treatment of blacks and the restrictions it placed on the communist movement.

In my view, the balance in Australia has generally worked well. It reflects the cultural importance of the tolerance of minorities and the suspicion of majoritarian rule. Much the same balance has been reached in Canada. Yet each has differences in approach.

The Internet globalizes race hate and Holocaust denial. What is published in the US is available everywhere. In order to minimize the spread and availability of race hatred and Holocaust denial, a more universal approach must be taken, which would also include the US. In the absence of the US (a likely prospect, given the current failure to challenge intellectually the reigning legal view in the US), the best method for limiting the spread and availability of such material is the regulation by government (including the courts) of service providers, not authors, and to regulate these providers regardless of the territorial source of the data.

Lastly, there is a lesson to be learned in the experience of the Australian Jewish community. Its leadership failed miserably in 1938. Its altered attitude has dramatically affected the response of government to issues of Jewish concern. The same Foreign Minister who, in 1938, opposed Jewish immigration refused, as Prime Minister, to accommodate the treatment of Jews by the Soviet Union in the 1960s and 1970s. The only lesson is that racial vilification and discrimination against minorities requires constant vigilance and vociferous expressions of concern.

But problems remain. Even in the Australian context, we have not yet seen – and I hope we never shall – a political party that argues for a racist or discriminatory platform. If we did, the head-on collision between freedom of political communication and the prohibition of racial and minority vilification may need to be resolved; and it may be resolved in a manner different from that propounded by opponents of racial vilification.

Lessons to be learnt

There is much that is problematic in the Australian experience as recounted above. There is also much that is extremely positive.

First, let us deal with the evidence. Other publications of the denier were not used to show “tendency” to vilify. They could, however, be used to destroy a motive of genuine desire for public information as distinct from racial motivation.

Secondly, there is the positive aspect that racial vilification was proved, orders removing particular hate from the Net were issued, and the perpetrator was punished for contempt when that did not occur.

Thirdly, there are several even more positive aspects. According to Australian law, a publication occurs every time a person gains access to an Internet site: *Dow Jones v. Gutnick* [2002] HCA 56; 210 CLR 575. Thus, it is not the authorship of the Holocaust denial that is problematic; it is the existence of it and the capacity of the public to gain access. However, the provisions of the *Broadcasting Services Act 1992* (Cth) protect Internet Service Providers from prosecution or liability for content of which they are unaware. Nevertheless, the ISP is liable where the content is known and unlawful. As a consequence, an ISP, while ordinarily not liable for proceedings or administrative action relating to the content of material it makes available, will be liable where the content is unarguably unlawful and the ISP is aware that it is carrying the material.

In Australia, a body, known as ACMA (Australian Communications and Media Authority) regulates the transmission of data (and other broadcasting) and licenses radio/broadband and other transmissions. It ensures, for example, that pornographic material is unavailable in specified circumstances. It also has the responsibility of ensuring that broadcasters, including an ISP, do not engage in unlawful conduct.

Therefore, from a Jewish community perspective, proceedings against racial vilification in relation to Holocaust denial, once successful, may be enforced by administrative (in the first instance) and/or curial proceedings against the ISP, by which time the material would have been declared unlawful, and the existence of it drawn to the attention of the Internet Provider. At that time, because the material would have been unarguably unlawful and the ISP aware of it, the ISP would not and could not escape liability. While I do not suggest that any ISP should be prosecuted for a penalty, an order requiring removal of offending material would be useful, could be effective beyond the borders of Australia, and would overcome the issues of republication by others who may not be subject to court orders.

There has been some success in removing Holocaust denial material from the Internet in Australia. However, in 1996 the Net reached 58 million people, and by 2002 it reached 560 million. The current reach is beyond imagination, and its effect is alarming. The Arab Spring is but one example. The first racist website of which I am aware was established in 1995, and by November 2002 there were 2,100 racist websites available in Australia.⁵

Conclusion

Holocaust denial is a particular problem for Australian Jewry because of the high proportion within their number of Holocaust descendants. We have utilised the resources of the community including the voluntary assistance of Jewish legal practitioners beyond the point of “commercial return” to contend with this phenomenon.

Formal equality is one of the fundamental aspects of Australian democracy. It requires equal treatment of all before the law. But equal treatment of those that are unequal is not equality: *Postiglione v. the Queen* [1997] HCA 26; 189 CLR 295; *Jimmy v. Regina* [2010] NSWCCA 60 at [254] - [258]. Equality before the law requires rational treatment of that which is unequal. Minorities that are subject to intimidation, whether governmental or societal, are unable to participate in the democratic processes in an equal way; and such intimidation undermines the very fabric of representative and democratic government. It is in that context that Holocaust denial must be seen as a form of intimidation, as a form of subjugation and as a form of denial of the legitimacy of Jewish history and existence. For at its heart, Holocaust denial is a statement that the worst-ever genocide is imaginary and therefore its victims cannot assume that it will not be repeated with impunity; the denial is a not so veiled threat that such an atrocity is possible without repercussions, simply by continuing to perpetuate myths of Jewish conspiracies and thereby a lesser right to historical legitimacy. ■

Justice Rothman is a judge of the Supreme Court of New South Wales Australia and was, prior to his appointment, President of the New South Wales Jewish Board of Deputies. This paper was delivered at a legal conference in Berlin in November 2011. The views in this paper are the views of neither the Supreme Court of New South Wales Law nor the Jewish Board of Deputies.

5. Prof. Dr Henrik W K Kaspersen, Director, Computer Law Institute, Vrije Universiteit-Amsterdam – The Netherlands & Chair Expert Committee of Council of Europe for Drafting of the Cyber Crime Convention and first Additional Protocol on Racism and Xenophobia, Paper on “Cyber Racism and Xenophobia: the Council of Europe’s Answer”, Sydney, 2003.

The Google Case in Argentina: A Comment

Marcos Arnoldo Grabivker

To properly understand the context of the case currently being heard by the courts in Argentina, known as the “Google case”, we should recall one of the major challenges facing those in the free world wishing to combat any form of discrimination. Sometimes, we must contend with an inescapable tension between two rights. On the one hand, freedom of speech is a right that is crucial in the battle against authoritarianism and oppression; on the other hand, confronting it, is the right to enjoy equality before the law and be free of discrimination.

Some human rights treaties and conventions include such crimes as instigation to commit violence, hatred and discrimination, and public and direct incitement to commit genocide, even if genocide has not yet occurred, within the rubric of crimes against humanity. In my opinion, public and direct incitement to genocide occurs every time Iran’s president calls for the destruction of the State of Israel. While every person, including this president, is entitled to criticize the policies of any government, instigating the annihilation of a state is not a mere matter of public criticism and free speech.

The task of judicial balancing between conflicting rights has become much more complex – and interesting – because of the Internet and concomitant technological advances. Web sites can be readily accessed by people of any age and it is therefore easy to promote discrimination, racism and anti-Jewish prejudice among children and young people who are in the process of forming their own attitudes.

Moreover, many adults – because of such factors as poverty, lack of education and pent-up resentments – tend to vent their frustrations not on themselves or their dysfunctional governments, but rather on outside scapegoats who become convenient objects of their hatred.

Does anyone suppose that exhibiting child pornography is protected speech rather than criminal activity? Does anyone claim that freedom of speech is that absolute? What, then, is the impediment to proclaiming that the open promotion of anti-Jewish prejudice in web sites is equally obscene and should be criminalized by law?

Shoah denial, even when purporting to be “scientific research”, is justifiably deemed to be a potent manifestation of anti-Jewish discrimination. It is evident that such denial

could never be premised on any good-faith rationale. The Iranian president clearly illustrates this fact. His call to eliminate the State of Israel is regularly followed by his denial of the Shoah.



In Latin America – unlike the situation prevailing in some other countries – there are no laws criminalizing Shoah denial. However, Argentina does have an anti-discrimination act, passed some twenty years ago following strong lobbying by leaders of the Jewish community. According to the provisions of this act, discrimination on the basis of race, religion or nationality is deemed to be an aggravating circumstance of any crime. It is also a crime to participate in an organization that engages in propaganda designed to spread ideas or

theories of racial, religious or ethnic superiority; to justify discrimination, or promote it in any way or for any reason; and to encourage by any means the persecution or hatred of any person or group of persons based on their race, religion, nationality, or even political ideas.

These provisions furnished the legal basis for the lawsuit in the *Google case*. The credit for developing this idea and the strategy for implementing it belong to Dr. Rodrigo Luchinsky, who will explain the technicalities of the litigation [see page 16]. Dr. Luchinsky is a member of the boards of both the Argentinian Association of Jewish Lawyers and the DAIA. The latter is the political representative of the Argentinian Jewish community. Essentially, Dr. Luchinsky and his team exposed the manner in which Google suggested or advised how to access anti-Jewish web sites. By selling advertisement space, Google derives monetary benefit from many of these sites.

After hearing Dr. Luchinsky’s plan, the DAIA directed him to file the lawsuit as the representative of the Jewish community in Argentina.

What can be done in countries where Holocaust denial is not specifically punished? In the case of Argentina, we can try to utilize the anti-discrimination act. However, perhaps the most useful way to fight discrimination and “denialism” is to learn from countries that have taken the lead on this issue. Of course, each society has its own unique characteristics, and Latin America differs greatly

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The Case against Google in Argentina

Rodrigo Luchinsky

In May 2011 a civil court in Buenos Aires, Argentina, granted the Delegación de Asociaciones Israelitas Argentinas (DAIA – the umbrella federation of Argentinian Jewry) an injunction against Google. The local and international media reported the news immediately. Judge Carlos Molina Portela ruled that the search engine should refrain from suggesting, in the “autocomplete” function searches that would lead to particular sites that have been deemed antisemitic and that those sites be removed from the search engine’s index. While this order will not eliminate the antisemitic sites, it has ensured that users will not inadvertently come across them upon typing key words in Google’s main page. These hate vehicles are particularly insidious in that any casual cybernaut may end up visiting them while browsing the Internet looking for something else entirely. The court also ruled that Google should refrain from including advertising banners in these web sites. The defendant has failed to reverse this ruling at the appellate stage.

When drafting the petition, DAIA’s team of lawyers and technology experts took great care to only include sites that contain indubitably grossly offensive content. The petition did not relate to anything that might be interpreted as criticism of religion, academic discussion, artistic expression, humor or political opinion. Argentine law forbids acts of “discrimination”, that is to say, statements or actions resulting in prejudice against groups on the grounds of gender, religion, political opinion, social condition, sexual orientation or race. The courts have generally construed this 1988 statute as superior to the freedom of speech privilege that is usually raised, provided, however, that it does not lead to the censoring of ideas in the press.

The issue of Holocaust denial in the local courts remains problematic. Argentina has no specific legislation making Holocaust denial illegal, unlike countries that do have such laws (and we reviewed many of the relevant provisions in the IAJLJ Berlin Conference). Further, although in some instances Holocaust denial has been viewed as “discrimination” under the 1988 act, no clear consensus has yet emerged regarding this issue in the case law. Many judges and scholars contest the view that Holocaust denial can be subsumed under the rubric of

the anti-discrimination act. To navigate its way round this problem, DAIA cited examples of the “conspiracy” version of the Holocaust, of the kind that entail clear implications for the present. The wackiest one is an often repeated tale contending that Patagonia was taken over by Nazi officials who were actually passionate Zionists.

The DAIA litigation is original in several respects. Google is being sued in many countries on a variety of grounds, principally dealing with the invasion of privacy. In the DAIA case what is at stake is the legality of the engine’s ability to prompt users to visit certain sites. By way of illustration, the court was shown that if one typed the word “judío” (Jew) in Google’s search engine, a window opened suggesting that the user “look for” “judío jabón” (Jewish soap). Of course, when searching for such a phrase, plenty of offending sites can be found. Thus, for example, if a young student at school would want to know something about Jews, he might end up browsing through sites about fantastic plots. In this case the question was whether linking the word “Jew” to the word “soap” made Google liable for what could be called “passive discrimination”, i.e., for not avoiding discrimination.

The same argument was applied to several other searches. Thus, for example, it was proven that when typing any word from A to Z after the term “Jewish” (Jewish a, Jewish b, etc.), Google would only suggest defamatory adjectives from the usual antisemitic catalogue. In the case of the so-called Google ads, it was certified that many defamatory sites contained paid ads by advertisers. It is hard to say whether the advertisers chose the sites where they wanted to advertise or retained any control over them after arranging the contract, but there is no doubt that at minimum firms have a duty to know which messages are linked to their products.

The Google case is also unique in the sense that it was filed by DAIA but it did so while claiming collective standing, akin somewhat to consumers’ class action suits. In effect, this meant that the real petitioner was the Jewish community of Argentina as a group, which brought a lawsuit against Google USA by virtue of the latter’s business interests in the country.

Founded in 1935, DAIA deals mostly with advocacy issues, fighting antisemitism and supporting Israel in the



political and legal fields. It is a member of the World Jewish Congress and the Organization of American States. In a sense, this case involved a change in DAIA's policies. Historically, this NGO litigated mostly in the criminal courts reporting specific antisemitic episodes against individuals. It did so because the anti-discrimination act also provides for criminal punishment of offenses when certain other conditions are met. Discrimination is also an aggravating circumstance in respect of any other crime. However, the high threshold required in order to bring a person to trial, coupled with the somewhat confusing wording of the act make it very difficult to succeed in a criminal court. Despite these difficulties, in the three-year-period between 2008 and 2010, DAIA filed almost a thousand claims and succeeded in many of them.

In order to avoid the stringent tests of the anti-discrimination Act, DAIA brought this case under the general torts law. As in any civil liability case, any person harming another – or, in this case, a group or class - by means of discrimination as defined by the law may be held liable. Of course, this principle must be construed in accordance with freedom of speech provisions.

Ultimately, DAIA is looking for a definite ruling about the collision of the two rights and the role which should be played by an Internet search engine in this context.

Litigation in this case is still in progress, and it is impossible to anticipate the outcome. Since it involves the clash of opposing rights, under any law this case is a difficult one, no matter how confident the legal team might be. However, there are many lessons to draw even at this early stage. First of all, after Google restricted their autocomplete searches, there was actually a decrease in the number of relevant searches. This is indisputable proof that many people are not really looking for antisemitic sites, but they are being guided to them. Secondly, suing under civil liability standards is easier than seeking to cross the higher thresholds that the criminal law naturally requires. Finally, the suit of a collective group has a greater impact on public opinion than an action initiated by a single advocacy NGO. ■

Rodrigo Luchinsky is a Board member of DAIA and the Association of Jewish Lawyers of Argentina.

