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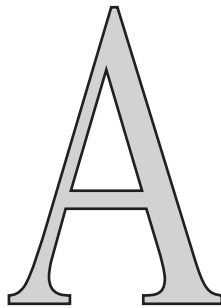
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*The Association wishes to record its special gratitude to
THE JEWISH AGENCY
for its contribution to The Jerusalem Conference on
Standing by Israel in Time of Emergency*

The Jerusalem Conference

Our Association in collaboration with the Jewish Agency has convened an international conference in Jerusalem (December 12-14, 2001) under the title: *Standing by Israel in Time of Emergency*, confronting the issues that have become a major part not only of our Jewish agenda, but also of the world agenda. 200 members and guests of the Association from ten countries attended the Jerusalem Conference. *JUSTICE* commences highlighting presentations delivered at this conference. More will appear in the next issue of *JUSTICE*.

PRESIDENT'S MESSAGE



part from being a member of the human race, each and every one of us is part of a group, a certain society and a people. We do not always identify with the country of which we are citizens. We do not always identify with the society or religion into which we are born. Sometimes we do not even identify with our own family. But none of us can live without a sense of belonging.

I am not speaking of officially belonging to one group or another. I am speaking of our inner deep-down sense of belonging, which comes not from an accident of birth but from a personal choice.

Let me be very personal. Let me speak not as a public figure, not as President of this Association, but as a person who constantly needs to define her own priorities, her own commitments.

As a matter of personal choice I define myself as a Jew, a Zionist, an Israeli and a member of the legal community, in that order.

I come from a Polish *shtetl*, I was brought to Israel as a child by Zionist parents, and lost all the rest of my family in the Holocaust. I fought the British in the *Hagana* and the Arabs in the War of Independence. After the establishment of the State of Israel and the end of the war, I was convinced, as were most Israelis, that we were on the way to finally solving the problems of the Jewish people.

We were absolutely convinced that we would gather here millions of Jews. We would establish a modern democracy, we would create a just society, we would benefit from the Jewish genius, we would revive the desert, and we would open our doors to every Jew who would finally have a homeland of his own.

And most important, we would be doing all this with the sanction of the international community that would finally recognize our right to a State of our own in our old historical homeland.



Keynote address by the President of the Association, delivered at the Opening Session of the Jerusalem Conference: *Standing by Israel in Time of Emergency*, held in December 2001.

We were sure that Israel was the ultimate answer for all Jews. The Diaspora had but one function: to help ingather the Jews in this homeland and to support the Jewish State in every possible way.

In 1965, as a young judge, I was invited by Golda Meir to join Israel's delegation to the United Nations Assembly and it was during that Assembly that I experienced a rude awakening. I cannot describe to you the pride that filled my heart to see the Israeli flag flying high among the flags of all the nations, to sit behind the sign of the State of Israel, to speak for my country at this august international forum. I am not going to describe here my step by step disillusionment, but one vivid memory comes to mind. There were at that time no electronic voting devices, and we voted by raising our yellow pencils. It was then that I found out how alone we really were. Very often, when we voted on an issue concerning Israel, I looked around and saw only one or two yellow pencils raised with mine, most of the time it was the United States and Costa-Rica. Many of our other so-called friends chose to express their friendship by abstaining or being absent.

One day, I don't remember on which issue, I voted in favour and discovered that our two traditional supporters were absent. Mine was the only yellow pencil and I held it high for a long moment although my heart broke. And suddenly there was a burst of applause from the visitors' gallery - something which is absolutely forbidden at the UN. I later learned that a Jewish school was visiting, and although they had no idea what the issue was, they felt a need to express their solidarity with Israel's lone yellow pencil. I have met with many Jewish audiences in my life, but I have never witnessed such an instinctive act of total unconditional solidarity. For the first time it dawned on me that I was not only representing the State of Israel, but that I was raising this yellow pencil in the name of all my people, who were so often in history compelled to stand alone against all odds. And suddenly I did not feel alone.

I was again invited to join the Israeli delegation to the UN Assembly in 1975, and it was in the third committee, where I represented Israel, that the resolution equating Zionism with racism was adopted.

When the resolution was finally confirmed in the General Assembly and our Ambassador, Haim Herzog, tore it up in a dramatic gesture, there was a feeling of a pogrom in the air. Our enemies went berserk, they shouted, they hugged each other, they climbed on chairs. When the American Ambassador Patrick Moynihan crossed the hall amid pandemonium to hug Ambassador Herzog, it was an act of bravery, because it looked as if he might be physically abused having to push his way through the celebrating crowd. I was recently reminded of that scene when watching the Durban conference on television.

That evening in New York we of the Israeli delegation returned to our offices beaten and discouraged, but immediately all the telephones began ringing like mad. Jews from all over the United States were calling to express both their outrage and their solidarity. And next morning, miraculously, thousands of New Yorkers were wearing a pin with the words "I am a Zionist". And suddenly we did not feel alone.

For me personally, your coming here from ten countries at this time, aware of all the risks in Jerusalem which has become a war zone, abandoning for days your law offices, reminds me somehow of those two events. Again, in your presence, I don't feel alone, and for this I wish to express to all of you my great appreciation and my deepest gratitude.

We are all aware of the fact that any risk to the State of Israel, to its security, to its very existence, endangers not only individual Jews everywhere, not only Jewish communities around the world, but also the very future of Jews as a people.

It warms our hearts that so many groups are coming here to show their solidarity and we respect them for it. But from this group we expect more than a show of solidarity. We expect you to make a personal commitment to represent current Jewish and Israeli issues wherever you are. You are lawyers and many of you do *pro-bono* work. I am asking you today to take on one more *pro-bono* client as part of your daily routine. Use your professional expertise, your personal prestige, your standing in your community. Please do not consider this trip as only a gesture of solidarity but also as the beginning of an ongoing commitment.

We are at a crossroad that may become a turning point in Jewish history. Whether we wish it or not, we are all involved and each and every one of us is compelled to confront daily the issues that face us. All we have to do is read the newspaper, look at the screen in our living room, and surf the websites.

As we consider our situation we cannot avoid facing some basic facts:

We knew, even before September 11, that we live in an imperfect world, and in this imperfect world we do not pretend to be perfect. Like others, we make mistakes, we fight our internal demons, we are not proud of some of our actions and we deeply regret some others. In the world of today we all sit in glass houses, exposed to the whole world.

One of the outstanding phenomena of the last century was the development of an international code, a growing set of international conventions and covenants, covering not only relations between States, but also a mode of behaviour in what traditionally belonged to the sphere of "internal affairs". Behaviour of governments, even towards their own citizens, in the field of human rights, in a very broad sense, has become the legitimate concern of the international community. Patterns of behaviour towards minorities have ceased to be the sole concern of any given society. It has become not only acceptable, but also almost imperative, that we watch each other in a global sense. It has become legitimate to interfere in what happens in other countries, to criticize, to protest and sometimes even to act when countries fail to take proper action in protecting rights which deserve to be protected within the meaning of an international code.

The UN has become the focal point for enforcing human rights throughout the world.

Both as Jews and as Israelis we welcomed and we applauded this phenomenon and we gladly became party to international conventions and covenants meant to protect human rights in a broad sense.

We naively believed that this new trend in the world would also protect us and would finally erase the historical discrimination against our people, and would at long last cause us to be treated with equality. We were bitterly disillusioned.

We are still being discriminated against both as Jews and as the Jewish State.

Suffice it to mention a few examples:

Sixty years after the Holocaust anti-Semitism is on the rise. In the last few years we witnessed the burning of synagogues, the desecration of Jewish cemeteries, attacks on individual Jews and on Jewish institutes. What other praying houses must be surrounded by armed guards during prayers, in the way that around the world synagogues are surrounded on a Jewish holiday?

The Holocaust is being openly denied in public meetings, in hundreds of publications and on the Internet.

How does the international community react? It holds in Durban a world conference to combat racism and allows it to turn into the most blatant anti-Semitic and anti Israeli

forum. Suddenly we are the worst racists. We are the major reason for convening this conference.

The UN Commission for Human Rights, empowered to deal with all the transgressions of human rights in the world, traditionally dedicates a grossly disproportionate part of its agenda to adopting a body of resolutions singling out Israel for censure. This is done on the basis of distorted facts and one-sided unjust allegations, often tainted by anti-Semitic undercurrents. No wonder this august committee has no room left on its agenda to deal with anti-Semitism, or to proclaim that it is one of the most blatant forms of racism. This human rights committee is too busy to deal with such a minor matter.

One other example is the new phenomenon of international jurisdiction to try war criminals. So now a Belgian court is getting ready to try the Israeli Prime Minister as a war criminal.

Just a couple of days ago I witnessed a televised interview with the Secretary General of the United Nations on the occasion of his receiving the Nobel Prize for Peace. He was asked point blank why the UN did not stop the genocidal massacre of hundreds of thousands of people in Rwanda. The answer was that they did not have enough observers on the ground and that he, the Secretary General, had personally pleaded with scores of nations around the world to help out, and they not only refused but instructed their observers not to become involved. I am sure that every Jew who watched this interview experienced a sense of *deja vu*.

Nobody is being tried in Belgium for this crime. Also absent on the Belgian dock are those who actually committed the murders in Sabra and Shatila. The only one they propose to place in the dock is the Israeli Prime Minister. One group of Arabs killed another group of Arabs in a most brutal massacre, and I did not hear of the Lebanese government setting up a public committee of inquiry, as did Israel, or being censured in the United Nations, let alone being accused in a criminal court.

Israel has been under terrorist attacks for many years, attacks specifically targeting civilians. But even after the world woke up on September 11 to the terrible threat of international terrorism, we suddenly had to face the argument that when innocent Americans were blown up in the Twin Towers this was an act of terrorism, but when innocent Israeli schoolchildren were blown up by suicide bombers in Israeli cities - not as accidental bystanders but as targets - this deserved a different definition. Why did it take weeks for the world finally, and reluctantly, to name the *Hamas* and the *Jihad* as terrorist groups?

We must ask ourselves: how do we act in the face of a world which, even as it pretends to recognize our rights, even as it sheds crocodile tears over our losses, keeps on discriminating against us in every international forum; its media distorting uncontested facts, in a blatant and sometimes cruel manner. Do we sit back and say there is nothing to be done, as some of us would have it, or do we confront this dangerous phenomenon, and how?

But, we would be amiss if we dealt only with our problems with the outside world and with international media. We should be frank in admitting that we also face problems that we must solve for ourselves. As in any other democratic society, we are experiencing controversy on many issues that concern each one of us.

The dilemmas are indeed enormous, and I am not here to supply answers and solutions. I shall just try to outline some of the problems that we face and some of the controversial issues that tear us apart.

Alas, I can only pose questions; I cannot supply any ready answers. But as it is my firm belief that the answers to these questions concern not only Israel but the future of Jews everywhere, I invite our friends from abroad to confront these issues with us and make up their own minds.

True, Jews from abroad do not have a vote here, but if they are ready to cooperate with us by offering help in their own countries, they cannot avoid taking a stand on many of these issues. The world is daily exposed to all our problems, if Jews want to help they must not only be well informed, but must also make their own decisions. They cannot avoid taking a stand.

Here are some of the questions we ask ourselves:

Is there a real chance for peace in this region in our lifetime, or are we and our children condemned to spend the rest of our days fighting a war with our neighbours, a war that not only endangers us physically but also disrupts the very fabric of our life?

Do we have a partner for peace or is our only option to use military force and to perpetuate our struggle with 3 million hostile Palestinians, most of whom were conditioned from birth to hate Jews? Do we have a real choice?

How do we protect the citizens of this country from daily terror in the face of growing numbers of potential suicide bombers who are ready, with the sanction of their families, to die for a cause which to them is more precious than life itself?

How can we succeed, in the present situation, in fulfilling our commitment to obey basic human rights without compromising the security of our citizens? Without endangering our very existence?

How do we confront the ongoing warnings that the Arabs may win by just waiting and letting demography turn us into a minority in a few years? Can we prevent this?

We are finally compelled to discuss frankly, in the open, the relations between Jews and the Arab minority in Israel. How can we avoid for very much longer the definition of “a Jewish and democratic State”, a definition which is much in controversy among our own people?

What is it that has brought back traditional anti-Semitism and how do we confront it frankly and courageously? Do we finally realize that this is as much an Israeli problem as it is a Jewish one? Can there be any doubt after the Durban conference? And what do we do about it?

What is going to happen to the inner fabric of our society if we have to continue to divert such a large chunk of our budget to fighting an ongoing war? We used to pride ourselves that we were building here a just society, based on equality, which gave the large numbers of new immigrants a fair chance to become part of us by offering them easy access to education and to employment. Can we fulfill this promise as we fight for our lives?

And what about our soldiers? What price shall we pay, as a society, for exposing 18 and 20 year old boys and girls to acting *vis-à-vis* a hostile civilian population, without corrupting the very values on which we want to raise our children?

How long can we keep the lid on the controversy, which is one of the deepest that divides Israeli society, concerning the future of the settlements and the final borders of our State?

And last, but definitely not least, how do we deal with fundamentalism within our own borders, which sadly still exists 6 years after it caused the murder of our Prime Minister, Yitzhak Rabin?

We have carefully organized this Jerusalem conference to supply you with relevant information, to expose you to the views of experts on important relevant subjects. Each one must decide for himself how to use this information; you will each define to yourself the extent of your commitment. Each one will decide how to deal with the enormous dilemmas that face us, and on which we must take a stand if we wish to sound credible.

You may say: this conference is about solidarity, about standing together, and of course it is. By coming here you have made a statement: you have said that terror will not bring us down, you have said that Israel is not alone.

So, why then am I burdening you with all these controversial issues? Why do I speak on this occasion of internal conflicts that are part of the political agenda in Israel? I do so because if you wish to do more than make a statement, if you are ready to be our emissaries abroad, if you are willing to confront the elements that are constantly at work creating a hostile world opinion against us, often using not only distorted facts but also sophisticated arguments, you must be well armed, not only with facts but also with ready answers to questions aired daily in the international media.

I hope I have succeeded in posing this partial list of questions as objectively as possible. I myself do not have a ready answer to all of them, so, obviously, I have no answers for you. We know for a fact that the members of this Association are as divided on these issues as are Israelis and Jews everywhere. Our contribution is therefore limited to offering you as many facts as possible. The speakers you will hear were not chosen for their views, but rather for their expertise. We shall continue to be as informative as possible both in our international meetings, through our publication *JUSTICE*, and through our site on the Internet.

We urge those who have not yet formally joined our Association, to do so. When we speak out in public, including at the UN bodies, we need to speak in a strong voice representing large numbers of Jewish lawyers. By coming here to stand with us at this Jerusalem conference, I hope you are expressing not only your solidarity with Israel, but also your support for the aims of our Association, what we stand for and what we do.

Bless you all for being here today. In these difficult times having convened in Jerusalem in such impressive numbers is no mean achievement in itself.

May I conclude by sending a message of support to the Israeli security forces, both army and police, who are out there defending us daily, at great risk. We send our condolences to the bereaved families who lost their beloved ones in heinous acts of terror, and best wishes for a speedy recovery to all those wounded in these attacks.

We also send our condolences to the American people who have suffered such a tremendous loss in a barbaric attack on September 11. We who have been exposed to ongoing terror for so long, feel their anguish and share their anger. We congratulate the American President and his government for their firm commitment to fight terror all the way to victory, and we wish them and all those who support them success in this unique endeavor to save civilization.

Hadasa Ben - Yitro

Israeli Leaders Greet the Conference

Ariel Sharon

Prime Minister of Israel

In these most trying times, when we celebrate our holiday of lights and freedom, it gives me great pleasure to welcome you to the city of freedom and peace - Jerusalem. Jerusalem, the one and only capital of the Jewish people for more than 3000 years, and the united and undivided capital of the State of Israel with the Temple Mount at its center, today and forever.

The State of Israel is currently in the midst of a war of terror, imposed on us by the Palestinian Authority and its leader Yasser Arafat. We have no choice but to exercise our right of self-defence.

We have been fighting terrorism for the last 120 years. Yet, we were able to build a democratic Jewish State here, governed by the rule of law and by our moral values. We built here the most advanced national infrastructure in science, education, public health care and technology. All this, while holding the sword in one hand.

Israel is the only place on earth where Jews have the right and capability to defend themselves by themselves. This we must preserve in the name of our mutual responsibility to Jews everywhere.

I wish to express my gratitude on behalf of the people of Israel, to the 150 jurists and lawyers from Israel and abroad who are present at this conference.

Your unwavering support for Israel and solidarity in these difficult times has touched us all. You have contributed to our unity and strength by coming and showing us that we are not alone in our



struggle for democracy, human rights and liberal values.

Despite the war of terror and incitement imposed on us, we remain committed to achieving a lasting and durable peace with our neighbours. United, and with your support, I know we can realize this vision.

Sallai Meridor

Chairman of the Executive of the Jewish Agency for Israel and the World Zionist Organization

Had these been regular times, I would have shared with you thoughts on what it means for Jewish jurists to be together, what we share and what, if anything, is different between us and others; what our contribution should be to the world in the sphere of law in the coming years. But these are not regular times. Israel is at war and Israel has been a victim of terror.

Terror is everywhere and it is cruel. People are incited and invited to serve as

living bombs killing others for the promise of heaven. It is dangerous because there is no deterrence against it. How can you deter a person who is ready to take his own life along with others? The entire world should unite not only against those who perform the acts, but also against those religious leaders and regimes which make the false promises. I recently read some statements given under pressure by certain Muslim leaders to the effect that they are against killing innocent people. This is a positive step, but it is far from being enough because the issue of who is “innocent” and who is not, and whether the Jews who have come to Israel are “innocent” or not - may be interpreted in different ways. There must be a very clear statement against the proposition that a person who takes the lives of others, by ending his own life, will receive a pre-paid ticket to heaven.

The war against Israel is not of any tactical nature. If we examine what happened in Camp David and its aftermath



- what Israel was ready to give and what was rejected, the demand for the so-called "right of return" for Palestinians, not to a proposed Palestinian State but to Israel proper, and the terror that followed - this should suggest to us all that the dispute is not about borders any more (perhaps it never was), nor is it about statehood. The dispute is about the very existence of Israel.

In this strategic effort against Israel, there are two components that are inter-connected and very dangerous, and against which the entire international Jewish community should stand. One is the attempt to de-legitimize Zionism and the State of Israel. We saw this plainly in Durban. It involves taking things out of context, portraying the aggressor as the victim and the victim as the aggressor, and it builds on the fact that in our age, people have short memories. It hides history, where we came from, two-thousand years of Diaspora, the Holocaust, the creation of the State, the very fact that when the State of Israel was created from the ashes it was Palestinian Arabs who tried to destroy it and kill refugees coming out of the camps, making every effort between 1939-1945 to ensure that the gates of this country were closed to any Jewish refugee. All this is forgotten as is the fact that ever since, we have been offering peace, ready to make concessions regardless of our own internal differences.

The second issue that is inter-connected is the Arab attempt to undermine the very nature of the State of Israel as a Jewish State and national homeland for the Jewish people. They disregard the fact that they have twenty-two national Arab States, but assert that the one State that was meant to be for the Jewish people - should be "a State of all its citizens", and

attempt to launch a demographic attack against Israel, to undermine its Jewish majority.

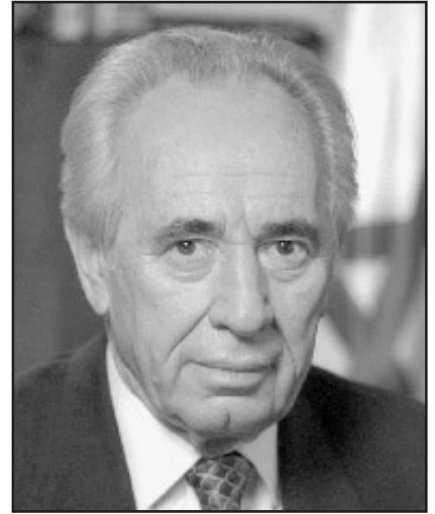
I think that this is the time for Israel, that already has some Basic Laws which may perhaps form the basis for a future constitution rightly emphasizing and constitutionalizing the democratic nature of Israel, to ensure for future generations the Jewish nature of the State of Israel.

The constitution will guarantee the fact that this is and will always remain the State of the Jewish people, the fact that it will always be open to Jews from the entire world, that the Jewish people will always have a stake and a role to play in Israel, that Israel will always have responsibility for the Jewish people and the duty to act to enhance Jewish interests. Obviously, it will also assure equal civil rights of the Arabs in Israel, and special recognition for their status as a minority within the State of Israel.