The Google Case in Argentina: a Comment - continued from page 15

from the United States and Europe. Nevertheless, perhaps we need to be a bit audacious and venture to skip some of the steps without waiting for a better moment than the present. In this context, we should recall that affirmative action laws, for example, have proved to be highly useful in combating gender discrimination and they have paved the way for women to fight for public and private positions on the basis of equality.

In Argentina, when we exchange ideas about how best to fight anti-Jewish prejudice, I usually propose that we

learn from our brethren in Israel and from our ancestors. Like the Israelites who stood before the Red Sea with the enemy at their backs, the only way is forward with courage! ■

Judge Grabioker is a Judge of the Federal Court of Appeals in Criminal Economic Matters in Argentina; a former Chairman of the Committee of Presidents of National and Federal Courts of Appeals and former VP (second) of the Association of Judges and Officers of the National Judiciary. He is a Professor of Law at the University of Buenos Aires among others and VP of the IAJLJ since 2007.

Holocaust Denial, is the French Experience Relevant?

Marc Lévy

To understand the importance of fighting Holocaust denial, we have to realize that such denial is part of the genocide project itself.

Himmler himself declared:

This is a page of glory in our history, which has never been written and is never to be written.
(Himmler, *The Posen speech to SS officers*, October 6, 1943)

We will first recall that French law punishes Holocaust denial irrespective of the medium used (I); we will see that, according to French law, Internet providers are responsible for the illegal contents they host (II); and finally we will consider the relevance of this mechanism (III).

I. In France, Holocaust denial constitutes the offence of “contesting crimes against humanity”

After serious and recurring debates on freedom of speech, MEPs concluded that as there could be no real discussion regarding the existence of the Holocaust, the real reason for its denial was antisemitism.

Thus, on July 13, 1990, the French Parliament passed a law which criminalized Holocaust denial, making it punishable by fine and/or imprisonment. This legislation concerns:

Those who have challenged (publicly) the existence of one or more crimes against humanity as defined by Section 6 of the Statute of the International Military Tribunal annexed to the London Agreement of 8 August 1945 and have been committed either by members of an organization declared criminal pursuant to Article 9 of that statute, or by a person convicted of such crimes by a French or international court.¹

This law has been challenged as violating freedom of speech, especially in the European Court of Human Rights,

which defined the boundaries of freedom of speech as follows:

.. as for any other remark directed against the values underlying the Convention, the justification of a pro-Nazi policy cannot claim the protection of Article 10 [which protects freedom of expression].²



The other famous case in this connection is the *Garaudy case* concerning a well-known French intellectual who was the author of the Holocaust-denial book “*The Founding Myths of Israeli Policies*”.

The French courts declared Garaudy guilty of contesting crimes against humanity and he consequently appealed to the European Court of Human Rights which held that Article 17 of the ECHR was applicable. This article provides that no one may use the rights guaranteed by the Convention to destroy rights and freedoms set forth in the Convention.

The reasons for the decision clearly explained the underlying justification of the law:

There is no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, is not in any way a work of historical research akin to a quest for the truth. The purpose and outcome of such an approach is completely different because it actually rehabilitates the National Socialist regime and, consequently, accuses the victims themselves of falsifying history. Thus, the denial of crimes against humanity appears to be one of the most serious forms of racial defamation of Jews and of

1. Gayssot Act, 1990 introducing Article 24 bis of the Freedom of the Press Act, 1881.
2. *Lingens v. Austria*, Eur. Ct. H.R. (Ser. A) (1986).

incitement of hatred against them. Such denial or rewriting of historical facts thus questions the values underlying the fight against racism and antisemitism and is likely to seriously disturb public order. Affecting the rights of others, such acts are incompatible with democracy and human rights and their authors clearly aim at objectives of the kind prohibited by Article 17 of the Convention.³

In fact, after more than twenty years experience with this law, it is evident that only genuine antisemites have been subjected to sanctions by its application.

All the fears that had been expressed about it being misused, for example, that it might be used against historical research, have proved to be unfounded.

II. In France, “warned” providers are responsible for the illegal contents they host

The law rendering the denial of the Holocaust illegal is not specifically directed at the Internet but has the consequence that denial contents on the web are illegal under French law.

The issue of the liability of Internet operators was made subject to statutory regulation in 2004.

On June 21, 2004, France adopted the EU E-commerce Directive through the enactment of the Digital Economy Act.

The law established the principle of the conditional liability of operators and set out specific requirements for particularly dangerous content:

The Act states that providers, informed of the illegal character of the content they host, are not responsible if they “act promptly to remove such data or make access thereto impossible as soon as they become aware of this situation”.⁴

If, to the contrary, they do not act even though they were informed of the illegal content, they become responsible.

Any person may inform the providers of the illegal character of any content so that it can be clearly identified.⁵

This provision of the law transfers the responsibility for vigilance to everyone and particularly to NGOs concerned by the denial of the Holocaust.

In practice, for the most part, French providers no longer harbor content denying the Holocaust, as they wish to avoid being declared accomplices to the crime established by the Act of July 13, 1990. Nonetheless, the problem has not been completely solved as such content may be found in denial sites hosted in “cyber paradises”.

When such contents is hosted in cyber paradises, the Act of June 21, 2004 allows the judge to order the French providers (ISP) to cut access to these sites wherever they are hosted.⁶

This was tried in the *AAARGH case* (denier portal). The court ordered access to be cut to the site:

Despite the technical difficulties of filtering, the cost and complexity of its implementation and its questionable efficiency (the legislature) did not rule out the use of (a measure to remove access to the site) ... where, as here, it is not possible to act against foreign hosts.⁷

Nonetheless, despite filtering, AAARGH site remains accessible. The site has changed its web host and chosen a new domain name.

Still, the procedure has had a positive effect because, as a result of the judgment, Google has stopped referencing the AAARGH site, so that only those who know of its existence can locate it. The general public, and of particularly young people, no longer risk stumbling across the site by means of a simple query on Google.

The procedure is long and arduous; it requires first the implication of providers often located in cyber paradise (establishing their refusal to remove illegal content), followed by the institution of proceedings against the many national ISPs. Given the remedies, the proceedings can last for years, which is why so few suits have been brought against Holocaust denial sites.

As mentioned, providers are subject to specific requirements concerning particularly dangerous content:

The June 21, 2004 Act requires internet operators to set up a system enabling any person to inform them on line of the most serious offences such as:
crimes against humanity

3. *Garaudy v. France*, Eur.Ct. H.R. (2003) in Damien Roets, *Épilogue européen dans l'affaire Garaudy: les droits de l'homme à l'épreuve du négationnisme*, RECUEIL DALLOZ 239 (2004).

4. Digital Economy Act, 2004, Art.6(I)2.

5. *Id.* at Art. 6(I)5.

6. *Id.*, Art. 6-I-8.

7. Decision of the Court of Appeal of Paris - *Tiscali, AFA, etc vs. UEJF, J'Accuse, SOS Racisme, etc.* (November 24,) (Fr.)

child pornography
incitement to violence, including incitement
to violence against women and violations
of human dignity
Incitement to discrimination, hatred or racial
violence.⁸

The result is that many web hosts have removed illegal content reported to them.

The providers are also required to promptly inform the competent public authorities of all illegal activities mentioned in the preceding paragraph which are reported to them or performed by recipients of their services, and also to publicly report how they fight these illegal activities.⁹

III The relevance of this mechanism

The effectiveness of these provisions must first be verified nationally.

A relevant test was established in the *Faurisson case*, named after a “famous” French Holocaust denier.

Thus, the query “Faurisson” gave no result in “DAILYMOTION”, the French site hosting and sharing videos that can be watched online.

The same test was performed on the website “YOUTUBE” and the answer obtained was 12 Holocaust denial videos on the first page!

Following the IAJLJ Berlin Conference, it appears that this situation may change:

We met with officials from Google and learned that some other services they offer, such as “YOUTUBE” and “BLOGGER” have the status of host. Moreover, these services have a national ID that can be adapted to different national laws.

As a result, Google is under an obligation to comply with the provisions of the Act of June 21, 2004, Section 6-I-2 “to act promptly to remove such data or make access thereto impossible as soon as they become aware of this situation”.

It is thus possible to seize a real opportunity here by reporting illegal content, including denial, resulting in its removal.

Are these provisions effective internationally?

In principle, French law should have no effect abroad, including, in particular, in the United States. Yet the *YAHOO! case* has had ramifications abroad and indeed others may also have an impact in the future.

Yahoo! was ordered by the Court of Paris, in a summary case to:

take all measures to dissuade and render impossible any access via *yahoo.com* to the auction sale service of Nazi objects and any other site or service that is an apology for Nazism or that contests Nazi crimes under penalty of 100,000 francs per day of delay.¹⁰

In the USA, Yahoo! asked the Federal Court in San Jose to declare that the French order was not enforceable in the United States. The U.S. Federal Court held that France was a sovereign state and could decide to prohibit the sale of certain items in its territory. It also noted that as Yahoo! had chosen to expand its activities abroad, it had to accept liability if it failed to apply the relevant foreign law.¹¹

This creates a field of possible action based on this model:

First, to engage in a dialogue with the major Internet operators based on the French and American decisions and secondly, to encourage associations fighting against racism – which alone have jurisdiction to take legal action - to initiate such actions as necessary.

In conclusion, the combination of these measures has resulted in a decrease in Holocaust denial content on French sites, but not in their disappearance. The reasons for this are threefold: their hosting in countries that do not criminalize Holocaust denial; the laxity of the public which does not report this type of content; and the failure of associations and the public prosecutor to institute legal actions.

It is possible that the application of the *Yahoo case* could extend the effect of French law to large international hosting platforms and content when the content is in French. There is also a real opportunity to be seized now by reporting Holocaust denial content on YOUTUBE, resulting in its removal, at least in countries where Holocaust denial is illegal. ■

Marc Lévy has been a lawyer at the Paris Bar since 1974. He founded the legal commission of LICRA (International League Against Racism and Anti-Semitism) in 1978 and was involved in the Faurisson, Yahoo and AAARGH cases.

8. *Supra* note 4, at Art.6(I)7.

9. *Id.*

10. *LICRA and EUJF v. Yahoo! France*. (November 20, 2000). Tribunal de Grande Instance de Paris.

11. *Yahoo! Inc. v. LICRA and UEJF*, 433 F 3d 1120 (9th Cir. 2004).

Zionist or Refugees: The Historical Aspect of the Uprooting of the Jews from Arab Countries and Their Immigration to Israel

Esther Meir-Glitzenstein

At the time of the establishment of the State of Israel in May 1948, there were approximately one million Jews living in Muslim countries. About half resided in North Africa: Morocco (250,000), Algeria (130,000), Tunisia (85,000) and Libya (40,000), and the other half in the Middle East: Iraq (135,000), Yemen and Aden (50,000), Syria and Lebanon (30,000), Iran (90,000) and Turkey (80,000).¹ Each of these communities was unique, with its own history and characteristics, but in each case the host country was Islamic and all were influenced by Islamic culture and the Muslim attitude towards Jews.² Within a twenty-year period, three quarters of these Jews had left their native lands. Today, very few remain, with the main concentrations found in Iran (17,000) and Turkey (17,000).

This phenomenon of uprooting is unique, because the Jewish communities had resided in these lands for hundreds of years or more, with the oldest communities establishing themselves in Iraq and Egypt during the first Exile (following the destruction of the First Temple in Jerusalem in 70 A.D.). In addition, the process of uprooting was both very rapid and carried a very heavy cost, as the Jews left behind extensive material property. Even the resettlement process exacted a steep social and cultural price as most of these Jews reached Israel when it was still a brand-new, poor country. This was especially true during the first three years of the state's existence, a period in which some 350,000 Jewish immigrants arrived from the Middle East and North Africa.

The various agencies participating in the Jewish exodus explained it in a variety of ways. In the Arab countries, they claimed that despite hundreds of years of harmonious Jewish/Muslim existence, Zionism had disturbed these good relations, causing the Jewish mass emigration.³ However, most of the Jews in the Arab countries were not party to the Zionist, nationalist vision and, moreover, were not responsible for it so that forcing them to leave was unjust. In response to this dilemma, another explanation was offered, according to which the State of Israel had initiated provocations, including even terrorist acts,⁴ along with false, fear-inspiring propaganda, to

motivate the Jews to leave.

The State of Israel explained the phenomenon of the mass emigration from Muslim countries as being the result of the worsening conditions of the Jews in those lands, caused by a combination of antisemitism, leading to political and economic persecution, and ideological, religious and even messianic incentives. According to this viewpoint, the Jews from the Muslim countries had identified the establishment of the State of Israel with the predicted "end of days" and the beginning of the messianic period, and therefore hastened to emigrate to the Holy Land. Moreover, Israel called all the immigrants *Olim* (i.e., pilgrims ascending to Zion), since they were returning to the "Promised Land", granted them full citizen's rights from the moment they set foot on the Land of Israel, and refused to see them as refugees. This attitude exceeded mere nomenclature: *olim* rather than "refugees", "*olim* camps" or "transit-camps" rather than "refugee camps". From the Zionist perspective, no Jew could be a refugee in his/her ancient/new Homeland.

During their initial period in Israel, these immigrants from Muslim countries were too weak to provide Israeli society with a narrative reflecting their experience of being uprooted. Their weakness also dictated their adoption of the Zionist approach, especially since it gave them the advantage of presenting themselves not as persons who

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1. OPEN AND SECRET: MASS IMMIGRATION TO ISRAEL FROM MUSLIM LANDS (1948-1967) 13 (Haim Saadoun ed., 1999).
 2. For more on the history of the Jews in Islamic countries see Norman A. Stillman, *THE JEWS OF ARAB LANDS: A HISTORY AND A SOURCE BOOK*. Philadelphia: 108 (1979); Martin Gilbert, *IN ISHMAEL'S HOUSE: A HISTORY OF JEWS IN MUSLIM LANDS* (2010).
 3. Abbas Shibliak, *THE LURE OF ZION: THE CASE OF IRAQI JEWS*. LONDON: 119 (1986).
 4. Shibliak's claim was raised primarily in the case of Iraq. For more see Ella Shohat, *Mizrahim in Israel: Zionism from the Standpoint of its Jewish Victims*, *SOCIAL TEXTS* 1-35 (1988).

had been forced to migrate to Israel, but rather as ones who had chosen to come. Their portrayal as ideological immigrants strengthened their claims to receive rights promised to them by the State of Israel that had not always been implemented. Additionally, at that time, issues concerning their property and rights were not on the agenda in Israel or the world so that no practical advantage was to be gained in presenting these *olim* as refugees.⁵

The situation of the Jews who emigrated to Western countries was different. During the 1950s, voices could already be heard speaking about having been forced to leave and some even said that they had been expelled. This claim was raised primarily by Egyptian Jews, who had been expelled en masse following the 1956 Suez Crisis (Sinai War) and following the 1967 Six-Day War, as well as by the Jews of Iraq, who fled their country at the start of the 1970s, after severe persecution, peaking in 1969 with the hanging of 11 Jews accused of espionage on behalf of the State of Israel and the murder of dozens of others.⁶

But it was only in the 1970s that a group of “Eastern” representatives began to coalesce around the growing recognition that by having relinquished the title of “refugees” they had also relinquished all the accompanying refugee rights having to do with private and community property and assets and various social rights that they had accumulated prior to their exodus. These delegates established WOJAC (the World Organization of Jews from Arab Countries), which claimed that the Jews had been forced to leave the Muslim countries under duress, due to political and economic persecution—that they were expelled.⁷ This claim paints the Jews from the Muslim countries as victims of the Jewish-Arab conflict, like the Palestinian refugees, since they too had been forced to leave their native land, lose all their property, give up their culture, language, unique values, etc., and come to live in harsh conditions in the State of Israel. As such, alongside the Palestinian *nakbah* (the catastrophe), there was also a “Jewish *nakbah*.”⁸

This new position, together with fresh research based on archival materials recently opened to the public, justifies a renewed investigation into the historical background and causes of the Jewish exodus from the countries of the Middle East and North Africa. These studies paint a new picture, and though the causes for leaving were different in respect of each country, it is possible to point to a number of common tendencies related to Arab nationalism, colonialism and the Jewish-Arab conflict in the Land of Israel.

The rise of the nationalist movements in the countries of the Middle East and North Africa during the twentieth century was central to fashioning the fate of those regions

and of the Jews, especially since most of these movements did not accept Jews as members, either because of the movements’ Islamic nature or because of conflicts of interest relating to colonialism and the dispute over the Land of Israel.⁹ The apprehension of the Jews regarding the establishment of independent, nationalist regimes in their native lands increased their desire to cooperate with British, French and Italian colonialism in the Middle East and North Africa. These ties gave them certain advantages by way of legal status and socio-economic standing and, in parallel, led them, to a certain extent, to adopt the cultures of their colonial rulers. However, the struggle that ensued between local nationalism and pan-Arabism, on the one hand, and colonialism, on the other hand, placed the Jews on the side of the despised rulers, and labeled them as collaborators and traitors.

With the onset of the de-colonialization process, the Jews found themselves in a difficult dilemma—should they stay in an independent Arab country, where they might actually lose the rights they had gained (as did happen later on, not only to the Jews, but also to the Copts, the Kurds and others)¹⁰ or, worse still—where they

5. Esther Meir-Glitzenstein, *Iraqi Jews in Israel: From ‘Refugees’ to ‘Zionist’ and Back Again* in POPULATION RESETTLEMENT IN INTERNATIONAL CONFLICTS 115-134 (Arie Kacowicz and Pavel Lutomski eds., 2007).
6. Nissim Kazzaz, THE END OF AN EXILE: THE JEWS IN IRAQ AFTER THE MASS IMMIGRATION TO ISRAEL, 1951-2000: 123 (2002) [Hebrew]; Joel Bein, THE DISPERSION OF EGYPTIAN JEWRY: CULTURE, POLITICS AND THE FORMATION OF A MODERN DIASPORA: 85 (1998).
7. For more on WOJAC see www.forgotten-million.co.il/wojac.html (last visited December 10, 2012) and Yehuda Shenhav, *Ethnicity and National Memory: The World Organization of Jews from Arab Countries (WOJAC) in the Context of the Palestinian National Struggle*, 29(1) BRITISH JOURNAL OF MIDDLE EASTERN STUDIES 27-56 (2002).
8. Ben-Dror Yemini, *The Jewish Nakbah: Expulsion, Massacre and Forced Conversion*, MAARIV (May 16, 2009) [Hebrew].
9. On the problem of minorities in Muslim lands see Maurice M. Roumani, *The Silent Refugees: Jews from Arab Countries*, 14(3) MEDITERRANEAN QUARTERLY 41-77 (2003); Daniel J. Schroeter and Joseph Chetrit, *Emancipation and Its Discontents: Jews at the Formative Period of Colonial Rule in Morocco*, 13(1) JEWISH SOCIAL STUDIES 170-206 (2006).
10. On the problem of minorities in the Middle East see Ofra Benjo, *Minorities in Arab Political Discourse*, in MINORITIES, STRANGERS AND OTHERS 51-63 (Shulamit Volkov ed., 2000) [Hebrew].

might suffer pogroms and massacres (as happened to the Armenians in Turkey during World War One, to the Assyrians in Iraq in 1933, to the Kurds in Iraq and to the Christians in Lebanon)? Or, should they migrate to other countries? Added into this local conflict were the ramifications of yet another conflict—the Jewish-Arab battle over the Land of Israel. As this conflict grew worse, so did the impact on the Jews in the Muslim countries. The establishment of the State of Israel in 1948 marked the watershed in this process.

Preceding the decision regarding the partition of the Land of Israel, representatives of Arab countries warned of imminent, violent attacks that might befall the Jews, asserting that they might be slaughtered in the Arab lands in response to the establishment of a Jewish state.¹¹ There had been some incidents of pogroms as early as the 1940s; in May 1941, Jewish shops in Basra, Iraq were robbed and, in the beginning of June, the citizens of Baghdad attacked, injured and murdered their Jewish neighbors, stealing much of their property.¹² Another pogrom occurred in 1945, this time against the Jews of Tripoli, Libya.¹³ The U.N. decision regarding the partition of the Land of Israel and the establishment of a Jewish state brought in its wake a wave of attacks. At the start of December 1947, there were pogroms in Aden, during which about 80 Jews were murdered, 120 injured and homes and shops ransacked and burnt. The damage was so extensive that the community could not be rehabilitated.¹⁴ Also in Halab (Aleppo), Syria there were outbreaks of violence that caused great damage to Jewish homes, stores, offices and public facilities. Violent incidents in Damascus, and other places in Syria during 1948 caused the deaths of dozens of Jews.¹⁵ The same happened in Egypt and in Oujda and Jrada, Morocco¹⁶ and in Tripoli, Libya, where the Jews came under attack once again. In 1948, the popular, violent pogroms were accompanied by state sanctioned persecution in Egypt, Syria, Iraq and Yemen. The persecution included arrests, blackmail, mass layoffs and the revocation of exit permits.

With the conclusion of the battles and the end of Israel's War of Independence, the exodus of the Jews from the Muslim countries began and three Jewish communities—those of Libya, Yemen and Iraq—arrived in Israel almost in their entirety. Thousands of Jews also arrived from Egypt, Turkey, Iran, Morocco and Tunisia. The immigration from these countries spanned almost twenty years.

Despite the existence of new research, there are still topics that require more investigation: a) the nature of the colonial powers - Great Britain and France's contribution to the uprooting of the Jews is not clear, albeit all three communities that relocated en masse were tied to British colonialism. It is not clear whether there

was an overall British policy in regard to the Jewish exodus; b) the existing studies barely deal with the local Jewish aspect of this phenomenon. It is not clear how the Jews organized their departure. What were the stages of their emigration process? What became of the private and community property of the emigrants? Many of these Jews passed through various transit-camps located in Aden, Iran, France, Italy and elsewhere and very little is known about this.

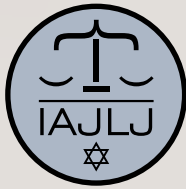
This article focuses on two communities – those of Yemen and Iraq – whose stories of being uprooted have been well researched.

The migration of the Yemenite Jews to Israel

Yemenite Jewry was the first community to come, almost in its entirety, to Israel. In 1948, there were 40,000 Jews in Yemen, living under a *dhimmi* status, subject to segregation and humiliation. In the twentieth century, Yemen was a poor country, isolated and shut off, fending off outside influences and especially barring contact with modern influences. The likelihood of a meager subsistence in such a country and news of better living conditions in the Land of Israel, coupled with the ideology of returning to the biblical homeland, motivated the ongoing process of Yemenite-Jewish migration, which began in 1881 and did not stop following the establishment of the State of Israel. Israel was virtually the only option for Yemenite Jewry.

Between December 1948 and March 1949, Israel airlifted almost 10,000 Jews out of Aden. Most were Yemenite refugees, though some were actually Jews from Aden.

11. See Yaakov Meron, *The Expulsion of the Jews from the Arab Countries: The Palestinian's Attitude towards It and Their Claims*, MEDINAH, MEMSHALAH VE-YAHASIM BENLEUMIYIM 28 (1992) [Hebrew].
12. See Esther Meir-Glitzenstein, *The Farhud* in HOLOCAUST ENCYCLOPEDIA available at www.ushmm.org (last visited December 10, 2012).
13. See Yaakov Hajjaj-Liluf, RIOTS IN LIBYA (1945, 1948, 1967): BACKGROUND, COURSE, RESULTS AND RESPONSES, available at www.livluf.org.il [Hebrew]. (last visited December 10, 2012).
14. Reuben Ahroni, THE JEWS OF THE BRITISH CROWN COLONY OF ADEN: HISTORY, CULTURE AND ETHNIC RELATIONS: 209 (E.J. Brill ed., 1994).
15. Michael Lasker, *In the Shadow of the Arab-Israeli Conflict and Arab Nationalism: The Muslim-Jewish in Syria, 1948-1970*, PAAMIM 66, 77 (1996) [Hebrew].
16. Yaron Tsur, A TORN COMMUNITY: THE JEWS OF MOROCCO AND NATIONALISM (2002) [Hebrew].



הארגון הבינלאומי של עורכי-דין ומשפסנים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

Religion in a Multicultural Society

Lausanne Conference

October 30 - November 4, 2012

Tuesday, October 30, 2012

Arrival and tour in Geneva (Human Rights Council, Old City)

Wednesday, October 31, 2012

Full day tour to Gruyeres and Bern

18:00

Opening Ceremony

Synagogue of Lausanne, 3 Avenue Georgette

18:30

Moderator:

Ambassador Dr. **Meir Rosenne**, Vice President, International Association of Jewish Lawyers and Jurists (IAJLJ)

Opening Address:

Adv. **Irit Kohn**, President, IAJLJ

Prof. **Christina Schmid**, Director, Swiss Institute of Comparative Law

Justice **Vera Rottenberg Liatowitsch**, Federal Supreme Court of Switzerland; Honorary President of the Swiss Section, IAJLJ

Adv. **Béatrice Métraux** [To Be Confirmed]

Mr. **Lionel Elkaim**, Rabbi of Lausanne and Canton of Vaud Jewish Community

Keynote Speaker:

Father **Patrick Debois**, President, the Yahad-In Unum Association, France

19:45

Light Supper at Hotel Alpha-Palmiers, Rue du Petit-Chêne 34

Thursday, November 1, 2012

Hotel Alpha-Palmiers, Rue du Petit-Chêne 34

Morning Session

09:30-10:15

Prof. **Shlomo Avineri**, Department of Political Science, The Hebrew University, Jerusalem: *"The Role of Religion in a Pluralist Society: Between Public Space and Individual Rights"*

10:15-11:00

Dr. **Alberto M. Aronovitz**, Legal Department, Swiss Institute of Comparative Law, Lausanne: *"Religious Law and State Law: Collision or Cohabitation?"*

11:00-11:30

Coffee Break

11:30-13:00

The Comparative Approach to Religion and State Law - Panel

Prof. Dr. **Gerhard Robbers**, Director, Institute of European Constitutional Law, University of Trier, Germany: *"Law and Religion in Germany - Current Developments"*

Dr. **Noemi Gal-Or**, Professor of Politics and Law, Kwantlen Polytechnic University, Canada; Barrister & Solicitor, NOEMI Gal-Or Inc.: *"State and Religion in Canada: Multiculturalism Meets Conflicting Rights"*

Prof. Dr. **René Pahud de Mortanges**, Faculty of Law, University of Fribourg, Switzerland: *"Law and Religion in Switzerland - Current Developments"*

- 13:00-14:00 **Lunch**
- 14:00-14:45 Prof. **Emmanuel Sivan**, Professor of History (Emeritus), The Hebrew University, Jerusalem: *"The Shari'a Myth"*
- 14:45-15:30 Prof. **Frances Raday**, Chair, Concord Research Center for Integration of International Law in Israel, The Haim Striks School of Law, Colman; Member, UN Human Rights Council WG on Discrimination against Women: *"The Equality Costs of a State Religion"*
- 15:30-16:15 _____ [To Be Decided]
- 16:15-17:00 Prof. **Raphael Draï**, Professor (Emeritus) in the Faculty of Law and Political Science, Aix en Provence, Marseille, France: *"The French Law re Anti-Burka, of March 3, 2011 : How the Fifth French Republic is Facing Islamic Temptation"*

Friday, November 2, 2012

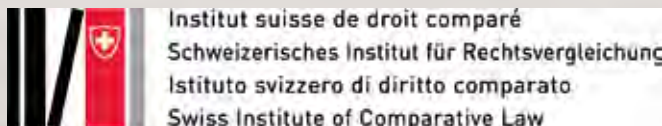
Amphipole Auditorium, University of Lausanne, Dorigny, Lausanne

- 09:30-10:30 Prof. **Izhak England**, Bora Laskin Professor of Law (Emeritus), The Hebrew University, Jerusalem; Justice (ret.) Supreme Court of Israel; Member of the Israel Academy of Sciences and Humanities: *"Jewish Law in Secular Courts - The Israeli Experience"*
- 10:30-11:15 Mrs. Justice **Sujata Manohar**, Former Judge, Supreme Court of India: *"State, Religion and Law in India"*
- 11:15-11:30 **Coffee Break**
- 11:30-12:15 Adv. **Martin Sychold**, Deputy Head, Legal Division, Swiss Institute of Comparative Law: *"Religious Tribunals and the National Legal Systems of Western European Countries"*
- 12:15-13:00 Prof. **Natan Lerner**, Faculty of Law, Interdisciplinary Center Herzliya: *"From 'Defamation of Religions' to Incitement Based on Religion"*
- 13:15-14:00 **Visit to the Swiss Institute of Comparative Law (SICL)**, Dorigny, Lausanne (for all participants not attending the Board meeting)
- 13:15-14:30 **Board of Governors Meeting** at the SICL
- 14:00-14:30 **Refreshments** at the SICL
- 19:30 **Shabbat Dinner at Hotel Alpha-Palmiers**, Rue du Petit-Cheêne 34

Saturday, November 3, 2012

Walking Tour

(*)The Conference is organized with the scientific support of the Swiss Institute of Comparative Law



Schedule is subject to additions/changes
The sessions will be held in English

Accommodation (B&B) at the Alpha-Palmiers Hotel (4*) or at the Agora Hotel (3*)
 For registration forms or additional information, see: www.intjewishlawyers.org or contact us:
 + 972 3 6910673 (9pm-3pm Israel time), iajlj@goldmail.net.il.