We are in difficult times but there is no reason for us to be pessimistic for three reasons: First, we continue to build and be strong. Our enemies may hope that we will get weaker, but I think that Israel today is stronger than Israel fourteen months ago. I do not think they can make the same claim with any validity. Second, their attempts to stop Jewish immigration to Israel have failed. Since the beginning of this attack on Israel in October 2000, more than 10,000 terror attacks have been launched against Israel, but than 57,000 new immigrants have also arrived. At the end of the day, these are the numbers that are going to count. Third, I think we should be optimistic because we take a perspective of where we were one hundred years ago and where we are today, we have a lot to build on and we will prevail.

Shimon Peres

Deputy Prime Minister and Minister of Foreign Affairs



I was looking forward to meeting you today in order to personally express my sincere appreciation for the support and encouragement that is demonstrated by your presence here in Israel in these difficult times. Your participation in this conference is a worthy reflection of your solidarity with the people of Israel during these demanding hours.

I have no doubt that during your stay in Jerusalem, you will be able to witness first-hand the complex issues we need to address. Yet, no matter the obstacles, we remain committed to peace, and seek to alleviate the suffering being experienced by the two peoples.

I am confident you will serve as proud ambassadors on Israel's behalf, and hope we shall work together to further our cause in the international community.

I wish you an interesting, fruitful and successful conference.

Meir Sheerit Minister of Justice

We live in a situation of war, not just since this wave of terror started but since the establishment of the State of Israel. Every planner has to conduct three different wars: the military war, the political war and the PR war. Often, we win the military wars but loose in the political and PR wars. We need ambassadors, people, who can speak out for the benefit of Israel in their own communities. We have very good reasons to believe in the justice of our cause. The world has proved to us that we have no other choice. We saw that in the very worst way possible when we lost one third of our nation in the Holocaust. The existence of the State of Israel is not just for the people of Israel, it is for every Jew in the world. Without Israel, the life of every Jew in the world would be changed, in the extreme, for the worse.

We are in a situation where we not only have to face a military war but are also isolated by most of the countries in the world - not because they believe that we are wrong but because of their interests in the Arab world. In most of the international forums Israel is isolated. In most of these forums, including the European-American groups, 50 years after the establishment of the State, we are observers. But even though we are observers, we are in fact part and parcel of the democratic countries - European and American - sharing the same values, the same democracy, and the same point of view.

In the terror situation facing us today, it is necessary to remember the very simple facts: September-October 2000 - Arafat was in Camp David with Prime Minister Barak, who offered him 98 per cent of the West Bank and the whole of the Gaza Strip, three-quarters of East Jerusalem, practical control of the Temple Mount, and a Palestinian State. Arafat refused. He came back to our area and he started a wave of terror.

There should be no mistake, the terror which is going on now in the field is conducted by Arafat. Sometimes he tries the pretence that he is not responsible, that he does not have control. This is a game for American and European eyes. The facts are that on his return from Camp David he released from jail all the convicted terrorists. *Hamas* and the *Hizbullah*

understood that they were free to take action and this they did. Arafat uses his police power to act against Israel. Just recently, Israel used its F-16 aircraft to bomb a house under which there was a production factory for mortar shells. It has not been published that this place was in fact underneath the headquarters of the Chief of the Palestinian Police, Razi Jibali. The Chief of the Palestinian Police is personally responsible for launching terror attacks against Israel.

In my opinion, everyone who belongs to a terrorist organization, finances or shelters it - is a legitimate target for retaliation. Israel has never been willing to negotiate with terrorism. Most of the world did not understand



us. All this prevailed until 11 September, when terrorist attacks were launched against Americans in New York. Since then the attitude of the world towards Israel has changed. Suddenly, what was totally impossible for us to explain to Europe and to the United States, from a legislative point of view, has become very clear. Had Israel dared to enact the legislation which has been passed in the United States, with the overwhelming support of Congress, we would have been condemned by every European country and perhaps also by the United States. We did not dare to enact such legislation.

Despite the 'ticking bombs' around us we have not lost our concern for human rights. We believe there should be no contradiction between human rights and fighting terror, and the test facing us during these very difficult

times, is to try to preserve human rights as much as we can. This is the reason why Israel does not attack on a large scale, in the same way as the United States did in Afghanistan. If we do not take back all of the territories under the control of the Palestinian Authority it is not because we cannot, it is because we do not want to shut the door on the hope for peace. We still believe that one day the Palestinian people will understand that this situation cannot go on.

Most of the Palestinian people are under siege; they cannot come to work in Israel, many are unemployed. For our part, even in this situation in which we live, we insist that food, medicine, merchandise, supplies of water, gasoline and electricity continue to be delivered to the Palestinians, because we try to distinguish between those who are responsible for terror and those who are not.

The government of Israel has announced that we will withdraw from any Palestinian city which will take responsibility for stopping terror there. This happened in Jericho, where Jibril Rajoub has taken responsibility for keeping the city calm, and likewise in Bet Jalla, where for months, there were nightly shootings on the houses of citizens in Gilo. In Hebron, it was the same. We have tried to be fair and give as much space as possible to those who do not want to kill us. But we learn in our tradition "If someone wants to kill you - you have to be first to kill him". In our history we have tried every other way, but none has worked. It is for us to protect ourselves.

Hanukka symbolizes much more than the kindling of lights. When we light a candle, we are creating a small light, but even such a small light creates a big light in the infinite darkness. When we have just one small candle, it is seen from far away, and the more candles, the bigger the light. That symbolizes, to every Jew in the world that every one is a candle. The light of all of us will illuminate the entire world. We are still a few against many. I believe we are still the good against evil. I believe that justice is on our side and that we have the right to protect ourselves and our people, and with God's help and with your help, we will do so.

War and Morality: Image and Reality

Menachem Finkelstein

On a day-to-day basis my function is focused on the meeting point between law and security - the confrontation between considerations of law and justice on one hand and military needs on the other.

This encounter is never simple, particularly in times of security crises and fighting, when questions of morality and conflicting values arise.

I would like to comment on the relationship between using force, law and morality, while focusing on the fighting that has been taking place over the last 15 months and the peculiar problems - some of them new - which have ensued. These comments will help explain the discrepancy between the concrete facts and the manner in which they are presented. Accordingly, the title of this address is *War and Morality: Image and Reality*.

The tale is told of the Roman leader Marius who led the Roman legions against the Germanic tribes of the Cimbri in 101 BCE. Marius granted Roman citizenship to the warriors of two regiments from the town of Camarinos who had shown particular bravery. This act was contrary to Roman law. When asked about it - Marius declared:

“In the midst of the noise of the weapons, I could not hear the voice of the civil law.”

Cicero put it succinctly:

“*Inter arma - silent leges*”

Major-General Dr. Menachem Finkelstein is the Military Advocate General of the IDF. The following are highlights of his presentation at the Jerusalem Conference on the panel of “Human Rights Issues in a Confrontation with Non-State Belligerents - a Delicate Balance”.

This is also the basis of the statement - “When the cannons roar - the muses are silent”.

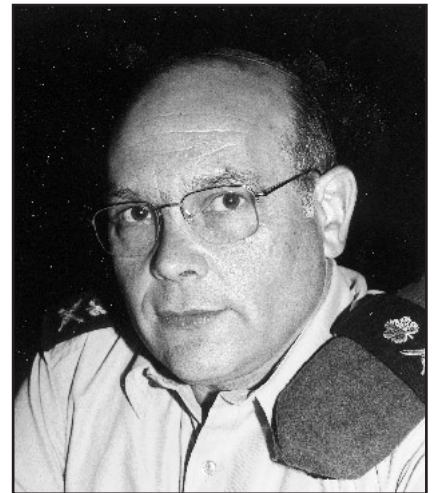
However, in the following 2,100 years, and particularly in the last century, significant human progress has been made. Laws of war were developed and are still developing among nations. Recently, the

President of the Supreme Court, Justice Aharon Barak, noted that Cicero’s comment is regrettable, explaining that, on the contrary, in times of war we are even more in need of laws:

“The ability of society to stand up against its enemies is based on its recognition that it is fighting for values worthy of protection. The rule of law is one of these values.”

The laws of war make a fundamental distinction between - *jus in bellum* - laws which are concerned with the launching and cessation of war, and in particular with the legality of war, and *jus in bello* - laws which govern the course of the war, and which essentially are intended to restrain the use of force during the fighting, irrespective of whether or not the war is deemed to be justified.

The central practical prohibition in the laws of war is the prohibition on injuring civilians who do not take an active part in combat. History shows that this prohibition is frequently breached. The famous Israeli poet Nathan Alterman wrote (freely translated):



*“The man who righteously holds the sword
Is causing blood to spill as he wends his way
He leaves behind the taste of salt
The tears of the innocent.”*

In this passage, Alterman was addressing his attention to those innocent persons who suffer even when force is used justly, *i.e.*, when the injury is accidental and unintended. I would point out that a distinction should be drawn between such a situation and brutal terror the object of which is to indiscriminately kill, injure and intimidate as many civilians as possible.

Since its establishment, the IDF has educated its soldiers not to injure innocent civilians. This is the essence of one of the basic principles of the IDF - *Tohar Haneshek* (which loosely translated means “use of weapons in a virtuous manner” or “moral warfare”).

Tohar Haneshek

“The soldier will use his weapon and force exclusively for the purpose of carrying out the mission and only to the extent necessary for that purpose, and will preserve his humanity even during battle. The soldier will not use his weapon and force in order to injure persons who are not combatants or to injure prisoners and shall do everything possible to prevent injury to their lives, persons, dignity or property.”

Thus, for example, in the beginning of the previous *Intifada*, in February 1988, when the violent mass riots were at their height, a military unit involved in dispersing the mob in Nablus (Shechem) succeeded in capturing two of the rioters. The commander ordered his soldiers “not to strike them.” Nonetheless, one soldier beat the two captured Palestinians and consequently was brought to trial in a military court. In determining the punishment, the court gave primary weight to the dangers facing the soldiers from the Palestinian mob throwing stones, rocks and Molotov Cocktails. The soldier was sentenced to a term of suspended imprisonment. The Military Court of Appeals, however, believed that this sentence did not reflect a proper balance of all the factors and decided that the soldier had to be sentenced to a term of actual imprisonment. The Court held:

“The mob activities which have become a phenomenon with which we have had to live for a number of months have compelled and continue to compel the creation of norms of conduct for soldiers coming into contact with the rioting population and those assisting it. It is the duty of the army, the duty of its commanders and the duty of the soldiers themselves to set boundaries of conduct in

such circumstances in such a way as to ensure that it remains the ‘conduct of the army’ and the ‘conduct of soldiers’ and not the conduct of a sect of unbridled, uncontrolled persons...

Every soldier, in the same way as he learns how to fight must learn how to control his temper, obey the orders given to him and preserve his morality as a soldier and as a human being in all circumstances. ‘He that is slow to anger is better than the mighty; and he that ruleth his spirit is better than he that taketh a city’ (*Proverbs* 16:32). This is human wisdom, this is a command to which soldiers must educate themselves and in the spirit of which they must be educated. If not, we shall be like Sodom. This military court has already held that the frontline of citizenship, of education of obedience to the law and respect for human dignity is a front which is no less important than the direct confrontation with the enemy.”

Let me go back 3,300 years and remind you that once - the same city of Shechem (Nablus) - had already provided the setting for the Jewish world’s condemnation of injury to innocent persons. The patriarch Jacob condemned his sons, Simeon and Levi, for having destroyed all the males of the city following the acts of Shechem and Dinah:

“Into their council let my soul not come; unto their assembly let my glory not be united, for in their anger they slew men.” (*Genesis* 49:6)

The great commentator, Rabbi Moshe Ben Nachman, (the *Ramban*) says:

“Many will ask: how did the righteous sons of Jacob do this act, spill innocent blood?”

In his opinion, Jacob was angry at Simeon and Levi because their act of revenge against the men of Shechem was unjustified, notwithstanding that the people of Shechem were evil:

“He was also angered, that it should not be said that this had been done upon his advice, and it would be sacrilege that a prophet had committed injustice and robbery.”

From the failure of the revolt of Bar Kochba some two thousand years ago through to the renewal of Jewish settlement in the land of Israel - the Jews did not deal in practice with questions of war, and, in any event, infrequently considered the moral dilemmas facing those obliged to use force in self-defence.

Renewed settlement, and later the establishment of the State of Israel and a Jewish military force, posed new questions of Jewish

morality. This is not the place for a detailed discussion of history, I shall merely mention that this question rose in all its vigor during the events which took place in Eretz Yisrael in the 1930s, when it was necessary to decide how to react to the unrestrained attacks launched by the Arabs against the Jews. During that period the phrase *Tohar Haneshek* was coined, a phrase apparently taken from the comments of the well-known leader Berl Katzenelson who stated that weapons should not be used except in situations where such use was necessary and unavoidable: “*We do not want our weapons to be stained with innocent blood.*”

In the same period much was said and written, including by Rabbis, to embed this principle in Jewish morality. Prominent among these Rabbis were Rabbi Herzog and Rabbi Amiel who often emphasized that self-restraint should not be shown and that there was a duty to fight the enemy, although concurrently vehement opposition had to be shown to causing injury to the innocent. Rabbi Amiel explained that from the point of view of Jewish morality the main reason for this was not utilitarian but rather substantive, and was based, in practice, on human dignity in Jewish morality:

“We look upon the soul of man not as upon a means for a known purpose, not as upon an individual who was only created for the whole, and to the extent of his usefulness to the whole so too his value. Rather we look upon every individual as upon an entire independent world.”

This is the Kantian principle, formulated differently.

Thus, in a study recently published, the writer asserted that the principle of *Tohar Haneshek* which then arose in the Jewish *Yeshuv* “was born from Jewish morality.”

The events of the last 15 months are different in a variety of ways from the *Intifada* of the end of the 1980s and beginning of the 1990s. We define the difficult current events as an “armed conflict”, whereas the events of 1987-1993 were not so defined.

The reasons for this are:

A. The events of 1987-1993 were generally characterized by violent breaches of the peace. Firearms were rarely used. Today, the majority of the incidents involve the use of firearms, explosives, mortars and the like, *i.e.*, weapons characteristic of combat. Up to the present there have been about ten thousand recorded incidents of attacks involving firearms. In these 231 Israelis have been killed, of whom 174 were civilians. 2,251 civilians and soldiers have been injured.

B. During the *Intifada*, we were sovereign in the territory. Today, the Palestinians control a significant portion of the territory in practice. The Palestinian Authority is the official leadership with authority in many areas of life. Regrettably, some of the violent activities conducted against Israel are carried out by agencies of the Palestinian Authority, with its encouragement, and in any event without hampering it.

C. The Palestinians have a strong police force numbering over 40,000 armed men. In the years 1987-1993, the Palestinians did not have any force responsible for enforcing law and order.

Defining the situation as an “armed conflict” is of great legal and practical significance. Being in a state of war permits a variety of activities aimed at assisting the army to fulfil its function - in law and morality - to defend the citizens and soldiers of the State: “*Democracy is not a prescription for national extinction.*”

At the same time, the IDF takes care, today just as in the past, to preserve the principle of *Tohar Haneshek* (“moral warfare”) and in particular to avoid, in as far as possible, injury to innocent persons. This is particularly difficult when the battle is directed otherwise than at a regular army and the uniformed soldiers of a defined hostile State.

I would like to give a number of examples that will illustrate the discrepancy between the facts as they really are and the manner in which they are reflected: between reality and image. Unfortunately, we have come to learn that the facts no longer “speak for themselves”. Someone always speaks for them. Telling the truth does not put an end to the argument. It is the starting point for a new interpretation.

The entity facing us does not operate a legal system. In contrast, an independent judicial system and independent legal system do operate within the IDF. These bodies do not defer to the authority of any commander (even in Western countries such as the United States, the military advocates are not independent in their decision making). It is possible to petition against the decisions of these bodies directly to the Supreme Court of the State of Israel. Severe cases of unlawful injury to civilians are made the subject of criminal investigations and soldiers are occasionally brought to trial before the military courts.

I would like to refer to two very recent incidents. The first incident concerned charges brought against four soldiers involved in assaulting Palestinians at an IDF roadblock in the south of Mount Hebron. The soldiers stopped the Palestinians travelling

in taxis, beat and cursed them and even ordered the Palestinians to strike one another. In addition, the soldiers damaged the taxi. In the second incident, charges were brought against a soldier who negligently caused the death of a local resident by firing at a vehicle which arrived at the roadblock where the soldier was stationed. There had been no basis for suspecting the vehicle of being hostile and the soldier also failed to take the necessary steps to signal the driver of the vehicle to stop.

At the same time it is clear that even in this connection, times of fighting cannot be treated in the same way as times of peace. For reasons of both principle and practicality, a criminal investigation cannot be conducted in every case of a death, at the height of a period of combat.

Military exigencies require that restrictions be imposed on freedom of movement of the local population - a freedom which that population enjoyed absolutely until October 2000. *Inter alia*, the army has been forced, on occasion, to encircle Palestinian cities. It is possible to prove a direct connection between these restrictions and the preemption of terrorist attacks and suicide attacks in the center of Jerusalem and other cities in the heartland of Israel. This fact finds little expression in the media.

Indeed, it seems that the events of the 11th of September in the United States sharpened the Western world's appreciation of the new types of dilemmas arising when considering self-defence against suicide attacks. The world is beginning to understand matters to which we have already become accustomed.

The decision which must be made by a competent body, whether or not to intercept a civilian plane which deviates from its flight plan and which it is feared may crash into the heart of a city, is a terrible and onerous one. "*Dammed if you do and dammed if you don't*". In principle, it is the same decision as the one that has to be made by a policeman stationed by a shopping mall when he sees someone he suspects of being a suicide bomber. It is also the same as the decision which faces a soldier posted at a roadblock who fears that the driver of an approaching car plans to detonate the car, killing himself and all the soldiers around him. When we strike at the terrorist or at someone planning to commit a suicide attack, even before he starts out on his mission, and there is no-one else to stop him - we are legally and morally justified in doing so.

Recently, we entered Area 'A'. The soldiers were under strict orders not to cause any damage to civilian property. We know of certain villages, where, after the IDF withdrew, the residents caused damage to shops in order to lead the media to believe that IDF soldiers had engaged in looting and property damage.

One can also refer to the respected French weekly - *Nouvelle Observateur* where the journalist was not ashamed to write that "IDF soldiers rape Palestinian women knowing that these women will afterwards be killed by their families for the dishonour caused to their families." "Here the rape becomes a deliberate war crime", the article asserts - "because the Israeli soldiers act in the knowledge of the fate awaiting these women."

I must state that the human rights organizations do not hesitate to complain against the army and its soldiers. Among the many complaints that have reached us - we have never heard such a claim. Audacity knows no bounds.

A Palestinian resident of Area 'A' who is injured, is currently entitled in the prevailing legal situation, to file a suit for damages in an Israeli court in respect of the activities of IDF soldiers. This phenomenon is not accepted in developed Western countries. A comparative study has shown that various countries provide mechanisms for preventing litigation on these types of claims against a State in that State's courts. Thus, for example, in the United States, the law provides that it is not possible to file a suit against the State for acts of war of the military forces in times of war or for a claim that is founded in a foreign State. The law has been interpreted as also applying to "armed conflicts" and not only to war. In addition, American law provides that enemy nationals who are not residents of the State cannot file a claim in United States courts for damage caused to them in times of war.

In England the rules relating to an "Act of State" have long prevailed, to the effect that a claim may not be asserted in respect of acts performed outside Britain against persons who are not British subjects, nor in respect of acts performed inside Britain against hostile nationals. Additionally, there is no duty to pay damages for torts committed in times of war.

Is it possible to continue in the legal position described above, without change? We are doubtful - particularly, since in addition to the problems of principle there are also practical problems. To illustrate - a resident of Gaza filed a claim in the Magistrate's Court in Jerusalem on the ground that in 1994 he was injured by a bullet fired at him by the Israeli security forces at a time when he was driving home in his car. The Ministry of Defence hired a private investigator to look into the circumstances of the claim. The investigation revealed that the plaintiff was shot by the Palestinian secret service, and not by IDF forces, while being chased driving a stolen vehicle. These findings, which once shown to the plaintiff were confirmed by him, illustrate the difficulty posed by fictitious claims.

Precisely 14 years ago, on 22nd of December 1987, a judge of the United States Supreme Court, Justice William Brennan, gave a speech here entitled: *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*.

Presenting an overview of US history, Justice Brennan demonstrated that human rights had been adversely affected time and again in situations of national security crises not as a result of balanced and well-based decisions but as a consequence of panic and paranoia.