Shortly thereafter, a mass Jewish exodus from Yemen began. In April 1949, the Yemenite Imam, Ahmad, granted the Jews permission to leave, on condition that they sell all their property. The British authorities in Aden were ready to allow them passage via Aden. In light of this, an agreement was reached between the State of Israel, the American Jewish Joint Distribution Committee (JDC) and the British rulers in Aden, with the cooperation of the Imam, to set in motion a plan to transfer the Jews.

The Yemenite Jews descended rapidly to the South. They came most of the way on foot or on donkeys. Only towards the end of the trek, in the regions of Sana'a and Taizz, were they placed in vehicles.

It is commonly, though erroneously, accepted that the Yemenite Jews were mostly rural and poor, in fact, however, they owned quite a bit of property, including lands, homes, agricultural assets and money. They sold all their property to their Muslim neighbors or to representatives of the Imam for ridiculously low prices, or, in some cases, simply abandoned their property and left. While en route to the southern border, they were obliged to pay various *laissez-passer* fees and travel taxes, not to mention the outrageous prices they paid for carfare to the border. In addition, there were many incidents of muggings and property theft on route. They reached Aden completely impoverished.

News of the Jews streaming towards Aden began to reach the organizers of the immigration in Aden and Israel during the months of June and July, 1949. The British in Aden demanded that Israel accept 20,000 immigrants within two months, although, a short time earlier, they had talked about a gradual process over the course of two years. At that time, Israel was dealing with difficult immigrant absorption problems, thus causing the British demand to become the source of a stormy argument in the Jewish Agency leadership. However, Israel was obliged to absorb all the immigrants immediately, regardless of their age and state of health. No doubt, this was a very bold decision, one not typical of absorbing countries. Nonetheless, any refusal to accept Jews would have been in direct contradiction to the Israeli ethos and the basic interests of the State of Israel, not to mention that it would have put an end to the window of opportunity to bring over this Jewish population, perceived as being a positive one and one likely to successfully integrate into the productive workforce in the State of Israel. Moreover, under the circumstances, with the Jews amassing at the southern borders of Yemen, rejection by Israel might have ended in catastrophe.¹⁷

In the end, the catastrophe was not prevented. The airlift that the JDC had undertaken to supply did not work. In September 1949, thousands of Jews from Yemen were

crowded into a transit camp ("Hashed") near Aden, which was unprepared to receive them. There were not enough buildings to house the people; there was insufficient staff and only a scant medical team; there was also a shortage of medicine, food and even water. As a consequence, over a period of a few months, some 30,000 immigrants reached Israel, most of whom were in terrible health, suffering from hunger, exhaustion and illness, including malaria and tropical ulcers. The children and babies suffered from digestive tract infections and dehydration.

Many people paid with their lives during that journey. It is known that many died en route in Yemen, although there is no comprehensive data on the extent of mortality and no testimonies have been collected. However, there is data regarding the hundreds of emigrants who died in the transit camp in Aden and the hundreds more who died of starvation or disease near the Yemenite border, after the British forbade their departure for more than a month, as well as regarding many more who were already mortally ill when they arrived at the tent camps in Israel.

Thus, it seems that the uprooting of the Jews from Yemen cost them not only their homes and native land, not only their property and assets, but also the lives of hundreds of their kinfolk. There is no doubt that the Israeli government and the JDC were responsible for this situation, because they were not properly prepared for it, but one must bear in mind that all these harsh events occurred on lands under the dominion of the Imam Ahmad, who, according to the Quran, was obliged to protect the Jews as long as they remained within his realm, and within the British Protectorate of Aden, which displayed apathy towards the fate of the Jewish refugees and did nothing to help them.

In the light of this awful situation, David Ben-Gurion (Israel's first Prime Minister), made a bold decision—to evacuate the transit camp in Aden immediately and bring everyone in it to Israel, including those who were critically ill. In his speech before the Israeli Parliament on November 21, 1949 he explained:

We must first do everything we can, the possible and the impossible, to bring them here, to this State of Israel. Let them not wander about in camps in Aden or on the roads of Yemen. Even if some of them are

17. For detailed, corroborated research see Tudor Parfitt, *THE ROAD TO REDEMPTION: THE JEWS OF YEMEN, 1900-1950* (E.J. Brill ed., 1996).

destined to die, it is better that they die here, in our Land, among their brethren, and not in that foreign place.¹⁸

The Jews of Yemen were the only ones in the mass of immigration of the 1950s who traded all their wealth, property, health and even life itself to come to the Holy Land.¹⁹ However, this huge sacrifice was never really recognized; it is not engraved on the collective Israeli memory and is even absent from the formal memorials of the State of Israel.

The migration of the Iraqi Jews to Israel

In 1948, approximately 135,000 Jews lived in Iraq, constituting three percent of the country's total population. Most of them lived in the major cities, with 90,000 in the capital, Baghdad, where they accounted for about a fifth of the population. After the establishment of the Iraqi state under a British mandate in 1921, the Jews were given citizenship with equal rights. Modernization and westernization in the Jewish community sped up, Jews were accepted into the civil service, their economic status improved and their educational system was expanded.

In the 1930s, after Iraq gained its independence, the status of the Jews began to deteriorate. This was manifested by waves of dismissals from the civil service, restrictions being placed on Jewish commerce and banking, and finally, in June 1941, the *farhud* (pogrom) broke out in Baghdad. On May 15, 1948, Iraq sent troops to fight against Israel. It suspended civil law, instituted emergency laws and concurrently launched an official, organized campaign of persecution against the Jews in Iraq. In mid-July 1948, the Iraqi Parliament declared Zionism a crime punishable by between seven years in prison and death. The Jews' freedom of movement was restricted, wealthy members of the community were fined heavily, thousands of Jews lost their jobs and hundreds of Jews were jailed. In September 1948, Shafiq Ades, an Iraqi-Jewish millionaire who had allegedly sold surplus military equipment to Israel, was executed. The incident was a severe shock to the sense of security of Iraqi Jewry. The Iraqi Jews were collectively portrayed as Zionists.

In late 1949, the emergency regime in Iraq was lifted and thousands of Jews fled to Iran. This illegal emigration created economic turmoil and aggravated the anti-Jewish atmosphere in Iraq. By March 1950, the Iraqi government had passed a law permitting Jews to emigrate, but it said nothing about their property. Was this law meant to expel the Jews from Iraq? According to legal scholar, Carole Basri, the persecution, harassment, confiscations and expropriations, all of which were carried out under cover of legislation, make it clear that the Jews suffered from

ethnic cleansing in the Arab world.²⁰ The Iraqi government explained it differently, saying that: "It has been found advisable not to prevent those wishing to do so from leaving Iraq for good, forfeiting their Iraqi nationality."²¹

Israeli and British archival documents indicate that the Iraqi government was trying to get rid of a few thousand young people who were perceived as troublemakers. But the registration for emigration exceeded all expectations. Within a month, some 47,000 Jews had signed up to leave and, eventually, the number reached 104,000. A few thousand more reached Israel via Iran. Altogether, the vast majority of the community left.

How can we explain this massive emigration? Why did Iraqi Jewry leave en masse? The British archival documents point to a snowball effect set in motion by inept Iraqi government policy regarding Jewish emigration and botched implementation of this policy. These factors exacerbated the economic crisis in Iraq, thus intensifying agitation against the Jews and further undermining the Jews' sense of security, leading a growing number of Jews to want to leave the country. The middle and upper classes—importers, exporters, commercial agents, and retailers—were particularly active in this process.

From then on, the security and economic situation of the Jews in Iraq deteriorated rapidly.

By the end of 1950, Iraq was trying to send off everyone who had registered to emigrate, immediately and at almost any price.

A new stage in the deterioration of the situation of Iraqi Jewry began on January 14, 1951, when a grenade was thrown near the emigration registration center located in the Mas'udah Shemtov Synagogue in Baghdad, killing three people and wounding about 20. This, combined with British and American pressure, prompted Israel to launch an emergency rescue operation for Iraqi Jewry. On March 10, 1951, the Iraqi Parliament blocked the assets of Jews who had given up their citizenship. This new law

18. RECORDS OF THE KNESSET 3, 1 (November 7, 1949) [Hebrew].

19. For specific consideration of the heavy cost exacted during the Yemenite immigration, in lives and property, see Esther Meir-Glitzenstein, *THE EXODUS OF THE YEMENITE JEWS: A FAILED OPERATION AND A FORMATIVE MYTH*: (FORTHCOMING 2012).

20. Carole Basri, *THE JEWS OF IRAQ: A FORGOTTEN CASE OF ETHNIC CLEANSING: POLICY STUDY NO. 26:5* (2003).

21. Words spoken by the Iraqi Minister of the Interior, Saleh Jabr in the Iraqi Parliament in Shiblak, *THE LURE OF ZION*, 133.

caused extreme dismay, because the emigrants had entrusted their assets to relatives and friends, assuming they would be able to sell them off gradually. As a consequence, these people arrived in Israel as persecuted, destitute deportees.

The Denaturalization Law was not intrinsically a “deportation”, but some of its components were quite problematic:

1. The immigrants received *laissez-passer* documents rather than passports, which meant that they could not go anywhere other than Israel and could never return to Iraq.

2. Those who changed their minds after registering and wanted to stay in Iraq were forced to leave anyway.

3. The Iraqi government nationalized all Jewish property after a year had passed.

4. Formally, the Iraqi Jews were not “refugees”, but in the end they found themselves destitute, living in temporary tent camps in a strange land, without their property and without the option of returning to their native land.

In summary, this short article considers the stories of the uprooting of approximately 340,000 Jews from Muslim countries during the first years of the State of Israel. Their stories reveal a complex reality integrating local, regional and global processes that fashioned the fates of the Jewish communities of the Middle East. Struggles set against the background of nationalism and anti-colonialism unsettled the status of the Jews in these countries, while the Israeli

War of Independence, the establishment of the State of Israel and the ongoing conflict made the lives of the Jews in those countries very dangerous. At the same time, these historic changes also provided the Jews with a new option—to migrate to Israel. As part of this process, the Jews in the Arab countries were obliged to relinquish their native lands, their assets, their property, their economic rights and even their most important cultural assets. In the case of Yemen, many even lost their lives. During this mass exodus, the Jews from the Arab countries became impoverished refugees. From this point on, a long process of rehabilitation began in the State of Israel or in other diasporic, immigrant countries. Even though the State of Israel rushed to grant them full citizenship upon their arrival and they were never considered to be refugees - in light of their socio-economic condition and self-perception, there is no doubt that they were, indeed, refugees. ■

Dr. Meir-Glitzenstein of Ben-Gurion University of the Negev, Beer-Sheva, specializes in the history of Iraqi Jews in the twentieth century. Her book, "Zionism in an Arab Country" (Routledge, London and New York) was published in 2004 and another book, about the integration of the Jewish immigrants from Iraq in Israel, ("From Baghdad to Ramat-Gan: Iraqi Jews in Israel", Yad Ben Zvi Publishers) was published in 2009.

Her new book, about the mass immigration of Yemenite Jews to Israel, "A Failed Operation and a Formative Myth: Yemen Exodus 1949", will be published in February 2012.



Skeleton of the Jewish boy's school in Aden, following the pogrom of December 3, 1947.
From Leon Betensky collection.
Courtesy of Aya Betensky

Narratives and Justice: Population Exchange Instead of the Right to Return

Avi Beker

Introduction: facts versus myths

In his speech to the United Nations General Assembly on September 20, 2011, US President Barack Obama provided a fresh look at the urgent need to separate facts from myths in the Arab-Israeli conflict.

President Obama explained why Israel's security concerns are not a mere narrative:

Let's be honest: Israel is surrounded by neighbors that have waged repeated wars against it. Israel's citizens have been killed by rockets fired at their houses and suicide bombs on their buses. Israel's children come of age knowing that throughout the region, other children are taught to hate them... Israel, a small country of less than 8 million people, looks out at a world where leaders of much larger nations threaten to wipe it off of the map. The Jewish people carry the burden of centuries of exile, and persecution, fresh memories of knowing that 6 million people were killed simply because of who they are.

President Obama flatly rejected the process of myths and narrative building in the Middle East:

Those are facts. They cannot be denied. The Jewish people have forged a successful state in their historic homeland. Israel deserves recognition. It deserves normal relations with its neighbors. And friends of the Palestinians do them no favors by ignoring this truth, just as friends of Israel must recognize the need to pursue a two-state solution with a secure Israel next to an independent Palestine.¹

The saga of the refugees in the Arab-Israeli conflict, Arabs and Jews alike, is built upon premises, narratives and propaganda which represent a long process of denying the facts. A typical escape from historical facts

is easily detected in the title of a *New York Times* story bearing a question mark: "*Are Jews Who Fled Arab Lands to Israel Refugees, Too?*" In its evenhanded approach and politically correct sensitivity towards Arab claims,

the *New York Times* left the issue unresolved using the regular post-modern claim that the Middle East is "typified by clashes of narratives, different accounts of flight and dispossession that are used to justify political goals today".² Hiding behind such clichés as "clashes of narratives" or "different accounts" the *New York Times* denied its own historical records published in 1948. The huge front page headline of the paper on May 16, 1948 was very factual indeed: "*Jews in Grave Danger in all Muslim Lands: Nine*

Hundred Thousand in Africa and Asia Face Wrath of their Foes". The article cited reports of deteriorating Jewish security including violent incidents and it referred to a law drafted by the Political Committee of the Arab League, which claimed that all the Jewish citizens of these countries would be considered "members of the minority Jewish state of Palestine." The law which was intended to govern the legal status of Jewish residents of Arab League countries stated that all [Jewish] bank accounts would be frozen and used to finance resistance to "Zionist ambitions in Palestine." Jews believed to be active Zionists would be interned and their assets confiscated.³



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1. Remarks by President Obama in Address to the United Nations, September 21, 2011, *The White House* available at <http://www.whitehouse.gov/the-press-office/2011/09/21/remarks-president-obama-address-united-nations-general-assembly> (last visited on March 5, 2012).
 2. Samuel G. Freedman, *Are Jews Who Fled Arab Lands to Israel Refugees, Too?* NY TIMES, October 11, 2003.
 3. Mallory Browne, *Jews in Grave Danger in All Moslem Lands*, NY TIMES, May 16, 1948; George Barret, *Protection of UN Sought for Jews*, NY TIMES, May 17, 1948.