At the core of his comments was the assertion that throughout history the United States had breached civil rights every time that it was believed that national security was endangered. However, an examination of the cases showed that these decisions had not been justified. The decisions were not made on the basis of real security needs but out of a sense of hysteria and paranoia.

“After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.”

The judge remarked that history has proved to be constant:

“It teaches that the perceived threats to national security that have motivated the sacrifice of civil liberties during times of crisis are often overblown and factually unfounded. The rumors of French intrigue during the late 1790’s, the claims that civilian courts were unable to adjudicate the allegedly treasonous actions of Northerners during the Civil War, the hysterical belief that criticism of conscription and the war effort might lead droves of soldiers to desert the Army or resist the draft during World War 1, the wild assertions of sabotage and espionage by Japanese Americans during World War 2 and the paranoid fear that the American Communist Party stood ready to overthrow the government, were all so baseless that they would be comical were it not for the serious hardship that they caused during the times of crisis.”

These comments reveal the difference between the reasons once given for those restrictive actions and the current objective examination of the situation. In Israel there would be no room for similar criticism, simply because the security dangers which faced and continue to face the country are genuine. It is interesting to point out that in his opening remarks Justice Brennan himself stated that:

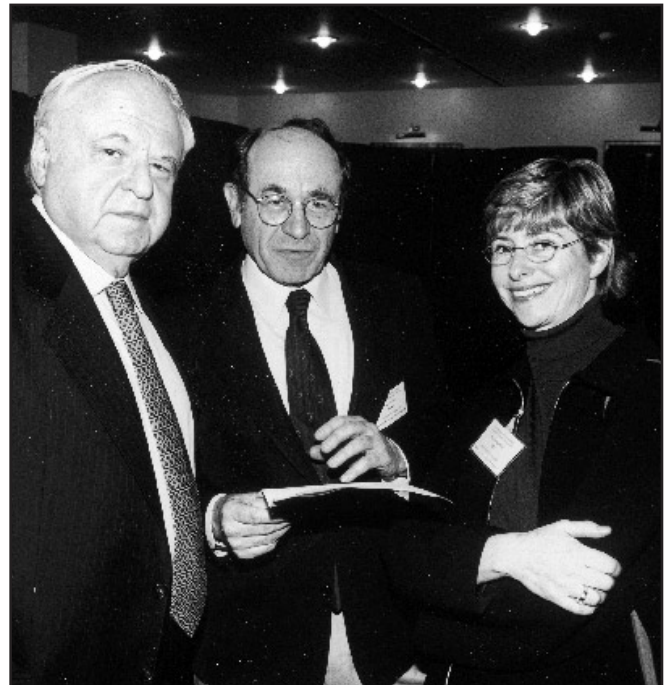
“My experience of the last thirty years unlike that of Israel, has

concerned the quest to develop a jurisdiction of civil liberties during times when my nation has been under no serious threat to its security.”

Justice Brennan’s comments were made at the beginning of the first *Intifada* (which commenced in December 1987) and since then we have fought in Lebanon as well as in the current *Intifada*. The United States too, has suddenly found itself facing a serious threat to its national security and it will be interesting to see how the various civil rights there will now be treated. In concluding, Justice Brennan expressed his assessment that the manner in which Israel has coped with the security dangers facing it is of importance to the world because:

“The nations of the world, faced with sudden threats to their own security, will look to Israel’s experience in handling its continuing security crisis...”

I hope that upon focusing attention on Israel, it will be seen that we indeed draw a proper balance between considerations of law, morality and military needs in a country which continues to defend its existence.



Panelists at the Jerusalem Conference: L to R - Ambassador Meir Rosenne, Ambassador Yaakov Levy and Professor Anne Bayefsky

Anti-Israel Bias in the International Arena: Politicization of International Criminal Law

Alan Baker

In the same way that criminal law is an integral part of any domestic legal system, international criminal law is, in no less a manner, an inherent component of international law. It is certainly not a new phenomenon on the international legal scene. It is a central element in international conventions and customary law aimed at dealing with matters involving criminal responsibility or liability in one form or another, of individuals, rather than States-subjects of international law. Such individuals being violators of specific norms and rules of international law.

Proceeding against individuals in the general context of a system of law aimed principally at States subjects of international law has taken two main forms. International criminal tribunals based upon treaties or decisions of international bodies, authorizing and mandating the functioning of such tribunals, is one form. The other is the establishment of universal criminal jurisdiction by individual States with a view to enabling their domestic courts to try individuals for crimes permitted outside their territorial or personal jurisdiction.

It is only recently that the international community is



witnessing a distinct and highly publicized development and growth in the practical application of international criminal law, whether on the local level by national courts of individual States or on the international level by international tribunals and juridical institutions.

The reason for this developing popularity and transparency of international criminal law is directly linked to a growing international awareness and concern for the suffering of human beings, the cruelty practiced in internal and international armed conflicts and the relative ease with which the purveyors of

such suffering and cruelty have succeeded in escaping justice. What was once the realm of indirect and delayed reporting by war correspondents of far-off battles is now brought directly to every home and computer through news media channels and the Internet - all in real time and with graphic and often startling detail.

The awareness of the world's public to the nature, intensity, urgency and seriousness of violent internal and international armed conflicts is thus real and actual. It awakens within the public at large and among those who have the means to influence policy and to direct governmental action, the need and the capacity to act in order to realize a greater sense of international responsibility, accountability and justice. This, with a view to preventing thereby situations of impunity, and preventing perpetrators of horrendous crimes from being excused, exempted, forgiven or forgotten.

There is no doubt that all forms of application of international criminal law are vital and worthy, as a means of ensuring the

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meting out of justice to those international criminals genuinely accused of the most horrendous crimes and thereby avoiding impunity. It is indeed an honourable vision, a vision advocated and actively supported by the State of Israel since its establishment, especially in the light of the tragic experience of the Jewish people in the Holocaust.¹

Such an honourable vision and its realization are of course worthy as long as the legal system or the judicial institution applying international criminal jurisdiction acts in a genuinely *bona fide* manner, and does not permit itself to be driven, guided or motivated by political bias or manipulation. Regrettably, as honourable and worthy as the present renaissance in the practical application of international criminal law is, politicization has already and continues to rear its head and threaten to pollute international criminal law and practice. I intend to dwell on some current examples in this article.

Dealing with impunity and making international criminal law work in a practical way has recently received a considerable push forward with a series of dramatic and newsworthy developments.

International *ad-hoc* Judicial Bodies

The vision and concept of creating a permanent international criminal judicial body to try individuals has existed since the end of World War I (1919).² Failing realization of this vision, for many and varied reasons (*inter alia* the Cold War following World War II), *ad-hoc* tribunals were established from time to time as the need arose. The practical application of international criminal law has been particularly evident and visible in more recent history in the *ad-hoc* international war-crimes tribunals established following the Second World War in Nuremberg³ and Tokyo.⁴

The tragic and cruel internal armed conflicts in Yugoslavia and Rwanda brought about the establishment by the international community, through the United Nations Security Council, of a new series of *ad-hoc* tribunals to try persons accused of crimes committed during these conflicts within the defined territories concerned.^{5,6} While these tribunals functioned initially in a somewhat lethargic manner, recent developments have led to an upsurge of activity with the capture, surrender or extradition of several key political and military figures, including the former President of Yugoslavia Milosevitch. Similarly, several key judgments delivered by these tribunals are actively molding and developing international criminal law into a solid *corpus* of law. Similar institutions are now being established in order to deal with the terrible crimes committed by the Pol Pot regime in Cambodia, and as a result of the recent civil war in Sierra Leone.⁷

International Criminal Court

The vision of a permanent, international, statutory judicial body is now coming to fruition with the finalization and adoption in 1998 of the Statute of the International Criminal Court and the relatively rapid entry into force of that Statute and establishment of the court itself, expected within the coming months.⁸

The adoption in Rome of the Statute of the ICC in 1998 and the preference given in that Statute to an individual State's capacity to bring suspects to trial before its own courts prior to the option of their being transferred to the ICC⁹, represented an open invitation and instruction to those States intending to become party to the Statute to adapt their internal legislation accordingly and enable a basis for wide, national criminal jurisdiction. The rapid rate of ratification of that Statute is perhaps indicative of the trend in the international community to make the necessary legislative amendments - including the changing of national constitutions - with a view to enabling domestic courts to try violators of international human rights conventions, parallel to the establishment of a permanent international judicial body.

However, as welcome and positive as this development may be in the genuine fight against impunity, and in strengthening the integrity of international criminal law as a viable means of achieving justice both between States and as against individuals,

1. Israel legislated its "Nazi and Nazi Collaborators Punishment Law" in 1950. This law extended Israel's criminal jurisdiction to crimes against humanity and war crimes committed abroad before the coming into existence of the State of Israel.
2. Bassiouny, *The Statute of the International Criminal Court. A Documentary History*, 1998, Transnational Publications Inc., pp 3-35.
3. 1945, 82 UNTS 279, 284.
4. 1946, TIAS No. 1589.
5. International Criminal Tribunal to prosecute those responsible for violations of international humanitarian law in the former Yugoslavia - United Nations Security Council Resolution 808(1993).
6. United Nations Security Council Resolution 955(1994).
7. These tribunals are in the process of being established, but will be based predominantly on domestic jurisdiction, with elements of international criminal procedure.
8. See document PCNICC/1999/INF/3. As at the date of preparation of this paper, 47 States have ratified the Statute of the ICC. It is anticipated that the Statute will enter into force and the court will materialize within the coming months.
9. The concept of "complementarity" is set out in the tenth preambular paragraph to the ICC Statute as well as in Article 17. See Trifterer, *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, at pp 15 and 383-394.

there is nevertheless a political shadow which seems to be hovering over the development as a whole. This shadow may well place in question the potential that presently exists, and the good will and *bona fides* needed for the operation of a viable and successful mechanism for criminal justice.

Politicization of international criminal law and the judicial processes and institutions involved in it has the potential to undermine those processes and institutions. When States, groups of States, international organizations or other political bodies seek to utilize a process within the international community in order to achieve political gains, or to exact political pressure *vis-à-vis* a State or States, they undermine the process itself, take hostage what may have been an honorable and just cause, and render it worthless.

The ICC Statute, while indeed establishing a judicial institution intended to dispense justice, was nevertheless the outcome of a lengthy political and legal negotiation and of a very politicized international conference in Rome in 1998 under the auspices of the United Nations - itself a political institution. The process whereby the court was established was thus a political process. States generally acted, negotiated, lobbied and ultimately voted along the political lines and according to the political, territorial, geographical or religious criteria and groupings through which they conduct their daily decision-making business in the United Nations and other international organizations. Any such body would, and does, open itself, of necessity, to some or other element of political pressure. That is a fact of international life within the organized international community as we know it. However, in most cases, and especially the more delicate ones, this process is utilised by those less responsible elements with ulterior political motives, whose genuine interest in dispensing criminal justice are not in the forefront of their minds.

An example of the tendency to politicize the Statute of the ICC is perhaps the provision inserted in the listing of "serious violations of the laws and customs applicable in armed conflict", with the active pressure of the Arab States, of a war crime of transferring "directly or indirectly" the population from an occupier's territory to the occupied territory. Needless to say, the motivation behind this exercise was not solely out of genuine enthusiasm for international criminal justice, as was evident to everyone involved in the drafting of the ICC Statute.

Substantively, this exercise has raised the interesting question of the extent to which the listing of the crimes in Article 8 of the Statute was supposed to represent and reproduce offences

recognised and accepted by international law as set out in existing international conventions and customary law. Alternatively the question was whether the Statute was to become a **law-making** instrument, producing **new law** or an instrument redrafting, changing and manipulating existing international law. While the listing of war crimes in Article 8(b) refers, in its *chapeau*, to "Other serious violations of the laws and customs applicable in international armed conflict, *within the established framework of international law*" and goes on to list such acts, what in fact has been put into the Statute has, in some cases, been tailored to meet specific political interests advocated by groups of States.

In this context Israel discovered, to its great disappointment and amazement, after years of avid and active encouragement and involvement in the drafting of the Statute, that its Arab neighbours - and principally the one with which it has a long-standing peace treaty - initiated and pushed through the conference textual changes to existing language of international humanitarian law instruments with the distinct and stated purpose of targeting Israel. While virtually all responsible States agreed that it was out of place and should not have happened, none could withstand the political pressure - amounting to blackmail - to keep such changes in the text. No-one, including the conference leaders, was prepared to upset the delicate package that was materializing, for fear of causing the failure of the conference.

Sadly, even before the court has been established we are already witnessing expressions by senior representatives of some governments - generally those governments that have no intention of ratifying the Statute, to utilise the upcoming court for political gain. Committees in some of the States neighbouring Israel are already busy seriously drawing up lists of offences and offenders to be dealt with by the court. Not all appear to be familiar with the Statute - especially the non-retroactivity provision (Article 24) or the Rules of Procedure and Evidence. We are even seeing States, the human rights of which leave much to be desired, proposing draft resolutions in the United Nations political organs calling for the labeling of Israel and Israelis as war criminals and for their trial before the ICC or other tribunals.

In the general context of the practical arrangements being made and instruments drawn up within the framework of the Preparatory Committee for the establishment of the court, elements of, and potential for politicisation remain. One example is a curious requirement that the Assembly of States Parties to the ICC Statute, - an organization ostensibly completely independent of the United Nations, intended to administer the functioning of the court -

invites *inter alia* “entities, intergovernmental organizations and other entities that have received a standing invitation from the General Assembly of the United Nations pursuant to its relevant resolutions to participate, in the capacity of observers . . . in the deliberations of the Assembly.”¹⁰ In so ensuring the participation in the main steering body of the ICC, by the many and varied political invitees to regular United Nations political bodies (including specifically such law-abiding bodies as the PLO), the continued politicisation of the ICC will be guaranteed.

Once the ICC becomes hijacked to serve a political agenda, and gives itself to political pressure and abuse by those States and elements whose sense of justice is not genuine and deeply ensconced as in the Western democratic systems, it will lose its moral authority, credibility and standing.

Criminalisation of Terrorism

The criminalisation of terrorism and attempts to render it a universally acknowledged international crime has been a constant item in international legislative activity over the past few years. This effort is still in relative infancy. While several important international conventions have been adopted to criminalise various components of terrorism, the international community has not yet proved itself capable of adopting a generally acceptable instrument defining terrorism as a crime in and of itself.¹¹

However, international law has recently taken some serious steps in the right direction, regrettably under the most tragic and violent circumstances. The recent wave of international terror initiated with the bombings of the World Trade Centre on 11th September 2001 in New York, and the reaction of the international community as evidenced by United Nations Security Council Resolution 1373,¹² have indicated an awareness and acknowledgement of the need to function more actively and practically to apprehend and try terrorists as criminals - whether internationally or in domestic courts.¹³

In this context of the attempts to criminalise terrorism, the international community has recently witnessed a sorry attempt at blatant politicisation of international criminal law. This occurred during the deliberations of the 6th (legal) Committee of the United Nations General Assembly on the drafting of a Comprehensive International Convention against Terror, in November 2001.¹⁴ The time (weeks after the World Trade Centre bombing) and the place (New York, merely several miles from the site of the bombing itself), were clearly propitious. The international atmosphere was expectant of a definitive and comprehensive new international

convention on terrorism. However, the Organization of Islamic States prevented this, in utter and blatant disregard and abuse of the prevalent atmosphere in favour of such a convention. During this debate the Arab and Islamic States attempted to adapt the prohibitions on terror set out in the draft convention, in such a way as to render acts carried out against “a foreign occupation” exempt from prohibition.¹⁵ In so proposing, the Arab States were attempting to introduce into the convention a concept of “justified terror” as opposed to other acts of terror (*e.g.* bombing the World Trade Centre) which they appear to admit, are prohibited and hence criminal.

This attempt was unacceptable to the rest of the international community and was rejected. Fortunately the other countries of the world could not join such a transparent and blatant attempt to manipulate them into accepting and justifying violence and terror. It remains to be seen whether their opposition will survive the forthcoming meetings of the special *ad-hoc* committee which will continue to attempt to complete this convention in the coming months.

Domestic Courts

The use of domestic courts to try foreign nationals for human

10. Rule 92 of the Draft Rules of Procedure of the Assembly of States Parties (PCNICC/2001/WGRPASP/RT.1/Rev.1). See also Paragraph 12 of United Nations General Assembly Resolution on the ICC approved by the 6th Committee of the General Assembly requesting the Secretary-General to invite such organizations to the first meeting of the Assembly of States Parties (A/C.6/56/L.21 of 15th November 2001).
11. Even the 1998 Rome Conference on the ICC failed to include a crime of terrorism in the ICC Statute and recommended in Resolution E annexed to the Final Act of the Statute that a Review Conference, to be convened seven years after entry into force of the Statute, arrive at an acceptable definition to be included within the jurisdiction of the court.
12. S/RES/1373(2001) adopted on 28 September 2001.
13. There has been considerable academic debate as to whether a new *ad-hoc* international tribunal should be set up to deal with terrorists such as Osama Bin-Laden, rather than permit domestic courts to try such people. Alternatively, some are proposing to extend the jurisdiction of the ICC and introduce a definition of the crime of terrorism - a task considered politically impossible during the deliberations on the drafting of the ICC Statute at Rome (1998) see footnote above.
14. Initially proposed by India with a view to serve as a convention complementing all the other anti-terror conventions that deal with specific components of terror.
15. *Aide-memoir* dated 7 November 2001 of the Member States of the Organisation of Islamic States.

rights violations anywhere in the world has become a significant and newsworthy item and is increasingly being used as a means for combating impunity.

The arrest of the former Chilean dictator Pinochet and the hearings in the English House of Lords on the question of whether to extradite him for torture crimes¹⁶ in violation of the United Nations Torture Convention, drew international attention to that convention, as a basis for establishing universal criminal jurisdiction in domestic courts. The Pinochet extradition rulings in the House of Lords have been rightly termed a “*landmark ruling*”, “*international legal history*” and “*a giant step forward towards establishing a rule of international law*” (*The Economist*).

This has obviously accentuated other human rights and humanitarian law instruments requiring States to establish criminal jurisdiction and bring individual violators to trial.

This deepened the realization that any individual State, based on its own obligations pursuant to international conventions, may, through extension of its own criminal jurisdiction, enable its courts to try gross human rights violators, even when there is not necessarily any direct causal connection between the State concerned and the suspected criminal. This realization has led to greater pressure by academics and parliamentarians to extend local criminal jurisdiction so as to cover a far wider and more universal field of criminal jurisdiction.

The recent case in a Belgian Court in which Rwandan nationals, including two nuns, were convicted of crimes against humanity, and sentenced to long periods of imprisonment, is indicative of the trend to realise universal jurisdiction within the domestic criminal context. The basis for these convictions was Belgian legislation from 1993 granting wide-ranging and extremely liberal universal jurisdiction for human rights offences committed anywhere. This legislation was initially promulgated with a view to enabling prosecution of persons involved in the atrocities committed during the course of the Rwandan civil war. The historic links to Belgium were clear in view of the fact that Rwanda had, prior to its independence, been a colony administered by Belgium.

This legislation was amended and extended in 1999, in order to cover other spheres of international criminal law, based closely upon the new Statute of the International Criminal Court, recently ratified by Belgium.

Regrettably what may well have been a well intentioned if perhaps a somewhat naive action by Belgian legislators, has nevertheless taken on a momentum which was not anticipated. Their extremely wide and liberal system of universal jurisdiction

has been taken up by many elements in order to institute a series of prosecutions before Belgian courts against several personalities throughout the world.¹⁷ This is also being utilised for political prosecutions by elements seeking to carry out their own political battles on Belgian turf, much to the regret and embarrassment of the Belgian political leadership.

In this context, Lebanese and Palestinian elements, encouraged, motivated and supported by political non-governmental organisations, have instituted a prosecution in Belgium, against Israel’s Prime Minister Ariel Sharon together with retired army officers, pursuant to the Belgian law, *inter alia* for crimes against humanity allegedly committed in Lebanon in 1982. The political motivation behind the prosecution is clear and has been admitted by those elements behind it. The legal framework and ability of the Belgian system to entertain such a prosecution is presently at the time of writing, under ongoing review by a Belgian constitutional court which is considering several grounds for revoking jurisdiction in the case.

It is somewhat curious and even dubious as to how Belgian law permits retroactive prosecutions with no apparent limitations, while at the same time affirming the very basic tenets enshrined in the Rome Statute, of non-retroactivity and complementarity. The question indeed arises how Belgium would be able to accommodate these apparently conflicting concepts if it genuinely seeks to be a true purveyor of universal jurisdiction. Belgium thus seems to have taken for itself virtually unlimited universal authority, in conflict with the international legal consensus indicated in the ICC Statute.