The need to set the historical record straight was recognized by the US Congress as the “Dual Middle East Refugee Problem”. The basic premises were introduced by the US Congress in an October 2003 resolution (H. Con. Res. 311) which recognized the “population exchange” that had taken place in the Middle East, and deplored the “cynical perpetuation of the Arab refugee crisis.” The resolution referred to the nine hundred thousand Jews from Arab countries who had been “forced to flee and in some cases brutally expelled amid coordinated violence and antisemitic incitement that amounted to ethnic cleansing.” It further criticized the “immense machinery of UNRWA” (United Nations Relief and Works Agency) that only “increases violence through terror.” Following their defeat in the battlefield and their failure to obstruct the UN partition resolution the Arab countries created UNWRA in 1949 and then harnessed it to perpetuate the tragedy and misery of one group of refugees and promote a new narrative of the conflict. The US Congress called on UNRWA to set up a program for resettling the Palestinian refugees.⁴

In April 2008, the US Congress passed another similarly worded resolution “expressing the sense of the House of Representatives” that “any comprehensive Middle East peace agreement must resolve all outstanding issues relating to the legitimate rights of all refugees in the Middle East, including Jews, Christians, and other displaced populations” (H.Res.185[110]).⁵

The actions of the American Congress were finally followed by the Israeli Knesset with a similar law passed on March 3, 2010.⁶

Responsibility for the Jewish and Palestinian refugee problem

The Israeli War of Independence led to the creation of two groups of refugees in the Middle East: the Arab Palestinian refugees and the Jews from Arab countries. In a few years, Jewish communities that had existed in the Middle East for more than 2,500 years, more than a thousand years before the arrival of Islam, were brutally expelled or had to run for their lives.⁷ In effect, a huge transfer of populations took place in the region; alongside 650,000 Palestinian refugees, 900,000 Jews were forced to leave their homes in Arab countries and either reach Israeli tent-towns as refugees (650,000 people) or go to other countries.

The vast majority of these Jews were forcibly expelled in a deliberate policy of “ethnic cleansing” due to waves of antisemitism and violence. An analysis of Arab anti-Jewish measures which was prepared by Shmuel Trigano, Professor of Sociology at the

University of Paris-Nanterre, lists a combination of six legal, economic and political measures which were instituted in order to isolate and deprive the Jews: denationalization; legal discrimination; isolation and sequestration; economic despoilment; socioeconomic discrimination; and pogroms or other violent measures.⁸ If there was no fear, and no existential threat to the Jews, what can explain the *en masse* flight of well established communities in the Middle East who left behind all their property and savings?

After an 18 month long War of Independence and great loss of life (6,000 dead in a community of 600,000 Jews), Israel still faced deadly threats. Nonetheless, the new Jewish state found it necessary to fulfill its

4. Itamar Levin, *Move in US Congress on Jews from Arab Countries*, GLOBES, October 30, 2003, [Hebrew]; Melissa Radler *US Congress hears resolution on Jewish refugees from Arab lands*, JERUSALEM POST, November, 2, 2003, available at http://saveisraelcampaign.com/atad/Articles.asp?article_id=1700 (last visited on March 6, 2012) and “Testimony of Dr. Avi Beker, Secretary General, World Jewish Congress Before the International Relations Subcommittee on the Middle East and Central Asia U.S. House of Representatives, Washington, D.C. June 3, 2003” available at <http://www.jewishfederations.org/page.aspx?id=43816> (last visited on March 5, 2012).
- And Marc Perelman, *Interview with UNRWA Commissioner-General, Peter Hansen* FORWARD, November 7, 2003 available at <http://unispal.un.org/UNISPAL.NSF/0/E0701DA101B82F4385256DDC006FD17C?> (last visited on March 5, 2012).
5. <http://www.opencongress.org/bill/110-hr185/show> (last visited on March 5, 2012).
6. Book of Laws 2232, March 3, 2010, pp. 406-407, [Hebrew].
7. For an updated survey of the Jewish condition in Arab countries see the new book by renowned British historian Martin Gilbert, *ISHMAEL’S HOUSE: A HISTORY OF JEWS IN MUSLIM LANDS* (2010).
8. Shmuel Trigano, *The Expulsion of the Jews from Muslim Countries, 1920-1970: A History of Ongoing Cruelty and Discrimination* POLICY PAPER Jerusalem Center for Public Affairs No. 62, November 15, 2010 / 8 Kislev 5771) available at http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=4&DBID=1&LN GID=1&TMID=111&FID=623&PID=0&IID=5174&TTL=The_Expulsion_of_the_Jews_from_Muslim_Countries,_1920-1970:_A_History_of_Ongoing_Cruelty_and_D (last visited on March 5, 2012).

obligation under its Declaration of Independence to ensure that “the State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles.” Israel, with its scarce resources, opened its doors to hundreds of thousands of Jews displaced from Arab countries, granted them citizenship, and tried, as best it could, under very difficult circumstances, to absorb them into Israeli society. In contrast, the Arab states turned their backs on the displaced Palestinian Arabs, sequestering them in refugee camps to be used as a political weapon against the State of Israel for the next sixty four years.

From a legal point of view there is a basic difference in the respective parties’ responsibility for the exchange of refugees. While the Arab Palestinians were an integral element of the enemy forces who fought the Jews in every city and village in Mandatory Palestine the Jews in the Arab world were loyal citizens of their far-off countries, unconnected in any way to the conflict in Palestine. The Palestinian population was highly motivated by calls from Arab leaders and by their own leader the Grand Mufti who declared a “holy war” and ordered his “Muslim brothers” to “murder the Jews. Murder them all”.⁹ The Palestinian Arabs formed part of the political forces that had declared war against the Jews and rejected the United Nations resolution to partition Palestine, leading to the collapse of law and order in Palestine. The fact that many of these Palestinians ended the war as refugees cannot relieve them and their leaders of their responsibility for calling, as their spokesperson Ahmad Shukeiry did, for the “elimination of the Jewish State”. They were clear about their ultimate goal which did not even contemplate a Jewish minority or Jewish refugees but rather as the Arab League Secretary General announced: “It does not matter how many [Jews] there are. We will sweep them into the sea.”¹⁰

Had the Arabs accepted the UN partition resolution there would have been no refugees - neither Arabs from Palestine nor Jews from Arab lands.

By rejecting the UN resolution in 1947 and declaring war against Israel the Arab states committed another brutal breach of international law - the mass displacement of the Jews from Arab countries. The 1945 Nuremberg Charter made wartime mass deportation a crime against humanity, and the 1949 Geneva Convention Relative to the Treatment of Civilians in Time of War prohibits deportations and forcible transfers, whether mass or individual. The Jews in the Arab world did not present any threat to the regimes or to the societies in their respective countries. The decrees and actions which were taken by these countries

against their local Jewish population were racist and discriminatory and included stripping the Jews of their citizenship and national rights, in a manner similar to the Nazi Nuremberg Laws on Citizenship and Race.

The above is clear evidence that the Jews leaving the Arab lands were full-fledged refugees in accordance with the instruments of international law. The term “refugee” is defined in the 1951 Convention Relating to the Status of Refugees (the “UN Convention”) as a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”¹¹

In the view of experts on restitution of assets the losses sustained by the Jews who have fled Arab countries since 1947 amounts to \$6 billion, in contrast to the losses of the Palestinian Arab refugees which he estimates at \$3.9 billion (both sums at 2007 rates).¹²

Arab legal responsibility for the creation of the Jewish refugee problem is well documented in the United Nations protocols and has been reflected in threats voiced against Jews by Arab representatives from the podium of the General Assembly. On November 24, 1947, the Egyptian delegate, Heykal Pasha, warned about the consequences of establishing a Jewish state in Palestine:

The United Nations...should not lose sight of the fact that the proposed solution might endanger a million Jews living in Muslim countries... creating antisemitism in those countries even more difficult to root out than the antisemitism which the Allies tried

9. Larry Collins and Dominique Lapierre O’ JERUSALEM (1972).

10. Benny Morris, *RIGHTEOUS VICTIMS: A HISTORY OF ZIONIST-ARAB CONFLICT, 1881-2001* (2001).

11. UN Convention Relating to the Status of Refugees, July 28, 1951, Art. 1 A(2)189 U.N.T.S. 150. *See also* UN Protocol Relating to the Status of Refugees, Jan. 31, 1967, Art. I (2), 606 U.N.T.S. 267. The UN Convention applied only to persons becoming refugees as a result of events occurring before January 1, 1951. The UN Protocol simply expanded the definition of “refugee” to include refugees caused by events after January 1, 1951.

12. Sidney Zabudoff *The Palestinian Refugee Issue: Rhetoric vs. Reality*, 20 JEWISH POLITICAL STUDIES REVIEW 2 (2008).

to eradicate in Germany... If the United Nations decides to partition Palestine, it might be responsible for very grave disorders and for the massacre of a large number of Jews.¹³

The Palestinian delegate, Jamal Al-Hussayni, said the Jews' situation in the Arab world "will become very precarious. Governments in general have always been unable to prevent mob excitement and violence."¹⁴ In Iraq, the threats were made publicly, and Foreign Minister Fadel Jamail, offered a similar statement in the UN.¹⁵ Iraqi Prime Minister Nuri Sa'id pursued special efforts to expel his country's Jews and promoted the idea of a population exchange proposing "to force an exchange of population under UN supervision and the transfer of 100,000 Jews beyond Iraq in exchange for the Arab refugees who had already left the territory in Israel's hands."¹⁶

UNWRA – perpetuating the refugee plight

With nearly five million descendants of Arab refugees from the 1948 war continuing to languish in 59 "temporary" refugee camps in Lebanon, Syria, Jordan, Judea, Samaria, Jerusalem and Gaza, UNRWA has been a significant player in perpetuating the refugee status of thousands of Palestinians. With funding of 1.2 billion dollars per annum (2010) by 38 Western democracies, UNRWA makes no effort to seek any long term solutions for descendants of Arab refugees who have been wallowing in the indignity of refugee life for more than 60 years. The U.S. is the largest Western investor in UNRWA, providing about one third of UNRWA's total budget (\$228 million in 2010), with another \$600 million pledged to support the Palestinian Authority in the West Bank and \$300 million for Gaza. Despite this heavy American and Western financing, UNRWA's facilities are hotbeds of anti-Israeli, anti-Western and antisemitic indoctrination and, according to the Palestinian Press Agency, Hamas has stored weapons in tunnels dug beneath UNRWA schools.¹⁷

UNRWA, a legal entity of the UN, gives millions of descendants of Arab refugees the false hope that they will be repatriated to their 1948 villages, even though these villages no longer exist. In fact, UNWRA is dedicated to a political agenda which sharply contradicts the efforts of the "Quartet" to mediate the peace process in the Israeli-Palestinian conflict. Ironically, the UN is one of the four members of the Quartet together with the United States, the European Union and Russia, while its Palestinian refugees agency, in practice, discourages the camp populations from believing that a future

Palestinian state in the West Bank and Gaza is viable. Through UNWRA, which embraces the quasi-legal concept of the "right of return" and operates educational facilities that show maps of Palestine which replace Israel, the UN is obstructing its own peace efforts within the framework of the Quartet, designed to promote the two-state solution to the conflict.

The Palestinians are the only refugee population in the world for whom a special, separate UN organization has been formed. Out of 150 million refugees designated as such since the end of World War Two, they are among the only ones who have (since Israel's creation in 1948) retained their refugee status. All refugees in the world, except for the Palestinians, fall under the mandate of the UN High Commission for Refugees (UNHCR), the declared goal of which is to seek *permanent* solutions to the problem of refugees. The UNHCR has about one fifth of the staff of UNWRA (5,000 compared to 25,000) while it deals with 5 to 6 times the number of refugees, with less than one third of its budget per refugee. Essentially, the stated goals of UNWRA have not changed since its establishment. UNWRA operated for 19 years to block the resettlement of Palestinian refugees before Israel won the Six Day War in June 1967 and entered the territories of Judea, Samaria and Gaza. Typical for those days was the statement given by UNRWA's director in Jordan, in August 1958:

The Arab states do not want to solve the refugee problem. They want to keep it as

13. GAOR *Official Records of the Second Session*, Ad Hoc Committee on the Palestinian Question, SUMMARY RECORDS OF MEETINGS, 25 September–25 November 1947, Lake Success, NY, p. 185.

14. *Ib.*

15. GAOR *Official Records of the Second Session*, VERBATIM RECORD OF THE PLENARY MEETING, Vol. 2, 110–28th meeting, November 16, 1947, p. 1391.

16. For the sources, see Ya'akov Meron, *Expulsion of Jews from Arab Countries: The Palestinians' Attitude Towards It and Their Claims* in THE FORGOTTEN MILLION: THE MODERN JEWISH EXODUS FROM ARAB COUNTRIES (Malka Hillel Shulewitz, ed., 88–89 (1999).

17. Assaf Romirowsky and Alexander Joffe *Defund the UNRWA: The 60-year-old U.N. aid agency is keeping Palestinians from leading normal lives*, WALL ST. J, April 1, 2010 available at <http://online.wsj.com/article/SB10001424052748704396904576226452357028480.html> (last visited on March 4, 2012).

an open sore, as an affront to the United Nations and as a weapon against Israel. Arab leaders don't give a damn whether the refugees live or die.¹⁸

Similarly in 2000, more than fifty years after UNRWA's establishment, an official PLO document reaffirmed the Arab strategy of perpetuating the refugees' distress by keeping them in the camps:

In order to keep the refugee issue alive and prevent Israel from evading responsibility for their plight, Arab countries — with the notable exception of Jordan — have usually sought to preserve a Palestinian identity by maintaining the Palestinians' status as refugees.¹⁹

In an unusual slip of the tongue a high official of UNRWA, Andrew Whitley, the outgoing head of the agency's New York office, admitted in 2010 that there is an inherent contradiction in UNRWA's mandate. In a speech to an Arab-American group Whitley stated that Palestinian refugees must start "debating their own role in the societies where they are rather than being left in a state of limbo where they are helpless." The UN official added that the Palestinian refugees should not be allowed to preserve the cruel illusion that perhaps one day they would return to their homes. His remarks reflected a clear frustration with UNRWA's contribution to the political deception:

We recognize, as I think most do, although it's not a position that we publicly articulate, that the right of return is unlikely to be exercised to the territory of Israel to any significant or meaningful extent... it's not a politically palatable issue, it's not one that UNRWA publicly advocates, but nevertheless it's a known contour to the issue.²⁰

Overcoming the Gordian knot

In order to undo the Gordian knot of the right to return, the UN must break with the institution which is built on the premise that Zionism was the source of the original sin. A sincere debate on the origins of the conflict is essential for conflict resolution. The issue of the refugees cannot be treated outside the framework of its historical context and must be tackled, to use President Obama's words, in an "honest" fashion because "facts cannot be denied."

To rectify this historical injustice there is a need for a new approach to the refugee problem based on two principles: resettlement of the Arab refugees and incorporation of the issue of the Jewish refugees in the diplomatic process.

First, UNRWA should be disbanded or at least adopt the principles of UNHCR: rehabilitation of the residents of the camps.

Second, the UN General Assembly — in the interests of justice and equity — should include reference to Jewish refugees as well as Palestinian refugees in its annual resolutions; this practice should also be followed by other UN agencies.

Third, both Arabs and Jews should agree that there is no return to the demographic realities of 1948: Jews are part and parcel of the Jewish state and Palestinian Arabs should resettle in their respected countries of residence or return, as part of a negotiated solution, to an independent Palestinian state. ■

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18. For more on the subject, see Avi Beker, *The Forgotten Narrative: Jewish Refugees from Arab Countries* 17 JEWISH POLITICAL STUDIES REVIEW 3-4, 3 (2005); and more recently Alexander H. Joffe and Asaf Romirowsky *A Tale of Two Gallows Notes on the Early History of UNRWA and Zionist Historiography*, 46 JOURNAL OF MIDDLE EASTERN STUDIES 655 (2010).
 19. Palestine Liberation Organization, *The Palestinian Refugees Fact File* 22 (2000).
 20. *Jordan slams UN official for urging Palestinian refugees to resettle in Arab states*, HAARETZ Oct. 28, 2010.

Well-Founded Fear of Persecution: An Analysis of the Status of Jews from Islamic Countries in the Prism of the International Refugee Convention

Sivan Carmel

Introduction

In the years that followed the proclamation of the State of Israel, the lives of many Jews in Moslem countries became increasingly difficult as these countries carried out repressive measures against their Jewish nationals. Some Moslem countries enacted laws that discriminated against Jews, denationalized and interned them, froze their bank accounts and confiscated their property. Jews were barred from government agencies and their admission to public office was severely restricted.¹ In some Arab countries Jews suffered acts of violence and threats at the hands of the local population without receiving effective protection from the state. Some Moslem countries, such as Egypt, expelled large numbers of Jews from their territory, while other countries, such as Iraq, prohibited them from leaving. Many of those who left, either on their own or through organized rescue operations, sought protection in Israel and in other countries.

Do these Jews meet the requirements set out in international law to be recognized as refugees? This article seeks to explore the legal situation of individual Jews who left their Moslem countries of origin, through the lens of the 1951 Refugee Convention ("the Convention").²

The case of Jewish refugees from Moslem countries may also be regarded as a useful test case as to who is a refugee. This question is of interest to many countries as large numbers of migrants flood across their national borders; a phenomenon which Israel has also experienced over the past few years. Differentiating between refugees and other classes of migrants bears significance for the rights, future and occasionally life of the individuals concerned and helps shape the asylum policies of the various host countries.

A Growing Concern in the Jewish Community

On a cool spring night in March 1948, Ms. Ilja Dijour, Director of Research at the Hebrew Immigrant Aid Society

(HIAS), wrote a memo to the organization's Executive Director:



...I would like to call the attention of our board to the problem of some 825,000 oriental Jews living in the Moslem countries. Before World War II, this section of the Jewish people represented only 15% of the Jewish population in the emigration countries. Now, after the annihilation of the greatest majority of the Eastern European Jews, they represent 40%. On several occasions, the Jewish Agency stressed the special hardships and real danger to which these oriental Jews are exposed, especially since the decision of the UN about partition of Palestine... Migration, especially to Palestine, is forbidden in most of the countries, that only a neutral organization, such as the HIAS, in close cooperation with the local communities, would be able to organize the emigration out of these countries...³

1. Ada Aharoni *The Forced Migration of Jews from Arab Countries* (2002) in: HISTORICAL SOCIETY OF JEWS FROM EGYPT available at <http://www.hsje.org/forcedmigration.htm> (last visited on March 8, 2012).
2. U.N, GAOR *Convention Relating to the Status of Refugees*, 28 July 1951, U. N. T. S. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html> (last visited on March 8, 2012).
3. Archives of the Hebrew Immigrant Aid Society: HIAS Collection in YIVO; RG (Record Group) 245.4; MKM (microfilm) 15.22; File XI-31.

The call to action was heeded. During the five decades that followed, HIAS worked in close collaboration with local Jewish communities, with JDC (American Jewish Joint Distribution Committee), the Jewish Agency and on occasion with the Mossad, to assist thousands of Jews to emigrate out of Arab countries and reach safety. Most of the Jews helped by HIAS came to Israel, while others continued to North America and Europe. It is estimated that from 1948 through the 1970s, over 850,000 Jews emigrated out of Moslem countries in the Middle East and North Africa.

Exploring Individual Cases of Jews from Arab Countries

When reading in articles and history books about the massive numbers of Jews who were uprooted from their homes, forced to flee or expelled from their Arab countries of origin, one tends to overlook the fact that these large numbers are made up of individuals.

Who are these individuals? Refugees? Migrants? Displaced persons? What triggered their decision to leave their home countries? What did they think would happen had they stayed?

We know today that many Jews left their countries of origins due to pull factors, such as a desire to help build the new nation of Israel. But many others left due to push factors, as life in the Arab countries of origin became unbearable. Reports and accounts from the late 1940s through the 1960s often open a window into the kinds of situations that triggered the decision of Jews to leave their home countries.

An excerpt from a 1963 report issued by the Europe and North Africa Department in the Jewish Agency on "The Situation of the Jews in Libya":⁴

...Hereafter some details of which some are known to you, which caused the fermentation of the Jewish community in Tripoli and the fear of the future:

C. N.⁵ – one of the leaders of the Jewish community in Tripoli. He was found one day at his home, attached with ropes to his chair, dead as a result of his head having been stoned. It is supposed that he was killed in relation with a private matter (an Arab desired his daughter), but since he was killed by an Arab, it caused quite a commotion.

B.H. – was active in his time in Aliya matters, Arabs entered his shop, beat him and as a result he lost his eyesight.

Some businessmen at Tripoli received

threatening letters, urging them to pay ransom to an Arab group, otherwise they will have to die.

A new law was enforced in Tripoli: every Jew possessing money in foreign countries is obliged to transfer it to Tripoli.

An additional law: every Jew exchanging letters with Israelis may be put in prison for 10 years.

The report also described the hardships faced by Jews in Libya, stating that Jews were not allowed to serve as government employees and that entire families were prohibited from crossing the borders of the country. Similar documents were written about the situation of Jews in other Moslem countries, such as Egypt, Yemen, Algeria, Tunisia, Iraq, Syria and Lebanon. For the sake of our discussion, we will refer to the above report as a case study and assume that the individuals noted in it managed to leave Libya and claim asylum in a country signatory to the Refugee Convention.

Legal Analysis and Discussion

In order to assess if an individual meets the criteria of a refugee according to international refugee law, states usually conduct Refugee Status Determination (RSD).

If the individuals from Libya noted in the report were to stand before an RSD officer or an immigration judge and make a refugee claim, would they be considered as refugees according to the 1951 Refugee Convention?

The rights set out by the Convention include several vital protections, including protection from forced return to the country of origin and protection from being penalized for seeking protection in the country of asylum. Refugees are entitled to documentation of their status and access to national courts for the enforcement of their rights, as well as to basic social rights.⁶

In principle, a person becomes a refugee at the moment when he or she satisfies the definition, so that the determination of status is declaratory, rather than constitutive.⁷

4. Archives of the Hebrew Immigrant Aid Society: HIAS Subject Files, Box 228, Libya 1964.

5. Names not disclosed for privacy reasons.

6. James C. Hathaway, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005).

7. Guy Goodwin-Gill & Jane McAdam, *THE REFUGEE IN INTERNATIONAL LAW* (3rd ed., 2007).

Article 1 of the Convention defines “refugee” as a person who:

...Owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country...

The RSD officer or the immigration court adjudicating the case of one of the Libyan Jews mentioned in the report, would probably raise the following questions:

Is the fear of persecution well-founded?

An analysis of “the fear of persecution” is an attempt to predict what might happen to the applicant in the future, if returned to his or her country of origin.⁸ The definition of well-founded fear has a subjective element (fear itself, as a state of mind) and an objective element (the “well-foundedness” of the fear – its basis in reality).⁹

The subjective element of the fear is usually assessed on the basis of the asylum seeker’s statements about his or her fear of return to the country of origin, taking into account factors such as personal experience, personality and cultural characteristics.¹⁰ The subjective state of mind must be supported by an objective situation. The applicant’s statements must be viewed in the context of the conditions in the applicant’s country of origin. The experiences of others in a similar situation might be considered, as well as the laws in the country of origin and the manner of their application.¹¹

For a fear to be considered “well-founded”, an applicant must prove that there is a “reasonable possibility” of persecution upon return to the country of origin. In most jurisdictions, the measure of “reasonable possibility” is usually lower than the balance of probabilities and in the United States is estimated at around 10% chance of persecution.¹²

The above report on the situation of the Jews in Libya does not give any indication about their subjective fear of persecution or lack thereof. It may be assumed that a person would not normally abandon his or her home country without some compelling reason. An RSD officer would have to evaluate the applicant’s statements as indicators of subjective fear.

Could the Libyan Jews mentioned in the report prove the objective element in the definition of well-founded fear? The measures carried out against Jews in Libya and in other countries were no secret. Newspaper articles

about violence and repressive measures were common. The *New York Times*, for example, published an article on May 16, 1948, with a headline that declared “Jews in Grave Danger in All Moslem Lands: Nine hundred thousand in Africa and Asia face wrath of their foes”.¹³ International aid organizations and migration agencies issued reports such as the above memo on the Jews of Libya, and representatives of Arab nations often made statements in the UN and in the media about the imminent danger faced by Jews in Arab countries following the establishment of the State of Israel.¹⁴

The discriminatory laws enacted in these countries in the late 1940s bore a chilling resemblance to the Nuremberg laws enacted in Germany just several years earlier – and should have served as a warning bell for the more severe persecution that would follow.

The danger facing Jews in Arab countries during the late 1940s was evident to many. Joe Schwartz, director of the JDC addressed an emergency meeting of the United Jewish Appeal in 1948, stating that the Jews in Moslem countries were “sitting on a volcano”.¹⁵

It seems that proving the objective element of the definition of well founded fear would not be a difficult task in the light of the information available at the time.

8. *Ib*, p. 54.

9. UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, paras 37-39 1992,. Available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html> last visited on March 8, 2012). See also *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 723 for a discussion of the bipartite test of ‘well-founded fear’.

10. UNHCR Handbook, *ib*, paras. 40-41.

11. *Ib*, paras. 42-43 .

12. This standard of proof was recognized by the US courts in *INS v. Cardosa-Fonseca* 480 US 421 (1987). Recently, this standard was applied by an Israeli Administrative Court in the matter of AP 3415-05-10 *Hernandez v. Ministry of Interior*, available in Hebrew at <http://www.court.gov.il>.

13. Irwin Cotler, David Matas and Stanley A. Urman *Jewish Refugees from Arab Countries: The Case for Rights and Redress* (2007), available at <http://www.justiceforjews.com/legal.html> (last visited on March 8, 2012).

14. *Ib*.

15. Tad Szulc, *THE SECRET ALLIANCE: THE EXTRAORDINARY STORY OF THE RESCUE OF THE JEWS SINCE WORLD WAR II* (1991).

Are the acts described above considered persecution?

There is no universally accepted definition of persecution. An act of persecution is usually agreed to be an act that causes “serious harm” or a “serious violation of human rights”. The stoning of C.N. and the beating of B.H. may seem like more compelling acts of persecution since they caused serious bodily harm. But what about the threatening letters sent to the businessmen? Must the threats have been carried out or attempted in order for them to amount to persecution? And the two laws described above – they are certainly discriminatory, but do they actually amount to persecution against the Jews forced to abide by them?

According to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, an individual may have been subjected to various measures which did not singly amount to persecution, but which, if taken together, could reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”.¹⁶

Whether these acts constitute persecution or not may also be influenced by their scope and breadth. It is known that similar measures were implemented against Jews in numerous Arab countries: a recently discovered Draft Law of the Political Committee of the Arab League detailed a coordinated strategy of repressive measures against Jews, indicating a pattern of conduct shared by a number of Arab states.¹⁷

According to this draft law, which was adopted by the domestic legislation of many Arab countries, Jews were made to register and then classified as “members of the Jewish minority state of Palestine”; the bank accounts of Jews were frozen and the money was used to finance “resistance to the Zionist ambitions in Palestine”; Jews who were not also citizens of non-Arab countries were considered enemies; Jews who were considered “active Zionists” were interned and their property was confiscated; in many Arab countries Jews were denationalized and forcefully expelled.¹⁸ The cumulative effect of these measures and the fact that they were implemented in several countries at the same time would constitute persecution if they produced in the mind of the person concerned, a feeling of apprehension and insecurity as regards his or her future existence.¹⁹

A hypothetical situation worth exploring would be one where a Libyan Jew who does not abide by the new law, noted in the report, requiring Jews to transfer money from foreign accounts to Tripoli, leaves the country to avoid a long prison sentence. Some might argue that such a person is in fact fleeing prosecution and not persecution. To help determine this, the following questions should be examined: does this new law apply to all citizens of Libya

or just to a certain sector in the population? Is it enforced on everyone or is it enforced selectively? Is the punishment imposed by virtue of this law proportionate to the act committed? A ten year prison sentence for Jews who correspond with Israelis is likely to be deemed disproportionate and persecutory, particularly if this punishment is confined to Jews.²⁰

Was the applicant persecuted on account of one or more of the five Convention grounds (race, religion, nationality, political opinion, membership of a particular social group)?