The implications of political abuse of a domestic criminal legal system, both on the good and proper functioning of any such system as well as on the normal functioning of ongoing international relations between States, are clear and cannot be overlooked and ignored.

In broaching the general question of a State’s ability and will to entertain a wide-ranging universal jurisdiction, the assumption should be that a State cannot and should not over-extend its powers beyond the bounds set by international law. If it does so it risks violating the sovereignty of other States and abusing the very framework which it is seeking to enhance. This results,

16. *Regina v. Bartle ex parte Pinochet*, 24 March 1999.

17. “Arrest Warrant of 11 April 2000” (*Democratic Republic of Congo v. Belgium*) instituted on 17 October 2000. Judgment in this case is pending.

intentionally or otherwise, in a widening of a State's domestic jurisdiction not only to meet, but to reach beyond the consensus of the international community.

In a recent article in *Foreign Affairs*¹⁸ on universal jurisdiction Henry Kissinger stated:

“ . . . any universal system should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores.”

He adds, in the same vein:

“It would be ironic if a doctrine designed to transcend the political process turns into a means to pursue political enemies rather than universal justice.”

Universal jurisdiction is indeed a noble concept as long as it genuinely serves its legal and social purpose of enabling

the achievement of complete justice *vis-à-vis* those who would otherwise escape such justice. It is not, and must not become a political tool for selective use as part of a political dispute, conflict or war. It must not be given to abuse and ridicule by those countries - generally non-democratic - that themselves deny true justice within their own systems, but seek to cynically utilise other countries' legal systems and openness in order to fight their own political battles.

It is perhaps incumbent upon international lawyers as well as lawyers involved in diplomacy, legislation and criminal prosecution, to seek ways of immunizing the otherwise worthy concept of universal jurisdiction, from the fatal illness of political abuse.

18. “The Pitfalls of Universal Jurisdiction”, July 2001.



Adv. Louis Garb, Member of the Executive Committee of the Association, lighting Hannuka candles at the Opening Session of the Jerusalem Conference

The Current Conflict - Legal Aspects

Daniel Reisner

I participated in the Camp David negotiations with the Palestinians and I can say from personal experience that a very wide variety of offers, proposals and ideas were put forward by either Israel or the United States during the negotiations. None of the proposals were accepted by the Palestinians, who did not present any significant counter proposals of their own. In principle they continued to demand that Israel fully withdraw to the 1967 borders, that the Palestinians be given full control of East Jerusalem, including the Old City and *Har Ha Bait* (the Temple Mount), and that Israel recognize the right of return of Palestinian refugees, including the actual return of at least a quarter of a million refugees from Lebanon.

When we once noted that both sides have to compromise, otherwise there would be no deal - I remember the following response: "We have made an observation: without the Yom Kippur War of 1973, there would have been no Peace Treaty with Egypt; without the *Intifada* between '87 and '93, there would not have been the Oslo Accords; without the *Hizbullah's* attacks against Israel from Lebanon, you would not have withdrawn from Lebanon. Why isn't it true to say as an observation that Israel is susceptible to the use of force in its political decision-making?"

In the wake of the failure of the talks in Camp David and Taba, the Palestinian leadership made a decision to launch a campaign of violence. To the best of our understanding, the idea was two-fold. One idea was that force could be an alternative to negotiations in attaining the political objectives. This is an idea held by some of the Palestinian leadership and by some of the Palestinian people. The other idea was that force could be a useful tool to change Israel's mind on some of the open issues. In other words, the Palestinians believed that, after a round of violence, on their return to the negotiating table they would have improved their

position. On this basis we now face the current round of violence which has lasted for the past 15 months.

As lawyers, one of the first questions we were asked was - what are we experiencing?

Terrorism for us used to be a single attack here, a single attack there, although, if one looks at Israeli history, there have been very few periods when some type of terrorism was not in evidence. But the scope of the current violence, the number of people injured, and everything else about it, told us that this was not just a normal round of terrorism. As international lawyers looking at the rule books, we could find no answer.

Public international law relating to this issue, drafted mainly in the first half of the previous century, defines two distinct situations: a State is either at war or at peace. There are rules for peace-time. There are rules for war-time. Most jurists do not believe that there exists any middle ground in law. In the late 1970's, international law acceded to reality by accepting the fact that there exists something called a "non-international armed conflict". This is a factual matter, usually relating to conflicts within the boundaries of a country. International law had to adapt to these conflicts, albeit 20 or 30 years too late. But reality has shown us that there are also international armed conflicts, *i.e.*, conflicts that transgress international boundaries, which are not necessarily wars.

Let us look at what we have here. We have 232 dead Israelis. We have approximately 800 dead Palestinians. That is the current



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number that we know. There are about 2,300 injured Israelis. There are about 10,000 injured Palestinians. We have been fighting for 15 months. The Palestinians are using rifles, grenades, sniper rifles, machine guns, bombs, mortars, anti-tank missiles. We are using tanks and aircraft. This does not look like an anti-terrorism campaign. This looks like a war. So when we ask ourselves what exactly are we going through and we try to put all this together, we came up with an answer that is not in the standard international law books. We said this is warfare. But, because the Palestinians are not a State, they do not have an army and we are not fighting the Palestinian entity in and of itself - we are only fighting elements within the Territory - we shall define this as an "armed conflict short of war". This category is well known in military thinking and international relations. It is called "low intensity conflict". It is "little wars". It has a lot of names. International law has not addressed it at all.

The definition is important because it tells you which part of the rules of international law to look at when fighting the conflict. The international community views the Israeli presence in the West Bank and Gaza Strip as an Occupation. As a result, they require us to apply the rules of international law which apply to Occupied Territory. Without acceding to the political aspect, we have acceded to the legal requirement and since 1967 have applied the rules of Occupation to the West Bank and Gaza Strip.

But the rules of Occupation, generally speaking, give the military a policing role in relation to the local population. One takes care of the population using police methods. When one sees a person who has committed a crime one arrests him. He is brought to justice. In warfare, on the other hand, if one sees an enemy soldier, one does not tell him to raise his hands. One does not tell him to stop and identify himself. He is killed. It is not necessary to ask questions first. If he is an enemy soldier, he is killed.

So what were we supposed to do now? We talked with all our counterparts and we came to the following decision. Apparently in such a situation, the rules of warfare applied but they had to be toned down. We would apply them to a limited extent. We would impose limitations based upon the principle of proportionality.

Let me give you some examples of the consequences of this definition and decision.

Rules of Engagement: The policeman's rules of engagement are very simple. He sees a felon and he uses non-lethal means to detain him. Only as a last resort and if in a life threatening situation can the policeman use deadly force. This is generally

accepted practice all over the world. Our standard rules of engagement before the current violence were very similar to those of a policeman. But now, in an armed conflict short of war, on identifying an enemy, were we to apply that concept? We thought about it and came up with a compromise. We told the soldiers to take less risk in self-defense. Thus, if, in the past, mortal danger required the soldier to see the rifle being aimed and probably fired at him a few times before he could actually use his weapon in self-defence. Today, in light of the new situation, we have recognized that some changes are necessary. If the soldiers see an armed group of men walking at night towards an ambush site, where in previous incidents Israeli civilian vehicles were attacked, we do not require them to try and arrest the people. They are entitled to engage these people by the use of deadly force. On the other hand, we do not apply the rules of warfare entirely. We have not designated all Palestinian policemen or all Palestinians bearing arms as enemies. This type of compromise has caused many problems for our soldiers. How do they recognize a terrorist and differentiate between him and a normal Palestinian policeman? We have actually placed the onus on the soldiers.

Weapon systems: In warfare, there are very few limitations on the type of weapons one is allowed to use. Accordingly, in the current conflict, we could probably use our entire arsenal and indeed we are using a lot of the military arsenal attack capability. We are using every infantry weapon we have. We are using helicopters. We are firing missiles. We are using airplanes and guided munitions. We are using tanks. But all of these platforms have one thing in common. They are extremely accurate. A tank can hit a target three meters wide at a range of three to five kilometers. A guided missile from a helicopter can go through a designated window. A guided bomb will hit within a radius of 20 to 30 meters from the location which is targeted. The Israeli forces have additional weapon systems, which may be used in warfare. We have artillery. We have non-guided munitions for aircraft. By the way, in the current conflict in Afghanistan, the Americans are using non-precision munitions as they did in Iraq and Kuwait. We are not. Why? Because we believe that we should still limit the current conflict, to targeting only those specific organizations that we have identified as enemy. The problem is that these intermingle with and are shielded by the civilian population. Therefore, we do not use the full range of legal weapons allowed in warfare. We have imposed our own restrictions.

Military Police Investigation: In the past, every allegation of misconduct by an Israeli soldier, especially one that was claimed

to have caused the death of a Palestinian, would automatically have been the subject of a military police investigation. No other military organization in the world has done that in warfare. In warfare, usually only war crimes are investigated. It is expected that in warfare soldiers will make mistakes. They are not criminal when they make a mistake in warfare unless they have exceeded what international law has defined as the line that no soldier is allowed to cross even by mistake.

On the other hand, we are not in full war so we decided to change our policy but not fully. We decided not to open an automatic military police investigation over every allegation. But we would do two things: First, we would require an investigation by the Military of every serious incident, and second, in the serious allegations, we would launch military police investigations.

We have currently about 37 police investigations against IDF soldiers in relation to allegations of misconduct related to death. We already have two cases in which a charge sheet has been filed against soldiers for misconduct. We are trying to balance between the fact that we are in a situation of warfare and the fact that we require soldiers to act in a moral and legal fashion. It is not an easy distinction to make.

There are several examples of the balancing act that we have to perform. One of the problems we face is how to prevent ourselves from doing things now that we may be sorry for five years from now. We actually work under three different supervision mechanisms, parts of which are unparalleled. First, we have an internal supervision process. Part of my job is to sit in on the planning process, including in the targeting process of specific targets in the Palestinian Authority. My officers advise the Military what to attack and what not to attack. This is an extremely difficult job, especially if it happens the day after a terrorist attack. Everyone wants to do something and it is a very unpopular voice which says, "We think you shouldn't attack that target because the damage is disproportionate to the military advantage". The Ministry of Justice does this as well, as do other Ministries within the government.

Second, we are open to public criticism. This is not a generally accepted practice. In other western countries in an equivalent situation, public criticism is toned down. In Israel, we are open to criticism from the media and from Human Rights Organizations. We get hundreds of letters per week concerning specific cases or general issues. Foremost of these is the International Committee of the Red Cross, which is a well established and well recognized organization.

The third level of criticism is judicial. From 1967 until this very day IDF military actions in the West Bank and Gaza Strip are subject to the supervision of the Israeli High Court of Justice. This decision has absolutely no parallel in any other country.

On the contrary, under the law prevailing in modern western countries, most specifically, the United States prior to the 11th September bombing, no one can appeal a military action by the US Military outside the boundaries of the United States, in an American court. Yet, Israel saw fit to do just that because we recognize the fact that in order to be legal and moral we must also be subject to supervision. The problem is that military actions have not lent themselves so easily to supervision. For example, about four weeks ago a bomb exploded near a tank in an outpost near a settlement in the Gaza Strip. We followed the explosive defonation wire through which the bomb was exploded and we found that it led to a small uninhabited greenhouse. The Military Commander said, rightfully, that the building had to be demolished because otherwise the terrorists could repeat their action.

Under the rules of warfare, a Military Commander is allowed to destroy private property in order to prevent further loss of life. But because we are constantly balancing, the owner of the building was notified of the proposed demolition in order to give him a chance to vacate the premises. That owner went to his lawyer and filed a petition to the High Court of Justice. That night I received a phone call from the Ministry of Justice to the effect that the Duty Judge had just issued a writ preventing the destruction of the greenhouse. This was a strange occurrence because there was a military operation underway. The judge did not know this because the petitioners, of course, never said so in their petition. I asked my unit in the Gaza Strip to stop the operation. They rang up the division headquarters and then the Division Commander who was in the field commanding the operation. He stopped the operation just before the building was demolished. In the morning we applied to the Supreme Court arguing that this case was not justiciable under Israeli law, as an act of warfare. This was a military response to an attack, not to a violation of a building code. The Supreme Court discussed the case for four hours and then dismissed it on its merits. They did not publicly accept our position that this was not a justiciable case.

We actually believe that the supervision of the Israeli Supreme Court is extremely important because it gives us two things. First, it gives us the capability to go to the Military and explain that it is not only the Military Advocate General's Unit which does not agree to action, the Supreme Court also will not accept it. This gives us some strength *vis-à-vis* our clients. Secondly, it also

gives us the chance to have someone double check us. We too can make mistakes working under pressure. This is not an easy job, especially when people are dying. In addition to the High Court of Justice, Israel is open to a second avenue of legal recourse to Palestinians. Palestinians who are injured in combat operations can sue the government of Israel for those combat operations, and unless we can prove in the Israeli court that it was a combat operation, we pay them money.

We are now discussing this issue with the Ministry of Justice. Illustrating the issue are two suits which were filed during the last three months. The first concerned the continuous fighting going on between the neighbourhood of Gilo in Jerusalem and the neighbouring Arab village of Beit Jalla. During that fighting many houses on both sides were hit by gun fire. A resident of Beit Jalla filed a claim against the Israeli government in an Israeli court in relation to the damage to his house during the exchange of fire. The court has no authority to throw the case out automatically. It has to consider the question whether it was a military operation. In the event, the suit was thrown out of court because the plaintiff claimed so much money he was unable to pay the court fee payable as a percentage of the claim.

About two weeks ago, Israeli forces entered one of the Palestinian towns as part of a military operation; one of the Israeli tanks drove over a local car in the street. The owner of the car has filed a suit against the Israeli government for the damage to his car. Ludicrously, one of the paragraphs in the claim states that the tank did not obey traffic regulations since the tank had enough room to maneuver around the car.

These claims are not limited just to Palestinians. We have some Israelis who are trying to make money out of the situation. An Israeli company which is involved in tourism filed suit against the Palestinian Authority for the damages incurred by them as a result of the reduction in tourism following this current violence. But they proceed to state that as the Palestinians claim that Israel is at fault for the current violence, they are also suing the State of Israel.

Currently we are discussing with the Ministry of Justice the fact that perhaps the rest of the Western countries are not totally wrong in holding that claims relating to combat related activity are barred from entering court rooms and that we should follow suit.

The Palestinians have chosen this violent conflict to improve their negotiating stance at the table or to attain the same goals without negotiating at all. The premise is that this can be done because Israel has a weak belly. We are not good at suffering casualties. We are not good at the prolonged attrition process. Public opinion in Israel declines over a lengthy process, in what is sometimes referred to as the Vietnam Syndrome. The Palestinians believe that while we are constrained by rules of morality and legality, they are not. In this imbalance they believe lies their advantage. As a lawyer, it is my job to make sure that the Army will fight lawfully and morally. As a soldier, my job is to assist the military in winning this conflict. I can tell you that it is our intention to succeed in both.



Plenary session at the Jerusalem Conference on *Standing by Israel in Time of Emergency*

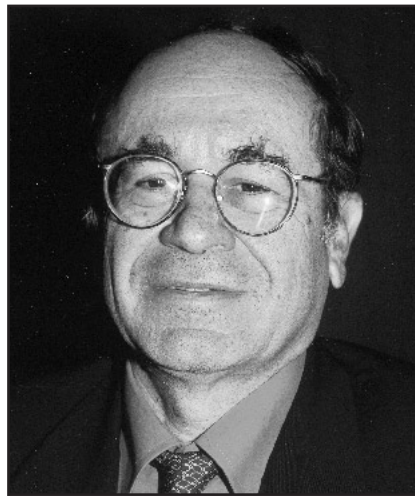
Geneva: Israel being Singled Out and Discriminated Against, Fighting Back, with Few but very Important Allies

Yaakov Levy

I have been working for the last year in a kind of parliament, the United Nations, which has 189 members. Included in this total are 21 Arab States, the PLO as an Observer, another 35 Muslim nations, and the G-77, the former non-aligned group, which includes supporters of the Arab and Muslim members. Against this numerically significant voting bloc stands the State of Israel, with one Ambassador and one voice, but not always the right to speak. This is the unequal starting point that partly explains why Israel is discriminated against and is unfairly singled out for criticism and condemnation.

Another factor which contributes to the unequal treatment accorded to Israel is her exclusion from membership in a regional group, in particular the Asian Regional Group where geography and logic ought to have placed her. The Arab-sponsored rejection of Israel's membership in the Asian group has serious consequences. At the United Nations, everything is based on regional groups: the African grouping, the Latin Americans, the Western Europeans, etc. There is only one country that does not belong to any regional grouping - Israel. This situation might seem abstract and insignificant to most people who are not involved in the daily life of an organization such as the United Nations,

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but not only does it violate principles of equality and fairness, this exclusion from a regional grouping also has many practical implications. One implication concerns the actual work of the United Nations meetings, which often begin in the morning with a Bureau meeting of representatives of the regional groups. Being excluded from a regional group means that we have no one to represent us at these important meetings and thus no way to voice our concerns before the bureau. Also, plenary meetings often break for consultations in regional groups. We had a situation in one of the human rights meetings last year where there was a spontaneous break for consultation and

the Chairman said "We have no room, so in this corner - Africa; in that corner - Europe." I got up and said, "How about me?" I felt like one orphan left in the middle of the hall. It was very striking because it happened in front of everyone. It was a departure from the more usual discrimination that occurs during the breaks, which is less visible, but no less damaging.

Under normal circumstances I would have had a chance to be chairman of a meeting, or president or vice-president of a conference - but I will never be elected to chair or preside over a conference or a regional group. Israel is the only country whose ambassador will never attain any of these positions. Every other country's Ambassador will attain one of them sooner or later because of trades and deals, including the smallest of countries.

There are only a few non-political organisations in Geneva (the Conference on Disarmament, the World Trade Organisation, as well as the Economic Commission for Europe). The sixty other political organisations in Geneva discriminate against Israel, which is purposefully singled out.

For example, in relation to the Fourth Geneva Convention, the High-Contracting Signatories met for the second time in history, to discuss and condemn one country - Israel. Forty-eight hours before the meeting, which we had opposed during the last year, and which was scheduled to take place after two major terrorist attacks against civilians in Jerusalem and in Haifa, I asked for a formal meeting with the Swiss ambassador. Since Switzerland is the depositary of the Conventions. I requested the annulment of the meeting, or at least a long-term postponement in light of so many Israeli civilians deaths and the great certainty that this would not even factor into the deliberations, let alone the final declaration. We made a similar move in Berne and in Jerusalem. Nevertheless, the meeting was held and the Declaration, watered down after many months of indirect negotiations but still highly one-sided, was still adopted. This is the most recent case of singling out one country and discriminating against it. There are many others.

I arrived at the United Nations in September 2000 and a month later, a Special Session of the Commission on Human Rights was held. I believe it was the fifth ever to take place. Such a session is usually convened only for extraordinary situations, such as the massacres in Rwanda. But this time, the Special Session was held just five weeks after the beginning of the riots and condemned Israel in such violent language, that we felt constrained to reject the resulting resolution (E/CN.4/Res/S-5/1 out-of-hand and declined to cooperate with it. The resolution was so one-sided and extreme that when the regular annual session convened a few months later, the Arabs and the Muslims themselves had to backtrack from some of the uncompromising and extreme text of many resolutions that they would normally have tabled at the Commission.

When the regular session of the Commission on Human Rights met last March, discussions on country situations were divided into two subjects: one was the violation of human rights worldwide, in about 188 countries; the other subject concerned the violations of human rights by one country: in the territories occupied by Israel. They spent 3 and a 1/2 sessions solely on this agenda item, a major section of the debate when compared to the item on worldwide violations, which took up 7 sessions, 5 of which also had mention of Israel's alleged violations. Speaker after speaker rose to the rostrum to attack Israel and besmirch her.

Last March was the first time I participated in a session of the Commission. During those meetings I witnessed a number of disturbing developments. Officers had to be elected. An independent organization called "Freedom House" published the record of the human rights of States that were candidates for membership in the Commission. By a very strange coincidence, the worst violators were elected to be members of the Commission in 2000. When it was time to elect the Vice-Chairman of

the Commission, the representative who was voted for with acclamation was the ambassador of Libya. The result is that when issues of human rights in places like Cuba are brought to the Commission, the ambassador usually says something like, "there are no human rights violations in Cuba", and he gets the so-called non-aligned Group of 77 to applaud loudly and automatically.