In the case of the Libyan Jews in the report, the first ground that probably comes to mind is religion – Jews fear persecution because they belong to a religious minority in a country with a Moslem majority. However, more than one ground may be applicable and the grounds may overlap.²¹ These Jews could also claim fear of persecution on account of nationality, as members of the “Jewish People” (for example, Jews were viewed as a nationality in the former Soviet Union). Since Nationality in Article 1A(2) of the Convention is usually interpreted to include origins and membership of a particular ethnic, religious, cultural and linguistic community,²² this kind of claim would probably be legitimate.

Another ground which may apply to the case of the Libyan Jews is political opinion. This ground should be understood in the broad sense to incorporate any opinion on any matter in which the machinery of state, government and policy may be engaged.²³ Indeed, some Jews were persecuted because they openly supported the new Jewish state, promoted Aliya or simply did not adhere to the restrictions imposed on them by the new legislation. Others may have been entirely neutral in their opinions or actions concerning the new Jewish state and yet their support of it was imputed to them by the Libyan authorities; they were deemed to be “Active Zionists” who opposed the

16. UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para. 53 1992. Available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

17. See *supra* note 13.

18. *Ib.*

19. UNHCR Handbook, *supra* note 9, para. 55.

20. See *supra* note 7.

21. *Ib.*

22. *Ib.*

23. *Ib.*

Libyan government. In this context, the ground of political opinion also encompasses imputed political opinion.²⁴

Is there a nexus between the fear of persecution and one or more of the Convention grounds?

An individual claiming to be a refugee must show a causal link, or nexus, between the persecution feared and the relevant Convention ground. A nexus can be shown through evidence regarding the reasons which led to the infliction or threat of harm, or which caused the individual's country to withhold effective protection when the agent of persecution was a non-state actor.²⁵

In the case of the businessmen from Tripoli, can they show that they received the threats because they are Jewish and not because they were perceived as wealthy businessmen who could easily fall prey to extortion? Can B.H. who was beaten in his shop show that he was attacked because he was active in Aliya matters and not as part of a violent robbery? Without a nexus between the persecution and the relevant ground, all elements of the refugee definition would not be met. Perhaps in a general discriminatory atmosphere against Jews this nexus would be easier to prove. If we had the testimony of B.H. as to what his attackers said to him during the attack, the question of nexus could be clearer in his case.

Are the Jews who fled from Moslem countries entitled to an "automatic" second nationality from Israel?

This is a more indirect – but no less substantive – question: a person will generally not be recognized as a refugee if he or she has a second nationality of a country that could provide protection. When Jews made refugee claims in Canada, the US or Australia after the Law of Return was enacted in Israel, their claims were often rejected on the ground that they had the option of immigrating to Israel. In the 90s this changed in Canada, as the Federal court determined that the right to Israeli citizenship is not automatic and is subject to the discretion of the Israeli immigration authorities and to the voluntary will of the applicant. Similar court decisions followed in Australia as well, as the courts found that: "... It would also be astonishing if the enactment by the State of Israel of the Law of Return, without more, meant that the Convention's "protection obligations", accepted by other countries, were thereby withdrawn throughout the world, by implication and not express terms, from application to all persons who were, or might be, classified as Jewish... Jews, however defined, are protected by the Convention like everyone else".²⁶

Recognition of Jews as Refugees

The above are just some of the questions that could be

raised as part of an RSD process that a Jew fleeing Libya and making a refugee claim would theoretically face. It seems that in the light of the severe human rights violations, lack of state protection and systematic repression carried out against Jews in Arab countries, the elements of the refugee definition could have been met by most of the Jews fleeing from these countries after the establishment of the State of Israel.

Although RSD is generally conducted on an individual basis, on several occasions Jews from Arab countries were collectively recognized as a refugee population by the international community.

Such recognition was granted in 1957 and 1967, when the High Commissioner for Refugees determined that Jews from Arab countries fell within the mandate of UNHCR.²⁷

Another indication of the UN recognition of Jews from Arab countries as refugees can be found in UN Resolution 242, which stipulated that a comprehensive peace settlement should include "a just settlement of the refugee problem". No distinction was made between Jewish and Arab refugees, despite attempts by some countries to limit the scope of the resolution to Arab refugees.²⁸

In 2008 the United States House of Representatives recognized Jewish refugees from Arab countries in Resolution 185, which stated that any Middle East peace agreement should also resolve issues related to Jewish refugees.²⁹

24. *Bolanos-Hernandez v. INS*, 767 F 2d 1277 (9th Cir 1984).

25. University of Michigan Law School, *International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground*, 25 March 2001: <http://www.unhcr.org/refworld/docid/3dca7b439.html> (last visited on March 8, 2012).

26. *NAGV and NAGW of 2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] HCA 6, March 2, 2005. Available at: <http://www.unhcr.org/refworld/docid/42c533034.html>; see also *MZXL & Anor v MIAC & Anor* [2007] FMCA 799 Federal Magistrates Court of Australia, McInnis FM, MLG 1064 of 2006, 29 May 2007 (last visited March 8, 2012).

27. See *supra* note 13, Article 6 of The Statute of the UNHCR determines to whom the competence of the High Commissioner shall extend. The criteria is worded almost identically to the wording of the Refugee Definition in the Convention. See UN GAOR, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html> (last visited March 8, 2012).

In 2010 the Israeli Knesset enacted the Law for the Protection of the Right to Compensation of Jewish Refugees from Arab Countries and Iran. This law recognized Jewish refugees who arrived in Israel due to persecution in Moslem countries and its stated purpose was to protect their rights to compensation as part of any peace negotiations in the Middle East.³⁰

We know today that most of the Jews who fled from Arab countries did not remain refugees for long. They found protection and new homes in Israel, North America and Europe.³¹

Although recognition of these Jews as refugees is no longer necessary to invoke international protection, recognition that they were refugees and victims of severe human rights violations is an essential step in the path to achieving legal and historical redress. The above collective recognition of Jews from Arab countries as refugees is directly related to their ability to seek compensation from the countries in which they were persecuted, as part of any future settlement of the Arab-Israeli conflict.³²

If the above collective recognition of Jews as refugees is enough to facilitate consideration of compensation and redress, why should we still be concerned with their recognition according to the Refugee Convention?

The significance of the analysis of ‘who is a refugee’ according to the Refugee Convention is twofold: it is the basis for the collective recognition reviewed above and it presents an educational and moral value to the discussion of this issue.

The determinations made by the High Commissioner for Refugees that Jews from Arab countries are refugees under the mandate of UNHCR, were based on an analysis of well-founded fear of persecution due to one or more of the five Convention grounds and lack of state protection.³³ US House Resolution 185 was also based on the Refugee Convention: “...Whereas the international definition of a refugee clearly applies to Jews who fled the persecution of Arab regimes, where a refugee is a person who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country...’.”³⁴ The explanatory note to the Knesset law recognizing Jewish refugees from Arab countries also referred to the definition of refugee in the Refugee Convention.³⁵

As lawyers and jurists we naturally take an interest in the legal perspective of an issue. Like a mechanic peeking under the hood of a car to understand how the engine works, we take apart and analyze a situation according

to the legal principles and standards that govern it.

Examining the status of the Jews who left Arab countries through the prism of the Refugee Convention may help filter out the political and historical discourses that surround this issue and focus on a more legalistic approach. The term “refugee” is often used in many contexts and for different purposes. There is only one meaning to the word “refugee” under the Refugee Convention. The question “were the Jews who left Arab countries refugees” thus becomes a question of law.

Finally, while looking back at our own history as Jews and refugees we may also wish to look outwards. At the time of this writing, there are over 50,000 migrants in Israel³⁶ who have crossed into Israel without visas through the porous Sinai border with Egypt. In general, they have come to find better, more secure lives. Some of them have fled from persecutory situations similar to those experienced by the Jews who fled from Arab countries. For example, many asylum seekers who have come to Israel from Darfur fled ethnic violence and genocide carried out against them by a radical Moslem regime. Some religious minorities from Eritrea have fled from lengthy imprisonment and torture after their religion was outlawed.³⁷ Many other asylum seekers have fled from other kinds of persecution in their countries of origin. To find out which of them are refugees in need of protection, the state must conduct Refugee Status Determination in

28. *Ib.*

29. H. RES 185, 110th Cong. (2008). Available at: <http://www.govtrack.us/congress/billtext.xpd?bill=hr110-185> (last visited March 8, 2012).

30. The Law for the Protection of the Right to Compensation of Jewish Refugees from Arab countries and Iran, 2010 (Hebrew), Book of Laws 2232, p.406.

31. See *supra* note 1.

32. For an in-depth discussion of restitution, compensation and redress for Jewish refugees from Arab countries, see *supra* note 13.

33. *Statute of the Office of the United Nations High Commissioner for Refugees*. Art. 6.

34. See *supra* note 30.

35. *Id.*

36. Statistics published by the Population and Immigration Authority: *Data on Foreigners in Israel (Dec. 2011)* (Hebrew) available at <http://www.piba.gov.il/PublicationAndTender/ForeignWorkersStat/Pages/default.aspx> (last visited March 8, 2012).

37. US State Department Human Rights Report: Eritrea (2010); available at: <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154345.htm> (last visited March 8, 2012).

relation to individual asylum seekers and ask similar questions to the ones we have asked in this article. Understanding the meaning of “refugee” in the Refugee Convention may help clear the fog around this term. Understanding this term as it applies to the Jews who fled from Arab countries more than half a century ago may impact the way that Israel (both state and civil society) treats asylum seekers today.

Conclusion

This article seeks to explore some of the questions arising from possible refugee claims of Jews who left their Moslem countries of origin in the years following the establishment of the State of Israel.

The great majority of the Jews who fled or were expelled from these countries are considered to be refugees according to international law, whether on an individual or group basis. This recognition goes beyond the theoretical, academic value it presents to our discussion. It bears an impact on possible remedies under international law, while shaping our collective identity as Jews in Israel. Perhaps it also influences (or should influence) how we regard people around us who are in similar persecutory situations today. ■

The author is an Israeli lawyer and Deputy Director of HIAS Israel. This article is based on a lecture given by the author at an IAJLJ event held on September 14, 2011.



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The Right to Freedom from Religion

Kaniuk v. Minister of the Interior et al

Rahel Rimon

Summary

This case concerned an Originating Motion submitted by the Plaintiff for a judgment declaring that he had “no religion”. The Plaintiff petitioned to change the record relating to “religion” in the Population Administration



Register, from “Jewish” to “no religion”. The court upheld this claim based on the Plaintiff’s fundamental right to freedom from religion, derived from his right to human dignity, as recognized by the Supreme Court and international conventions.

In the District Court of Tel Aviv - Jaffa
O.M. 25477-05-11
Before Judge Gideon Ginat, Deputy President
Judgment given on 27.9.11

Yoram Kaniuk

Plaintiff – Applicant

Against

1.Minister of the Interior

2.Official in Charge of Registration,
the Population and Immigration Authority, Ministry of Interior

Defendants - Respondents

JUDGMENT

Issue

This case concerned an Originating Motion submitted by the Plaintiff for a judgment declaring that he had “no religion”. The Plaintiff petitioned to change the record relating to “religion” in the Population Administration Register, from “Jewish” to “no religion”.

Factual Background

The court noted that the Plaintiff was a writer by profession, who had achieved recognition and respect both in Israel and abroad for his work. The court described the Plaintiff’s background as set out in the *“Lexicon of Modern Hebrew Literature”*, noting, *inter alia*, that he was born and educated in Tel Aviv. During the War of Independence he had served in the Palmach, on the Jerusalem front, and was wounded. Currently, he wrote articles for the Israeli newspapers and had published a large number of books and stories aimed at both adults and young people; he had won the Ze’ev prize for his book *The House Where Cockroaches Live to a Ripe Old Age* (1979); the President’s Prize (1998); the Bialik Prize for Literature (1999); the Brenner Prize (1987). In France he had won the Prix de Droits de l’Homme (Human Rights Award) (1997) and the Prix Méditerranée Etranger (2000). In 2010 he won the Sapir Prize. In 1996 a documentary was produced on his life and work and his books had been translated into many languages.

The court noted that the Plaintiff had never defined himself as a religious Jew, and had never been observant. As a result of his marriage to a Christian woman, his grandson was defined as having "no religion". As an act of solidarity, claiming that he was "fed up" with Judaism in its present form, and because of his lack of desire to convert to another religion, on November 17, 2010 he sought to alter the record in the Population Registry (the "Registry") from Jewish to "no religion". This request was denied because no public certificate had been attached to his application. An official of the Department of Registration and Passports wrote to the Plaintiff's attorney with respect to his request to correct the Registry, stating that in view of the fact that the Plaintiff's "initial registration details recorded the Jewish religion, in order to correct this he now has to produce a public certificate, which in this case is a judgment."

In view of this answer, the Plaintiff filed the current proceeding. Following an exchange of pleadings, the Plaintiff submitted an affidavit in which he wrote by hand that he insisted on his request as formulated in the Statement of Claim, that he was "now over 81, ill, and greatly wished to receive a decision very soon ... my request is very important to me."

The issues

The Plaintiff pointed to fundamental rights and basic values, by virtue of which he petitioned to be granted freedom from being defined as a Jew in the Registry. He relied on the right to freedom from religion. The Respondents argued that the Plaintiff had the burden of persuading the court that his intentions were genuine when seeking to change the Registry record concerning his religion (Civil Appeal 448/72 *Isaiah Shik v. Attorney General* 27(2) PD 3, hereinafter: the "*Isaiah Shik case*") The Respondents also reiterated the importance of the Registry as an instrument which had to be left outside the arena in which protests were conducted (HCJ 147/70 *Ziggy Shtederman v. Minister of Interior* 24(1) PD 766).

The Plaintiff responded that the Respondents' conditions had been met in this case and therefore it would be proper to register him as having no religion and grant him the relief sought without delay. The Plaintiff added that the written response filed by the Respondents did not create any doubt regarding his honesty and good faith.

Summarizing their position the Respondents wrote that they were leaving the decision regarding the Plaintiff's application to the "discretion of the Honorable Court in accordance with the specific circumstances and on the basis of the rulings of the Supreme Court...".

The law and its defects

The court explained that the relevant statute was the Population Registry Law, 1965 ("the Law"). Section 19C(A) and Section 19D provided (respectively):

19C(A): "a change in a particular in the registration of a resident will be registered in accordance with a document provided by virtue of Sections 15 or 16 or by a notice under Section 17 which was presented together with a public certificate evidencing the change..."

19D: "Without prejudice to Section 19E or Section 23, a particular in the Register shall not be changed save at the request of the resident to whom the registration refers and in accordance with a public document indicating that the registration was not true."

The court noted that the law did not address the case where no governmental authority had power to issue a public document in so far as concerned the particular regarding religion in the Register, in cases where an individual wished to change that particular from an active religion to "no religion".

The court questioned whether this was a lacuna in the law, explaining that a lacuna existed where a legal arrangement was incomplete, and cried out to be completed, and where this lack of completion was contrary to the purpose of the arrangement (A. Barak, "Types of Judicial Creativity: Interpretation", 39 *Hapraklit* (1990) 267, 269 and Crim.App. 4972/07 *Atef Fuaz v. State of Israel* [Published in legal databases, 20/03/08]. The law required a public certificate, but there was no body authorized to issue a certificate attesting to a person having "no religion".

The function of the Registrar

The court noted that the function of the Registrar was – to register. His function was technical and aimed at checking whether a certificate had been blatantly forged or not (HCJ 143/62 *Funk Schlesinger v. The Minister of the Interior* 17 PD 225, 249 (1963); HCJ 4916/04 *Zlasky v. Minister of the Interior* [Published in legal databases, 19/06/11] and HCJ 10533/04 *Eyal Weiss v. Minister of the Interior* [Published in legal databases, 28/06/11]).

Completion of lacuna

Completion of the lacuna was to be carried out in accordance with Section 1 of the Foundations of Law – 1980: “Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel’s heritage.”

The court noted that facing it was a demand for freedom from religion as a matter of self-definition for the purpose of the Register (as freedom of worship had been given to the Plaintiff without interference). Freedom from religion was a freedom derived from human dignity, which was protected by Basic Law: Human Dignity and Freedom (CA 6024/97 *Shavit v. Hevre Kadishe Rishon Lezyon* 53(3) PD, 600). Accordingly, given a lacuna in the law, the fundamental right would be the deciding factor and tilt the scales in favor of the Plaintiff, when he came to define himself in the Register. The court saw no need to impose any burden on the Plaintiff apart from bringing his application before the court. It was not for nothing that the Respondents had cited references from Israeli law prior to the adoption of the Basic Laws. In the court’s view, after the adoption of the Basic Laws, and particularly Basic Law: Human Dignity and Liberty, it would not be right to impose burdens of proof on an applicant wishing to define himself as having “no religion”, when the issue under discussion was one of self-definition by virtue of the right to dignity.

In the case at hand, there was no dispute about the Plaintiff’s good faith and the Respondents had not disputed the facts alleged by him nor had they sought to question him about his affidavit. Both the competent official in the Ministry of the Interior and counsel for the Respondents had agreed that in this case the court judgment provided a suitable certificate for registration of the Plaintiff as having no religion, in the absence of any other authority competent to issue a public document for this purpose, and the only question requiring decision was whether the Plaintiff had proved the seriousness of his intentions. In the circumstances described here, and also according to the *Isaiah Shik* case, it was clear that the Plaintiff had met the burdens imposed on him by virtue of the judgments cited by the Respondents.

The court explained that in the *Isaiah Shik* case, the Supreme Court, *per* Justice Berenson, had emphasized that a person possessed the right not to belong to any religion or nationality, and that when he made a declaration to this effect, these particulars would remain empty in the Population Registry.

In an article written by Prof. Shimon Shetreet on freedom of religion in Israel, the author mentioned that the Mandate (Articles 2, 13-18) and the Palestine Order in Council (Articles 83 and 17(1)(a) (83), both from 1922, guaranteed freedom of religion, worship and conscience. In his words:

“The Palestine Mandate of 1922 contained a number of provisions ensuring freedom of religion and conscience and protection of holy places, as well as prohibiting discrimination on religious grounds. Further, the Palestine Order in Council of that same year provided that ‘all persons ... shall enjoy full liberty of conscience and the free exercise of their forms of worship, subject only to the maintenance of public order and morals’. It also lays down that ‘no ordinance shall be promulgated which shall restrict complete freedom of conscience and the free exercise of all forms of worship’. These provisions of the Mandate and of the Palestine Orders in Councils have been recognized in the Israeli legal system and are instructive of Israeli policy in safeguarding freedom of conscience and religion.”

Regarding the Declaration of Independence, Professor Shetreet, stated:

"Israel's Declaration of Independence, promulgated at the termination of the British Mandate in 1948, is another legal source that guarantees freedom of religion and conscience, and equality of social and political rights irrespective of religion."

Later, the author noted that freedom from religion is also a right that a democratic country must guarantee to its citizens:

"The democratic state must promise and preserve the freedom of religion, which is defined as the freedom of any religion to maintain its religious activity and the freedom of any person to maintain his faith and religion and to fulfill its commandments and rituals. **Another right that a democratic state must promise is the freedom from religion, which is the freedom of any person not to fulfill the commandments of the religion. The private person is not obliged to any religious duty, religious institute, or religious ritual, he is free of any religious restriction, and he has every right of speech, belief and equality in front of the law.**"

(The court added the emphasis).

The court concluded that it was clear from these remarks that a person also held the right to be registered as having no religion where a register was being administered in relation to that person's religion.

Finally, the court noted that there were a large number of international conventions recognizing the right to freedom of thought, conscience and religion. These included Article 18 of the International Covenant on Civil and Political Rights (1966); Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), as amended in 1970, 1971, 1990 and 1998; and Article 10 of the Charter of Fundamental Rights of the European Union (2010).

The court stated that the universal recognition of these rights was consistent with the Supreme Court's ruling in the *Isaiah Shik* case.

Remedy

In this case, the Registrar had performed his functions properly. His function was to record, and nothing more. No change could be made in the Register regarding religion without an appropriate public document, and the Registrar had therefore rightly referred the Plaintiff to the court to obtain declaratory relief.

Based on the above considerations, the judge upheld the claim. The court issued a judgment declaring that the Plaintiff was without religion. Based on a notice given by counsel for the Respondents, the court ordered the Registrar to correct the particular in the Register relating to the Plaintiff's religion to "no religion".

Dr. Rahel Rimon, Managing Editor of JUSTICE, is a lawyer specializing in maritime law and family law.

The International Association of Jewish Lawyers and Jurists Not At All What You Thought!

Fighting anti-Semitism, Holocaust denial and negation of the State of Israel is going cyber!

Erez Modai

The Challenge

The ILJLJ is going on-line in effort to raise international awareness of antisemitism, Holocaust denial and the negation of Israel's legitimacy.

We encourage legal activists and "ambassadors" to participate in its activity and exert their influence in international organizations, legislative bodies and wherever a Jew is discriminated against or mistreated on religious, racial or ethnic grounds.

So the challenge is twofold: recruiting as many members as possible and organizing and supporting those who wish to take an active part in this endeavor.

The ILJLJ is Going Online

The IAJLJ is harnessing the power of social and professional networks to reach out to all our colleagues. We have created IAJLJ Friends groups in both Facebook and LinkedIn and are now available on Twitter.

The IAJLJ will keep the members of these groups and its Twitter followers informed about developments and publications in its areas of focus.

Our forums encourage the free exchange of views on these issues.

"What's In It For Me?"

Be the first to get information about IAJLJ activities and conventions.

Get in touch, get acquainted, get connected, find a lawyer. We are here!

So next time you need a professional contact, information or advice, post a message in the IAJLJ Friends group and let the network help you.

And besides, who knows? Maybe the next contact that someone from the network needs IS YOU.

So What Do I Do?

Look up the IAJLJ Friends group in Facebook and/or LinkedIn.

Join the group/s.

Follow us on Twitter.

Share this information with Jewish colleagues.

Send us material, information, news pieces and articles which you think could be of interest to group members. Tell all of us Jewish lawyers and jurists what you think about relevant events and publications.

If you like, let us know you are interested in taking an active part in IAJLJ efforts or operations.

Q&A

Q: Do I have to become an IAJLJ member?

A: No. the Facebook and LinkedIn groups will welcome IAJLJ friends even if they are not members.

Q: How much will joining the groups cost me?

A: Nothing. Just a minute or two of your time and you are a group member.

Q: What else do I have to do?

A: Nothing. If the opportunity arises, the IAJLJ may invite you to give a hand in specific activities.

Q: So why become an IAJLJ member?

A: First and foremost – identify and BELONG. Show and feel the solidarity.

Second, in the future members will obtain access to materials and information not generally available, as well as other benefits.

Last, but not least, your membership fees will contribute to IAJLJ causes.

Erez Modai MBA the IAJLJ's Internet Relations Manager, is a member of the Israel Bar - currently serves as General Counsel of Oracle Israel. Mr. Modai focuses on international transactions, technology and industry. Erez Modai has taken part in complex transactions of over 1 billion dollars in the aggregate with governments and companies from some 30 countries.

Statements Delivered on Behalf of the IAJLJ to the Human Rights Council, 19th Session in March 2012

The Statements read by the IAJLJ's representative, Adv. Tom Gal, related to the situation in Syria, negotiations with the Palestinians and the Durban process

Human Rights Council 19th Session, March 12, 2012

Item 4 – Interactive Dialogue with COI on Syria (follow-up to SS 17th)

NGO: IAJLJ – The International Association of Jewish Lawyers and Jurists

Representative delivering the statement: Adv. Tom Gal

Dear Madame President,

The International Association of Jewish Lawyers and Jurists welcomes the initiative and persistence of the Council and the High Commissioner to continue and follow-up the situation in the Syrian Arab Republic; a situation which amounts to an armed conflict and during which more than 7,500 people have already been killed, and are still being killed as we sit here in this Council.

Since March 2011, the Syrian authorities have been committing atrocities that amount to crimes against humanity and other gross violations of international law. In its special session no 17, the Council has decided to appoint an Independent International Commission of Inquiry to carefully examine the nature of these atrocities and try and identify those responsible for their commission.

The reports submitted to this Council reveal that during the last months crimes against humanity and war crimes continue to occur: Residential and civilian areas are being constantly targeted by governmental authorities. Political activists, journalists and human rights defenders are attacked. Governmental authorities continue to arbitrary arrest, torture, abduct and cause the enforced disappearance of civilians. Civilians are being deprived of their right to find shelter and escape the areas of conflict. Moreover, and although Syria is a member of this Council, it continues and refuses to cooperate with the Commission of Inquiry.

The International Association of Jewish Lawyers and Jurists is shocked and stunned by the idleness of the international community vis-à-vis these crimes and the cry of the Syrian people. As a legal organization, but more than that - as a Jewish organization, we cannot legally and morally let the international community stand aside while such hideous crimes and atrocities are being committed against the Syrian people. We urge the states, this Council and the international community as a whole to act before it will be too late.

Human Rights Council 19th Session, March 19, 2012

Item 7 – General Debate

NGO: IAJLJ – The International Association of Jewish Lawyers and Jurists

Representative delivering the statement: Adv. Tom Gal

The ongoing conflict between the Jewish and Palestinian Peoples has affected many lives on both sides of the divide. The situation in the entire region is complex – a progress toward an agreement is now more crucial than ever. The International Association of Jewish Lawyers and Jurists strongly feels the need to express itself on the matter at stake.

It is the opinion of the International Association of Jewish Lawyers and Jurists that the solution to the ongoing conflict in the area, and especially in light of the current situation, is not a country mandate, nor a session dedicated to the scrutiny and selective criticism of one of the parties to the conflict. Imposing such obstacles to the peace process, encouraging criticism, denunciation and condemnation of one of the parties, will only cause further antagonism between the parties and endanger a process that is already fragile.

The ongoing conflict should rather be solved by a sincere, direct and concrete negotiation without any imposition of preconditions by either of the parties.

Therefore, we call the parties, both of them, to cease the promotion of unilateral acts, that are aimed at nothing else but to harm the other party and impede the peace process as a whole. We encourage the parties to retake their places beside the negotiating table, and engage themselves in a direct, sincere and transparent process; without imposing any preconditions that are making progress on the matter difficult and almost impossible. Moreover, we encourage the states, this Council and the international community as a whole to support such direct negotiations and refrain from imposing further one-sided mechanisms that are harming the progress of the peace process.

Human Rights Council 19th Session, March 20, 2012

Item 9 – General Debate – IGWG on Durban follow-up

NGO: IAJLJ – The International Association of Jewish Lawyers and Jurists

Representative delivering the statement: Adv. Tom Gal

The 2001 Durban Declaration and its following conferences were created to achieve a high value purpose: fight racism, racial discrimination, xenophobia and related intolerance. The International Association of Jewish Lawyers and Jurists treasures and promotes these values; however, these values are distorted in the Durban process. The Intergovernmental Working Group Report submitted to this Council and the Durban III Resolution reinforce such fear. We express our disappointment at the outcomes of the Durban process and the Report submitted to this Council. We retain our objection to the Durban process, since, as we feared all along it serves no more than shallow political interests.

The importance of education in the prevention of racism and genocide, particularly the promotion of accurate reflection of history in education systems is emphasized in the Working Group report. However, both the Durban III Resolution and the Report failed to do just that; actually they failed to reflect history at all. Both ignored the Holocaust and other similar atrocities committed in the last decades. Surprisingly, the Holocaust was mentioned in the Durban III draft resolution, but was deleted from the final version. We find such ignorance outrageous. Failing to mention the Holocaust and similar atrocities encourages falsification and distortion of historical facts as well as future racial and genocidal acts.

Such fear is not detached from reality: Iran's policy of constant denial of the Holocaust and its ongoing campaign to annihilate the State of Israel, a fellow member of the UN, are a vivid example. Iran's policy cannot be treated lightly, as history and recent events show these threats are not purely theoretical. Tolerating Iran's policy is a disgrace to the international community. Furthermore Iran's policy amounts to public incitement of Genocide – a crime punishable by the Genocide Convention. The international community must ensure respect for the Genocide Convention and International law and prevent processes like Durban from being used for the promotion of a political agenda.



הארגון הבינלאומי של עורכי-דין ומשפטים יהודים (ע"ר)
THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.)

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

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

Justice is one of the goals of the International Association of Jewish Lawyers and Jurists. Thus, the Association works to advance human rights everywhere, addressing in particular issues of concern to the Jewish people through its commitment to combat racism, xenophobia, antisemitism, Holocaust denial and negation of the State of Israel.

We invite you to join a membership of lawyers, judges, judicial officers and academic jurists in more than fifty countries who are active locally and internationally in promoting our aims.

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