Another case in point concerns preparations for the Durban World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. There were five regional preparatory meetings, as usually takes place, and then five preparatory meetings in Geneva itself. The source of our problems, beyond the general disposition of such a commission and its composition, was the meeting in Teheran, the regional meeting of the Asian Group. Of course, we were not invited. A few days before the convening of the Commission, I made entreaties to the Office of the High Commissioner for Human Rights for an invitation, but to no avail. Australia, New Zealand, the Bahais and Jewish organisations were also not invited. I told the Office of the High Commissioner that the Jewish NGOs were being denied their rights. Surprise was expressed and immediate intervention was promised. The result was a quick intervention with the Iranian authorities. The Iranians are quite smart; they said "Problem? We have no problem. Tomorrow morning, come to our embassy and you'll get the visas." It just so happened that "tomorrow" was Friday and unfortunately the mission closed over the weekend. By the time it re-opened on Monday, the Conference was over. At the regional conference, all the women participants, including the High Commissioner, were asked to wear the veil "because this is the practice in our country". Even though they tried to protest and asked for dispensation, it was not granted. This was the kind of atmosphere of "tolerance" in which the most rabid anti-Israeli text was adopted. When we asked repeatedly for the removal of this text, we were told repeatedly "But you can't. The regional grouping in Teheran is as valid as the Latin American one, and you are not taking out of the draft declaration and programme of action, text passed in Santiago. How can you discriminate against the Asians and take out text adopted in Teheran?"

One of my worst experiences in Geneva was not solely an Israeli-related issue. It was the question of how the issues of anti-Semitism and the Holocaust would be treated at the Durban World Conference against Racism. This question was raised during the preparatory meetings for the Durban conference. Here, I had two experiences: one in the plenary and the other in lobbying different delegations. We were running from one meeting to another because every time the words "anti-Semitism" or "Holocaust" came up in one of the paragraphs, some an Arab or Muslim delegation would demand it be deleted, placed in brackets or coupled with some references to "Zionist practices of anti-Semitism", "Zionist ethnic cleansing of East Jerusalem",

etc. When we would ask to speak, fifteen other delegations would raise their signs and demand that the Holocaust either be omitted from the text or written with a small “h” and in plural. That was my experience in the plenary meetings. I also lobbied each and every ambassador of friendly countries and asked them, one after the other, not to hide behind the stand taken by their regional group. Rather, I asked them to specify what was happening on their soil, in relation to displays of anti-Semitism, or during the Holocaust, and introduce or second resolutions accordingly.

For me, as an Israeli and a Jew, the disappointment regarding the reactions to the issues of anti-Semitism and Holocaust remembrance was major. This reaction was something I had not expected. One may argue about the Middle East conflict, the Intifada, and our response. These are political issues. But anti-Semitism and the Holocaust, to my mind, are moral issues and I even had one shouting match with an ambassador representing a major power who, after I had appealed to him on behalf of his group, for a full hour, told me, “Don’t give me lessons in morality”.

Another case in point is the emblem of Magen David Adom. This organisation is the only emergency medical association whose emblem is not recognized by the International Committee of the Red Cross. This is a major issue, well known in Geneva, although it is not within the direct jurisdiction of the UN. Nevertheless, it is the same member countries who have to make the ultimate decision on this issue, albeit in a different forum. Sadly, it is one more example of anti-Israel discrimination.

Another example of discrimination concerns special sittings. The International Labour Organisation met last year and agreed that a special sitting had to be conducted, not about issues of slave labour and the millions of children working under terrible conditions, but about Israeli practices. Why didn’t Israel allow 130,000 Palestinian labourers to come into Israel freely, as she had prior to the current rioting? 1,200 delegates could not debate the issues that concern all workers in the marketplace; instead they had to defer to Arab-Muslim demands to debate the specific issue of Palestinian labourers. For six hours, fifty speakers mounted the rostrum, forty of them Arabs and their supporters, blasting and attacking us.

Another example of discrimination is the unique and open-ended mandate that was adopted in 1993, regarding the creation of the post of a special rapporteur to the Commission on Human Rights on alleged Israeli violations in the occupied territories. Rapporteur after rapporteur has come to the area since 1993. Five of them resigned and a new one was appointed just recently. I met with the new Special Rapporteur and pleaded with him not to follow the path of his five predecessors - that is, either to not accept the mandate or to resign on the spot, rather than resign within the next year or two due to the skewed mandate.

He decided, for whatever reason, to accept the mandate even though, to my knowledge, sixteen candidates had declined to accept this position. The new Special Rapporteur is a professor who participated into the so-called “Commission of Inquiry” that came to the territories as a consequence of a one-sided resolution at a special session in October 2000, and perhaps will come to the area again to report to the Commission on Human Rights in the coming months.

These are the kinds of discrimination and unfair singling out that we face in our daily work. However, we do have some very good friends. I would mention two, in particular: the great United States, which regrettably is no longer on the Commission on Human Rights, and small, but brave Guatemala, whose ambassador and deputy representative get up in front of a hissing audience who would shout them down, and speak for Israel and defend her, and speak and defend Zionism. There are others States who have also shown a willingness to come together and speak for us and vote for us. The support, both official and unofficial, of these States is of critical importance in ensuring that Israel has some kind of voice in international fora where otherwise it would not be heard or listened to.

The media also serves as an important ally. Discussions in the hall are inscribed in the annals of the international community and the United Nations, but they reach a limited audience. Outside there is an audience of hundreds of millions. There are over 100 journalists at the United Nations. I make good use of their presence and present our case to them, outside of the hall, on a regular basis.

Second and most important, but under-valued and under-represented, is the Jewish community worldwide. I appeal to all major Jewish organisations, international and regional, to join the new phenomenon of greater participation and influence of non-governmental organisations in the work of the United Nations. I would like every major and valuable active organization to open a high-profile branch, lodge or presence here in Geneva. I hope that two major organisations are going to do just that before March 18th, the opening of the next Commission on Human Rights. There are also plans to hold a major Jewish event here in Geneva on the same day the commission on human rights opens, possibly even in the same room. This week, in the same hall where the Holocaust was denied in January last year, there will be a presentation, co-sponsored by the Bulgarian embassy, about the rescue of Bulgarian Jews during the Holocaust.

This, briefly, is the general scene in Geneva: Israel being singled out and discriminated against, fighting back, with few but very important allies and potential resources that could be more fully utilized and developed.

When Countering Terrorism - Definitions Matter

Wayne L. Firestone



For too long the international community permissively related to terrorism in a manner similar to how former US Supreme Court Justice Potter Stewart related to pornography when he said in short, *I don't know how to define it, but I know it when I see it.*¹ In the rush for the international community to respond decisively and collectively to the unprecedented 11th September attacks on America, an *ad hoc* international coalition promulgated economic, military and diplomatic measures. At the same time, familiar voices in the international community continue to refer elsewhere to “good” and “bad” terrorists and the “noble” goals of “freedom fighters.” At stake is not merely prolonged cognitive dissonance in international affairs but rather fundamental security concerns that will not fade away and need to be addressed *de jure* by the community of nations.

In a classic example of placing the cart before the horse, on 28th September, the United Nations Security Council passed UNSC 1373,² to outline mandatory financial and legal measures for UN Member States to take against Osama Bin Laden and *Al Qaeda*, in particular, and more generally against similar acts in the future. Further, on 19th October, the Security Council's Counter Terrorism Committee (CTC) released a detailed work plan indicating the resolution was more than precatory language.³ But woefully missing from this effort is an obligatory definitions section. CTC chairman Jeremy Greenstock told a press conference that it was not within the jurisdiction of his committee to “define terrorism”

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but instead the work plan sought to “establish the highest common denominator of action against terrorism in every territory of members of the United Nations.”⁴

The international community does not have to look very far to address this slighted issue and establish a uniform, objective definition of terrorism. An objective definition of terrorism can be derived from public international law sources and norms established in the Geneva and Hague Conventions, for example.

In March 1997, long before the image of airplanes crashing into American governmental and commercial sites, an international interdisciplinary group of counter terror experts organized by the Institute of Counter Terrorism in Herzliya proposed a straight forward definition of terrorism - “an intentional violent attack on the lives of civilians aimed to achieve political goals”. More recently, Robert Pfaltzgraf, President of the Institute for Foreign

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1. *Jacobellis v. Ohio* 378 U.S. 184 (Stewart, J, concurring).
 2. Resolutions passed under Article VII of the UN Charter are mandatory on all Member States and provide the Security Council with significant economic, diplomatic and military enforcement measures. (See e.g. Arts. 41 and 42).
 3. The five subheadings of the plan are: 1) contact points between the CTC and Member States; 2) CTC steps for recruiting technical expertise; 3) the reporting requirements of the Member States, 4) the manner of assistance to be provided by the CTC and 5) details on CTC information dissemination.
 4. David Schenker, Washington Institute for Near East Policy Paper #582: *UNSC1373 and the War Against Terrorism: An Important if Untested Tool*. November 6, 2001. A transcript of the press conference, as well as the resolution and work plan texts are available at the UN web site.

Policy Analysis and Professor of international security studies at the Fletcher School of Law and Diplomacy, concurred: “No attack that purposefully targets civilians is ever justified from any aggrieved group, no matter what its complaint.” ICT Executive Director Dr. Boaz Ganor notes that this proposed narrow definition of terrorism could help in recruiting nations to adopt the objective test, but recognizes that it would necessarily exclude other controversial acts such as “guerilla warfare.”⁵

Understandably, since 11th September, there has been renewed interest in addressing the legal mechanism to counter-terrorism both in domestic legislation in the US as well as at the international level at the United Nations. In late October, the United States passed legislation that gives law enforcement officials and intelligence agencies needed tools to identify, track and prosecute terrorists and their supporters but also appropriately provides judicial review and congressional oversight to prevent abuse of these new powers. Subsequently, U.S. President Bush declared an “extraordinary emergency” which empowers him to order military trials for suspected international terrorists. These actions, which have been both praised and criticized by international law experts as well as civil rights lawyers, are not necessarily inconsistent with UN1373, but also should not be seen as a substitute for attempting to garner international support.

Shortly after the attacks on America, Israeli Justice Minister Meir Shearit proposed to U.S. Attorney General John Ashcroft the convocation of an international summit of Justice Ministers to address by law, international terrorism. Interestingly, a similar idea was previously attempted by Justice Ministers from Arab countries who also have confronted their own terrorist threats but the result was emasculated when the definition of terrorism excluded acts of “national liberation”.

While the United States and Israel have often found themselves voting together without further support there are some signs that other countries recognize a local and international interest in supporting an objective definition of terrorism. India, for example, long the leader of the non-aligned movement has authored a comprehensive counter-terror proposal at the United Nations that specifically states in Article 5: “acts of terrorism are under no circumstance justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”⁶

Admittedly, it is impossible today to discuss the emergence of a new legal standard for international affairs while ignoring prevailing political considerations. Given the troubling poor

state of moral and legal ethos in the international community demonstrated at the UN sponsored World Conference Against Racism in Durban, South Africa this summer, it is uncertain if a majority of nations will support a new legal standard that appears to legitimize the political position of Israel.

Moreover, leaving aside the question of whether the UN Security Council, UN General Assembly or a Special Convention on Terrorism is the appropriate venue for discussion, the *realpolitik* aftermath of 11th September has presented the international community with an urgent, seminal question: “Who is a terrorist?” If the opportunity to answer the question is missed, it is likely that the world will continue to witness *ad hoc* foreign policies that place Western democracies in an awkward, if not distorted position *vis-à-vis* international terrorists and their State supporters.

5. *Terrorism: No Prohibition Without Definition*, Boaz Ganor, October 7, 2001. (www.ict.org).
6. India first circulated a draft of a “Comprehensive International Convention against Terrorism” at the 51st UN General Assembly in 1996. The draft quoted herein has been updated as of September 4, 2000 and made available by the Embassy of India, in Israel.



Judge Hadassa Ben-Itto delivers keynote address at the Opening Session of the Jerusalem Conference

“That you should do what is good and right in the sight of the Lord your God” - Integrity as a Value

Elyakim Rubinstein*

The verse “That you should do what is good and right in the sight of the Lord your God” (*Deut.* 12:28) is explained by *Rashi* in the following terms: “Good in the sight of heaven, and right in the eyes of man.” This explanation complements his commentary on the verse “And you shall do what is right and good in the sight of the Lord” (*Deut.* 6:18): “This refers to compromise, and acting beyond the letter of the law.” As we shall see, this verse serves as a basis for rulings of a judicial nature. These are, therefore, appropriate behaviours, which, in *Rashi’s* view, when combined, lead to an outcome that is both good in the sight of heaven, and right in the eyes of man.

The Commandment to be Upright

The idea of integrity also finds expression in the commentary by the *Netziv* of Volozhin (Rabbi Naftali Zvi Yehudah Berlin, Lithuania, 19th century), *Ha’amek Davar* on the *Torah*. Our sages refer to the book of *Genesis* as *The Book of the Upright*, based on the statement in the Babylonian *Talmud*: “This is the book of Abraham, Isaac and Jacob, who are called upright” (*Avodah Zarah*, 25a). In his introduction to *Genesis*, the *Netziv* writes that the accolade “‘upright’ is used to justify God’s decision to destroy the Second Temple, for the people of that time were a crooked, perverse generation... for they were righteous and pious,

and learned in the *Torah*, but were not upright in their dealings with others... while the Holy One, Blessed is He, is upright, and does not tolerate right-eous people such as these, unless they act honestly in their dealings, but not if they act crookedly, even if their actions are for the sake of heaven... And this was to the credit of the forefathers, who, apart from being righteous, and pious, and loving God... were also upright.”



The name *The Book of the Upright* is also applied to *Deuteronomy* - specifically on the basis of the verse “And you shall do what is right and good” (Babylonian *Talmud*, *Avodah Zarah*, *ibid.*) - and to the *Book of Judges*. The reason for giving *Deuteronomy* this name is the following: “For [this principle] is not counted among the commandments; rather, you should do what is right and beyond the letter of the law, and this is good in the sight of the Lord.” Rabbi Barukh Halevi Epstein (Russia, 19th-20th centuries), author of the commentary *Torah Temimah*, explains the name “Book of the Upright” as follows: “Just as a person only wishes to do that which is right and good to himself, so one who waives his rights in favour of another [is also acting properly] - this is the basis for the whole *Torah*”.

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Indeed, the Bible often points out the demand of integrity, as a fundamental principle of human, social, legal and ethical relations. Integrity is one of the characteristics which man is commanded to follow, in the sense of closely following or imitating the characteristics of God. There are many examples. In the **Torah**: the verse cited in the title of this article, which is explained by Aharon Mirsky: “By this your actions will be upright in the sight of God” (*Da’at Mikra*), and the verse “And you shall do what is right and good;” in the **Prophets**: “To be sure, My words are friendly to those who walk in rectitude” (*Micah 2:7*); in the **Writings**: “The path of the upright: avoid evil” (*Prov. 16:17*). This last verse is the source for the title of the one of the most important works on ethics, *Mesilat Yesharim*, by Rabbi Moshe Hayyim Luzzatto (Italy, Holland and Eretz Yisrael, 18th century). The term “integrity” is, of course, music to the ears of a jurist, for it indicates the straight road, not twisting paths.

The Hebrew root *y-sh-r* is also commonly found in Rabbinic Hebrew. The Sages included, among the forty-eight traits through which the *Torah* can be acquired, “one who loves uprightness” (*Avot*, 6:5). Rabbi Shmuel di Ozida (Safed, 18th century), author of *Midrash Shmuel*, explains this as follows: “One who does not flatter any man, whoever it may be, but loves uprightness, and clings to it.” Rabbi Yisrael Lifshitz (19th century), in his *Tiferet Yisrael*, writes: “He despises all crooked and twisted thoughts”.

The late Justice Moshe Silberg¹ felt that the meaning of the term “*yosher*” changed in the transition from Biblical to *Talmudic* Hebrew, and from *Talmudic* to modern Hebrew. It “underwent ‘plastic’ surgery, it was squeezed down, its image was abraded, and today it retains but a fraction of the content it held in ancient days. It is a long way from the transcendental ‘uprightness’ of the Bible to the pragmatic ‘honesty’ - honesty in action - of the *Talmudic* literature.” He compares the principle of *yosher* in Jewish law, and the English legal concept of *equity*, which for many years was translated as *dinei yosher* (see below). In his opinion, in spite of their differences, “both of them derive from a single source, from the need to blunt the harshness of the law, and to provide an antidote to its roughness... because the common factor - perhaps the most important - in the Jewish concept of *yosher* and the English *equity* is, that they did not lessen the importance of the law, or make it but a footnote to pure morality.” Silberg felt that both of these concepts operate at the margins of the law, and to this end he identified three categories of quasi-legal action, in descending order toward the full legal norm: (a) “And you shall do what is right and good” (noted above); (b) acting

beyond the letter of the law; (c) “The spirit of the Sages is not pleased with him” or “an act of piety.”

One law that derives from “And you shall do what is right and good” is the principle that “seized property may always be returned” (*Baba Metzia*, 35a). That is, a lien, under which property was handed over to the lender, can be annulled by the borrower returning the sum of the debt; even if the lender has taken actual possession of the property, he must return it to its [original] owner. This is also true of the prior right of purchase given to one whose field abuts on another field that is being sold (*Baba Metzia*, 108a). As *Rashi* explains there:

“And you shall do what is right and good - something which causes you no loss at all, since you can find property [to buy] elsewhere, but [by allowing the neighbour to purchase] you will not force him into a situation where his properties are scattered.”

In my view, both the Sages and the formal *Halachic* rulings view uprightness as an ethical foundation that has slowly been absorbed into the law, and has become an indispensable, fundamental plank in the structure of the law. It is the way to link the law with an ethical framework. The root *y-sh-r*, in its fundamental sense, means: “wholeness, truthfulness, the character or trait of an upright person; a lack of crookedness” (*Even-Shushan Dictionary*).

In *Parshat Re’eh*, this root appears a number of times. Regarding the sacrifices, the *Torah* states: “You shall not do what we are doing here today, each person **as he sees fit**” (*Deut. 12:8*); here the text suggests its opposition to lawlessness and a lack of discipline. In regard to the consumption of forbidden meat, the *Torah* commands: “Do not eat it, so that it may be well for you and your children after you, when you do what is **right** in the eyes of the Lord” (*Deut. 12:25*). On this, Rabbi Ovadiah Sforno (Italy, 16th century) comments:

“When you abstain from eating, it should not be as though you are disgusted with it, but rather to do what is right in the eyes of the Lord, as the Sages said: A person should not say, I dislike forbidden meat, but, rather, he should say, I would like it, but my Father in heaven has decreed that I [should not eat].” Here, too, the idea is to maintain the framework about which we have been commanded.”

And so too in a following passage:

1. M. Silberg, *Kach Darko Shel Talmud* (This is the Way of the *Talmud*), (Jerusalem 1962), pp. 97-98.

“When you hearken to the voice of the Lord your God, to keep all His commandments, which I command you today, to do what is right in the eyes of the Lord your God” (*Deut.* 13:19).

An Ethical Norm in Conjunction with the Law

In his *Yad HaChazakah*,² the *Rambam* states

“The majority of the laws of the *Torah* are none other than advice from afar, from He who is Great in Counsel, to offer correct understanding and rectify all actions. And so it is written: ‘Indeed, I wrote down for you a threefold lore, wise counsel, to let you know truly reliable words, that you may give a faithful reply to him who sent you.’ (*Prov.* 22:20-21)”.

These words of the *Rambam* appear after he has pointed out:

“Although all the laws of the *Torah* are decrees... it is appropriate to look into them, and wherever you can assign a rationale to them, do so...; the *Torah* fully comprehended man’s thoughts and some of his evil inclination, since man naturally wishes to increase his wealth and protect it... But all these things are in order to bend his will and correct his understanding.”

Rambam’s intention, in writing “to rectify all actions” can be understood from his comments in the *Moreh Nevuchim*. In explaining the term *Tzedakah*, he writes: “[This] is derived from *Tzedek*, ‘righteousness,’ that is, uprightness, and this uprightness means to give everyone his due” (*Moreh Nevuchim*, part 3, chapter 53). This is the whole of ethics in a nutshell. According to Prof. Englund,³ who discusses the problem of integrity within the *Rambam’s* philosophical framework, the unique contribution made by the *Rambam’s* view is “to see integrity as a description of the Creator’s actions, which it is our duty to emulate in our own lives.”

As noted previously, integrity implies the establishment of an ethical norm that stands alongside the law. As Professor Menachem Elon puts it: “The *Torah* gave the Sages the authority to establish, from time to time - taking into account human behaviour, which varies from time to time and among different individuals”⁴ - various laws, whose fundamental intent is to do what is right and good. At times these take on the force of legal norms; sometimes they are offered as acts of piety; and at other times “acting beyond the letter of the law is itself part of executing the law.”⁵ Thus, for example, in the *Laws of Neighbours* (14:5), the *Rambam* bases the rule of the abutter’s right of first refusal on “And you shall do what is good and right.” However, at the

same time he emphasizes that, in such cases, there is no possibility of legal enforcement, “since the Sages only commanded this as a matter of piety and a good heart.”

Similarly, R. Vidal di Tolousa (Spain, 14th century, *ibid.*), the author of the *Maggid Mishneh*, a commentary on the *Rambam’s* *Yad HaChazakah*, writes:

“Our *Torah* gave us a number of general principles, to correct man’s traits and his behaviour in the world... And similarly it stated: ‘And you shall do what is good and right.’ And the intention is that [a person] should act properly and uprightly with his fellow man.”⁶

Indeed, the concept of “beyond the letter of the law” is found in the framework of the law at the point where the strict law and ethical behaviour intersect. It is undoubtedly rooted in a deep human emotion. At times it takes on the appearance of law, and at others it is imposed upon the law. (This is the case in English law, too, where the sequence is: law, then equity, and then the combination of the two.) Nonetheless, as Prof. A. Kirschenbaum points out,⁷ no new concrete cases were added to those of the return of seized property and the abutter’s right. Rather, further development was through the *responsa* process. The principle underlying these rulings was viewed as an aid, and not as an essential consideration in these decisions, although, academically speaking, there was certainly room to do so.

Moreover, Rabbi Eliezer Waldenberg (Israel, 20th century) writes:

“I have found in the *Responsa Darkhei Noam*... where he writes... that the *Beit Din* has the ability to force one of the parties to accept a compromise, since this is a principle of the *Torah* law, as it states: ‘And you shall do what is good and right’.”⁸

2. *Hilchot Temurah* (Laws of Substituted Sacrifices), 4:13; quoted by the *Hafetz Hayyim* in his foreword to *Sefer HaMitzvot HaKatzar*.
3. Y. Englund, “‘*Al derekh harov*’ and the problem of integrity in the philosophy of the *Rambam*”, *Jewish Law Annual* 14-15 (1998-99), pp. 31, 55, 59.
4. M. Elon, *Hamishpat Halvri - Toldotav, Mekorotav, Ekronotav* (Jewish Law - Its History, Sources and Principles) (Jerusalem 1973) p.142.
5. Justice Elon, C. A. 417/79, *Marcus v. Hammer* 37(2) P.D. 332, 352; in his opinion this is sometimes the case in Israeli law as well.
6. Quoted by Elon, *ibid.*
7. *Equity in Jewish Law* (New York, 1991) pp. 280-281.
8. *Responsa Tzitz Eliezer*, Part 7, No. 48. [Citations in the original Hebrew are from Bar-Ilan University’s *Responsa* Project CD-ROM.]

Similarly, other authorities - such as *Mahari Kolon*⁹ (Italy, 15th century) and Rabbi Meir of Rothenburg¹⁰ (Germany, 13th century) - ruled on various issues, utilizing “And you shall do what is good and right” as an ethical principle.

The *Hatam Sofer*¹¹ (Slovakia, 18th-19th centuries) noted that, in a particular case, the claim was groundless, “nonetheless we have spoken to the Respondent [and asked him to act] because of ‘And you shall do what is good and right.’” There are also cases where the principle of “what is good and right” requires that the law of the abutter’s right *not* be implemented: “Since the principle of the law is to do ‘what is good and right,’ and providing property for orphans who are minors, in order to safeguard their assets and provide them a source of income, is more just than providing for the owner of the neighbouring field.”¹² In a case of conflict between two competing interests, the benefit of the young orphans wins out.

In his preface to the book of *Deuteronomy*, the *Netziv* describes the book as the source for the study of ethics, and states: “Therefore, every individual should study as best he can, and find a just way to go by, applicable to his own behaviour.” Indeed, he explains the verse “That you should do what is good and right” in *Parshat Re’eh* as an instruction not to trouble the judges:

“One who acts perversely, and thus troubles the judges to have to rule and point out the letter of the law, is neither good in the sight of the Lord, nor upright in the eyes of man. But one who is careful not to come to this, is good and upright.”

The similar verse - “And you shall do that which is right and good” (6:18) - he explains as relating to acts of kindness between people, specifically during times of war. In his opinion, this was the purpose behind the ten decrees relating to inter-personal behaviour, established by Joshua upon entering the Land of Israel:

“For these acts of kindness bring good and blessing into the world, and, while these apply constantly, at such a time (war) we are particularly required to follow them.”¹³

Integrity as a Principle in Israeli Law

Israeli law, although it has not “formally” set this principle on a pedestal, does see integrity as one of its principles. Perhaps symbolically, the Foundations of Law Law, 5740-1980 - which, contrary to the expectations of its promoters, did not bring Israeli law closer to Jewish law and tradition - states in Section 1:

“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” [Author’s emphasis].

This formulation adds the term “equity” to the range of expressions used in the Declaration of Independence’s passage on principles, which states that “The State of Israel shall be established on the principles of freedom, justice and peace, in the light of the vision of the prophets of Israel.” Logic suggests that this change also derives from the fact that the same law revokes the connection to English Law, that was based on Clause 46 of the King’s Order-in-Council, in which the term “equity” was translated as *yosher*.¹⁴ As the explanatory note to the Foundations of Law Law¹⁵ states:

“This formulation was chosen, from among the various versions proposed, in order to direct the judge toward the fundamental values and ethics of Jewish tradition, without imposing on him all of the provisions of Jewish law.”

In Israeli legislation, which does not deal with “equity”, the term *yosher* is found, although it is not common. See, for example, the Customs Agents Law, 5725-1964, which requires the agent to act “reliably, loyally and **honestly**” (Section 20), or Section 245(b) of the Workplace Safety Ordinance (New Version), 5730-1970, which gives the Court, in certain cases, the power to make orders “as it sees proper and **just** under the circumstances of the case.” Similar provisions exist in other legislation.

Similarly, Section 29 of the Partnership Ordinance (New Version), 5735-1975, which deals with the responsibilities of one partner to the other, states that “Partners shall be bound to carry on

9. *Responsa Maharik*, No. 78.

10. *Responsa Rabbi Meir ben Barukh of Rothenburg*, Part 4, No. 764.

11. *Responsa Hatam Sofer, Kovetz Teshuvot*, No. 102.

12. *Responsa of Rabbi Avraham ben HaRambam*, Egypt, 13th century.

13. *Baba Kamma*, 80b-81a.

14. For the English term ‘equity’ (in the original), see Section 44 of the Land Rights Ordinance (New Version) 5729-1969, “both in law and in equity”; Section 1(b) of the Partnership Ordinance (New Version) 5735-1975, “the rules of English common law and equity”; and Section 3 of the Interpretation Law, 5741-1981, “the English common law and principles of equity”, following on Section 1 of the Interpretation Law (New Version).

15. *Hatzaot Hok*, 5738, 307, 308.

the business of the partnership for the common advantage, to be **just** and faithful to each other.” And the same ordinance (Section 45[6]) rules that one of the grounds for dissolving the partnership is the creation of “circumstances... which, in the opinion of the Court, render it **just** and equitable that the partnership be dissolved.”

Integrity and fairness also find expression in legal decisions. The High Court is often asked to rule on the basis of considerations of fairness and integrity. In one case¹⁶ the Court was called upon to respond to the “cry for fairness” (*per* Justice Barak, President of the Supreme Court), which justified deviating from the formal requirements of the property laws (a similar expression appears in the ruling by Justice Goldberg in the same case). In another case,¹⁷ considerations of fairness were offered as grounds for returning investment monies to a leaseholder who had ceased to hold the property (Justice Tirkel).

In the *K.A.L. case*,¹⁸ in discussing fundamental equality, Justice Cheshin stated: “If it is fairness, integrity and justice that we seek, then these are the elements that create the principle of fundamental equality and the prohibition of discrimination...” In another ruling, he states:

“The Court is not like a machine designed to extract carrot juice from carrots, a machine into which you push carrots from one side, and from the other comes carrot juice. The Court is like a living, breathing tissue, a tissue filled with juices - among them the juices of justice and integrity, of good faith and clear logic...”¹⁹

Furthermore, Israeli law recognizes “good faith” as a fundamental principle, one described by Justice Barak as “a multi-faceted ‘majestic’ provision.”²⁰ Section 39 of the Contracts (General Part) Law, 5733-1973, states: “An obligation or right arising out of a contract shall be fulfilled or exercised in customary manner and in good faith”; this section “gives expression to the idea of appropriate behaviour. It establishes the principle that people must behave toward each other uprightly and faithfully.”²¹ “Good faith does not demand that the individual not consider his own personal interest... the principle of good faith establishes a standard of behaviour for people who, individually, are concerned with their own interests. The principle of good faith holds that protecting one’s own interest ought to be fair, and take into account the reasonable expectations and appropriate reliance of the other party. Let a man act toward his fellow - not as a wolf, nor as an angel - but as a man.”²² Section 12 of the same part of the Contracts Law, which deals with negotiations prior to conclusion

of a contract, also rules that the negotiations should take place “in the customary manner and in good faith.” The Bible (1 *Kings*, 9:4) uses the two terms together: “In good faith and with uprightness.” To me, they are indeed one. And this is how Israeli law ties in with the Jewish sources and Jewish law.

Afterword

Integrity, as a measure of morality of the first order, is a consistent theme throughout our history: it appears in the Bible, in the sense of imitating the divine, and in the language of the Sages, who explain the Bible in the light of personal and social ethics.

Indeed, one of the fundamental ethical texts is a work by Rabbi Moshe Hayyim Luzzatto, *Mesilat Yesharim*, which I have mentioned previously. This work is directed, as noted in its introduction, at the “upright man.” The final passages in the book are full of expressions of integrity. The passage indicates that the aim is for each individual to expand his own study and examination of ethical behaviour, as outlined in the book, “since the way has been made clear and our eyes have been opened, so that we may go along the straight path... and each person will be able to rectify his own path before his Creator. This is because, just as each individual has his own occupation or trade, so too he requires the appropriate guidance and instruction.”

Toward the end of the passage, the author quotes the verse: “In all your ways know Him, and He will make your paths straight” (*Prov.* 3:6). On this verse, the *Talmud* offers the following exposition: “Bar Kapara expounded: Upon which short passage do all the principles of the *Torah* depend? ‘In all your ways know Him, and He will make your paths straight’” (*Berakhot*, 63a). Indeed, without integrity, there can be no justice. Integrity is an incomparable moral compass, an ideal toward which the whole legal system, and, indeed, every individual, ought to strive.

16. C.A. 986/93, *Kalmar v. Guy*, 50(1) P.D. 185.

17. C.A. 429/91 4163/91, *Israel Lands Authority v. Barashi*, *Dinim Elyon* 54, 164.

18. H.C. 1703/92, *K.A.L. v. Prime Minister*, 54 (4) P.D. 193.

19. C.A. 1842/97 1869/97, *Ramat Gan Municipality v. Manahami Migdelei David*, 54 (5) P.D. 15.

20. H.C. 1683/93, *Yakhin Plast Ltd. v. National Labor Court*, Jerusalem, 47 (4) P.D. 702, 708; see also Aharon Barak, *Parshanut BeMishpat* (Interpretation in Law), Vol. 4: Interpretation of Contracts (2001), pp. 209, 213.

21. Barak, *ibid.*

22. A.L.A. 6339/97 *Roker v. Salomon*, quoted *ibid.*, p. 214.

Religion and the ‘Boundaries of Endurance’ of Israeli Society

H.C.J. 1514/01

Yaakov Gur Arieh and others v. The Second Authority for Television and Radio and others

Before President Aharon Barak, Deputy President Shlomo Levin, Justice Dalia Dorner

Judgment given on 18.6.2001.

Precis

The Second Authority for Television, a statutory corporation, sought to broadcast a film documenting the life and beliefs of the Petitioners, Orthodox Jews. The Petitioners had taken an active part in the film, including by giving a number of interviews. The film was made during weekdays, however, the Second Authority wished to broadcast it on the Sabbath. The Petitioners objected on the grounds that this violated their religious sensibilities and freedom of religion. President Barak, delivering the majority opinion, held that broadcasting the film on the Sabbath did not violate the freedom of religion or excessively violate the religious sensibilities of the Petitioners. Deputy President Shlomo Levin concurred. Justice Dorner dissenting held that while the violation of the religious sensibilities of the Petitioners *per se* could not justify granting the petition in these circumstances, the broadcast here did more than merely violate their sensibilities. It also unlawfully infringed their right to freedom of religion.

Judgment

President Aharon Barak

Justice Barak set out the facts and held that no agreement had been reached between the Petitioners and the producers of the film regarding the day on which it would be broadcast. Moreover, the Petitioners should have known that the film would be broadcast within the framework of a documentary series that was regularly slotted for the Sabbath. Justice Barak also held that programs which entailed the participation of Orthodox Jews and were broadcast on the Sabbath routinely included captions informing viewers that the program had been filmed on a weekday. In this

case, the Respondents were willing to broadcast the same caption and indeed a further statement to the effect that the Petitioners had objected to the film being broadcast on the Sabbath. The Petitioners rejected this proposal. They contended that they had a right, which arose otherwise than by contract, not to have the film broadcast on the Sabbath. Such a broadcast would violate their religious sensibilities and freedom of religion and though the Petitioners themselves would not violate the Sabbath, the broadcast made them accomplices to such a violation.

The Normative Framework

Respondent 1 was a statutory corporation. Its discretion was subject to principles of public law which required it to draw a balance between the relevant values and principles. On one hand, the Respondents had a right to freedom of expression - comprising a right to artistic expression and the right of the public to know. On the other hand, were the religious sensibilities of the Petitioners. Justice Barak accepted that knowledge that the program would be broadcast on the Sabbath - making the Petitioners, in their own eyes, accomplices to a violation of the Sabbath - violated their religious feelings. Preventing such a violation was in the public interest. Justice Barak held that a society whose values were Jewish and democratic protected the feelings of society in general and religious feelings in particular. A gross violation of religious feelings eroded tolerance, which was one of the values unifying society in Israel. The duty not to violate the religious sensibilities of another “ensues directly from the duty of mutual tolerance between free citizens of different faiths, without which it is not possible to have a diverse democratic society such as ours.” (*per* Landau J. in H.C. 351/72 *Kainan v. Council for Film and Play Reviews*, 26(2) P.D. 811).

Violation of Religious Sensibilities

What was the proper balance between the need to protect the freedom of expression of the Respondents and the need to protect the religious sensibilities of the Petitioners? The case law had considered this question extensively and held that the balancing

formula was as follows: freedom of expression superceded unless the violation of religious sensibilities was almost certain and the violation was real and severe. The violation had to exceed the threshold of endurance of Israeli society.

In the instance case there was no doubt that there would be an “almost certain” violation of the religious sensibilities of the Petitioners. However, the violation here was not excessive in terms of its severity. The “boundaries of endurance” of Israeli society, in a Jewish and democratic country, included situations in which television programs were broadcast on Saturday, containing images of religious Jews. The figures could be politicians or others, captured on film in active interviews or fortuitous shots. This had been the situation in Israel over many years. The injury to the religious feelings of the Petitioners did not shake the religious foundations of mutual tolerance in the State. A different conclusion would lead to the end of television broadcasts on the Sabbath; programs which customarily involved *Knesset* sessions, interviews, entertainment shows and more in which Orthodox Jews participated. Ending all this was not compatible with “the boundaries of endurance” in relation to the violation of religious sensibilities in Israel as accepted over many years. Indeed, the possibility of a certain injury to religious feelings was a price which every person, whatever his religion, had to pay for living in a democratic society, in which secular people lived alongside religious people and members of different faiths lived alongside each other.

In many cases, this was the inescapable price that had to be paid. However, equally there were cases where a person who had a particular difficulty coming to terms with the violation to his religious sensibilities could prevent such a violation from occurring. The instant case was such a case. A religious person, who was prepared to be interviewed for television but was not prepared for the interview to be broadcast on the Sabbath, could make this a condition for granting the interview. The Petitioners had not done so and therefore the contention regarding the unlawful violation of their religious sensibilities had to be dismissed.

Freedom of Religion

The Petitioners also contended that the broadcast infringed their freedom of religion. In their view, in the balance between the violation of freedom of expression and the violation of freedom of religion, the injury caused to the Petitioners by broadcasting the program on the Sabbath was more severe than the injury which

would be caused to the Respondents if the program would be broadcast during the week.

Justice Barak held that a distinction had to be drawn between a violation of religious sensibilities and a violation of freedom of religion. The former injured a public interest. The balance that had to be drawn between this interest and the violation of freedom of expression was a **vertical** balance. Freedom of expression possessed superior weight unless there was a probability or near certainty of severe injury to the public interest. The second violation (of freedom of religion) concerned the freedom of an individual.

Here the Court was concerned with a proper balance between two freedoms. The balance was **horizontal**. It provided for restrictions of time, place and manner, which would enable each freedom to be realized. Justice Barak held that in order to determine whether in the instant case a horizontal balance had to be drawn, it was necessary to examine the scope of the competing rights and see whether they clashed.

Justice Barak noted that it was generally acknowledged that freedom of religion was a basic right in Israeli law. Freedom of religion extended to the freedom of an individual to believe and his freedom to act in accordance with his belief by applying its rules and customs. Thus, freedom of religion included the right of a person not to be forced to act in a manner contrary to his religion. Likewise, freedom of religion included the right of a person to express himself by wearing apparel which met the requirements of his religion. This was not a closed list. Freedom of religion was connected to the individual and the fulfillment of his identity. It was part of his “I am”, and in the same way as the “I am” was a complex phenomenon which could not be clearly delineated, so too it was not possible to delineate the boundaries of freedom of religion.

Did broadcasting the program on the Sabbath violate the Petitioners’ freedom of religion - as opposed to their religious sensibilities? The answer had to be in the negative. Broadcasting the film on the Sabbath did not violate the freedom to believe, and the freedom to act in accordance with that belief. It did not prevent the Petitioners from practicing the rules and customs of their belief. In essence, the argument of the Petitioners was that the acts of **others** (the Respondents), which violated religious commandants, amounted to a violation of the Petitioners’ own freedom of religion. The Court had rejected this type of argument in the past. For example, the Court had rejected the argument that broadcasting television on the Sabbath violated the freedom

of religion of individuals who did not watch television on the Sabbath (H.C. 287/69 *Miron v. Minister of Labour*, 24(1) P.D. 337). Justice Berenson had said in that case that notwithstanding the broadcasts on the Sabbath, no one forced anyone else to watch on the Sabbath. Only violations that prevented an individual from obeying the demands of his religion and beliefs, or conduct his life as a religious person, would be regarded as a violation of freedom of religion. In a different case, the Court rejected the contention that the importation of non-Kosher meat and consumption of non-Kosher food by Jews amounted to a violation of the freedom of religion of Orthodox Jews (H.C. 3872/93 *Mitral Ltd. v. The Prime Minister*, 47(5) P.D. 485). There, it was held that a distinction had to be drawn between a direct injury to the lifestyle of an individual (which comprised a violation of his freedom of religion) and an injury to the sensibilities of the individual, as a result of the acts of another, which was not a violation of freedom of religion. An allegation that a person was injured by the acts of another which were contrary to religion, was merely an allegation of injury to his sensibilities and conscience.

Justice Barak stated that he was aware that in the instant petition the injury to the Petitioners did not only ensue by reason of the acts of others, but also because of the use on the Sabbath of an interview conducted with the Petitioners on a weekday. This fact, however, did not affect the determination that the Petitioners' claim related to an injury to their religious sensibilities and not to their freedom of religion. In the same way that it would be inconceivable to state that the freedom of religion of an Orthodox Jew would be violated if a book which he had written during the week was read on the Sabbath thereby desecrating the Sabbath, so too it was inconceivable that the freedom of religion of an Orthodox Jew would be violated if an interview given during the week was broadcast on the Sabbath. The outcome of an uncontrolled expansion of freedom of religion could only be the cheapening and debasement of freedom of religion.

Accordingly, Justice Barak held that broadcasting the film on the Sabbath did not violate the freedom of religion of the Petitioners. Accordingly, there was no need to examine the nature of the horizontal balance between violations of freedom of religion (had such a violation occurred) and violations of freedom of expression. Justice Barak therefore dismissed the petition, noting that the Respondents had undertaken to add a caption to the film to the effect that it had been filmed during the week.

Deputy President Shlomo Levin concurred.

Justice Dalia Dorner dissented. Justice Dorner agreed with President Barak that a violation of the religious sensibilities of the Petitioners *per se* could not justify granting the petition in these circumstances. Nonetheless, in Justice Dorner's opinion, broadcasting on the Sabbath a film documenting the lifestyle of the Petitioners who were Orthodox Jews, and including interviews with them, did more than merely violate their sensibilities. It also unlawfully infringed their right to freedom of religion.

After setting out the facts and the questions in dispute Justice Dorner held that the element separating freedom of religion from a violation of religious sensibilities was whether the religious person was commanded or prohibited from engaging in the violating activity. In this context Justice Dorner quoted Justice Haim Cohn who wrote:

"Freedom of religion' does not means freedom to do everything that the religion permits, but only all that the religion requires... In other words, the right to freedom of religion is the right to comply with all the commandments that the religion of a person imposes on him, provided that he does not breach the law... The question what is a 'commandment' that the religion requires to comply with is a religious question not a legal one..." (Haim Cohn, *Hamishpat* (1992) 525).

A similar approach could be found in the case law of the US Supreme Court.

In Judaism which was not a monolithic religion but rather a decentralized one, a religious person or community chose a Rabbi, and it was the Rabbi who determined the person's religious commitments.

In the instant case, the Petitioners' Rabbi had held that by appearing in a film to be broadcast on the Sabbath, the Petitioners themselves would violate a religious commandment, even if others would perform the broadcast. It was true that there were other less severe approaches than that taken by the Petitioners' Rabbi, but the latter approach was not esoteric and had much support.

Nonetheless, Justice Dorner held that a boundary had to be set between a violation of freedom of religion and a violation of religious sensibilities. Thus, no constitutional protection would be given to an extreme view which perceived every injury to religious sensibilities by reason of other Jews' failure to obey commandments as a violation of the freedom of religion of the believer - in the sense of 'all the Jewish people are guarantors for each other'.

On the other hand, the test was also not necessarily the identity

of the person performing the prohibited act - rather it was whether the prohibited act was forced on the believer or whether he was prevented from performing a religious duty. The coercion did not have to be physical. Thus, for example, operating a plant during the Sabbath by virtue of an emergency order, when the religion of the owner prohibited such work since his property would be involved in the desecration of the Sabbath, could breach his right to freedom of religion. Likewise, in Germany, it was held in 1973 that placing a crucifix on the judge's bench in court violated the freedom of religion of the Jewish lawyer appearing before him, and accordingly was prohibited (*BverfGE* 35, 36). In a later case in 1995 it was held that hanging a crucifix in school classes violated the freedom of religion of non-Christian students and accordingly was prohibited. The law providing for the same was void (*BverfGE* 93).

In the instant case broadcasting the film on the Sabbath injured the Petitioners not because of the activities of others, nor because of some metaphorical mutual guarantee connected to the entire people of Israel. The Petitioners had been injured directly because they themselves appeared on television on the Sabbath. By so doing they personally participated in the desecration of the Sabbath, and, at the time of the broadcast, unwillingly transgressed against religious commandments.

The broadcast would be a violation of freedom of religion that enabled an individual to comply with his religious duties without governmental interference. Freedom of religion was a basic freedom guaranteed in the Declaration of Independence. Nonetheless, like every other right it was not absolute and had to be balanced against other protected rights and interests.

Balancing the Parties' Rights

In the instant case, countering the Petitioners' right to freedom of religion were the Respondents' rights to freedom of expression and property, which too were basic rights. In such circumstance, the case law distinguished between values which superceded each other, in which case the balance drawn between them was "vertical", and values of equal weight which made concessions to each other in order to allow coexistence, in which case the balance was "horizontal".

The legal literature pointed to the difficulties raised by the distinction between the two types of balances and noted that it was necessary to aspire to the coexistence of values even if they were not of equal weight. However, if two values could not be met concurrently, one inevitably had to be preferred to the other, even if the two were of equal weight.

In Justice Dorner's opinion, the essence of the distinction between the two types of balancing formulae, was not the outcome of the balance, in the sense of mutual concessions as opposed to the preference of one value over another. Rather, it lay in its purpose - from which one derived the standards for drawing the balance. The vertical balance - which was applied in the clash between human rights and the public interest - was intended to minimize, in so far as possible, the injury to the right even when the public interest superceded it. In the case of the horizontal balance - which was applied in the clash between different human rights - the purpose was to minimize, in so far as possible, the injury to both rights.

By its nature, a basic right carried a social price. This price was expressed by the standards for respecting human rights as provided in Section 8 of Basic Law: Human Dignity and Freedom and Section 4 Basic Law: Freedom of Occupation (the "limitation clauses"). The purpose of the limitation clauses - which also embraced the principle of proportionality - was to protect human rights by minimizing the injury caused to them when they clashed with the public interest. Thus, the principle of proportionality required the authority to adopt the measure most likely to promote the public interest in the manner causing the least harm to the right. Today, the principle of proportionality also included such balancing formulae as the test of "near certainty" and the test of "reasonable possibility" in order to determine the legality of administrative decisions which violated human rights.

The test of the least harm and the balancing formulae therefore reflected the public price that a democratic society was willing to pay in order to protect human rights.

The standards in the limitation clause, and in particular the principle of proportionality, were not compatible with a balance between two human rights. The purpose of the horizontal balance was to minimize the injury to both rights by engaging in mutual concessions which enabled both to be realized, albeit not in full. However, if it were not possible for the two conflicting rights to coexist, the right - injury to which would cause the most harm to the individual - would supercede. The harm would be determined, first, in accordance with the substance of the right. In this connection a distinction had to be drawn between rights of great weight, which sprang directly from the core of respect for human rights, and rights of lesser weight, further removed from this core. Attention had to be paid to the interests underlying the concrete case and the particular values protected in the relevant context. Secondly, it was necessary to consider the degree and

scope of the violation of the right and whether realization of the competing right violated the core of the first right or its margins.

In the instant case, Justice Dorner believed that the competing human rights - the freedom of religion of the Petitioners on one hand, and the freedom of expression and property rights of the Respondents on the other hand, were of equal weight. However, no mutual concessions could be made here. In the existing circumstances, the right to freedom of religion had no room to retreat and the injury to it was substantive (as the Petitioners and their Rabbi felt that they were being compelled to desecrate the Sabbath). Justice Dorner discussed the logistics of scheduling and programming of the Respondents. Taking them into account, she noted that in contrast to the position of the Petitioners, the circumstances of the case enabled the Respondents to concede a small portion of their rights - by broadcasting the film on a weekday rather than on the Sabbath. This concession impaired only the margins of their rights.

Accordingly, the balance, which would allow coexistence of rights, required the petition to be upheld. Justice Dorner concluded

by noting that the Second Broadcasting Authority should not have relied on the practice of placing captions to the effect that the program had been filmed during the week. Rather, it had the duty to inform the subjects of the film, who might be injured by it, that they planned to broadcast the film on the Sabbath. Justice Dorner rejected the fear expressed by President Barak that preventing this film being broadcast on the Sabbath would ultimately lead to the closure of all television and radio broadcasts on the Sabbath. In her view, there would always be people - secular, non-Jewish and even Orthodox Jews - willing to participate in programs broadcast on the Sabbath if accompanied by suitable captions. This decision had to be limited to cases like the one at hand where the persons injured were the focal point of the film being broadcast and where the technical activity of the broadcasters was the substantive activity of the people who were the subjects of the film.

Abstract by Dr. **Rahel Rimon**, Adv.



Tzipi Livni, Minister without portfolio in charge of information, with former Supreme Court Justice Gabriel Bach, Judge Hadassa Ben-Itto and Executive Director of the Association Ophra Kidron

Remember Warsaw is the third of a series of conferences commemorating Jewish lawyers and jurists who perished in the Holocaust and their contribution to the law in their respective countries. The Warsaw International Conference was held on May 9-13, 2001, by the IAJLJ, under the auspices of the Secretary General of the Council of Europe. Co-Sponsors were The Polish National Council of Legal Advisors; The Polish National Bar Association; The Polish Judges Association; and European Judges and Prosecutors for Democracy and Freedom. More presentations from the Warsaw Conference will appear in the next issue of *JUSTICE*.

Polish-Jewish Relations Under Nazi Occupation

Barbara Engelking-Boni

Polish-Jewish relations under Nazi occupation have been of more than purely historical significance. The important and difficult relationship has historical roots and has had psychological repercussions. The significance of the problem and the extent to which it remains unresolved have come to light in the recent controversy in Poland surrounding the book *Neighbours* ("Sasiedzi") by Jan Tomasz Gross. Responses to the debate have been twofold. Some Poles have chosen to reconcile themselves to the sensitive past, others have opted to defend a stereotyped innocence and national martyrdom. We shall have to wait and see how the debate will unfold, yet, it is unlikely that either side will convince the other. It is important to realize that the events

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of six decades ago remain significant for Poles and continue to evoke strong emotions.

There is no simple answer to the question of how the Poles treated the Jews during the War. It will never be possible to determine the proportions of honest people and rogues, heroes and murderers. I believe that both good and evil manifested themselves in extreme forms under the German occupation. Everything in between is open to discussion and moral judgment. I would like to assess Poles' attitudes toward the Jews at the time in psychological terms. Discussions of collective behaviour are always speculative and subjective. The only psychological facts that historians will ever be able to establish are the emotions revealed in accounts given by survivors.

Immediately prior to the War, Jews accounted for ten percent of Poland's population. Members of the Jewish community differed in terms of national identity, social status, religious beliefs and political views. A number of solid social and personal

barriers separated the Jews and the Poles. These contributed to a sense of distance on both sides. Rising anti-Semitism, hostile press, anti-Jewish fighting squads and acts of aggression at universities all led to the growing popularity of Zionist ideas and parties on one hand and of leftist sentiments on the other. Poles and Jews were two very different communities. Despite good will on both sides, they grew further and further apart as the conflict worsened.

Tension between the Poles and the Jews eased somewhat shortly before World War Two and remained subdued through September 1939. In the face of a common enemy, past disagreements were placed on the back burner. Warsaw residents worked together digging trenches in the suburbs, putting out fires and defending the city. Nonetheless, the sense of being in the same boat turned out to be short-lived and illusionary.

Even in the first months of their occupation of Poland, the Germans issued dozens of discriminatory anti-Jewish decrees. Some, such

as smaller food rations, an obligation to wear badges and compulsory labour were targeted at the Jewish community as a whole, others such as the ban on employing Jewish waiters in restaurants or Jewish stamp collectors buying postal stamps, had a more local effect. It soon became obvious that the Jews and the Poles would be treated differently. The fates of Poles and Jews during World War Two differed widely. Although from the beginning both nations were persecuted and terrorized by the Germans, there was no doubt that the Germans were going to treat the Jews and the Poles in a different way. Simply put, the Nazi occupation placed the Poles in what the latter regarded as a bilateral conflict between themselves and the Germans. The history of World War Two is to this day in Poland, a history concerning the Poles and the Germans. Such a view is a logical consequence of centuries of living next to the Germans, a consequence of partitions and of the stereotype image of the Germans as eternal enemies. The experiences of the Poles during the War were another stage of this old conflict. Seen in this way, the Jewish problem was marginal for Poles who perceived the War as an issue between the Germans and themselves. Poles were preoccupied with their own war with the Germans.

Things did not appear quite the same to the Jews. For them, the War was not a bilateral but rather a trilateral issue, a conflict between themselves, the Poles and the Germans. The fact of the matter was that the Jews depended on the Poles during the War, their very survival depended on the help and acceptance of the Poles and could easily be jeopardized by their indifference or hate. The relations between the Poles and the Jews were asymmetrical. The Poles did not need the Jews in their war against the Germans. The Jews, on the other hand, without help from the Poles, could not avoid being murdered by the Germans. They depended on the Poles' love of their fellow man and their compassion, they were affected by the Poles' hatred, indifference and greed.

Nazi terror, round-ups for compulsory labour, and Polish anti-Semitic aggression in the streets (I am referring to events in 1940

in Warsaw) all had the effect of intimidating the Jews to the point where they were afraid to leave their homes. The Jews were thrown into a psychological ghetto long before they were locked up in the physical one. Polish aggression was more painful for the Jews than German terror. The relationship between the Poles and the Germans was clear: they were sworn enemies, the conquerors and the conquered, the occupiers and a subjugated society. The Jews did not expect anything but persecution and terror from the Germans. They wanted to see the Poles, however, as comrades and compatriots united under oppression. They thought that they and the Poles were on the same side of the barricade and expected solidarity. It must have been all the more painful to see that the Poles and the Jews did not share the same fate.

The tragic day-to-day experience of life in the ghetto soon dispelled any illusions.

Life in the ghetto was constant suffering, not only in the physical but also in the spiritual and moral sense. The ghetto was a separate world with its own experiences hidden from outsiders. Ghetto residents grew more and more hungry and felt more and more abandoned. Poles were so close but still too far. The line between the Aryan side and the ghetto was - literally and figuratively - a line between two worlds. Their physical proximity underlined the psychological distance. Jews in the ghetto had a sense of being far removed from the rest of Warsaw. They could see it but could not live in it. To quote Rengelblum:

“A wooden bridge has been built on Przebieg Street. It commanded a view of the Vistula and the Oliborz District. Many Jews stood there all day watching the free world go by.”

The psychological gap between the ghetto and the rest of Warsaw continued to widen. The two worlds were the furthest apart during the genocide and later during the lonely uprising. On sunny days in 1942, when the residents of Warsaw basked in the sun and bathed in the Vistula, their neighbours behind the wall were carted off to Treblinka gas chambers.

Adina Blady Sz wajger described the sense of distance at the time:

“...we stood in the window, actually peeking from behind the frame as windows were often shot at, and watched them paraded along. A column kept passing below - we saw them with children's carriages, strange objects, some hats, coats, pots and pans; they continued on and on ... We saw old gray-bearded men and small children, women in summer dresses, coats, autumn jackets, toting luggage for this long road ahead. The heat on this 30th day of July was oppressive, there was silence in the air, no wind was blowing, the air was perfectly still. (..) In the house at Elazna Street, across on the other side, a lady in a flowery gown stepped out on the balcony to water her plants in flowerbeds. She must have seen the procession but nevertheless kept on watering.”

Let me discuss the dilemmas experienced in deciding to leave the ghetto. Life on the Aryan side involved constant hiding among the Poles but also from the Poles. A decision to leave the ghetto was very tough. Stefan Ernest wrote this in his diary:

“There is a dilemma between here and there. Do we build shelters, hiding places filled with weeks' worth of supplies or do we move outside the walls? Neither is easy. Out there one needs money or friends. One false step, one act of blackmail may ruin meticulous plans to hide for weeks, even months. Not to mention more dramatic cases of being discovered. Or an unending list of problems connected with trying to 'settle down' in this way.”

The option to hide on the Aryan side was not available to all Jews. Those who wanted to live among the Poles had to meet at least one (or at best more or all) of the following conditions:

- look good,
 - have money,
 - have fake documents,
 - speak Polish,
- and most of all:

- have contacts and connections among the Poles.

These conditions restricted the list of persons who stood a chance of making it outside the ghetto. The crossing itself was technically easy. Psychologically, however, it was quite challenging. The decision to go meant leaving behind a family, disguising one's identity, coping with uncertainty, living a life of constant tension and watchfulness and running the risk of being suspected, blackmailed and sold to the Germans. It took determination and courage to leave the ghetto.

The key factor to succeeding outside the ghetto was having a place to go. The gates of the ghetto teemed with "squeezers", on the lookout for victims among ghetto refugees. Ita Dimant, formerly known as Rozenecwajg, describes the way from the ghetto gate at Elazna Street in Leszno to the Main Train Station at Aleje Jerozolimskie (roughly a kilometer):

"As soon as we stepped outside of the ghetto, a swarm of older boys - blackmailers descended upon us. I had no idea that anything like that could ever happen to us on the other side. The boys started chasing us and (...) shouting to give them money. We were not wearing our badges, of course. At first I thought we should give a little to this or that one, and they'd leave us alone but they were like locust. As soon as one left, they sent another one and another. It did not take me long to realize we were getting nowhere. (...) We took a horse-drawn cab. It is difficult to say how much we spent on what. We were riding the cab and suddenly here they were, right next to us, one, two, three of them on bikes. Each stretching a hand and each had to get something. They never left you alone. (...) To make a long story short, by the time we (got on the train), we no longer had rings, watches or shoes. We had nothing."

Squeezers would follow their victims, blackmail them repeatedly and demand regular payments for their "silence". Many people seeking help on the Aryan side returned to the ghetto stripped of all possessions.

There were also people who could have left the ghetto but chose not to. They looked good, had money and friends. Still, they decided against seeking help outside the ghetto. These people primarily consisted of underground activists, the soldiers of the Jewish Combat Organization who were preparing an uprising. There were also "civilians", who much like the members of the underground, tied their fate to that of their nation, these were people for whom staying in the ghetto was a matter of solidarity. Others refused to consider hiding among "goys" for religious reasons. For them, religious principles could not be suspended, even in the face of death. Some did not leave the ghetto because they did not want to be

They did not, however, approve of hiding the Jews. The Jews were pushed beyond the bounds of the Poles' moral responsibility. They were excluded from the world governed by the principles of brotherhood.

rescued alone, leaving their families behind. Many refused to part with their children, elderly parents and spouses. They wanted to be together even though they knew what fate awaited them all. There were also those tired after spending two years in the ghetto, tired from what they had seen and experienced. They had no more strength and energy, did not feel like making another effort to save themselves. There were also those who did not want to present a moral challenge to others. They did not want to face another man and say: "save me, despite your fear. Save me because my life is worth as much as yours".

Almost all hiding Jews needed Poles to help

them. Those Poles that were "righteous among the nations of the world" gave wonderful testimony to humanity even in the darkest of times. During those times, the decision to help the Jews was far from easy. Yet, risking death, some people proved to be courageous enough to hide Jews. Some did this for humanitarian or religious reasons, others for money. Hiding a Jew took bravery and also patience, tact and helpfulness in overcoming often nearly insurmountable everyday situations such as a toothache or an illness that required seeing a doctor. Sometimes impulsive decisions to help compelled people to live for months or even years together with others who turned out to be simply not nice, or boring or stupid. Living together with a stranger for an extended time could prove to be a very trying experience for all involved. Those who hid themselves participated (even if only passively) in the lives of others. They had to adjust to the customs and habits of the new home. Janina Bauman described the condition of the hiding Jew, deprived of a life:

"Hiding in the homes of strangers meant not only isolation from the outside world, but also the need to observe burdensome rules and cope with constant danger. Enclosed within four walls, forced to do nothing, we had no life. Men and women who gave us shelter, even their children, had their daily things to do, problems to solve, minor troubles and serious concerns, successes and failures, moments of joy and sadness. Our existence was empty. We simply vegetated to pass time. Deprived of a life of our own, we lived the lives of others. We shared in other people's joys and sorrows. (...) To our hosts, our presence was more than grave danger, daily discomfort and a source of additional income. Our presence affected their moods and behaviour, brought out their most noble or base instincts. Sometimes we tore families apart, sometimes helped them bond in a joint effort to help one another and survive."

Many Jews living outside the ghetto needed

help. There were also those ingenious, brave and determined enough to fend for themselves. Needless to say, a lot more Jews would have survived the War, even without any help, had they been simply left alone. One such heroic person capable of coping by herself was Barbara Rucinska, who looked good, had excellent documents and a lot of nerve. In her account held at the *Yad Vashem* Archive, the author described the epic attempt to rescue her husband, Ksyl, an orthodox Hassidic Jew, from the ghetto and hide him on the Aryan side. Saving a Jew who ate only *kosher* food and prayed twice a day bordered on a miracle. Barbara Rucinska tells the following story:

“Throughout the occupation and the hideaway period, my husband observed his religious rites, ate exclusively *kosher* food and never parted with his *tefillin*. Shortly before the Easter of 1944, I ‘*koshered*’ the oven and was baking *matzos* together with our son and cousin, who also lived on Aryan papers. Two days before Easter, German gendarmes, the blue police and firefighters surrounded our house. (...) I had just returned from the city when I saw them. (...) Our host, Bronislawa, nearly fainted of fear as there was a *matzo*, a *sidur* and *tefillin* in her house - she was prone to panicking anyway. I managed to find out that this time it was not about Jews. A printing house was discovered with twelve members of the underground resistance caught in the act. Since they would not surrender, the Germans brought in the fire brigade and flooded the basement complete with the printing house. Seven men came out, five chose death by drowning. We were certain that the house was going to be searched. What was I supposed to do with the *matzos*, prayer-book and *tefillin*? I knew that if I destroyed the *matzo*, my husband would have nothing to eat and would not even taste the bread. Then an idea occurred to me. Bronislawa had sacks with crackers she kept for a rainy day. We broke the *matzos* to pieces, put them in a similar bag and hung them up next to the crackers. What do I do with the *tefillin* that usually stayed hidden in a chair cushion? Do I burn it or flush it down the toilet? As I

considered my options, Bronislawa threw up her hands and urged me to destroy the *tefillin*. I walked over to my husband, who stood around the corner, and asked him what to do with the *tefillin*. He replied: Do what you want, just make sure it stays intact. That made me mad and I called: Your choices are to keep your wife, keep your *tefillin*, or have neither. I returned to the apartment, and mind you, all people entering or leaving through the front gate were asked to show their documents. What could I do? I knew that if I destroyed the *tefillin* I would never be at peace again, not because of religious reasons but because my husband valued it so much. I took the *tefillin*, stuffed it in my bra and walked downstairs. The gendarme at the gate was surprised to see me constantly shuttle in and out and wanted to know where I was going so late, just before the curfew. I blinked at him skittishly and said that my friend was waiting for me and that I still had enough time to have a word with him. I then gave the saved treasure to my husband, who went to spend the night elsewhere, and returned to the apartment.”

In conclusion, I would like to share some general reflections on the psychological differences between the wartime experiences of the Poles and the Jews. It seems significant that Polish society at the time generally supported the resistance movement, underground education, and various other forms of fighting with the Germans. They did not, however, approve of hiding the Jews. The Jews were pushed beyond the bounds of the Poles’ moral responsibility. They were excluded from the world governed by the principles of brotherhood.

The Jews were afraid of the Poles. I think that, in a whole different sense, the Poles were also afraid of the Jews. The Poles were eyewitnesses to the Holocaust. It was a peculiar and unusual situation for them. Few people, few nations ever find themselves face to face with ultimate evil. The situation was difficult to comprehend. Yet it was also an opportunity. It was a chance to find out the

truth about oneself. A chance to face the question of who one was and what one should do. It was a chance to choose between being a hero and being a scoundrel. Most such choices are never made consciously. In fact, most people are unable to make them, they push them out of their sight. That helps them remain indifferent, move the Jews out of the bounds of their moral responsibility, return to the point where no choices need to be made.

Yet, Jews, especially individual Jews, Jewish persons separated from the anonymous crowd, occasionally stumbled into the sight of Poles. They made an appearance and, by their presence alone, demanded something. Some were former neighbours, acquaintances, others were total strangers, tired and hungry. I think such encounters were what the Poles feared most. They feared that they would have to do something with this Jewish presence, respond somehow to people in need of help. They would have to make a choice they did not want and could not make.

I believe that the Poles are still afraid of the Jews. They are afraid of the Jews’ silent absence that is a pang on their conscience. The Jews who are gone also want something from us. They want respect for their suffering. They want to be remembered. They keep giving us a chance. And finally in Poland we begin talking about what it means to be an eyewitness and an accessory to crime and about the extent of our responsibility.

The Jews today no longer need the Poles. They have their own State, a different place for their history to unfold. Yet, the history of Poland goes on at the very place where the Holocaust occurred. And it is the Poles now who need the Jews. They need them to understand their own past, their experiences, and to come to grips with the fact that the Holocaust is not only an episode in Jewish history but also an integral part of the history of Poland.

The Legal Practice of Apolinary Hartglas

Jolanta Zyndul

In the interwar period in Poland, the legal profession attracted a relatively large number of Jews. According to a census, in 1931, the Bar, notary's offices and legal firms employed 6,306 Jews,¹ accounting for 41% of all those employed in these institutions. This high percentage was due to two reasons. First, law studies were popular among Jewish youth. In the 1920s, 8-9 thousand Jews attended Polish universities. Of these 2-3 thousand studied law. This means that about a quarter of the Jewish students chose to study law or political science. The second reason for the high percentage of Jews in the Bar was the fact that Jewish graduates of law studies found it difficult to gain access to other legal professions (judicial, or in the public prosecutor's offices). In 1931, Jews accounted for a mere 2.6% of all those employed in the public administration and judicial systems. Thus, graduates of law studies chose the Bar.

Given that at that time Jews accounted for 10% of the population of Poland, it is clear that Jewish attorneys had among their clients not only Jews but also Poles, Ukrainians, etc. Moreover, as is evidenced by the legal practice of the Jewish attorney who is the subject of this article, nationality

often played no role whatsoever in selecting one's attorney. The clients of Apolinary Hartglas (active in Poland as a lawyer from 1907 to 1939) were largely non-Jewish. They were simply convinced that Hartglas was a good defence attorney. He, himself, claimed that Jews avoided him, perhaps afraid that judges would not favour a Jewish attorney.²

Hartglas's practice was not typical. As a Member of Parliament, President of the Jewish caucus in the Parliament, a journalist, and an important Zionist activist, he was a well-known figure in Poland and especially in the Jewish community.

Apolinary Hartglas was born in 1883 in Biala Podlaska, a small town in the eastern part of the then Kingdom of Poland, where his father, Kalman Hartglas, had moved a few years earlier from Warsaw to open a legal practice (although he was not licensed to handle all cases). Apolinary Hartglas's family was fairly well assimilated. His parents spoke Polish at home and did not observe the rules of Judaism.

Following in his father's footsteps, in 1900, after graduating from secondary school, Apolinary Hartglas began law studies at the Russian University in Warsaw. There he came into contact with the Zionist movement and soon became an ardent Zionist. Among his fellow students in Warsaw were such well-known Zionist activists as Izaak Grunbaum and Nachum Nir-Rafalkes. Like many students of that time, Hartglas was actively involved in politics. In 1903 he even spent a few

weeks in prison for participating in an anti-Semitic demonstration at a theater performance. He graduated in 1904.

After graduation Hartglas had to struggle to obtain the right to practice law. Jews wishing to obtain access to the Bar in Russia faced serious restrictions. It was only after the revolution of 1905 that the discrimination lessened slightly and many Jewish attorneys were permitted to practice law. Hartglas was permitted to conduct cases before a district court and at the gathering of Justices of the Peace in Siedlce, a town larger than his hometown Biala Podlaska, but equally parochial.

The practice of the young attorney in Siedlce was not too exciting but involved both civil and criminal cases.

During the German occupation in the First World War, Hartglas became a Magistrate in Siedlce and later Vice-President of the Town Council. In 1916 he was accused of contesting the regulations imposed by the German occupation authorities. He was his own defense counsel and won. Later, during the German occupation of Poland in 1917, he defended Dziewulski, a member of the Polish Socialist Party, accused of

1. S. Bronsztejn. *Jews in Poland in the interwar period. A statistical study.* Wroclaw 1963. p. 205.
2. A. Hartglas. *On the border of two worlds.* Warszawa 1996. p.107.

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organizing the First-of-May parade.

After the War, Hartglas was elected Member of Parliament from the Biala Podlaska District in the first parliamentary elections held in independent Poland in 1919. He was soon absorbed by parliamentary and political activities and his legal practice ceased to hold all his attention. In the Sejm, of which he was member until 1930, he participated in the Legal Committee. For many years, Hartglas fought to lift the legal restrictions that had been imposed on the Jews by the Russians. Despite the March Constitution of 1921, which introduced full equality, regulations discriminating against Jews remained in force because the Constitution required that conflicting regulations be repealed by statute. It took a long time before the Sejm actually passed the necessary legislation in 1931, when Hartglas was no longer a Member of Parliament.

The combination of attorney and Member of Parliament was fairly popular. Many Jewish MPs had a legal background, with about a dozen serving as active attorneys. Among Warsaw's attorneys, Salomon Seidenman became a Member of Parliament in the second half of the 1930s. In particular, many Jewish MPs from Galicia were attorneys, including Dawid Schreiber, Maurycy Leser, Izrael Lublinski-Stuczynski, Leon Reich, Michal Ringel, Henryk Rosmarin, Jonas Rubin, Kopel Schwarz, Ignacy Schwarzbart, Adolf Silberschein and Emil Sommerstein. Although well assimilated, Member of Parliament Natan Loewenstein of Lvov, was also a Jewish attorney. Additionally, Emil Sommerstein, who was active in Lvov, was a member of the Council of the Bar in Lvov, as was Salomon Seidenman in Warsaw.

When Hartglas was elected a Member of Parliament in 1919, he did not abandon his legal practice. After all, his membership could have been temporary. New

regulations concerning the practice of law were being introduced and in independent Poland too Hartglas was obliged to fight for the right to practice his profession. Thus, persons wishing to practice law had to be registered on a list of attorneys maintained by the competent Bar Chamber (in this case in Warsaw). However, the Bar Chamber in Warsaw refused to register Hartglas. In his memoirs *On the border of two worlds*, Hartglas explained why. A large number of attorneys were Jewish, and until the late 1930s they did not find it difficult to be admitted to the Bar. Hartglas, however, was also a Zionist. In the opinion of the Council, this made him alien to Poland and its aspirations. The basis for this accusation was an article he published in the press on the pogrom which took place in Kielce in November 1918 and the killing of Jews in Piosk in April 1919. Only in 1920 did the Supreme Bar Council consent to admit him to the Bar in Warsaw. He was particularly helped by one member of the Council, a Polish attorney from Siedlce called Aleksy Chrzanowski, a moderate National Democrat.

The question of non-admittance to the Bar of persons of Jewish faith appeared again later with the notable exception of those Jews who declared Polish nationality. In 1921, the Supreme Bar Council passed a resolution barring persons of Jewish nationality from the Bar, but this decision was soon withdrawn.

In the 1920s, preoccupied with politics, Hartglas was little involved with his legal practice. It was only in the 1930s when he was no longer an MP that he became more active as an attorney. In the period between 1935-1937, he became a member of the 19-strong Bar Council in Warsaw, the governing body of the Bar Chamber, which had approximately one thousand members in the Warsaw district.

The major cases Hartglas conducted during this period were political. The most important concerned the rehabilitation of

Rabbi Chaim Szapiro of Plock who had been accused of collaboration with the Bolsheviks during the Polish-Soviet war. On 18 August 1920, the Soviet army entered Plock. While the Polish troops were withdrawing, Szapiro went out on the balcony and made some gestures. On the following day, the Soviet army withdrew from Plock. He was denounced as having made signs to the Soviet troops in the New Market to the effect that there were no more Polish troops in Kręlewiacka Street. A few Poles hiding in the basement opposite the house where Szapiro lived witnessed the incident.

A week later, on 27 August, a hearing was held before a Field Court Martial. The Court sentenced the 45-year-old Szapiro to death. The President of the Court, General Lasocki, approved the sentence. Szapiro was put before a firing squad and shot within a few hours of the verdict. Plock's bishop Antoni Nowowiejski appealed for the suspension of the execution, but to no avail. Military Judge Peplowski issued the sentence.

After the War, Jewish MPs conducted an investigation and concluded that the sentence had been a mistake. Hartglas, who was convinced of Rabbi Szapiro's innocence, wrote later that had he been the judge, he would have issued the same sentence. He thought that it was not an anti-Semitic murder committed by the Polish army, but only a mistake arising out of the circumstances of the war. He was convinced that Colonel Peplowski who issued the sentence was not an anti-Semite.

Members of Parliament also asked the Ministry of the Interior to take an interest in Szapiro's execution. The Military Prosecutor of the Supreme Military Court made the same request.

On 3 December 1920, the Supreme Military Court ordered an extraordinary resumption of the case. The new hearing was to be held before the District Military

Court in Warsaw. The hearing was held in Plock three years later on 28-29 September 1923. Colonel K.S. Heydukowski was the presiding judge. The hearing attracted considerable interest on the part of the local Jewish community and a few thousand people gathered in front of the court building in Plock. Only a few dozen witnessed the hearing. The press reported that admittance cards to the courtroom fetched a high price. The hearing was attended by numerous representatives of the Polish and Jewish press and foreign press correspondents.

The court heard the testimony of 14 witnesses; among them were those who had been in the basement across the street and saw the rabbi standing on the balcony. Two experts - Plock's Rabbi Bzura and Dr Mieses - described the nature of Hasidism because it turned out that Szapiro was not, as was commonly believed, a rabbi, but rather a Hasidic *cadyk*.

Hartglas based his defense on the claim that Szapiro had been praying on the balcony. To prove it, he presented a book used by Szapiro on that day. A famous rabbi had written the book and it included a prayer that is said on meeting the enemy (in that case the Bolsheviks). The Court dismissed this line of defence, claiming that during the hearing in 1920 Szapiro had never mentioned the prayer. In his speech, Hartglas also stressed that it was illogical to accuse a Hasidic *cadyk* of collaboration with the Bolsheviks.

The witnesses testified that Rabbi Szapiro had stood on the balcony and given signs to the Bolsheviks. After the Russians entered the city, a Soviet soldier had come asking whether any shots had been fired from the building in which Szapiro lived. Szapiro's neighbour, the Pole Stanislaw Deczyoski, directed the soldier to the Rabbi's apartment. However, according to the witness, after talking to the Rabbi, the soldier decided not to search the apartment. It should be noted that according to

Szapiro's wife, Szapiro did not know any language other than Yiddish. Perhaps the Soviet soldier was also a Jew and when he saw the Rabbi he understood that he did not have any fire arms.

The Court did not overcome the conflicts in the witness testimony as to how long the Rabbi stood on the balcony and what gestures he made. Neither did the Court establish the circumstances of the shots that broke the window panes on the balcony where the Rabbi was standing. After the shots, the Rabbi returned to his apartment. The Court was of the opinion that even if one assumed that the shots had been fired by the Bolsheviks (a very probable

The case attracted considerable attention both in Poland and abroad. Hartglas was even offered the services of Oskar Gruzenberg, the famous Russian attorney who had emigrated to France. Naturally, he was unable to attend the trial.

scenario), this fact would not affect the guilt of the accused.

The Court upheld the verdict of 27 August 1920, under which Rabbi Szapiro was found guilty of collaboration with the enemy and sentenced to death. Later, Hartglas maintained that Judge Heydukowski took the decision because he thought that Szapiro's rehabilitation would have negative political repercussions by providing new prey for propaganda directed against the Polish army. In any event it was not possible to raise Szapiro from the dead.

Hartglas filed an appeal with the Supreme

Military Court, which dismissed the ruling of the District Court and ordered a retrial before the District Court with different judges. This time the case was to be held in Warsaw in order to avoid tension in Polish-Jewish relations in Plock. The retrial began on 29 May 1925, but it was adjourned due to the failure to appear of witnesses. Now that the Supreme Military Court had ordered a second retrial, Hartglas was sure of victory.

However, the case was never resumed. Hartglas thought that Pilsudski, for whom the good name of the army mattered most, influenced the decision. Anti-Semitic sentiments did not play a role. Similar treatment was given to the rehabilitation of two other Poles accused and executed like Rabbi Szapiro for high treason on behalf of Soviet Russia.

Chaim Szapiro was not well known. In the course of the trial, he was referred to as Rabbi although, in fact, he was a Hasidic *cadyk* with rather limited influence. The rehabilitation trial was certainly important to his relatives (his wife and ten children). However, this single case acquired a political character in view of frequent accusations of treason against Jews during the Polish-Bolshevik war. Szapiro's rehabilitation also became the rehabilitation of Polish Jewry. Perhaps this is why issues not directly associated with Szapiro were raised during the trial.

Karol Mierzejewski, an MP from Plock affiliated with National Democracy, testified that the Jews gathered in the marketplace had threatened the Poles with Bolsheviks and poured boiling water over Polish soldiers. However, the President of Plock's City Council Stromayer testified that the city's Jews participated in the defense of Plock. After the invasion, the City Council passed a resolution stating that the Jews had demonstrated loyalty. The City's Mayor Michalski also testified that the Bolsheviks had plundered mainly Jewish stores.

The case attracted considerable attention both in Poland and abroad. Hartglas was even offered the services of Oskar Gruzenberg, the famous Russian attorney who had emigrated to France. Naturally, he was unable to attend the trial.

Another political case conducted by Hartglas was the case of the Polish Jew Wasserholz, who was accused of accepting Palestinian citizenship without the consent of the Polish government during his stay in Palestine in 1924. Wasserholz failed to return the Polish passport and came back to Poland as a Polish citizen. Hartglas proved before the Supreme Court that Wasserholz did not receive Palestinian citizenship, but only registered as a person wishing to receive it in the future. In 1926, the Supreme Court ruled that expressing desire to receive foreign citizenship was not subject to prosecution in Poland. This ruling had some importance to the Zionists.

Yet, the most interesting of Hartglas's clients was the Catholic Pole Antoni Raczowski. In 1929, Raczowski asked Hartglas for assistance in changing his religion. He wanted to convert to Judaism. Earlier, Raczowski had approached Salomon Seidenman (also an attorney), Secretary of the Jewish community in Warsaw, with the same request. Seidenman had responded that he was required to receive permission from the local administration, which was refused. The Ministry of the Interior also refused to give permission.

Two years later, the case was brought before the Supreme Administrative Court, where Hartglas claimed that Polish law did not include a ban on conversion to Judaism. The Court lifted the ban, but this was not the end of Raczowski's problems. Warsaw's rabbinate refused to circumcise Raczowski and admit him to the Jewish community. Hartglas was unable to help any further. But Raczowski soon found a rabbi in Lublin who agreed to circumcise him. Raczowski thus became a Jew and soon afterwards married a Jewish woman in Włodawa.

It is worth noting at this point how the legal controversy around conversion to Judaism evolved. In tsarist Russia (therefore also in the Polish land held by Russia before the First World War), there were regulations concerning changes of religion. Under these regulations, Christians were banned from converting to Judaism. It was not until the order on religious tolerance issued by Tsar Michael II that such conversion was permitted, subject to the consent of the authorities. There was a simplified procedure for persons of Jewish origin wishing to re-convert to Judaism. Hartglas also dealt with a case in this context.

Before the First World War in Siedlce, David Milgram, a thief, just back from the Far East, approached Hartglas. While serving a few years' prison sentence, Milgram had been told by the prison's chaplain that if he converted to the Orthodox religion, he would be permitted to leave prison and settle in the Far East. On his return from the Far East, for practical reasons Milgram decided to re-convert to Judaism. Helped by Hartglas, he again became a Jew after six weeks.

Returning to the Raczowski case, it should be noted that despite the introduction of full religious freedom in the March Constitution, Russian law restricting the freedom of conversion by Christians to non-Christian religions continued to be observed in independent Poland. However, the number of such cases was extremely small.

Hartglas also participated in the famous Przytyk trial. On 9 March 1936 in a small town near Radom (Central Poland), Jews and one Pole were killed in anti-Jewish unrest. Jewish self-defence units participated in the events. The resulting trial, which began on 2 June 1936, before the District Court in Radom, brought 14 Jews and 42 Poles before the Court. The Court issued its ruling on 26 June. Szulim Chil Leska accused of

killing a Pole was sentenced to eight years in prison. Luzer Kirszenwajg and Icek Frydman were sentenced, respectively, to six and five years in prison for shooting two peasants. The four Poles accused of killing the Jewish couple were found completely innocent because, as stated in the grounds for the ruling, "the Court had not established sufficient evidence in the trial to convict them of the crime". Three other Jews and eighteen Poles were also found not guilty. Eight Jews were sentenced from 6 to 10 months in prison and twenty-two Poles from 6 to 12 months in prison. The ruling created a great sense of injustice among the Jews, who saw it as giving permission for physical attacks against the Jewish population and as taking away their right to self-defence.

Hartglas was invited by the well-known Jewish attorney Aleksander Margolis to participate in the appeal. He served as counsel for one of the Jewish victims who filed a civil case. The Court of Appeal in Lublin (where the second Przytyk trial was held in the autumn of 1936) increased the sentences slightly. It is difficult to say whether this was thanks to Hartglas, though he made quite a harsh speech. The trial gathered a number of outstanding attorneys, among them Lejb Landau, Mieczysław Ettinger, and Waclaw Szumaoski, a Pole and Hartglas's friend.

In December 1939, Hartglas fled German-occupied Warsaw together with a group of Zionist activists. At the beginning of 1940, travelling *via* Trieste he arrived in Palestine. Given very poor command of Hebrew and lack of familiarity with the local legal system, he took no steps to return to his legal profession. After the establishment of the State of Israel in 1948, he became a high-ranking official in the Ministry of the Interior, where he was responsible for, among other things, the organization of local administration. He died in 1953.

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